



Citation: *NH v Minister of Employment and Social Development*, 2021 SST 993

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: N. H.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated November 9, 2020 (issued
by Service Canada)

Tribunal member: Jackie Laidlaw

Type of hearing: Teleconference

Hearing date: December 21, 2021

Hearing participants: Appellant
Bengali Interpreter : Tanazzum Kaiser

Decision date: December 28, 2021

File number: GP-21-826

Decision

[1] The appeal is dismissed.

[2] The Claimant, N. H., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is a well-educated man who came to Canada from Bangladesh in 2000 at age 30. He is fluent in English, but understandably made use of a Bengali interpreter at the hearing. Since coming to Canada, he has worked in factories and restaurants, and as a taxi driver since around 2011. He has been diabetic for years. He had a car accident in 2015 that caused problems with his neck and shoulder, and gave him headaches. After his car accident, he stopped working full-time as a cab driver and continued to drive on a part-time basis. He stopped driving cab in October 2019. He began driving Uber two months ago for a few hours a week.

[4] The Claimant applied for a CPP disability pension on October 11, 2019. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Claimant says that his diabetes and pain caused stress on his body, and he had to stop working.

[6] The Minister says the medical information in its totality does not support a severe physical or psychological condition in 2016. As well, he continued to work after his car accident of 2015 until beyond his MQP.

What the Claimant must prove

[7] For the Claimant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2016. This date is based on his contributions to the CPP.¹

[8] The *Canada Pension Plan* defines “severe” and “prolonged.”

[9] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.²

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[11] This means the Claimant’s disability can’t have an expected recovery date. The disability must be expected to keep the Claimant out of the workforce for a long time.

[12] The Claimant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

Reasons for my decision

[13] I find that the Claimant hasn’t proven he had a severe and prolonged disability by December 31, 2016.

Was the Claimant’s disability severe?

[14] The Claimant’s disability wasn’t severe. I reached this finding by considering several factors. I explain these factors below.

¹ Service Canada uses a claimant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Claimant’s CPP contributions are on GD 2 55

² Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

– **The Claimant's functional limitations don't affect his ability to work**

[15] The Claimant has diabetes, shoulder pain and back pain. However, I can't focus on the Claimant's diagnoses.⁴ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁵ When I do this, I have to look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect his ability to work.⁶

[16] I find that the Claimant doesn't have functional limitations.

– **What the Claimant says about his functional limitations**

[17] The Claimant says that his medical conditions have resulted in functional limitations that affect his ability to work.

[18] He stated that he has diabetes, which has deteriorated since 2016. He gets dizzy and falls, feels tired and cannot walk for the past three or four years. He stated that the doctors are wrong that he has uncontrolled diabetes. He stated his diabetes cannot be controlled.

[19] He stated that he has problems with his bladder due to diabetes, and must now wear a diaper. He also cannot sit in a car for long. He must go to the washroom every 20 minutes. The doctor gives him medication. In 2013 or 2014 he got the bladder issues, and a month ago went to emergency. They found a cyst on his kidney.

[20] When questioned how a cab driver cannot sit in a car for more than 20 minutes, he stated that he drives on and off.

[21] He had a car accident (MVA) in 2015 and has had shoulder pain since. He cannot do heavy work. He continued to work after the MVA but it is difficult to look on the right and do a left turn holding the steering wheel. His rotator cuff and tendonitis has not resolved. He takes injections on a monthly basis. He saw orthopaedic

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

specialist, Dr. Syed, three to four years ago, and then Dr. Fan Jianz for six or seven months around 2020, and now started seeing Dr. Massicotte two to three months ago. They see him for his right shoulder. He cannot move or hold his arm.

[22] He has lower back pain and cannot sit for the last six months. In 2016 his back was fine and did not cause problems.

[23] He also had headaches intermittently in 2016, because of the MVA. He takes Tylenol 2 for the headaches, and regular Tylenol for pain.

[24] He worked as a taxi driver since 2011 or 2013. He indicated he stopped working in 2016 full time but picked up part time work after that until October 2019 when he applied for the CPP disability benefit.

[25] After the MVA he worked three days, then took three days to stay at home. His workday was for four to seven hours per day. In October 2019 he stopped working as a cab driver. In 2020 he went on CERB until it ceased in 2021. After that, he started working as an Uber driver two months ago, and stated he does it one or two days a week. Last week he worked three days, two to three hours at a time, then rested at home, then returned to work for the day.

[26] When questioned how he went on CERB, which is a benefit for those who were unable to work due to COVID, he stated that he had no idea CERB was an income replacement, but knew the income he had in 2019 made him eligible.

[27] He applied for the CPP disability benefit himself, and was not told to do so by Dr. Khan, his family physician.

