



Citation: *ML v Minister of Employment and Social Development*, 2022 SST 564

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

## Decision

**Appellant:** M. L.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated November 18, 2020 (issued  
by Service Canada)

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**Tribunal member:** Pierre Vanderhout

**Type of hearing:** Teleconference

**Hearing date:** February 3, 2022

**Hearing participant:** Appellant

**Decision date:** February 8, 2022

**File number:** GP-21-750

## Decision

[1] The appeal is dismissed.

[2] The Claimant, M. L. wasn't eligible for a Canada Pension Plan ("CPP") disability pension between October 2011 and April 2019. This decision explains why I am dismissing the appeal.

## Overview

[3] The Claimant is 60 years old. He first applied for a CPP disability pension in January 2004, but was not successful. He applied again in November 2004. The Minister of Employment and Social Development (the "Minister") approved that application, and the Claimant started receiving CPP benefits as of August 2003. At that time, his disabling condition was schizophrenia. He had trouble with memory, concentration, and executive functions. His mood was anxious. He displayed psychosis, delusional thinking, and hallucinations.

[4] The Claimant received a CPP disability pension until April 2019. The Minister then suspended his benefits until it could investigate his employment. The Minister later found that the Claimant started working for X in June 2011 and had several other jobs until 2017. The Minister granted the Claimant a three-month work trial, but found that he was no longer entitled to the CPP disability pension after September 2011. As a result, the Minister ordered the Claimant to repay the CPP benefits he received from October 2011 to April 2019. These payments totalled \$101,571.57.<sup>1</sup> The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Claimant says he made multiple attempts to contact the Minister about his work activities starting in 2011. However, he was never able to contact the Minister: he said the line was always busy. He had to contact the Minister by phone because of

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<sup>1</sup> This consists mainly of \$100,242.21 for his CPP disability pension. He also received \$1,329.36 for the related Disabled Contributor's Child's Benefit ("DCCB").

severe dyslexia and a lack of support from agencies, family, and friends. He was told at work that reporting his income to the Canada Revenue Agency was sufficient.

[6] The Claimant says he began to have back problems after he started working again in 2011. He says he is once again disabled, but had been wrongly diagnosed with schizophrenia. He says the improper medication (Seroquel) stopped him from reasoning properly. At that time, he also had an undiagnosed neck fracture. He says he is now disabled by severe back and leg pain.<sup>2</sup> At the hearing, he said he also has only 25% lung capacity. He uses a wheelchair because walking aggravates his pain.

[7] The Minister says the Claimant returned to regular and gainful employment in June 2011, so he no longer met the “severe and prolonged” criteria for a CPP disability pension. The Minister notes that his earnings met the “substantially gainful” threshold for several years after he returned to work. The Minister says he also received regular Employment Insurance (“EI”) benefits on several occasions after June 2011, which shows he was ready, willing and able to work at those times. The Minister says the Claimant knew about his obligation to report his work activities.

[8] As the Claimant was already receiving a CPP disability pension, the onus is on the Minister to show that the Claimant no longer had a severe and prolonged disability. The Minister must prove this on a balance of probabilities.<sup>3</sup> This means the Minister must show it is more likely than not that the Claimant was no longer disabled.

## **What the Minister must prove**

[9] The Minister must prove that the Claimant did not continue to have a severe and prolonged disability after September 30, 2011.

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<sup>2</sup> GD1-6 and GD2-12

<sup>3</sup> See persuasive decisions such as *Doyle v. Minister of Human Resources Development*, (2001) CP 16627 (P.A.B.), and *Perrotta v. Minister of Social Development*, (2004) CP 19598 (P.A.B.).

[10] The *Canada Pension Plan* defines “severe” and “prolonged.” A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>4</sup>

[11] I must look at all of the Claimant’s conditions together to see what effect they had on his ability to work. I must also 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 was severe. If he could regularly do some type of work from which he could earn a living, then he wasn’t entitled to a disability pension.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>5</sup>

## **Reasons for my decision**

[13] I find that the Minister has proven the Claimant didn’t continue to have a severe and prolonged disability after September 30, 2011.

