



Citation: *KO v Minister of Employment and Social Development*, 2021 SST 997

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: K. O.
Representative: Gavin Cosgrove

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision() dated November 22, 2019
(issued by Service Canada)

Tribunal member: Jackie Laidlaw

Type of hearing: Teleconference

Hearing date: August 12, 2021

Hearing participants: (List roles of participants, not names. Add or delete as needed.)
Appellant
Appellant's representative

Decision date: August 23, 2021

File number: GP-20-563

Decision

[1] The appeal is dismissed.

[2] The Claimant, K. O., 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 41 year-old man who was in a motorcycle accident in May 2018. He fractured his left wrist and underwent five surgeries. He is right handed. The accident also caused a soft tissue injury to his lower back. The Claimant stated he had a concussion from the accident, for which he has never received any treatment. He worked as a carpenter and has not worked since the accident.

[4] The Claimant applied for a CPP disability pension on December 10, 2018. 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 he must be viewed as a whole body impairment, including his mental and physical conditions.

[6] The Minister says a return to work with retraining was always expected.

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, 2020. This date is based on his contributions to the CPP.¹

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

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 2-4.

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

[10] This means I have to look at all of the Claimant's medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or "real world" picture of whether his disability is severe. If the Claimant is able to regularly do some kind of work that he could earn a living from, then he isn't entitled to a disability pension.

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

[12] 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.

[13] 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

[14] I find that the Claimant hasn't proven he had a severe and prolonged disability by December 31, 2020.

Was the Claimant's disability severe?

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

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 do affect his ability to work in manual labour**

[16] The Claimant has a permanent disability of his left wrist, chronic mechanical low back pain and an adjustment disorder with mixed anxiety and depressed mood.

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

[17] I find that the Claimant has functional limitations.

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

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

- i. He has a permanent disability of his left wrist.
- ii. He has issues with his concentration and memory and would not be able to write exams or retrain.
- iii. He cannot sit for long periods.
- iv. He is on medical marijuana and cannot drive when he takes this.
- v. He is unpredictable and would not be able to make a commitment to an employer.

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

[19] The Claimant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2020.⁷

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.

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

[20] The medical evidence supports that the Claimant has limitations regarding his left wrist, back and concussion.

[21] Dr. Gammon, the orthopaedic surgeon who performed four of the five surgeries on the Claimants left wrist, indicated that it would take six months to two years before he could return to work in another type of occupation that would require training. That was December 2018, and Dr. Gammon recommended he stop working at that time.⁸ By September 2019, Dr. Gammon found he was permanently disabled related to his left hand, wrist and forearm and unable to return to manual labour.⁹

[22] I do not dispute the Claimant is permanently disabled in his left hand/wrist/forearm, and that he is unable to work in manual labour.

[23] Despite this opinion, Dr. Gammon also noted again in 2019 that the Claimant was a good candidate for retraining to a sedentary position that did not involve repetitive use of his left arm. He indicated that once the hand therapy, Occupational Therapy and physiotherapy have concluded no further treatments would be recommended.¹⁰

[24] The evidence regarding his functional limitations because of his back is less clear as there was not as much medical intervention for his back. The Claimant only saw Dr. Wai, another orthopaedic surgeon, once for his back¹¹. Dr. Wai found that he had chronic pain due to aggravation of degenerative disc disease and a soft tissue injury. Surgery was not an option. Dr. Wai noted that his prognosis to return to suitable work or retrain for more suitable work was poor, and recommended pain management, exercise and psychosocial stress management.

[25] A more recent medical legal report in December 2020 from Occupational Therapist Ruth Nicholson indicated he had functional limitations from his back in reduced walking, standing tolerance and a limited ability to climb stairs. The Claimant takes CBD oil for his pain and no other medications. The Claimant indicated that the

⁸ GD 2 128 CPP medical report of Dr. Gammon, December 19, 2018

⁹ GD 1 10 letter from Dr. Gammon September 17, 2019

¹⁰ Gd 2 91 Dr. Gammon July 8, 2019.

