



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *AP v Minister of Employment and Social Development*, 2020 SST 1070

Tribunal File Number: GP-20-293

BETWEEN:

**A. P.**

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: Daly Canie

Minister represented by: John Gebara

Teleconference hearing on: June 16, 2020

Date of decision: July 12, 2020

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant is a 48-year-old man who used to work as an underground miner. In December 2013, he was seriously hurt in a snowmobile accident. Since that time, the Claimant has not returned to his mining job or any other regular employment.

[3] The Claimant applied for disability benefits in November 2016. In his application, he reported that he is unable to work because of chronic pain.

[4] The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

[5] A Tribunal member heard the Claimant's appeal in April 2019. That member decided that the Claimant was not entitled to disability benefits because his disability was not severe at the time of his Minimum Qualifying Period (MQP).

[6] The Claimant appealed the decision to the SST Appeal Division. The Appeal Division allowed the appeal, finding that the General Division had made an error of law by failing to analyze the evidence about whether the Claimant was **capable regularly** of pursuing any substantially gainful occupation. The Appeal Division returned the matter back to the General Division for reconsideration.

## **ELIGIBILITY REQUIREMENTS**

[7] 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, 2017.

[8] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</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.

## **ISSUE(S)**

[9] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2017.

## **ANALYSIS**

### **Severe disability**

#### **The nature of the accident and resulting injuries**

[10] The Claimant testified that the accident happened when he was driving his snowmobile home from his parents' house. His right ski hit a property pin, which caused the Claimant to be thrown off his sled. He hit a tree and then lost consciousness. When he woke up, he could only move his right arm and left leg, and could barely breathe. He knew he was in trouble and so he dragged himself closer to the highway where he used one of his gloves to flag someone down for help. Someone saw the Claimant and called 911.

[11] At the hospital, the Claimant was diagnosed with extensive orthopedic and chest wall injuries. His injuries included a closed head injury, multiple left rib fractures with flail chest, a pulmonary contusion, hemothorax, C7 fracture, stable fractures of T4, L1 and L2, an unstable fracture of T11, left scapular fractures, a left humeral fracture, and a fracture of the metatarsal bones in the right foot.

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<sup>1</sup> Paragraph 42(2)(a) of the *Canada Pension Plan*

[12] The Claimant testified that he had three surgeries while in hospital and then participated in extensive therapy. He said that at the time of his MQP, his two main disabling conditions were (and still are) chronic pain and depression.

[13] The Claimant explained that at the time of his MQP the chronic pain mainly involved his back and left arm. He described the pain as always being at least a 6 or 7 out of 10. His pain gets worse with activity. For example, the longer he tries to stand up, the more pain he feels. The depression has impacted his entire life. He used to be a happy, go-lucky guy who had lots of friends. Now he has no friends and his family has fallen apart. He gets angry and snaps at the smallest things such as dropping a spoon or spilling water.

[14] The Claimant said that in addition to the pain and depression, he has also had symptoms from a brain injury and has experienced side effects from his medications. He gets blurred vision, ringing in his ears, and a constant snuffle from uncontrolled nasal discharge. When he snuffles, he feels like he is breathing in chlorine and it gives him a migraine. He has short-term memory loss and experiences foginess and fatigue.

**The Minister argues there is evidence of work capacity**

[15] The Minister acknowledges that the Claimant was involved in a significant accident. However, the Minister submits that the Claimant recovered to the point where he had the ability to do suitable work at the time of his MQP. The Minister points out that several reports support a finding of work capacity, including:

- A Functional Abilities Evaluation of August 2016 that determined the Claimant was capable of at least a medium work tolerance.
- A September 2016 report by Dr. Veluri, psychiatrist, that acknowledges the Claimant would not be capable of returning to work as a miner but goes on to say that the Claimant might require a different type of modified work such as office work where less interpersonal issues are present.
- A vocational evaluation report of September 2016 that says the Claimant had the potential to secure alternative work.

