



Citation: *RM v Minister of Employment and Social Development*, 2021 SST 860

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

# **Decision**

**Appellant:** R. M.

**Representative:** J. M.

**Respondent:** Minister of Employment and Social Development

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<b>Decision under appeal:</b>	Minister of Employment and Social Development reconsideration decision dated October 1, 2020 (issued by Service Canada)
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**Tribunal member:** George Tsakalis

**Type of hearing:** Teleconference

**Hearing date:** July 27, 2021 and post-hearing submissions

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** December 21, 2021

**File number:** GP-21-62

## 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 February 2019. This decision explains why I am allowing the appeal.

## Overview

[3] The Claimant was born in 1968. She finished Grade 11. She last worked as a letter carrier with Canada Post in March 2017. She claims she cannot work at any job because of her medical condition. The Claimant suffers from end stage osteoarthritis in her left elbow and Meniere's disease.

[4] The Claimant applied for a CPP disability pension on July 29, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Claimant says she cannot work at any job because she suffers from severe pain that affects her memory and concentration. She cannot use her left arm. She has difficulty lifting and she cannot drive safely because of Meniere's disease.

[6] The Minister says that while the Claimant might not be able to return to her previous job at Canada Post, there are other jobs that she can do with her medical condition.<sup>1</sup>

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<sup>1</sup> See GD11-3

## What the Claimant must prove

[7] For the Claimant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2019. This date is based on her CPP contributions.<sup>2</sup>

[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.<sup>3</sup>

[10] This means I have to look at all of the Claimant’s medical conditions together to see what effect they have on her ability to work. I also have to look at her background (including her age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether her disability is severe. If the Claimant is able to regularly do some kind of work that she could earn a living from, then she 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.<sup>4</sup>

[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 she has a severe and prolonged disability. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not she is disabled.

## Matters I have to consider first

[14] The Claimant testified that she had received a letter from Sun Life insurance stating that they accepted she was unemployable. This letter was not in the Tribunal file.

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<sup>2</sup> 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 GD2-4-6.

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>4</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[15] There is also evidence in the Tribunal file that the Claimant underwent a vocational assessment in November 2018.<sup>5</sup> However, the vocational assessment report was not in the Tribunal file.

[16] I found that the letter from Sun Life and the vocational assessment report were relevant to the issue of whether the Claimant had a severe and prolonged disability by December 31, 2019.

[17] I asked the Claimant to provide a copy of the letter from Sun Life and the vocational assessment report after the hearing. I asked the Minister to make submissions on these documents. The Minister asked for an extension of time to make submissions, which I granted.

[18] I have now received the letter from Sun Life, the vocational report, and the Minister's submissions. I am now prepared to make a decision on this appeal.

## **Reasons for my decision**

[19] I find that the Claimant had a severe and prolonged disability by December 31, 2019. 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?**

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

#### **– The Claimant's functional limitations affect her ability to work**

[21] The Claimant has end stage osteoarthritis in her left elbow and Meniere's disease. However, I can't focus on the Claimant's diagnoses.<sup>6</sup> Instead, I must focus on

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<sup>5</sup> See GD2-94

<sup>6</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

whether she had functional limitations that got in the way of her earning a living.<sup>7</sup> 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 her ability to work.<sup>8</sup>

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

– **What the Claimant says about her functional limitations**

[23] The Claimant says that her medical conditions have resulted in functional limitations that affect her ability to work.

[24] The Claimant says she has no experience working with computers. She had previously worked in a factory and she also worked as a server. She last worked as a letter carrier for Canada Post from November 2006 to March 2017, when she stopped working because of her medical condition. She looked for work for a period of time. But she stopped looking for work in October 2018, when she had an attack of Meniere's disease.

[25] The Claimant says she did some volunteer work at a long term care facility her mother resides in. She would talk to Alzheimer's patients for about one hour at a time. She stopped doing this after the start of the COVID-19 pandemic.

[26] The Claimant says she was medically retired by Canada Post in July 2020. Sun Life, her private disability insurance company, accepted that she is unemployable. Sun Life is paying her disability benefits until she turns 65.

[27] The Claimant says she worked 25 hours a week at Canada Post, but she also worked overtime. She has a long history of left elbow problems. She had two surgeries in 2005. Her left elbow got worse with time. She discussed a return to work with Canada Post, but they did not have any work available for her. The only jobs available required the use of two hands, which the Claimant could not do.

