



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *CW v Minister of Employment and Social Development*, 2021 SST 241

Tribunal File Number: GP-18-2885

BETWEEN:

**C. W.**

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: Jonathan Burton

Videoconference hearing on: March 26, 2021

Date of decision: April 22, 2021

## **Decision**

[1] The Claimant's disability was severe and prolonged from June 2015 to and including May 2019. This decision explains why I am allowing the appeal, in part.

## **Overview**

[2] The Claimant is a 42-year-old man who used to work as a Technical Support Analyst for the Government of Canada<sup>1</sup>.

[3] The Claimant has had three motor vehicle accidents (MVAs) in the last several years. The MVAs were in September 2014, July 2017 and November 2019.

[4] The Claimant applied for Canada Pension Plan (CPP) disability benefits in June 2017, just before the second MVA. In his application, he reported that he is unable to work because of post-concussion symptoms, headaches, vision problems, neck, back and shoulder pain, and sciatic nerve pain. He explained that he is unable to sit for prolonged periods and is unable to concentrate due to his cognitive issues<sup>2</sup>.

[5] The Minister denied the application, initially and on reconsideration, because the Minister determined that the Claimant's limitations did not prevent him from doing some type of work by the end of 2017. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

## **What the Claimant must prove**

[6] For the Claimant to succeed with this appeal, he must prove he has a disability that was severe and prolonged by December 31, 2017. This date is based on his contributions to the CPP<sup>3</sup>.

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<sup>1</sup> Page GD2-1121

<sup>2</sup> Page GD2-155

<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 on pages GD15-6 to GD15-7 and GD17-1 to GD17-3.

[7] 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>. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death<sup>5</sup>.

### **This case is complex**

[8] This is a complex case. It is complex because it involves three MVAs, numerous medical assessments, conflicting diagnoses, and post-MVA work activities. On top of all of this, the case involves a Claimant who experienced a significant and tragic pre-MVA history.

#### **The nature of the MVAs**

[9] The MVAs can be summarized briefly. The first MVA was in September 2014. The Claimant was driving a vehicle and was hit from behind while waiting to make a left-hand turn. The police arrived at the scene. The Claimant did not go to the hospital. However, he saw his doctor a few days later<sup>6</sup>.

[10] The second MVA was in July 2017. The Claimant was a passenger in a Para Transpo cab<sup>7</sup>. The front of the cab was hit when another vehicle backed into it<sup>8</sup>.

[11] The third MVA happened on November 12, 2019. I do not have much information about what happened in this accident, except that the Claimant was a passenger in a Para Transpo vehicle<sup>9</sup>.

#### **The conflicting diagnoses**

[12] There is some debate in the medical evidence as to whether the Claimant actually has post-concussive syndrome.

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<sup>4</sup> The definition of severe disability is set out in paragraph 42(2)(a) of the *Canada Pension Plan*.

<sup>5</sup> The definition of prolonged disability is set out in paragraph 42(2)(a) of the *Canada Pension Plan*.

<sup>6</sup> Pages GD2-17 , GD2-100, GD2-108, GD2-124, GD2-249 and GD2-1120

<sup>7</sup> Para Transpo is a public transportation alternative for persons who are unable to take conventional transit some or all of the time due to disability (page GD2-367).

<sup>8</sup> Pages GD1-29, GD1-40, GD2-203, GD2-217, GD2-221 and GD2-222

<sup>9</sup> Page GD4-6 and the Claimant’s testimony

[13] Dr. Lawrence, Chiropractor, diagnosed the Claimant with post-concussion syndrome in June 2015<sup>10</sup>.

[14] In October 2015, Dr. Morgan reported that the Claimant's symptoms might be explained by migraines, neck and back pain, with underlying depression/stress/PTSD and possibly a somatization disorder<sup>11</sup>. That same month, Dr. Cattan, Psychiatrist, diagnosed somatic symptom disorder with predominant pain, persistent, moderate to severe, and histrionic personality associated with a whiplash syndrome. Dr. Cattan did however recommend a neurological assessment at the Traumatic Brain Injury program to rule out underlying concussion syndrome<sup>12</sup>. In October 2019, Dr. Judge, Psychologist, reported that there is substantial evidence for somatic symptom disorder and associated functional impairment<sup>13</sup>.

