



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CD v Minister of Employment and Social Development*, 2021 SST 286

Tribunal File Number: GP-19-1880

BETWEEN:

C. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Lianne Byrne

Claimant represented by: Denise D'Silva

Teleconference hearing on: January 19, 2021

Date of decision: January 31, 2021

DECISION

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

OVERVIEW

[2] The Claimant was self-employed in construction until January 2016. He stopped working because of pain in his elbows, shoulders, and neck. The Minister received the Claimant's application for the disability pension on September 28, 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. I find the Claimant's MQP to be December 31, 2017.

ISSUE(S)

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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.

¹ Paragraph 42(2)(a) *Canada Pension Plan*

Severe disability

[7] The Claimant was self-employed in construction (home renovations) from October 8, 2009 until January 20, 2016. He stopped working because of pain in his elbows, shoulders, and neck.

[8] The Claimant testified that, as of 2017, he had pain in both elbows and throughout his body. His pain worsened at night. He had difficulty sleeping. He was tired throughout the day. He had trouble holding or carrying things. He did not have any good days. He had trouble walking for more than a few minutes. He was unable to do any activities. His wife helped him get in and out of the bath tub.

[9] In addition to his pain, he began to feel depressed about three years ago. His memory and concentration are poor. He was prescribed anti-depressant medications, which cause side effects such as dizziness.

[10] His wife, L. D., also testified at the hearing. She explained that he was a construction worker doing physically-demanding work. He began to have pain in his elbows, which got worse in 2015. He stopped working in 2015.

[11] She stated that his symptoms of depression began approximately three years ago. His family physician referred him to a psychiatrist. He was prescribed medication. He is still irritable and easily angered.

[12] He applied for CPP disability benefits in 2017 because he had pain in both elbows, both thumbs, his lower back, his neck, and his right shoulder. He had trouble walking. He had difficulty sleeping and was tired throughout the day. He needed assistance with personal care, such as getting in and out of the shower. He has gotten worse since then.

[13] There are numerous medical reports on file, all of which I considered. There are several reports from Dr. Imtiaz Khan, rheumatologist, that indicate that the Claimant had pain and limitations in 2017. However, it is evident that his limitations would not have precluded him from attempting alternative work within his limitations.

[14] On March 17, 2017, Dr. Khan reported that he has bilateral elbow pain for the last three years. He stopped working in 2016. He developed pain at the first MCP joints to the point that he was having difficulty using chopsticks or grasping anything. This is a soft tissue injury. He received an injection.

[15] Dr. Khan wrote on April 10, 2017 that he has progressive bilateral epicondyle pain with pain at the first MCP joints. He reported no benefit from injection. He has more tenderness over the left medial and lateral epicondyles.

[16] Ravinder Faury, physiotherapist, reported on September 13, 2017 that he had some improvement with physiotherapy. He is able to move his elbows better than before and is able to do all exercises, although he still feels pain.

[17] Dr. Minh Quan, family physician, completed a CPP Medical Report on February 26, 2017. He has chronic daily elbow pain, epicondylitis, and pain in both thumbs. He stopped working his construction job because of pain and difficulty carrying things.

[18] Dr. Minh D. Quan wrote on January 31, 2017 that he has pain in both elbows daily. He has been unable to work for a long time. Dr. Quan wrote on March 3, 2017 that he has chronic daily pain in his elbows. Dr. Quan wrote on November 30, 2017 that the Claimant has complained of pain in both shoulders, both elbows, and both thumbs for over one year.

[19] Dr. Michael J. Weinberg reported on December 19, 2017 that the Claimant has significant right and left thumb pain for the last two years, worse on right. It occurs at the MCP joint and his elbow. Dr. Weinberg thought he should continue working and work through his pain.

[20] There are multiple reports from Dr. Amina Lodhi, rheumatologist. I note that Dr. Lodhi began treating the Claimant just after the MQP in January 2018. It is evident from Dr. Lodhi's reports that the Claimant was unable to do construction work. However, his limitations would not have precluded him from attempting alternative work within his limitations.

[21] On January 19, 2018, Dr. Lodhi reported that he was seen for arthritis. He has had pain in his right elbow for the last three years that is worse with activity. He also has pain in both

thumbs and constant pain in his right shoulder for about one year. He has occasional pain in his ankles and MTP joint. He has had back pain with activity for many years. His bilateral elbow pain is in keeping with bilateral lateral epicondylitis and right medial epicondylitis. His right shoulder pain is in keeping with rotator cuff tendinopathy.

[22] On February 20, 2018, he was noted to have right shoulder pain, bilateral elbow pain, and osteoarthritis in his hands, which is not hurting because he is not working. On June 22, 2018, he had pain in his right shoulder, osteoarthritis in his hands, degenerative disc disease of the cervical spine, and pain in his neck. On September 18, 2018, his activities were noted to be limited by pain.

[23] Dr. Lodhi completed the CPP Medical Report on September 24, 2018. It is noted that the Claimant has right shoulder rotator cuff tendinopathy, tear and bursitis. He also has bilateral common flexor and extensor tendinopathy and tear of right common flexor tendon. He has osteoarthritis in his hands and degenerative disc disease in his cervical spine. He has pain in the right shoulder, both elbows, both hands, and neck. His pain is moderately controlled with pain medications. He has multiple degenerative issues with his joints that limit his ability to work as his work requires heavy weight lifting.

[24] There is a psychiatric report dated well-passed the MQP. On October 7, 2019, Dr. Phuong Tran, psychiatrist, wrote that he has had two years of insomnia with irritable feeling. He has a pain disorder and major depressive disorder, single episode.

[25] I accept that the Claimant's health problems prevented him from returning to his physically-demanding construction work. However, I considered that 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 work².

[26] I find that there is evidence of work capacity. The medical reports on file indicate that the Claimant cannot continue working in construction, which is a physically-demanding job.

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

However, his functional limitations would not have prevented him from attempting lighter work. I also note that Dr. Weinberg thought he should continue working.

[27] 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 condition³. In this case, the Claimant has not looked for or attempted lighter work since he stopped working in construction.

[28] I must assess the severe part of the test in a real world context⁴. 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 49 years old as of the MQP. He has a college level education obtained in Vietnam. He has worked mainly in construction (home renovations). He is able to communicate a little in English, but requires assistance from his wife. He can read and write a little in English. He is unable to use a computer.

[29] Despite his poor English language and computer skills, the Claimant is relatively young and well-educated. In considering his personal characteristics, I do not find that he is unemployable in a real world context. While I acknowledge that he would be unable to return to his physically-demanding work in construction, he would not be precluded from lighter work within his limitations, retraining for lighter work, or upgrading his English language skills. He has not made any attempt to look for lighter work. Therefore, he has not shown that his efforts at obtaining and maintaining employment have been unsuccessful because of his health condition.

[30] 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 impairment⁵. 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.

³ *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁵ *Bungay v. Canada (A.G.)*, 2011 FCA 47

CONCLUSION

[31] The appeal is dismissed.

Lianne Byrne
Member, General Division - Income Security