



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *HA v Minister of Employment and Social Development*, 2020 SST 1135

Tribunal File Number: GP-19-1601

BETWEEN:

**H. A.**

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: Shannon Russell

Claimant represented by: Michael Salehi

Teleconference hearing on: April 23, 2020

Date of decision: June 4, 2020

## **DECISION**

[1] The Claimant is not entitled to Canada Pension Plan (CPP) disability benefits because the evidence does not show that his disability is severe.

## **OVERVIEW**

[2] The Claimant is a 38-year-old man who was injured in a motor vehicle accident (MVA) in February 2014. He applied for CPP disability benefits in March 2017, and in his application he reported that chronic back pain prevents him from working. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

## **BACKGROUND**

[3] The SST scheduled a hearing for May 7, 2019. Neither the Claimant nor his then representative attended the hearing. The Tribunal Member determined that the Claimant had received notice of the hearing, and so he chose to proceed in the Claimant's absence. That member decided that the Claimant was not entitled to disability benefits because his disability was not severe.

[4] The Claimant appealed that decision to the SST Appeal Division. In September 2019, the Appeal Division allowed the appeal, finding that the General Division had failed to observe a principle of natural justice when it decided the appeal without the Claimant having had an opportunity to present his legal case. The Appeal Division referred the matter back to the General Division for reconsideration.

## **PRELIMINARY MATTERS**

[5] I scheduled this appeal to be heard by teleconference on April 23, 2020. On the date of the hearing, the only person who attended the hearing (other than me) was the Minister's representative, Alexandria Dejonge.

[6] Neither the Claimant nor his representative attended the scheduled hearing. A tribunal registry officer contacted the Claimant's representative by telephone and by email to remind him of the teleconference. We have no telephone number for the Claimant. The Minister's representative and I waited on the telephone for 30 minutes, but the Claimant's representative did not reply to the messages, and neither he nor the Claimant joined the teleconference.

[7] After 30 minutes had passed, I asked the Minister's representative to state her position on whether the hearing should proceed in the Claimant's absence. She deferred to me. Given that the Claimant was not present to testify, the Minister's representative had nothing to add to her written submissions.

[8] I said that we would end the teleconference, and that I would allow the Claimant and his representative some time after the hearing to contact the Tribunal Office to explain their absence. I also said that, depending on what I heard from either the Claimant and/or his representative, the Minister would receive either a new Notice of Hearing or my decision on the merits. The Minister's representative agreed with my approach.

[9] In the days following the hearing, I did not hear anything from either the Claimant or his representative. On May 11, 2020, I wrote by email to the Claimant's representative and summarized what had happened during the hearing of April 23, 2020. I also wrote that if there were special circumstances that prevented the Claimant or his representative from attending the hearing, the representative should notify me of these as soon as possible. I added that if I did not hear anything by May 22, 2020 I would proceed to render my decision based on the documents filed on record (i.e. without oral evidence).

[10] I did not receive a reply by May 22, 2020 (or since), and so I have rendered my decision based on the documents filed<sup>1</sup>. I am satisfied that the Claimant's representative received Notice of the Hearing because it was sent to the email address he provided to the Tribunal in March 2020<sup>2</sup>. I am also aware that on April 16, 2020 a Registry Officer called the Claimant's representative and left him a detailed voice message reminding him of the hearing.

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<sup>1</sup> My authority to proceed in the Claimant's absence is set out in section 12 of the *Social Security Tribunal Regulations*.

<sup>2</sup> Page IS3-1

[11] I have recently learned that the Notice of Hearing that was sent to the Claimant was returned to the SST. However, the Claimant's representative received Notice of the Hearing. The Claimant's representative did not contact the Tribunal to advise that he has been unable to contact his client, or that there are any other special circumstances that I should consider.

[12] I have considered the impact of COVID-19 and its effect on office operations, but the Notice of Hearing was sent on March 4, 2020 (before the pandemic caused offices to shut down). Moreover, I consider it unlikely that lawyers, even during office shut-downs, are not checking their voice messages or emails. Finally, the Claimant has shown what appears to be a pattern in not attending Tribunal proceedings. He did not attend the first hearing scheduled for May 7, 2019 (although he and his then representative later said they could not attend the hearing because the lawyer's computer system was hacked and encrypted by unknown persons who made ransom demands). After that, however, neither the Claimant nor his representative attended the settlement conference of September 13, 2019 that was scheduled by the Appeal Division.

