



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *TP v Minister of Employment and Social Development*, 2020 SST 1247

Tribunal File Number: GP-19-1806

BETWEEN:

T. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Steven Sacco

Teleconference hearing on: October 1, 2020

Date of decision: October 7, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 41 years old when he applied for a CPP disability pension in April 2019. He last worked as a merchandiser for Pepsi. He stated that he had not been able to work since September 2017 because of back strain, sciatica, and right shoulder tendonitis. The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] The Minister acknowledges that the Claimant might not be able to return to his previous physically demanding employment. However, its position is that he has the capacity to pursue alternative work and has failed to make efforts to do so.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.¹ The Claimant's disability is severe if it causes him to be incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

[5] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP).² His MQP – the date by which he has to prove he was disabled – is December 31, 2019. This is the last date when he had valid contributions to the CPP in four out the last six years.³

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2019?
2. If so, is his disability long continued and of indefinite duration?

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

² Paragraph 44(1)(b) CPP

³ Record of Contributions: GD6-2

ANALYSIS

Severe Disability

The Claimant was regularly able to pursue alternative employment

[6] The Claimant started to work as a merchandiser for Pepsi in 2002. His work involved filling shelves, displays, and coolers with soft drinks at stores. The work was physically demanding. He had to move the product from storage rooms using carts or skids, and then put it on shelves. He testified that he started to have upper back problems around 2006. By April 2014, his back was getting “worse and worse.” In August 2017, he injured his low back while getting out of a car. He called in sick and took a day off. He “toughed it out” for a couple of days, and then went on vacation for 10 days. He returned to work in September. He had a helper and did not do any lifting above his shoulders. Despite this, he had to stop working after a couple of weeks. He has not returned to work since.

[7] He has not looked for other work. He stated it is not realistic for him to do this because he isn't able to walk or sit for a long time. He isn't able to lift. He has to lie down throughout the day. He has no experience with office jobs and couldn't do one because he isn't able to sit. He hasn't taken any steps to upgrade his computer and work skills because he couldn't sit through a class. He isn't able to drive for a long period.

[8] He stated that in 2018 he asked his employer if some modified work would be available for him after he recovered. His employer told him that modified work would not be available. His union representative told him that his employer did not have to create a job for him.

[9] He has problems with his right shoulder, but acknowledges he has not had any treatment for this. He also suffers from depression and anxiety. He stated that he has discussed this with his family doctor but he wasn't sure if his doctor had prescribed any medication for depression or anxiety. He acknowledged that his family doctor has not referred him to a mental health specialist. Nor has he gone for psychotherapy.⁴

⁴ GD5-10: January 2020 telephone conversation with Service Canada.

[10] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.⁵ The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.⁶

[11] The case law is clear that medical evidence is required to support a claim that a disability is severe.⁷

[12] Although the medical evidence confirms that the Claimant suffers from long-standing back problems, it does not establish that this condition is sufficiently severe to prevent him from pursuing all forms of employment. His treatment has been conservative. He sees his family doctor who prescribes pain and anti-inflammatory medication. He has gone for some physiotherapy and chiropractic treatment, but not over an extensive period of time. He has also gone for some nerve block injections at a pain clinic. Significantly, he has not been referred to an orthopaedic surgeon or other back specialist.

[13] Mr. Sacco, the Claimant's representative, relies on the April 2019 CPP medical report from Dr. Corless, family doctor. That report states the Claimant's impairing medical condition is low back pain radiating down his legs. It does not list right shoulder strain and/or depression/anxiety as impairing medical conditions. Dr. Corless stated that he did not expect the Claimant to return to any type of work in the future. However, he did not set out any basis for this statement. Moreover, he did not state that the Claimant was unable to return to work. He merely ticked a box on what is now the standard medical form for initial CPP medical reports.⁸

[14] Significantly, in March 2018, Dr. Corless stated that the Claimant was fit to return to work on modified duties on May 15, 2018.⁹ When referred to this note at the hearing, the Claimant said that Dr. Corless "misunderstood" and his employer never agreed to accommodate him. This response does not provide a satisfactory explanation why the Claimant did not make

⁵ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

⁶ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

⁷ *Villani* 2001 FCA 248; *Warren*, 2008 FCA 377

⁸ GD2-62,65

⁹ GD7-14

some effort to return to employment at that time. Even if his employer wasn't prepared to accommodate him, he should have attempted to upgrade his work skills and/or pursue alternative employment suitable to his limitations.

[15] In July 2018, Dr. Jeyaraj, interventional chronic pain specialist, stated that the Claimant was able to sit and stand for 15 to 20 minutes before feeling discomfort or pain. He was also able to walk for about 30 minutes. On examination, he was not in pain or distress, and was able to stand on his tiptoes and heels without difficulty.¹⁰ His limitations would not have prevented him from pursuing alternative less physically demanding work.

[16] In January 2020, Dr. Corless stated that the Claimant was unable to do any bending, lifting, or twisting with his low back. He then went on to say that the Claimant was unfit for work.¹¹ Although these restrictions prevented the Claimant from returning to his previous employment, they would not have prevented him from pursuing alternative work.

[17] I find that the Claimant's medical conditions did not prevent him from pursuing alternative less physical demanding work as of December 2019.

The Claimant has failed to establish a severe disability

[18] A disability is severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assesses the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining his "employability".¹²

[19] The Claimant was only 42 years old on the MQP date. This was more than 20 years away from the usual retirement age. He completed high school and two years of college. He worked as a cashier and as a waiter before working as a merchandiser. He is fluent in English. His personal characteristics do not preclude him from pursuing alternative less physically demanding work.

¹⁰ GD4-11, 12

¹¹ GD7-4

¹² *Villani v. Canada (A.G.)*, 2001 FCA 248

[20] The difficulty facing the Claimant is that he has made no efforts to seek alternative employment. Although the evidence establishes that he has limitations because of his back condition, it does not establish that he was unable regularly to pursue all forms of substantially gainful employment. In order to qualify for CPP disability, he should have at least made some effort to pursue alternative employment within his limitations.¹³

[21] Because the Claimant has not looked for alternate work, he has not demonstrated that he was unable to obtain or maintain employment because of his health condition. The onus is on him to show that it is more likely than not that he lacked the regular capacity to pursue substantially gainful employment. I find that he has failed to discharge this onus.

[22] The Claimant has failed to establish that it is more likely than not that he suffers from a severe disability in accordance with the CPP requirements.

[23] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[24] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security

¹³ *Inclima v Canada (Attorney General)*, 2003 FCA 47