



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *P. B. v Minister of Employment and Social Development*, 2019 SST 1503

Tribunal File Number: GP-18-2545

BETWEEN:

**P. B.**

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: Connie Dyck

Claimant represented by: Yanid Castellon

Teleconference hearing on: December 13, 2019

Date of decision: December 27, 2019

## **DECISION**

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of May 2017.

## **OVERVIEW**

[2] The Claimant was 46 years old when he stopped working as a field service specialist in January 2017. He could no longer work because of cervical radicular pain which was secondary to degenerative disc disease. The Minister received the Claimant's application for the disability pension on November 17, 2017. The Minister denied the application. The Claimant appealed the reconsideration decision to the Social Security Tribunal. I am the Tribunal member who heard his appeal.

## **ISSUE IN THIS APPEAL**

[3] A person who applies for a disability pension has to meet the requirements. These are set out in the law that deals with CPP disability benefits. First, you have to meet the contribution requirements. The legal term for this is the "minimum qualifying period"<sup>1</sup>. That is not a problem in this appeal. The Claimant's minimum qualifying period is December 31, 2020.

[4] Second, you have to have a disability that is "severe and prolonged"<sup>2</sup>. You have to have that disability on or before the date of the minimum qualifying period. Because the Claimant has a minimum qualifying period in the future, I must decide if he was disabled on or before the date of the hearing (December 13, 2019).

[5] For most people "severe" means something that is "really bad" or "really significant". Similarly, most people think of prolonged as something that takes a long time. But, the words "severe" and "prolonged" have special meanings in this area of law. This can be confusing. I will explain what the terms severe and prolonged mean when it comes to CPP Disability Pension decisions.

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<sup>1</sup> It is found at Section 44(1)(b) of the *Canada Pension Plan* (CPP).

<sup>2</sup> This requirement is found at Section 42(2)(a) of the CPP.

### **What Does Severe Mean?**

[6] The law says that if a person is unable regularly to pursue any substantially gainful occupation because of their disability then they are severely<sup>3</sup> disabled.

[7] Severely disabled is not about the nature of a disability. Severely disabled is about whether the disability impacts a person's capacity to work. Severely disabled is not about the nature of a disability. Severely disabled is about whether the disability impacts a person's capacity to work. If a disability is so severe that it prevents a person regularly from working at a job, then they are severely disabled. It is important to note that this does not mean a former job or a job with a comparable wage. This means any job that is substantially gainful, even if the pay is lower than previous jobs.

### **What Does Prolonged Mean?**

[8] Prolonged means that a disability is "long continued" and is "of indefinite duration" or "is likely to result in death"<sup>4</sup>. For a disability to be "prolonged" the disability must be almost permanent in nature. So if a person has a reasonable chance to regain the ability to work at some time in the near future then their disability is not prolonged.

[9] The Minister says that the Claimant does not have a severe medical condition that would prohibit him from returning to some type of work. The medical evidence supports that the Claimant would have capacity for work in less physical employment than his previous employment. That is why his application was refused.

[10] The Tribunal's file indicates that the Claimant presently has numerous conditions including back, arm and shoulder pain and weakness. To decide if his disability is severe, I have to consider how the Claimant feels about the impact these conditions have on his capacity to work. I also have to consider what his doctors and other medical professionals say about his condition, including such things as the results of medical tests. If the Claimant is able to

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<sup>3</sup> The legal definition of "severe" is found at s 42(2)(a)(i) of the *Canada Pension Plan*

<sup>4</sup> The legal definition of "prolonged" is found at s 42(2)(a)(ii) of the *Canada Pension Plan*.

regularly do some kind of work that is substantially gainful<sup>5</sup>, then he is not entitled to a disability pension.

***The Claimant has an honest belief that he is severely disabled***

[11] The Claimant explained how he sees his medical condition and the impact of his health on his activities of daily living. He stated that:

- In January 2017, he woke up during the night in severe pain. He went to the Emergency Department. He has been in pain ever since then. He has constant pain even when not engaging in physical activity and despite using medication and lifestyle adjustments.
- His pain continues even after his leg surgery. The medication he has to take since his operation cause side effects and only provide partial pain relief.
- He has developed memory issues.
- He has decreased sensation in his left forearm that extends to his left thumb, index and middle fingers. He also has flare ups from daily activities such as house chores, that causes pain.
- He is unable to work due to cervical degenerative disc disease. He has limited use of both arms and shoulders. He has weakness in his arms and pain in his back, even when he is stationary.
- He has to keep moving and changing positions sometimes every 5 minutes.
- He cannot lift anything over 5 pounds.
- He also had difficulty concentrating and remembering information due to his pain and fatigue.
- He is only able to drive very short distances due to his condition and needing to change positions.

