



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *MM v Minister of Employment and Social Development*, 2020 SST 987

Tribunal File Number: GP-20-530

BETWEEN:

**M. 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: Virginia Saunders

Teleconference hearing on: October 13, 2020

Date of decision: October 26, 2020

## **DECISION**

[1] The Claimant, M. M., is eligible for a *Canada Pension Plan* (CPP) disability pension. Payments are to start July 2018. This decision explains why I am allowing the appeal.

## **OVERVIEW**

[2] The Claimant is 53 years old. After high school, he played professional hockey for about 15 years. Most of his jobs after that were physically demanding. He had many injuries, leading to surgery on his back, shoulders, sinuses, arm and elbow. He has chronic pain and fibromyalgia.

[3] In March 2018, the Claimant hurt himself by stepping awkwardly onto a curb to avoid being hit by a car. His pain got worse, so he went on medical leave from his job. He never went back.

[4] The Claimant applied for a CPP disability pension in September 2018.<sup>1</sup> The Minister of Employment and Social Development Canada (the Minister) refused his application. The Minister said the Claimant had transferable skills or could retrain for work that was suited to his limitations.<sup>2</sup> The Claimant appealed to the General Division of the Social Security Tribunal.

[5] The Claimant's hearing was scheduled for August 2020. In July, he started training for a new job. I adjourned the hearing to allow time to see how he managed with it. When the hearing was held on October 13, there was enough evidence to make a decision about his appeal.

## **WHAT THE CLAIMANT MUST PROVE IN THIS APPEAL**

[6] For the Claimant to succeed, he must prove that he has a disability that was severe and prolonged by the date that I heard his appeal.<sup>3</sup>

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<sup>1</sup> GD2-41-46

<sup>2</sup> GD2-5-7

<sup>3</sup> This is because the Claimant's minimum qualifying period in subsection 44(2) of the *Canada Pension Plan* is December 31, 2020, which is after the hearing date. The minimum qualifying period is based on the Claimant's CPP contributions. These can be found at pages GD4-35-36.

[7] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>4</sup>

## **THE REASONS FOR MY DECISION**

[8] I find that the Claimant has a severe and prolonged disability as of March 2018. I reached this decision by considering the following issues.

### **IS THE CLAIMANT'S DISABILITY SEVERE?**

#### *The Claimant has functional limitations that affect his ability to work*

[9] My decision about whether the Claimant's disability is severe is not based on his diagnosis.<sup>5</sup> It is based on whether he has functional limitations that prevent him from earning a living.<sup>6</sup> I have to look at his overall medical condition and think about how his health issues might affect his ability to work.<sup>7</sup>

[10] The Claimant says that he cannot work because of daily pain, weakness, nerve issues, decreased range of motion, and muscle spasms in his back, hips and legs. His symptoms limit his ability to sit, stand, walk, or do even basic physical activities like reaching and bending. Because of pain and stress he has trouble remembering and concentrating.<sup>8</sup> He had depression in the past, but he told me at the hearing that he is no longer being treated for it and he does not feel his depression affects his ability to work.

[11] The medical evidence confirms that the Claimant has functional limitations that affect his ability to work. He has arthritis in the neck and shoulder area.<sup>9</sup> He has osteoarthritis and spinal stenosis of the lumbar spine.<sup>10</sup> His family doctor, Dr. Wong, wrote that the Claimant had chronic

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<sup>4</sup> The definition is found in paragraph 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove they are disabled on a balance of probabilities. In other words, they must show it is more likely than not that they are disabled.

<sup>5</sup> The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

<sup>6</sup> The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

<sup>7</sup> The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

<sup>8</sup> GD1-8-9; GD2-8-9, 21-28

<sup>9</sup> GD2-101

<sup>10</sup> GD2-98-100

back pain since 2008, with reduced range of motion, reduced strength, and extreme fatigue. He could not sit or stand for long periods, and could not lift more than 15 pounds on a regular, repetitive basis. He also had a chronic injury to both shoulders. His conditions were recurrent and continuous.<sup>11</sup>

