Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. P. v Minister of Employment and Social Development*, 2019 SST 556

Tribunal File Number: AD-18-656

BETWEEN:

**J. P.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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DECISION BY: Kate Sellar

DATE OF DECISION: June 10, 2019

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. The Appeal Division will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan* (CPP).

### OVERVIEW

[2] J. P. (Claimant) worked as a heavy equipment operator. He injured his back on more than one occasion, and after the third time, he was no longer able to work at his regular job. He worked in a sedentary position for the same employer, but ended his employment in October 2014 and returned to his home province on a permanent basis. After he returned home, he tried working as a line cook for several months, and then stopped in March 2016 due to pain. The Claimant also has adjustment disorder with depressed mood.

[3] The Claimant applied for a disability pension under the CPP in June 2016. The Minister denied his application both initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed his appeal in July 2018. He appealed to the Appeal Division. The Appeal Division granted leave to appeal.

[4] The Appeal Division must decide whether the Claimant has shown, on a balance of probabilities, that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If the Claimant has proven an error, the Appeal Division must decide what remedy to give to fix that error.

[5] I find that the General Division made an error of fact by failing to have regard for some of the evidence when it decided that the Claimant had a residual capacity to work. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the CPP.

## ISSUE

[6] Did the General Division make an error of fact by failing to have regard for some of the evidence when it decided that the Claimant had a residual capacity to work?

## ANALYSIS

### Appeal Division's Review of the General Division's Decision

[7] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to determine whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.[1]

[8] The DESDA says that a factual error occurs when the General Division bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.[2] For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

### Did the General Division make an error of fact by failing to have regard for some of the evidence when it decided that the Claimant had a residual capacity to work?

[9] The General Division made an error of fact by failing to have regard for some of the evidence when it decided that the Claimant had a residual capacity to work. Specifically, the General Division decided the Claimant had a residual capacity to work without having regard for the sedentary work that the Claimant was doing for his employer before he ended his employment and moved back to his home province in October 2014.

[10] To be eligible for a CPP disability pension, the Claimant must have a severe and prolonged disability[3] on or before the end of the minimum qualifying period (MQP). A disability

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(c).
[3] *Canada Pension Plan*, s 42(2)(a).

is severe, according to the CPP, when the Claimant is incapable regularly of pursuing any substantially gainful occupation.[4] The Claimant's MQP ended on December 31, 2016.[5]

[11] The case law from the Federal Court of Appeal suggests that when deciding whether a claimant has a severe disability, the first question is whether the claimant has a serious health condition that affected work capacity. Put differently, does the claimant have residual work capacity? To answer that question, the relevant factors are: the nature of the health conditions and the corresponding functional limitations; the recommended treatments and any unreasonable refusal to pursue those treatments; and the claimant's personal circumstances.[6] When considering personal circumstances, the factors include the Claimant's age, education level, language proficiency, and past work and life experience.[7]

[12] To show that a disability is severe, evidence of employment efforts and possibilities are relevant.[8] Where there is evidence of a residual capacity to work, the Claimant must show that efforts to obtain and maintain employment were unsuccessful by reason of health condition.[9]

[13] The Claimant argues that the General Division made an error of fact by failing to have regard for the evidence that the Claimant attempted sedentary work before he left his employment and returned home. The Claimant notes that in addition to his own testimony about this attempt to do sedentary work, Dr. Robichaud (his family doctor) stated on August 24, 2014 that he had tried a desk job but was unable to tolerate prolonged sitting due to increased back pain.[10]

[14] The Claimant also argues that the General Division made an error of fact by ignoring the evidence from Dr. McMillan about the Claimant's inability to do work that requires prolonged sitting or standing.[11]

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[4] *Canada Pension Plan*, s 42(2)(a).
[5] GD1-6.
[6] *S.G. v Minister of Employment and Social Development*, 2017 CanLII 141823.
[7] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[8] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[9] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[10] GD3-24.
[11] AD1-5.

