



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *JG v Minister of Employment and Social Development*, 2021 SST 21

Tribunal File Number: GP-19-1760

BETWEEN:

**J. G.**

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: Raymond Raphael

Claimant represented by: Dorothy Myles

Minister represented by: Alexandria Dejonge

Teleconference hearing on: November 4, 2020

Date of decision: January 22, 2021

## **DECISION**

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension with payment starting as of September 2016.

## **OVERVIEW**

[2] The Claimant was 34 years old when he applied for the CPP disability pension in August 2017. He worked as a mechanical assistant on a ship. In February 2012, he injured his left leg and back when he fell down a set of stairs in the ship engine room. As a result, he had three surgeries in 2013 and 2014. In November 2013, he had left knee surgery.<sup>1</sup> In February 2014, he fell on his driveway and fractured his left kneecap and ankle. In that month, he had a second surgery involving a reconstruction of his knee and the insertion of screws and a plate in his ankle. In November 2014, he had a third surgery to remove the hardware from his ankle.

[3] In his disability questionnaire, the Claimant stated that he had been unable to work since June 2012 because of a shattered left kneecap, a broken ankle, broken ribs, and back problems. He also stated that he had mobility problems and suffered from anxiety.<sup>2</sup> The Minister denied the application initially and upon reconsideration.

[4] The Claimant appealed to the Social Security Tribunal. In April 2019, the General Division dismissed his appeal. The General Division found that the Claimant's attendance at, and completion of, a college program established that he was capable of pursuing a substantially gainful occupation for more than two years after the end of December 2014, when he last qualified for CPP disability. The Claimant appealed to the Appeal Division.

[5] In October 2019, the Appeal Division allowed the appeal and referred this matter back to the General Division for reconsideration. The Appeal Division found that the Claimant had not been able to present his case fully at the initial hearing because he did not have a significant number of relevant documents.

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<sup>1</sup> The surgery involved the reconstruction of his left knee ACL (anterior cruciate ligament), which is one of a pair of ligaments in the knee.

<sup>2</sup> GD2-63

[6] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing. I also heard additional oral evidence from the Claimant.

### **TEST FOR CPP DISABILITY**

[7] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.<sup>3</sup> The Claimant's disability was severe if it caused him to be incapable regularly of pursuing any substantially gainful occupation. His disability was prolonged if it was likely to be long continued and of indefinite duration.

[8] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP).<sup>4</sup> His MQP – the date by which he has to prove he was disabled was December 31, 2014. This is the last date when he had valid contributions to the CPP in four out the last six years.<sup>5</sup>

### **ISSUES**

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2014?
2. If so, was his disability likely to be long continued and of indefinite duration by that date?

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

<sup>4</sup> Paragraph 44(1)(b) CPP

<sup>5</sup> Record of contributions: IS1-5

## ANALYSIS

### *Severe Disability*

#### *There is some evidence that the Claimant had the capacity for alternative work at the end of December 2014*

[9] I must assess the Claimant's condition as a whole and consider all of the impairments that affected his employability, not just his biggest or main impairment.<sup>6</sup>

[10] The Claimant testified that he had been unable to work because of physical and psychological conditions. His physical conditions included chronic pain from his left foot to his upper back – he could not sleep because the pain was so bad. He fell frequently because his leg constantly gave out. His psychological conditions included anxiety, panic attacks, and depression. He also suffered from post-traumatic stress disorder.

[11] Dr. Cussen has been the Claimant's family doctor since April 2011. In February 2020, he reported that the Claimant has been in constant pain since the February 2012 accident. He also reported that the Claimant had significant anxiety after the accident. Dr. Cussen stated that the Claimant was unable to return to physical work. He felt that he was unqualified to state whether the Claimant could do some other form of work.<sup>7</sup>

### **Physical conditions**

[12] In his oral evidence, the Claimant described the February 2012 workplace accident. He slipped while going down the stairs in the engine room. He landed on his left leg. He was not sure if he lost consciousness. He could not move his leg and felt "excruciating" pain in his leg and back. He was taken to the hospital. He was released after a couple of hours on pain medications.

