



Citation: *CM v Minister of Employment and Social Development*, 2021 SST 862

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: C. M.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated June 3, 2020 (issued by
Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Videoconference

Hearing date: November 3, 2021

Hearing participant: Appellant

Decision date: December 3, 2021

File number: GP-20-1066

Decision

[1] The appeal is dismissed.

[2] The Claimant, C. M., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is 54 years old. He is a chartered accountant and has worked since 1992 in various accounting/finance roles. In March 2019, he underwent a laser eye procedure that caused a serious injury to his eye. He has chronic eye pain, PTSD, and anxiety. His conditions prevent him from working in an office, but he has been able to work from home since January 2021.

[4] The Claimant applied for a CPP disability pension on August 30, 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 his disability is severe and prolonged. What happened to him has been nothing short of debilitating. He has tried everything possible to find a treatment and improve his condition, but with no success. He can't work in an office environment because of his conditions. He doesn't expect that he will be accommodated to work from home after the pandemic restrictions lift.

[6] The Minister says that the evidence doesn't support that the Claimant's limitations are so severe that they prevent him from doing any type of work. In fact, he has returned to work. He has limitations because of his medical conditions, but they don't prevent him from earning a living.

What the Claimant must prove

[7] For the Claimant to succeed, he must prove he had a disability that was severe and prolonged by the hearing date.¹

[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.

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 at GD12-11 to 13. 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.

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.

Matter I have to consider first

I accepted the documents sent in after the filing deadline

[14] The Minister submitted two documents—an employer questionnaire (GD11) and submissions on the appeal (GD12)—after the filing deadline of August 23, 2021.⁴ Service Canada received the employer questionnaire on August 12, 2021, but it wasn't filed until October 7, 2021.⁵ Service Canada wrote to the Claimant's employer requesting the information on April 28, 2021, and again on June 9, 2021.⁶ It was following up on 2020 income that had been reported.⁷

[15] The Claimant contacted the Tribunal before the hearing. He wanted to know whether the late documents would be accepted so that he could prepare for the hearing. On October 20, 2021, I informed the parties that I was accepting the late documents because they were relevant to the appeal.⁸ I said that I was prepared to give the Claimant an opportunity to respond to the documents in writing post-hearing in case he needed more time.

[16] At the hearing, the Claimant objected to the Minister filing these documents past the filing deadline. He said that it should have filed the employer questionnaire sooner and that it should follow the rules for filing documents.

[17] I explained at the hearing why I had accepted the late documents. In dealing with late documents, the law requires that I balance the value of the evidence with any unfairness or prejudice that accepting them would cause.⁹ The employer questionnaire was directly relevant to an important issue on the appeal: whether the Claimant had current work capacity. It also included details that could help determine the issue. In my

⁴ The Tribunal set the filing deadline in letter it sent to the parties on July 12, 2021.

⁵ See the employer questionnaire at GD11.

⁶ See the letters to the employer from Service Canada, at GD9-16 to 23 and GD9-38 to 45.

⁷ See the additional information from ESDC on appeal to SST, at GD9-1.

⁸ See my letter from October 20, 2021, at GD13.

⁹ See *McEwing v Canada (Attorney General)*, 2013 FC 183.

view, any prejudice caused by the late filing could be addressed by providing more time to respond to the documents, including the submissions.¹⁰

[18] At the end of the hearing, I offered the Claimant more time to respond to the late documents post-hearing in writing. He said he didn't need more time.

Reasons for my decision

[19] I find that the Claimant hasn't proven he had a severe and prolonged disability by November 3, 2021, the hearing date.

Was the Claimant's disability severe?

[20] The Claimant's disability wasn't 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, but he can be accommodated

[21] The Claimant has generalized anxiety disorder, PTSD, a retinal (eye) tear, and chronic eye pain. However, I can't focus on the Claimant's diagnoses.¹¹ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.¹² 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.¹³

[22] I find that the Claimant has functional limitations. However, I also find that he can be reasonably accommodated by working from home. He has worked successfully and effectively from home since the start of the pandemic. His disability can and should be accommodated.

¹⁰ The documents were late but still allowed time for review and preparation for the hearing. The employer questionnaire was provided to the Claimant on October 7, 2021, almost a month before the hearing. The submissions were provided on October 13, 2021.

