



Citation: *MM v Minister of Employment and Social Development*, 2021 SST 628

Social Security Tribunal of Canada General Division – Income Security Section

Decision

**Appellant: (Claimant)
Representative:**

M. M.
Nathaniel Hartney

Respondent: (Minister)

Minister of Employment and Social Development

Decision under appeal:

Minister of Employment and Social Development
reconsideration decision dated March 4, 2020 (issued by
Service Canada)

Tribunal member:

Raymond Raphael

Type of hearing:

Teleconference

Hearing date:

September 14, 2021

Hearing participants:

Appellant
Appellant's representative
Arabic Interpreter

Decision date:

September 25, 2021

File number:

GP-20-915

DECISION

[1] The Claimant is not entitled to a *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] The Claimant was 41 years old when he applied for a CPP disability pension in July 2019. He worked as a food service supervisor for Tim Horton's. He stated that he had been unable to work since August 2018 because of right leg sciatica (pain down the whole right side of his body) and a previous heart attack. He also suffered from depression and anxiety.¹ The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] For the Claimant to succeed, he must prove that it is more likely than not that he has a disability that was severe and prolonged by December 31, 2020. This date is based on his contributions to the CPP.²

[4] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.³ It is prolonged if it is likely to be long continued and of indefinite duration.⁴

[5] The Minister's position is that the evidence does not support a determination that the Claimant is disabled within the meaning of the CPP. Although he may not be able to return to his previous work, he is able to pursue alternate work suitable to his limitations.

ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2020?
2. If so, was his disability likely to be long continued and of indefinite duration by that date?

¹ Application, GD2-29, 32, 40

² 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 GD3-13.

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

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

ANALYSIS

Severe Disability

The Claimant's medical conditions interfered with his ability to work by December 31, 2020

The Claimant's account

[6] The Claimant had neck fusion surgery in 2011. In 2015, he had heart bypass surgery. From May to August 2018, he was injured in four car accidents. He had a history of right-sided sciatica prior to these accidents. He testified that the fourth accident "pushed him over the edge." He has not been able to return to his previous work since that accident.

[7] He has a long history of low back pain. Treatments - including physiotherapy, massage therapy, and injections - have not helped. His back pain worsened after the fourth accident. He walks with a spastic gait.⁵ He also suffers from neck pain, chest pain, anxiety, and depression.

The medical evidence

[8] The medical evidence confirms that the Claimant had a long history of chronic neck and back pain that became worse after the car accidents. It also confirms that he had a history of coronary artery disease but this was not significantly disabling. There was no medical evidence to establish significant depression and anxiety.

[9] From October 2016 to February 2018, Dr. Niagara, neurologist, treated the Claimant with injections for back pain.⁶

[10] In February 2017, Dr. Chan, cardiologist, stated that the Claimant had atypical chest pain 2½ years following coronary bypass surgery.⁷

⁵ A peculiar type of walking, in which a person walks stiffly, as if his feet are being dragged while walking.

⁶ GD1 -263, 267, 269,271

⁷ GD1-214

[11] In June 2018, Dr. Kamani, interventional chronic pain management specialist, stated that the Claimant had been complaining about low back, right hip, and right lower leg pain for seven years. The Claimant had gone for physical therapy and massage therapy, without any benefit.⁸

[12] X-rays in August 2018 revealed bilateral foramina⁹ encroachment of the cervical spine. They also revealed mild disc space narrowing at the L5-S1 levels of the lumbar spine. The impression was degenerative disc disease and mild right sided sacroiliitis.¹⁰

[13] A MRI in September 2018 revealed that the Claimant's sciatica had worsened after the accidents.¹¹

[14] In the December 2018 CPP initial medical report, Dr. Klair, family doctor, diagnosed right leg sciatica. The Claimant was impaired by chronic pain and right sided weakness. Due to his pain, he was not able to walk for one block or for 10 minutes. He had difficulty on stairs.¹² Dr. Klair stated that the Claimant had been injured in four car accidents which exacerbated his previous health conditions.¹³

[15] Dr. Klair also stated that the Claimant was impaired by chronic intermittent chest pain following a heart attack in 2015. He was short of breath after light physical activity.¹⁴ Dr. Klair did not mention anxiety or depression.

[16] In May 2019, the Claimant told Dr. Klair that he was in too much pain to return to his previous work. This was because that work required moderate lifting and standing for long periods of time. Both the Claimant and Dr. Klair agreed that the Claimant should work at a different occupation.¹⁵

⁸ GD1-201

⁹ A foramina is a small opening in the spine

¹⁰ GD1-220

¹¹ GD1-68

¹² GD1-286

¹³ GD1-90

¹⁴ GD1-287

¹⁵ GD2-96

[17] In May 2019, Dr. Pham, internist, stated that a coronary angiogram the previous year showed that the Claimant had minor coronary artery disease. He had returned to the clinic because he was experiencing left side chest pain. He had no shortness of breath.¹⁶ In August 2019, Dr. Pham stated that the Claimant's chest pain was musculoskeletal.¹⁷