[13] He tried to return to work on modified duties after the February 2012 accident. However, he slept a lot and was not able to do regular duties. His employer wanted him to do things that he

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<sup>6</sup> *Bungay v. Canada (Attorney General)*, 2011 FCA 47

<sup>7</sup> GD9-3

could not do such as painting. He tried to do computer work, but he could not go up the stairs to the computer and he could not sit. He had to stop working in June 2012<sup>8</sup> because of his pain.

[14] The medical evidence confirms that the Claimant had longstanding severe chronic knee pain as well as back and ankle pain. Despite three surgeries, extensive physiotherapy, and the use of opioid pain medication there had been little improvement as of the MQP. In addition, he fell frequently because his knee was unstable.

[15] In August 2012, Dr. Veljkovic, orthopaedic surgeon, stated that the February 2012 accident had resulted in an ACL deficiency as well as cartilage injury and kneecap degeneration. The Claimant continued to have significant knee pain and had fallen recently down two stairs after his legs buckled.<sup>9</sup>

[16] In June 2013, Troy Harvie, physiotherapist, recorded that the Claimant remained off work awaiting ACL reconstruction surgery. The Claimant had a reduced tolerance for standing and walking. He remained functionally limited because of his knee instability. Recently, the Claimant had fallen again and twisted his ankle. He still had a lot of pain in his knee and lower back.<sup>10</sup>

[17] In September 2013, the Claimant's knee gave out again. He fell, twisted his ankle, and suffered a significant ankle sprain.<sup>11</sup> Troy Harvie stated that the Claimant remained functionally limited because of his knee instability. He continued to have a lot of pain in his knee and low back.<sup>12</sup>

[18] In October 2013, Dr. El-Tahan, orthopaedic surgeon, told the Claimant that the proposed ACL reconstruction surgery was for instability, not pain.<sup>13</sup> In November 2013, Dr. El-Tahan performed ACL reconstruction surgery.<sup>14</sup>

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<sup>8</sup> GD2-783

<sup>9</sup> GD2-749

<sup>10</sup> GD2-734

<sup>11</sup> GD2-583

<sup>12</sup> GD2-705

<sup>13</sup> GD2-54

<sup>14</sup> GD2-55

[19] In February 2014, the Claimant fell again. He fractured his left kneecap and left calf bone. Dr. Coles, orthopaedic surgeon, performed open reduction and internal fixation (ORIF) surgery.<sup>15</sup>

[20] In June 2014, Dr. Cussen stated that the Claimant had not done well since the ACL reconstruction surgery. Despite extensive physiotherapy and pain medication, he continued to suffer chronic pain. He continued to use crutches.<sup>16</sup>

[21] In September 2014, Dr. El-Tahan stated that the Claimant continued to have issues with his kneecap and with the hardware in his ankle.<sup>17</sup>

[22] In November 2014, Dr. Coles removed the hardware that he had inserted in the Claimant's left ankle in the February 2014 ORIF surgery.<sup>18</sup>

[23] Dr. Cussen's January 2015 office note records that the Claimant was still using crutches.<sup>19</sup>

### **Mental health conditions**

[24] The Claimant testified that he suffered from anxiety and had panic attacks. In addition, the pain medication made him groggy and absent minded. The medical evidence confirms that the Claimant suffered from anxiety. His only treatment for mental health issues at the MQP was Celexa (an anti-depressant) and Ativan (used to treat anxiety and sleep disorder). Dr. Cussen prescribed these. Although recommended by the WSIB assessors, the Claimant did not pursue psychological treatment.

[25] According to Dr. Cussen, the Claimant has a complex mental health history. He had a history of anxiety before the February 2012 accident, and was on a combination of Celexa and

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<sup>15</sup> GD2-660. ORIF surgery involves the setting of bones and the implementation of screws and/or plates to facilitate healing.