¹¹ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹² See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹³ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[23] The Claimant says that his medical conditions have resulted in functional limitations that affect his ability to work. His eye injury causes the following symptoms that restrict how he can work:

- **Eye pain** – He suffers from excruciating eye pain. He has to lie down and close his eyes throughout the day to manage the pain. Some days he has a hard time keeping his eyes open.
- **Visual symptoms** – He sees white flickering lights that are activated by sunlight or florescent light. In the dark, he sees spark-type explosions activated by eye movement. These episodes can overwhelm him emotionally and trigger his anxiety.

[24] The Claimant's anxiety comes from both the physical pain and the emotional pain caused by his eye injury. The more eye pain and visual symptoms he experiences, the more anxious he gets. He also feels a strong sense of injustice about his eye injury that creates anxiety. He learned that the procedure that caused the injury wasn't medically necessary. The eye injury has taken such a substantial toll on his life, but he can't seem to find any justice.

[25] The Claimant says he has the following functional limitations because of his medical conditions:

- **Function outdoors** – He can't tolerate sunlight. He has to wear welding-grade sunglasses when outdoors. A flickering light episode can last an hour. Visual symptoms cause anxiety.
- **Tolerate indoor lighting** – Florescent lighting also causes flickering light episodes. Many office environments have florescent overhead lighting.
- **Function in public** – He has anxiety about being in public.

- **Concentrate** – Eye pain and anxiety make it hard to concentrate for long periods of time.
- **Work a regular schedule** – He has to lie down two to three times a day to manage the eye pain, visual symptoms, and anxiety. He takes many other breaks as well. He often has to work weekends or stretch his days to get his work done. He takes unpaid vacation when the pain is really bad. He builds time off into his schedule to give his eyes time to rest.
- **Sleep** – He has anxiety when he goes to bed and when he wakes up. When he sees sparks, he can't sleep. He has learned to control his eye movement at night, but the sparks can still happen.

– **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 the hearing date.¹⁴

[27] The medical evidence supports what the Claimant says. The Claimant's family doctor, Dr. Bajwa, diagnosed him with generalized anxiety disorder, PTSD, and a retinal tear.¹⁵ Dr. Bajwa says that these conditions cause sensitivity to light, burning and dry eyes, panic attacks, and feelings of being overwhelmed.¹⁶ In Dr. Bajwa's opinion, the Claimant would not be able to perform any kind of work that involves focus with his eyes or working on screens.¹⁷

[28] Dr. Poon, optometrist, says that the Claimant is dealing with severe complications from a retinal laser procedure he had on March 25, 2019. Part of the Claimant's debilitating eye issues include white flickering lights that appear in his field of vision, activated by sunlight and florescent lights, and spark-type explosions that are activated by eye movement in the evening/dark.¹⁸ Dr. Poon says that these symptoms

¹⁴ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁵ See Dr. Bajwa's Medical Report dated December 2, 2019, at GD2R-66.

¹⁶ See Dr. Bajwa's Medical Report dated December 2, 2019, at GD2R-66.

¹⁷ See Dr. Bajwa's letter from July 21, 2020, at GD1-9.

¹⁸ See Dr. Poon's memo dated November 10, 2020, at GD5-2.

significantly impact his ability to focus attention (even in his own home) and would therefore impact his ability to perform adequately in any potential employment context.¹⁹

[29] Dr. Kassam, ophthalmologist, explains that the Claimant's condition is uncommon with no clear explanation and falls under a phenomenon similar to chronic pain/photopsia (flashes of light in the field of vision).²⁰

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

– **The Claimant has followed medical advice**

[31] The Claimant has followed medical advice.

[32] To receive a disability pension, a claimant must follow medical advice.²¹ If a claimant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the claimant's disability.²²

[33] The Claimant has seen many doctors in an attempt to find a solution to his eye condition. Unfortunately, there are no known treatments for the laser-induced retinal injury he suffered.²³ He treats eye pain and dryness with eye drops, which provide only temporary relief.

[34] The Claimant has been active in his treatment of PTSD and anxiety. He participated in a 19-day hospital day program in August and September 2019 to stabilize anxiety and depressive symptoms.²⁴ He has since attended many counselling sessions.²⁵ He has been working with his current counsellor since March 2021.²⁶

¹⁹ See Dr. Poon's memo dated November 10, 2020, at GD5-2.

²⁰ See Dr. Kassam's letter from March 4, 2021, at GD6-2.

²¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²² See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²³ See Dr. Christakis' October 21, 2020, response to Dr. Bajwa's letter at GD4-2.

²⁴ See Rockyview General Hospital discharge summary at GD2R-75 and 76.

