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

Citation: *SD v Minister of Employment and Social Development*, 2020 SST 1130

Tribunal File Number: GP-19-1069

BETWEEN:

**S. D.**

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: | Pierre Vanderhout |
| Claimant represented by: | Leo Dillon |
| Videoconference hearing on: | January 27, 2020 |
| Date of decision: | March 10, 2020 |

Canada

## DECISION

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

## OVERVIEW

[2] The Claimant was born in India in 1964. He came to Canada in 2004. He has not worked since August 1, 2002. He stopped working then as a general labourer (for a company called "X") because of a workplace knee injury. The Minister received the Claimant's application for the disability pension on September 28, 2015. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal. Another member of the Tribunal's General Division made a decision on October 29, 2018, but the Claimant appealed that decision to the Tribunal's Appeal Division. On June 21, 2019, the Appeal Division returned the matter to the General Division for a new hearing, as it found that the previous General Division member made an error in fact.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. More specifically, he must be found disabled as defined in the CPP on or before the end of the minimum qualifying period ("MQP"). The MQP calculation is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2004.

## PRELIMINARY MATTERS

[4] The Claimant filed a late document (indexed as "IS6") shortly before the hearing. This was a decision from another tribunal: while certainly not binding on the Tribunal, it contained potentially relevant information (including direct quotations from reports that were not in the Tribunal's file). The Minister was able to file a response (indexed as "IS7") to the IS6 document before the hearing. Accordingly, all documents up to and including IS7 were part of the record.

[5] As the Claimant can only speak a particular dialect of Punjabi, there have been multiple interpreter issues. While I only had to adjourn the hearing once, multiple adjournments were needed in the previous General Division matter. However, there did not appear to be any interpreter issues at the hearing on January 27, 2020. The Minister's representative also attended.

## ISSUES

[6] Has the Claimant had a severe disability since at least December 31, 2004?

[7] If so, was the Claimant's disability also prolonged by December 31, 2004?

## ANALYSIS

[8] Disability is defined as a physical or mental disability that is severe and prolonged.[1] A person is considered to have a severe disability if he 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. A person must prove, on a balance of probabilities, that his disability meets both parts of the test. If the Claimant meets only one part, he does not qualify for disability benefits.

### Has the Claimant had a severe disability since at least December 31, 2004?

[9] The Claimant has been severely disabled since June 2004. I will now explain why I came to this conclusion.

[10] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest or main impairment.[2] This is important, because the Claimant reports both physical and mental limitations.

[11] I must also assess the severe part of the test in a real-world context.[3] 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. This is also very important, as the Claimant has exceptional personal circumstances.

[12] The Claimant was 40 years old at his MQP date. He is 55 years old now. He only went to Grade 4 in India. Punjabi was the language of instruction. He speaks only the Malwai dialect of Punjabi, but cannot read or write much in that language. His dialect created problems at the

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[1] Paragraph 42(2)(a) of the *Canada Pension Plan*
[2] *Bungay v. Canada (A.G.)*, 2011 FCA 47
[3] *Villani v. Canada (A.G.)*, 2001 FCA 248

Tribunal on several previous occasions, as he was unable to communicate effectively with the Punjabi-speaking interpreters at the hearings. Despite several years of trying to learn English in a structured setting, he still can only understand a little bit. He cannot speak, read, or write in English. In fact, his ability to learn English appears to be severely limited.[4] In India, he only worked in farming. When he came to Canada, he worked initially in farming and tree planting. He then started working as a general labourer at the X factory around the year 2000. He also successfully completed roughly two weeks of lathe machine training after his MQP date, although it appears this was in a Punjabi-speaking environment.

[13] Without considering his medical conditions, the Claimant's limited education and work experience realistically only prepare him for low-skilled physical labour that requires little or no English or French ability. I do not find his limited lathe machine training to be significant, given its very short duration and the Punjabi-speaking environment in which it occurred. I cannot assume that a Canadian workplace will be Punjabi-speaking. I also question whether safe machine operation in Canada is possible without at least some English or French ability.