[15] Nothing turns on whether the Claimant's symptoms are attributed to post-concussive syndrome or somatization disorder. First, there appears to be a link between the two diagnoses. In this regard, Dr. Judge explained that post-concussive syndrome is best characterized as a somatoform disorder, reflecting the (unconscious) conversion of intolerable depressed and anxious mood (psychological distress) into somatic (post-concussive) symptoms<sup>14</sup>. Second, my focus is not on the Claimant's diagnoses<sup>15</sup>. My focus is on whether the Claimant had functional limitations that got in the way of him earning a living<sup>16</sup>.

### **The pre-MVA history**

[16] The Claimant has a significant pre-MVA history. It is not necessary for me to summarize all of the details. However, I will mention that when the Claimant was a teenager, his parents and twin brother were murdered in front of him. The Claimant was also shot in the attack, but survived. I mention this because the Claimant's traumatic history may have impacted some of his symptomatology following the MVAs. As one psychologist explained, the Claimant's pre-

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<sup>10</sup> Page GD1-153

<sup>11</sup> Page GD1-179

<sup>12</sup> Pages GD1-206 to GD1-208

<sup>13</sup> Page GD5-400

<sup>14</sup> Page GD5-397

<sup>15</sup> *Ferreira v. Canada (Attorney General)*, 2013 FCA 81

<sup>16</sup> *Klabouch v. Canada (Attorney General)*, 2008 FCA 33

existing experience of trauma made him “exquisitely vulnerable” to the effects of subsequent trauma<sup>17</sup>.

### **The post-MVA work activities**

[17] The Claimant has had periods of work activity since the MVA in 2014. For the most part, I have relied on what the medical evidence says about the dates of work activity. This is because the Claimant had trouble remembering all of the dates in question.

[18] According to the medical reports, the Claimant returned to work in November 2014 in a modified capacity for three half days per week<sup>18</sup>. He was off work from January 2015 to March 2015 due to abdominal surgery<sup>19</sup>. He stopped working at the end of June 2015 because of daily headaches, sensitivity to light, dizziness, nausea, blurred vision and poor sleep<sup>20</sup>.

[19] The Claimant appears to have tried to work again in 2015, 2016, and 2017, though it is not really clear how much and for how long he worked. I have a medical note of April 2016 that says the Claimant was back to working full time since the fall of 2015<sup>21</sup>. However, I am not sure that this is accurate because I have another medical note of January 2016 that says the Claimant was working two half days a week, and this was a “slow return”<sup>22</sup>. I think what probably happened is that the Claimant had short return to work attempts, but nothing really long-lasting until 2019.

[20] The Claimant’s most recent work activity was from about March 2019 to November 2019, when he was in the third MVA. I will talk more about this work activity later.

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<sup>17</sup> Page GD5-398

<sup>18</sup> Pages GD1-104 and GD1-108 to GD1-112

<sup>19</sup> Hernia, repair, diastasis repair, and abdominoplasty (page GD1-124)

<sup>20</sup> Pages GD1-142, GD2-100, GD2-639, GD2-898, GD2-1267 and GD1-201

<sup>21</sup> Page GD2-399

<sup>22</sup> Page GD2-419

## **Severe disability**

### **The Claimant had functional limitations that affected his ability to work by December 31, 2017**

[21] The evidence shows that the Claimant had functional limitations that affected his ability to work by December 31, 2017.

[22] The Claimant testified that after the first MVA of 2014 he began having symptoms associated with a concussion. He felt drained, had cognitive difficulties, and vision problems. He also had pain and mobility issues, and ended up having to use Para Transpo.

[23] The Claimant filled out a Questionnaire in June 2017 (just before the second MVA). In that Questionnaire the Claimant reported a number of limitations, including a sitting tolerance of 45 minutes, a standing tolerance of 20 minutes, a walking tolerance of 5 to 7 minutes, an inability to lift, carry, reach or bend, blurred and double vision, cognitive difficulties and poor sleep<sup>23</sup>.

[24] The Claimant testified that the second MVA made all of his symptoms worse.

[25] In addition to what the Claimant told me, I have also considered what the medical evidence says. The medical evidence supports a finding that the Claimant had functional limitations that affected his ability to work by December 31, 2017.

[26] By the spring of 2015, the Claimant was reporting symptoms of headaches, dizziness, poor concentration and memory, difficulty reading and poor cognition<sup>24</sup>.

[27] In August 2015, the Claimant's family doctor noted that the Claimant's back pain was causing the Claimant to fall down. The Claimant's worst problem though was his headaches. They were occurring 4-5 times a week and got worse when the Claimant tried to concentrate<sup>25</sup>.