[15] The Minister argues that the General Division is presumed to have considered all of the evidence and does not need to refer in its reasons to each and every piece of the evidence.[12]

[16] The Minister argues that the General Division did consider the Claimant's sedentary work before he ended his employment and came home. The Minister notes that this evidence was considered as part of the analysis about whether the Claimant's efforts to obtain and maintain employment were unsuccessful by reason of health condition.[13] The Minister argues that when the Claimant was asked at the hearing about whether he could have kept working in that sedentary environment, the Claimant responded that he needed something that has purpose, not just siting and staring at a wall.[14]

[17] The Minister argues that the General Division considered the Claimant's functional limitations in terms of sitting and standing. The General Division noted that the Claimant's family doctor stated that he was "unable to tolerate prolonged sitting/standing for more than 2 hours."[15] The General Division also made note of the Claimant's evidence that he was unable to "sit/stand for more than 1-2 hours before the pain becomes intolerable."[16] The General Division also mentioned the Claimant's letter requesting reconsideration that stated that he has a hard time sitting or standing for prolonged periods and needs constant breaks.[17]

[18] The General Division member was clear about what evidence he relied on to support his finding that the Claimant had a residual capacity to work: "based on the reports of Dr. McMillan and Dr. Manolescu, I find that the Claimant retained the capacity for some type of work."[18] The General Division noted that Dr. McMillan completed an independent orthopedic examination on the Claimant in July 2014. Dr. McMillan concluded that it was unlikely that the Claimant would be able to return to the persistent stress of heavy work, and that the Claimant would not get better enough to manage working with heavy equipment at his previous job.[19]

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[12] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[13] General Division Decision, para 17.
[14] AD3-9.
[15] General Division decision para 8.
[16] *Ibid*, at para 9.
[17] *Ibid*, at para 10.
[18] *Ibid*, at para 13.
[19] *Ibid*, at para 12.

[19] The General Division did consider the sedentary work that the Claimant completed, but did not mention it when deciding whether the Claimant had a residual capacity to work. Instead, the General Division took that work into account as part of the assessment as to whether the Claimant proved that efforts to obtain and maintain employment were unsuccessful by reason of his health condition. The General Division decision states:

> The Claimant testified that he was working as a heavy equipment operator for X in Fort McMurray, Alberta. His job involved driving a heavy truck over rugged roads and despite cushioned seating, he experienced bumping and jostling while driving the truck. He suffered through 3 incidents of hurting his back. The first time, he was off work for 2-3 months and on short-term disability. The 2nd time he was off for 3 months while on short-term disability and after the 3rd time he did not go back to his previous work. He was then assigned a "no job" position in the office at X where he did very little work with no shift work and regular business hours, 5 days per week. As such, he was unable to return home to Moncton very often which affected his mood.[20]

[20] The General Division did mention that Dr. Robichaud "reported that the Claimant has limited forward flexion due to pain and is unable to tolerate prolonged sitting/standing for more than 2 hours."[21] However, in determining that there was evidence of work capacity, the General Division expressly relied on the reports from Dr. McMillan and Dr. Manolescu and did not discuss the fact that the Claimant had already tried and failed at sedentary employment.

[21] I find that the General Division made an error of fact by ignoring evidence about the sedentary work the Claimant completed before he left his employment in October 2014. We presume that the General Division considered all of the evidence. However, there is an exception to that rule where the evidence is of such importance that it needed to be discussed.[22] The fact that the Claimant was working in a sedentary position (or what the General Division referred to as a "no job" position) before he ended his employment was of particular relevance in this case. The work the Claimant was doing was sedentary. The General Division considered the position

[20] General Division decision, at para 17.
[21] *Ibid*, at para 8.
[22] *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

only in relation to the Claimant's attempts to look for work, but this was a sedentary job that needed to be considered first in relation to whether the Claimant had residual capacity.

[22] At the hearing, the General Division member asked the Claimant about the alternate work he did. He testified that he did the work for the last 9 to almost 12 months of his employment (he ended his employment in October 2014), from Monday to Friday from 8am to 4pm (whereas in his old job, he worked longer hours and was able to return to his home province on his days off). The Claimant testified that mostly he was expected to sit and stare at the walls. He stated that there was some paperwork to do, and that sometimes he was asked, for example, to print a file or to make a flyer. He testified sometimes he was asked to make up gift bags, and that he had trouble bending, stretching and reaching. He testified that he was in the process of applying for long-term disability benefits, and that he was commuting from his home province, was renting a room, and had no help.

