



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *TD v Minister of Employment and Social Development*, 2020 SST 1022

Tribunal File Number: GP-19-138

BETWEEN:

**T. 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: Nicole Zwiers

Teleconference hearing on: April 21, 2020

Date of decision: May 4, 2020

## **DECISION**

[1] The Claimant continues to be entitled to a Canada Pension Plan (CPP) disability pension. The claimant's disability eligibility did not cease at any time since his deemed date of disability of December 2008 and he continues to have a severe and prolonged disability.

## **OVERVIEW**

[2] The Claimant has Guillan-Barr Syndrome (GBS) and stopped working in December 2008 when he was hospitalized as a result. The Minister received the Claimant's application for the disability pension on January 29, 2010. The Minister allowed the application and determined that the Claimant had a severe and prolonged disability with a deemed date of onset of December 2008.

[3] The Claimant entered rehabilitation in March 2009 after he was released from the hospital in order to recover from GBS. The Claimant started working on a part-time basis in March 2014 and has continued to work for his long-time employer. By way of decision dated April 26, 2018 the Minister advised the Claimant that he was no longer disabled as of the end of June 2014.<sup>1</sup> The Minister maintained the decision on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] The Claimant's common law spouse, G. H. testified at the hearing.

## **ISSUE(S)**

[5] Did the Claimant continue to be disabled within the meaning of the CPP ?

## **ANALYSIS**

[6] Disability is defined as a physical or mental disability that is severe and prolonged<sup>2</sup>. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of

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<sup>1</sup> GD2-40

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

probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **Severe disability**

#### ***The Defendant continues to have a severe disability***

[7] The Claimant has a severe disability. Although he recovered from the most severe symptoms of GBS including becoming a quadriplegic, he continued to experience extreme fatigue. Following his hospitalization the Claimant was in rehabilitation from March 2009 through to July 24, 2009. The Claimant applied for CPP disability benefits on January 29, 2010 and he was found to have a severe and prolonged disability with a deemed date of disability of December 2008, the date when he had stopped working.

[8] The Claimant received CPP disability benefits until April 2017 when payments ceased.<sup>3</sup> The Minister seeks repayment by the Claimant of an overpayment the Minister claims represents CPP disability payments to the Claimant of \$38,386.14 from July 2014 to April 2017 when the Minister says the Claimant was no longer disabled by reason of his return to work.<sup>4</sup>

[9] The Claimant made significant improvements in his symptoms of GBS although he still has the diagnosis. The Claimant's physician felt that the Claimant could attempt to return to work with his long-time employer's gradual return to work plan. The Claimant returned to work for a 3-month trial basis in March 2014, working 4 days a week, 4-5 hours per day. The Claimant has consistently maintained this work since March 2014 and currently works 5 days a week, 3-4 hours per day.

[10] There is reference in the documents filed with the Tribunal of a report from Dr. Fleming dated July 13, 2017 indicating that the Claimant's residual effect of GBS is profound fatigue that has persisted since his initial diagnosis of GBS in 2008. Dr. Fleming noted that the Claimant had resumed work on reduced hours to accommodate his fatigue. Dr. Fleming indicated that this is a chronic condition for the Claimant.<sup>5</sup> The reference to medical documents filed with the Tribunal

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<sup>3</sup> GD2-71

<sup>4</sup> *Ibid*

<sup>5</sup> GD2-65

support the Claimant's testimony that he was diagnosed with GBS in 2008, has neurological indicators of GBS and continues to have symptoms of severe fatigue although he has recovered from the paralysis he initially experienced.<sup>6</sup>

[11] Importantly, the Claimant works for his long-time employer, X, of over 30 years. The Claimant, previous to his GBS diagnosis and work stoppage as a result of the illness, had been a reliable mechanic for the same employer for over 30 years. When the Claimant attempted a return to work in March 2014, he was not able to work as a mechanic due to his disability but his employer asked if he would supervise the other mechanics. It is this supervisory work that the Claimant has done and continues to do since he returned in March 2014.

[12] At first blush, it may appear that the Claimant's consistent employment since March 2014 is evidence of his ability to regularly engage in substantially gainful employment. The Claimant has earned the following income: 2014 - \$58,210; 2015 - \$46,900; 2016 - \$49,000; and 2017 \$40,000.<sup>7</sup> The Claimant testified that his income for 2017 up to the present time continues to be \$40,000. The position taken by the Minister is that this income is evidence of an ability to work and that the Claimant was no longer disabled as of the end of June 2014.

