



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SE v Minister of Employment and Social Development*, 2020 SST 1143

Tribunal File Number: GP-20-827

BETWEEN:

S. E.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Teleconference hearing on: November 19, 2020

Date of decision: December 24, 2020

DECISION

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

OVERVIEW

[2] The Claimant was born in Sri Lanka. He came to Canada in 1984. He was 59 years old when he applied for a CPP disability pension in May 2018. He last worked loading and unloading delivery trucks. He was injured in a car accident in January 2006. He has not worked since. In the disability questionnaire, he stated that he had been unable to work since January 2006 because of his physical injuries from the accident and depression.¹ The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] The Minister acknowledges that the Claimant may now be severely disabled. However, its position is that the evidence does not establish a severe medical condition that prevented the Claimant from pursuing suitable employment when he last qualified for CPP disability at the end of June 2006.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² The Claimant's disability is severe if it causes him to be incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

[5] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP). His MQP – the date by which he has to prove he was disabled - is based on his contributions to the CPP.³ It ended on December 31, 2005.

[6] The Claimant also had earnings of \$2,247 in 2006.⁴ This amount is below the minimum level of earnings required to make valid contributions to the CPP. If the Claimant was not

¹ GD2-640

² Paragraph 42(2)(a) *Canada Pension Plan*

³ CPP Record of Contributions: GD11-4

⁴ Earnings Details: GD10-8

severely disabled by December 31, 2005, the law allows for proration of his earnings to help him meet the contributory requirements. If he became disabled in 2006 before the end of June, he will qualify for the disability pension.

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by the end of June 2006?
2. If so, is his disability long continued and of indefinite duration?

ANALYSIS

Severe Disability

The Claimant's medical condition prevented him from returning to his previous employment at the end of June 2006, but it did not prevent him from pursuing alternative employment

[7] I must focus on the Claimant's condition as of the end of June 2006. When doing so, I must assess his condition as a whole and consider all of the impairments that affected his employability at that time, not just his biggest or main impairment.⁵

[8] The CPP is a social insurance regime based on contributions. Under the CPP, the Claimant is covered only for conditions that became severe on or before his MQP. He is not covered for conditions that became severe afterwards.

[9] Since the MQP is more than 14 years before the hearing, I have relied to a greater extent on the documentary evidence than on the oral evidence.

[10] Recent Federal Court decisions have stated that, in order to succeed, a claimant must provide objective medical evidence of their disability at the time of their MQP. The Federal

⁵ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

Court has also stated that medical evidence dated after the MQP is irrelevant when a claimant fails to prove that they suffered from a severe disability prior to the MQP.⁶

[11] The Claimant states that he has been unable to work since the accident because of several conditions. These include chronic low back and neck pain, migraines, diabetes, and hypertension. In his notice of appeal, he stated that he has suffered from major depressive disorder, migraines, L4-5 degenerative disc disease, diabetes, and hypertension since 2006.⁷

[12] At the hearing, he testified that he has not been able to work since the car accident because of he always suffers pain from “his head to his toes.” He suffers from constant pain in his shoulders, neck, and knees. He has constant headaches. He is depressed.

Medical Evidence as of the pro-rated MQP

[13] X-rays taken on January 25, 2006 revealed mild degenerative changes at C4-5 and mild disc space narrowing at L4-L5.⁸

[14] Dr. Chan, the Claimant’s family doctor, saw the Claimant five times in the first six months of 2006.⁹ His office notes establish that the Claimant was suffering from neck pain and headaches caused by cervical sprain and low back pain caused by lumbar sprain. Dr. Chan treated the Claimant conservatively with painkillers and anti-inflammatory medication.¹⁰

[15] Dr. Goldman, neurologist, was the only specialist the Claimant saw before June 30, 2006. In May 2006, Dr. Goldman stated that the Claimant had been involved in what appeared to be a minor accident. He had no cuts or bruises. He complained about headaches and neck pain. Dr. Goldman diagnosed a minor neck injury with resultant muscular-skeletal pain. Dr. Goldman stated there was a lot of functional overlay (a medical symptom with no known cause). He

⁶ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and CPP Regulations: *Attorney General of Canada v Angell*, 2020 FC 1093, para 40

⁷ GD1-1

⁸ GD2-509

⁹ Dr. Chan’s office notes run from February 20, 2006 to June 19, 2014. Dr. Gnanendrajah was the Claimant’s family doctor starting in July 2014.

¹⁰ Office notes February 20/06, March 14/06, April 10/06, May 4/06, and June 22/06: GD2- 425 to 435

ordered an EEG (electrical monitoring of the brain) because of the Claimant's concern about headaches.¹¹ The EEG on May 31, 2006, was normal.¹²

The Claimant's medical condition deteriorated after June 30, 2006

[16] The medical evidence establishes that the Claimant's medical condition deteriorated after the prorated MQP. However, this deterioration is not relevant to whether the Claimant was disabled by the prorated MQP. This is because to qualify for CPP disability the Claimant must establish that he was severely disabled by the MQP.

[17] Dr. Chan's notes establish that the Claimant first complained of photophobia (sensitivity to light) on July 26, 2006. On August 2006, he first complained of right eye transient blindness.¹³ Dr. Chan referred him to a neurologist and an ophthalmologist.