*The Claimant's injury and pre-MQP treatment*

[14] In August 2002, the Claimant had a medial meniscus tear in his left knee. His knee pain continues to this day, despite having arthroscopic surgery in December 2002. At the time, Dr. Thakkar (Family Physician) thought the Claimant would be off work for another four weeks, when modified employment could be considered.[5] He never returned to work. However, there are no medical documents from December 2002 until March 2004. At that time, the Claimant continued to complain of left knee pain, particularly with prolonged walking. Dr. Thakkar described "chronic pain".[6] The knee pain complaints continued through 2004, with depression mentioned by June 2004.[7] Dr. Thakkar treated the Claimant regularly.

*The Claimant's condition now*

[4] IS6-10 to IS6-11: while this is from a different tribunal's decision, that decision directly quoted a psychologist's Psycho-Vocational Evaluation. I have no reason to believe that the quote was inaccurate.
[5] GD2-53
[6] GD2-54 to GD2-56
[7] GD2-82 to GD2-86

[15] The Claimant lives in a house with his wife, his mother, and his two adult children. When asked how he has been spending his time since 2002, the Claimant said he simply sits, eats, and does nothing. He has no daily schedule. He rarely leaves home: he might get some groceries with his children, and he goes to the temple once a month. He used to go to the temple every day, but stopped because people kept asking questions about his condition. As his mother is also home all day, he spends time with her. When asked whether he had anybody else to talk to, the Claimant said he did not like talking to people. He has felt this way since the accident. He takes depression medication, which makes him sleepy. He has no friends outside his home, as "my friends all left me". He does not seem to have any other extended family in Canada, but has brothers in India.

[16] The Claimant is afraid something bad will happen to him. He has sleeping problems, but sometimes has a full night's sleep. Medication helps this a little bit. He will nap during the day. He does not shave, but can have a shower and make some food. He still has pain all the time in his left knee: sometimes the pain lessens, but it is always there. His pain medication takes away his appetite. He also has back pain, if he sits for a long time or does not do anything. It is unclear how long this back pain has existed. He said he has had it since he started walking with a cane: he said this was after his December 2002 surgery. He has used a cane consistently since then, but sometimes tries to walk without it. When he does not use his cane, he has to hold on things. However, he also suggested the back pain only started "two or three years ago", when he went for an MRI. Other than headaches, he reported no other pain or illnesses.

[17] The Claimant's only current treatment is by Dr. Thakkar and Dr. Panjwani (Psychiatry). He sees Dr. Panjwani every 2-8 weeks. Dr. Thakkar referred the Claimant to Dr. Panjwani because he was "doing nothing, sitting at home, and feeling sad and bad". Dr. Thakkar made that referral in December 2005.[8] Dr. Panjwani first saw the Claimant in January 2006, and noted the Claimant had been feeling depressed for about 2 years.[9]

[18] The most recent medical document is an October 2017 letter from Dr. Thakkar. Dr. Thakkar said the Claimant could not work because of knee pain and chronic pain syndrome. Dr.

[8] GD2-93
[9] GD2-58

Thakkar also gave diagnoses of chondromalacia patella and major depressive disorder, and said that depression also contributed to his inability to work.[10]

[19] Dr. Thakkar said the Claimant was always in constant pain with his left knee, and could not walk for more than one block. He was also very anxious and depressed, and could not do any household chores. If he tried to do any work, he got anxious and had palpitations with chest discomfort. He could not do banking or shopping because of his anxiety. Dr. Thakkar saw him every 4-8 weeks since the 2002 accident: he always had left knee pain and had recently developed low back pain. He walked with a limp and always appeared depressed. He was sad because he could not work and his wife was fully running the household.[11]

*Is the Claimant severely disabled now?*

[20] I am satisfied that the Claimant is severely disabled now. His personal characteristics make him suitable for only a very narrow range of unskilled physical jobs. His physical limitations, particularly when combined with his depression, leave him with no work capacity for such jobs. This means he is currently severely disabled. The more difficult question is whether the Claimant has been severely disabled since at least his MQP date of December 31, 2004.

[21] Three factors complicate this assessment. I will look at each of these factors separately, before deciding whether the Claimant had any post-MQP work capacity.

*1. The nature of the Claimant's conditions around his MQP date*

[22] The nature of the Claimant's conditions was different in 2004. While his knee pain has existed since the 2002 injury, his back pain does not appear to have existed until a couple of years ago.[12] Although depression was mentioned on a couple of occasions in 2004, no psychiatric referral was made until December 2005. Thus, while I need to consider the combined impact of all his conditions, his non-knee complaints may not have contributed as much before 2005 as they later would. By January 2006, his Global Assessment of Functioning ("GAF")

[10] GD3-2 to GD3-3
[11] GD3-2 to GD3-3
[12] In 2017, at page GD3-2, Dr. Thakkar affirmed the recent emergence of back pain.

score was only 35[13]: this typically means a complete inability to work from a psychiatric perspective. I find that, up to the Claimant's MQP date, his main condition would have been chronic knee pain with an increasing contribution by his depression symptoms.

