



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JK v Minister of Employment and Social Development*, 2019 SST 1760

Tribunal File Number: GP-18-2109

BETWEEN:

J. K.

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: December 10, 2019

Date of decision: December 13, 2019

DECISION

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

OVERVIEW

[2] The Claimant worked as a store associate at X until July 10, 2017. She feels that she could no longer work as of that date due to degenerative disc disease at C5-C6 with posterior osteophytic lipping on the left side. The Minister received the Claimant's application for the disability pension on September 6, 2017. 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, 2015.

[4] When an appellant'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, 2016 to June 30, 2016.

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 by December 31, 2015 or in 2016 by June 30, 2016?

[6] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2015 or in 2016 by June 30, 2016?

¹ Section 19 of the CPP

ANALYSIS

[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 MQP or 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 she worked part-time as a sales associate at X from 2013 to July 10, 2017. Her duties included working the cash register, stocking shelves, cleaning and putting products on shelves. She was able to do this work until her health problems began in 2014.

[10] She explained that she was at work hanging hats, mittens and scarves, when her left shoulder became really sore. She visited her chiropractor. She was sent for an x-ray, which revealed degenerative disc disease in her neck.

[11] She continued to work, but was helped by her coworkers with the tasks she could not do, such as lifting and carrying heavy items. She had trouble working the cash register because it required her to use her arm to grab items. She had pain in her neck and left shoulder.

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

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

[12] She continued to work despite her health problems until she got to the point that she was in pain after every shift. She discussed the situation with her chiropractor, who advised her to stop working. She stopped working after the MQP and prorated period in July 2017. She did not attempt to return to work or look for another job after that.

[13] Her health has worsened approximately since the time she stopped working. Since then, she has had constant neck and left arm pain. She is also starting to get pain in the right arm. She has difficulty sleeping (3 hours per night) due to pain. She will no longer use her left hand to lift anything heavier than a cup of coffee due to weakness. She is also being treated for high blood pressure.

[14] While I acknowledge that the Claimant's health problems began in 2014, she was able to continue working after the MQP, during the prorated period and for more than a year thereafter until she stopped working in July 2017. The Claimant herself acknowledged in the CPP disability questionnaire that the date upon which she could no longer work due to her health problems is July 2017, which is after the MQP and prorated period. This is also approximately the time that she testified her health problems worsened.

[15] The medical reports on file confirm that the Claimant has had some pain in her neck and left arm since 2014 that worsened over time. However, it is evident from her testimony and the medical reports that she did not have a severe disability as of December 31, 2015 or in 2016 by June 30, 2016.

[16] The Claimant's chiropractor is supportive of her application for CPP disability benefits. He stated in the CPP Medical Report that he began treating her in 2014 for cervical degenerative disc disease at C5-C6. She has had left neck, chest and upper back pain while performing overhead activities since September 2014 which has persisted. He noted that the Claimant is incapable of activities including prolonged repetitive flexion or extension of neck and activities and overhead or repetitive use of the left arm. He was of the opinion that she is incapable regularly of pursuing any substantially gainful occupation.

[17] While his opinion is noted, I considered that her functional limitations would not preclude her from attempting alternate work within her limitations. In addition, the office notes

of her family physician, which are dated after the MQP in July 2017, indicate that she had a normal grip, normal reflexes, mild tenderness of the cervical spine with reasonably intact range of motion.

[18] An EMG dated after the MQP in October 2017 indicated a possible impingement of the left shoulder and possible mild cervical radiculopathy for which conservative management was recommended.

[19] I find that there is evidence of work capacity for the following reasons:

- The Claimant worked her regular scheduled after the MQP, throughout the prorated period and for another year until July 2017;
- The Claimant indicated in her CPP disability questionnaire that the date she could no longer work was July 2017;
- The Claimant testified that her health worsened in approximately July 2017; and
- The limitations provided by her chiropractor would not prevent her from looking for alternate work within her restrictions.

[20] 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. In this case, as previously stated, the Claimant continued working her regular hours, albeit with assistance from coworkers, for more than a year after the prorated period. She stopped working in July 2017. She did not look for alternate work within her limitations. She did not attempt to retrain for lighter work.

[21] 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, in deciding that

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

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

the Claimant's disability is not severe, I considered that she was 48 years old as of the MQP with a grade 12 education. She has worked as a labourer and sales associate.

[22] Despite her work experience, she is relatively young and reasonably well-educated. She is also fluent in the English language. In considering her personal characteristics, I do not find that she is unemployable in a real world context. While I understand that she cannot perform activities requiring repetitive flexion or extension of her neck or overhead or repetitive use of her left arm, she would not be precluded from attempting lighter work within her limitations. She continued to work after the MQP, throughout the prorated period and for another year after that. She subsequently did not make any attempts to find alternate work or retrain. Therefore, she has not shown that her efforts at obtaining and maintaining employment have been unsuccessful because of her health condition.

[23] 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 impairment.⁶ 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 she suffers from a severe disability.

CONCLUSION

[24] The appeal is dismissed.

Lianne Byrne
Member, General Division - Income Security

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