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<sup>5</sup> This is explained in a Federal Court of Appeal decision called *Klabouch v Canada (MSD)*, 2008 FCA 33

- He can do no activity, such as small household chores, for more than one hour. After that hour, he needs to lie down and rest.
- His doctors have told him that his condition will not get better. The best they can do is provide him with pain management. He said the only thing that might help is surgery. A referral was made in November 2018, but there is a 2 year waiting period to get an appointment with the spine clinic. He explained that this is an option that may or may not help. There is no guarantee. In fact, the result could be that he is paralyzed.
- He initially had pain in his left arm in January 2017. This has not progressed to both arms, hands and elbow.
- He experiences pain doing all of his activities of daily living. He cannot even copy a recipe because his hands are painful and go numb. He cannot hold a pen or carry a coffee cup. He needs to hold the cup with both hands.
- He tries to stay active and goes for a one hour walk twice a day. After each walk, he needs to lie down for half an hour to recover. He can stand for about one hour, but then also needs to go and lie down or sit down to recover.

[12] I believe that the Claimant was telling the truth when he gave his evidence. His answers to questions at the hearing were mostly consistent with what he was telling his doctors on different occasions in the past. When a person's story is consistent over a period, this can indicate that they are being truthful. He did not hesitate in answering questions and seemed to be making an honest effort to answer accurately. I conclude that he is credible.

[13] However, I do not just look at how he feels that his disability has an impact on his ability to work. He also needs to support his case with objective evidence. I have to consider what he says, along with what the doctors and other medical professionals say. I have to look at how consistent his evidence is with what is in the medical reports.

*The medical evidence supports that the Claimant is disabled*

[14] In July 2017, the Claimant saw Dr. Konasiewicz (neurosurgeon) because he had been having increasing neck and arm pain since January 2017.<sup>6</sup> Dr. Konasiewica noted that the Claimant had been suffering from axial neck pain and appeared to have left cervical radiculopathy. He also had sensory deficits in the left arm and had a positive cervical nerve root irritation sign (positive Spurling's test). He prescribed a muscle relaxant, physiotherapy and a home cervical traction device. Dr. Konasiewica said that if the Claimant's symptoms did not improve or they continued, nerve, joint and muscle blocks should be considered. The Claimant began physiotherapy treatment in October 2017,<sup>7</sup> but it did not improve his condition. Since November 2017, he has had injections in his spine every week. They provide him with 3-4 days where he is pain in reduced. However, this does not improve his function ability. If he does any task or even lifts a grocery bag, the benefit is gone. He explained that his pain is lessened, but his function ability is unchanged.

[15] The Claimant saw Imran Ibrahim (pain specialist) in November 2017.<sup>8</sup> He provided the following diagnoses:

- a) Moderate chronic mixed nociceptive and neuropathic pain
- b) Cervical and lumbar facet syndrome
- c) Degenerative disc disease lumbar spine
- d) Bilateral shoulders rotator cuff tendonitis

[16] Dr. Ibrahim described the Claimant's conditions and limitations. He said the Claimant had headaches and pain in his neck, shoulder, back, knee and elbow.

- i) **headaches** - He had headaches for 5-10 years which were intermittent lasting 4-8 hours.

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<sup>6</sup> Dr. Konasiewicz's report is at GD 2-71

<sup>7</sup> The physiotherapist's report is at GD 2-68

<sup>8</sup> Dr. Ibrahim's report is at GD 2-50 – GD 2-53

- ii) **neck pain** - He also had neck pain for 5-10 years. The pain is located on both sides of his neck and his symptoms have been increasing. The Claimant told Dr. Ibrahim that his pain was most bothersome in the morning, evening, during the night and with activities. Prior treatments which had provided some relief included rest, heat, injections, and physiotherapy.
  
- iii) **left shoulder pain** - The Claimant said his left shoulder pain started in 2016. The pain interfered with reaching, lifting, getting dressed and sleep. It was worse during the day and with activities. It did not interfere with his ability to use a computer. Rest, physiotherapy and injections had provided him with some benefit in the past.
  
- iv) **back pain** – The Claimant said he had back pain for more than 20 years. It was worse with twisting/rotating, sitting, standing, lifting and sleeping. He said he needs to take breaks from sitting and standing. His symptoms were most bothersome in the morning and with activities including prolonged sitting and standing. Rest and NSAIDs help.
  
- v) **knee pain** – Inner side left knee pain for about 7-9 months affect the Claimant. This was an aching burning feeling with was worse with activities.
  
- vi) **elbow pain** – The Claimant described left sided elbow pain affecting the tip of his elbow. He said the pain was worse with bending the elbow, resting on things and carrying items.

[17] Like the neurosurgeon, Dr. Ibrahim also recommended physiotherapy and nerve blocks, joint injections and trigger point injections. He also recommended modifications in activities of daily living according to response to chronic pain control. To me this means that the Claimant should do the activities that he is able to do with his pain levels. There is no suggestion that modifications in activities will provide the Claimant with work capacity or more function ability.

