



Citation: *SK v Minister of Employment and Social Development*, 2024 SST 1121

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant: S. K.
Representative: Amra Selimovic

Respondent: Minister of Employment and Social Development
Representative: Sandra Doucette and Viola Herbert

Decision under appeal: General Division decision dated April 16, 2024
(GP-23-694)

Tribunal member: Neil Nawaz

Type of hearing: In writing
Decision date: September 19, 2024
File number: AD-24-375

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 61-year-old former restaurant owner with a history of arthritic hip pain. He was later employed as a caregiver for his father, who passed away in September 2021. More than a year later, he underwent a total right hip replacement surgery.

[3] In August 2022, the Appellant applied for a CPP disability pension. He claimed that he could no longer work because of severe arthritis in his right hip. He also cited a herniated lower back disc and an early arthritic right knee.¹

[4] The Minister of Employment and Social Development refused the application after determining that the Appellant did not have a severe and prolonged disability during his coverage period, which ended on December 31, 2017.

[5] The Appellant appealed the Minister's refusal to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal after finding insufficient medical evidence that the Appellant was incapable of substantially gainful employment during his coverage period. The General Division also found that the Appellant's employment as a full-time paid caregiver for his father was a suitable job that did not involve working for a so-called "benevolent employer."

[6] The Appellant then applied for permission to appeal to the Appeal Division. In June, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. At the Appellant's request, I have conducted a hearing by reviewing the documents on file.

¹ See Appellant's application for the CPP disability pension dated April 7, 2022, GD2-33.

Issue

[7] For the Appellant to succeed, he had to prove that, more likely than not, he had a severe and prolonged disability during his coverage period.

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.² A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.
- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.³ The disability must be expected to keep the claimant out of the workforce for a long time.

[8] The parties agreed that the Appellant's coverage ended on December 31, 2017.⁴ My job was to decide whether the Appellant had a severe and prolonged disability as of that date.

Analysis

[9] I have applied the law to the available evidence and concluded that the Appellant is not entitled to the CPP disability pension. The Appellant has a progressive arthritic condition, but there is not enough medical evidence to show that it prevented him from working before December 31, 2017.

The Appellant did not have severe disability

[10] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability during their coverage period.⁵ I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out

² See *Canada Pension Plan*, section 42(2)(a)(i).

³ See *Canada Pension Plan*, section 42(2)(a)(ii).

⁴ Under section 44(2) of the *Canada Pension Plan*, disability coverage, also known as the "minimum qualifying period (MQP)," is established by making threshold contributions to the CPP. According to the formula used to calculate the MQP, a disability claimant with at least 25 years of earnings gets six years of coverage for their last three years of valid contributions. See the Appellant's record of earnings and contributions at GD2-17.

⁵ See *Canada Pension Plan*, section 44(1).

in the *Canada Pension Plan*. While the Appellant was subject to some functional limitations at the time, I couldn't find enough evidence showing that they rendered him incapable of work.

[11] In his application for benefits, the Appellant claimed that the main thing preventing him from working was severe arthritis in his right hip. He also disclosed that he had undergone disc herniation repair surgery in April 2000. He listed numerous functional limitations that interfered with his ability to sit, stand, and walk and to lift, kneel, and bend. He said that he could no longer work in December 2019 — two years after his coverage period ended.

[12] The Appellant indicated that he co-owned a pizza restaurant from 2002 to 2014. Not long before that partnership dissolved, his father suffered a stroke, and he assumed responsibility for his care, preparing his meals, managing his appointments, and assisting with his personal hygiene tasks. It was a role that required him to be on call 24/7 until his father's death in late 2021.

[13] He said that, by late 2019, the pain in his right hip had increased. In January 2022, an x-ray showed severe osteoarthritis, and the following year, he underwent a total hip replacement. He maintains that, even with a new hip, he would be unable to do any kind of job.

[14] I understand that the Appellant now feels disabled. However, I must base my decision on more than just his subjective view of his capacity.⁶ In my view, the evidence, looked at as a whole, suggests that, while he may be disabled now, he was regularly capable of substantially gainful employment at the end of 2017.