[12] Dr. Shuckett is a rheumatologist who saw the Claimant in 2014, and assessed him again by telehealth<sup>12</sup> in September 2020. She noted he had multiple areas of degenerative osteoarthritis from injuries to his spine and joints, and fibromyalgia with central sensitization. He had issues with his knees, shoulders, neck and lower back. He was able to work after back surgery a few years ago, but the incident in March 2018 set him back and “his back really decompensated.” She said the Claimant met the criteria for fibromyalgia because of his widespread pain, severe sleep disorder, and mechanical low back pain. He had pain all over, and had trouble sleeping at night because of musculoskeletal pain. As a result, he was poorly refreshed in the morning and was tired during the day, with brain fog.<sup>13</sup>

[13] The Claimant had a functional capacity evaluation in June 2019. It showed that he had the following physical limitations:<sup>14</sup>

- lifting floor to waist height limited to 20 lbs on an occasional basis;
- lifting waist to shoulder height limited to 30 lbs on an occasional basis;
- carrying limited to 30 lbs on an occasional basis;
- pushing and pulling in the light-medium category, limited to an occasional basis;
- sitting limited to an occasional basis;
- standing limited to an occasional basis;
- walking limited to an occasional basis;
- stair climbing limited to an occasional basis;
- stooping/bending and crouching limited to an occasional basis;
- inability for kneeling;
- reaching above or below shoulder height limited to an occasional basis;

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<sup>11</sup> GD2-93-94

<sup>12</sup> Due to Covid-19 restrictions

<sup>13</sup> GD8-2-6

<sup>14</sup> GD5-8-9. The evaluator deferred comments on his cognitive abilities or mood “to the appropriate evaluator.”

- gripping with the right and left hands on a frequent basis.

[14] The evaluator concluded that the Claimant was capable of performing household tasks and recreational activities within the light category, but did not think he could return to his previous job or to any occupation, part-time or full-time.<sup>15</sup>

***The Claimant does not have work capacity***

[15] With these limitations, the Claimant would not be able to return to his previous job as a transport worker in the movie industry, or to other physical work. Realistically, I cannot see how he is capable regularly of pursuing even light, sedentary, or part-time employment.

[16] Most of the Claimant's jobs have been physical. Besides playing hockey, he has been a labourer, a nightclub doorman, a movie stuntman, and a printing press operator. He has no transferable skills from these positions.

[17] The Claimant has some experience that, in theory, might make him employable. He finished high school. Over ten years ago, he worked for three years as an automotive service writer and assistant manager. But his education and work experience cannot overcome his significant limitations. He cannot sit or do most activities except on an occasional basis. He cannot do a job that allows him to switch between sitting, standing, and moving around, because all of these cause pain. He has to do everything slowly, and he suffers afterward.

[18] In deciding that the Claimant does not have work capacity, I considered his current work effort. He started a new job in July 2020. He is training to be a technician for a company that does concrete scanning and ground penetration radar. He found the job through a friend. He spoke with the owner and explained his situation. The owner hired him and gave him a laptop so that he could train on-line. Over the next six weeks the Claimant spent six to eight hours a day in training. Occasionally he would go into the office, but he was mostly at home. He found that sitting was difficult. He had trouble learning and retaining information. It took him a long time.

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<sup>15</sup> GD5-8

[19] In September the Claimant started going to job-sites with experienced technicians. The work has been limited because of bad weather. The week before the hearing he worked a little under three hours. He estimated that in the weeks before that, he worked three to six hours a day, but he did not work two or three days in a row. He finds the work difficult because there is a lot of movement involved, including reaching and being on his hands and knees. His back and neck seize up. When he gets home he has to rest, use ice packs, do his core exercises, and take painkillers. Dr. Shuckett noted that the day she spoke to the Claimant he had only worked for one hour and he was exhausted.<sup>16</sup>

[20] The Claimant is paid \$23.00 per hour, which is above what the CPP considers to be substantially gainful.<sup>17</sup> While he was training, he got \$1700.00 every two weeks. Now that training has ended, he is earning much less because there isn't much work. The availability of work does not matter. What matters is if the Claimant is capable regularly of doing substantially gainful work.

[21] The Claimant's job does not show this. He is barely managing even working just a few hours each week. He cannot sit for long. He has no computer skills. At age 53, he is not likely to learn many. His ability to get through a job-specific training course for a few weeks at home does not mean he would be able to manage in a competitive workplace.

