



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *V. C. v. Minister of Employment and Social Development*, 2018 SST 856

Tribunal File Number: GP-17-393

BETWEEN:

**V. C.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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

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Decision by: George Tsakalis

Claimant represented by: Marin James Nati

Videoconference hearing on: July 3, 2018

Date of decision: July 9, 2018

## **DECISION**

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of August 2014.

## **OVERVIEW**

[2] The Claimant was born in 1965. He has a Grade 12 education. He obtained a certificate in microcomputers and an electronic engineering technician diploma at the community college level. He last worked as a security guard/mobile ambassador at an airport. He sustained injuries in an April 14, 2014 motor vehicle accident. The Claimant could only work for a few days after the vehicle accident, but he could not tolerate his job because of his medical condition. He has not worked since April 2014. The Claimant alleges that he is incapable of working because of chronic back pain and depression. The Minister received the Claimant's application for the disability pension on June 8, 2015. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2016.

## **ISSUES**

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016?

## ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. A person is considered to have a severe disability if 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. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **The Claimant's disability was severe as of December 31, 2016**

[7] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It's not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work<sup>2</sup>.

[8] I am satisfied that the evidence shows that the Claimant was unable to perform any substantially gainful work at the time of his MQP because of his medical condition.

[9] The Claimant in his Questionnaire for Disability Benefits stated that he could not work because of his medical condition as of July 29, 2014 because of chronic back pain and depression.<sup>3</sup>

[10] The Claimant testified that he was healthy prior to his April 2014 motor vehicle accident. His post-accident physical and psychological problems have led to problems with sitting and standing. He testified that he suffered from chronic neck and back pain prior to his MQP. He was told that he suffered from post-traumatic stress disorder (PTSD) and depression. He suffered from occasional headaches His back pain radiated into his legs and he had foot numbness. He has problems walking and used a cane. He can only walk for a total of five minutes with rest stops. He is restricted to driving for only 10 to 15 minutes because of back pain. He has problems with his memory and concentration. He is unable to perform his housekeeping tasks and he relies

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>2</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

<sup>3</sup> GD2-167

on family members to take care of these tasks. He has difficulty with dressing and undressing and lifting.

***The medical conditions and impairments that the Claimant referred at the hearing and in his Questionnaire for Disability Benefits are supported by the medical evidence***

[11] The medical evidence confirms that the Claimant sustained injuries and suffered from functional impairments after his motor vehicle accident.

[12] The Claimant's family physician, Dr. I. Okafor completed a Medical Report for Service Canada that was received by the Minister on August 13, 2015. Dr. Okafor noted that the Claimant suffered from back pain and an adjustment disorder. Dr. Okafor also indicated that the Claimant had mood symptoms and severe functional incapacity. He described the Claimant's pain as disabling and the Claimant was using a cane to ambulate. Dr. Okafor provided the Claimant with a guarded prognosis.<sup>4</sup>

[13] Dr. Okafor completed a form for the Canada Revenue Agency in relation to the Claimant's application for a Disability Tax Credit in March 2015. Dr. Okafor noted that the Claimant had a marked restriction with walking.<sup>5</sup>

[14] Dr. Okafor also completed a report for the Ontario Ministry of Community and Social Services in July 2015. Dr. Okafor stated that the Claimant had limited strength and the ability to participate physically in sustained activity. Dr. Okafor stated that the Claimant also had problems walking and completing his housekeeping.<sup>6</sup>

[15] Dr. Okafor's clinical notes and records make reference to chronic back pain, lower right leg pain, lumbar radiculopathy, inflammation of the upper foot, heavy limping and significant pain behaviour.<sup>7</sup> Dr. Okafor's most recent clinical note from December 11, 2017, stated that the Claimant had suffered from back pain for more than years. The Claimant had weakness and numbness in his legs.<sup>8</sup>

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<sup>4</sup> GD2-107-110

<sup>5</sup> GD1-39

<sup>6</sup> GD1-149

<sup>7</sup> GD9-5 and 30

<sup>8</sup> GD9-3

[16] Dr. Ogilvie Harris, Orthopaedic Surgeon in a May 22, 2015 stated that the Claimant was incapable of returning to work because of his chronic pain syndrome.<sup>9</sup>

[17] A lumbar spine MRI showed an incidental finding of a nodule of the cauda equine nerve roots of questionable etiology.<sup>10</sup> The Claimant was referred to Dr. E.G. Duncan, Neurosurgeon for a surgical consultation on December 8, 2015. Dr. Duncan noted that the Claimant had ongoing post-traumatic back pain. He stated that the MRI showed no abnormality that can be corrected by surgery to improve chronic pain symptoms.<sup>11</sup>

[18] With respect to his psychological condition, the Claimant was treated by Dr. J. Pilowsky, Psychologist. She diagnosed the Claimant with major depressive disorder, PTSD, and persistent severe somatic symptom disorder in February 2015.<sup>12</sup>

[19] The Claimant also saw Dr. A. Azadian, Psychiatrist. Dr. Azadian diagnosed the Claimant with major depressive disorder, insomnia, and somatic symptom disorder in June 2015.<sup>13</sup> Dr.