[15] I base this conclusion on the following factors:

⁶ A CPP disability claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*. In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

– **None of the Appellant’s medical evidence ruled out work during his coverage period**

[16] The Appellant has seen several doctors, but their reports do not strongly indicate disability, as defined by the *Canada Pension Plan*, during the relevant period:

- In December 2021, the Appellant’s family physician noted “increasing right [hip] pain since before father passed away earlier this year.”⁷ At the time, the Appellant refused painkillers and physiotherapy. The following month, an x-ray confirmed advanced degenerative changes in the right hip.⁸
- In a CPP medical report from April 2022, the family physician wrote that the Appellant had been diagnosed with moderate to severe hip osteoarthritis, which caused him pain and decreased mobility. He was taking Tylenol and had been referred to an orthopedic surgeon.⁹
- The family physician also said that the Appellant’s right hip displayed complete loss of joint space and that her right knee osteoarthritis was showing signs and symptoms of osteoarthritis. She noted that, given his prior occupation tending bar and waiting tables, the Appellant wouldn’t reliably have the joint flexibility to bend, lift, and twist, even with joint replacement. She added that his hip didn’t become a disability until 2019.
- In July 2022, the family physician summarized the Appellant’s medical history from January 2017 to date. She noted that the bulk of the Appellant’s visits during the previous five years were for monitoring hypertension and treating plantar warts. In 2020, he was seen several times for leg pains, which were resolved by discontinuing his statin medication.¹⁰

⁷ See clinical noted dated December 22, 2021 by Dr. Lisa Aulayne Jeans-Mingo, family physician, GD2-88.

⁸ See x-ray of the right hip dated January 6, 2022, GD2-106.

⁹ See Dr. Jeans-Mingo’s CPP medical report dated April 4, 2022, GD2-94.

¹⁰ See Dr. Jeans-Mingo’s letter dated July 21, 2022, GD2-86.

- In December 2022, an orthopedic surgeon wrote that the Appellant had experienced hip problems for some time but, in the last three years, it had been “getting pretty bad.”¹¹ The Appellant felt that the pain was affecting his quality of life, and he wanted something done. The following month, he underwent a right total hip replacement for advanced arthritis;¹² a year later, he was doing well and reported no pain.¹³

[17] The Appellant also produced a recent letter from his new family physician, who wrote that the Appellant’s right hip pain started in 2017 and had progressed since that time.¹⁴ However, the letter said nothing about the intensity of the Appellant’s hip pain in 2017 or how that assessment could be reconciled with earlier reports that the pain did not become acute until two years later. The letter also failed to describe the effect of the Appellant’s hip replacement, which, only a few months earlier, Dr. Boudreau had said produced positive results.

[18] On the whole, the available medical evidence indicates that the Appellant’s hip pain did not become severe until late 2019 at the earliest. Reports from his former family physician and his orthopedic surgeon suggest that, although the Appellant was diagnosed with osteoarthritis as far back as 2008, it did not result in a significant impairment until two years after his coverage period ended. Above all, the Appellant’s former family physician did not completely rule out work; she only suggested that the Appellant would be incapable of a **physically demanding** occupation after receiving a hip replacement.

– **The Appellant’s background and personal characteristics don’t affect his employability**

[19] Based on the medical evidence, I find that the Appellant had at least some capacity to work as of December 31, 2017. I am reinforced in this belief when I look at the Appellant’s overall employability.

¹¹ See report dated December 1, 2022 by Dr. Todd Boudreau, orthopedic surgeon, GD1-45.

¹² See Dr. Boudreau’s report dated March 27, 2023, GD1-48.

¹³ See Dr. Boudreau’s report dated February 12, 2024, GD5-3.

¹⁴ See letter dated May 3, 2024 by Dr. Owen Averill, general practitioner, AD1-24.

[20] When deciding whether the Appellant can work, I can't just look at his medical conditions. I must also consider factors such as his age, level of education, language abilities, and past work and life experience. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." These circumstances help me decide whether the Appellant can work in the real world.¹⁵

[21] The Appellant experienced some arthritic pain when he last had coverage in 2017, but he also had several assets that gave him an advantage in a job search. He is a native-born English speaker, and he has a high school education with some post-secondary training. He was 55 when his CPP disability coverage ended — not exactly young, but still several years from the usual age of retirement. His work experience is fairly one dimensional — it appears he has spent his entire career in the hospitality industry — but he did co-own a restaurant for 12 years and he presumably has some administrative skills that would assist him in finding a sedentary job.