*2. The lack of medical documents from late 2006 to late 2015*

[23] There are almost no medical documents from late 2006 to late 2015. During that time, I see 2008 reports from Dr. Thakkar and Dr. Panjwani, but little else.[14] However, as I will explain, this lack of documents is not fatal to the Claimant's appeal.

[24] In May 2016, Dr. Thakkar said that there had been no change in the Claimant's conditions (left knee pain and depression) since Dr. Thakkar's letter of May 27, 2008. In that 2008 letter, Dr. Thakkar said the Claimant was unable to return to work.[15] At the hearing, the Claimant said he saw Dr. Thakkar every month or two between June 2008 and September 2015. In 2017, Dr. Thakkar affirmed that he had seen the Claimant every 4-8 weeks since the 2002 accident.[16] While it would have been better to have Dr. Thakkar's notes from 2008 forward, I accept that treatment continued during that period. This gives credibility to Dr. Thakkar's May 2016 "summary".

[25] The lack of documents from Dr. Panjwani from June 2008 to September 2015 is also regrettable, but does not prevent a finding of severity. In June 2008, Dr. Panjwani found the Claimant's major depressive disorder and chronic pain disorder to be severe and prolonged, with a GAF score of 40. In October 2015, Dr. Panjwani said he had treated the Claimant every 4-6 weeks since June 2008.[17] He also said the Claimant's mental and physical disorders remained severe and prolonged, despite extensive forms of treatment.[18] These statements satisfy me that the Claimant was treated but had no significant improvement in his condition.

*3. The nature of the Claimant's post-MQP retraining and education*

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[13] GD2-58
[14] These reports begin at pages GD2-52 and GD2-110 respectively.
[15] GD2-51 and GD2-52
[16] GD3-2
[17] GD2-110 to GD2-112
[18] GD2-106 to GD2-109

[26] The Workplace Safety Insurance Board provided extensive retraining after the Claimant's MQP date. This appears to have lasted for several years. Once again, relevant documentary evidence is scarce, although the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") seems to have had access to many more documents.[19] Dr. Thakkar's clinical notes refer to ESL courses in 2006 as well as "upgrading at school" in May 2008.[20] Dr. Panjwani did not mention any retraining in his June 2008 report.[21]

[27] According to the WSIAT's January 2018 decision, the Claimant started to retrain for a parking lot attendant job in August 2006 and continued through 2009 with additional training in English. However, this occupation was later deemed unsuitable. He made little progress with the English language, which was a major component of the retraining program. He started to train for light electronics assembly in January 2010. This training ended in February 2010. The Claimant then did further training (in electronics/light assembly) from November 2013 to August 2014. Once again, he made little progress with English.[22] Dr. Luther (Psychologist) predicted this in 2006. Dr. Luther said the Claimant had "no areas of strength", and had "very low" test results in intellectual functioning, memory, attention span, and other indicators. Dr. Luther thought the Claimant would require "years of ESL Training before he can reach the Grade 5 level". Dr. Luther did not think it was possible for him to complete upgrading to the high school level, because of his intellectual limitations.[23]

[28] The WSIAT's decision and its findings of fact do not bind me. I also am not bound by the WSIAT's summary of the Claimant's training, and I would normally be reluctant to assign much weight to it. However, I find it consistent with the oral evidence and the limited documentation in the Tribunal file. The WSIAT also directly quoted from Dr. Luther's reports, which lessens the concerns I would usually have about relying on that particular evidence.