<sup>16</sup> GD2-644

<sup>17</sup> GD2-629

<sup>18</sup> GD2-599

<sup>19</sup> GD3-9

Ativan. He had also seen a psychologist. The Claimant reported the onset of significant anxiety after the accident but did not see a psychiatrist until he saw Dr. Burke in October 2019.<sup>20</sup>

[26] A Workplace Safety & Insurance Board (WSIB)<sup>21</sup> memo in March 2013 records that Dr. Cussen had been prescribing Celexa and Ativan. Dr. Cussen's June 2014 office note records that the Claimant was "still in a lot of pain and had anxiety." He prescribed Ativan.<sup>22</sup> In August 2014, Dr. Cussen prescribed a refill of Ativan.<sup>23</sup>

[27] In October 2013, Dr. Hann, psychologist, and Jessica Kuderean, psychometrist, performed a Psychovocational assessment of the Claimant at the request of the WSIB. Unfortunately, the Claimant was not forthcoming with the assessors. He did not provide details about his injury or course of treatment. He did not wish to disclose his current medications. When asked about his current emotions, he stated that he was generally content. He also stated that he had never consulted with a psychologist or psychiatrist in the past<sup>24</sup>, and he did not feel this type of treatment would be necessary. The assessors recommended a psychological consultation and supportive counselling for issues of adjustment, perception of disability, and pain management. Unfortunately, this recommendation was not pursued. This was likely because the Claimant believed this type of treatment was unnecessary.<sup>25</sup>

[28] According to Dr. Cussen, the Claimant saw Dr. Burke in October 2019. The Claimant testified that he saw Dr. Burke on only one occasion. He also testified that he did not get psychological treatment other than seeing a mental health counsellor at the college.<sup>26</sup> Dr. Burke diagnosed unspecified anxiety disorder with general features, prominent avoidant coping, and possible somatic symptom disorder. This was, however, close to five years after the MQP.<sup>27</sup>

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<sup>20</sup> IS9-3

<sup>21</sup> The WSIB was involved because the ship was owned by an Ontario corporation.

<sup>22</sup> GD3-3

<sup>23</sup> GD3-5

<sup>24</sup> Dr. Cussen has stated that the Claimant has previously seen a psychologist for anxiety.

<sup>25</sup> GD2-1323 to 1348

<sup>26</sup> Although Dr. Cussen offered to provide a copy of Dr. Burke's consultation report, it was not in the hearing file.

<sup>27</sup> IS9-3

### **Functional Limitations**

[29] On November 5, 2014, Troy Harvie's Functional Capacity Assessment found that the Claimant was severely restricted in bending, stooping, crouching, twisting, and squatting. He could tolerate only occasional standing. He could walk for only 10 minutes. However, his sitting tolerance was good. Troy Harvie concluded that the Claimant was capable of doing sedentary work with occasional light lifting demands.<sup>28</sup>

[30] In March 2015, Troy Harvie recorded that the Claimant could walk for no more than five minutes and stand for no more than 30 minutes. He stated that the Claimant could begin working on modified duties for four hours per day.<sup>29</sup>

[31] In October 2015, Andrew Sinclair, a WSIB work transition specialist, wrote that the Claimant was restricted in squatting, kneeling, climbing ladders, pushing and pulling, walking more than 10 minutes, and standing more than one hour.<sup>30</sup>

[32] In June 2016, Troy Harvie recorded that the Claimant continued to have severe left knee pain. He also continued to have pain in his left ankle, but to a lesser extent. He always walked with a cane and wore a custom knee brace. He could walk for only 10 minutes and stand for only 20 minutes.<sup>31</sup>

### **My Findings**

[33] There is no dispute that as of the MQP the Claimant could not return to his previous work or any physical demanding work. His primary disabling condition was his chronic knee pain and weakness that led to him falling frequently. He was also physically limited by his ankle and back pain. In addition, he suffered from longstanding anxiety.

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<sup>28</sup> GD2-620

<sup>29</sup> GD2-596

<sup>30</sup> GD2-830

<sup>31</sup> GD2-572



[34] The Functional Capacity Assessment was about one month before the MQP. This stated that the Claimant was capable of doing sedentary to light work. There were no limitations on his sitting.

[35] I find that there is some evidence that the Claimant had the capacity to do light to sedentary work at the MQP.

***The Claimant made efforts to obtain employment that were unsuccessful because of his health condition***

[36] I have already determined that there was some evidence that the Claimant had work capacity as of the MQP. In view of this, I must determine whether he made efforts to obtain and maintain employment that were unsuccessful because of his medical condition.<sup>32</sup>

[37] For the reasons that follow, I am satisfied that he did.