[23] He testified that his injury was so severe that once he woke up in the morning and could not get out of bed in time to get to the washroom. When asked about pain, the Claimant explained that while he did this work he was taking fentanyl. He stated that he felt high and was drooling. He testified that he could not do the same job without opioids as he can only sit for a period of time before he is uncomfortable and then in pain. When asked if he could have kept working at that job, he stated that he needed to have work that had purpose. But he was clear that he could not do that work without opioids. He testified that he was no longer on that type of painkiller as a result of advice from his family doctor at home.

[24] I find that the Claimant's evidence about this job was important. Failing to consider that evidence before finding that the Claimant had a residual capacity for work was an error of fact. The Claimant's work experience in a sedentary job immediately before he ended his employment was key to any analysis of whether he had residual capacity for work in a sedentary job on or before the end of this MQP. The General Division did not have regard for the evidence in the record on this question, and the evidence was material to the question of whether the Claimant had residual capacity to work.

**REMEDY**

[25] The Appeal Division has several options to remedy errors made by the General Division: for example, the Appeal Division can give the decision that the General Division should have given, or refer the case back to the General Division for reconsideration.[23] The Appeal Division has the ability to decide any question or fact or law before it.[24]

[26] The Minister argues that if I find an error under the DESDA, I should give the decision that the General Division should have given. I understood the Claimant's counsel to argue that if I find an error under the DESDA, I should give the decision that the General Division should have given, provided that the decision results in a finding that the Claimant is entitled to a disability pension.

[27] The Appeal Division will give the decision the General Division should have given. Because the parties had the chance to file all of their evidence before the General Division, providing the decision that the General Division should have given is consistent with the *Social Security Tribunal Regulations* (SST Regulations). The SST Regulations require proceedings to be conducted as informally and quickly as the circumstances and the considerations of fairness and justice permit.[25]

[28] The Appeal Division will give the decision that the General Division should have given: the Claimant has proven on a balance of probabilities that his disability was severe and prolonged before the end of his MQP. At the time of the MQP, taking into account all of the evidence including the Claimant's personal circumstances, the Claimant did not have even a residual capacity to work. The Claimant has a severe and prolonged disability and is entitled to a disability pension.

**Proving A Disability Is "Severe"**

[29] Claimants have to show that it is more likely than not (also called proving on a balance of probabilities) that they have a disability. Claimants must have some objective medical evidence to support their claim for the disability pension.[26] When assessing whether a disability is severe,

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[23] DESDA, s 59.
[24] DESDA, s 64.
[25] *SST Regulations*, s 3(1).
[26] *Warren v Canada (Attorney General)*, 2008 FCA 377.

the Tribunal must take into account all of the impairments, not just the biggest impairment or the main impairment. The Tribunal must consider the cumulative impact of the conditions on the Claimant's capacity to work.[27]

[30] In assessing whether a disability is severe, the General Division must take a real-world approach, which means considering whether claimants, in the circumstances of their background and medical condition, are employable. This includes considering aspects of claimants' personal circumstances like their: age, education level, language proficiency and past work and life experiences.[28]

**Evidence About the Claimant's Diagnoses and Functional Limitations**

[31] The Claimant has chronic mechanical low back pain and depressive symptoms associated with the loss of his function.[29]

**Back Pain**

[32] The Claimant began to have problems with his lower back while working as a heavy equipment operator in 2012.[30] These problems effected the Claimant's attendance at work and resulted in functional limitations that negated his capacity for certain work tasks. On October 15, 2012, the Claimant had an x-ray of his lumbar spine, which showed mild disc space narrowing consistent with early degenerative disc disease and grade 1 anterolisthesis secondary to a possible spondylolysis.[31] A physiotherapist stated a few days later that he was restricted from sitting for more than 50 minutes without standing breaks and from lifting, pushing or pulling more than 20 pounds. He also had limitations in terms of repetitive bending.[32] The Claimant was back at work full-time as a heavy equipment operator. Dr. Onwukwe, noted that the Claimant was still experiencing back pain and had requested stronger medication. Dr. Onwukwe prescribed Percocet.[33] In the spring of 2013, the record shows that the Claimant was still having

