



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *RM v Minister of Employment and Social Development*, 2021 SST 93

Tribunal File Number: GP-18-802

BETWEEN:

**R. 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: Raymond Raphael

Claimant represented by: Steven R. Yormak

Minister represented by: Jennifer Hurley

Teleconference hearing on: February 17, 2021

Date of decision: February 20, 2021

## **DECISION**

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension. His payments start as of April 2011.

## **OVERVIEW**

[2] The Claimant was 51 years old when he applied for a CPP disability pension in March 2012. He last worked as an inside sales and customer service representative for a welding supply company. He stated that he had been unable to work since March 2010 because of post-traumatic spinal fractures, lumbar radiculopathy<sup>1</sup>, chronic lower back pain, and right hip osteoarthritis.<sup>2</sup> The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] In November 2015, the General Division dismissed the appeal. The General Division member found that the Claimant had the physical ability to regularly pursue sedentary or part-time work. The Claimant appealed to the Appeal Division. In March 2018, the Appeal Division allowed the appeal and referred this matter back to the General Division for a new hearing. The Appeal Division found that the General Division made an unwarranted negative conclusion about the Claimant's credibility based on an erroneous finding of fact.

[4] 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**

[5] For the Claimant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2013. This date is based on his contributions to the CPP.<sup>3</sup>

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<sup>1</sup> A pinched lower back nerve causing pain that spreads to the legs.

<sup>2</sup> GD7-295

<sup>3</sup> Service Canada uses a person's years of CPP contributions to calculate their coverage period, or "minimum qualifying period" (MQP). The end of the coverage period is called the MQP date. See subsection 44(2) of the Canada Pension Plan. The Claimant's CPP contributions are at IS2-5

[6] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.<sup>4</sup> It is prolonged if it is likely to be long continued and of indefinite duration.<sup>5</sup>

## ISSUES

1. Did the Claimant’s chronic back and leg pain result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2013?
2. If so, was his disability likely to be long continued and of indefinite duration by that date?

## ANALYSIS

### *Severe Disability*

#### **The Claimant’s medical conditions interfered with his ability to work by December 31, 2013**

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

#### **The Claimant’s account**

[8] In August 1994, the Claimant was injured in a serious work related truck accident. His injuries included compression fractures in his mid and lower back (from T10 through L1), a left thumb fracture, tendon lacerations in both wrists, and a left eye injury.<sup>7</sup> He was off work for about a year during which time he underwent extensive therapy. In the summer of 1995, he returned to work on graduated hours. Although he continued to experience mild back pain, he was gradually able to increase his hours from two hours a day to eight. He initially worked on the front counter doing dispatch and paper work. In 1997, he started working as a sales supervisor overseeing nine salespersons.

[9] In September 2009, the company downsized. It put him at the front counter where he had to lift heavy gas cylinders for customers. In October 2009, he reinjured his back. He developed

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<sup>4</sup> Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>5</sup> Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

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

<sup>7</sup> GD2-276

increased back pain and sciatica, but attempted to continue working. In March 2010, he stopped working on the advice of his family doctor. He has not returned to work since. In July 2012, he underwent a right hip replacement.

[10] Although the surgery was successful, he continued to suffer constant lower back pain as well as pain in both legs because of sciatica. He stated that his condition is the same today as it was at the end of December 2013. He spends most of his days either lying back in a reclining chair or lying down. He suffers from constant mid to low back pain. The pain affects his pelvic area and radiates down both legs. He usually sits for two hours at a time – three to four times a day. He can walk for only 20 minutes and stand for only 10 minutes. He cannot twist, turn, or bend without intense pain. After sitting for about 30 minutes, his back and leg pain increases, he has leg spasms, and his legs feel like they are falling asleep. He then has to lie down for about two hours. He is able to drive for only 30 to 40 minutes.

[11] He has to pace himself when trying to do any household or social activities. When he goes grocery shopping, he has to lift one light bag at a time. He has to lie down for a couple of hours when he gets home. He can do household chores such as light gardening, cleaning, and cooking for only 15 to 20 minutes. When he goes to family gatherings for holidays and birthday parties, he has to lie down on a couch or reclining chair.

### **The medical evidence**

[12] The Claimant has seen several specialists, taken pain medications, and undergone extensive treatment including physiotherapy and nerve block injections. None of the treatments has relieved his severe and constant pain. None of the medical reports suggests that he is feigning or exaggerating his symptoms. None of them suggests he is capable of returning to work. I am setting out below in chronological sequence the most significant excerpts from the medical reports.