²⁵ See the 2019–2020 counselling records at GD7-1 to 4.

²⁶ See Mr. Moshrefzadeh's letter from May 25, 2021, at GD7-8.

[35] I now have to decide whether the Claimant can regularly work. To be severe, the Claimant's functional limitations must prevent him from earning a living at any type of work.²⁷

– **The Claimant can work in the real world**

[36] 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

[37] 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.²⁸

[38] I find that the above factors support the Claimant's ability to work. He is only 54 years old. He has a university education and a designation as a chartered accountant. But, most importantly, he has extensive work experience in his field. He says that he can do the work of three people because of his knowledge and experience. This allows him to work efficiently and meet performance standards while still taking the time that he needs to manage his symptoms from home.

[39] I find that the Claimant can work in the real world. There is no question that his medical conditions create significant challenges that he must overcome to keep a job. But, the evidence shows that he can perform at a competitive level despite his limitations.

[40] The Claimant has been working continuously as a financial project manager since January 2021 on a full-time, one-year contract.²⁹ He works on average 30 hours a

²⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁸ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁹ See the employer questionnaire at GD11-1.

week and is paid \$55 an hour. He hasn't asked for any accommodation for his disability, other than some time off. There have been no issues with his job performance.

[41] The Claimant is able to manage his conditions and his job responsibilities while working from home. He uses blackout blinds to control sunlight. He can control his interior lighting and the brightness of his computer screen. He can take breaks and lie down when he needs to. He would not be able to adequately manage his eye pain and anxiety if he had to leave his home and work in an office environment.

[42] The Claimant, like much of the workforce, has been working from home since the pandemic started in March 2020. This arrangement had nothing to do with accommodating his medical conditions. In fact, he hasn't told his employer about his disability. He was concerned that it would jeopardize his chances of getting contract work.

[43] The Claimant works for an agency that places people with his skill set in workplaces that need them. He has found work through this agency since 2015. He performed a short-term contract from June to July 2020, and he has been working on a one-year contract since January 2021 with a company in Vancouver. An employer questionnaire that was completed in July 2021 said that his work performance was satisfactory.³⁰ The Claimant's testimony confirmed that he has been able to meet the demands of the job.

[44] In my view, it is reasonable to expect an employer to accommodate the Claimant's medical conditions by allowing him to work from home. He has proven over

³⁰ See the employer questionnaire at GD11. The Claimant testified that the person who had completed the questionnaire would not have had any knowledge of his work performance. However, I find that they would have made inquiries to fill out the questionnaire.

the last year that he can do his job despite his disability, as long as he can work from home.³¹

[45] The Claimant is concerned that, when restrictions from the pandemic begin to lift, his employer will require that he work from the office. He says that people with his job never worked from home before the pandemic.

[46] The pandemic has clearly challenged traditional views on remote working. It has proven over an extended period of time that many jobs can be performed effectively from home, including the Claimant's. An employer can't ignore a year's worth of evidence that the Claimant can do his job from home. And, working from home isn't a matter of preference for the Claimant—it is a necessity based on serious medical conditions for which he can seek accommodation.³²

[47] The Claimant has shown that he has the capacity for substantially gainful work, with full credit to him for his determination and work ethic. His disability makes it harder for him to work, but it doesn't get in the way of him earning a living.

[48] Therefore, I can't find that the Claimant had a severe disability by November 3, 2021, the hearing date.

Conclusion

[49] I find that the Claimant isn't eligible for a CPP disability pension because his disability isn't severe. Because I have found that his disability isn't severe, I didn't have to consider whether it is prolonged.

³¹ An employer that accommodates an employee beyond what is required in the competitive marketplace is considered "benevolent." This is a factor that can be considered in determining whether an individual is "incapable regularly of pursuing any substantially gainful occupation." This factor doesn't apply to the Claimant. His employer doesn't know he has a disability and hasn't made any accommodation for it. The Claimant has also shown that he has the ability to perform at a competitive level. There is no evidence that the work expected from him was considerably less than the work expected from other employees. See *Atkinson v Attorney General (Canada)*, 2014 FCA 187.

³² The Claimant currently lives and works in British Columbia. Under the BC *Human Rights Code*, all employers in British Columbia are required to accommodate an employee with a mental or physical disability up to the point of undue hardship. See section 13 of the BC *Human Rights Code*.

[50] This means the appeal is dismissed.

Michael Medeiros

Member, General Division – Income Security Section