### **Was the Claimant’s disability severe?**

[14] The Claimant’s disability was no longer severe by the end of September 2011. I reached this finding by considering several factors. I explain these factors below.

#### **– The Claimant’s medical conditions in September 2011**

[15] I see little evidence about the Claimant’s medical conditions in September 2011. His CPP disability pension was granted because of schizophrenia, but that diagnosis no longer applies. I did not see any medical documents between November 2004 and January 2013. The November 2004 report refers to schizophrenia, while the January 2013 report was investigating chronic nausea.<sup>6</sup>

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<sup>4</sup> S. 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>5</sup> S. 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

<sup>6</sup> GD2-147 and GD2-321

[16] However, I can't focus on the Claimant's diagnoses.<sup>7</sup> Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.<sup>8</sup> When I do this, I must look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect his ability to work.<sup>9</sup>

[17] While medical evidence is sparse, I find that the Claimant didn't have significant functional limitations by the end of September 2011. I base this primarily on his work history starting in June 2011.

– **The Claimant worked regularly from June 2011 until early 2017**

[18] The Claimant admits working regularly during this time. He also received regular EI benefits on several occasions.

[19] The Claimant worked as a part-time sales associate at X from June 30, 2011, to May 24, 2014.<sup>10</sup> He received EI sickness benefits from September 30, 2012, until November 10, 2012, but then returned to work.<sup>11</sup> He had neck surgery in September 2012, due to a fracture.<sup>12</sup> He worked at X 4-8 hours per day, for 3-5 days per week.<sup>13</sup> At the hearing, he said he left this job because he found a full-time job. He said he would have been able to work full-time at X. He wanted to work full-time there, but they would not take him on.

[20] The Claimant was a full-time millwright at X from May 26, 2014, to June 27, 2014.<sup>14</sup> He said he stopped working because of back pain and a failed drug test.<sup>15</sup> The employer reported no medical, attendance, or work quality issues.<sup>16</sup> The Claimant then got regular EI benefits from September 7, 2014, until October 25, 2014.<sup>17</sup>

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<sup>7</sup> See *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

<sup>8</sup> See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

<sup>9</sup> See *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

<sup>10</sup> GD2-94 and GD2-184

<sup>11</sup> GD2-92

<sup>12</sup> GD2-149

<sup>13</sup> GD2-250

<sup>14</sup> GD2-94 and GD2-180

<sup>15</sup> GD2-248

<sup>16</sup> GD2-181

<sup>17</sup> GD2-92

[21] The Claimant next worked for 2-3 months as a seasonal full-time labourer at X Pool and Spas, starting in late 2014.<sup>18</sup> He then collected regular EI benefits from March 1, 2015, to July 4, 2015.<sup>19</sup> He resumed his seasonal full-time labourer position at X from August 16, 2015, until October 16, 2015.<sup>20</sup> He said his employer never called him after that. While he originally claimed he had a seizure due to a work injury, he denied this at the hearing.<sup>21</sup> The employer reported no medical, attendance, or work quality issues.<sup>22</sup>

[22] From October 2, 2015, to January 20, 2017, the Claimant worked full-time as a delivery driver for X. He had a leave of absence from February 19, 2016, to May 9, 2016.<sup>23</sup> He fell on some stairs and fractured his right arm.<sup>24</sup> He received sickness EI benefits from March 6, 2016, to May 7, 2016.<sup>25</sup> The Claimant said he quit this job because the workplace was abusive.<sup>26</sup> He then collected regular EI benefits on three separate occasions: from January 29, 2017, to February 25, 2017, from March 5, 2017, to March 25, 2017, and from April 2, 2017, to September 16, 2017.<sup>27</sup>

[23] While getting regular EI benefits, the Claimant also worked part-time for X from January 11, 2017, to April 20, 2017.<sup>28</sup> He assembled barbecues. He was paid on a “piece work” basis. He stopped working because he had to work inside a X store: he had a conflict with X and they didn’t want him in their store.