*The Claimant's post-MQP work capacity*

[19] A January 2018 WSIAT decision refers to many documents that are not in the Tribunal file. See IS6-2 to 12.
[20] GD2-52, GD2-91, and GD2-95 to GD2-97
[21] GD2-110 to GD2-112
[22] IS6-4 to IS6-5, and IS6-9 to IS6-10
[23] IS6-10 to IS6-11

[29] The narrative medical evidence shows that the Claimant did not have any work capacity from at least January 2006 forward. In January 2006, Dr. Panjwani diagnosed a major depressive disorder (severe), with agitation, as well as a chronic pain disorder with both psychological features and a general medical condition (chondromalacia). The Claimant's continuous knee pain stopped him from working, and he had felt depressed for about two years. He had a recurrent severe headache, fragmented and non-restorative sleep, loss of interest in things, depressed mood, difficulty concentrating. He felt hopeless, helpless, and worthless. He was unable to enjoy life, avoided going out, and was forgetful and absentminded. He had poor executive functioning and only partial insight. His GAF score was only 35.[24]

[30] In May 2008, Dr. Thakkar said depression and knee pain were the primary causes of the Claimant's inability to work.[25] In June 2008, Dr. Panjwani said the Claimant had difficulty sitting or standing for any prolonged period. The 2006 symptoms were essentially still present. In addition, he avoided social activities, was relatively housebound, had trouble making decisions, cried easily, was very emotional, had a low frustration tolerance, and lacked the motivation to do anything. His cognitive functions were impaired. Dr. Panjwani affirmed the earlier diagnoses, noting that the major depressive disorder was a continuous single episode, and reported a GAF score of only 40. There was no subjective improvement, and the symptoms had persisted despite medication. His pain was persistent, he was still anxious and depressed, and he was totally disabled from any employment.[26]

[31] In October 2015, Dr. Panjwani reported similar diagnoses: major depressive disorder (severe, recurrent) with generalized anxiety, and a chronic pain disorder associated with both psychological features and general medical conditions. The Claimant remained totally disabled from any gainful occupation.[27] In May 2016, Dr. Thakkar affirmed that the Claimant had been off work since 2002 because of left knee pain and depression. There had been no change in his conditions, and he remained disabled.[28]

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[24] GD2-58
[25] GD2-52
[26] GD2-110 to GD2-112
[27] GD2-106 and GD2-109
[28] GD2-51

[32] In October 2017, Dr. Thakkar said the Claimant had not been able to work since his workplace knee injury due to chronic pain, major depressive disorder, and chondromalacia patella. His left knee was in constant pain and he could not walk more than one block. He was still very anxious and depressed, and could not do household chores. He got anxiety and palpitations with chest discomfort with any attempt to work. He depended on his wife and children for his banking and shopping. He always appeared depressed and expressed sadness because of his inability to work and to contribute to the running of the household. Dr. Thakkar said he was not employable due to depression and chronic pain syndrome.[29]

[33] As for the period up to January 2006, I must rely on Dr. Thakkar's clinical records. These are often difficult to read. On May 28, 2004, the Claimant had pain walking or sitting in a car for more than 30 minutes. He could not sit for more than two hours. In June 2004, he had pain walking for more than two blocks or during a bumpy car ride. He could not return to his job. He also felt depressed.[30] His knee pain persisted through the rest of the year, and he was still depressed in December 2004. He was taking Paxil by this time.[31]

[34] The Claimant reported headaches and stress to Dr. Thakkar in early January 2005. Pain complaints continued through 2005. He also frequently complained of headaches and depression. Other 2005 complaints included lack of sleep, being unable to climb steps, being tired and unhappy, fear, confusion, stress, and low motivation.[32]

[35] There was little detailed evidence about the number of hours spent by the Claimant in his various retraining programs. However, as noted by Dr. Luther, he appears to have made little progress, particularly with the English instruction that formed the core of those programs. A key part of work capacity is the ability to accomplish something. The Claimant has demonstrated little of this, regardless of how much time he spent in retraining programs.

[36] The above evidence satisfies me that the Claimant lacked work capacity from at least June 2004 forward. In particular, he lacked work capacity for low-skilled physical labour that required little or no facility in either English or French. However, I must also consider oral

[29] GD3-2 to GD3-3
[30] GD2-55 and GD2-82
[31] GD2-84 to GD2-86
[32] GD2-85 to GD2-88 and GD2-93.

evidence from the Claimant, as well as a 2005 notation from Dr. Thakkar, that suggest the Claimant may have had some post-MQP work capacity.