[22] At the hearing the Claimant told me he is very concerned that he will not be able to do the job once his hours have increased. Dr. Shuckett is skeptical that the Claimant will succeed. The functional capacity evaluator did not think he was capable of any type of work. Based on this, I do not think it is likely that the Claimant can predictably and reliably get up, go to work, and remain employed at any substantially gainful occupation. I do not think he should be penalized for his current effort, when all the other evidence tells me he is not likely to succeed.

[23] The Minister referred me to a court decision that said a person's capacity to regularly engage in remunerative employment "is the very antithesis of a severe and prolonged

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<sup>16</sup> GD13-3

<sup>17</sup> Section 68.1 of the *Canada Pension Plan Regulations* says an occupation is "substantially gainful" if it pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. In 2020 this amount is \$16,651.92 per year or \$1387.66 per month (Canada Pension Plan (CPP) Maximum Monthly Amounts of New Benefits <https://open.canada.ca/data/en/dataset/e547539b-7fc6-4879-be54-3d1f80ac9e9e> )

disability.”<sup>18</sup> I agree, but that does not describe this Claimant. He may be able to engage in remunerative employment for a few days or weeks. However, I am satisfied that he cannot regularly do so.

***The Claimant has followed medical advice***

[24] The Claimant has to make reasonable efforts to follow medical advice.<sup>19</sup> He has done this. He has had many surgeries, and has gone to physiotherapy and chiropractors. He does exercises at home. He takes medication as prescribed. He explained that he declined more shoulder surgery in September 2018 because he was worried that it would affect his back and neck pain. Dr. Shuckett said this was understandable.<sup>20</sup>

[25] The Claimant did not have an image-guided injection that his orthopedic surgeon, Dr. Regan, planned in November 2018.<sup>21</sup> He told me he was sick the week it was scheduled. He does not remember what happened after that, but he is certain he would have discussed it with Dr. Wong. Dr. Wong’s notes from 2019 do not indicate that he pursued this option for the Claimant.<sup>22</sup> I do not think the Claimant had an obligation to follow-up on his own.

[26] The Minister submitted that the lack of further treatment or referrals by Dr. Wong in 2019 meant that current management was sufficient. I do not think it meant that at all. Dr. Wong’s notes show the Claimant continually complained of back pain and other issues.<sup>23</sup> Investigations and treatments up to that time had not helped.<sup>24</sup> I think it is more likely that Dr. Wong did not think anything else would either. In any case, he eventually referred the Claimant to Dr. Shuckett and to a pain clinic. The Claimant has yet to hear from the pain clinic.

**IS THE CLAIMANT’S DISABILITY PROLONGED?**

[27] The Claimant’s disability is prolonged. The Minister correctly noted that the Claimant was able to work before 2018. That does not mean he will always be able to work. He persevered

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<sup>18</sup> *Miller v. Attorney General of Canada*, 2007 FCA 237

<sup>19</sup> The Federal Court of Canada explained this in *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

<sup>20</sup> GD13-3

<sup>21</sup> GD2-101

<sup>22</sup> GD2-66-74

<sup>23</sup> GD2-66-74

<sup>24</sup> GD2-93, 96

despite injuries. But his condition is chronic and deteriorating. The seemingly minor incident in March 2018 increased his pain and decreased his function. He has not improved since then.

[28] Dr. Shuckett started the Claimant on gabapentin in early September 2020, and said it could be increased. She thought it might lessen some of his pain, but she did not in any way suggest that it would significantly increase his functionality so that he would be more likely to succeed at work. It had not made any difference to the Claimant as of the hearing date. Therefore the possibility of increasing gabapentin does not mean the Claimant's condition is not prolonged.

### **WHEN PAYMENT BEGINS**

[29] The Claimant's disability became severe and prolonged in March 2018, when he re-injured his back. There is a four-month waiting period before the disability pension is paid.<sup>25</sup> This means that payments start as of July 2018.

### **CONCLUSION**

[30] I am allowing this appeal.

Virginia Saunders  
Member, General Division - Income Security

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<sup>25</sup> This is set out in section 69 of the *Canada Pension Plan*.