[38] Because his employer was not able to accommodate him, the WSIB placed the Claimant in a Work Transition (WT) plan. The plan was for what was considered to be the suitable occupation (SO) of civil engineering technologist (CET).<sup>33</sup>

[39] In March 2015, the WSIB notified the Claimant that it had agreed to sponsor his WT plan. The Claimant then took the spring/summer semester of an education/math upgrading program. In the fall, he started the CET program at Nova Scotia Community College (NSCC).<sup>34</sup>

[40] The Claimant participated in the CET program from September 2015 until he graduated in May 2017. He then started on a job placement program through the March of Dimes. However, he was not able to obtain employment because of his medical condition.

**Minister's arguments**

[41] The Minister acknowledges that the Claimant has limitations and that he cannot return to his previous physically demanding employment. However, its position is that he had the capacity

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<sup>32</sup> *Inclima v Canada (Attorney General)*, 2003 FCA 47, para 3; *Yantzi v Attorney General Canada* 2014 FCA 193, para 5; *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41.

<sup>33</sup> GD2-1216 to 1218

<sup>34</sup> GD2-839

to do light to sedentary work when he last qualified for CPP disability in December 2014, and for a few years afterwards.

***The Claimant's participation in the CET program did not establish that he had the regular capacity to pursue substantially gainful employment after the MQP***

[42] Ms. Dejonge, the Minister's representative, argues that the Claimant's ability to attend and successfully complete the CET program established that he had the regular capacity to pursue substantially gainful employment after the MQP. Ms. Dejonge submitted that much of the Claimant's evidence about his difficulties with and accommodations in the course was not "mirrored" in his reports to the WSIB. For example, there was no mention of his stopping to rest while driving to the course, of his lying down on couches at school to rest, or of teachers ignoring bad marks or poor test results.

[43] In his testimony at the hearing, the Claimant described his difficulties while taking the course and his required accommodations as follows:

- He had to drive about 90 minutes each way to participate in the program;
- Sometimes, he would stop about ½ way to recline his car seat and rest;
- The classes were from 8:30 to four, for five days a week. Sometimes he had to lie down on couches for ½ to 1 hour at the school to rest;
- He required accommodations for some of the physical requirements such as surveying and mixing concrete;
- He was not able to participate in field trips;
- He was provided with a tutor and a classmate routinely helped him by copying her work and giving it to him;
- Sometimes the teachers ignored his bad marks or poor test results. They did this because they knew he was struggling to pass; and
- He was not able to do the usual on the job training at the end of the course. They accommodated by allowing him to do it at the college. He did not really do anything. He just marked tests a couple of times. He could not do anything physical.

[44] The medical records and WSIB reports are generally consistent with the Claimant's evidence. Although he may not have reported every difficulty or accommodation to the WISB, there was no need for him to do so. He did not want to discuss many of his problems with the WSIB because he was understandably concerned that they might cut off his funding. The Claimant was a consistent and credible witness. I accept his oral evidence about the problems he had while participating in the CET program.

[45] The medical records establish that the Claimant suffered from increasing and worsening pain while attending the program. Although a Claimant may be expected to live with pain while pursuing employment, he should not be expected to endure increasing and worsening pain.

[46] I have set out the most significant excerpts from the medical records below:

- Dr. Cussen's January 2015 office note records that the Claimant was still using crutches.<sup>35</sup>
- Dr. Cussen's April and May 2015 office notes record that the Claimant had fallen again on two occasions. He continued to have knee problems.<sup>36</sup>
- Dr. Cussen's June 2015 office note records that the Claimant said his pain was getting worse.<sup>37</sup>
- In June 2015, Troy Harvie recorded that the Claimant felt that his knee pain had been worsening.<sup>38</sup>
- Dr. Cussen's October 2015 office note records that the Claimant continued to be in pain. He felt his pain had been made worse by the distance he had to travel for his college program.<sup>39</sup>
- Dr. Cussen's June 2016 office note for the first time records that he was assessing the Claimant for drug addiction (opioid type dependence) and obesity. The note also records that the Claimant was concerned about the mobility of his left knee and ankle.<sup>40</sup>

