



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *SY v Minister of Employment and Social Development*, 2020 SST 1153

Tribunal File Number: GP-19-1738

BETWEEN:

**S. Y.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Nicole Zwiers

Teleconference hearing on: November 12, 2020

Date of decision: December 10, 2020

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

## **OVERVIEW**

[2] The Claimant is in receipt of CPP retirement benefits since October 2018. The Claimant is 62 years old as of the date of the hearing and bases his CPP disability benefits claim on his hips, knees, shoulders, hammertoe, decreased memory and stamina. The Claimant owns a restaurant that he continues to work in. The Claimant has suffered a very difficult time recently with his wife's and son's death. During the hearing I expressed my sympathy to the Claimant for his difficult loss.

[3] The Minister received the Claimant's application for the disability pension on November 9, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant to have two MQPs. The first MQP is September 2018 because that is 1 month before the Claimant began receiving his CPP retirement benefits. The second MQP is for a post-retirement disability benefit (PRDB) because the Claimant is not yet 65 years of age and is in receipt of a CPP retirement pension. The second MQP is December 2019.

## **ISSUE(S)**

[5] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by either of September 2018 or December 2019?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by of September 2018 or December 2019?

## **ANALYSIS**

[7] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **Severe disability**

#### ***The Claimant does not meet the CPP test for disability***

[8] The Claimant's testimony is that he continues to own and work in his restaurant. The Claimant's evidence is that he has really decreased his involvement in the day-to-day operations of the restaurant and relies on his staff. The Claimant testified that he tries to go to the restaurant everyday but he finds it difficult as he cannot drive because he does not have a valid license. He must take the bus to the restaurant having lost his license for drinking while intoxicated. The Claimant testified that he goes about 4 times a week to the restaurant. He spends 1-2 hours there and wraps utensils, pays bills and to acknowledge his staff. The Claimant testified that he is able to sweep and mop the floors as well as wash dishes. However, by November 2019 he had to reduce his hours and he hired more staff to help because he was frequently at the hospital with his wife who was ill.

[9] The Claimant's testimony is that he was incapable of working full-time as of September 2018 but was working part-time. Since December 2019 he has not been able to work. The Claimant testified that he was asked to sell his restaurant but he did not because he would have lost a lot of money. The Claimant agreed that he would have to pay someone else to do the work

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

he does in the restaurant but he does not do feel he really does the work of the restaurant. The Claimant pays an accountant for his taxes and income reporting.

[10] In the Claimant's CPP Questionnaire date stamped November 9, 2018 the Claimant answered that he could do lighter work but no heavy or physical work.<sup>2</sup> The Claimant described that he did light duties, setting up and cleaning at his restaurant. Further, the Claimant answered that he was still working for himself in his self-employed business. The Claimant described his work at the restaurant as part-time, working 3-5 hours a day, 7 days a week.<sup>3</sup>

[11] The medical documentation filed with the Tribunal shows that the Claimant had a left total knee arthroplasty and left D2 hammertoe correction in October 2018. Dr. Kraemer, the surgeon, noted that the Claimant was doing reasonably well 8 months post-surgery in a letter dated June 26, 2019.<sup>4</sup> The Claimant was encouraged to continue doing all of his daily activities and was encouraged to walk more. A 4-month follow-up assessment was noted as the next follow-up.

[12] A letter from the Sunnybrook Health Sciences Centre dated May 21, 2019 provides that the Claimant has right shoulder massive rotator cuff tear. The tears are chronic. Surgery was scheduled for April 2019 but was cancelled due to the Claimant's drinking and seizures. It was noted that the Claimant has symptoms of pain with limited range of motion around his right shoulder. It was also noted that he is a restaurant owner and needed to recover quickly. The plan was to discuss the possibility of surgery with the anesthetics team to determine the risks of surgery.<sup>5</sup> A letter dated October 10, 2018 shows that the Claimant had been scheduled for surgery on his shoulder 4 years earlier but he did not show up for surgery on the scheduled date.<sup>6</sup>

[13] An x-ray of the Claimant's pelvis and hip bilateral dated January 9, 2019 was in follow-up to the Claimant's bilateral total hip replacement arthroplasties. It was noted that the components were in good position alignment compared to previous with no evident hardware

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<sup>2</sup> GD2-35

<sup>3</sup> GD2-34

<sup>4</sup> GD2-121

<sup>5</sup> GD2-123

<sup>6</sup> GD2-151

complication.<sup>7</sup> Another x-ray showed severe arthritis in the Claimant's first metatarsal-phalangeal.<sup>8</sup>

[14] The CPP Medical Report by Dr. Malcolm is date stamped November 9, 2018. The Claimant was diagnosed with a condition that is grave.<sup>9</sup> His medical conditions were described as osteoarthritis (OA) in his hips, knee and shoulder for over 20 years. The Claimant's condition was described as advanced OA with a left hip replacement in 2000 and a right hip replacement in 2006 and a right hip and hammer toe in 2017.<sup>10</sup> The Claimant was noted to have bilateral shoulder OA and bilateral rotator cuff tears. The Claimant was going to have a left knee replacement in the next month.