### **ELIGIBILITY REQUIREMENTS**

[13] To qualify for CPP disability benefits, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the MQP. The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP is December 31, 2020.

[14] Disability is defined as a physical or mental disability that is severe and prolonged<sup>3</sup>. A disability is severe if it renders a person 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 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.

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<sup>3</sup> Paragraph 42(2)(a) of the *Canada Pension Plan*

## **ISSUE(S)**

[15] I must decide whether the Claimant has a disability that is severe. If he does, then I must also decide whether his disability is prolonged.

## **ANALYSIS**

### **Severe disability**

#### **Why the Claimant stopped working in 2014**

[16] At the time of the MVA, the Claimant was doing drywall work for a contracting company. He described the job as a heavy job that required him to stand all day. He said he had to stop working on February 16, 2014 because his chronic back pain prevented him from standing for long periods of time<sup>4</sup>.

#### **The Claimant does not have a severe disability**

[17] I am unable to find that the Claimant has a disability that is severe. I say this for four reasons – namely, (1) the medical evidence does not describe a pain condition that prevents the Claimant from working; (2) the evidence shows the Claimant’s pain improved after 2014; (3) the Claimant’s other medical conditions do not result in a severe disability; and (4) there is evidence of recent work activity. I will now explain each of these reasons in more detail.

##### **(i) The medical evidence does not describe a pain condition that prevents the Claimant from working**

[18] I have reviewed the medical evidence in its entirety, and it does not describe a pain condition that prevents the Claimant from working. Medical evidence is needed to support a finding that a disability is severe<sup>5</sup>.

[19] First, the Claimant’s family physician, Dr. Ryan Banach, filled out a form for the Claimant’s insurer in April 2014, shortly after the MVA, and although he said the Claimant had

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<sup>4</sup> Page GD2-58

<sup>5</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248 at paragraph 50

pain and stiffness when bending and rotating, he did not suggest that the Claimant's working days were over. In fact, he said he would reassess the Claimant in mid May 2014 about his ability to return to work<sup>6</sup>. In June 2014, Dr. Banach reported that the Claimant would be able to return to light duties in July 2014<sup>7</sup>.

[20] Second, in the CPP medical report of December 2016, Dr. Banach did not report that the Claimant's disability resulted in functional limitations that prevent the Claimant from working. Dr. Banach wrote that the Claimant has pain from a back strain/spasm, and that the Claimant said the pain had continued for the past 2.5 years. As for physical findings and functional limitations, Dr. Banach referred the reader to a physiatry report of October 2014<sup>8</sup>. Significantly, at the time Dr. Banach completed the CPP medical report, he had not seen the Claimant since 2014, a fact Dr. Banach mentioned in a clinic note of December 2016. At that time, Dr. Banach also said that he was not sure the Claimant would even qualify for CPP disability benefits<sup>9</sup>.

[21] Third, Dr. Thomas Han is the physiatrist who saw the Claimant in October 2014 and while he noted the Claimant had ongoing complaints of neck and back pain, he said he had no specific reason to believe the Claimant's symptoms were anything more serious than a cervical and lumbar myofascial strain / spasm<sup>10</sup>.

**(ii) The evidence shows the Claimant's pain improved after 2014 to manageable levels**

[22] The evidence shows that the Claimant's pain improved after the MVA and that it was likely manageable. I am not suggesting that the symptoms completely resolved; rather, I am pointing out that the medical evidence shows significant improvement. For example, in April 2014, Dr. Banach reported that physiotherapy was helping and that the Claimant was feeling 30% better<sup>11</sup>. In June 2014, Dr. Banach reported that the Claimant's back pain was 70% better<sup>12</sup>.

