Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada

Citation: *SA v Minister of Employment and Social Development*, 2021 SST 148

Tribunal File Number: GP-21-450

BETWEEN:

S. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: April 1, 2021

Date of decision: April 5, 2021

Decision

[1] The Claimant, S. A., is not eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[2] The Minister of Employment and Social Development (called "the Minister") received the Claimant's application for CPP disability benefits in July 2017. [1] For his application to succeed, he must have a disability that is severe and prolonged by December 31, 2013.

[3] The Claimant was 46 years old in December 2013. He worked in a grocery store from 2007 to 2011, when he went on disability benefits because of back pain and neuropathy pain. He returned to work at the grocery store on a part-time basis in 2015. He said he was no longer able to work because of April 2016 because of back pain and neuropathy pain.

[4] The Minister refused his application because the evidence does not support the presence of a continuously severe medical condition, which would prohibit the Claimant from returning to the workforce in a suitable capacity.

[5] The Claimant disagreed with the Minister's decision and appealed that decision to the Social Security Tribunal's General Division. I am the Tribunal member who heard the appeal. The hearing was held in the afternoon as per the Claimant's request and the Claimant confirmed to me that he was capable and ready to proceed with the hearing.

[1] The application is at GD 2-33.

What the Claimant must prove

[6] For the Claimant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2013. This date is based on his contributions to the CPP.[2]

[7] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.[3] It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.[4]

[8] The Claimant has to prove it is more likely than not he is disabled.

Reasons for my decision

[9] I find the Claimant has not proven he has a disability that was severe and prolonged by December 31, 2013. I reached this decision by considering the following issues.

[10] The Claimant has an adjustment disorder with anxiety and depression; diabetic neuropathy; and chronic mechanical low back pain.[5] My focus though is not on the Claimant's diagnosis.[6] I must focus on whether he had functional limitations that interfered which him earning a living.[7] This means I have to look at all the Claimant's medical conditions (not just the main one) and think about how his conditions affect his ability to work.[8]

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[2] Service Canada uses a person's years of CPP contributions to calculate their coverage period, or "minimum qualifying period" (MQP). The end of the coverage period is called the MQP date. See subsection 44(2) of the *Canada Pension Plan*. The Claimant's CPP contributions are on GD 6-3.
[3] Paragraph 42(2)(a) of the *Canada Pension Plan gives this definition of severe disability.*
[4] Paragraph42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.
[5] This information is provided by Dr. Cortens in his December 2014 report at GD 2-77.
[6] The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.
[7] The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.
[8] The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

What the Claimant says about his limitations

[11] The Claimant says he has limitations from his medical conditions that affect his ability to work in the following ways.

- He was diagnosed with diabetes when he was a child. There is no cure for this disease. His condition has only worsened over time.
- Stress levels and worries aggravate his condition.[9]
- He began collecting short-term disability in May 2011 when he stopped working at a grocery store because of pain in his feet and legs. This pain has continued to worsen over time.
- After he stopped working, he developed emotional distress and depression.[10]

[12] I accept that the Claimant had limitations by December 31, 2013 that would interfere with his ability to work at a physically demanding job, such as his grocery store job. However, the test before me is not whether the Claimant can return to his previous job, but rather whether he is incapable regularly of performing any substantially gainful employment.

[13] I find that:

i. the medical evidence and opinions of his doctor,

ii. his successful return to school (full-time) along with placements in occupational settings (in 2013 – 2015) and

iii. his return to part-time, modified work at the grocery store (in 2015 – 2016),

all support that he was not disabled by December 31, 2013.

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[9] This information is at GD 1.
[10] This is at GD 2-12.

What the medical evidence says about the Claimant's limitations

[14] The Claimant must provide objective medical evidence that shows his limitations affected his ability to work by December 31, 2013.[11]

[15] The clinic notes of Dr. Cortens in 2013 say that the Claimant was having personal issues, which were affecting his mood. Also, his diabetes was not controlled which was affecting his neuropathy in a negative way. He was advised to lose weight, exercise and contact the Diabetes Clinic. In October 2013, Dr. Cortens said the Claimant was "not making the effort he should in terms of diet, exercise".[12]In February 2014, Dr. Cortens noted that the Claimant was not even monitoring his blood sugar levels. Dr. Cortens advised the Claimant several times to get in touch with the Diabetes Clinic. However, the Claimant only did this at the end of 2014.[13]

[16] The Claimant testified that when his diabetes is not controlled, his neuropathy is worse. When his stress is bad (ie: from his divorce, custody issues and not working), his blood sugar levels are not controlled. He told me that about a year ago, he made a conscious effort to stop stressing and he got his blood sugar levels down to a manageable level.

