



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. C. v. Minister of Employment and Social Development*, 2018 SST 478

Tribunal File Number: GP-16-92

BETWEEN:

**A. C.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Carol Wilton

HEARD ON: February 20, 2018

DATE OF DECISION: April 13, 2018

## REASONS AND DECISION

### DECISION

[1] The Appellant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment commencing in April 2015.

### OVERVIEW

[2] The Appellant, a welder, applied for a CPP disability pension in March 2015, when he was 54 years old. He stated that he had been unable to work since December 2014 because of low back pain, pain in the right shoulder and knee, and right arm numbness. He also experienced extreme anxiety and panic attacks. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he became disabled the end of his Minimum Qualifying Period (MQP), which is calculated based on his contributions to the CPP. The Appellant's MQP ended on December 31, 2017.<sup>1</sup>

### ISSUES

1. Did the Appellant's physical and mental health conditions result in his being incapable regularly of pursuing any substantially gainful employment on or before December 31, 2017?
2. If so, is his disability long continued and of indefinite duration?

### ANALYSIS

#### Test for a Disability Pension

[4] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

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<sup>1</sup> GD2-4

***The Appellant's conditions and treatments***

[5] I must assess the Appellant's entire condition and consider all of his possible impairments that affect employability, not just his main impairment.<sup>2</sup> Although each of his medical problems taken separately might not result in a severe disability, the collective effect of his various health conditions may render him severely disabled.<sup>3</sup>

[6] The Appellant's testimony was straightforward and he did not seem to magnify his symptoms. I found that his testimony was credible.

[7] The Appellant suffers from pain in his neck, lower back, arms, right knee, and left ankle. His pain increases with activity.<sup>4</sup> The extent of his symptoms has a significant effect on his ability to attend work and to be productive.

[8] The Appellant testified that his physical conditions were largely the result of injuries he received while performing a very difficult and dangerous job as a welder. He injured his back in about 2008 and was treated at a pain management clinic.<sup>5</sup> In 2012, he had a meniscal repair on his right knee followed by physiotherapy.<sup>6</sup> In January 2013, he broke his right kneecap in a fall.<sup>7</sup> The following year, he injured both hands and his left arm, and again received physiotherapy.<sup>8</sup>

[9] The Appellant stated that his physical condition had progressively worsened over time, and his family doctor confirmed that he had chronic progressive back pain with increasing deterioration in function.<sup>9</sup> The Appellant testified that sitting for more than about 40 minutes hurt his back, neck, and shoulders. He had stopped driving a car in mid-2017 because his knee condition made it difficult to control the brakes. His knee "pops out," and he had fallen down on the ground a number of times. He used a grab bar and a stool in the shower. It was difficult for him to walk. Dr. Yanover, his family doctor, confirmed in December 2017 that the Appellant had

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<sup>2</sup> *Bunga*, 2011 FCA 47

<sup>3</sup> *Barata v MHRD* (January 17, 2001) CP 15058 (PAB)

<sup>4</sup> GD4-7-8

<sup>5</sup> As reported by Dr. Dinesh Kumbhare: GD4-4.

<sup>6</sup> GD2-33-34

<sup>7</sup> GD2-35-36

<sup>8</sup> GD4-6

<sup>9</sup> CPP medical report, March 2015: GD2-50

been markedly restricted in walking since 2006,<sup>10</sup> and the Appellant testified at the hearing that he had been using a cane for the past nine months. His spouse helped him to dress and to move from one room to another. Dr. Yanover's CPP medical report stated that he experienced right arm numbness when working with vibrating tools, and the Appellant testified that the condition of his hands also prevented other activity. For example, he used plastic cutlery, which was easier for him to hold than metal utensils. In addition, his medication had a sedating effect, as his doctor warned him.<sup>11</sup> Further, his concentration was poor, and he was unable to understand written material without reading it multiple times.

[10] Dr. Kumbhare, a physiatrist, assessed the Appellant in June 2016. He found that the Appellant had chronic musculoskeletal pain in his neck, thoracolumbar spine, upper extremities, right knee, and left ankle. His pain was generally at a level of six to eight out of ten. As a result, he had poor tolerances for prolonged sitting, standing, walking, bending, heavy lifting, heavy pushing and pulling and overhead reaching activities. In addition, he would have difficulty with prolonged kneeling, crouching, and walking on uneven ground.<sup>12</sup>

[11] Dr. Yanover wrote in 2017, as the Respondent submitted, that the Appellant's pain was controlled with a reduced dosage of medication. On examination, he had only slight pain in his back and knee. However, Dr. Yanover confirmed that the Appellant had back and joint pain, and reported that without medication the Appellant's pain level was six or seven out of ten.<sup>13</sup> Significantly, by this time the Appellant had not engaged in heavy physical labour, which aggravated his pain, for several years. The Appellant further testified that the reduction in medication was arbitrary, since his doctor had been "red-flagged" for over-prescribing narcotics. He had an appointment with Dr. Yanover the day after the hearing, and intended to ask him for a medication increase because his pain was worsening.