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<sup>23</sup> Page GD2-156

<sup>24</sup> Page GD1-153

<sup>25</sup> Page GD2-627

[28] In October 2015, the Claimant was assessed by an Occupational Therapist. At that time, his main complaints were pain in his neck, back, hips, left leg, and shoulders, headaches, dizziness, nausea/vomiting, decreased balance, sensitivity to light and noise, decreased positional tolerances, decreased endurance, and cognitive and psychosocial issues. The therapist reported that testing showed decreased range of motion with neck, shoulder, back and hip movements; decreased strength in the upper and lower extremities; cognitive deficits and some executive functioning difficulties mostly with respect to time management, problem solving, organizing and processing information and developing and executing an effective plan<sup>26</sup>.

[29] In February 2016, the Claimant's Occupational Therapist reported that the Claimant continued to experience increased pain and fatigue with increased activity levels. She noted that it was taking the Claimant about 3.5 hours to complete his bathing and grooming routine. She also noted the Claimant was demonstrating cognitive deficits in several areas including memory, attention and concentration<sup>27</sup>.

[30] In May 2016, the Claimant's family doctor wrote to the Ministry of Transportation and explained that it was unsafe for the Claimant to drive because of his post-concussive symptoms and because he could not turn his head more than 15 degrees and was therefore unable to do shoulder checks<sup>28</sup>.

[31] In June 2016, Dr. Carswell, Neuropsychologist, reported that the Claimant identified problems with occasional headaches that, on a pain scale, averaged a 2 to 3 out of 10, but which could easily worsen to a severity of 8 to 9 out of 10. He also reported problems with dizziness and nausea, sensitivity to noise and light, blurred or fuzzy vision, and daily neck and lower back pain that averaged a 6 to 7 out of 10 and that could easily worsen to 10 out of 10. Cognitively, the Claimant said he felt he had returned to about 75 to 80% of his pre-accident levels but he identified problems with multi-tasking, word-finding, cognitive stamina, and being easily overwhelmed by too much information. He said that sleep was very problematic, resulting in low energy and fatigue<sup>29</sup>. Dr. Carswell administered a number of tests over several days and concluded that the Claimant's results showed difficulties, particularly with respect to processing

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<sup>26</sup> Page GD2-635

<sup>27</sup> Pages GD2-93 and GD2-96

<sup>28</sup> Page GD2-373

<sup>29</sup> Page GD2-103

speed. She said the Claimant had reduced processing speed for simple information and it declined significantly when the Claimant divided his attention or shifted his mental set<sup>30</sup>.

[32] In July 2016, Stacey Johnson performed a speech-language pathology/cognitive-communication assessment. She reported that the Claimant has difficulties with auditory processing (within the “marked” severity range), word finding, and information processing (within the “severe” range)<sup>31</sup>.

[33] In August 2016, the Claimant saw Dr. Deanna Quon, Psychiatrist, at the post-concussion clinic. He was experiencing severe, ongoing difficulty with sensitivity to light and noise, sleep disturbance, and fatigue. He also continued to have blurred and double vision, and decreased balance, though his vision and balance were somewhat improved following surgery on the left eye in July 2016 for a detaching retina. He reported a constant, fairly mild headache which could increase to a 10 out of 10 every three days, and persistent cognitive fatigue resulting in a reading tolerance of 20-30 minutes. Dr. Quon diagnosed a probable mild traumatic brain injury and whiplash-associated disorder<sup>32</sup>.

[34] In December 2016, the Claimant’s occupational therapist reported the Claimant’s most significant difficulties as pressure in his eyes, headaches, and vision problems. He was also experiencing dizziness, fatigue, sensitivity to light and noise, and increased pain and fatigue associated with increased activity levels<sup>33</sup>.

[35] In April 2017, the Claimant’s family physician (Dr. David Ponka) reported the Claimant’s most troubling problem as concentration and mood difficulties. However, he also explained that the Claimant has retinal detachments which had significantly altered the Claimant’s vision. Dr. Ponka did not know when the detachments occurred, but thought they may have been caused by a fall the Claimant had in early 2016<sup>34</sup>.

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<sup>30</sup> Pages GD2-105 to GD2-106

<sup>31</sup> Pages GD2-116 to GD2-123

<sup>32</sup> Pages GD2-124 to GD2-127

<sup>33</sup> Page GD2-1105

<sup>34</sup> Page GD2-54



[36] In June 2017, Dr. Ponka reported that the Claimant's conditions (post-concussion syndrome, retinal detachments, and sleep apnea) resulted in slowed cognition, concentration difficulties, balance problems, and vision issues<sup>35</sup>.