[20] The Claimant saw Dr. S. Connell, Psychologist on April 14, 2016. Dr. Connell diagnosed the Claimant with PTSD, specific situational phobia related to vehicular traffic, depression, probably neurocognitive disorder, chronic pain, and probably somatic symptoms disorder. Dr. Connell stated that he thought the Claimant sustained a “catastrophic impairment” under Ontario’s no fault automobile regime.<sup>14</sup>

[21] The Claimant was also treated by Dr. C.M. Vigna. Psychologist. Dr. Vigna in a February 2, 2017 noted that the Claimant was not a candidate for further psychological therapy because he did not improve with treatment. Dr. Vigna suggested that the Claimant’s best option was to participate in a comprehensive pain management program where psychological support could be incorporated into a larger approach that would include physical, occupation, and recreation

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<sup>9</sup> GD1-235

<sup>10</sup> GD1-31

<sup>11</sup> GD9-42

<sup>12</sup> GD1-185

<sup>13</sup> GD2-86

<sup>14</sup> GD1-276-277

therapy. However, he provided the Claimant with a guarded prognosis even if he participated in such a program.<sup>15</sup>

[22] A prescription summary showed that the Claimant was took Baclofen, Voltaren, Cymbalta, Seroquel, Lyrica, Dilaudid, and a BuTrans patch prior to the expiry of his MQP.

***I prefer the evidence of the Claimant's treating physicians and the Claimant's hearing evidence over the evidence of the experts retained by the automobile insurers involved in litigation with the Claimant***

[23] There was evidence in the file that medical assessors retained by the Claimant's automobile insurance company did not accept the truth of his symptoms or that he sustained any significant impairment arising from his motor vehicle accident.

[24] Dr. Pilowsky referred to a report authored by Dr. Louise Koepfler, Psychological dated July 31, 2014. Dr. Koepfler found that the Claimant magnified his symptoms on testing and she consequently did not have sufficient valid or reliable data to make a diagnosis.<sup>16</sup>

[25] Dr. Ogilvy-Harris's report referenced a report drafted by Dr. L. Weisleder, Orthopaedic Surgeon from August 2014. Dr. Weisleder stated that the Claimant had impairments in terms of limited range of motion in the neck, shoulder and lower back, but the Claimant could return to his pre-accident occupation as a security guard.<sup>17</sup>

[26] The Claimant's legal representative also reference a report of Dr. L. Reznick, Psychiatrist dated November 1, 2016, who did not accept that the Claimant sustained a serious injury.<sup>18</sup>

[27] I do not give significant weight to these reports because they were considering legislative tests under Ontario's automobile insurance regime that differs from the severe disability test under the CPP.

[28] In addition, the medical experts retained by the automobile insurers based their opinions within the narrow confines of their medical disciplines. Unlike the medical experts retained by the automobile insurers, I must assess the Claimant's condition in its totality, which means I

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<sup>15</sup> GD6-6

<sup>16</sup> GD1-173

<sup>17</sup> GD1-235

<sup>18</sup> GD6-23-24

must consider all of the possible impairments, not just the biggest impairments or the main impairment.<sup>19</sup>

[29] I accept that the Claimant has a severe disability when I consider both the Claimant's physical and psychological impairments. Dr. Weisleder was assessing whether the Claimant had a physical impairment, but I agree with Dr. Ogilvie-Harris that the Claimant's chronic pain was not entirely considered by Dr. Weisleder. I also do not accept that the Claimant exaggerated or magnified his psychological symptoms.

[30] I am obligated to consider both hearing and medical evidence in making my determination as to whether the Claimant had a severe disability under the CPP. As with many cases involving chronic pain, arguments are advanced that the objective medical evidence does not support a finding of disability.<sup>20</sup> Many of these cases hinge on a claimant's credibility.

[31] I found the Claimant to be credible. The Claimant attended the hearing using a cane. He appeared to be physically uncomfortable giving evidence and he became emotional at certain points in his hearing. The Claimant had a good work ethic. He was with the same employer for six years prior to stopping work in April 2014. He was also employed from 1987 to 1999 and from 2001 to 2004.<sup>21</sup> The medical records also confirm his hearing evidence. I am satisfied that he sustained serious psychological and physical injuries in his motor vehicle accident. I believe him when he stated that he enjoyed his last job and that he was troubled by his inability to work and perform many of his activities of daily living. His family doctor's clinical notes and records are replete with references to chronic back pain and he has received significant psychological treatment that has not improved his medical condition. In addition, the Claimant's treating psychologists and psychiatrists provided nearly identical diagnoses for the Claimant. I did not see any significant variance in their reports that would make me question their opinions.