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<sup>35</sup> GD3-9

<sup>36</sup> GD3-13,14

<sup>37</sup> GD3-15

<sup>38</sup> GD2-593

<sup>39</sup> GD3-19

<sup>40</sup> GD3-23

- The July 2016 office note records that the Claimant continued to have problems with his back.<sup>41</sup>
- Dr. Cussen's November 2016 office note records that the Claimant was still in a lot of pain. He told Dr. Cussen that he could not get by without his pain medication and Ativan. He stated that he was not able to function without them.<sup>42</sup>
- Dr. Cussen's December 2016 office note records that the Claimant's back was getting worse.<sup>43</sup>
- Dr. Cussen's February 2017 office note records that he spoke to the Claimant about his being dependant on hydromorphone. They discussed the possibility of the Claimant going to a methadone clinic.<sup>44</sup>
- In June 2017, Troy Harvie stated that the Claimant's chronic back, knee, and leg pain had worsened over the past six months. His knee continued to be weak and unstable.<sup>45</sup>
- In the same month, Dr. Cussen stated that the Claimant had a long history of chronic pain. Over the past several years, he had been taking Hydromorphone (an opioid painkiller) on a daily basis. However, this was no longer helping because he had developed a tolerance for it. Dr. Cussen had recently prescribed medical marijuana.<sup>46</sup>
- In August 2017, Dr. Cussen recorded that the Claimant told him that he was now disabled and that he could not work.<sup>47</sup>
- Dr. Cussen's September 28, 2017 office note records that the Claimant asked for a prescription for a wheelchair. Dr. Cussen was concerned that the Claimant was on the road to being wheel chair bound and an invalid.<sup>48</sup>
- The next day, Dr. Cussen told the WSIB that he refused to prescribe the wheelchair because it would lead to the Claimant becoming more dependant. He stated that despite encouragement and education, the Claimant had limited understanding that he could be more mobile and function well because of his knee injury. He was also concerned that the Claimant had developed a dependency on opioids.<sup>49</sup>

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<sup>41</sup> GD3-24

<sup>42</sup> GD3-26

<sup>43</sup> GD3-27

<sup>44</sup> GD3-28

<sup>45</sup> GD1-11

<sup>46</sup> GD1-4

<sup>47</sup> GD3-34

<sup>48</sup> GD3-35

<sup>49</sup> GD2-78

[47] The WSIB reports confirm that the Claimant experienced many difficulties and required significant accommodations while attending the CET program. I have set out the most significant excerpts from the WSIB records below:

- In April 2015, the WSIB notified NSCC that the Claimant required accommodations to allow him to reposition himself as necessary because of his knee impairment.<sup>50</sup>
- In May 2015, the Claimant's WT case manager stated that the Claimant had demonstrated an admirable level of dedication to his upgrading program.<sup>51</sup>
- In July 2015, the Claimant told his case manager that although he was doing well in his upgrading program, he was experiencing increased pain and instability in his knee.<sup>52</sup>
- In September 2015, the Claimant told his case manager that he had difficulty with the surveying course in the CET program because it required more walking than he had anticipated.<sup>53</sup>
- In that month, he also told his case manager that he was experiencing more pain and swelling because of walking around to get to classes.<sup>54</sup>
- On October 5, 2020, the WSIB notified NCCC that the Claimant's physical restrictions included no squatting, kneeling, climbing, repetitive pushing or pulling. In addition, he could tolerate only 10 minutes of continuous walking and one hour of standing.<sup>55</sup>
- On October 29, 2015, the Claimant told his case manager that he was discouraged because his instructors had suggested he drop out of the program.<sup>56</sup>
- In November 2015, the Claimant told his case manager that he was frustrated because the NCCC disability services had not been willing to accommodate him for surveying. They had told him that he should consider switching programs because they could not accommodate him further.<sup>57</sup>

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<sup>50</sup> GD2-835, 841

<sup>51</sup> GD2-1194

<sup>52</sup> GD2-1186 to 1187

<sup>53</sup> GD2-1173

<sup>54</sup> GD2-1175

<sup>55</sup> GD2-830

<sup>56</sup> GD2-1158

<sup>57</sup> GD2-1154

- In July 2016, the Claimant told his case manager that because of his difficulties with outside surveying he would focus on sedentary occupations.<sup>58</sup>
- In December 2016, the Claimant told a WT specialist that he was experiencing more pain in his knee. He was doing his best to manage his pain, but it was affecting his home life.<sup>59</sup>
- In March 2017, the Claimant told the WSIB that although he was doing well academically, he felt like his body was “falling apart.” Driving to and from school as well as being in school had caused his pain to increase continuously. Dr. Cussen had prescribed medical marijuana but it was making him “foggy.” He had arranged a meeting with the Dean to discuss his pain concerns. He hoped to be able to manage his pain so that he could successfully complete the program.<sup>60</sup>
- On July 28, 2017, the Claimant told the WT specialist that his pain was horrendous.<sup>61</sup>
- In August 2017, the WSIB terminated the Claimant’s loss of income benefits. The Claimant advised the WT specialist that for the past few months he had been either in physiotherapy (which resulted in more pain) or in bed surrounded by pillows and on medication. The Claimant did not believe he could work in any capacity.<sup>62</sup>

