



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MF v Minister of Employment and Social Development*, 2021 SST 165

Tribunal File Number: GP-19-1712

BETWEEN:

M. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Angela Ryan Bourgeois

Claimant represented by: M. I.

Teleconference hearing on: December 11, 2020

Date of decision: January 29, 2021

DECISION

[1] The Claimant qualifies for a Canada Pension Plan (CPP) disability pension. Pension payments start as of May 2018.

OVERVIEW

[2] The Claimant is a 47-year-old labourer. Most of his work experience is as a flooring installer for his parents' company. He was forced to leave this job after a knee injury. Shortly after he started another labour job, he injured his left elbow. He has not returned to work.

[3] He applied for a CPP disability pension. He based his disability application on an injured left elbow and a heart condition.

[4] To be eligible for a CPP disability pension, the Claimant has to meet the requirements that are set out in the CPP. He has to prove that he had a severe and prolonged disability on or before the end of a minimum qualifying period or "MQP." In this case, the MQP ended on December 31, 2012. However, because the Claimant had earnings in 2013, he also has a prorated MQP date of June 30, 2013.

[5] The Minister denied the Claimant's disability application.¹ The Minister says the Claimant has not proven that he had a severe disability before his MQP ended. The Claimant appealed to the Tribunal.

[6] I have to decide if the Claimant was disabled under the CPP during his MQP, and continuously since.

LATE DOCUMENTS

[7] The Claimant filed late documents and submissions that the Tribunal numbered GD5 and GD8. I accepted GD5 into evidence because it contained relevant medical evidence and a

¹ The Claimant applied for a CPP disability pension in November 2015. The Minister denied his application and the Claimant did not ask for a reconsideration of that decision. The Claimant reapplied for a CPP disability pension in April 2019. The April 2019 application is the subject of his appeal.

summary of the Claimant's position. The Minister had time to respond and did so (GD7). I accepted the Minister's submissions because they were in response to GD5.

[8] Some documents in GD5 were illegible so, before the hearing, I had Tribunal staff asked the Claimant to provide better copies. The Claimant did so (GD8), and included additional submissions. I accept GD8 because it is relevant to the issue before me. The Minister was not prejudiced. GD8 was sent to the Minister for review more than a week before the hearing. The Minister would have benefited from knowing the Claimant's position before the hearing. The Minister did not send a representative to the hearing, and has not objected to me accepting GD8 into evidence.

ISSUES

[9] Did the Claimant have a severe disability before his MQP ended?

[10] If so, is his disability also prolonged?

ANALYSIS

[11] To receive a CPP disability pension, claimants have to prove on a balance of probabilities that they have a physical or mental disability that is severe and prolonged and that their disability started during their MQP.²

[12] The MQP is based on contributions made to the CPP. Based on the Claimant's contributions, he has two MQPs. The first one ends on December 31, 2012. The second MQP is from January 1, 2013, to June 30, 2013. I can only consider the second MQP if the Claimant became disabled during the six-month period between January 1, 2013, and June 30, 2013.

[13] I will consider whether the Claimant's disability is severe during his first MQP, and if not, during his prorated MQP. If his disability became severe during one of his MQPs, I will consider whether his disability is prolonged.

Does the Claimant have a severe disability that started on or before December 31, 2012?

² *Canada Pension Plan*, s 42(2)(a).

[14] A person has a severe disability if their disability makes them regularly incapable of doing any substantially gainful occupation.³

[15] I find the Claimant has not proven that he had a severe disability on or before December 31, 2012. I accept that the Claimant had a knee injury and required knee surgery in 2010. However, from 2010 until 2013, the Claimant worked part-time at his parent's business.⁴ The Claimant's part-time work shows that he had work capacity around the time of his December 2012 MQP. Considering this evidence of his work capacity and the lack of medical evidence about his functional capabilities at that time, I find that the Claimant has not proven that he was regularly incapable of doing all substantially gainful work on or before December 31, 2012.

[16] Next, I will consider whether his condition became severe during his prorated MQP from January 1, 2013, to June 30, 2013.

Does the Claimant have a disability that became severe between January 1, 2013, and June 30, 2013?

[17] Yes. I find the Claimant has had a severe disability since he stopped working in April 2013. The pain he has had since he first injured his elbow has caused both mental and physical limitations that have regularly prevented him from working. Despite treatment, the Claimant's condition has not improved. Further, the Claimant's personal characteristics negatively affect his employability.

The Claimant has a number of health conditions.

[18] The Claimant has chronic pain in his left arm, wrist and hand. In an April 2013 workplace accident, the Claimant injured his left elbow. He has had three surgeries on his left elbow (2014, 2015 and 2017) without significant improvement. In 2015, Dr. Fraser, orthopaedic surgeon, confirmed that the first two surgeries left the Claimant in worse condition than before. Unfortunately, the Claimant had no significant functional improvement with the third surgery either.

³ *Canada Pension Plan*, s 42(2)(a)(i).

⁴ GD2-21.