[13] In June 2010, a MRI of the Claimant's lumbar spine revealed mild wedge fractures at T12 and L1. It also revealed a pinched nerve at L4-5.<sup>8</sup>

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<sup>8</sup> GD2-276

[14] In December 2010, Dr. Chapeskie, family doctor, wrote to the Claimant's lawyer that his disability was permanent. His prognosis for a full recovery was poor.<sup>9</sup> In the same month, Dr. Chapeskie wrote to the Claimant's long-term disability insurer that his limitations included no twisting, no bending, no lifting more than five pounds, and no sitting or standing for more than 15 minutes. He reiterated that the Claimant's prognosis was poor and that his disability was permanent.<sup>10</sup>

[15] In May 2011, Dr. Death, physiatrist, reported that the Claimant complained of constant sharp low back pain (24 hours a day, 7 days a week). He also had constant pain in his right buttock, thigh, and calf. Dr. Death reviewed the June 2010 MRI and stated that there were two causes of the pain. The first was the fractures at T12 to L1. The second was the irritation of the nerve root at L4-5. Dr. Death arranged for the Claimant to undergo facet injections.<sup>11</sup>

[16] Dr. Chapeskie's January 10, 2012 office note records that the Claimant suffered from daily severe pain in his mid-lower back, pelvic area, and both legs. He was using a cane for most of his walking.<sup>12</sup>

[17] In January 2012, Dr. Petis, a resident for Dr. McCalden, orthopaedic surgeon, stated that the Claimant had severe post-traumatic right hip arthritis.<sup>13</sup>

[18] In his February 2012 CPP medical report, Dr. Chapeskie diagnosed post-traumatic spinal fractures from T10 through to L5, and severe post-traumatic right hip arthritis. The Claimant's back was "very" sore after prolonged sitting, standing, or walking. He could not lift more than five pounds, and he could not do any bending or twisting. Facet injections had not helped. Fifty-one sessions of physiotherapy had not helped. Chiropractic treatments had made his condition worse. The Claimant's prognosis was poor.<sup>14</sup>

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<sup>9</sup> GD7-263

<sup>10</sup> GD7-264 to 265

<sup>11</sup> GD2-277

<sup>12</sup> IS5-11

<sup>13</sup> GD2-284 to 285

<sup>14</sup> GD7-269 to 272

[19] In July 2012, Dr. McCalden performed a right total hip joint replacement. In October 2012, Dr. Motu-Grigg, a clinical fellow for Dr. McCalden stated that the Claimant had been recovering well from the surgery.<sup>15</sup>

[20] In March 2014, Dr. Siddiqi, spinal surgeon, stated that surgery would not relieve the Claimant's symptoms.<sup>16</sup>

### **My findings**

[21] I accept the Claimant's oral evidence because it is consistent with and confirmed by the extensive medical evidence.

[22] I find that the Claimant's longstanding back and leg pain interfered with his ability to work by December 31, 2013.

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

[23] A disability is severe if it renders a claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement 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".<sup>17</sup>

[24] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.<sup>18</sup> The Claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.<sup>19</sup>

[25] The Minister acknowledges that the Claimant cannot return to his previous employment. The Minister's position is that the medical evidence does not establish that the Claimant is unable to pursue alternative work. Since he has not done so, he is not entitled to a CPP disability pension.

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<sup>15</sup> GD7-51

<sup>16</sup> GD3-7

<sup>17</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>18</sup> *Ferreira v. Attorney General of Canada*, 2013 FCA 81

<sup>19</sup> *Klabouch v. Canada (Social Development)*, 2008 FCA 33

[26] In view of this, the primary issue that I must decide is whether the Claimant is able to pursue alternative work.

[27] The Claimant was 53 years old in December 2013, when he last qualified for a CPP disability pension. He was about 12 years away from the usual retirement age. He completed high school and has a college diploma in engineering and technology management. He has a varied work history including working as truck deliveryman, as a sales supervisor, and as a front desk sales and service representative. He is able to use both Word and Excel. He is proficient in English. He has significant transferable skills. These are positive factors and support a finding that the Claimant had the capacity to pursue alternative employment.

[28] However, the Claimant suffers from longstanding and disabling chronic back and leg pain. Despite his positive personal characteristics, he could not be a regular and reliable employee

[29] The Claimant acknowledged that he has not made any efforts to return to work since March 2010. He stated that he has not done so because he could not work. He cannot do physical work. He cannot do sedentary work because he cannot sit in a chair for more than 30 minutes. He has to spend most of his time lying down. Any activity increases his pain.

[30] I am satisfied that the Claimant lacked the regular capacity to pursue any form of gainful employment. In view of this, he was not obliged to make efforts to pursue alternative employment.<sup>20</sup>

[31] I find that the Claimant has established that it is more likely than not he suffers from a severe disability in accordance with the CPP requirements.

### ***Prolonged Disability***

[32] The Claimant's disabling back and leg pain has persisted for many years. He has undergone extensive treatment, with little improvement.

[33] In September 2015 and again September 2017, Dr. Chapeskie stated that the Claimant suffered from chronic mechanical mid and lower back pain because of multiple vertebral

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<sup>20</sup> *Inclima v Canada (Attorney General)*, 2003 FCA 117

fractures. He also stated that the Claimant had pursued all possible treatment modalities and had explored all medical options at a pain clinic.<sup>21</sup>

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

[35] I find his disability is prolonged.

## **CONCLUSION**

[36] I find that the Claimant had a severe and prolonged disability in March 2010, when he last worked. However, the CPP says a person cannot be considered disabled more than 15 months before the Minister receives their disability application. After that, there is a four-month waiting period before payments start.<sup>22</sup> The Minister received the Claimant's application in March 2012. That means he is considered to have become disabled in December 2010. Payment of his pension starts as of April 2011.

[37] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>21</sup> GD9-3, AD7-3

<sup>22</sup> Section 69 of the *Canada Pension Plan* sets out this rule.