[15] Dr. Malcolm indicated that the Claimant walks with a limp and is unable to walk, stand or sit for prolonged periods due to his hip and knee OA. The Claimant was unable to carry, lift, push or pull anything other than light weights and cannot do overhead work. The Claimant was noted to have liver disease with alcohol abuse of more than 5 years. Severe memory loss was also noted as well as cognitive issues including multi-tasking. Fatigue from liver disease was indicated. Both the Claimant's hips, knees and shoulder as well as his alcohol abuse and liver disease were likely to deteriorate.

[16] The Claimant was noted to have a seizure disorder for over 5 years related to alcohol abuse and is no longer able to drive. Dr. Malcolm thought this was likely to remain the same.<sup>11</sup> The Claimant was recommended to stop working around 5 years earlier. It was not expected by Dr. Malcolm that the Claimant would return to work in the future.<sup>12</sup>

[17] The Claimant's testimony as supported by the medical documents is that he has a number of physical issues with his hips, knees, right shoulder as well as liver disease and seizures. Aside from Dr. Malcolm's CPP report, the medical documents do not show that the Claimant is incapable of regular work due to his conditions.

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<sup>7</sup> GD2-128

<sup>8</sup> GD2-129

<sup>9</sup> GD2-180

<sup>10</sup> GD2-181

<sup>11</sup> GD2-183

<sup>12</sup> GD2-184

[18] Dr. Malcom's assessment that the Claimant could not work was provided in November 2018 when the Claimant was working daily in the restaurant. Although I accept that the Claimant has physical limitations, he has been working within his limitations and doing lighter work at the restaurant that he can do such as wrapping utensils, sweeping, mopping, doing dishes and paying the bills. The Claimant's own CPP Questionnaire shows that he felt he could do light work but could not do heavy work in November 2018.

[19] The evidence before me is that the Claimant was, as of November 2018, working 3-5 hours, 7 days a week in his restaurant. I accept the Claimant's testimony that he has since decreased the number of hours and days that he goes into the restaurant. However, the Claimant's work at the restaurant is work that he would otherwise have to pay someone else to do. While I appreciate that the Claimant's work is to a lesser extent than what he used to do and that he no longer does heavier work, it remains work that he engages in regularly. This demonstrates capacity to work as I have explained in greater detail below.

***The Claimant has capacity to work***

[20] I must assess the severe part of the test in a real world context<sup>13</sup>. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Claimant was 62 years old on the date of the hearing. He has had long-standing alcohol abuse issues with liver disease, seizures, and OA in his hips, knees, and shoulder, including replacement surgery. He also had surgery to correct his hammertoe that the Claimant says was not done properly and causes a painful callous to develop. The Claimant is fluent in English, has some post-secondary education, has many years work experience including running a restaurant. Importantly, the Claimant continues to work at his restaurant on a regular basis.

[21] Dr. Malcolm provided in the CPP Medical Report that the Claimant could not drive as a result of the seizures, this was not supported by the Claimant's testimony. The Claimant's testimony was that he lost his license some time ago due to drinking and driving and he had not attempted to reinstate his license. The Claimant testified that takes public transportation to his

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<sup>13</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

restaurant and often takes a cab when returning. He now lives alone in an apartment and is able to get his own groceries and personal items since the passing of his wife. He does his own laundry and cleaning when necessary.

[22] In consideration of all of the evidence, I cannot find that the Claimant was disabled within the meaning of the CPP as of either September 2018 or December 2019. The Claimant's CPP Questionnaire, dated 2 months after his first MQP of September 2018, shows that he was working every day of the week for 3-5 hours. This clearly shows capacity to work. The evidence before me to the date of December 2019 and to the present also shows capacity to work despite the Claimant's health difficulties and age.

[23] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It's not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work<sup>14</sup>. Although the Claimant has not been working full-time hours, I must consider part-time work when determining whether he can earn a living. The Claimant's continued work and oversight of his restaurant including bill payments show that his conditions do not prevent him from earning a living.

[24] The Claimant did not provide testimony about his income but it is noted in the file that in a telephone conversation he had with a Service Canada representative, the Claimant said he earned \$17,000 in 2018.<sup>15</sup> This amount is above what could be considered the threshold for substantially gainful.

[25] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment<sup>16</sup>. The Claimant has numerous health issues and he is on medication. In addition, he has had multiple surgeries that, by the medical documents, appear to be largely successful with minimal follow-up. Although the Claimant's evidence is that he continues to suffer from pain and limited range

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<sup>14</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

<sup>15</sup> GD2-171

<sup>16</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

of motion as well as a constant callous due to improper surgical repair of his hammertoe, the fact of the Claimant's continued work and the medical documents do not support a finding of severe.

[26] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition<sup>17</sup>. As noted above, the Claimant continues to work regularly including work that is necessary to the proper functioning of his restaurant such as bill payments. He has not shown that he has been unable to obtain and maintain employment because of his health conditions as of either September 2018 or December 2019.

[27] I find that the Claimant has not shown that he has a severe disability. Having made this determination, it is not necessary for me to consider whether he has established a prolonged disability.

## **CONCLUSION**

[28] The appeal is dismissed.

Nicole Zwiers  
Member, General Division - Income Security

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<sup>17</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117