



Citation: *RM v Minister of Employment and Social Development*, 2021 SST 632

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: R. M.
Representative: Michelle Zare

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated August 6, 2020 (issued by Service Canada)

Tribunal member: Tyler Moore

Type of hearing: Teleconference

Hearing date: September 2, 2021

Hearing participants: Appellant
Appellant's representative

Decision date: September 16, 2021

File number: GP-20-1390

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 August 2018. This decision explains why I am allowing the appeal.

Overview

[3] The Claimant is 61 years old. He last worked as a full-time parts counter clerk from June 2013 until April 2018. He testified that he could no longer work as of March 2017 because of COPD, emphysema, daily headaches, chronic bronchitis, chronic asthma, and sleep apnea. Fatigue, poor sleep, and shortness of breath are his main symptoms.

[4] The Claimant applied for a CPP disability pension on July 22, 2019. 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 that he tires very easily to the point of falling asleep during the day. He also gets short of breath with any physical exertion. He has no transferable work skills, and his condition has not improved despite treatment.

[6] The Minister says that the Claimant's conditions are stable. He has not attempted any alternate work, despite the fact that his respirologist said that he could.

What the Claimant must prove

[7] For the Claimant to succeed, he must prove that he had a disability that was severe and prolonged by December 31, 2020. This date is based on his contributions to the CPP.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 pages GD3-11 to 12 of the file.

[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 that 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 that he is disabled.

Reasons for my decision

[14] 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 his disability severe?
- Was his disability prolonged?

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.

Was the Claimant's disability severe?

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

– The Claimant's functional limitations affected his ability to work

[16] The Claimant has chronic bronchitis, moderate COPD, moderate to severe asthma, recurrent pneumonia, sleep apnea, high cholesterol, and headaches. However, I can't focus on his diagnoses.⁴ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁵ When I do this, I have to look at **all** of the his medical conditions (not just the main one) and think about how they affect his ability to work.⁶

[17] I find that the Claimant has several functional limitations.

– What the Claimant says about his functional limitations

[18] The Claimant says that his medical conditions have resulted in functional limitations that affected his ability to work. He says that:

- He can't walk more than 1 block, climb stairs, kneel, squat, or lift anything over 10 lbs without getting tired and short of breath.
- He gets tired just talking.
- He can become out of breath without doing anything at all.
- He doesn't sleep well and he falls asleep during the day. He has very low energy all the time.
- Exacerbations of his breathing symptoms are unpredictable.
- He spends his days sitting watching television and reading. He can't do much else around the house.
- Gas and other fumes make his breathing worse.

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- He has to rely on his wife and grandkids to do the housekeeping and home maintenance.
- He sleeps on the couch on the main floor of his house so that he doesn't have to climb stairs.

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

[19] The Claimant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2020.⁷

[20] The medical evidence generally supports what the Claimant says. For example:

- In September 2019, Dr. Greenspoon, family doctor, reported that the Claimant's shortness of breath and decreased exercise tolerance limited any prolonged walking and doing heavy activity.
- In March 2020, Dr. Amer, respirologist, noted that the Claimant could not do any work that required mild to moderate activity. He continued to have progressive shortness of breath, wheezing, and recurrent episodes of bronchitis, despite being compliant with treatment. It was more and more difficult for him to exert himself without becoming short of breath, and he lacked the skills to work in an office.
- In November 2020, Dr. Amer confirmed that the Claimant had moderate to severe asthma, chronic bronchitis, recurrent pneumonia, emphysema, COPD, and sleep apnea.

[21] The Minister argues that Dr. Amer was of the opinion that the Claimant could do office work. I agree that Dr. Amer did mention in November 2018 that the Claimant could return to work in an office with no exposure to fumes, dusts, or other agents. By March 2020, however, Dr. Amer's opinion had changed. She expressed her support for

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

the Claimant's application given his multiple respiratory conditions and progressive shortness of breath.

[22] I find that the medical evidence supports that the Claimant's multiple lung conditions prevented him from working by December 31, 2020.

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

– **The Claimant has generally followed medical advice**

[24] The Claimant has followed medical advice to the best of his ability.⁸ He continues to follow-up with his family doctor and respirologist regularly.

[25] In December 2020, the Claimant was taking Symbicort, Seebri Breezhaler, Ventolin, and up to 6 Tylenol/day for his headaches. He was also taking medication for high cholesterol. He tried to using a CPAP machine for sleep apnea, but was unsuccessful. Dr. Amer reported that the Claimant couldn't get the air out of his lungs and would have to take the mask off. He tried different types of masks but still couldn't get used to it. When he tried using it he couldn't sleep.

[26] The Minister argues that the Claimant's condition is stable and that he has responded to treatment. While I accept that treatment has helped a bit degree, it doesn't change the fact that the Claimant is suffering from multiple chronic, progressive, and moderate to severe respiratory issues. He still has exacerbations of symptoms that require antibiotic use multiple times per year, he gets short of breath just talking, he gets pneumonia every few months, he is constantly fatigued, and his shortness of breath has been getting worse. I must be mindful that just because a condition is stable at a certain point in time, it does not mean that the condition and its impact is not severe.

[27] No other treatment has been recommended.

⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[28] 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.⁹

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

[29] 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

[30] 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.¹⁰

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

- He is 61 years old and fluent in English.
- He finished high school, but he struggled and it took him 7 or 8 years to do so.
- He has only worked in unskilled labour-type jobs.
- He has no computer skills.
- He can't do any type of physical labour or work that requires prolonged talking, walking, or standing.

[32] I find that the Claimant's disability was severe by December 31, 2020. He is not a good candidate for re-training or for office-type work. Given his age, unreliability, limited education, lack of transferable skills, lack of computer skills, and multiple

⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

functional limitations, I find that it is not realistic to expect any employer in a competitive job market to accommodate him indefinitely.

[33] I accept that the Claimant would work if he could. He has demonstrated effort to remain in the workplace. He first stopped working in March 2017 after his COPD symptoms got worse and he was hospitalized. He did a work hardening program and was off work until early 2018. He attempted a graduated, part-time return to work as a helper at the parts counter. His duties were very limited and he could sit or stand as needed. He gradually worked his way up to 7 hours/day by April 2018, but then he had an attack of symptoms at work and was taken by ambulance to the hospital. That's when his doctor advised him that he couldn't go back. The Claimant hasn't looked for any other work since that time because his condition hasn't improved.

Was the Claimant's disability prolonged?

[34] The Claimant's disability was also prolonged by December 31, 2020. He has had chronic lung conditions for many years. His symptoms were there when he first stopped working in March 2017, they were there when he stopped working completely in April 2018, and they continue today. Despite regular follow-up with his family doctor and respirologist, there not been any significant improvement. According to Dr. Greenspoon, the Claimant's condition will likely continue to deteriorate.

When payments start

[35] The Claimant's disability became severe and prolonged in April 2018, when he stopped working completely.

[36] There is a four-month waiting period before payments start.¹¹ This means that payments start as of August 2018.

¹¹ Section 69 of the *Canada Pension Plan* sets out this rule.

Conclusion

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

[38] This means the appeal is allowed.

Tyler Moore
Member, General Division – Income Security Section