- An October 2016 report of Dr. Cisa, orthopedic surgeon, that says the Claimant retained the physical capacity to return to the workforce but would not be able to lift heavy weights repetitively or stand and walk for long periods or on uneven surfaces.
- A report of January 2017 by Dr. de Chabris, pain specialist, that states that the Claimant may benefit from a return to some form of work<sup>2</sup>.

[16] The Minister also submits that the Claimant's age, education and language proficiency are such that alternative work would have been a realistic option for him at the time of his MQP.

**The totality of the evidence does not support a finding of work capacity**

[17] I acknowledge that there are some reports that, when read in isolation, suggest that the Claimant could work at the time of his MQP. However, when I assess the evidence as a whole, I am unable to find that the Claimant had work capacity by December 31, 2017.

[18] First, the chiropractor (Robert Fera) who carried out the Functional Abilities Evaluation of August 2016 concluded that the Claimant demonstrated an ability to work within the medium work tolerance. However, Dr. Fera also concluded that the Claimant only had the ability for a medium work tolerance on an occasional basis. He explained that "occasional" means work that comprises 1% to 33% of a work day<sup>3</sup>. This tells me that the Claimant would likely not have been able to sustain a medium strength job over the course of an entire shift, even if he was working part time.

[19] Second, Dr. Fera reported that there were tasks the Claimant could perform on a frequent basis – namely, handling, walking, sitting, standing and stair climbing. While this evidence indicates physical tolerances that would be consistent with a capacity to perform some type of work, there is other evidence from around the same period of time that suggests the Claimant's physical tolerances were not as high as what the Functional Abilities Evaluation states. For example, in October 2016 the Claimant was assessed by Dr. Cisa, orthopedic surgeon, and during that assessment the Claimant reported that his pain prevents him from walking for longer

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<sup>2</sup> Page GD9-151

<sup>3</sup> Page GD2-274

than 30 minutes, standing for more than one hour at a time, or sitting for more than one hour at a time. Dr. Cisa appears to have accepted that the Claimant was not as functional as the Functional Abilities Evaluation suggests because he concluded that the Claimant would not be able to do a job that required him to stand for long periods of time or walk for long periods of time on uneven surfaces. He also explained that just because the Claimant could manage tasks during the Functional Abilities Evaluation does not mean he can do those tasks repetitively for an 8 or 12-hour shift, day after day<sup>4</sup>.

[20] Third, the conclusions set out in the Functional Capacity Evaluation are only with respect to the Claimant's physical abilities. They do not take into consideration the impairments and limitations the Claimant has from his mental health conditions. The same is true for some other reports on file. For example, Dr. Cisa concluded that, from a musculoskeletal perspective, the Claimant did not suffer a complete inability to engage in any occupation for which he was reasonably suited<sup>5</sup>. Similarly, Dr. Veluri concluded that, from a psychiatric point of view, the Claimant was incapable of returning to work as a minor, but did not suffer a complete inability to engage in any occupation<sup>6</sup>. As pointed out by the Claimant's representative, Dr. Cisa and Dr. Veluri were conducting their assessments very narrowly. They did not consider, and in fact were not permitted to consider, the combination of the Claimant's physical and mental impairments.

[21] Fourth, there is evidence that shows that the combination of the Claimant's physical and mental impairments prevented the Claimant from working at any job before his MQP. For example, in May 2017, Dr. Berbrayer, Physiatrist, reported that the Claimant's physical restrictions, anger problems and significant ongoing problems with social adaptation prevent him from doing any job<sup>7</sup>. Also, in July 2017 Dr. van Reekum, neuropsychiatrist, discussed the totality of the Claimant's conditions, including chronic constant pain in various sites of the body, sleep disturbances with resulting fatigue, depressed mood with anxiety, and personality change. Dr. van Reekum concluded that the combination of the Claimant's conditions render the Claimant unable to return to his previous job and will continue to pose significant barriers to his ability to attain and maintain competitive employment *of any type* in the future. Dr. van Reekum

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<sup>4</sup> Page GD2-223

<sup>5</sup> Page GD2-223

<sup>6</sup> Page GD9-126

<sup>7</sup> Page GD3-158

explained that while the Claimant's physical injuries precipitated the Claimant's ongoing functional limitations, the combined impact of the mental health sequelae were now maintaining them<sup>8</sup>.

