



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DA v Minister of Employment and Social Development*, 2020 SST 1237

Tribunal File Number: GP-18-1651

BETWEEN:

D. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Lianne Byrne

Teleconference hearing on: February 4, 2020

Date of decision: February 29, 2020

DECISION

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

OVERVIEW

[2] The Claimant indicated in his application for CPP disability benefits that he was doing work as a paralegal and court agent until he stopped working in June 2017 due to memory loss, confusion, inability to concentrate, major depression, and pain. The Minister received the Claimant's application for the disability pension on January 31, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] 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.

[4] In this case, the Claimant does not have sufficient contributions to establish an MQP with proration. When a claimant's earnings and contributions are below the year's basic exemption for that year, their earnings and contributions can be prorated if they became disabled during the prorated period.¹ In this case, the prorated period is from January 1, 2009 to May 31, 2009.

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 in 2009 by May 31, 2009?

[6] If so, was the Claimant's disability also long continued and of indefinite duration in 2009 by May 31, 2009?

ANALYSIS

¹ Section 19 of the CPP

[7] Disability is defined as a physical or mental disability that is severe and prolonged². 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 did not have a severe disability as of the prorated period.

[8] 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 is 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 work³.

[9] The Claimant testified that he worked full-time as a professional dancer for 25 years. He stopped doing this work due to an injury in 2000. He tore his left and right meniscus. Despite surgery, he was unable to continue dancing or even teach dancing.

[10] He enrolled in a full-time paralegal program, which he successfully completed in 2003. In 2004, he began representing clients in small claims, traffic and landlord/tenant matters. However, the work was not steady. He began doing collections work. After four months, he returned to his previous paralegal work. However, he was having difficulty concentrating. He had a lot of anxiety sitting in an office for eight hours per day. He was taking 1-2 days off per week.

[11] In 2007, he returned to collections work. He did this work until January 2009, when the company he was working for downsized. He returned to paralegal work until he went back to college in 2012 to attend another paralegal course. This was a two-year program. He struggled at school due to difficulty concentrating, anxiety, frustration, confusion and exhaustion.

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

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[12] Since completing this program, he has done what he described as “extremely part-time” work at a collections agency. He works 10-20 hours every two weeks. This is all he can handle. He also has earnings from a rental property.

[13] As of May 31, 2009, he was living on and off in an apartment with his father. He was seeing his family doctor because he was feeling down and depressed. He tried to “fix” himself by relying on his support system of family and friends.

[14] His health worsened after May 31, 2009. In January 2014, he had a seizure. He has not had another seizure since then. In 2015, he was admitted to the hospital with heart pain. He was hospitalized for four months. He was diagnosed with type II diabetes mellitus and high blood pressure. He gets shooting diabetic nerve pain. He is constantly running to the washroom. He was also diagnosed with encephalopathy. He has diminished memory and concentration. He is always tired. He gets nauseous from his medications.

[15] Since his discharge from hospital, he has lost four teeth. He has difficulty eating. He is sometimes weak, tired and dizzy. He has edema in his legs and feet causing pain. It has improved, but comes back from time to time. He has also had worsened anxiety and agoraphobia. He was told that he almost passed away three times in the hospital, which is a big source of his anxiety. He was diagnosed with major depressive disorder, which he was told started about three years ago.

[16] In 2015 and 2016, he needed help with personal care and walking. He is finding it harder and harder to care for himself. His mother is now assisting.

[17] There are numerous medical reports on file, all of which were considered. However, most of the medical reports on file are dated after May 31, 2009 and relate to the state of his health after May 31, 2009.

[18] Dr. E. Boynton performed and EUA arthroscopy, debridement lateral compartment and partial lateral meniscectomy on March 28, 2000. Although I accept that he was unable to return to work as a dancer after this surgery, there are no subsequent medical reports on file to indicate that this health problem prevented him from alternate work within his limitations as of May 31, 2009.