[24] The Claimant has not worked since his job ended at X. He got sickness EI benefits from December 3, 2017, to February 24, 2018.<sup>29</sup>

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<sup>18</sup> There is some conflicting evidence about when this work took place. The employer said it started on October 20, 2014 (GD2-192). However, other records suggest it lasted from November 3, 2014, to February 27, 2015 (GD2-94). The Claimant said it ended in March 2015 (GD2-247).

<sup>19</sup> GD2-92

<sup>20</sup> GD2-192 and GD2-195

<sup>21</sup> GD2-247

<sup>22</sup> GD2-193

<sup>23</sup> GD2-95, GD2-172, and GD2-249

<sup>24</sup> GD2-157 and GD2-158

<sup>25</sup> GD2-93

<sup>26</sup> GD2-172 and GD2-249

<sup>27</sup> GD2-93

<sup>28</sup> GD2-95

<sup>29</sup> GD2-93

[25] The evidence reveals that the Claimant worked, or received regular EI benefits, for almost all of the period from June 2011 until at least the end of 2016. I will now reconcile his work and EI history with the CPP definition of disability.

**- The Claimant was capable of pursuing a substantially gainful occupation from June 30, 2011, until at least the end of 2016.**

[26] When assessing disability, I would normally perform a detailed review of the Claimant's work, education, and other personal characteristics. This would help me decide whether he had any work capacity in the real world.

[27] However, in this case, I don't need to review the Claimant's characteristics in detail. I can assess his real world work capacity by reviewing his work history and earnings. In the previous section, I summarized his work history. It shows that most, if not all, of his job changes were unrelated to disability. The following chart summarizes the Claimant's income history from 2011 to 2017:<sup>30</sup>

| <u>Year</u> | <u>Earnings</u> | <u>Max CPP Pension*</u> | <u>Regular EI Weeks</u> | <u>Sickness EI Weeks</u> |
|-------------|-----------------|-------------------------|-------------------------|--------------------------|
| 2011        | \$8,421.00      | \$11,520.00             | 0                       | 0                        |
| 2012        | \$15,135.00     | \$11,840.00             | 0                       | 6                        |
| 2013        | \$17,629.00     | \$12,150.00             | 0                       | 0                        |
| 2014        | \$17,768.00     | \$14,836.20             | 6                       | 0                        |
| 2015        | \$10,236.00     | \$15,175.08             | 18                      | 0                        |
| 2016        | \$18,423.00     | \$15,489.72             | 0                       | 9                        |
| 2017        | \$4,980.00      | \$15,763.92             | 31                      | 4 (continues into 2018)  |

\*-This column shows the maximum CPP pension amount for a person in that year.

[28] The above chart shows that the Claimant had a consistent level of work activity from June 30, 2011, until at least the end of 2016. In most years, his earnings exceeded the maximum CPP pension. He did not start working until halfway through 2011. If prorated over the entire year, his earnings for the second half of 2011 exceeded the maximum CPP pension for that year.

<sup>30</sup> GD2-23, GD2-95 and GD2-283.

[29] The Claimant's earning capacity for the above years would have been even higher than his actual earnings. At the hearing, he said he wanted to work full-time at X (where he worked up to May 24, 2014), but X would not give him a full-time position. He finally left that job because he found a full-time job at X. His receipt of regular EI benefits for six weeks in 2014 further elevates his earning capacity for that year. When combined with his actual 2015 work earnings, his 18 weeks of regular EI benefits (more than one-third of the year) suggests that his earning capacity for that year exceeded the maximum CPP pension for 2015 too. A person receiving regular EI benefits must be "capable of and available for work".<sup>31</sup>

[30] From June 30, 2011, through the end of 2016, the Claimant had two brief periods (in 2012 and 2016) when he was unable to work due to surgery. He received sickness EI benefits at those times. Work may not have been advisable for additional brief periods around these surgical procedures. But I find that he was otherwise working or "capable of and available for work."