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[27] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[28] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[29] GD2-53.
[30] GD3-87.
[31] GD3-78.
[32] GD3-85.
[33] GD3-51.

lower back pain, that he reported improvement with physiotherapy and that he had taken about a week off work.[34]

[33] By January 2014, the Claimant had another x-ray of his lumbar spine which showed mild to moderate disc space narrowing and grade 1 spondylolisthesis.[35] The record shows that in March 2014 the Claimant was on modified work, was better after treatment, but was also still bothered by his lower spine.[36]

[34] On April 7, 2014, an MRI of the Claimant's lumbar spine showed degenerative disc disease (moderate) and disc prolapse (mild to moderate) at L4-S. It also showed degenerative disc disease (mild to moderate) at LS-SI, a small central disc extrusion, and a small left foraminal disc extrusion, causing a slight compression of the exiting left LS nerve root.[37]

[35] A physical therapist assessed the Claimant in May 2014, and noted a decreased range of motion in the lumbar spine and generalized lower extremity weakness in all muscle groups.[38] In May 2014, a surgeon, Dr. Manolescu, examined the Claimant. Dr. Manolescu's report states that the natural history of the disease is to resolve on its own with recurrent episodes of pain, but he noted the chronic nature of the Claimant's pain, and recommended finishing physiotherapy.[39]

[36] In early June 2014, a physical therapist stated that the Claimant would require frequent breaks at work if he was required to sit (breaks every 30 to 40 minutes) and no lifting more than 40 pounds. The physical therapist stated that the Claimant was still reporting slight discomfort in his back, but had made significant gains in strength and increased endurance.[40]

[37] On June 6, 2014, Dr. Manolescu stated that the Claimant had moderate improvement of his symptoms. He advised continuing with physiotherapy and discussed the benefit of changing jobs, since his usual work tasks driving the truck appeared to be triggering his pain.[41]

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[34] GD3-94.
[35] GD3-80.
[36] GD3-97.
[37] GD3-74.
[38] GD3-59.
[39] GD2-68.
[40] GD2-66.
[41] GD2-65.

[38] In July 2014, Dr. McMillan, an independent medical examiner, wrote that the Claimant did not need surgery and would not benefit much from further physiotherapy. Dr. McMillan stated that the Claimant was unable to continue with his regular job as a heavy equipment operator, and that he was unable to carry on with prolonged sitting or standing work, particularly sitting in a haul truck.[42] He stated that while the Claimant's symptoms may improve, it is unlikely that improvement would be to the point that he can perform twelve hours of heavy work as he did previously.[43]

[39] In August 2014, Dr. Robichaud, the Claimant's family physician in his home province, wrote that the Claimant was home again, and that he had tried doing a desk job, but was unable to tolerate prolonged sitting.[44] At the end of October, 2014, the Claimant had stopped doing the sedentary job and ended his employment. [45] On April 9, 2015, the Claimant reported being in pain all the time to his family doctor.[46]

[40] The Claimant tried medical marijuana for his pain. At the end of August 2015, Dr. Robichaud wrote that this was helping with the pain and that the Claimant had increased his activities.[47] The Claimant tried working as a line cook for just over four months from 2015 to 2016, but he stopped when his back was too sore and has not worked since then.[48]

[41] On May 18, 2016, Dr. Robichaud noted that the Claimant could no longer afford medical marijuana and only feels comfortable when lying flat.[49]

[42] The Claimant's family doctor stated that he was "unable to tolerate prolonged sitting/standing for more than 2 hours."[50] The Claimant's evidence is that he is unable to "sit/stand for more than 1-2 hours before the pain becomes intolerable."[51] The Claimant's letter