[37] In September 2017, Dr. Ponka noted the Claimant was in another MVA in July 2017, and was still having neck stiffness, decreased range of motion, numbness in both arms, dizziness, nausea, balance issues and almost constant headaches. The Claimant was not sleeping well and was easily fatigued<sup>36</sup>.

[38] In September 2017, Dr. Quon noted the Claimant's recent MVA of July 2017 and she said the second MVA caused an acute flare of the persisting symptoms. She said the Claimant's biggest concern was with cognition, but she also noted that he had ongoing neck and back pain, balance issues, and daily headaches with a constant pain rating of 6 out of 10<sup>37</sup>.

[39] In the fall of 2017, the Claimant was getting help from personal support workers to assist with dressing, hygiene and fall prevention<sup>38</sup>.

**The evidence about the Claimant's work capacity has changed throughout the years**

[40] Despite all of the Claimant's functional limitations, there have been times when the evidence has shown some capacity for work. Although the Claimant's first accident occurred in September 2014, I have focused my analysis on work capacity on the period in and after June 2015. This is because the Claimant's symptoms of post-concussive syndrome did not start until 2015. Also, the Claimant was working until June 2015, albeit with time off for abdominal surgery and vacation. He also had earnings that were substantially gainful in 2015 (i.e. \$34, 408)<sup>39</sup>.

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<sup>35</sup> Pages GD2-32 to GD2-35

<sup>36</sup> Page GD2-212

<sup>37</sup> Pages GD1-40 to GD1-41

<sup>38</sup> Page GD2-61. Although the document is numbered GD2, it is located in the GD5 bundle of documents.

<sup>39</sup> Page GD15-7

I – June 2015 to the fall of 2015

[41] The evidence does not show work capacity for the period from about June 2015 to the fall of 2015. In fact, Dr. Ponka wrote in July 2015 that the Claimant's condition had not started to improve and he needed to be fully off work<sup>40</sup>.

II – October 2015 to mid-2016

[42] By October 2015, the doctors were saying that the Claimant could return to work within several weeks.

[43] For example, on October 21, 2015, Dr. Ponka reported the Claimant was incapable of working until December 1, 2015 and then should start with three half days per week<sup>41</sup>.

[44] On October 22, 2015, Dr. Cattan, psychiatrist, reported that the Claimant was not ready to return to work, primarily because of chronic pain. However, he said that if the Claimant followed his treatment recommendations then he should be able to return to work in the next three months on a graduated basis<sup>42</sup>.

[45] In early 2016, there is conflicting evidence about the Claimant's capacity to work. On the one hand, the Claimant told his Occupational Therapist (Maegan Whitteker) in February 2016 that he felt his functioning had increased to 60-65% since the accident, and that his family physician had cleared him to return to work two half days per week<sup>43</sup>. On the other hand, Ms. Whitteker reported that she met with the Claimant's insurer and, after discussing the Claimant's physical tolerances and functioning, pain symptoms, and active rehabilitation therapies, they determined that the Claimant's perception of his current level of functioning did not match the level of functioning needed to begin a return to work program at that time<sup>44</sup>.

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<sup>40</sup> Page GD1-157

<sup>41</sup> Page GD1-181

<sup>42</sup> Pages GD1-207 and GD1-209

<sup>43</sup> Pages GD2-95 and GD2-412

<sup>44</sup> Pages GD2-95 and GD2-412

III - Mid-2016 to November 2018

[46] The Minister submits that a report from Dr. Woolsey shows that the Claimant could work.

[47] It is true that in February 2017, Dr. Woolsey wrote that the Claimant could, and probably should, begin a gradual return to work. He explained that there was no indication that further rest would help the Claimant. In fact he discouraged further rest as he said it would be detrimental to the Claimant's health and well-being. He believed the Claimant should begin a graduated return to work, with a gradual increase in cognitive demands over 2-3 months<sup>45</sup>.

[48] While Dr. Woolsey's opinion is relevant, I do not find it persuasive. First, Dr. Woolsey is not one of the Claimant's treating practitioners. He is a consultant for one of the Claimant's insurers, and he based his opinion on a paper review of the file. Second, and perhaps more importantly, Dr. Woolsey's opinion is not consistent with most of the other opinions on file about the Claimant's ability to work. When I look at all of the medical opinions together, it is obvious that most practitioners were of the view the Claimant could not work. When read together, I find the other opinions more persuasive, particularly since most of them were written by practitioners who have treated the Claimant and are thus well positioned to comment on his capacity to work.

[49] By mid-2016, most of the healthcare practitioners were saying the Claimant could not work, and this continued to be the case until about November 2018.

