



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *W. M. v Minister of Employment and Social Development*, 2020 SST 441

Tribunal File Number: GP-19-900

BETWEEN:

**W. M.**

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: Allison Schmidt

Teleconference hearing on: April 23, 2020

Date of decision: April 30, 2020

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant stopped working in October 2016 as a field operator for X because of severe back pain. He had back surgery in October 2016 and developed a complete loss of dorsiflexion with a left foot drop. The Claimant also owns a farm that generates income. The Minister received the Claimant's application for the disability pension in June 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

## **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, 2021.

[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's MQP date is in the future, I must decide if he is disabled on or before the date of the hearing (April 23, 2020).

[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

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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.

time. But, the words “severe” and “prolonged” have special meanings in this area of law.

### **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. 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 acknowledges the Claimant’s symptoms. The Minister believes the evidence does not show these conditions are severe. This means that the Claimant would have capacity to work. The Minister says that the Claimant continued to make business decisions regarding his farming operation. He had gross farming income more than \$100,000 in 2017 and more than \$200,000 in 2018.<sup>5</sup> That is why his application was refused.

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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*.

<sup>5</sup> This information from CRA is at GD 4-15

[10] The Tribunal's file indicates that the Claimant presently has numerous conditions. 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 regularly do some kind of work that is substantially gainful<sup>6</sup>, then he is not entitled to a disability pension.

***The medical evidence supports that the Claimant is disabled***

[11] Dr. Swiegers (family doctor) has been treating the Claimant since 2011 when he had his initial back injury. She said that he had several interventions since that injury for a lumbar-sacral radiculopathy. This radiculopathy progressed to the point where he developed complete loss of dorsiflexion with a left foot drop in 2017. After his back surgery (October 2016) the Claimant did not recover any of his movement or strength in his left leg. Dr. Swiegers said that the Claimant also has the added complication of complex regional pain syndrome with swelling, impaired temperature control and circulation in his whole lower left leg. It was Dr. Swiegers' opinion that the Claimant was completely unable to function in his capacity as a farmer<sup>7</sup> and any job that would require him to walk, stand or sit for more than 30 minutes. She explained that the Claimant's lower limb weakness was profound. He had bilateral leg atrophy with numbness. His neuropathic pain with allodynia and hyperesthesia prevented most activities of daily living.<sup>8</sup> She said that the referral to the neuro-surgeon was a "last ditch effort" for pain management. Dr. Swiegers said that the length of time the Claimant's disability had been progressing and the degree of muscle atrophy would not be corrected with surgery.

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<sup>6</sup> This is explained in a Federal Court of Appeal decision called *Klabouch v Canada (MSD)*, 2008 FCA 33

<sup>7</sup> Dr. Swiegers' letter is at GD 6-7

<sup>8</sup> Dr. Swiegers' May 2019 letter is at GD 2-70

[12] A letter from Dr. Wardell of the Pain Clinic in June 2018 say that the Claimant may have significant spinal stenosis.<sup>9</sup> In clinic notes of May 2019,<sup>10</sup> it is noted that the Claimant has a great deal of pain and weakness in both of his legs. He has muscle spasms and neuropathic pain secondary to the spinal stenosis. He has to lay down quite often to relax his back.

[13] Dr. Pillay (neurologist) said in April 2019<sup>11</sup> that nerve studies confirmed a left peroneal motor neuropathy. Needle studies confirmed a peroneal nerve injury, showing positive sharps fibrillation potentials. Dr. Pillay recommended ongoing rehabilitation and physiotherapy. The Claimant's symptoms of pain and hyperesthesia were suggestive of chronic regional pain syndrome.

[14] The Claimant testified that he has had psoriasis for about 2 years. This affects his fingers, elbows and toes. He gets injections every 6 months from his specialist. He continues to have intermittent pain and difficulty using his hands. The Claimant said he continues to receive physiotherapy and acupuncture weekly. He said this relieves the pressure on his legs, but it only lasts for a few days. He also receives massage therapy, but this treatment also only provides partial relief for a few days.

[15] The medical evidence supports that the Claimant has limitations as a result of his lower limb weakness and neuropathic pain. There is no doubt he would be able to return to any type of physically demanding work such as a field operator or a farmer.