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<sup>7</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>8</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[28] The Claimant says she left her letter carrier position at Canada Post because of her left elbow. Her work at Canada post was physical and she could not lift her left hand and elbow. She had a Meniere's disease attack in October 2018. She thought she had a stroke and had to be rushed to the hospital. Meniere's disease leads to dizziness, nausea, and panic attacks. She is working with a medical specialist to control her symptoms, but she never knows when these symptoms will arise. She takes medication for Meniere's disease. She gets severe episodes of Meniere's disease approximately one time a month. She has been told that Meniere's disease is incurable and can only be managed with treatment. An attack can come out of nowhere.

[29] The Claimant has been told that her only treatment option for her left elbow osteoarthritis is an elbow replacement. But she has been told that she is too young to receive such an operation.

[30] The Claimant said she experienced constant left elbow pain in 2019. She still wears an elbow brace. She takes OxyContin, Diclofenac, and natural medicine to manage her pain.

[31] The Claimant says she cannot retrain. She suffers from anxiety and has taken Paxil since 2010. She had difficulty concentrating in 2019. She had interrupted sleep because of her left elbow pain. She does not believe she can handle a driving job safely because of Meniere's disease. She needed help from family to perform her household tasks. She had to take breaks while performing her housekeeping activities. She had difficulty grocery shopping because she can only lift bags using her right hand.

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

[32] The Claimant must provide medical evidence that shows her functional limitations affected her ability to work by December 31, 2019.<sup>9</sup>

[33] The medical evidence supports what the Claimant says. The medical evidence shows that the Claimant suffered from elbow problems since 1987, after she shattered

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

her left elbow in a fall. She had two elbow surgeries around 2001. However, her symptoms got worse with time.<sup>10</sup>

[34] An x-ray of her left elbow taken in September 2016 showed severe degenerative changes.<sup>11</sup>

[35] The Claimant saw an orthopaedic surgeon in January 2017. The Claimant had constant elbow pain, which was made worse with lifting. The orthopaedic surgeon confirmed the Claimant had end stage osteoarthritis. He could not provide the Claimant with a reliable solution to relieve her pain. He would have considered an elbow replacement, but the Claimant was too young for such a procedure. He suggested that the Claimant change jobs and choose a career that would allow her to avoid lifting more than five pounds with her left arm.<sup>12</sup>

[36] The Claimant's family doctor advised Sun Life in March 2017 that he doubted Canada Post had a light duty job that did not involve the use of both hands. He recommended early retirement for the Claimant. He noted the Claimant had left arm weakness due to pain. He said she could not use her left hand in any sustained fashion with lifting or moving objects.<sup>13</sup>

[37] Canada Post advised Sun Life in September 2017 that the Claimant's work duties were not modified and it was unknown when she would return to work.<sup>14</sup>

[38] The Claimant's family doctor completed a form for Sun Life in October 2017. He advised Sun Life that he recommended that the Claimant go off work in March 2017. The Claimant's treatment was limited to managing her pain and wearing a brace. He described her disability as being permanent and partial. She had practically no use of her left arm with lifting.<sup>15</sup>

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<sup>10</sup> See GD2-82-83

<sup>11</sup> See GD2-81

<sup>12</sup> See GD2-82-83

<sup>13</sup> See GD2-79-80

<sup>14</sup> See GD2-74-76

<sup>15</sup> See GD2-84-89

[39] An otolaryngologist wrote a report in April 2019. He said the Claimant experienced acute imbalance triggered by an inner ear condition that was consistent with Meniere's disease. The Claimant attacks of imbalance could occur spontaneously and unpredictably. They could last for several minutes to hours. This condition affected her quality of life and could impact her ability to perform work safely. He said there was no cure for Meniere's disease, but he hoped to reduce the frequency of her symptoms with treatment.<sup>16</sup>

[40] The medical evidence supports that the Claimant's functional limitations prevented her from doing her usual job at Canada Post by December 31, 2019.

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

– **The Claimant has followed medical advice**

[42] To receive a disability pension, a claimant must follow medical advice.<sup>17</sup> I find that the Claimant followed medical advice. She saw an orthopaedic surgeon, who unfortunately could not come up with treatment options to relieve her pain. She tried pain medications. She has not tried physiotherapy recently, but her physicians did not recommend such treatment. Even if she received physiotherapy, she would still be left with severe pain. She wears a brace as recommended by her treating doctors. She tried pain medications. She has seen and received treatment from an otolaryngologist for Meniere's disease that included medication.

[43] The Claimant testified she suffers from anxiety. I do not see evidence in the file that she received treatment for anxiety. But I do not place much weight on this because the Claimant's disabling conditions are left elbow osteoarthritis and Meniere's disease, and not anxiety.

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<sup>16</sup> See GD2-96

<sup>17</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.