¹¹ GD 2 79 Dr. Wai, June 10, 2019

medical cannabis helped control the pain.¹² As well, in his questionnaire he indicated he had a fair ability for kneeling and squatting and good to excellent functioning capacity for the rest of his physical abilities. He did wear compression shorts. At the hearing, the Claimant testified that he does not use any walking or mobility aids, but sitting and standing for too long inflames the nerves down his legs. He stated he has nerve damage in his legs, but there is not medical evidence to support this.

[26] Physically, the medical evidence supports functional limitations of his left hand/wrist which would prevent manual labour, but no severe limitations of his back which would prevent him from working at any job. There is evidence he is a good candidate for retraining to a more sedentary position.

[27] Dr. Wai's poor work prognosis was in part due to a need for pain management, which is usually cognitive behavioural therapy, and psychosocial stress management. The Claimant eventually saw a psychologist, Dr. Coates, twice in 2019. The first time was an assessment and the second time was for driver anxiety. Dr. Coates diagnosed adjustment disorder with mixed anxiety and depressed mood, and recommended a psychologist and rehabilitation specialist along with exercise and several behavioural adaptations. Dr. Coates indicated that the Claimant should be reassessed in 1.5 years, or three years post accident, "at which time almost all of the recovery from the concussion will have taken place".¹³

[28] I do note that Dr. Coates indicated in that report of September 2019 that the Claimant had strong abstract reasoning, exceptional language and verbal fluency, executive functioning, verbal attention and simple motor tasks were all normal. This indicates that cognitively, he was well on his way to recovery.

[29] Therefore, the medical evidence from Dr. Coates in 2019 shows an anticipation of recovery of his concussion with treatment by 2021, just after his MQP. Dr. Gammon

¹² GD 2 10 note of November 25, 2019

¹³ GD 2 69 Dr. Coates, psychologist, neuropsychological evaluation September 17, 2019

expected the Claimant would not be able to work or retrain because of his physical condition until just at his MQP of December 2020.

[30] The medical evidence supports that the Claimant's functional limitations of his left hand and arm, and the concussion affecting his ability to retrain were present at the time of his MQP. The expectation was that just after the MQP, with treatment, he would be able to retrain for a more sedentary job.

[31] Next, I will look at whether the Claimant followed medical advice.

– **The Claimant hasn't followed medical advice**

[32] To receive a disability pension, a claimant must follow medical advice.¹⁴ If a claimant doesn't follow medical advice, then he must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on his disability.¹⁵

[33] The Claimant hasn't followed medical advice. He didn't give a reasonable explanation for not following the advice.

[34] The Claimant stressed he be viewed as a whole impairment, and asked me to put special weight on a number of reports. Most reports on his physical limitations and disability referred to his left hand.¹⁶ I have already reviewed these and agree he has a permanent disability of the left hand/wrist/arm.

[35] The specific medical reports regarding his mental health were two reports from the Catastrophic Assessment, which the Minister correctly indicated was for the purposes of the insurance claim on the accident. Basically, a catastrophic (CAT) determination allows for a larger amount of money to be paid by the insurer to the

¹⁴ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁵ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁶ GD 2 8 physiotherapist Steve Zanet, September 13, 2019; Gd 1 10 Dr. Gammon September 17, 2019; GD 5 2 Dr. Li, orthopedic surgeon Dr. Li who agreed with Dr. Gammon he has a permanent disability of his left hand; and Dr. Gallimore, orthopaedic surgeon in the Catastrophic Assessment of November 6, 2020

Claimant. The Claimant correctly argued that while a CAT assessment is for an insurance determination, it also relies upon medical evidence.

[36] The psychiatric assessor, Dr. Waisman¹⁷, indicated the Claimant had poor stress tolerance which would be common to a work environment. This is not an opinion that the Claimant cannot work due to stress.