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<sup>6</sup> Page GD4-3

<sup>7</sup> Page GD4-14

<sup>8</sup> Pages GD2-50 to GD2-53

<sup>9</sup> Page GD4-61

<sup>10</sup> Pages GD2-54 to GD2-55

<sup>11</sup> Page GD4-56

<sup>12</sup> Page GD4-56

[23] Shortly after that, the Claimant went a long time without seeing Dr. Banach (almost 2.5 years)<sup>13</sup>. The Claimant's lack of follow-up with his family physician tells me that his pain was likely manageable. Dr. Banach's clinic note of December 2016 says that the Claimant had signed up with another doctor<sup>14</sup>, but I do not have any information about who this doctor was or how often (if at all) the Claimant saw that doctor.

[24] I also believe the Claimant's pain improved to manageable levels because the Claimant appears not to have been interested in trying certain treatments that may have helped his pain. For example, in October 2014 Dr. Han offered possible treatment options such as Botox injection therapy. However, it seems that the Claimant was not interested in these options because he told Dr. Han he would think about it and then did not follow up<sup>15</sup>. In December 2016, Dr. Banach talked to the Claimant about another referral to the pain clinic, but Dr. Banach said the Claimant declined because he wanted to consult his lawyer first<sup>16</sup>.

[25] In December 2017, the Claimant said that he wanted to see Dr. Han again. Dr. Banach made another referral for him, and an appointment with Dr. Han was scheduled for January 8, 2018<sup>17</sup>. However, in March 2018 Dr. Banach wrote that the Claimant did not show up for his appointment with Dr. Han<sup>18</sup>, and in June 2018 Dr. Banach wrote that the Claimant never followed up with Dr. Han<sup>19</sup>.

**(iii) The Claimant's other medical conditions do not result in a severe disability**

[26] The Claimant has other medical conditions, but the medical evidence does not show that those conditions (even when considered in totality with the back and neck pain) result in a severe disability.

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<sup>13</sup> Page GD4-60

<sup>14</sup> Page GD4-60

<sup>15</sup> Pages GD2-54 to GD2-55

<sup>16</sup> Page GD4-61

<sup>17</sup> Page GD4-43

<sup>18</sup> Page GD4-69

<sup>19</sup> Page GD4-72

[27] On May 9, 2017, Dr. Banach wrote that the Claimant was depressed and he prescribed Cipralex 10 mg for one month<sup>20</sup>. Dr. Banach also wrote that the Claimant had other symptoms including a cough, pressure in the chest, tingling in his fingers, and a feeling as if he were going to vomit. I will deal with the depression shortly, but for now I will point out that by May 23, 2017, Dr. Banach was reporting that some of the Claimant's physical symptoms were better. For example, Dr. Banach wrote that the stomach pain was better and the tingling in the hands was better.

[28] On May 11, 2017, the Claimant had a chest x-ray because he had a cough and abdominal pain. The x-ray showed an abnormality with the Claimant's lungs<sup>21</sup>. When the Claimant saw a respirologist, Dr. Carr, in July 2017 he reported that the chest discomfort had resolved, though he thought he was wheezing with exercise. Dr. Carr said that a spirometry was unremarkable. However, for completeness, he ordered more tests including a pulmonary function test<sup>22</sup>. The pulmonary function test was done in August 2017 and the results were normal<sup>23</sup>.

[29] The Claimant saw Dr. Carr again in November 2017, and there is nothing in Dr. Carr's report to suggest that the Claimant's chest condition would have prevented the Claimant from working. In fact, Dr. Carr reported that the Claimant's symptoms had improved. He wrote that the Claimant was well, with no coughing, wheezing or shortness of breath. He said the Claimant had only occasional chest tightness and that his chest discomfort had reduced significantly. He added that the condition was likely of no clinical significance<sup>24</sup>. He planned to see the Claimant again in May 2018, but the Claimant did not show up for the appointment<sup>25</sup>.

[30] The Claimant has also had elevated liver function tests. However, this does not appear to have affected his functionality in any significant way. The Claimant saw a gastroenterologist, Dr. Ptak in August 2017, who reported that the Claimant was feeling well, with no jaundice, no

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<sup>20</sup> Page GD4-62

<sup>21</sup> It showed minimal blunting of the right costophrenic angle which could represent trace pleural effusion or thickening (page GD4-30)

<sup>22</sup> Page GD4-38

<sup>23</sup> Page GD4-40 to GD4-41

<sup>24</sup> Page GD4-36

<sup>25</sup> Page GD4-44. There is a report from Dr. Carr that is dated November 28, 2018 (page GD4-45). However, it appears the date of 2018 is a typo as the correct date of November 28, 2017 is noted at the top of the page.



fever, no pain, and no weight loss. Dr. Ptak suspected the Claimant had a fatty liver and nothing else<sup>26</sup>.

