



Citation: *RM v Minister of Employment and Social Development*, 2021 SST 540

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: R. M.
Representative: Howard Goldford

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated November 13, 2019 (issued
by Service Canada)

Tribunal member: George Tsakalis

Type of hearing: Videoconference

Hearing date: July 20, 2021

Hearing participants: R. M., Appellant
Howard Goldford, Appellant's representative

Decision date: August 19, 2021

File number: GP-20-281

Decision

[1] The appeal is allowed.

[2] The Claimant, R. M., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of September 2017. This decision explains why I am allowing the appeal.

Overview

[3] The Claimant was born in 1982. He dropped out of school in Grade 8. He returned to school and received his GED in 2009. He last worked as a heavy equipment operator in April 2017. The Claimant says he cannot work at any job because of his medical condition. The Claimant suffers from chronic back pain and radiculopathy.

[4] The Claimant applied for a CPP disability pension on August 13, 2018. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Claimant says he cannot work at any job because of severe chronic back pain. His severe chronic back pain has led to impairments with his memory, concentration, sitting, standing, walking, lifting, bending, sleeping, driving, and performing his housekeeping tasks.

[6] The Minister says the Claimant is not entitled to a CPP disability pension because the medical evidence shows he can perform sedentary work.

What the Claimant must prove

[7] For the Claimant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2020. This date is based on his CPP contributions.¹

¹ Service Canada uses a claimant'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 section 44(2) of the *Canada Pension Plan*. The Claimant's CPP contributions are on GD2-59.

[8] The *Canada Pension Plan* defines “severe” and “prolonged.”

[9] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.²

[10] This means I have to look at all of the Claimant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether his disability is severe. If the Claimant is able to regularly do some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[12] This means the Claimant’s disability can’t have an expected recovery date. The disability must be expected to keep the Claimant out of the workforce for a long time.

[13] The Claimant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

Matters I have to consider first

[14] The videoconference hearing proceeded on July 20, 2021. The Claimant’s legal representative submitted witness statements to the Tribunal on July 19, 2021.⁴ I agreed to consider these witness statements at the hearing because they were relevant to the issue of whether the Claimant had a disability under the CPP. I gave the Minister an opportunity to provide submissions on these documents.⁵ However, the Minister did not

² Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁴ See GD11

⁵ See GD12

provide submissions. I am now ready to make a decision based on the Claimant's hearing evidence, the documentary evidence, and the submissions of both parties.

Reasons for my decision

[15] I find that the Claimant had a severe and prolonged disability by December 31, 2020. I reached this decision by considering the following issues:

- Was the Claimant's disability severe?
- Was the Claimant's disability prolonged?

Was the Claimant's disability severe?

[16] The Claimant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

– The Claimant's functional limitations do affect his ability to work

[17] The Claimant has chronic back pain with radiculopathy. However, I can't focus on the Claimant's diagnosis.⁶ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁷ When I do this, I have to look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect his ability to work.⁸

[18] I find that the Claimant has functional limitations.

– What the Claimant says about his functional limitations

[19] The Claimant says that his medical condition has resulted in functional limitations that affect his ability to work. He says that he could not work at any job by December 31, 2020.

[20] The Claimant says he started worked in security. He ended up getting a job as a heavy equipment operator. He operated equipment on uneven ground. This led to

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

equipment pounding up and down all day, which led to lower back pain. His back got worse with time. His employer offered him accommodation by reducing the amount of hours he worked. But he had one final injury at work in April 2017 He could barely walk after this injury. His employer had to fly him back home.

[21] The Claimant says his condition never improved, despite receiving treatment that included spinal injections. He discussed spinal surgery with his family doctor and a doctor who performed spinal injections. They advised him that spinal surgery only gave him a 50% chance of improving and there might be a chance that such a surgery would cripple him. The Claimant decided not to pursue surgery.

[22] The Claimant previously collected disability insurance from an insurance company. The insurance company wanted him to take a computer course. But he did not believe he could handle going back to school. His insurance company suggested he work selling cars. However, his family doctor did not support a return to work at any job.