The Claimant had his first course of therapeutic epidurals in December 2017.<sup>9</sup> He continues to have injections on a weekly basis, two years later. Although his pain is lessened for several days each week, his function ability is not increased. In fact, the medical evidence supports that his condition has worsened.

[18] The Claimant was seen by Dr. Anastakis in August 2018 for hand cramping and pain which he had for 4 months.<sup>10</sup> The Claimant said the pain started on the left side and progressed to the right. There was no weakness or change in his hand function. He did have some numbness and a tingling sensation in his index, middle and ring fingers. It was Dr. Anatstakis' opinion that the Claimant's symptoms were more consistent with cervical spine radiculopathy and related to his cervical spine condition. It was recommended that he see a spine surgeon for consultation.

[19] 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>11</sup>. I considered the Claimant's functional limitations and whether he would have capacity for some other type of work than his previous job as a field serve specialist which was quite physically demanding.

[20] In a form completed for the insurance company on February 2, 2018, the family doctor said in an 8 hour work day, the Claimant could:

- a) climb, balance and stoop for up to 2.5 hours;
- b) kneel, crouch walk for up to 5.5 hours; and
- c) crawl, sit and stand for more than 5.5 hours.

This would suggest to me that the Claimant had capacity for some type of sedentary work, at least on a part-time basis.

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<sup>9</sup> The clinic note is at GD 3-18

<sup>10</sup> The report from the Hand Clinic is at GD 3-25

<sup>11</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33



[21] However, in a report completed by the pain specialist, Dr. Ibrahim three weeks later, the Claimant had much less physical capacity. Dr. Ibrahim said that by February 22, 2018, in an 8-hour day, the Claimant could:

- a) Climb, stoop, kneel, crouch, crawl, and reach 0 hours;
- b) He could walk and stand for 30 minutes; and
- c) Sit for up to 2.5 hours.

[22] I asked the Claimant what had changed in his condition in three weeks to explain this significant decrease in his function. He told me that there had been no change. He explained that at no time did he have capacity in 2018 to sit or walk for 5.5 hours in an 8-hour day. He explained that his primary care giver was Dr. Ibrahim whom he saw on a weekly basis for injections. He rarely saw his family physician, except for medication refills. I gave more weight to the functional limitations as described by Dr. Ibrahim. The Claimant had not seen his family physician for at least 3 months before he wrote his report in February. However, the Claimant had seen the Claimant on a regularly weekly basis at that time for at least 4 months. Also, Dr. Ibrahim's description of the Claimant's function ability is consistent with the description provided to me by the Claimant.

[23] I must assess the severe part of the test in a real world context<sup>12</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.

[24] Although the Claimant is only 49 years old, I do not find that he would be a candidate to retrain. He completed a GED, but has no further educational training. All of his jobs have been physically demanding jobs. They include filed service specialist, furniture mover and construction worker. These would provide no transferable skills when considering the Claimant's physical condition and limitations that prevent him from returning to any type of physically demanding job. I also considered that the Claimant's limited sitting capacity, 2.5 hours in an 8-hour day, would also need to be accommodated by a 30-60 minute break to lie down after each

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<sup>12</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

hour. It is unreasonable to expect any employer, in a real world to provide these accommodations.

[25] When I considered the disabling effect of his chronic pain, I was persuaded that he does not have work capacity for any occupation even a non-physical sedentary occupation. Given the medical evidence and the testimony of the Claimant, I find that he would not be a reliable employee in the context of the real world of work and is incapable regularly of working at any occupation or retraining.

### **Prolonged disability**

[26] A disability is prolonged if it goes on for a long period of time and looks like it will continue indefinitely, or will result in the person dying.<sup>13</sup>

[27] I do not find any evidence that would reasonably lead me to assume that the Claimant's condition will be resolving in the foreseeable future. The Claimant continues to experience the same symptoms of pain he has since at least 2017. Despite numerous investigations and weekly treatments for two years, there has been no improvement in his functional capacity. In fact, his condition, has worsened. Treatments today consist of pain management.

[28] I did consider that there is a surgical treatment possibility in the future. However, this is a referral to a spine clinic. There is no evidence that he will be a candidate for the surgery, or that it would improve his condition.

[29] For these reasons, I conclude that the Claimant's disability is prolonged, as well as severe.

### **CONCLUSION**

[30] The Claimant had a severe and prolonged disability in January 2017, when his pain increased to the point that he was no longer able to work in any capacity. Payments start four months after the date of disability, as of May 2017<sup>14</sup>.

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<sup>13</sup> This requirement is found at Section 54(2)(a)(ii) of the CPP

<sup>14</sup> Section 69 *Canada Pension Plan*

[31] The appeal is allowed.

Connie Dyck  
Member, General Division - Income Security