[12] The Appellant has also suffered from depression and anxiety for many years, and has been on medication for this since at least 2009.<sup>14</sup> The Appellant's representative submitted that this condition was seriously disabling, but the medical evidence does not support this. The Appellant

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<sup>10</sup> GD11-16

<sup>11</sup> GD11-7

<sup>12</sup> GD4-15

<sup>13</sup> GD11-7-8

<sup>14</sup> GD4-4

testified that he had seen a psychologist in the past, but there is no evidence that in the past several years he has been referred to a psychologist or psychiatrist for assessment or treatment. Further, his family doctor, Dr. David Yanover, did not mention depression or anxiety in his CPP medical report.<sup>15</sup> I am not convinced that the Appellant's mental health condition has been seriously disabling.

[13] Considering the Appellant's physical impairments, however, I find the medical evidence supports his account of his multiple physical conditions and limitations.

[14] An appellant is required to abide by and submit to reasonable treatment recommendations, or provide a persuasive explanation for their failure to do so.<sup>16</sup> The Appellant has seen a pain management specialist (2009), two orthopedic surgeons, and a physiatrist.<sup>17</sup> He has taken medication for pain and depression, and has taken physiotherapy and chiropractic treatments, according to his testimony. He has not attended a pain management clinic since 2009, but he explained that his family doctor had not recommended this. I find that the Appellant cannot be faulted for non-attendance when his family doctor did not refer him. I also find that, in general, the Appellant has followed reasonable treatment recommendations.

***The Appellant's impairments meant he was unable regularly to pursue any substantially gainful employment by his MQP***

[15] It is not the diagnosis of the disease, but the Appellant's capacity to work, that "determines the severity of the disability under the CPP."<sup>18</sup>

[16] The Appellant consistently struggled to retain his job as a welder in spite of his health concerns. He returned to the job following his 2008 back injury, which kept him off work for at least a year.<sup>19</sup> He had to stop work in November 2011 because of his knee injury and was unable to return again until July 2013 because of his knee surgery and subsequent knee fracture.<sup>20</sup> He tried resuming his usual duties at that time, but had to perform modified duties after September

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<sup>15</sup> GD2-48-51

<sup>16</sup> *Warren*, 2008 FCA 377; *Lalonde*, 2002 FCA 211

<sup>17</sup> GD2-34-36, GD4.

<sup>18</sup> *Klabouch*, 2008 FCA 33.

<sup>19</sup> GD4-4

<sup>20</sup> GD2-33-36

2013, according to his testimony. He was off work again from March to August 2014 because of injuries to both hands and his left arm.<sup>21</sup> His final return to work was short-lived; he left in December 2014 because his employer would not respect his restrictions.

[17] There is no evidence of work capacity after December 2014. Dr. Kumbhare wrote that the Appellant had been unable to work since then.<sup>22</sup> In January 2018, Dr. Yanover wrote that the Appellant was unable to work at any job on a regular basis.<sup>23</sup>

***Considering all the Appellant's circumstances, his disability is severe***

[18] In deciding whether the Appellant's condition was severe, I must take a "real world" approach and consider factors such as his age, level of education, language proficiency, and past work and life experience.<sup>24</sup> The Appellant was 54 years old when he stopped working. He is English-speaking and has a high school education. On the other hand, all his work has involved physical labour, since prior to training as a welder he worked as a window cleaner and a hospital porter. Clearly, he is no longer able to perform physical work. His prospects for finding a job in the commercial market place doing sedentary work are also dim, given his difficulties sitting and other physical limitations, as well as his problems retaining new information. Moreover, he described himself as "computer illiterate," and the condition of his hands would prevent him from training for most office work.

[19] I am persuaded that the Appellant was unable regularly to pursue any substantially gainful employment by his MQP.

[20] I find, on a balance of probabilities, that the Appellant's disability was severe on or before December 31, 2017.

**The Appellant's disability is prolonged**

[21] The Appellant has suffered from back pain since 2008, from knee pain since 2011, and from pain in his hands since 2014. No doctor has suggested that his condition would improve.

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<sup>21</sup> His CPP questionnaire states that he was on Employment Insurance during this period: GD2-60.

<sup>22</sup> GD4-15

<sup>23</sup> GD11-13

<sup>24</sup> *Villani*, 2001 FCA 248

[22] The Appellant's disability is both long continued and of indefinite duration. I therefore find that it is prolonged.

**CONCLUSION**

[23] I find that the Appellant had a severe and prolonged disability in December 2014, when he stopped working. Under section 69 of the CPP, payments start four months after the date of disability. Payments start as of April 2015.

[24] The appeal is allowed.

Carol Wilton

Member, General Division - Income Security