– **What the medical evidence says about the Claimant's functional limitations**

[28] The Claimant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2016.⁷

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

[29] I agree with the Minister that the medical information does not support a severe condition in December 2016.

[30] I do not dispute that currently the Claimant has chronic pain in his neck and shoulder. In 2020, Dr. Syed, his orthopaedic surgeon, found he will likely need surgery with a long recovery period due to foraminal stenosis of the cervical spine.⁸ He had been seeing Dr. Syed since January 2017 for pain in his shoulder and arms.⁹

[31] His family physician, Dr. Khan, has found he is not able to work at this time, in 2019, for an indefinite period of time. He had recommended he stop working. Dr. Khan found he would not be able to do any gainful work in the future, and supported a permanent disability. Dr. Khan does not specifically state which one of his multiple issues have rendered him unable to work, but did indicate he is taking Tylenol 2 for pain and has right shoulder tendonitis and rotator cuff and cervical spondylosis. He also diagnosed diabetes since 2007 and a peptic ulcer in 2012. I find it more than likely, when taking Dr. Syed's opinion into consideration, that the Claimant is currently unable to work due to the spondylosis of his cervical spine.

[32] Unfortunately, both these opinions are well past the MQP of December 2016.

[33] In his reconsideration request,¹⁰ the Claimant stated he worked in 2017 and 2018 for a few hours a week. He stated was unable to continue working full time due to complications from diabetes and severe headaches and degeneration of his spine.

[34] The diagnostics in 2015 show mild to moderate spondylosis of the cervical spine and minimal lumbar degeneration¹¹. The evidence does not support a severe degenerative condition in 2016 of either his cervical or lumbar spine.

⁸ GD 2 12 Dr. Syed October 27, 2020.

⁹ GD 2 35 according to his application on October 11, 2019.

¹⁰ GD 1 9 reconsideration request, August 24, 2020

¹¹ GD 2 83 MRI cervical and lumbar spine November 24, 2015

[35] I accept he would have headaches due to the neck pain, but there is no evidence to support that he required any intervention for the headaches, or that they prevented him from working.

[36] Dr. Khan indicated diabetes type 2 was diagnosed in 2007. A diabetic ambulatory consultation with Dr. Jeanette Goguen¹² indicates that it was diagnosed in 2010. It is not that relevant whether he was diagnosed in 2007 or 2010. Both dates are prior to his MQP, and he continued to work full-time with the condition.

[37] Dr. Goguen's consultation was in 2015, and she found he had not had any issues for more than one year. The doctor noted that he has poor glycemic control, in that he owned a glucometer but does not regularly check his blood glucose. This confirms he has poorly controlled diabetes. This is not the same as uncontrollable diabetes, as the Claimant testified.

[38] More importantly, Dr. Goguen found that he had no clear cut episodes of hypoglycemia, no signs or symptoms of diabetes complications. The evidence shows that even though his diabetes was poorly controlled at the time of his MQP, there were no complications.

[39] The medical evidence doesn't show that the Claimant had functional limitations that affected ability to work by December 31, 2016.

[40] The Claimant continued to work, even after his MVA in 2015, for three years past his MQP. Dr. Timothy Leroux was consulted in 2018 for his right shoulder pain. Dr. Leroux confirms in 2018 that the Claimant was able to work as a cab driver three to four hours a day, but not full time.¹³

[41] The Claimant testified he continued to work part-time until October 2019, then returned to work again two months ago on a part-time schedule. The part-time work he did up to 2019 allowed him to be eligible for the CERB, which was a substitute for

¹² GD 2 94 April 9, 2015 Dr. Jeanette Goguen

¹³ GD 2 98 November 12, 2018 Dr. Leroux

income lost due to COVID. In receiving the CERB, the implication is that he was capable of working.

[42] The capacity to work is indicated by the performance of part-time work.¹⁴ The Claimant worked part-time until 2019, showing a capacity to work well beyond his MQP.

[43] When I am deciding whether a disability is severe, I usually have to consider a claimant's personal characteristics.

[44] This allows me to realistically assess a claimant's ability to work.¹⁵

[45] I don't have to do that here because the Claimant's functional limitations didn't affect his ability to work by December 31, 2016. This means he didn't prove his disability was severe by then.¹⁶

Conclusion

[46] I find that the Claimant isn't eligible for a CPP disability pension because his disability isn't severe. Because I have found that his disability isn't severe, I didn't have to consider whether it is prolonged.

[47] This means the appeal is dismissed.

Jackie Laidlaw

Member, General Division – Income Security Section

¹⁴ *S.M.-R. v. Canada (Attorney General)*, [2013] F.C.J. No 689, 2013 FCA 158

¹⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

¹⁶ See *Giannaros v Minister of Social Development*, 2005 FCA 187.