[50] In June 2016, Dr. Carswell reported that the Claimant's pain and fatigue needed to be better managed before he could return to work. She explained the Claimant has a number of limitations that would interfere with a successful return to work in his previous position, including an inability to tolerate more than two hours of sustained cognitive activity without significant pain and fatigue, difficulties with processing speed even in a very quiet and structured environment, and difficulty with word finding that would interfere with the Claimant's ability to communicate effectively in a management position<sup>46</sup>.

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<sup>45</sup> Page GD2-72

<sup>46</sup> Page GD2-106

[51] In November 2016, the Claimant approached his doctor about a return to work in either January or early February 2017<sup>47</sup>. In December 2016, his doctor reported that the Claimant wanted to try a gradual return to work, but the doctor said the Claimant was not ready yet. He explained that the Claimant could **maybe** do 45 to 60 minutes of work at a time<sup>48</sup>.

[52] In December 2016, the Claimant's occupational therapist reported that vocational rehabilitation was on hold until the Claimant's function improves to a level where concerned parties agree that a return to work could be considered<sup>49</sup>.

[53] In September 2017, Dr. Quon reported that the Claimant's MVA of July 2017 caused an acute flare of his persisting symptoms. She said that due to the severity of the persisting symptoms and the limited cognitive tolerance, the Claimant was not able to attempt a return to work at that time<sup>50</sup>.

[54] In February 2018, Dr. Melanie Nguyen reported that the Claimant was not ready to return to work. She explained that his case has been quite complex, and a third-party specialist medical assessment is ongoing and pending<sup>51</sup>.

[55] In March 2018 and May 2018, Dr. Ponka reported that the Claimant was not ready to return to work<sup>52</sup>.

[56] Before turning to the period in and after November 2018, I want to address one of the arguments raised by the Minister. The Minister suggests that Dr. Carswell's comments on work capacity should be given less weight because they are really about the Claimant's inability to return to his regular job and not about his ability to do a different type of job.

[57] It is true that Dr. Carswell talked about the challenges the Claimant would face if he returned to his regular position. However, Dr. Carswell's opinion is just one of many opinions I have relied on. Not all of them are specific to the Claimant's regular or usual job. Moreover, when I think about the functional limitations the Claimant was experiencing during this time

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<sup>47</sup> Page GD2-295

<sup>48</sup> Page GD2-430

<sup>49</sup> Page GD2-1107

<sup>50</sup> Page GD2-202

<sup>51</sup> Page GD1-28

<sup>52</sup> Pages GD1-584 and GD2-161

(from mid-2016 to November 2018), it is difficult to imagine another type of job the Claimant could have done. His dizziness, balance issues, vision difficulties, fatigue and pain would have rendered him an unlikely candidate for physical jobs. And these symptoms, in addition to the cognitive difficulties, would have made any type of desk job an unrealistic option.

#### IV - November 2018 to November 2019

[58] By the summer of 2018, Dr. Ponka was supporting a return to work. In August 2018, he wrote that the Claimant was doing better overall since having surgery on his left eye for a retinal repair. He also signed off on a proposed return to work plan. According to the gradual return to work schedule, the Claimant was to return to work the week of November 26, 2018 and gradually increase his hours until the week of February 25, 2019 when he would reach full time hours<sup>53</sup>.

#### **The Claimant has favourable employment attributes**

[59] When I am deciding if a Claimant can work, I must consider more than just his medical conditions and how they affect what he can do. I must also consider his age, level of education, language ability, and past work and life experience<sup>54</sup>. These factors help me to decide if the Claimant has any ability to work in the real world.

[60] The Claimant clearly has many favourable employment attributes. By the end of 2017, he was only 39 years of age. He thus had many years ahead of him before the standard age of retirement. He is proficient in English and in French<sup>55</sup>. He is well educated, having a Master's degree in Project Management<sup>56</sup>. He also has valuable work experience, having worked for the federal government for several years. Perhaps the best evidence of the Claimant's employability is the fact that he maintained a position with the government throughout the period of his disability and worked throughout most of 2019.

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<sup>53</sup> Page GD1-639

<sup>54</sup> *Villani v. Canada (Attorney General)*, 2001 FCA 248

<sup>55</sup> Pages GD2-100 and GD2-1123

<sup>56</sup> Page GD2-379

**The Claimant tried to work before the end of 2017 but was not successful**

[61] Evidence of work capacity is important. It is important because if there is evidence of work capacity, then a claimant must show that he tried to find and keep a job. To establish a severe disability, he must also show that his efforts were not successful because of his medical condition<sup>57</sup>.