[22] Fifth, the evidence consistently describes the Claimant as a person whose life changed considerably as a result of the accident.

[23] The Claimant testified that he has lost everything. He lost his family (his relationship with his spouse broke down and so he moved in with his parents). He lost the financial ability to buy gifts for his sons. He lost his truck to a bailiff. He lost all but one of his friends because no one likes him anymore. He lost his passion.

[24] The Claimant's mother (G. P.) testified at the hearing. She told me that the Claimant has been living with her for just over two years now. She said that before the accident the Claimant was a happy person who was very active. She said he used to play hockey and golf, was involved with his kids' hockey leagues, and was very helpful around the home with things like cooking and cleaning. She also said he used to have a lot of friends and was very close to his brother. When asked to describe what the Claimant was like in and around December 2017, the Claimant's mother said the Claimant had (and still has) a lot of mood swings and gets angry often. He is rude and swears at her. He locks himself in his bedroom when he is in a bad mood. He complains about the pain a lot and she sees his pain, just in the way he moves. She does not believe the Claimant would be able to do any type of consistent work, and this is mainly because of his pain and bad memory and anger.

[25] In his submissions, the Claimant's representative compared the life the Claimant enjoyed before the accident with the life the Claimant has now, and he submitted that no person would put themselves through that type of hardship voluntarily. I agree. By all accounts, the Claimant was a hard-working, highly functional family man before the accident. Since then, the Claimant has experienced great losses. The Claimant told me that if he could have returned to the workforce he would have. I believe him.

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<sup>8</sup> Page GD2-149

**The Claimant was incapable *regularly* of pursuing any substantially gainful occupation by December 31, 2017**

[26] Even if the Claimant could have returned to *some* type of job by December 31, 2017, it is unlikely that he would have been able to offer the employer the predictability of attendance. In other words, he was likely incapable *regularly* of pursuing any substantially gainful occupation.

[27] The Claimant testified that he could probably do some type of work, but he explained that he would not be able to commit to a regular work schedule unless there was a bed nearby for him to lie down when needed. As for why he needs to lie down, the Claimant explained that he lies down to ease the pain or calm his mind or to sleep. It is not realistic to expect that an employer would be willing to provide the Claimant with a bed so that he can lie down when he needs to.

[28] There is medical evidence on file that supports the Claimant's testimony of being incapable *regularly* of working. For example, Claudia Maurice, Occupational Therapist, assessed the Claimant in February 2017 and she reported that the Claimant was markedly impaired in regards to concentration / persistence / pace. She noted the Claimant was struggling to follow through on basic tasks that needed to be completed around the home, and that his struggles were due to a combination of pain, fatigue and difficulties regulating his mood and emotions<sup>9</sup>. As another example, Dr. Joseph, psychiatrist, assessed the Claimant in October 2017 and he reported that the Claimant is capable of maintaining a range of stressful tasks and matters, but for short periods of time. He explained that the Claimant's performance is reduced by increased pain and fatigue with longer exposure or on certain days<sup>10</sup>.

**The Claimant's disability is severe despite having favourable employability attributes**

[29] 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

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<sup>9</sup> Page GD3-136

<sup>10</sup> Page GD4-40



that the severe criterion is assessed in a real world context<sup>11</sup>. I acknowledge that the Claimant had favourable employability attributes by December 31, 2017. For example, at the time of his MQP, he was only 45 years of age and thus had many years ahead of him before the standard age of retirement. He has a reasonable level of education (grade 12 and WHMIS and CPR courses<sup>12</sup>). He is proficient with internet and email operation. He is proficient in both of Canada's two official languages. He has transferrable skills, as evidenced by a vocational evaluation and transferrable skills analysis of September 2016. That report concluded that the Claimant had the potential to secure alternative work in a number of suitable employment alternatives.