[31] The maximum CPP pension for each year is critical because, since June 2014, that amount is the threshold for a "substantially gainful" occupation.<sup>32</sup> If a person is capable of earning more than the maximum CPP pension, he is capable of pursuing a substantially gainful occupation. This is critical because a person's disability is only severe if he is incapable regularly of pursuing any substantially gainful occupation.<sup>33</sup>

[32] From June 30, 2014, to the end of 2016, either the Claimant's actual earnings or his earning capacity (as shown by his actual earnings and his work availability) exceeded the maximum CPP disability pension. This precludes a CPP disability pension during that period.

[33] From June 2011 to June 2014, the Claimant's earnings and earning capacity had a similar effect, although a specific earning threshold was not yet defined by law. The Claimant was not incapable regularly of pursuing a substantially gainful occupation

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<sup>31</sup> See s. 18(1)(a) of the *Employment Insurance Act*.

<sup>32</sup> Section 68.1 of the *Canada Pension Plan Regulations*.

<sup>33</sup> Section 42(2)(a) of the *Canada Pension Plan*.



during this period. Any work interruptions were very brief. He worked regularly, had significant earnings, and wanted to work more than his long-term part-time employer could provide. Accordingly, his disability was not severe during this period.

[34] These findings mean that I cannot consider the Claimant's disability severe from June 30, 2011, to at least December 31, 2016. In making this finding, I am not saying that the Claimant was without medical conditions or symptoms. However, through his earnings (and additional earning capacity), he showed that he had significant functional abilities and could earn a living.

– **The Claimant wasn't entitled to CPP disability benefits after September 2011**

[35] As the Claimant's disability stopped being severe by June 30, 2011, the Minister could terminate his CPP disability pension after that date.

[36] The Minister allowed a three-month work trial. The Minister said the Claimant could still receive his CPP disability pension during that trial.

[37] Given the Minister's statement, I find that the Claimant was entitled to continue receiving his CPP disability pension up to the end of September 2011. It is not appropriate to find otherwise.<sup>34</sup>

[38] However, the Claimant was no longer entitled to a CPP disability pension from October 2011 forward. I will now consider his submissions about his attempts to contact the Minister during that time.

– **The Claimant's attempts to contact the Minister**

[39] The Claimant admits that he started to work in mid-2011. However, he says he tried to contact the Minister about his return to work and was never successful. He says his dyslexia limited him to phoning the Minister, but he always received a busy signal. In

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<sup>34</sup> See the persuasive decision in *Boudreau v. Minister of Human Resources Development*, (2000) CP 11626 (Pension Appeals Board).

turn, he says other people told him not to worry about it, as filing regular tax returns would satisfy any CPP reporting obligation.

[40] The Claimant appeared to recognize his legal obligation to “inform the Minister without delay” of any return to work.<sup>35</sup> The Minister also regularly notified him that he must report any return to work.<sup>36</sup> He says he tried to call as soon once he completed his 3-month probation at X in June 2011. He said he continued trying for 2-3 months. He says he tried to call again when he started full-time work.<sup>37</sup> In essence, he claims that the Minister’s failure to respond should exempt him from any repayment.

[41] The Claimant’s argument does not persuade me. The Claimant knew his CPP disability pension might be affected by his return to work. His inability to reach the Minister cannot exempt him from the implications of that return to work.