[37] Chiropractor, Dr. Milne, noted that he doesn't have adequate pain control to function in a traditional work environment because he takes his CBD at night in order to drive in the day. Dr. Milne indicated his unresolved driving anxiety, depressive symptoms and cognitive issues would also be a barrier to returning to the workforce or retraining.¹⁸ This is important because the Claimant had never been treated for any psychological issues. His unresolved conditions were because he never received any counselling for his cognitive issues or depression as recommended. He did receive one session of driver anxiety treatment with Dr. Coates.

[38] Dr. Coates specifically recommended Occupational Therapy, psychologists and rehab specialist and several behavioural adaptations. With this, it was implied by Dr. Coates, he would have almost completely recovered from the concussion by early 2021, just after his MQP. The Claimant stated he did not get these treatment because he exhausted his funding from the insurance company quickly and therefore did not have the money for treatment. He also testified that the Occupational Therapists did not provide any help for his concussion and focussed on his hot tub relief for his arm and back.

[39] I do not find this to be a reasonable explanation. The Claimant himself pursued Dr. Coates due to fears over his memory. He was referred to Dr. Coates by his lawyer, and not his family physician. Dr. Coates only provided one session of driver anxiety and no psychotherapy for depression, anxiety or stress or treatment for his concussion. I accept the Claimant would have been quite worried about his cognitive functioning, and therefore it would have been reasonable for him to consult with his family physician for

¹⁷ GD 5 83

¹⁸ GD 5 121

help. He did not. As well, there are concussion treatment facilities and mental health treatments which are available at no cost. It is reasonable his family physician could have helped with securing some treatment at no cost to the Claimant.

[40] I accept the Claimant was focussing on his physical health. However, he is arguing that his mental health is equally as important to his determination of a severe disability. As such, he had an obligation to treat his mental health with the same effort as he put into his physical health.

[41] The Claimant also relies heavily upon the medical-legal report for a CAT determination from Occupational Therapist Ms. Barbara Moroney. She noted unresolved driving anxiety, depressive symptoms and cognitive issues are barrier to work or retraining¹⁹. This is the same opinion as Dr. Waisman, both of whom only assessed the Claimant once. The Claimant submitted that this alone should indicate a severe disability. However, I find the Claimant had all these unresolved symptoms because they were never treated. With treatment, presumably the Claimants cognitive functioning and depression would have resolved.

[42] The last report the Claimant has asked I put weight to is another Occupational Assessment from Ruth Nicholson in December 2020²⁰. I have already noted the report showed some physical limitations. She also stated that from a functional standpoint, he would have difficulty returning to any kind of work with respect to his physical behaviour, emotional, communication, thinking and other activities of daily living. I do not put weight on this as she also noted that an expected duration and prognosis is out of her scope of practice and she cannot predict when he can return to work from a medical standpoint, and deferred to a medical physician. Therefore, she has indicated her opinion is not from a medical standpoint.

[43] The Claimant has also testified that he is anticipating working on these issues with a psychological counselling now that he has the funding. If he is now still going to receive treatment for these issues, it indicates there is the possibility he may resolve

¹⁹ GD 5 63

²⁰ GD 7 11 medical report December 18, 2020.

them. If he resolves them, there are no barriers to work or retraining. Even with his physical conditions he would be able to retrain, because Dr. Gammon felt he was a good candidate for retraining to a sedentary position.

[44] In summary, Dr. Gammon was his treating specialist for his hand/arm and he found he was a good candidate for retraining. He was quite compliant with his physical rehabilitation. He was not compliant with the recommendations from Dr. Coates to see a psychotherapist and rehabilitation specialist, and that caused him to delay recovery of his mental health and cognitive functioning. I find that following the medical advice might have made a difference to the Claimant's disability.

[45] The Claimant didn't follow medical advice that might have affected his disability. This means that his disability wasn't severe.

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

[47] This allows me to realistically assess a claimant's ability to work.²¹

[48] I don't have to do that here because the Claimant didn't follow medical advice and didn't give a reasonable explanation for not following the advice. This means he didn't prove that his disability was severe by December 31, 2020.²²

Conclusion

[49] 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.

[50] This means the appeal is dismissed.

Jackie Laidlaw

Member, General Division – Income Security Section

²¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.