[31] Turning now to the depression, the evidence shows that the Cipralelex was helpful in managing the Claimant's symptoms. On May 23, 2017, Dr. Banach reported the depression was better, the medication was making a difference and the Claimant was feeling more calm<sup>27</sup>. On June 8, 2017, Dr. Banach wrote that the Claimant was doing better on Cipralelex and that he was less anxious and had no recent thoughts of self-harm or harming others<sup>28</sup>. Dr. Banach wrote similar comments on June 20, 2017<sup>29</sup>.

[32] The Claimant's depression appears to have worsened by late 2017, but the evidence shows the Claimant was not taking his medication as prescribed. On December 5, 2017, Dr. Banach wrote that the medication had been helping, but the Claimant had not taken it in over one month. He also noted that the prescription should have run out 4.5 months ago (not just one month ago)<sup>30</sup>. In March 2018, Dr. Banach wrote that the Claimant was not sleeping, but he also noted that the Claimant was able to sleep when taking the Cipralelex. He said the Cipralelex had run out 2-3 weeks ago and although the Claimant was supposed to have an appointment at that time, he did not show up for it<sup>31</sup>. Dr. Banach told the Claimant to look into counselling<sup>32</sup>. I do not know if the Claimant pursued counselling.

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<sup>26</sup> Page GD4-35

<sup>27</sup> Page GD4-63

<sup>28</sup> Page GD4-65

<sup>29</sup> Page GD4-67

<sup>30</sup> Page GD4-68

<sup>31</sup> Page GD4-69

<sup>32</sup> Page GD4-70

**(iv) There is evidence of recent work activity**

[33] The evidence shows that the Claimant has likely been working in recent years. His record of earnings shows earnings from self-employment as follows<sup>33</sup>:

<b>Year</b>	<b>Amount of Earnings</b>
2014	\$13,349
2015	\$7,000
2016	\$12,000
2017	\$12,000
2018	\$15,000

[34] Although the Claimant's recent earnings are less than the substantially gainful threshold that is prescribed by the CPP legislation<sup>34</sup>, the low amount does not discount the Claimant's work activity. The Claimant's earnings in the years just before his MVA were not high. For example, in 2012 he earned just under \$12,000 and in 2013 he earned just under \$9,000. These amounts suggest that there may be reasons other than disability for why the Claimant's earnings are not above the substantially gainful threshold.

[35] The Claimant's recent earnings tell me that the Claimant has had the ability to work after his MVA.

[36] In assessing work capacity, I have considered the Claimant's age, level of education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context<sup>35</sup>.

[37] The Claimant's personal characteristics are such that he is realistically employable. He is only 38 years of age and thus he has many years ahead of him before the standard age of retirement. He also has grade 12, a reasonable level of education<sup>36</sup>. I do not have much

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<sup>33</sup> Page IS1-7

<sup>34</sup> Subsection 68.1(1) of the CPP Regulations states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. The maximum annual amount a person could receive as a disability pension in the years from 2014 to 2018 is: 2014 (\$14,836.20), 2015 (\$15,175.08), 2016 (\$15,489.72), 2017 (\$15,763.92), and 2018 (\$16,029.96)

<sup>35</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>36</sup> Page GD2-56

information about his language proficiency (though I note he lived in the Dominican Republic until about March 2000<sup>37</sup>) or his work experience (other than drywall work<sup>38</sup> and perhaps some work as a high-level baseball player). However, the Claimant appears to have worked for several years after his MVA and may still be working now.

**Prolonged disability**

[38] Given my finding that the Claimant's disability is not severe, it is not necessary for me to assess whether his disability is prolonged.

**CONCLUSION**

[39] The appeal is dismissed.

Shannon Russell  
Member, General Division - Income Security

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<sup>37</sup> Page GD2-29

<sup>38</sup> Page GD3-4