## My Findings

[48] In determining whether attendance at an education program establishes regular work capacity, I must consider the particular facts of the case. I must determine whether the Claimant’s attendance is just evidence of good faith rather than actual work capacity. There are non-binding Pension Appeal Board decisions that support either position depending on their unique facts.<sup>63</sup>

[49] There is a significant difference between a WT program, which is a “stepping stone” to employment, and actual employment. Although the Claimant was willing to endure increased pain and hardship during the temporary WT “stepping stone” period, this is not something that

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<sup>58</sup> GD2-1101

<sup>59</sup> GD2-1080

<sup>60</sup> GD2- 175, 182,1066

<sup>61</sup> GD2-981

<sup>62</sup> GD2-972

<sup>63</sup> *Fraser v Minister of Human Resources Development*, CP 11086 and *Marriott v. Minister of Human Resources Development*, CP08452 support the Minister’s position. On the other hand, *R.B. v. Minister of Human Resources and Skills Development*, CP28005 and *Stratton v. Minister of Social Development*, CP24370 support the Claimant’s position.

he should be reasonably expected to endure as part of employment. It is not reasonable to expect a Claimant to work under circumstances during which his condition significantly deteriorates.

[50] In addition, the college was in many respects similar to a benevolent employer. It provided the Claimant with accommodations that went beyond what was reasonably required of an employer in a competitive marketplace.<sup>64</sup> An employer is not required to allow an employee to lie down to rest, to not participate in physical requirements of the job, to be provided assistance by tutors and fellow workers, or to ignore poor results. The Claimant's need for these accommodations supports that he was not able to work in a competitive environment.

[51] After considering the Claimant's increased pain and deteriorating condition as well as the accommodations he required, I find that the Claimant's participation in the CET program did not establish that he had the regular capacity to pursue substantially gainful employment. Rather, this was a commendable good faith effort by him to upgrade his education and work skills, so he could regain the regular capacity to pursue substantially gainful employment. This type of effort should be encouraged, not penalized. Sadly, the effort was unsuccessful in this case.

### **The Claimant was not able to pursue alternative work**

[52] Ms. Dejonge also argues that the Claimant did not co-operate with the WT specialist and job placement facilitators after he completed the course. She submitted that if the Claimant was not physically able to work as a CET, he was obligated to look for alternative work suitable to his limitations.

[53] Ms. Dejonge relies on the following excerpts from the WSIB records:

- On June 7, 2017, the Claimant told the WT specialist that he was concerned because there was no work in his area. He could not commute to Halifax because he could only drive for an hour. He was experiencing intense back pain and he felt that his condition had deteriorated significantly.<sup>65</sup>
- On June 13, 2017, the WT specialist recorded concerns about the Claimant's commitment to the job placement program. The Claimant would not commit to

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<sup>64</sup> *Atkinson v Attorney General of Canada*, 2014 FCA 187, para 40

<sup>65</sup> GD2-1001

any aspects of the program and there were concerns about his level of drug use and his resulting impairment. The Claimant was told about two job leads in Halifax for CET with a chief focus on drafting. He said these were not suitable because they were full-time. They were also not suitable because of the time required for him to commute to Halifax. The Claimant stated that he would look for a part-time job in his area.<sup>66</sup> He also rejected suggestions of co-ordinating search efforts with an agency in his area.<sup>67</sup>

- On June 28, 2017, the WT specialist recorded that the Claimant had not performed any job searches. The Claimant had stated that he had been in bed the entire time, and that he had increased his marijuana consumption to manage the pain.<sup>68</sup>

[54] A claimant is not expected to pursue employment when he is unable to do so. During the period relied on by the Minister, the Claimant has been laid up in bed for most of the day because of his pain. He asked Dr. Cussen to prescribe a wheelchair. Dr. Cussen was concerned that he had developed a dependency on opioids. His pain medication had stopped being effective. He felt that his body was “falling apart.” Dr. Cussen had prescribed medical marijuana, which limited the Claimant’s driving and made him “foggy.”<sup>69</sup>

[55] At the time the Claimant completed the academic portion of the WT program, he was not able to pursue any form employment. His effort to pursue employment by completing the CET program was unsuccessful because of his medical condition.