[62] Although there is evidence of some work capacity before the end of 2017 (i.e. from about October 2015 to mid-2016), this is not detrimental to the Claimant's appeal. This is because the Claimant made efforts to find and keep a job and was able to show that his efforts were not successful because of his disability.

[63] Again, it is not really clear how often the Claimant worked. However, he does not appear to have worked much. In the years 2016 and 2017, the Claimant did not have enough earnings to make a valid contribution to the CPP. Whatever work the Claimant managed to do, it is clear that he was unable to sustain it for reasons related to his disability. In May 2016, the Claimant's doctor wrote that the Claimant was not working, and he explained that the Claimant could not handle part-time work as his symptoms had returned<sup>58</sup>. In September 2017, Dr. Quon reported that the Claimant had returned to work for short visits in the past, but these caused a flare in his symptoms<sup>59</sup>.

**The Claimant's disability stopped being severe in 2019**

[64] The evidence shows that the Claimant's disability stopped being severe in 2019. I say this for two main reasons.

[65] First, the medical evidence shows that by the fall of 2018 the Claimant was realizing significant improvements. For example, in September 2018, Dr. Quon<sup>60</sup> reported the Claimant had ongoing symptoms related to mild traumatic brain injury. However, she also said the Claimant had experienced a number of improvements and planned to begin a gradual return to work in November 2018. As for the improvements, Dr. Quon wrote that the Claimant still had

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<sup>57</sup> *Inclima v. Canada (Attorney General)*, 2003 FCA 117

<sup>58</sup> Page GD2-677

<sup>59</sup> Page GD1-40

<sup>60</sup> The report was written by Sarah Simms for Dr. Quon

issues with blurred and double vision and sensitivity to light, but she said his vision had “improved significantly” after surgeries in July 2016 and August 2018 and after starting to wear prism glasses. Dr. Quon also noted improvements with the Claimant’s balance, vertigo, headaches, and memory. Dr. Quon observed that the Claimant was now able to follow questions and not lose his train of thought<sup>61</sup>.

[66] Second, the Claimant returned to work in 2019, and his work activity is indicative of a capacity regularly to pursue a substantially gainful occupation.

[67] I have not been provided with the Claimant’s employment records, and so I do not know for certain when the Claimant began his most recent return to work. A return to work plan of August 31, 2018 shows that the Claimant was supposed to return to work the week of November 26, 2018, albeit on a graduated basis<sup>62</sup>. However, I do not think the Claimant actually returned to work in November 2018. I say this because in December 2018 the Claimant told a support worker that his return to work program was starting in January 2019<sup>63</sup>. Also, during a telephone conversation of February 23, 2021, the Claimant told one of the Minister’s adjudicators that he started his graduated return to work in March 2019<sup>64</sup>. During the hearing, I asked the Claimant if March 2019 is the correct date of his return to work, and he said it is. I accept that the Claimant likely began his return to work program in March 2019.

[68] Recognizing that the Claimant’s return to work began gradually, I have determined that by June 1, 2019 the Claimant’s disability was no longer severe.

[69] First, the date of June 1, 2019 allows for a three-month work trial so to speak, and is generally consistent with the 3-month progression towards full time hours set out in the return to work plan of August 31, 2018.

[70] Second, I have reason to believe that the Claimant either earned, or had the capacity to earn, a substantially gainful income in 2019.

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<sup>61</sup> Pages GD2-30 to GD2-33. Although these pages are numbered GD2, they are located in the GD5 bundle of documents.

<sup>62</sup> Pages GD1-639 and GD1-640

<sup>63</sup> Page GD5-418

<sup>64</sup> Page GD15-5

[71] The CPP Regulations state 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<sup>65</sup>. The maximum annual amount a person could receive as a disability pension in 2019 was \$16,347.60 (\$1,362.30 x 12).

[72] The Minister submits that in 2019 the Claimant earned \$29,291.00 and \$14,714.99<sup>66</sup>. I can confirm the earnings of \$14,714<sup>67</sup>, but I cannot find evidence of the earnings of \$29,291. Unfortunately, the Minister was not represented at the hearing, and so I was unable to clarify this issue at the hearing.

[73] In any event, even though the Claimant’s earnings of \$14,714 are slightly below the substantially gainful threshold of \$16,347.60 I am nonetheless of the view that the Claimant either earned more than \$14,714 in 2019 or had the capacity to earn more than that in 2019.

