Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *ML v Minister of Employment and Social Development*, 2021 SST 905

Tribunal File Number: GP-20-378

BETWEEN:

M. L.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

HEARD ON: May 11, 2021

DATE OF DECISION: May 31, 2021

Canada

DECISION

The Appellant is eligible for a Canada Pension Plan (CPP) disability pension as of May 2019 for the reasons that follow.

OVERVIEW

[1] The Minister received the Appellant's application for a CPP disability pension on June 19, 2019.[1] He is 38 years old and finished high school. He was also awarded a telehandler operator certificate in October 2021. His application is based on partial paralysis of his left arm. The Appellant had to leave his job as a bricklayer and supervisor. He indicated that he could no longer work as of January 18, 2019, because of a snowmobile accident.[2] The Minister refused the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[2] The Appellant's minimum qualifying period (MQP) ended on December 31, 2020. To be eligible for a CPP disability pension, the Appellant has to meet the requirements set out in the CPP. More specifically, he must have been found disabled as defined in the CPP by the end of the MQP. The MQP is calculated based on the Appellant's contributions to the CPP.

ISSUES

[3] Can the Appellant's physical conditions be considered a severe disability that made him incapable regularly of pursuing any substantially gainful occupation by December 31, 2020?

[4] Can the Appellant's physical conditions be considered a prolonged disability by December 31, 2020?

ANALYSIS

[5] To be considered disabled, you need to have a physical or mental disability that is severe and prolonged.[3] You are considered to have a severe disability if you are incapable regularly of

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[1] GD2-19.
[2] GD2-[*sic*].
[3] Section 42(2)(a) of the CPP.

pursuing any substantially gainful occupation. A disability is prolonged if it is long continued and of indefinite duration or is likely to result in death. The disability must be both severe and prolonged for you to be found disabled within the meaning of the CPP.

Severe Disability

[6] I find that the Appellant had a severe disability by December 31, 2020.

i. Medical reports

[7] A February 11, 2019, report[4] by Dr. Mohammed, neurosurgeon, indicates that the feeling in the Appellant's left forearm had improved, but he had no feeling in his left shoulder.

[8] On May 6, 2019,[5] Dr. Boyd, plastic surgeon, indicated that the Appellant had had dual nerve transfer surgery on April 16, 2019. After the surgery, he did not feel his left arm as much. However, the muscle strength assessment had shown that finger strength, the range of wrist flexion, and tricep strength were normal.

[9] The May 11, 2019, medical report[6] by Dr. Feldman, family doctor, says that the Appellant was in a snowmobile accident in January 2019. He sustained injuries to the nerves near his spine, in the area of his neck and upper back, that affected his arm and part of his left shoulder. Dr. Feldman indicated that the Appellant's condition should improve in the near future.

[10] The February 19, 2021, physiotherapy report[7] indicates that the Appellant had surgery on his left arm and participated in a rehabilitation program. Because of his injury and the surgery, he had permanent impairments that reduced his mobility and strength. His left arm occasionally twitched when he performed extension movements. His prognosis was poor, and the residual impairments he had are expected to continue.

[11] An undated letter from the Appellant's employer, B. Y., president of the company X, indicates that the Appellant was unable to work from late January 2019 to July 2020 because of a

[4] GD2-90.
[5] GD2-99.
[6] GD2-58.
[7] GD5-2.

snowmobile accident. However, he went back to work in July 2020 as a result of accommodations. His work included tasks that did not go above chest level and that did not include setting up and taking down scaffolding. The Appellant did tasks that he could perform in light of his physical limitations.

ii. Testimony

[12] The Appellant testified that he had been in a snowmobile accident in 2019. His left arm was not working. He had surgery (nerve transfer) in April 2019. For two years, he had almost no feeling in his arm, and he had very limited motor function.

[13] He took morphine for the pain and inflammation. He also did a lot of physiotherapy and is still in physiotherapy. The pain subsided, so he does not need to take medication anymore.

[14] He started working again in July 2020. His former employer agreed to rehire him, but he is limited in his bricklaying tasks. He does not do any preparation work, he works with one arm, he cannot work alone, and he can work only up to waist level. Depending on what he is doing, he sometimes does not finish his day because he cannot continue with his restrictions. He is not paid the same as before his accident either. He explained that no other employer would hire him with his restrictions. His employer rehired him because it knew him to be a good employee, and it accommodated him. The Appellant mentioned not working the same number of hours. Before his accident, he often worked up to 60 hours a week; now, he is unable to work full days. His pay has changed too; he earns about $800 a week, which is a lot less than his pay before the accident. He added that he had always done physical work and that he could not do another job with the limitations with his right arm.