[17] In August and October 2015, Dr. Cortens said the Claimant's anxiety and depression were well controlled. I note that this was during the time the Claimant was working at X.[14] The Claimant testified that he stopped seeing a counsellor about 1 ½ years ago because she felt that things were okay.

[18] Dr. Cortens said in December 2014 that the Claimant had altered sensation in his feet.[15] He said that the Claimant was managing his activities of daily living. Dr. Cortens told the Claimant's insurance company that the Claimant was not able to return to work in December 2014 because of physical and mental restrictions. However, the Claimant

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[11] The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.
[12] This is in the clinic notes at GD 2-149.
[13] This is at GD 2-152.
[14] This is at GD 2-155.
[15] Dr. Cortens' report is at GD 2-77.

was in full-time attendance at school at this time. For the reasons, outlined below, I find his attendance at school shows that he had work capacity.

[19] In July 2015, Dr. Cortens said the Claimant had no limitation with sitting or walking; standing as tolerated and he was to avoid lifting. He could work a maximum of 4 hours/day and required a rest every 2 hours.[16] This was during the time the Claimant was working at X.

[20] Several months after the Claimant stopped working at X, Dr. Cortens said, "I've asked him to start thinking about finding work that he is physically capable of doing."[17] This supports that although the Claimant found the work at X too physically demanding, he retained capacity for some type of lighter duty work.

[21] The medical evidence shows that the Claimant was not disabled by December 31, 2013 and he retained capacity to work after December 31, 2013. As a result, he has not proven that he had a severe disability.

[22] If the medical evidence does not prove that his functional limitations affected his ability to work by December 31, 2013, medical evidence dated after is irrelevant. Reports written afterward must be based on clinical observations or assessments by December 31, 2013.[18]

[23] I accept that the Claimant's condition has worsened after his MQP. The Claimant testified that he also has vision loss since having eye injections for the past 2 ½ years. While this condition may be affecting the Claimant's function ability today, the evidence of September 2013 is that there was no diabetic retinopathy.[19]

[24] Dr. Cortens said the Claimant had a worsening of symptoms, including chronic back pain, since April 2016.[20] Although he felt the Claimant had capacity to work in

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[16] This is at GD 2-88.
[17] This opinion was as of October 2016 and is at GD 2-158.
[18] The Federal Court said this in *Canada (Attorney General) v. Angell*, 2020 FC 1093.
[19] This is at GD 2-148.
[20] This is at GD 2-106 and GD 2-157.

October 2016[21], by March 2017, it was Dr. Cortens' opinion that the Claimant would not be able to return to work, even if his work was modified. However, this is more than three years after the Claimant's MQP of December 31, 2013.

The Claimant's return to school supports he had work capacity after December 31, 2013

[25] In determining whether attendance at an education program establishes regular work capacity, I must consider the particular facts of the case. I must determine whether the Claimant's attendance is just evidence of good faith rather than actual work capacity. There are non-binding Pension Appeal Board decisions that support either position depending on their unique facts.[22]

[26] In this case, I find that the facts support that the Claimant's attendance at school establishes regular work capacity.

[27] The Claimant started post-secondary education in the fall of 2013. He completed his two-year program in Native child and family studies in 2015. The Claimant said he was encouraged by friends, family, his counsellor and his doctor to enroll in this program to improve his mental health. In fact, Dr. Cortens completed the forms for the Claimant to get some financial assistance for the courses.[23] The Claimant told me that this was a full-time two-year program and he went to school from about 8am to 2:30pm. The students had breaks between classes and a lunch break. He said he would come home and do his homework, usually while laying down on the couch. The Claimant said he passed the program. Part of the requirements of the Social Work program was participating in "placements". One placement was at X in X, Ontario. He said this was a bit of a drive from his home. He worked at the school for about 8 weeks. During his placement, he supported students in grades 1-6 by helping them with their work, going

[21] This is at GD 2-158.
[22] *Fraser v Minister of Human Resources Development*, CP 11086 and Marriott v. *Minister of Human Resources Development, CP08452 support the Minister's position.* On the other hand, *R.B. v. Minister of Human Resources and Skills Development*, CP28005 and *Stratton v. Minister of Social Developmen*t, CP24370 support the Claimant's position.
[23] This is at GD 2-148.

with them to baseball games and basically taking on the role of an Educational Assistant (EA).

[28] The Claimant said when he graduated in 2015, he applied for work with X. He was not hired because the management determined he would not be able to do the physical parts of the job, such as supporting a person if they fell. I asked the Claimant if he had applied for other work that was not physically demanding. He said he did not. He testified that he did not apply at any school, although he had success with this type of less physical work during his placement.

[29] If the Claimant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts were not successful because of his medical conditions.[24] Finding and keeping a job includes re-training or looking for a job that accommodates his limitations.[25] The Claimant was able to attend school full-time for two years after his MQP, and work in a school setting placement. Both of these support that he had capacity for work that was not physically demanding.