[74] The Claimant’s record of earnings shows earnings of \$19,053 in 2020<sup>68</sup>. When I asked the Claimant about this, he said that he has not filed his income tax return for the taxation year 2020 but that he received money in 2020 that was owed to him for the work he performed in 2019. He explained that when he was working in 2019 he was not always being paid correctly in that his pay cheques were often considerably less than what they should have been. He attributed the pay problems to the Phoenix pay system<sup>69</sup>. This tells me that the Claimant’s earnings of \$14,714 are not a true indicator of his earning capacity in 2019. If his earnings of almost \$20,000 are added to his earnings of \$14,714 then he would clearly be well above the substantially gainful threshold for 2019.

[75] I have also considered the fact that the Claimant did not work throughout the entire year in 2019. He likely did not work in January and February and he did not work after November 2019. The Claimant’s earnings are therefore not likely indicative of his earning capacity for an entire year.

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<sup>65</sup> Subsection 68.1(1) of the *Canada Pension Plan Regulations*

<sup>66</sup> Pages GD15-2 and GD15-5

<sup>67</sup> Page GD15-6

<sup>68</sup> Page GD17-3

<sup>69</sup> The Phoenix pay system is a payroll system used by the Government of Canada



[76] The Claimant submits that even though he was working in 2019, he was still disabled. He explained that he was motivated to do well, and this is something that should not be held against him. He pointed out that on the day of his third MVA he was coming from a therapy appointment in a Para Transpo vehicle, and so if he still needed therapy and needed to be transported by Para Transpo then he clearly was not “fine”. The Claimant also said that when he was working in 2019 he had some set backs. He explained that he tried working full time hours but his managers and other colleagues told him he should reduce his hours. They told him to reduce his hours to only 1 to 2 days a week. He declined because he did not want to lose the gains he made. The Claimant then made arrangements to work from home 3 days a week.

[77] I accept that the Claimant may not have been “fine” and that he likely still had some limitations while he was working. However, I do not accept that his disability continued to be severe between June 1, 2019 and November 2019. Again, the Claimant was working, and he was working at a job that was substantially gainful. Also, the Claimant was able to sustain his work activity over several months, and he appears to have been able to work regularly. I do not have evidence showing he was unable to meet his work commitments or that he had unusually high absences from work. Lastly, when I asked the Claimant if he thinks he would have been able to continue working had the MVA of November 2019 not happened, he did not say “no”. Instead, he said it was really hard to say “yes” or “no”. He went on to explain that he really wanted to have a family, and that family comes before work. This evidence is not indicative of a work activity that was unlikely to continue for reasons of disability.

**There is no evidence of a benevolent employer**

[78] The Claimant’s representative submitted that the Claimant’s work activity in 2019 was not a return to work. Rather, it was an attempt to work with a very accommodating employer. I have already explained why I believe the Claimant’s work activity in 2019 was more than just an attempt to work. As for the accommodating nature of the employment, the evidence is quite thin. As I mentioned previously, I do not have the Claimant’s employment records, and so it is difficult for me to assess the entirety of the accommodations that were put into place for the Claimant. However, even if the Claimant’s employer was accommodating, I do not have

evidence showing the accommodations were beyond what is required of an employer in the competitive marketplace.

[79] The representative did not go so far as to describe the employer as benevolent, but I have nonetheless put my mind to this issue. When determining whether an employer is benevolent (which is different from an employer who provides accommodations), the focus is on the performance expectations and, more specifically, whether the performance expectations are more relaxed than what would reasonably be expected in a competitive workforce<sup>70</sup>.

[80] I do not have evidence to support a finding that the Claimant's employer was benevolent. For example, I do not have documentary evidence (such as a letter) from the Claimant's employer that speaks to the Claimant's work situation throughout 2019. I do not have evidence showing that the Claimant's performance expectations were reduced or modified in any way and I do not have evidence of any hardship caused to the Claimant's employer by having made accommodations for him. Finally, the Claimant told me that his substantive position in 2019 was a position that paid between \$73,000 to \$78,000 per year. He did not give evidence suggesting his work was not commensurate with his classification.

### **The Claimant's disability may have become severe again in or after November 2019**

[81] I acknowledge that the Claimant's disability may have become severe again in November 2019. However, if it did it was because of the MVA of November 2019. The 2019 MVA happened after the Claimant's CPP coverage expired in December 2017 and so it is not something that I can consider.

### **Prolonged disability**

[82] The evidence shows that the Claimant's disability was likely long continued and of indefinite duration before the end of 2017. However, I also find that the Claimant's disability improved after 2017, to the extent that the Claimant was able to successfully return to work in 2019. As such, I find that the Claimant was disabled for a closed (defined) period of time.