[23] The Claimant says the focus of his treatment is to manage his pain and to make sure that he can do some activities of daily living. He does little around the house. Washing dishes fatigues him to the point that he has to lay down on the couch.

[24] The Claimant says he wants to work. He has a young family to support. But he experienced constant back pain by December 31, 2020. His back pain affected his ability to concentrate and his memory. He had difficulty driving. He had to take pain medications. He used a cane occasionally to help him walk. His lifting ability was affected by his back injury. He only gets a few hours of interrupted sleep a night, which leaves him tired. He needed his wife to carry the groceries when he went shopping with her. He could only maintain activities for 45 minutes to one hour before having to take a one hour break.

[25] The Claimant says he has not worked since April 2017. His current source of income is provincial disability benefits. He says the severity of his medical condition is unpredictable. He does not believe he can commit to a regular work schedule. His condition is not getting better with time.

– **What the medical evidence says about the Claimant’s functional limitations**

[26] The Claimant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2020.⁹

[27] The medical evidence supports what the Claimant says about his functional limitations.

[28] The medical evidence shows that the Claimant suffered from chronic lower back pain for many years. His symptoms would flare up and then settle after resting and receiving chiropractic treatment. But he had a severe flare up of pain in June 2016. The Claimant had an MRI in August 2016 that showed some nerve impingement in his lumbar spine. His family doctor diagnosed him with lumbar strain with radiculopathy. The Claimant began receiving physiotherapy and pain medications. The Claimant slowly improved and began a gradual return to work in October 2016. The Claimant resumed full work duties in November 2016. But the Claimant experienced back pain and had difficulty weaning himself off narcotic pain medication. His family doctor planned on having the Claimant receiving pain injections. But the Claimant worked a long shift on April 13, 2017. Repeated vibrations caused the Claimant’s back to increase. The Claimant never returned to work after April 13, 2017.¹⁰

[29] The medical evidence shows that the Claimant attended a chronic pain clinic in 2017. He received Gabapentin.¹¹ He also took Morphine, Toradol, Ativan, Percocet, and Cymbalta.¹² He received pain injections.¹³

[30] The Claimant’s medical problems continued in 2018. The Claimant saw a physiatrist. The physiatrist diagnosed the Claimant with chronic mechanical lower back pain. The physiatrist would not perform injections on the Claimant because that treatment had failed.¹⁴ The Claimant’s family doctor said that the Claimant’s pain was

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See GD2-81

¹¹ See GD2-90

¹² See GD2-78-80 and 157

¹³ See GD2-94

¹⁴ See GD2-101-102

severe and affected him on a daily basis. The Claimant had limited mobility and could only walk short distances.¹⁵

[31] The Claimant's family doctor wrote a letter on August 7, 2018. He disagreed with the opinion of the Claimant's insurance company that the Claimant could return to sedentary duties and retrain. The Claimant continued to experience severe pain and his family doctor did not believe he could tolerate long hours in a classroom setting or at a sedentary job.¹⁶

[32] The Claimant's family doctor completed a medical report for the Minister on August 9, 2018. He said the Claimant could not sit for a long period of time. The Claimant only had a limited treatment. He diagnosed the Claimant with chronic pain syndrome.¹⁷

[33] The Claimant's family doctor also completed a medical report in support of the Claimant's provincial disability application on September 25, 2018. He said the Claimant had problems with lifting, standing, walking, sitting, concentrating, and sleeping. He noted the Claimant was not comfortable in any position. He said the Claimant was unable to hold down any job.¹⁸

[34] The Claimant saw a mental health nurse in 2018 for stress and anxiety. Testing showed the Claimant had severe anxiety and moderate depression.¹⁹

[35] The Claimant underwent a two-day Functional Capacity Evaluation (FCE) in November 2018. The FCE showed that the Claimant did not have the ability to perform the essential duties of his previous employment as a heavy equipment operator.²⁰