### **The Claimant has established a severe disability**

[56] I must assess the severity of the Claimant’s disability in a “real world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining his “employability”. The Claimant’s disability is severe if it prevents a him from consistently pursuing a remunerative occupation<sup>70</sup>

[57] Employability is the key measure of a severe disability under the CPP.<sup>71</sup>

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<sup>66</sup> There is no evidence about the Claimant looking for a part-time job at that time.

<sup>67</sup> GD2-996.

<sup>68</sup> GD2-989

<sup>69</sup> See para 51, last sic bullets, and para 52, last three bullets, above.

<sup>70</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>71</sup> *Canada (A.G.) v. Dean*, 2020 FC 206



[58] The Claimant testified that he received a certificate for jobs that he could not do. He stated that he sent numerous on-line applications for CET jobs up until 2019. However, he had only one in person interview and a couple of phone interviews. On each application, he acknowledged that he had limitations and disabilities. He was not offered any jobs in this field. He did not apply for other types of jobs. When I asked him why he did not look for other work, he stated that he could not do anything physical such as driving, lifting, or standing. The medications made him groggy, which made any type of job difficult.

[59] I asked him why he believed he was unable to work. He stated that he had only been able to pass the CET program because of the accommodations and help from classmates. An employer would not accommodate him. He cannot function because of the effects of his medications. He stated, "I can't stay on track ... I can't meet deadlines ... I can't be in a routine."

[60] He now sees Dr. Cussen on a monthly basis. Dr. Cussen renews his prescriptions. He is taking hydromorphone for his pain and depression, a muscle relaxant, and medical marijuana. He sees a counselor twice a month. He does this by phone because of Covid-19. On most days, he just sits on a couch and watches U-tube on a tablet. He has to pace himself to do housework. He stated that he has not had a shower since June because he cannot get in and out of the shower on his own. He is afraid to leave his house because of his post-traumatic stress disorder.

[61] Ms. Dejonge also argues that the Claimant was very young, well educated, and had many transferable skills. He was fluent in English and had good computer skills. She submitted that the Claimant's personal circumstances supported that he had the capacity to pursue alternative employment suitable to his limitations.

[62] I agree that the Claimant's personal circumstances support that he had the capacity to pursue alternative employment. However, because of his medical conditions and limitations he lacked the regular capacity to do so.

[63] I have already determined that there was some evidence that the Claimant had the capacity to do light to sedentary work at the MQP. However, this does not necessarily mean that

that he was regularly capable of pursuing alternative work. With the benefit of hindsight, it appears that this was overly optimistic.

[64] I have already determined that the Claimant made efforts to pursue employment that were unsuccessful because of his medical condition. I recognize that the Claimant's condition deteriorated after the MQP. However, just because his condition subsequently deteriorated, does not mean that he was not severely disabled as of the MQP.

[65] I find that the Claimant has established that it is more likely than not that he suffered from a severe disability in accordance with the CPP requirements as of the MQP.

### ***Prolonged Disability***

[66] The Claimant's disabling chronic pain has persisted for many years. Unfortunately, there has been little or no improvement. If anything, his overall condition appears to be deteriorating.

[67] The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

[68] I find his disability is prolonged.

### **CONCLUSION**

[69] I find that the Claimant had a severe and prolonged disability in June 2012, when he last worked. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.<sup>72</sup> The Minister received the Claimant's application in August 2017; therefore, the Claimant is deemed disabled in May 2016. Payments start four months after the deemed date of disability.<sup>73</sup> Payments will start as of September 2016.

[70] The appeal is allowed.

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<sup>72</sup> Paragraph 42(2)(b) of the CPP

<sup>73</sup> Section 69 of the CPP

Raymond Raphael  
Member, General Division - Income Security