[22] In my view, the Appellant's background and personal characteristics are not obstacles to his returning to work. Even with his impairments, the Appellant has at least some capacity to pursue substantially gainful employment. However, as we will see, that capacity obliged him to at least attempt to re-enter the labour market.

– The Appellant has not attempted alternative employment

[23] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.¹⁶

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

¹⁶ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[24] This passage suggests that, if a claimant retains at least **some** work capacity, the General Division must conduct an analysis to determine (i) whether they attempted to find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

[25] On top of that, disability claimants must make **meaningful** attempts to return to work.¹⁷ They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.¹⁸ Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[26] In this case, the Appellant had at least some work capacity — enough to trigger the obligation to pursue employment that might have been better suited to his impairments. However, there is no evidence that the Appellant has made a serious attempt to look for suitable employment since his restaurant partnership dissolved in 2014.

[27] Throughout his career, the Appellant has held what appear to be physically demanding jobs in restaurants and bars, working as a waiter, bartender, and food preparer. These jobs required him to be on his feet much of the time. As his hip pain got worse, such jobs would become increasingly unsustainable.

[28] However, the Appellant has never attempted a relatively sedentary job — one that would permit him to sit behind a desk or counter. Even in today's competitive and specialized job market, there are still many low skilled jobs in the service and retail sectors that don't require prolonged standing and walking or repetitive kneeling and lifting.

[29] Rather than investigate employment that might have been easier on his hips, the Appellant assumed a caregiving role for his ailing father. He has compared this role to a personal support worker and has even said that his responsibilities went well beyond

¹⁷ See *Tracey v Canada (Attorney General)*, 2015 FC 1300, in which the Federal Court stated that the onus is on claimants to show that they made "sincere" efforts to meet the employment efforts test.

¹⁸ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

that.¹⁹ However, the work that PSWs do is typically hard on their bodies, and it doesn't seem appropriate for someone who is struggling with arthritic pain.

[30] I don't fault the Appellant for taking care of his father, but the fact that he was able to do such work for so long is yet another sign that he had residual capacity, even after his arthritis flared up. Nor do I draw an adverse inference from the fact that the Appellant applied for and received a Nova Scotia caregiver's allowance of \$400 per month — a relatively modest amount that fell far below the statutory threshold for "substantially gainful."²⁰ However, the Appellant carried on working as a caregiver long after the end of his coverage period and stopped, not because of his impairments, but because his father died in September 2021.

[31] For these reasons, I must conclude that the Appellant did not fulfill his obligation under the *Inclima* case. He didn't attempt to pursue employment that might have been better suited to his medical condition. He is therefore unable to show that such an attempt failed by reason of his disability. In the end, I was unable to assess the extent of the Appellant's impairment as of December 31, 2017, because he has never made a real effort to return to the employment market.

The Appellant does not have a prolonged disability

[32] A disability must be severe **and** prolonged.²¹ The Appellant has not proved that his disability is severe, so I don't have to assess whether it is also prolonged. However, the available medical evidence also leads me to doubt that the Appellant's impairments were indefinite, long continued, or likely to result in death. As noted, the Appellant's arthritic right hip degenerated to the point where he required a joint replacement in January 2023. However post-op reports indicated that the Appellant made a good recovery, leaving him pain-free and able to walk without a limp. Although the Appellant

¹⁹ See the Appellant's request for leave to appeal to the Appeal Division dated May 30, 2024, AD1-4.

²⁰ Since the Appellant never made anything approaching threshold earnings from his employment as a caregiver, there is no need for me to assess whether his father could be fairly characterized as a "benevolent employer," as defined by case law.

²¹ See *Canada Pension Plan*, section 42(2)(a).

will never again have the strength or endurance to work on a restaurant floor, he would likely be capable of managing a low impact job.

Conclusion

[33] The Appellant has suffered from hip pain, but I am not convinced that it amounted to a severe disability as of December 31, 2017. The Appellant's doctors have never barred him from returning to work. He has residual capacity but has never tried a job that might have been less physically demanding than the ones he had as a hospitality worker.

[34] The appeal is dismissed.



Member, Appeal Division