[19] The CPP Medical Report was completed on January 23, 2018 by Dr. Kenneth Chen, family physician, who has known the Claimant for more than 30 years. He has hepatic dysfunction with mild encephalopathy/cirrhosis, left knee degenerative tear of lateral meniscus and osteoarthritis of lateral compartment, and major depressive disorder. He was also noted to have diabetes with atrophic pancreas, pericardial effusion, right knee septic monoarthritis and history of seizure. He has moments of confusion due to encephalopathy. He has chronic persistent depression. His analytical and judgement skills are diminished. Dr. Chen felt that, with the combination of his physical condition and mental condition, he is not able to engage in any meaningful employment. While Dr. Chen's opinion is noted, he did not indicate when the Claimant's health problems began or how they progressed over time. It is evident from the remaining medical reports on file and the Claimant's testimony at the hearing that his health worsened significantly after the MQP.

[20] Dr. Mark Bonta reported on January 5, 2014 that he was admitted to the hospital on January 4 and was discharged on January 5. He has a diagnosis of new onset seizures. In a report dated April 17, 2014, Maneesh Sud, resident, reported that he has alcohol induced hepatitis. However, these health problems occurred many years after the MQP.

[21] There are also numerous post-MQP medical reports relating to his hospitalizations in 2016. In a discharge summary dated February 21, 2016, Dr. Robert Sergeant reported that he was admitted on February 13, 2016 with epigastric pain and other symptoms. He was diagnosed with choledocholithiasis, chronic pancreatitis, and alcoholic hepatitis. On March 9, 2016, he was noted to have been referred for diabetes. He has no known previous history of diabetes.

[22] On March 30, 2016, he was seen by Dr. Florence Wong for chronic pancreatitis and recent alcoholic hepatitis. He was thought to have liver failure with hepatic encephalopathy. On May 9, 2016, Dr. Reena Pattani reported in a discharge summary that he was admitted to the hospital on April 11, 2016. He was diagnosed with right septic knee arthritis. He developed pericarditis in hospital. This hospitalization occurred many years after the MQP and indicates a post-MQP worsening in his health.

[23] Similarly, he was noted on July 22, 2016 by Dr. Thomas Harvey, infectious disease, to have bilateral lower extremity swelling for several weeks time. This health problem began after the MQP.

[24] Dr. Wong wrote on June 15, 2016 that he has liver failure and is disabled. He needs social assistance as he cannot work. Dr. Wong reported on August 31, 2016 that he was admitted to the hospital in May because of septic arthritis. He decompensated while in hospital. His liver function tests at the end of May still show significant liver dysfunction. His major complaint is constant fatigue, which is likely related to a degree of mild hepatic encephalopathy. While Dr. Wong's opinion regarding his ability to work is noted, her opinion is given many years after the MQP and is based on the Claimant's post-MQP health problems.

[25] I accept that the Claimant had some health problems that began prior to the MQP. However, there is no medical evidence to indicate that he had a severe disability by May 31, 2009.

[26] His oral testimony also indicates that he worked for many years after the MQP and also returned to school. I therefore find that there is evidence of work capacity. 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 condition⁴. The Claimant was able to continue working as of the MQP and for many years afterward, albeit with some difficulty. He was also able to attend a two-year paralegal course. His health worsened significantly after the MQP.

[27] I must assess the severe part of the test in a real world context⁵. 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. In this case, I considered that he was 44 years old as of the MQP with a college level education. He has worked as a professional dancer and then as a paralegal, court agent and collections agent. He is fluent in the English language.

⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

[28] The Claimant was young and well-educated with sedentary work experience. While I acknowledge he could no longer work as a professional dancer due to his knee problems, he was not prevented from attempting lighter work within his limitations. In fact, he was successful in finding sedentary jobs. Therefore, he has not shown that his efforts at obtaining and maintaining employment have been unsuccessful because of his health condition.

[29] 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 impairment⁶. Having considered the totality of the evidence and the cumulative effect of the Claimant's medical conditions, I am not satisfied on the balance of probabilities that he suffers from a severe disability.

CONCLUSION

[30] The appeal is dismissed.

Lianne Byrne
Member, General Division - Income Security

⁶ *Bungay v. Canada (A.G.)*, 2011 FCA 47