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<sup>19</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

<sup>20</sup> GD10-13

<sup>21</sup> GD2-4

***I do not give any weight to the argument advanced by the Claimant's legal representative that a "catastrophic impairment" under Ontario's no insurance legislation at the very least means that the Claimant has a severe disability under the CPP<sup>22</sup>***

[32] The test for a "catastrophic impairment" under Ontario's insurance regime differs significantly from the severe disability test under the CPP. The test for a "catastrophic impairment" in Ontario refers to specific diagnostic criteria that determine whether an individual is entitled to a greater pool of medical, rehabilitation, and attendant care benefits. In order to evaluate whether the Claimant has sustained a "catastrophic impairment", I would have to review the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition, 1993.<sup>23</sup> Such a review falls outside my role as a member of this Tribunal.

[33] My focus is not on whether a particular Claimant meets the diagnostic criteria for enhanced medical, rehabilitation, and attendant care benefits. My focus is on whether the Claimant has the capacity to work.<sup>24</sup>

***The Claimant had no work capacity prior to the expiry of his MQP***

[34] I must assess the severe part of the test in a real world context<sup>25</sup>. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[35] I disagree with the Minister's submission that the Claimant was capable of performing some type of work.<sup>26</sup>

[36] After considering all of the evidence, I accept that the Claimant was not employable in a real world context prior to his MQP. The Claimant was 51 years old at the time of his MQP. He has some post-secondary education. He has a good command of the English language. Despite his education and language skills, I am satisfied that the Claimant proved on a balance of probabilities that he was incapable regularly of pursuing any substantially gainful occupation at the time of his MQP. The Claimant's most recent job as a security guard/mobile ambassador

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<sup>22</sup> GD15-11

<sup>23</sup> *Desbiens v. Mordini*, 2004 CanLII 41166 (ON SC)

<sup>24</sup> *Klabouch*

<sup>25</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>26</sup> GD10-13



consisted of working in parking garages. He counted spaces and responded to calls with passengers in distress who had difficulty accessing or exiting the parking garage at the airport. He could rotate between sitting and standing. This type of occupation would be ideal for someone with a chronic pain condition, such as the Claimant who has sitting, standing and lifting restrictions. However, the Claimant could only tolerate this position for only a few days after his April 2014 motor vehicle accident. He was eventually terminated by her employer. He made enquiries about obtaining a similar job with a parking lot company, but they would not take him on because of his mobility restrictions. I am satisfied that the Claimant's attempts to seek employment were wishful thinking on his part, as opposed to evidence of being able to perform substantially gainful employment.

[37] The Claimant previously worked in more sensitive areas at the airport, including runways. This work was stressful in nature and I am satisfied that he would not have been able to perform this type of work at the time of his MQP. He also has experience working in the construction industry, but I am satisfied that he cannot perform such occupations because of his lifting and mobility restrictions. The Claimant also has experience driving a bus, but I am satisfied that he cannot handle a driving job. I accept that the Claimant can only drive for 10 to 15 minutes before having to stop because of back pain and foot numbness. I do not believe that the Claimant can perform any type of occupation because of his impairments, which include memory and concentration difficulties. He might be able to keyboard for a short period of time, but his significant pain levels, sitting, standing, memory, and concentration difficulties make a keyboarding position unrealistic. I accept that the Claimant has difficulties performing his activities of daily living. He relies on family members to complete his housekeeping tasks and he has difficulty dressing and undressing. He can only perform activities such as walking for a few minutes before having to stop. I am satisfied that the Claimant cannot sustain activities for a long enough period of time to be employable in a real world context.

***The Claimant pursued and complied with reasonable treatment options***

[38] I am satisfied that the Claimant did all that he could to seek and follow all reasonably recommended treatment options. The Claimant has been followed by his family physician. He had a consultation with a neurosurgeon. He has been treated by a psychiatrist and psychologists.

He tried physiotherapy. He tried powerful narcotic pain medications. He tried anti-depressants. He also received treatment at chronic pain clinics.

**Prolonged disability**

[39] I find that the Claimant proved on a balance of probabilities that he had a prolonged disability that was likely to be long continued and of indefinite duration.

[40] The Claimant continues to suffer from chronic pain and major depression. His condition has not improved despite treatment and there is no expectation for significant improvement. Dr. Vigna provided the Claimant with a guarded prognosis, as did Dr. Okafor in his Medical Report for Service.

**CONCLUSION**

[41] The Claimant had a severe and prolonged disability in April 2014, when he last worked. Payments start four months after the date of disability, as of August 2014<sup>27</sup>.

[42] The appeal is allowed.

George Tsakalis  
Member, General Division - Income Security

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<sup>27</sup> Section 69 *Canada Pension Plan*