[30] The vocational assessment is not evidence of work capacity. The opinions of the vocational assessor were made strictly from a vocational skills, education and training perspective<sup>13</sup>. The opinions were not based on an assessment of the combined effect of the Claimant's mental and physical conditions. Although the Claimant had the education and skills necessary to find a job by December 31, 2017, he did not have the capacity *regularly* to pursue a substantially gainful occupation.

### **Prolonged disability**

[31] Most of the evidence shows that the Claimant's disability was likely long continued and of indefinite duration by December 31, 2017. By that time, it had been four years since the Claimant's accident and he was still struggling with significant functional limitations, despite having participated in years of treatment modalities.

[32] In November 2015 (almost two years after the accident) Dr. Cisa reported that the Claimant had achieved maximal medical recovery from the serious injuries he sustained<sup>14</sup>. In August 2016, the Claimant was discharged from physiotherapy, and his physiotherapist reported that the Claimant had reached maximum benefit from direct rehabilitation<sup>15</sup>. In September 2016,

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<sup>11</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>12</sup> Page GD2-293

<sup>13</sup> Page GD2-306

<sup>14</sup> Page GD2-196

<sup>15</sup> Page GD3-81

Dr. Berbrayer reported the Claimant's overall prognosis as guarded<sup>16</sup>. In November 2016, Dr. Connolly, neurologist, reported that, from a neurological perspective, the Claimant had likely reached maximum medical recovery<sup>17</sup>. In July 2017, Dr. van Reekum reported that ongoing treatment was clearly warranted for the Claimant's mental health so as to optimize the Claimant's quality of life, wellness and functional abilities. However, Dr. van Reekum also wrote that the Claimant remained at high risk for *permanent* suffering, impairment and handicap, and that the Claimant was at risk for future decline in wellness and functional ability<sup>18</sup>.

[33] I acknowledge that the record contains some more optimistic prognoses. For example, Dr. Veluri reported in September 2016 that the Claimant's prognosis was good if he was treated with medication<sup>19</sup>. The Claimant has been taking an anti-depressant medication (Cymbalta) since at least September 2017<sup>20</sup>, and he has not improved in any significant way. The Claimant has also participated in therapy (including sessions with Dr. Klassen, psychologist, and Vanessa Wilkins) but has not regained the capacity to work.

## **CONCLUSION**

[34] The Claimant has a disability that was severe and prolonged by December 31, 2017. Because of the nature of the disability and, in particular, the fact that it is based on a combination of physical and mental conditions, it is difficult to say, with any definitive precision, when the disability became severe and prolonged. In the end, I believe the evidence supports a date of disability of September 2016. This is when the Claimant was assessed by Dr. Veluri, who diagnosed the Claimant with adjustment disorder with mixed anxiety, depressed mood and a personality change due to a possible head injury. Dr. Veluri reported that, from a psychiatric point of view, the Claimant's condition was significant enough as to render him incapable of returning to his former job. Although Dr. Veluri thought the Claimant could do a different job, his report is telling because it shows that by September 2016 the mental health portion of the

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<sup>16</sup> Page GD3-100

<sup>17</sup> Page GD2-240

<sup>18</sup> Page GD2-150

<sup>19</sup> Page GD2-259

<sup>20</sup> Pages GD3-149 and GD4-29

Claimant's disability was significant. That significant mental health component combined with the physical limitations rendered the Claimant disabled.

[35] Payments start four months after the date of disability<sup>21</sup>. Four months after September 2016 is January 2017.

[36] The appeal is allowed.

Shannon Russell  
Member, General Division - Income Security

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<sup>21</sup> Section 69 of the *Canada Pension Plan*