[42] I note that the Claimant successfully contacted the Minister on several occasions in 2011 before he returned to work. One of those contacts was in writing.<sup>38</sup> I also note that the Claimant successfully contacted the Minister on several occasions in 2019 after the Minister suspended his pension.<sup>39</sup>

[43] However, even if the Claimant had been unsuccessful in contacting the Minister at all other times between June 2011 and April 2019, he really just wants the overpayment to be forgiven. The Tribunal does not have the authority to do that.<sup>40</sup>

[44] I will now consider the Claimant’s submissions about disability on grounds other than schizophrenia.

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<sup>35</sup> See s. 70.1 of the *Canada Pension Plan Regulations*.

<sup>36</sup> GD2-4, GD2-45 to GD2-49, GD2-308 to GD2-312, and GD5-17 to GD5-21.

<sup>37</sup> GD1-6 and GD2-12

<sup>38</sup> GD2-37 and GD2-232

<sup>39</sup> GD2-258 to GD2-259, and GD2-229 to GD2-230

<sup>40</sup> See *Lazar v. Canada (Attorney General)*, T-459-98 (Federal Court), upheld at 2001 FCA 124 (Federal Court of Appeal).

– **The Claimant's changing diagnoses**

[45] I find that any change in the Claimant's diagnoses has no bearing on my decision in this appeal.

[46] The Claimant was originally granted a CPP disability pension due to schizophrenia. Both he and his specialists attested to that condition.<sup>41</sup> However, after many years, he was found not to have that condition.<sup>42</sup>

[47] The Claimant now claims to be disabled due to a neurological problem with his spine. He also reports depression, hallucinations, scoliosis, memory issues, and a severe learning disability.<sup>43</sup> As noted above, I must focus on functional limitations rather than diagnoses.

[48] The Claimant's current conditions could result in a finding of disability. In particular, he may have become disabled again at some point after October 2011. However, I cannot make findings on that issue. My authority is confined to the issues raised by the Minister's reconsideration decision. That decision was confined to whether his pension entitlement continued after September 2011.<sup>44</sup> I found that it did not.

[49] The Claimant is not without recourse. My finding that he was no longer entitled to a CPP disability pension in October 2011 does not preclude him from ever receiving that pension again. If he applied again, he might be able to establish a new entitlement to that benefit. The Minister told him that he could apply again.<sup>45</sup>

[50] However, the Claimant said he never applied to reinstate his CPP disability pension. Nor did he apply for a new CPP disability pension. He says the provincial disability plan in British Columbia is more favourable than the CPP disability pension, as it covers drug costs.

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<sup>41</sup> GD2-321, GD2-327 and GD2-339

<sup>42</sup> GD2-238. A 2019 medical report for CPP purposes makes no mention of schizophrenia: see GD2-246.

<sup>43</sup> GD2-238

<sup>44</sup> GD2-4

<sup>45</sup> See GD2-24, for example.

– **The Claimant's repayment obligation**

[51] The *Canada Pension Plan* says that a disability pension stops being payable with the month in which the recipient ceases to be disabled.<sup>46</sup> I have already found that the Claimant was no longer entitled to a CPP disability pension starting in October 2011.

[52] From October 2011 to April 2019, the Claimant received a benefit to which he was not entitled. As a result, the Claimant must return that benefit to the Minister.<sup>47</sup> This means that the Claimant remains responsible for returning the sum of \$101,571.57 to the Minister. As noted above, the Tribunal cannot waive that obligation.

## **Conclusion**

[53] I find that the Claimant wasn't eligible for a CPP disability pension after September 2011 because his disability was no longer severe. I also find that the Claimant remains responsible for repaying the CPP disability pension he received from October 2011 to April 2019. However, the Claimant is not precluded from making another application for CPP disability benefits.

[54] This means the appeal is dismissed.

Pierre Vanderhout  
Member, General Division – Income Security Section

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<sup>46</sup> S. 70(1)(a) of the *Canada Pension Plan*.

<sup>47</sup> See ss. 66(1) and (2) of the *Canada Pension Plan*.