[19] Following his elbow injury, the Claimant developed Stressful Reaction Adjustment Disorder.⁵ According to his family doctor, the stress from his elbow injury led to Adjustment Disorder with hypersensitive reactions to his arm injury and subsequent traumatism. His family doctor opined that the stress from his injury led to his heart attack in December 2013, and his development of diabetes and adrenal fatigue. The Claimant's family doctor says that the Claimant has stress-related adrenal imbalance.⁶ The Claimant has also been diagnosed with Major Depressive Disorder—Chronic.

[20] Because the Claimant did not have any mental health conditions before his elbow injury, and depression and other mood disorders are common in those with chronic pain, I find it likely that his mental health conditions are related to his arm injury.

[21] It is not enough to have a serious health condition. To be disabled under the CPP, the Claimant has to show that his health conditions rendered him regularly incapable of doing all substantially gainful work during his MQP. If his disability was not severe at the time of his MQP, it doesn't matter that it later became severe.

[22] I will now consider the Claimant's functional limitations at the time of his MQP and how they affected his ability to work. I will also consider how his personal characteristics impact his employability, if he has done enough to try to get better, and whether he could do some other type of work, perhaps something less physically demanding.

The Claimant had significant symptoms and limitations from his health conditions at the time of his prorated MQP.

[23] The Claimant reported that since April 2013, and before his prorated MQP ended in June 2013 he had severe pain in his left arm. His arm locked, would not straighten out, and he had no function in his arm. While the Claimant is right-handed, the Claimant said that he could not work because of the severity of the pain. He said he had significant functional limitations, so much so that he had to move in with his parents. He stopped riding his bicycle, playing hockey and playing the drums. He also reported symptoms related to depression and anxiety, including

⁵ GD5-10.

⁶ GD5-127, GD5-10.

fatigue, frustration, and anger. He had trouble dealing with stress, excessive worrying and panic attacks. He could not sleep at night because of pain and worrying about his injury.

[24] I accept the Claimant's statements about his symptoms and limitations at the time of his MQP. His statements are in line with what he did (moving in with his parents), and the medical evidence. Further, I found the Claimant's testimony credible and reliable. He was direct in his answers, and was a good historian when it came to his health conditions. His subsequent surgeries suggest that his condition did not improve.

[25] The Claimant's family doctor said the Claimant had been "sick since spring 2017?" Since the doctor used a question mark after the date, I place no weight on this start date.⁷

[26] The Claimant's functional limitations continue. In February 2015, before his second surgery, a rehabilitation assessment completed for workers' compensation purposes shows that the Claimant reported elbow pain at 7 out of 10, which got worse with physical activity. The functional testing showed that he had limitations with lifting, pulling with his left arm, and gripping with his left hand.⁸

[27] In August 2015, Dr. Fraser, orthopaedic surgeon, noted that the Claimant continued to be in pain and had poor range of motion in his left elbow.⁹ The Claimant had another surgery in August 2015. Dr. Laursen, family doctor, reported the Claimant's condition was worse after the second surgery.¹⁰ He noted that the Claimant was in pain and had a poor range of motion in that elbow.¹¹ The Claimant stated that after this surgery he had numbness in his left hand and problems turning his left wrist. Following the third surgery, the Claimant continued to have significant stiffness, pain, instability and weakness in his left arm.

[28] The February 2015 rehabilitation assessment noted symptoms of depression, and anxiety, including low mood, anhedonia, mentation issues, ruminative worry, excessive anger, irritability, and pessimism with his recovery and the healthcare system.¹² Having reviewed all the medical

⁷ GD5-127.

⁸ Multidisciplinary Assessment Report dated February 2015, starting at GD2-165.

⁹ CPP Medical Report dated November 2015 starting at page GD2-182.

¹⁰ GD2-146.

¹¹ CPP Medical Report dated November 2015 starting at page GD2-182.

¹² GD2-161, GD2-162.

evidence and considering the testimony of the Claimant and his mother, I find it is more likely than not that the Claimant had similar mental health symptoms before his MQP ended in June 2013.

[29] However, there is insufficient evidence to show that any symptoms or functional limitations relating to his heart attack, diabetes, adrenal fatigue, and congestive heart failure, had any impact on his work capacity at the time of his MQP.

The Claimant has made reasonable efforts to improve his condition.

[30] To prove their condition is severe, claimants have to show that they have tried to manage their condition.¹³

[31] The Claimant has mitigated his condition. He has had three surgeries, has seen four orthopaedic surgeons, and has had extensive physiotherapy, after the injury, and after each surgery.¹⁴ He does exercises and stretching at home. He has sought help from a naturopath.

[32] The Claimant stopped taking strong pain medication in 2017.¹⁵ This is reasonable because the pain medication interfered with the treatment of his heart condition.

[33] The Claimant's physiotherapist recommended a chronic pain management class to the Claimant. The Claimant attended two classes. During the second class he became very sick and was rushed to the hospital. He did not return. While the Claimant may have received some benefit from the pain management class, I find it unlikely that it would have had any significant impact on his work capacity.

