



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *WL v Minister of Employment and Social Development*, 2021 SST 421

Tribunal File Number: GP-20-1736

BETWEEN:

W. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Allison Schmidt

Minister represented by: Kyle MacEachern

Teleconference hearing on: June 29, 2021

Date of decision: June 30, 2021

DECISION

[1] The Claimant, W. L., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of October 2019. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant was born in 1965. He left school in Grade 10 and eventually returned to receive his GED. The Claimant worked at various jobs. He worked as car detailer at an automobile dealership. He delivered baked goods. He worked at a fibreglass plant. He worked as a mechanic/technician at another automobile dealership. The Claimant eventually found a job at a municipality in 2006. He became a firefighter in 2009 and he was eventually promoted to a lieutenant position. The Claimant alleges that he has been unable to work at any job since June 2019 because he had a relapse of chronic lymphocytic leukemia (CLL).

[3] The Claimant applied for a CPP disability pension on May 23, 2019. The Minister of Employment and Social Development (the Minister) refused his application because the medical evidence did not support finding that the Claimant had a disability under the CPP.¹ The Claimant to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[4] For the Claimant to succeed, he must prove that he has a disability as defined under the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's CPP contributions. I find the Claimant's MQP to be December 31, 2022. In this case, I must decide whether it is more likely than not that the Claimant had a severe and prolonged disability on or before the hearing date because of the future MQP date.

[5] To be disabled under the CPP, the disability must be both severe and prolonged. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful

¹ See GD2-4-5

occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.²

THE REASONS FOR MY DECISION

[6] I find that the Claimant has a severe and prolonged disability as of June 2019, when he last worked. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant has functional limitations that affect his capacity to work

[7] My decision about whether the Claimant's disability is severe is not based on his diagnosis. It is based on whether he has functional limitations that prevent him from working.³ I have to look at his overall medical condition and think about how the Claimant's health issues might affect his ability to work.⁴

[8] The Claimant argued that his medical condition results in numerous functional limitations that affect his ability to work.

[9] The Claimant testified that he was initially diagnosed with CLL in 2012. He received aggressive chemotherapy treatment for six months. He continued working while receiving chemotherapy. His cancer went into remission. His life went back to normal and he continued with his hobbies, which included fishing, hunting, and riding a motorcycle.

[10] However, his cancer returned in 2019. He cannot have chemotherapy again because of the aggressive treatment he received in 2012. He takes an oral medication called Ibrutinib to treat his cancer.

[11] The Claimant had to stop working. He began seeing a hematologist in June 2019. He testified that he does not have a good relationship with his hematologist. He has only had

² The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove they are disabled on a balance of probabilities. In other words, they must show it is more likely than not that they are disabled.

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

telephone appointments with his hematologist since the start of the COVID-19 pandemic. He does not have a local family doctor. He has to drive two hours to see his family doctor, which leaves him exhausted.

[12] The Claimant testified he has no energy to drive. The Claimant lives in a small town. He has to drive long distances in order to get blood work. He suffers from severe fatigue. He can only perform activities for about 15 minutes before he has to stop. He is then often couch bound for the rest of the day. He might be able to regain strength in order to fix something to eat. He is often so fatigued that he cannot cook. He consumes protein drinks when he is too tired to cook. He suffers from severe fatigue when he stands to prepare meals. Cleaning dishes tires him. He is easily fatigued when he has conversations. He feels depressed. He has lost 40 pounds since his cancer returned.

[13] The Claimant lives alone. His girlfriend comes over and cleans his house. His neighbours cut his lawn and shovel his snow. There have been times where he had to stay with his brother because of the severity of his illness.

[14] The Claimant does not believe he can perform alternative work. He has problems with his memory. He does not know when he will have a good day or a bad day. He has no computer training. He has difficulty concentrating. The Claimant testified that he cannot lift. He also suffers from back pain. He has a growth and compression fracture in his back. He feels that his condition is getting worse with time. He receives disability benefits from an insurance company. The insurance company has not suggested retraining him for alternative work.

The medical evidence shows that the Claimant has functional limitations that affect his ability to work

[15] The Claimant has to provide objective medical evidence of his disability as of his hearing date.⁵

[16] The Minister argued that the medical only showed that the Claimant cannot return to his previous work as a firefighter. The functional impairments listed in the medical reports did not

⁵ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)* 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348 and *Canada Pension Plan Regulations*

show that the Claimant could not return to all forms of work.⁶ I disagree with the Minister's arguments.

[17] The medical evidence shows that the Claimant took chemotherapy in 2012 and 2013 to treat his CLL.⁷ The Claimant had an excellent response to chemotherapy and returned to work.⁸ However, the Claimant's condition relapsed in 2019. His hematologist stated that CLL is an incurable disease.⁹ He began taking Ibrutinib in September 2019.

