



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DV v Minister of Employment and Social Development*, 2020 SST 1126

Tribunal File Number: GP-20-1468

BETWEEN:

D. V.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Teleconference hearing on: December 8, 2020

Date of decision: ~~December 14, 2020~~

CORRIGENDUM DATE: December 21, 2020

DECISION

[1] The Claimant, D. V., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start [**March**] ~~October~~ 2017. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant is a former welder who fractured his left wrist in 2001. In 2003, he lost his job. He later attempted to work as a self-employed auto body repairperson. He is 55 years old.

[3] The Claimant applied for a CPP disability pension in [**February**] ~~September~~ 2018. On his application, he indicated that he could no longer work because of a lack of energy and shortness of breath. His diagnoses included cardiomyopathy, heart arrhythmia, sleep apnea, depression, a left wrist injury, and alcoholism. The Minister of Employment and Social Development Canada (the Minister) refused his application because his medical condition was not so severe that it precluded all work. The Claimant appealed to the General Division of the Social Security Tribunal.

[4] On February 17, 2020, the General Division dismissed the Claimant's appeal. The Claimant applied for leave to appeal from the Appeal Division on May 14, 2020. Leave to appeal was granted, and on September 28, 2020, the Appeal Division found that the General Division had based its decision on erroneous findings of fact. The Appeal Division returned the matter to the General Division for a new hearing because the record was incomplete. Specifically, the Claimant's alcohol abuse and his attempt at self-employment after 2005 needed to be addressed.

WHAT THE CLAIMANT MUST PROVE

[5] For the Claimant to succeed, he must prove that he had a disability that was severe and prolonged by December 31, 2005. This date is based on his contributions to the CPP.¹

¹ The *CPP* calls this date the 'Minimum Qualifying Period.' See s. 44(2).

[6] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.²

THE REASONS FOR MY DECISION

[7] I find that the Claimant had a severe and prolonged disability as of December 31, 2005. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant had functional limitations that affected his capacity to work

[8] My decision about whether the Claimant's disability was severe is not based on his diagnoses. It is based on whether he had functional limitations that prevented him from working.³ I have to look at his overall medical condition and think about how his health issues might have affected his ability to work.⁴

[9] I found the Claimant to be credible. His testimony was straightforward and candid in answering questions related to his work and health history. He submitted that his cardiac problems and shortness of breath began in about 2016, which was several years after December 31, 2005. For that reason, I have not considered the cardiomyopathy and arrhythmia conditions in this decision.

[10] The Claimant argues that his alcoholism, depression, a left wrist injury that required surgery, and learning disabilities have resulted in an inability to grip/use tools, do physical tasks, manage finances, be reliable, learn new skills, and follow instructions. In December 2005, he was fatigued to the point that he would nap regularly during the day, and he was not able to lift anything that required him to use his left hand. He submitted that he has been reliant on alcohol

² The definition is found in s. 44(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove that they are disabled on a balance of probabilities. In other words, they must show that it is more likely than not that they are disabled.

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferriera v. Canada (A.G.)*, 2013 FCA 81

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

since the age of 13. Despite going to detox on three separate occasions and participating in treatment, he has never been sober for more than a few months straight.

[11] The medical evidence from Dr. Fowler, Ms. Campagnoni, and Dr. Poder supports the Claimant's argument. In November 2004, Dr. Fowler, psychologist, reported that the Claimant's history of alcohol abuse that went back many years affected his job performance and financial situation. Dr. Fowler also noted that the Claimant used a good portion of the 50 thousand dollars of home equity he took out to build his own welding shop on alcohol. In June 2008, Dr. Poder, psychiatrist, reported that heavy alcohol was a prime contributor to the Claimant's decreased motivation and low mood.

[12] In August 2020, Ms. Capagnoni, psychologist, conducted a psycho-educational assessment after he was referred by social services. Ms. Campagnoni found that the Claimant had severe learning disabilities and that he was not functionally literate. As a result, he needed support with repetition of any instructions, as well as frequent reminders. Though the report was dated years after the MQP, the findings speak to the Claimant's lifelong literacy and learning challenges.

[13] I find that the evidence shows that the Claimant had functional limitations that affected his ability to work by December 31, 2005.

The Claimant was not realistically employable

[14] When I am deciding if the Claimant is able to work, I have to consider more than just his medical conditions and their effect on functionality. I must also consider his age, level of education, language proficiency, and past work and life experience. These factors help me to decide if he could work in the real world.⁵

[15] The Claimant is currently 55 years old and fluent in English. He finished grade 6 in school before going back to upgrade and get his grade 10 equivalency. The Claimant completed a welding apprenticeship, but his ticket expired several years ago. He has only worked as a

⁵ The Federal Court of Appeal held that the severe part of the test for disability must be assessed in the real world context (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

welder, commercial fisherman, and in auto mechanics/sales. He has no computer skills. I find that the Claimant has no transferable skills.