[16] I must assess the severe part of the test in a real world context<sup>12</sup>. This means that I consider the Claimant's personal circumstances such as age, level of education, language proficiency, and past work and life experience in combination with the health

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<sup>9</sup> This letter is at GD 6-12

<sup>10</sup> The clinic notes are at GD 5-5

<sup>11</sup> Dr. Pillay's report is at GD 5-8

<sup>12</sup> *Villani v Canada (AG)*, 2001 FCA 248

condition and resulting limitations.<sup>13</sup> The Claimant is 59 years old. He has a grade 10 education and grade 12 upgrading. He has very minimal work experience and his work history consists of physical labour only. The Claimant worked as a heavy equipment operator for 21 years, as a gravel truck driver and as a field operator. The medical evidence including the opinion of his family doctor, all support that he would be unable to return to physical labour. I find that his limited work experience, age and lack of education would all be a deterrent to the Claimant.

***Is the Claimant's farming activity evidence of work capacity?***

[17] The Claimant's farm has gross farming income of \$138,326.00 in 2017 and \$227,201 in 2018. According to the jurisprudence, the profitability of a Claimant's business venture is not necessarily an indicator of his or her capacity to work. This leaves the evidence as to the Claimant's functional restrictions. The question remains whether the receipt of high gross earnings is determinative of an ability to regularly pursue substantially gainful employment. I find that it is not. To rely upon the gross earnings does not take into account the Claimant's capacity to work.

[18] The Minister has argued that the Claimant is involved in the operation of his farm and this supports that he has capacity to work. At the hearing, the Claimant provided further explanation about his role in the farming operation.

[19] In a Self-Employment Questionnaire,<sup>14</sup> the Claimant said his farm was a family farm. His wife, son, daughter all worked to complete tasks required to do the work. They get the farm prepared to seed the crop and do what is needed to complete tasks. He said he was not working in the business because of his medical condition. His family runs it. He can make decisions and move things when he feels able.

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<sup>13</sup> *Bungay v Canada (AG)*, 2011 FCA 47

<sup>14</sup> The questionnaire is at GD 2-99

[20] In January 2020, the Claimant told his representative that occasionally he will move machinery from one field to another. Sometimes he is only able to move it for a few minutes and other times for an hour. He said that there were days when he could not do anything and his ability varied from day to day. In December 2018<sup>15</sup>, the Claimant said that his son ran the entire farm with help from the Claimant's wife and a hired hand. The Claimant explained that he cannot stand or walk without difficulty. He needs to rest by laying down frequently during the day. He said he is not reliable as some days he can drive a tractor for a few minutes and some days not at all. The physical work is done by his son and hired help. This has consistently been the Claimant's evidence and I found no reason to doubt his testimony.

[21] The Minister has also argued that the Claimant continued to be involved in the decision-making and was active in managing farm. The Claimant provided more clarification as to what his role was in the management and decision making of the farming operation. He explained that the land and equipment remains in his and his wife's name, as does the debt. It is the plan that the Claimant's son will eventually own the farm. Presently, his son operates the farm and makes all of the daily decisions. His son suggests when seeding and harvesting should start. His son decided the combine needed to be replaced. His son decided what type of grain to plant. The Claimant's son received 60% of the farming revenue and the remaining 40% is given to the Claimant to apply to farming debt and equipment. The Claimant explained that he is not making the decisions regarding the operation of the farm, but because he has a financial interest in the farm, particularly the debt, his son runs his decisions by the Claimant for approval. He testified that his son has little prior experience with farming and he relies on his dad's expertise.

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<sup>15</sup> The questionnaire is at GD 2-31

[22] Although the Claimant has a financial interest in the farm and provides advice to his son, I do not find that this is evidence of work capacity.

***The Claimant's disability is prolonged***

[23] 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>16</sup>

[24] 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 prognosis is poor and there is no expectation that his condition will improve and no further treatment options planned.<sup>17</sup> Despite numerous medications and treatments, his condition has not improved enough to allow him to return to gainful employment.

[25] The Claimant has done what his doctors told him to do, but he has not improved. This indicates to me that his condition will continue indefinitely. For this reason, I conclude that his disability is prolonged, as well as severe.

**CONCLUSION**

[26] The Claimant had a severe and prolonged disability in October 2016 when he was no longer able to work. However, to calculate the pension payment date, the Claimant cannot be deemed disabled more than fifteen months before the Minister received the disability pension application<sup>18</sup>. The Minister received the application in June 2018 so the deemed date of disability is March 2017. Payments start July 2017, four months after the deemed date of disability<sup>19</sup>.

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<sup>16</sup> This requirement is found at Section 54(2)(a)(ii) of the CPP

<sup>17</sup> The medical report is at GD 9

<sup>18</sup> Section 42(2)(b) of the *Canada Pension Plan*

<sup>19</sup> Section 69 of the *Canada Pension Plan*



[27] The appeal is allowed.

Connie Dyck  
Member, General Division - Income Security