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<sup>70</sup> *K.A. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 6 and *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

[83] I have not made this finding lightly. I acknowledge that CPP disability benefits are not meant to help people through a temporary period when they cannot work<sup>71</sup>. I also acknowledge that a finding of a closed period disability is rare, and should be confined to those situations where medical opinion prior to prescribed treatment does not clearly indicate the likelihood of a claimant's recovery and his subsequent ability to work<sup>72</sup>. In my view, this is such a case.

[84] The Claimant was incapable regularly of pursuing a substantially gainful occupation from June 2015 to June 2019. This is a period of four years. Four years is a long time to be unable to work. It is difficult to characterize a four-year disability as temporary (short-lived), or anything but long continued.

[85] Even so, the law requires more than a disability that is long continued. To be prolonged, the disability must also be of indefinite duration. Most of the evidence before the end of 2017 shows uncertainty as to how long the Claimant's disability was to last and uncertainty about whether the Claimant would be able to return to work. When a return to work was discussed by the healthcare providers it was mostly in the context of the practitioner being hopeful of a return to work or of a return to work remaining a possibility.

[86] In June 2016, Dr. Carswell reported that the Claimant's prognosis was uncertain, as it had been more than 18 months since his injury and he was continuing to experience problems with chronic pain, reduced endurance / fatigue and cognitive deficits. She said that functional gains remain possible with better management of his pain and ongoing therapy. She also suspected that his cognitive functioning would improve with better management of his pain and fatigue<sup>73</sup>.

[87] In August 2016, Dr. Quon reported that it was now almost two years since the accident and the Claimant had persistent physical and cognitive symptoms post-concussion as well as chronic neck and back pain. She said that since it had been almost two years since the injury, she

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<sup>71</sup> *Litke v. Minister of Human Resources and Social Development Canada*, 2008 FCA 366 and *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309

<sup>72</sup> *Henderson, supra.*

<sup>73</sup> Page GD2-107

did not anticipate any further significant neurologic recovery, though she said the Claimant may see improvement in his function with improved management of his symptoms over time<sup>74</sup>.

[88] In December 2016, the Claimant's doctor said the Claimant was not ready to return to work but that he was hopeful the Claimant would be able to return to work in the future<sup>75</sup>.

[89] In April 2017, Dr. Ponka reported that the Claimant has not experienced significant improvement and has largely been unable to work since the MVA of September 2014. He said he agreed with Dr. Carswell's opinion that the Claimant's prognosis is uncertain as it had been more than 18 months since the MVA and the Claimant was continuing to experience problems with chronic pain, reduced endurance / fatigue and cognitive deficits<sup>76</sup>.

[90] In March 2018, Dr. Ponka reported the Claimant's prognosis as guarded<sup>77</sup>.

[91] In May 2018, Dr. Xu (for Dr. Ponka) reported that he had no information to suggest that the Claimant's condition will be resolved or improved for a return to work in six months<sup>78</sup>.

[92] In July 2018, Dr. Xu (for Dr. Ponka) wrote that he supports the prospect of return to work in the foreseeable future. He anticipates a trial of partial progressive return to work likely beginning in October or November 2018<sup>79</sup>. This prognosis is favourable, but not inconsistent with a continued finding of prolonged disability. The doctor anticipated a **trial of a partial** return to work. He did not offer an opinion on the likelihood of such a trial being successful.

## Conclusion

[93] The Claimant's disability became severe and prolonged in June 2015, when he stopped work following the onset of post-concussive symptoms.

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<sup>74</sup> Page GD2-126

<sup>75</sup> Page GD2-430

<sup>76</sup> Page GD2-54

<sup>77</sup> Page GD2-161

<sup>78</sup> Page GD1-590

<sup>79</sup> Page GD1-606

[94] For payment purposes, the earliest a person can be deemed to be disabled is 15 months before the date of application<sup>80</sup>. The Claimant applied for disability benefits in June 2017. Fifteen months before June 2017 is March 2016. There is a four-month waiting period before payments begin<sup>81</sup>. Four months after March 2016 is July 2016.

[95] The Claimant's disability continued to be severe and prolonged through to and including the month of May 2019. The Claimant is therefore eligible for disability benefits from July 2016 to and including May 2019.

[96] The appeal is allowed, in part.

Shannon Russell  
Member, General Division - Income Security

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<sup>80</sup> Paragraph 42(2)(b) of the *Canada Pension Plan*

<sup>81</sup> Section 69 of the *Canada Pension Plan*