[44] 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 her from earning a living at any type of work, not just her usual job.<sup>18</sup>

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

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

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

[46] These factors help me decide whether the Claimant can work in the real world—in other words, whether it is realistic to say that she can work.<sup>19</sup>

[47] I find that the Claimant can't work in the real world. The Claimant was 51 years old by December 31, 2019. She did not finish high school. She has no experience working with computers. Her background suggests her job options are limited. But she understands English, which suggests she can retrain. However, I am still satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2019.

[48] The Ministers argues the Claimant could perform some type of work by December 31, 2019. The Minister argues the medical evidence did not support a finding of a severe disability under the CPP.<sup>20</sup> But I am satisfied the medical evidence supported the Claimant's evidence about her functional limitations and inability to work.

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<sup>18</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>19</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>20</sup> See GD3-3

[49] The Minister also argues that the vocational report listed occupations that the Claimant could perform.<sup>21</sup>

[50] I have reviewed the vocational report and I do not believe that the Claimant could perform the listed jobs in a real world context.

[51] The vocational report said the Claimant could work at the following jobs:

- supervisor in a mail and message distribution operation;
- dispatcher;
- transportation and route scheduling;
- production clerk; and
- receptionist.<sup>22</sup>

[52] The vocational report says that the Claimant would be able to perform these jobs if she completed her GED and received computer training. However, I do not believe that the Claimant had the capacity retrain by December 31, 2019. I accept her hearing evidence that retraining was not a realistic option because of her severe and constant pain. The Claimant's pain caused fatigue, which impaired her concentration. I also find the Claimant's pain medications would affected her ability to concentrate in a classroom or any type of training setting. Her dizziness caused by Meniere's disease would also have negatively affected her ability to retrain.

[53] I do not believe that the Claimant could have performed any type of physical work by December 31, 2019 because of her difficulty with lifting. I believe the Claimant had the capacity to work in a driving job until October 2018, when she had her first attack of Meniere's disease. I do not believe that the Claimant had the ability to perform

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<sup>21</sup> See GD11-2-3

<sup>22</sup> See GD8-9

a driving job safely after October 2018 because of the possibility of unpredictable dizziness caused by Meniere's disease.

[54] I found the Claimant to be a credible witness. She acknowledged that she had work capacity until October 2018. What forced her to stop looking for sedentary work was the onset of Meniere's disease. The Claimant never knows when she will have an attack, which makes her an unreliable employee.

[55] I agree with the Minister that Sun Life's acceptance that the Claimant is unemployable under their policy does not bind me. The test for a CPP disability pension differs from the test for disability benefits under an insurance policy. But I am satisfied that the Claimant had a severe disability under the CPP because of the combine effect of end stage osteoarthritis in her left elbow and Meniere's disease.

[56] I accept that the Claimant ability to perform her household tasks was impaired by December 31, 2019. I am satisfied that the Claimant's pain levels were significant enough that she could not sustain activities for a long enough period to be employable in a real world context. I also accept the Claimant's testimony that her pain levels and Meniere's disease were so unpredictable that she could not work on a reliable or regular basis at any type of job.

[57] I find that the Claimant's disability was severe by December 31, 2019.

### **Was the Claimant's disability prolonged?**

[58] The Claimant's disability was prolonged.

[59] The Claimant's end stage osteoarthritis in her left elbow and Meniere's disease began before December 31, 2019. These conditions have continued since then, and they will more than likely continue indefinitely.<sup>23</sup> Her family doctor said her treatment is

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<sup>23</sup> 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.

focused on managing her pain, not eliminating it and he confirmed that the Claimant has a permanent disability with her left arm.<sup>24</sup>

[60] The Claimant's orthopaedic surgeon said that he could not offer a medical solution to the Claimant's pain.<sup>25</sup>

[61] The Claimant's otolaryngologist said that there is no cure for Meniere's disease. He is trying to reduce the severity of her symptoms, rather than eliminating them.<sup>26</sup>

[62] I find that the Claimant's disability was prolonged by December 31, 2019.

### **When payments start**

[63] The Claimant's disability became severe and prolonged in October 2018, when she had her first attack of Meniere's disease.

[64] There is a four-month waiting period before payments start.<sup>27</sup> This means that payments start as of February 2019.

### **Conclusion**

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

[66] This means the appeal is allowed.

George Tsakalis

Member, General Division – Income Security Section

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<sup>24</sup> See GD2-84-89

<sup>25</sup> See GD2-82-83

<sup>26</sup> See GD2-96

<sup>27</sup> Section 69 of the *Canada Pension Plan* sets out this rule.