



Citation: *GS v Minister of Employment and Social Development*, 2021 SST 673

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: G. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 12, 2021 (issued
by Service Canada)

Tribunal member: Adam Picotte

Type of hearing: Teleconference

Hearing date: October 15, 2021

Hearing participants: Appellant

Decision date: October 17, 2021

File number: GP-21-830

Decision

[1] The appeal is allowed.

[2] The Claimant, G. S., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of April 2019. This decision explains why I am allowing the appeal.

Overview

[3] The Claimant is a 59 year-old former Skytrain attendant.¹ He worked in that role from August 2011 until October 2017.² The Claimant wrote that he could no longer work as of November 2017. He indicated that the reason he could no longer work was due to a total knee replacement of both knees.³ The Claimant detailed that he was required to use knee braces for any walks or physical activities.

[4] The Claimant applied for a CPP disability pension on March 5, 2020. 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 following a double knee replacement he can no longer walk or stand for long periods of time. He says that he lacks the ability to work in any capacity.

[6] The Minister says that while the Claimant has functional limitations he is still able to work in a sedentary position.

What the Claimant must prove

[7] For the Claimant to succeed, he must prove he has a disability that is severe and prolonged by the hearing date.⁴

¹ Skytrain is a medium-capacity rapid transit system in the Metro Vancouver Regional District.

² GD2-58

³ GD2-50

⁴ 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 (page number(s)

[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.⁵

[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.⁶

[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.

Reasons for my decision

[14] I find that the Claimant had a severe and prolonged disability by October 15, 2021. I reached this decision by considering the following issues:

- Is the Claimant’s disability severe?
- Is the Claimant’s disability prolonged?

GD2-73-74). In this case, the Claimant’s coverage period ends after the hearing date, so I have to decide whether he was disabled by the hearing date.

⁵ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁶ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Is the Claimant's disability severe?

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

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

[16] The Claimant had bilateral knee replacements resulting from subchondral edema.

[17] However, I can't focus on the Claimant's diagnosis.⁷ Instead, I must focus on whether he has functional limitations that get in the way of him earning a living.⁸ 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.⁹

[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.

[20] He says his bilateral knee condition causes him extensive pain and a lack of stability. The Claimant wrote in his reconsideration request that he had his left knee replacement in June 2019. He wrote that he is better pain wise but he has lost significant feeling in his knee cap area. He also noted that he cannot put weight on his kneecap. Flexibility has been limited to basic walking and bending. He wrote that he cannot squat or do a full bend of the knee. Going downstairs is limited and upstairs is challenging.

[21] The Claimant wrote that he had difficulties with squatting and being down. In terms of exercise, he is only able to do low impact things. He told me that he used to be pretty physical. He is able to swim and do cycling and that is about it.

⁷ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[22] The Claimant told me that if he does any walking or standing, he needs to wear a thick soled athletic shoe. He told me that he uses tensor wraps. He cannot run. He can drive for 20 minutes before he needs to get out of his car and do a brief stretch. The Claimant told me that he's no longer able to do sports. He cannot work on his vehicle without taking a stool down.

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

[23] The Claimant must provide medical evidence that shows that his functional limitations affected his ability to work by October 15, 2021.¹⁰

[24] The medical evidence supports what the Claimant says. He has had bilateral knee replacement. The Claimant had a total right knee arthroplasty completed on May 12, 2019.¹¹

[25] The Claimant was noted to have ongoing bilateral knee pain in March 2018.¹²

[26] Operative reports from the time indicate that the Claimant had moderate assuring of the medial patellar facet cartilage, however no significant subchondral edema. More extensive thinning of the medial compartment weight-bearing cartilage including areas of full-thickness loss and subchondral edema/cystic changes and small peripheral osteophytes noted Lateral compartment cartilage integrity is relatively maintained.¹³ This clearly shows that the Claimant had significant impairments with his knees requiring operative intervention.

[27] The medical evidence supports that the Claimant's knee pain prevented him from walking, bending, squatting and his job as a Skytrain attendant by October 15, 2021.

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

¹⁰ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹¹ GD2-11

¹² GD2-18

¹³ GD2-18

– **The Claimant has followed medical advice**

[29] The Claimant has followed medical advice.

[30] To receive a disability pension, a claimant must follow medical advice.¹⁴ If a claimant doesn't follow medical advice, then he must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on his disability.¹⁵

[31] The Claimant has followed medical advice.¹⁶ He has gone through four operations to assist in his knee pain. Unfortunately, these have not successfully relieved his condition. Instead he is left with knee instability and pain with use.

[32] 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.¹⁷

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

[33] 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

[34] 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.¹⁸

¹⁴ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁵ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁸ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

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

[36] On the face of things, the Claimant is only limited by his physical mobility. He has no cognitive impairments and could likely work in a sedentary position. However, I have to consider the Claimant's personal circumstances.

[37] The Claimant has only ever held two types of employment. He first moved to Vancouver after completing one year of college. From there, he started working as a hotel bellman at the Vancouver Pan Pacific. He did this for 30 years. After working in the hotel business as a bellman, and then a doorman he obtain his job with Skytrain. In his role at Skytrain, he was responsible for overseeing the cars to ensure safety and cleanliness. Neither of his roles were sedentary. Nor did either require the use of a computer. The Claimant has no transferable skills outside of his work as a bellman or a Skytrain attendant.

[38] Skytrain is a large provincial employer. It has approximately 2000 employees and the Claimant was represented by a Union. This is important because as a unionized employee there was an extensive attempt to find the Claimant an accommodated position. In other words, a position that was suitable given his functional impairments. He told me that both his long term disability provider and his Union tried to find an office position for him. But because he had no computer literacy and his relatively older age that they were unable to accommodate him into a new position. They further determined that because of his age he could not be retrained. I put a lot of weight on these factors. It was apparent to me that if a large unionized provincial employer was unable to accommodate the Claimant into a sedentary position, when bound to do so, it would be most unlikely for any other employer to afford a 59 year old man a similar opportunity.

[39] In a real world perspective, I am satisfied that the Claimant has no possibility of finding substantially gainful employment.

[40] I find that the Claimant's disability was severe by October 15, 2021.

Is the Claimant's disability prolonged?

[41] The Claimant's disability is prolonged.

[42] The Claimant's condition began in 2017 when he had to stop working because of bilateral knee pain. It is now 2021, he has had several surgeries and his knees remain painful and he cannot stand or walk on them for any length of time. His surgeon has told him there is nothing further that he can do to assist him. His bilateral knee condition will more than likely continue indefinitely.¹⁹

[43] I find that the Claimant's disability was prolonged by October 15, 2021.

When payments start

[44] The Claimant had a severe and prolonged disability in November 2017 when he could no longer work.

[45] However, 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.²⁰

[46] The Minister received the Claimant's application in March 2020. That means he is considered to have become disabled in December 2018.

[47] Payment of his pension starts as of April 2019.

Conclusion

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

¹⁹ 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.

²⁰ 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.

[49] This means the appeal is allowed.

Adam Picotte
Member, General Division – Income Security Section