[34] I find he has taken reasonable steps to managing his mental health conditions. The multidisciplinary assessment report recommended psychological treatment.¹⁶ The Claimant saw a psychiatrist two or three times but did not find it beneficial. He has taken different medications

¹³ Canada (A.G.) v Tsagbey, 2017 FC 356.

¹⁴ GD5-107, GD5-115.

¹⁵ GD5-103.

¹⁶ GD2-161, GD2-162.

for mental health conditions but stopped because of side effects, including suicidal thoughts, and interference with his cardiac medication.¹⁷ He has had cognitive behavioural therapy.¹⁸

The Claimant has no work capacity.

[35] I find that the Claimant had no capacity to do work at the time of his 2013 MQP, and continuously since then.

[36] The Claimant has had significant functional limitations since April 2013. In October 2015, Dr. Fraser, Orthopaedic Surgeon, remarked that the Claimant was not ready to return to work,¹⁹ and in 2019, the Claimant's family doctor said that the Claimant has had no work capacity since April 2013.²⁰

[37] I note that in 2017, Dr. Sauder, Orthopaedic Surgeon, was hopeful that despite some deficits in his arm that the Claimant would be able to return to work.²¹ Dr. Sauder considered just the Claimant's left arm, but I have to consider the functional limitations from all his health conditions and his employability in the real world.²²

[38] The Claimant has limited education. He did not graduate high school. He attended summer school a couple of times but was unable to finish his grade 12 courses. He struggled in school and had a special education teacher. He has attention deficit disorder and dyslexia. He has trouble with reading and reading comprehension.

[39] The Claimant has limited work experience and transferable skills. He has only done labour work. He did construction work and worked as a flooring installer for his parents' company. He has always worked alone because he is easily frustrated. He was working as a labourer when he was injured in 2013. He has no computer skills.

¹⁷ GD2-114, GD2-159, GD5-9.

¹⁸ GD5-10.

¹⁹ GD2-149.

²⁰ GD2-112.

²¹ GD5-107.

²² This means that when deciding whether his disability is severe, I have to consider factors such as age, level of education, language proficiency, and past work and life experience. *Villani v Canada (A.G.)*, 2001 FCA 248.

[40] Since April 2013, the Claimant's pain and functional limitations have rendered him regularly incapable of doing any substantially gainful work, including sedentary and part-time work. In the real world, no employer in a competitive job market would hire the Claimant with his functional limitations, despite his young age and fluency in English.

[41] The Claimant cannot do any physical work because of his chronic pain and weakness in his left arm, hand and wrist. He has limitations with lifting, carrying, pushing and pulling. The Claimant cannot do sedentary work because of his pain and symptoms from his mental health condition, including fatigue, low mood, anhedonia, worry, excessive anger, and irritability. The Claimant would have difficulties doing any office job or training because of his chronic pain and cognitive difficulties. Further, with his symptoms, it is unlikely he could maintain a regular work schedule.

[42] The Minister relies on the multidisciplinary assessment from February 2015 that says the Claimant could do light to medium work at that time. This is important because if there is evidence of work capacity, to qualify for a CPP disability pension, the person has to show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition.²³

[43] I find that the assessment is not evidence of work capacity. Although the report reviewed the Claimant's mental health symptoms, when determining the level of work the Claimant could do, it did not consider the effect of his mental health symptoms on his overall work capacity. Further, the assessment is only a snapshot of his ability on that day, which was before the Claimant had his third surgery. I prefer the opinion of his orthopaedic surgeon that he had no work capacity in 2015, which is supported by the fact that he had more surgery to try to improve his pain and functioning.

[44] Because the Claimant has been regularly incapable of doing any substantially gainful work since April 2013 (before his qualifying period ended in June 2013), he has had a severe disability since then. Next, I will consider his 2017 income, then I will consider whether his disability is prolonged.

²³ *Inclima v Canada (A.G.)*, 2003 FCA 117.

The Claimant's 2017 income was not from employment so it is not evidence of work capacity.

[45] The Claimant's summary of earnings shows income in 2017. The Claimant explained that this income was not from employment, as he had not worked since 2013. I accept the Claimant's uncontradicted statement as true. These earnings are not evidence of work capacity.

Prolonged disability

[46] A disability is prolonged if it is likely to be long continued and is of indefinite duration or is likely to result in death.²⁴

[47] I find that the Claimant's disability is prolonged. It has been ongoing since April 2013. After three surgeries and extensive physiotherapy, his physical symptoms are unlikely to improve. There is no indication that his mental health symptoms will improve in the foreseeable future.

CONCLUSION

[48] The Claimant is disabled under the CPP. Because the Claimant has had a severe and prolonged disability since April 2013, he qualifies for a CPP disability pension.

[49] However, his disability payments only start in May 2018. This is because the earliest a person can be considered disabled for payment purposes is 15 months before they applied. This is called the deemed date of disability. Further, there is a four-month waiting period before pension payments start. The Claimant applied in April 2019, so his deemed date of disability is January 2018. Payments start four months later, in May 2018.²⁵

[50] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division—Income Security

²⁴ *Canada Pension Plan*, s 42(2)(a).

²⁵ *Canada Pension Plan*, s 42(2)(b) and s 69.