[37] In general, the Claimant denied having work capacity. However, he also admitted that he attended retraining for 2-3 years, and attended ESL classes 2 or 3 days a week after Dr. Thakkar recommended them in 2005. He also said he trained for two weeks with a lathe machine; the presence of Punjabi speakers made this easier. He shifted between sitting and standing positions. However, after completing the training, he said that he received no calls for employment. He believed he could have done this work at the time, but could not do it now because he cannot sit or stand for long and always has headaches. I asked if he could have done this kind of work at any time since 2002. He said he could have done a light job then, but could not do it now. It was not clear when exactly he might have had such capacity.

[38] In July 2005, Dr. Thakkar said the Claimant could do a "sitting down job", although he was under stress, was not happy with life, and had knee pain.[33] Along with the Claimant's oral evidence about the lathe machine, this suggests some post-MQP work capacity.

[39] I must consider this apparent capacity in the context of the Claimant's personal characteristics, as required by the Federal Court of Appeal in *Villani*.[34] I have already found that the Claimant's limited education and work experience realistically only prepare him for low-skilled physical labour that require little or no facility in either of Canada's official languages.

[40] Disregarding his language issues, the Claimant may once have had some post-MQP capacity for light assembly work that allowed him to shift between sitting and standing. However, I find that this was contingent on being in a Punjabi-speaking environment (and ideally in his own dialect). It is unlikely that Dr. Thakkar considered the Claimant employable in an English-speaking environment, as he had previously encouraged the Claimant to take an ESL class.[35] I cannot apply the *Villani* decision but disregard the Claimant's inability to communicate in English or French. I conclude that he has not had any work capacity since June 2004. This means he has been severely disabled since June 2004.

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[33] GD2-88
[34] *Villani v. Canada (A.G.)*, 2001 FCA 248
[35] GD2-85

[41] This situation is very unusual. Somebody with similar medical concerns but more language or intellectual ability would likely have had some post-MQP work capacity. However, I cannot consider a “typical” applicant. The binding *Villani* decision requires me to consider the Claimant personally. Otherwise, it would be an error in law.

**Was the Claimant's disability also prolonged by December 31, 2004?**

[42] Nobody has suggested that the Claimant's disability will result in his death. This means his disability is only prolonged if it is likely to be long continued and of indefinite duration.

[43] The Claimant consistently made pain complaints both before and after his MQP date. Dr. Thakkar prescribed Paxil for depression before the MQP date, and made a psychiatric referral in 2005.[36] The Claimant did not think he could do any work. He still takes depression medication, but it tires him and makes him sleepy. He has recently developed back pain, which suggests that this chronic pain syndrome is worsening rather than improving. He continues to have headaches. He denied refusing any recommended treatments, adding that "I want to get better".

[44] Dr. Thakkar has treated the Claimant since 2001. Dr. Panjwani has treated him since January 2006. While Dr. Thakkar initially hoped that the Claimant would return to work, he later gave little indication of any such possibility. The only notable exception was Dr. Thakkar's July 2005 comment about "sitting down work", but I already addressed this in my assessment of severity. Otherwise, these doctors have consistently described his disability as prolonged.

[45] In June 2008, Dr. Panjwani said the Claimant had made no subjective improvement after two years of treatment. His symptoms had persisted and his long-term prognosis was poor. Dr. Panjwani affirmed that the Claimant's long-term prognosis was poor in October 2015, with respect to both his mental and physical disorders.[37] In May 2016, Dr. Thakkar affirmed that the Claimant remained disabled, and there had been no change in the Claimant's condition since Dr. Thakkar's May 2008 letter.[38] In October 2017, Dr. Thakkar affirmed the Claimant's ongoing disability since his work injury, despite being fully investigated and treated by specialists.[39]

[46] It has been nearly 18 years since the Claimant's workplace injury. He has not done any meaningful work since then. I also accept that his depression emerged because of his inability to continue working. On a balance of probabilities, I find that his disability is likely to be long

[36] GD2-84 to GD2-86, and GD2-93
[37] GD2-109 and GD2-112
[38] GD2-51
[39] GD3-2 to GD3-3

continued and of indefinite duration, and has been since at least June 2004 (when his depression first emerged). His disability has therefore been prolonged since June 2004.

## CONCLUSION

[47] The Claimant has had a severe and prolonged disability since June 2004. However, to calculate the pension payment date, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.[40] The Minister received the application in September 2015, so the deemed date of disability is June 2014. Payments start four months after the deemed date of disability, as of October 2014.[41]

[48] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security

[40] Paragraph 42(2)(b) of the *Canada Pension Plan*
[41] Section 69 of the *Canada Pension Plan*