[18] In July 2019, the Claimant told Dr. Klair that he would like to pursue employment that was not as physically demanding.¹⁸

[19] In November 2019, Dr. Klair, stated that the Claimant was unable to perform any job that required significant pushing/pulling or standing for extended periods of time.¹⁹

[20] In June 2021, Dr. Simonett, physiatrist, stated that the Claimant's symptoms included low back pain, neck and upper back pain, chest pain, and anxiety. Dr. Simonett concluded that the Claimant could not return to his previous work. He stated that the Claimant might be able to do sedentary work, but this would require an ergonomic assessment and micro breaks.²⁰

[21] In August 2021, Neeru Aggarwal, occupational therapist, reported on her two-day functional capacity and vocational disability assessment. She concluded that the Claimant did not meet the light physical strength and positional requirements for his previous employment as a food service supervisor. This was because that work required constant standing, frequent below waist reaching, repetitive above shoulder reaching, frequent stooping, prolonged neck positioning, bending, lifting, and carrying up to 50 pounds. The Claimant's physical abilities were in the sedentary work category with some modifications for postural tolerances and right upper arm reaching. The assessor stated that the Claimant's language barrier limited his competitiveness in the workplace. The Claimant would likely continue to experience income loss until his

¹⁶ GD2-106

¹⁷ GD2-103

¹⁸ GD2-99

¹⁹ GD2-63

²⁰ GD4- 5 to 7, 18

language and vocational skills improved to the extent he was able to perform alternate work.²¹

My findings

[22] 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.²²

[23] I find that the Claimant's chronic neck, back, and leg pain interfered with his ability to work by December 31, 2020. He could not return to his previous work as a food service supervisor or any other physically demanding work.

The Claimant has not established a severe disability

[24] 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 a claimant's age, education level, language proficiency, and past work and life experiences when determining his "employability".²³

[25] 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.²⁴ A claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.²⁵

[26] Since I have determined that the Claimant cannot return to his previous work, the primary issue that I must decide is whether he was able to pursue alternative work.

[27] The Claimant was only 43 years old when he last qualified for a CPP disability pension in December 2020. He was more than 20 years away from the usual retirement

²¹ GD6-21

²² *Bungay v. Canada (Attorney General)*, 2011 FCA 47

²³ *Villani v. Canada (A.G.)*, 2001 FCA 248

²⁴ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²⁵ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

age. Mr. Hartney, the Claimant's representative, argues that the Claimant's limited English language proficiency and narrow work history preclude him from successfully pursuing alternative sedentary employment.

[28] I disagree.

[29] First, the Claimant is reasonably fluent in English. He could not have worked for many years as a food service supervisor if he wasn't. Although the Claimant was assisted by an interpreter, I was able to conduct most of the hearing in English. The Claimant testified that he is able to both read and write in English – although not “100 per cent.” He is able to work on a computer. As an assistant store manager at Tim Horton's he interviewed job applicants in English. He supervised up to seven people in English. He wrote shift reports in English. He also served and spoke to customers in English. Further, if required he would be able to take additional courses to improve his English language skills.²⁶

[30] Second, he is reasonably well educated and has a varied work history. He completed a grade 12 education in Palestine. He worked as an airport police officer there. At the same time, he completed 1½ years of an accounting program.²⁷ In Canada he initially worked in a fish plant. He then worked for Tim Horton's from 2002 to 2018. He worked his way up to being an assistant store manager. On days off, he worked as a delivery driver and with a friend installing tiles in houses. He successfully completed security guard and forklift operator courses.

[31] The Claimant testified that since he stopped working for Tim Horton's he started a course for selling auto insurance. He didn't pass the course because of his English language limitations but he has not taken any additional courses to improve his English language skills. He has sent out resumes and gone for two job interviews, but was not offered a job.

²⁶ The Claimant testified that he took English as a Second language courses after he came to Canada.

²⁷ GD6-9

[32] For the past year, he worked at a friend's pizza store. He wasn't able to work more than eight to ten hours a week because he was always in pain and his legs are very weak. He continually has to sit down. His friend allows him to take breaks and sit when needed. If he is too tired, his friend allows him to go home. I have not drawn any conclusions from this work since it is the type of light physical work that the assessor determined was not suitable.²⁸

[33] Where a claimant has some capacity to work, he must show that he has made efforts to find and keep employment that were unsuccessful because of his medical condition.²⁹

[34] I find that the Claimant had some capacity to pursue alternative work. He has not yet exhausted reasonable efforts to find alternate work including upgrading his English language and work skills. He has not demonstrated that he will be unable to find alternate suitable employment because of his medical condition.

[35] The Claimant has failed to establish that it is more likely than not that he suffered from a severe disability in accordance with the CPP requirements.

[36] Since he has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[37] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security

²⁸ Para 21, above

²⁹ *Yantzi v Attorney General Canada* 2014 FCA 193, para 5; *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41. This decision is not binding but I find it persuasive.