¹⁵ See GD2-81

¹⁶ See GD2-75

¹⁷ See GD2-235-238

¹⁸ See GD2-138-144

¹⁹ See GD2-76-77

²⁰ See GD2-121-131

[36] The Claimant's family doctor wrote to the Claimant's legal representative on December 17, 2019. He did not believe the Claimant's symptoms ever resolved. He said the Claimant was left with a significant disability and decreased functioning.²¹

[37] The Claimant's medical problems continued in 2020. He had a MRI on March 13, 2020. The MRI showed that the Claimant's degenerative changes in his lumbar spine had worsened.²² The Claimant's family doctor wrote to the Claimant's legal representative on May 22, 2020. He said the Claimant's condition had not improved, despite receiving extensive treatment.²³

[38] The Minister argued that the medical evidence did not show a severe disability under the CPP. The Minister relied on reports drafted by the Claimant's family doctor, a physiatrist, and an orthopaedic surgeon in support of this argument.

[39] The Claimant's family doctor completed a medical form for the Claimant's insurance company on August 29, 2017. He believed the Claimant would have a full recovery. He also said the Claimant could work at a less physically demanding job and the Claimant was a suitable candidate for vocational rehabilitation.²⁴ The Minister argued that this evidence showed the Claimant could perform sedentary work. But I do not place much weight on this form because the Claimant's family doctor later changed his opinion on the Claimant's ability to work. The Claimant's condition did not improve, even though he received treatment at a pain clinic. By 2018, his family doctor was of the opinion that the Claimant could not even handle sedentary work.²⁵

[40] A physiatrist assessed the Claimant at the request of his insurance company. This physiatrist said the Claimant could begin performing sedentary work from a physical perspective.²⁶ However, I do not place much weight on this report. This report noted that the Claimant had difficulty sleeping and did not feel rested. The Claimant also

²¹ See GD1-7

²² See GD4-8-9

²³ See GD4-24

²⁴ See GD2-78-80

²⁵ See for example GD2-75

²⁶ See GD2-107-116

had difficulty driving, walking, and sitting. I do not see how the Claimant can be said to have the capacity to regularly work with the impairments listed in this report. I do not see how the Claimant could work at a sedentary job if he is fatigued, has difficulty sitting, and took opioid pain medication that affect his ability to concentrate. In addition, the physiatrist did not provide an opinion on when the Claimant could return to work. He wanted the Claimant to undergo an FCE. When I reviewed the FCE, it did not provide an opinion on what type of work the Claimant could perform.

[41] The orthopaedic surgeon assessed the Claimant at the request of a provincial worker's compensation board.²⁷ However, I accept the argument of the Claimant's legal representative that I should not place much weight on the orthopaedic surgeon's reports.²⁸ The orthopaedic surgeon did not perform functional testing. He seemed to focus more on the objective medical evidence and placed less weight on the Claimant's reported symptoms.

[42] The Claimant suffers from chronic pain. Pain is hard to measure. The Supreme Court of Canada recognized that those who suffer from chronic pain are subject to persistent suspicions of malingering because their condition cannot be supported by objective findings.²⁹ Many of these cases come down to a Claimant's credibility.

[43] I found the Claimant to be a credible witness. He had a high paying job and he has suffered a serious financial loss because of his inability to work. The Claimant originally went off work in June 2016, but he made an effort to return to work that ended in failure. I believe the Claimant would work if he could, but he cannot do so. The Claimant provided witness statements from his wife and a friend. These statements outlined that the Claimant had difficulty fighting through pain and completing simple household tasks.³⁰ I accept this evidence. I also accept that the Claimant did not exaggerate his symptoms.

²⁷ The Claimant is making a worker's compensation claim because he says his back injury arose out of the course of his employment.

²⁸ See GD4-13 and 14-22

²⁹ See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54

³⁰ See GD11-13-15

[44] I also find that the Claimant's treating doctors accepted the severity of his pain. They tried to treat him, but unfortunately, the Claimant did not recover to the point where he could return to substantially gainful work. I believe that the majority of the medical evidence supports a finding of a severe disability under the CPP.