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[42] GD2-61 and 62.
[43] GD2-57.
[44] GD3-24.
[45] GD2-46.
[46] GD3-21.
[47] GD3-20.
[48] GD2-45.
[49] GD3-17.
[50] General Division decision para 8.
[51] *Ibid*, at para 9.

requesting reconsideration that stated that he has a hard time sitting or standing for prolonged periods and needs constant breaks.[52]

[43] The Claimant testified that he knows his limits in terms of functional limitations better now than he did when he tried (and ultimately failed to maintain) work in a pizza restaurant when he returned to his home province. He testified that if he sits down for a period of time, he becomes uncomfortable, and then the pain escalates. He stated that he can stand in one place for maybe 20 minutes and then he is leaning. He can drive with a lumbar support. He can take care of his personal needs like showering, but he cannot get his socks on.

[44] The Claimant testified that there are rare days in which he wakes up and his back does not hurt. He identified many activities that cause pain, including running, taking the stairs, bending to pick anything up, and activities with his children. He testified that he is "so secluded now" to his basement where he can lie down. He testified that his medications knock him out. In response to a question about doing sedentary work at a computer, the Claimant testified that it would be hard.

**Depression**

[45] When the Claimant was still away from his home province for work and his back was injured, his doctor noted that the Claimant was depressed and having difficulty coping. He was referred to a psychiatrist in April 2014. The psychiatrist diagnosed the Claimant with adjustment disorder secondary to significant medical and social stressors.[53]

[46] Dr. Robichaud completed the CPP Medical Report for the Claimant, which stated that he has mechanical low back pain and depressive symptoms associated with loss of full function. Dr. Robichaud gave a poor prognosis for his condition, noting that it has been chronic and has limited response to treatment.[54] Dr. Robichaud stated that the Claimant was unable to tolerate

[52] *Ibid*, at para 10.
[53] GD3-61.
[54] GD2-53.

prolonged sitting or standing, and has bad days where he is bed bound for most of the day. These bad days occur a few times a month.[55]

[47] The Claimant testified that he gets depressed that he cannot do anything, and that if he tries even to take his children to the park, he will end up in the car as a result of pain. The Claimant gave evidence about anxiety and about his fear of leaving his safe zones (areas in his home) when he is trying to manage his back pain.

**Treatment**

[48] Claimants must show that they have taken reasonable steps to manage their medical conditions.[56] If claimants refuse treatment unreasonably, they are not be entitled to the disability pension (and the impact of the refused treatment is relevant in that analysis).[57]

[49] The Claimant has shown that he has taken reasonable steps to manage his medical conditions. The Claimant's back problems began in 2012, and the Claimant sought medical attention, and he took time away from his work in the form of short-term disability leaves when he needed to. The Claimant took medication and cooperated with physiotherapy, including periods of time when he testified the physiotherapy was intense and three times a week. By July 2014, the Claimant's gains in terms of physiotherapy plateaued, and Dr. McMillan acknowledged that he would not benefit much from further physiotherapy. Dr. Manolescu had suggested the need to stay active and lose weight, and he acknowledged that the Claimant did lose some weight in July 2014.[58]

[50] The Claimant took opioid pain killers with a prescription from his physician when he was working the sedentary job. When he could not manage the sedentary position any longer, he returned home. It appears from the record that he accepted the advice of Dr. Robichaud about ceasing opioid pain killers because they are highly addictive, which he did. I accept his evidence

[55] GD2-54.
[56] *Klabouch v Canada (Social Development)*, 2008 FCA 33; *Sharma v Canada (Attorney General)*, 2018 FCA48.
[57] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[58] GD2-64.

that after changing medications, he is in more pain but understands the risks of ongoing use of that medication as advised by his doctor.

[51] The Claimant testified that he tried a TENS machine, and that he has tried massage once in a while when he can afford it. The Claimant testified that to keep his back at 70 percent, he needs to complete 1-2 hours per day of exercise. He testified that he cannot afford to pay for physio more than about 3 sessions per year.

[52] He has been treated conservatively in the sense that no physician has recommended surgery as a treatment option for his back. The Claimant testified that medical marijuana helped him after he returned home, but that he can "hardly" afford it anymore. The Claimant also uses a back brace.