The Claimant's return to part-time, modified work at the grocery store supports he had work capacity after December 31, 2013

[30] I considered whether the Claimant's income in 2015 could be considered income earned from employment, which might show he was capable regularly of pursuing substantially gainful employment. In respect of an occupation, "substantially gainful" is described as an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.[26] A Contribution of Earnings Record shows the Claimant's post-MQP earning history.[27] He had earnings in 2015 of $14,145. Although the total amount of his earnings in 2015 is $1,030 less than the prescribed amount for substantially gainful employment, this is not in itself evidence a regular incapacity to pursue substantially gainful employment. That determination must be made on the basis of the entirety of the evidence including the

[24] The Federal Court of Appeal said this in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[25] The Federal Court of Appeal said this in *Janzen v. Canada (Attorney General)*, 2008 FCA 150.
[26] Section 68.1 of the *CPP Regulations*
[27] The Contributions sheet is at GD 3-13.

medical evidence as well as the details of the employment.[28] I considered that these earnings were only for part of the year (from April – December 2015). Further, the following reasons support that the Claimant's work efforts at X were evidence of work capacity.

[31] The Claimant said he needed to return to work at X because of financial reasons. He went to see the manager of the grocery store and asked him for a job. The manager was aware of the restrictions given by Dr. Cortens. The Claimant was hired for a part-time light duty or modified job.

[32] The Claimant told me that his doctor said he should not be working. However, Dr. Cortens approved the Claimant's return to work effort at X as of April 21, 2015.[29] He said the Claimant should work reduced hours (4 hours/day) and do modified work (no excessive or repetitive bending or lifting). The Claimant followed up with his doctor every month and in June and July 2015, Dr. Cortens confirmed that working was okay, as long as it was half-time (4 hours/day) and the restrictions of mainly avoiding repetitive or excessive bending or lifting were adhered to.[30]

[33] I did not find the Claimant's employer to be a benevolent employer. Case law, including the decision *Atkinson v. Canada,*[31] says that accommodating an employee does not necessarily mean that an employer is benevolent. For an employer to be found benevolent, the accommodation must go beyond what would be expected in the marketplace. A benevolent employer requires a high evidentiary threshold. Commonplace accommodations from an employer does not make it a "benevolent" employer.[32] In this case, the Claimant's work was productive. His employer was aware of the Claimant's medical restrictions and hired him as a general grocery store worker. The Claimant was paid a competitive wage and there were job duties expected of him. Help from co-workers was made available to him, when he required it. This is not an

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[28] *Villani v. Canada (A.G.),* 2001 FCA 248
[29] This is at GD 2-154.
[30] This information is in Dr. Cortens' clinic notes of GD 2-154 – GD 2-155.
[31] *Atkinson v. Canada (Attorney General),* 2014 FCA 187.
[32] Although not binding on me, I considered a SST Appeal Division decision – *Minister of Employment and Social Development v. T.D.*, 2020, SST 1021.

accommodation that went beyond what was required of an employer in a competitive market.

[34] The Claimant testified that when his employer wanted to put him on more than 4 hours/day, “things went off the rails”. He explained that he was still doing light duties but sometimes during the day, he had to get part-time employees to help him. He told me the boss said to just do what he could. However, eventually the stress of hurting himself and the pain was too much and he quit in April 2016.[33]

[35] Dr. Cortens noted that the Claimant had an acute exacerbation in back pain because he had to do excessive lifting at work. The Claimant said he was not getting the help that he had been promised and this had been going on for weeks. The Claimant said the requirements of him were too much for his back now that he was getting little or not help at work. This is why he stopped working in April 2016.[34]

The Claimant’s personal circumstances

[36] When I am deciding if the Claimant can work, I must consider more than just his medical conditions and how they affect what he can do. I must also consider his age, level of education, language ability, and past work and life experience.[35] These factors help me decide if the Claimant has any ability to work in the real world.

[37] The Claimant was only 46 years old at his MQP of December 31, 2013. He worked as a manager at a grocery store for many years. He has post-secondary training (a 2-year course in Native Child and Family Services) which was achieved after his MQP. He also has computer skills. His capacity to do sedentary educational training, computer skills and his experience in management all provide him with transferable skills. I find that the Claimant’s personal circumstances would not have prevented him from working in the real world by December 31, 2013.

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[33] This was his testimony at the hearing and is noted in Dr. Cortens’ clinic notes at GD 2-156.
[34] This information is at GD 2-190.
[35] The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

Conclusion

[38] I am sympathetic to the Claimant's situation. However, I find the Claimant is not eligible for a CPP disability pension because his disability was not severe by December 31, 2013. Because I found the disability is not severe, I did not have to consider if it is prolonged.

[39] This means the appeal is dismissed

Connie Dyck
Member, General Division - Income Security