[45] Next, I will look at whether the Claimant followed medical advice.

– **The Claimant has followed medical advice**

[46] The Claimant has followed medical advice.³¹ The Claimant followed up with his family doctor. He went to a pain clinic and received injections from an anesthesiologist. He tried physiotherapy. He tried numerous pain medications. Even though, I am satisfied that the Claimant's main disabling condition is chronic back pain with radiculopathy, he also suffers from anxiety. The Claimant received counselling from a mental nurse for his anxiety and he took an anti-anxiety medication.

[47] I now have to decide whether the Claimant can regularly do other types of work. To be severe, the Claimant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.³²

– **The Claimant can't work in the real world**

[48] When I am deciding whether the Claimant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language abilities
- past work and life experience

³¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48. This case explains the requirement that claimant's follow medical advice in order to receive a CPP disability pension.

³² See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

[49] These factors help me decide whether the Claimant can work in the real world—in other words, whether it is realistic to say that he can work.³³

[50] I find that the Claimant can't work in the real world.

[51] The Claimant is 38 years old. He does not have post-secondary education. His past work experience mostly consisted of working as a heavy equipment operator. But he understands English and normally one would assume that something as young as the Claimant can retrain for sedentary work. Although the Claimant is quite young, I am satisfied that he has been incapable regularly of pursuing any substantially gainful occupation by December 31, 2020.

[52] I do not believe the Claimant could perform any type of physical work by December 31, 2020 because of his difficulty lifting. The pain medications he took also compromised his ability to perform physical jobs safely. I also do not believe he could have performed any sedentary work because of his impairments, which included difficulty sitting and concentrating. I do not believe that the Claimant could have upgraded his education and work on a computer because of his difficulty with sitting and concentrating. I do not believe that the Claimant could have worked in an office job because he has to regularly rotate between a sitting and standing position. I accept the Claimant's evidence that he can only perform tasks for about 45 minutes to one hour before having to take a break. I do not believe that the Claimant could sustain activities for a long enough period to have been employable in a real world context. I am also satisfied that the Claimant could not work at his former occupation as a security guard or work as a car salesman, which was suggested by his insurance company. This is because I accept that the Claimant's pain was unpredictable to the point that he could not maintain a regular work schedule at any type of job.

[53] I find that the Claimant's disability was severe by December 31, 2020.

³³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

Was the Claimant's disability prolonged?

[54] The Claimant's disability was prolonged.

[55] The Claimant's condition began in at least June 2016. This condition has continued since then, and it will more than likely continue indefinitely.³⁴

[56] The Claimant's family doctor said the Claimant's condition is likely to be indefinite. The Claimant's pain specialists did not have much to offer in terms of further treatment.³⁵ He does not expect the Claimant's condition to improve with treatment.³⁶ The Claimant's family doctor is also not contemplating the Claimant returning to work.

[57] I find that the Claimant's disability was prolonged by December 31, 2020.

When payments start

[58] The Claimant had a severe and prolonged disability in April 2017, when he last worked. His family doctor suggested in August 2017 that a less physically demanding job might be beneficial for the Claimant, but the Claimant never recovered from his April 2017 injury to the point where he could return to a substantially gainful occupation.

[59] The *Canada Pension Plan* says a claimant can't be considered disabled more than 15 months before the Minister receives their disability pension application. After that, there is a four-month waiting period before payments start.³⁷

[60] The Minister received the Claimant's application in August 2018. That means he is considered to have become disabled in May 2017.

[61] Payment of his pension starts as of September 2017.

³⁴ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that a claimant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

³⁵ See GD2-238

³⁶ See GD2-143

³⁷ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.

Conclusion

[62] I find that the Claimant is eligible for a CPP disability pension because his disability is severe and prolonged.

[63] This means the appeal is allowed.

George Tsakalis
Member, General Division – Income Security Section