[53] The Claimant gave evidence and there is reference in his medical file to being on a waiting list for a pain clinic. He testified and I accept that he has been on the wait list for 3 years. He believes that the pain clinic may provide him with injections to assist in managing his pain. He testified that he is willing to try this treatment, although he in under the impression that it will not improve his functionality. There is no legal requirement for the Claimant to exhaust all treatment options, only that he make reasonable efforts to manage his condition.[59]

[54] Although the Claimant has been referred to a psychiatrist in his home province, he testified that he has not followed up on that referral. The Claimant testified that he does not "have it in [him]", and that he does not see how it would help his back. He testified that when he injured his back and was working away from home, he was treated by a psychiatrist. He testified that the psychiatrist merely prescribed anti-depressants, advised him that he would be fine, and sent him on his way. The Claimant's family doctor is treating the Claimant with psychiatric medication.

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[59] The requirement to make reasonable efforts to manage medical conditions is reflected in *Klabouch v Canada (Social Development)* 2008 FCA 33; and *Sharma v Canada (Attorney General)*, 2018 FCA 48. There is no reference to exhausting all treatment options in these cases. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211 is not to unreasonably refuse treatment, which is different from exhausting all treatment options.

[55] I find that the Claimant's refusal to book the appointment to see a psychiatrist is not unreasonable given his experience with psychiatry in the past, and the fact that his depression is still treated using medication and monitored by his family doctor. In any event, if I am wrong and the Claimant's refusal to see a psychiatrist is unreasonable, I find that it would not have an impact on his disability such that it would change his capacity for work. His main condition is his back.

**The Claimant's Personal Circumstances**

[56] I must take a "real-world" approach to considering the severity of the Claimant's disability. That means that I must take into account the Claimant's personal circumstances, including his age, education level, language proficiency, and his past work and life experience.[60]

[57] At the end of the MQP, the Claimant was 35 years of age.

[58] He testified at the General Division hearing that he had attention deficit disorder (ADD) and problems with authority when he was a child and that he dropped out of school in Grade 6. He testified that he saw a psychiatrist and was prescribed mediation for the ADD and was able to complete grade 10 and then later he achieved high school equivalency. He testified that he had a troublesome youth and that he lived in a group home. He testified that he tried an upgrading course ("pre-tech") and had a hard time with it and dropped out. He later succeeded in attaining his high school equivalency and had a string of low-paying jobs to support the twin children he had at the age of 18.

[59] The Claimant speaks, understands, and reads English.

[60] The Claimant's testified that his work experience before he became a heavy equipment operator was in retail, seasonal work at a carnival, line cook, and working at a factory. The kinds of work the Claimant attempted after he stopped working as a heavy-equipment operator were failed work attempts. He could not stand long enough to make pizzas, and some of the other physical demands of that job (like reaching and carrying) exceeded his functional limitations.

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[60] *Villani v Canada (Attorney General)*, 2001 FCA 248.

[61] I find that the Claimant's personal circumstances create a real-world barrier to employment. He is not close in age to a standard or even early retirement and his English language proficiency is no barrier. However, the Claimant's education level, past life experience, past work experience are significant barriers to his employability. The Claimant's counsel argued that the Claimant's education history meant that he has lost out on the opportunity to learn how to learn, a submission that I accept. His failed attempt at upgrading is significant, and is evidence that he would have trouble upgrading his education.

[62] I find that the Claimant lacks transferrable skills from his work history that would assist him to complete even sedentary work. The kinds of jobs he might have the skills for he is no longer physically suited to due to his functional limitations, including jobs like line cook.

**The Claimant Has a Severe Disability**

[63] I find that the Claimant has a serious medical condition. His main disabling condition relates to the state of his back, which precludes him from functioning in any physical job. He also has depression, although I find the record lacks functional limitations associated with that condition that would impact the Claimant's capacity to work. The Claimant testified about the impact that anxiety plays in his daily routines, but the medical records lack information about anxiety.