[18] The Claimant's hematologist reported in September 2019 that the Claimant would continue to take Ibrutinib indefinitely, if he was able to tolerate the medication.¹⁰

[19] The Claimant's hematologist completed a medical report for the Minister in October 2019. He confirmed that CLL is a malignant blood condition that resulted in fatigue and a lack of energy.¹¹

[20] The Claimant's hematologist noted in November 2019 that the Claimant that the Claimant stopped taking Ibrutinib because of back pain. The Claimant had to go to the emergency room because of back pain, where a compression fracture was discovered.¹²

[21] The Claimant's hematologist stated in April 2020 that the Claimant was tired. The Claimant performed household tasks, but his sister brought him groceries because of the pandemic.¹³

[22] I agree with the Minister that some of the medical evidence showed that the Claimant was doing well. In October 2020, the hematologist stated that the Claimant's CLL had not progressed.¹⁴

⁶ See GD8-6-7

⁷ See GD2-67

⁸ See GD6-2-3

⁹ See GD4-3-4

¹⁰ See GD4-2

¹¹ See GD2-63-71

¹² See GD6-4-5

¹³ See GD6-6-7

¹⁴ See GD6-8

[23] However, the Claimant has CLL, which is an incurable malignant blood disorder. I agree with the Minister that there is not much medical evidence in the file. When I weigh medical evidence, I do not look at how much medical evidence is in the file. I have to consider whether there is objective medical evidence to support a disability under the CPP. I find that the medical evidence showed that the Claimant suffered from a serious medical condition that resulted in fatigue and affected his activities of daily living and ability to work.

[24] I also find that the lack of medical evidence in the file is not the fault of the Claimant. The Minister unsuccessfully attempted to obtain updated medical evidence from the Claimant's hematologist.¹⁵ The Claimant testified that his hematologist did not view it as part of his job to draft reports to support his disability claim. The Claimant's inability to obtain medical records has been compounded by the fact that he does not have a local family doctor. However, I am satisfied that the available medical evidence supports a severe disability finding under the CPP.

The Claimant does not have work capacity

[25] When I am deciding if the Claimant is able to work, I must consider more than just the Claimant's medical condition. I must also consider his age, level of education, language proficiency, and past work and life experience. These factors help me decide if the Claimant can work in the real world.¹⁶

[26] I find the Claimant has no capacity to work in the real world. The Claimant is 55 years old. He obtained a GED. He understand English. Even though the Claimant does not have computer experience, he completed training courses when he worked as a firefighter. The Claimant's background suggests he should be able to retrain and perform sedentary work. However, I am still satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation at the time of his hearing. I acknowledge that the Claimant has a back problem, but his primary disabling condition is CLL.

[27] I do not believe that the Claimant could have handled any type of physical work by his hearing date because of difficulty lifting brought about by fatigue. I do not believe that the

¹⁵ See GD8-8

¹⁶ The Federal Court of Appeal held that the severe part of the test must be assessed in the real world context (see *Villani v. Canada(A.G.)*, 2001 FCA 248).

Claimant can handle any type of sedentary work because of fatigue brought about by CLL. I do not believe that the Claimant can upgrade his education and work on a computer because of fatigue, and memory and concentration problems brought about by CLL. I do not believe that the Claimant can handle a driving job because of fatigue. I accept that the Claimant's ability to perform his activities of daily living was impaired by his hearing date. I accept the Claimant's testimony that he can only perform activities for about 15 minutes before having to stop. I do not believe that the Claimant can sustain activities for a long enough time to be employable in the real world. I also accept his evidence that the severity of his condition is unpredictable to the point that he cannot regularly or reliably work at any type of job.

[28] I found the Claimant to be a credible witness. He has an excellent work ethic. His Record of Earnings showed that he worked for about 30 years.¹⁷ He returned to work after his initial cancer diagnosis. I believe the Claimant would work at sedentary occupation if he was capable of doing so. I am satisfied that he cannot. I find that the Claimant has not had the capacity to regularly pursue any substantially gainful occupation since he last worked in June 2019.

The Claimant made reasonable efforts to follow recommended treatment

[29] The Claimant made reasonable efforts to follow medical advice.¹⁸ The Claimant has seen a hematologist. The Claimant takes medication to treat his cancer. The pandemic has made it difficult for him to access treatment. He is limited to telephone consultations with his hematologist. Like many Canadians in rural communities, he does not have a local family doctor. He goes to the emergency room when he gets very sick. I cannot fault the Claimant for not having a family doctor in his local community. That is something out of his control. There is reference in the hematologist's records that the Claimant was not complying with blood work. The Claimant testified he has to drive far to get his blood work and driving leaves him severely fatigued. I cannot fault the Claimant for living in a rural community where it is difficult to access medical services. I do not believe that the Claimant has neglected his medical condition. He continues to take medication to treat his cancer and the hematologist's most recent report in October 2020 confirmed that the Claimant had blood work done. However, the Claimant's

¹⁷ See GD2-44-45

¹⁸ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

treatments have not improved his condition to the point where he can return to substantially gainful employment.

IS THE CLAIMANT'S DISABILITY PROLONGED?

[30] The Claimant's disability is prolonged.

[31] The Claimant's CLL was present when he left work in June 2019 and continues today. The Minister argued that the Claimant did not have a prolonged disability. This is because the hematologist stated that the Claimant's prognosis depended on his response to treatment and the Claimant's treatment response remained unknown.¹⁹ I disagree with the Minister's argument that the Claimant does not have a prolonged diagnosed. His hematologist stated in his last report in October 2020 that the Claimant's CLL had not progressed.²⁰ However, the Claimant is still suffering from a disease that has no cure. I do not see any evidence that the Claimant's cancer is in remission and that he can return to substantially gainful employment.

CONCLUSION

[32] I am allowing this appeal.

[33] The Claimant's disability became severe and prolonged in June 2019, when he last worked. There is a four-month waiting period before the disability pension is paid.²¹ This means that payments start as of October 2019.

George Tsakalis
Member, General Division - Income Security

¹⁹ See GD8-7

²⁰ See GD6-8

²¹ This is set out in s. 69 of the *Canada Pension Plan*.