[16] The Claimant's literacy deficits also have a big impact on the Claimant's ability to work and re-train. The psycho-educational assessment in August 2020 outlined that the Claimant has dyslexia with significant encoding and decoding deficits, as well as weakness with his working memory. That weakness affects his ability to follow instructions and learn new things. He does not have a functional level of literacy.

[17] I find that the combination of the Claimant's limited left hand dexterity, his lack of transferable skills, his alcoholism, depression, and learning disabilities render him a poor candidate for re-training or for lighter desk-type work. In any competitive job market, the Claimant is not realistically employable.

The Claimant attempted to remain in the workplace for as long as he could

[18] After breaking his wrist and undergoing surgery in 2001, the Claimant was off work for 7 months. He then fractured the wrist a second time. When he did return to his welding job, he could no longer do what was required. He could not climb ladders or hold tools. He also often missed days because he was hung-over. He submitted that the wrist injury itself was not alcohol related.

[19] By 2003, the Claimant's employer told him to stop coming in to work because he could not do the job. He became increasingly depressed, and in 2005, he thought that he might be able to do something from home. He attempted to start his own auto body shop from home with help from friends and family. Unfortunately, the business failed. The Claimant took fifty thousand dollars from the equity in his home to start the business, but he spent a good portion of that money on alcohol.

[20] Between 2005 and 2008, the Claimant spent about 15 hours per week driving around to local used car lots looking for cars that he could fix up and sell. He did not have any employees. He called a mechanic friend to come to his shop only when he had a vehicle he needed work done on. The Claimant could not do any of the physical labour himself.

[21] The entirety of the Claimant's business amounted to selling 3 or 4 cars. The Claimant made no money, and his Record of Earnings reflects this. He submitted that he could not have put more time or work into the business of his depression and the fact that he was drinking heavily. He was also taking several anti-depressant medications that were causing side effects. Dr. Poder confirmed this in June 2008.

[22] I accept the Claimant's submission that his home business may have remained open until 2010, but it was in name only. I find that his work efforts after December 31, 2005 were not indicative of ongoing capacity regularly for any substantially gainful work.

The Claimant made reasonable efforts to follow recommended treatments

[23] The Claimant made reasonable efforts to follow medical advice.⁶ Any issue with treatment compliance was due to his medical condition. For example, in 2008 Dr. Foder reported that the Claimant had been on Sertraline, Effexor, Mirtazapine, Wellbutrin, and Cipralex. They were discontinued either because of side effects, or because they were not effective while he was using alcohol concurrently.

[24] The Claimant has been hospitalized on three separate occasions since 2000 for alcohol Detox. Each time, he abstained from alcohol for a few months. He has attended counseling and alcoholics anonymous but he has not been able to effectively treat his disease.

[25] The Claimant submitted that there has not been any period of more than a few months that he has been sober since 2001. He was not truthful with his doctors when he reported that he had stopped drinking for longer periods. He told Dr. Fowler that he had stopped drinking because he wanted his driver's license reinstated after he lost it for a year because of drinking and driving. The Claimant submitted that the Minister's argument that he maintained several years of sobriety was not correct. I accept the Claimant's submission.

[26] The Claimant has continued to use alcohol to self-medicate. He was, and continues to, drink at least a gallon of rum each week. His alcoholism, chronic left wrist injury, and depression all affect each other.

⁶ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

[27] Despite going to various types of therapy and treatment, the Claimant's functionality has not improved and his learning disabilities are lifelong.

WAS THE CLAIMANT'S DISABILITY PROLONGED?

[28] The Claimant disability is prolonged. His condition began when he was 13, it was present when he stopped working as a welder in 2003, and it continues today. Despite multiple trials of detox treatment, medications, and psychological/physical therapy, his condition has not improved. Given the chronic nature of his physical and psychological conditions, I do not anticipate the Claimant will improve to the point that he could regularly return to any substantially gainful work.

CONCLUSION

[29] I am allowing this appeal. The Claimant had a severe and prolonged disability in December 2005. However, the CPP says that he cannot be deemed disabled more than fifteen months before the Minister received his disability application. After that, there is a four-month waiting period before payment begins.⁷ The Minister received the Claimant's application in **[February] September** 2018. That means he is deemed to have become disabled in **[November 2016] June** 2017. Payment of his pension then starts as of **[March] October** 2017.

Tyler Moore
Member, General Division - Income Security

⁷ This is set out in s. 69 of the *Canada Pension Plan*