[64] Taking into account the Claimant's functional limitations, personal circumstances and treatment, I find that the Claimant does not have residual capacity to work that would trigger the need for the Claimant to show that efforts to obtain and maintain employment were unsuccessful by reason of his health condition.

[65] The evidence is quite clear about the Claimant's lack of capacity to do physical work. The Claimant stopped working as a heavy-equipment operator and the medical evidence is clear (including from the independent assessor, Dr. McMillan) that this kind of work is now beyond his functional abilities. The Claimant is limited in terms of bending, lifting, as well as prolonged sitting and standing as mentioned above. I accept the Claimant's testimony and the evidence in his reconsideration letter and his CPP questionnaire about his very limited tolerance for sitting

and standing. I accept Dr. Robichaud's evidence that the Claimant has bad days several times a month when he is in bed for most of the day.

[66] I find that as of October 2014, the Claimant did not even have even a residual capacity to work due to his limitations in terms of sitting and standing. The Claimant did complete sedentary work earlier in 2014, but this work was heavily accommodated in the sense that it was not competitive work but "no job" work provided to him before it was clear to his employer and his union whether he would ever return to his regular job. I also find that the fact that the Claimant is no longer on narcotic or opioid medication to address his pain means that he has less tolerance for sitting at the end of the MQP than he had when he first returned to his home province in 2014.

[67] From a real-world perspective, the Claimant does not have any transferrable skills that would assist him with sedentary office-type work. His ability to use a computer is limited as his sedentary work was heavily accommodated and was referred to as a "no job." Although he is young enough to retrain for work and there are no problems with his English, I find that it is not reasonable to expect that he will be capable of retraining. It is not reasonable to expect him to retrain because of the combination of both his physical limitations in terms of his pain, his functional restrictions in terms of both sitting and standing, and also his limited success in the past in education settings, including his attempt to upgrade in pre-tech.

**The Claimant Has a Prolonged Disability**

[68] The Claimant's disability is likely to be long-continued and of indefinite duration. This means it is prolonged within the meaning of the CPP.

[69] A disability is prolonged within the meaning of the CPP if it is likely to be long-continued and of indefinite duration or likely to result in death.[61]

[70] I find that the Claimant's disability is prolonged within the meaning of the CPP. It is likely to be long-continued and of indefinite duration. The Claimant's back pain started in 2012, and worsened until he was no longer able to continue working as a heavy-equipment operator.

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[61] *Canada Pension Plan*, s 42(2)(a).

Dr. Robichaud characterized the Claimant's prognosis as "poor" and stated that it has been chronic and that he has had only limited response to treatment.[62]

[71] The Claimant gave evidence that he is on a wait list for a pain clinic, but Dr. Robichaud stated that "hopefully pain clinic and physio will help him regain some function."[63] I find that this is not a statement that the Claimant's condition is expected to improve with future treatment such that he is capable regularly of pursuing any substantially gainful occupation. There is no evidence in the file that suggests that the Claimant's conditions will likely end or resolve sometime anytime in the future. They are likely to be long-continued and of indefinite duration.

**CONCLUSION**

[72] The appeal is allowed. The Minister received the Claimant's application for a disability pension in June 2016. The Claimant proved he had a severe and prolonged disability when he ended his employment in October 2014 (before the end of his MQP on December 31, 2016).

[73] The Claimant is deemed disabled 15 months before the date of application.[64] The date of Application is June 2016; the deemed date of disability is March 2015. Payments begin 4 months after the deemed date of disability,[65] which in this case means the Claimant's payments will begin from July 2015.

Kate Sellar
Member, Appeal Division

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| HEARD ON: | March 20, 2019 |
| METHOD OF PROCEEDING: | Teleconference |
| REPRESENTATIVES: | J. P., Appellant<br><br>Duncan Allison and David Brannen, Representatives for |

[62] GD2-53.
[63] GD2-56.
[64] *Canada Pension Plan*, s 42(2)(b).
[65] *Canada Pension Plan*, s 69.

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| | the Appellant<br><br>Sylvie Doire and Sabrina Rodriguez-Meniz, Representative for the Respondent |