[13] The Claimant testified that the X store changed hands and his income in 2014 reflects additional payments in vacation pay that the Claimant was paid by the seller. The Claimant further testified that he has known the new owners of the X store for many years as well and his conditions of employment have remained the same despite the change in ownership. The Claimant testified that his presence seems to help keep things running smoothly with the mechanics he supervises because everyone has known him for so many years. His employer is happy with this outcome and the Claimant has continued his employment despite his limitations and need for many hours of sleep following 3-4 hours of work.

[14] Based on the evidence before me, I find that the Claimant remains disabled continuing as he does to experience significant fatigue. I further find that the Claimant is working for a benevolent employer and the work he is doing is not representative of work he could do for any other employer. The Claimant testified that his employer is very accommodating and, as noted

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<sup>6</sup> *Ibid*

<sup>7</sup> GD2-51

above, finds that the mechanics the Claimant supervises work better with the Claimant as the supervisor because the Claimant is well respected at the workplace having worked there for so many years. The employer is willing to let the Claimant take breaks whenever he wants and the Claimant can sit or stand as he wishes while supervising.

[15] However, the Claimant and Ms. G. H. separately testified that when the Claimant returns home from working each day, he immediately goes for a nap that lasts anywhere from 3 to 5 hours. The Claimant testified that he does not eat or do anything else when he returns home from work as he is so exhausted he must lie down. Ms. G. H. testified that the Claimant, despite sleeping for hours during the day, has no difficulty sleeping the entire night.

[16] The Claimant testified that the optimal recovery for GBS symptoms is within the first 5 years of diagnosis. The Claimant has made maximum recovery and his physician has told him he will not recover any further. The Claimant testified that he feels much better since his initial diagnosis and hospitalization in December 2008. However, his continuing symptoms of extreme fatigue and sore legs prevent him from doing any household chores of any kind or from doing anything else other than working 3-4 hours per day.

[17] The Claimant was initially found to have met the test for severe disability and was found to be entitled to CPP disability benefits with a deemed date of disability of December 2008. Although the Claimant has improved through rehabilitation and made best efforts to return to part-time employment with his long-term employer, he has never ceased to be severely disabled. Therefore, I rely on the finding that the Claimant had a severe disability following his application in January 2010 with a deemed date of disability of December 2008.

[18] Further, I find that the Claimant continues to have a severe disability and is not able to work for any other employer. The Claimant has a benevolent employer who is willing to accept the Claimant working within the limits of his continuing disability. The Claimant's ability to work for a benevolent employer cannot be confused with the Claimant's ability to work generally in a competitive work environment. I must assess the severe part of the test in a real world context<sup>8</sup>. When I consider that the Claimant must nap during the day from 3-5 hours

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<sup>8</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

following his work of 3-4 hours, working for a benevolent employer, and that he is unable to do any household chores of any kind, I do not find that the Claimant can work in a real world context. The Claimant remains regularly incapable of engaging in substantially gainful employment despite the generosity of his long-term employer.

[19] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition<sup>9</sup>. For the reasons stated, I do not find that there is work capacity. The Claimant has been able to rely on his many years established as a good employee and his long-term employer finds the Claimant's reputation is beneficial to the supervision of mechanics in these unique circumstances.

### **Prolonged disability**

[20] The Claimant's GBS has been long continued and is of indefinite duration. The Claimant has recovered to maximum potential but continues to suffer from fatigue and sore legs. He takes numerous medications to lessen the symptoms of GBS but he is not expected to recover or improve now or in the future. The Claimant continues to see his physician regularly for prescription refills although there is no further rehabilitation that would assist the Claimant.

[21] I find that the Claimant continues to have a prolonged disability. Despite his re-entry into the workforce at his long-time employer, I find that the Claimant has not ceased to have a prolonged disability since he was originally determined to have a severe and prolonged disability by the Minister with a deemed date of disability of December 2008.

### **CONCLUSION**

[22] The Claimant had a severe and prolonged disability in December 2008 when he first became hospitalized for GBS. The Claimant has continued to have a severe and prolonged disability despite his return to work for his long-time employer. The Claimant's employer is a benevolent employer and the fact that the Claimant has returned to work for this employer in

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<sup>9</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

March 2014 to the present is not indicative of the Claimant's ability to regularly pursue and substantially gainful employment. Accordingly, the Claimant's entitlement to CPP disability benefits has not ceased at any time and the Claimant continues to be disabled within the meaning of the CPP.

[23] The appeal is allowed.

Nicole Zwiers  
Member, General Division - Income Security