[18] The Claimant saw Dr. Dindar, neurologist, on three occasions between September 2006 and August 2007. Dr. Dindar stated that the Claimant's vision symptoms were probably related to the migraines from his neck condition.¹⁴ In August 2007, Dr. Dindar stated that the Claimant's back pain was intermittent and he seemed to be coping with painkillers.¹⁵

[19] In September 2006, Dr. Karunanithy, optometrist, stated that the Claimant had occasional blurry vision that lasted a few seconds.¹⁶

[20] The Claimant's physical and mental health conditions deteriorated in mid-2007. In May 2007, Dr. Chan's notes record for the first time complaints of multiple joint pain, fatigue, morning stiffness, and worsening neck, shoulder, and lower back pain. Dr. Chan referred the Claimant to the CPM pain clinic. The first indication of anxiety is in Dr. Chan's May 30, 2007 note – "very anxious, anxiety neurosis." The first indication of depression is the July 2007 note –

¹¹ GD2-505

¹² GD2-506

¹³ GD2-422 to 424.

¹⁴ Dr. Dindar's September 2006 and June 2007 reports, GD1-6,7

¹⁵ GD2-493

¹⁶ GD2-500

“depressed, withdrawn, very depressed, Celexa.” In October 2007, Dr. Chan referred the Claimant to Dr. Sooriabalan, psychiatrist.¹⁷

[21] Three reports show that the Claimant was unable to work as of May 2007. However, this was close to a year after the June 30, 2006 prorated MQP.

- In May 2007, Dr. Jacobson, from the CPM Centre for Pain Management, stated that the Claimant suffered from severe pain in his neck and head following a January 2006 accident. He also stated that the Claimant was unable to work because of the pain. Dr. Jacobson diagnosed chronic neck pain, chronic cervical strain, and cervicogenic tension headaches.¹⁸
- In October 2007, Dr. Chan stated that because of his disability, the Claimant became depressed. Dr. Chan concluded that in view of his disability and the development of depression, the Claimant was unable to function in any form of gainful employment.¹⁹
- In November 2007, the Claimant told Dr. Sooriabalan that he had been depressed for about seven to eight months. He was tearful. He had difficulty sleeping. He had no interest in life and lacked motivation. He also had bodily aches and pains, and headaches. Dr. Sooriabalan stated that the Claimant demonstrated cognitive abnormalities including psychomotor retardation. Dr. Sooriabalan diagnosed major depressive disorder and increased the dosage of the Claimant’s anti-depressant medication.²⁰

[22] There are numerous reports in the hearing file after 2007 describing the further deterioration of the Claimant’s physical and mental health conditions. I have not discussed those reports because they are not relevant to the severe issue.

[23] I have also not discussed the Claimant’s diabetes and hypertension. This is because the Claimant did not state that these conditions were disabling when he testified. In addition, there is no medical evidence to establish that they affected his ability to work.

¹⁷ GD2-401, 400, 395, 391 to 392, and 388

¹⁸ GD3-147 to 150

¹⁹ GD2-181 to 186

²⁰ GD1-9 to 10

My Findings

[24] Although the medical evidence supports that the Claimant now suffers from a severe disability, it fails to show that his health conditions prevented him from pursuing alternative employment as of the end of June 2006.

[25] At that time, the Claimant suffered from headaches as well as neck and back pain. His depression and worsening pain did not develop until May 2007, which was close to a year after he last qualified for CPP disability. The only specialist who saw him before the prorated MQP diagnosed a minor neck injury with functional overlay.²¹

[26] The Claimant's neck and back injuries prevented him from returning to his previous physically demanding employment loading and unloading trucks. However, the evidence fails to show that they prevented him from pursuing alternative less physically demanding work.

The Claimant has failed to establish a severe disability

[27] A disability is severe if it prevents a claimant from earning a living. I must assess the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining his "employability".²²

[28] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.²³ The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.²⁴

[29] Since the Claimant was unable to return to his physically demanding employment, the primary issue that I must decide is whether he was regularly able to pursue alternative work as of the end of June 2006.

²¹ Para 15, above

²² *Villani v. Canada (A.G.)*, 2001 FCA 248

²³ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²⁴ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

[30] The Claimant was only 46 years old at the MQP, which is close to 20 years before the usual retirement age. This factor supports that the Claimant had the capacity to pursue alternative employment. He has the equivalent of a high school education in Sri Lanka. In Sri Lanka, he worked on his father's farm. He also worked as a sales person in a retail store. In Canada, he has worked at only unskilled physical jobs. These have included working as a dishwasher, kitchen helper, factory worker, security guard, and deliveryman.²⁵

[31] His English language proficiency is limited. He did not speak English when he came to Canada. In Canada, he has taken some part-time English as a Second Language (ESL) courses. He required the assistance of an interpreter at the hearing. He stated that he can read "a little bit" in English. He can write only his name and address. He goes to the bank to pay his bills. He uses interpreters for most medical appointments.

[32] Although the Claimant's limited English language proficiency and work history may have restricted his employability, I am not satisfied that he was not employable at light non-physically demanding work.

[33] In August 2008, Dr. Sooriabalan advised the Claimant to look for a job.²⁶ In December 2008, Dr. Sooriabalan noted that the Claimant was still not motivated to look for a job because of his physical pain.²⁷ I have already determined that the Claimant's medical condition did not prevent him from pursuing alternative less physically demanding employment as of June 2006.

[34] The Claimant acknowledged that he has made no efforts to pursue alternative employment. He also acknowledged that he has made no efforts to upgrade his English language proficiency and work skills.

[35] Because the Claimant has not looked for alternate work, he has not demonstrated that he was unable to obtain or maintain employment because of his health condition. The onus is on the Claimant to show that it is more likely than not that he lacked the regular capacity to pursue substantially gainful employment at the MQP. I find that he has failed to discharge this onus.

²⁵ Claimant's oral evidence; social and developmental history, GD2-83

²⁶ GD1-19

²⁷ GD1-20

[36] The Claimant has failed to establish that it is more likely than not that he suffers from a severe disability in accordance with the CPP requirements.

[37] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[38] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security