[15] The Appellant also mentioned being very limited in his daily tasks. He cannot do much, and he needs help.

iii. The Minister’s position

[16] The Minister argues that, while it is accepted that the Appellant has limited use of his left upper limb, he does not require the use of assistive devices, and his dominant arm is not affected. What is more, the Appellant has reported no other physical impairments.

iv. Residual capacity to work

[17] I have considered all the medical reports and the Appellant’s testimony. Based on the evidence, the Appellant has had very limited use of his left arm and shoulder since his snowmobile accident in January 2019. The evidence shows that he had feeling in his left forearm before his surgery in April 2019, but after his surgery, he had less feeling but more finger strength, wrist flexion, and tricep strength, [which] were normal. His family doctor anticipated improvement in 2019, but the 2021 physiotherapy report indicates that, despite the surgery and rehabilitation program, the Appellant has permanent impairments, and his prognosis is poor.

[18] So, I cannot deny the Appellant’s limitations related to his left arm and shoulder, according to his testimony and as indicated in the medical reports, and that this condition existed when his MQP ended on December 31, 2020.

[19] Importantly, the Appellant has worked for his employer for a number of years. At first blush, it may appear that the Appellant’s consistent employment since July 2020 is evidence that he is capable regularly of pursuing any substantially gainful occupation. When he testified, the Appellant said that he earned about $800 a week. In 2018, before his accident, his income was $55,900. The Minister’s position is that, even though the Appellant is unable to do some of the physical aspects of his old job, the evidence supports that he continues to work within his limitations.

[20] I disagree. I find that this is not evidence of work capacity. I say this because this is a job that is heavily accommodated.

[21] I find that the only way the Appellant is able to manage his work is because of a benevolent employer. A benevolent employer is one who will change the conditions of a job and

adjust its expectations of an employee in keeping with the person's limitations. A benevolent employer will expect far less performance, output, or product from this person compared to that expected from other employees. Also, accommodations offered by a benevolent employer will go further than what is asked of an employer in the competitive marketplace.[8] Work for an employer who will provide an employee with accommodations and lower expectations than other employees may not be evidence of true work capacity. In this case, the employer is allowing the Appellant to work within his limitations, and there are no expectations for him like there are other employees.

[22] The definition of "severe" addresses an appellant's capacity to work in a meaningful and competitive work environment. An employer should not have to put up with occasional absences from work and make accommodations by creating a flexible work environment to enable the individual to have a job that they would not otherwise be able to perform in a normal competitive work environment. Given its flexibility about hours of work, the lower performance it expects of him, and the accommodations, the Appellant's employer falls within the definition of "benevolent." For these reasons, I do not find that the Appellant's work efforts would be considered evidence of work capacity.

[23] I find that the Appellant is working for a benevolent employer and that the work he is doing is not representative of work he would do for any other employer. The Appellant said that his employer was very accommodating and that it was willing to let him work within his limitations. The Appellant's ability to work for a benevolent employer cannot be confused with his ability to work generally in a competitive work environment. I must assess the severe part of the test in a real-world context.[9] When I consider that the Appellant has to leave work when he is unable to lay bricks above chest level, that he does not set up and take down scaffolding like other employees, that he works with one arm, that he cannot work alone, and that, in his personal life, he is unable to do some household chores, I do not find that the Appellant can work in a real-world context.

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[8] The Federal Court of Appeal explained the concept of a benevolent employer in a decision called *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[9] *Villani v Canada (AG)*, 2001 FCA 248.

[24] Where there is evidence of work capacity, you have to prove that your efforts to find and keep a job were unsuccessful because of a medical condition.[10] For the reasons stated, I do not find that there is work capacity.

[25] Lastly, while the Appellant is only 38 years old and finished high school, he has not taken any other courses. When he testified, he explained that he had been awarded the telehandler operator certificate after a short explanation of how the machine worked. He has always done physical work. Even if he could retrain in another field, since he can work only with one arm, the Appellant needs help performing tasks; he would be unable to function in a work setting with his limitations. The Appellant remains incapable regularly of pursuing any substantially gainful occupation.

Prolonged Disability

[26] The Appellant's disability is also prolonged given the medical reports since his snowmobile accident in January 2019, which show that his condition has not improved and that he has residual impairments of and limitations with his left arm and shoulder. Although the pain subsided with medication, he still has limited use of his left arm despite two years of physiotherapy.

CONCLUSION

[27] I find that the Appellant had a severe and prolonged disability in January 2019, when he was in a snowmobile accident. Disability pension payments start four months[11] after the date of disability. Payments start as of May 2019.

[28] The appeal is allowed.

Antoinette Cardillo
Member, General Division – Income Security

[10] *Inclima v Canada (AG)*, 2003 FCA 117.
[11] Section 69.