Citation: *HM v Minister of Employment and Social Development*, 2022 SST 640

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	H. M.
Representative:	George McAllister
Respondent:	Minister of Employment and Social Development
Representative:	Marie Griffin
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 12, 2019 (issued by Service Canada)
Tribunal member:	Anne S. Clark
Type of hearing:	Videoconference
Hearing date:	June 3, 2022
Hearing participants:	Appellant Appellant's representative Appellant's Witnesses Respondent's representative
Decision date:	June 30, 2022
File number:	GP-20-258

Decision

[1] The appeal is allowed.

[2] The Appellant, H. M., is eligible for a *Canada Pension Plan* (CPP) disability pension. Payments start as of October 2017. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 53 years old. He last worked in construction. He has always work in physically demanding jobs. In 2003 he was injured twice at work. The first injury was when a 16 foot board struck him on the jaw. He experienced neck pain and nausea. He began having headaches. About two months later, in April 2003, he was injured when a large roll of tarpaper fell on his head and shoulder. He returned to work and was able to continue until January 2006 when he was laid off. Debilitating pain and other symptoms persisted and worsened. He was unable to pursue other work.

[4] This is the Appellant's fourth application for a disability pension.[1] The Minister received the Appellant's current application on September 12, 2018.[2] The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal (Tribunal).

[5] The Appellant said he was not able to work in any capacity after January 2006. He worked as long as he could after the injuries to try to support his family. Pain and other symptoms made him unreliable and unable to pursue any work. He said he is limited by his education and the fact that he has only ever worked in "hard labour" jobs.

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[1] The Appellant applied on January 22, 2008, November 19, 2012, and August 24, 2016. He did not pursue any of these applications beyond the reconsideration decision.
[2] The current application begins at page GD2-4.

[6] The Minister says the Appellant might not have been able to return to his previous job but could have sought lighter jobs or retrain for other work. The Minister said the Appellant's doctors suggested he retrain for lighter duties.[3]

What the Appellant must prove

[7] For the Appellant to succeed, he must prove that it is more likely than not that he had a disability that was severe and prolonged by December 31, 2007. This date is based on his contributions to the CPP.[4]

[8] The *Canada Pension Plan* defines "severe" and "prolonged."

[9] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[5]

[10] This means I have to look at all of the Appellant's medical conditions together to see what effect they have on his ability to work. I also have to look at his background (age, level of education, language abilities, 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 Appellant is able to regularly do some kind of work to earn a living, 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 Appellant's disability can't have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

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[3] Dr. B. Poole is a specialist who examined the Appellant's neck and back. He said the Appellant should seek lighter duties. His letter at GD2-327. Dr. Braganza said the Appellant was disabled from physical work in his reports at GD2-132 dated July 14, 2008.
[4] A person's years of contributions to the CPP are used to calculate the "minimum qualifying period". It is usually called the MQP and is often described using the date the period ended. In this case it is December 31, 2007. See subsection 44(2) of the *Canada Pension Plan*. The Appellant's contributions are on page GD2-54.
[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.

[13] The Appellant has to prove he had a severe and prolonged disability. Contrary to the Appellant's submissions, the Minister is not required to show evidence that the Appellant can work or retrain. The Appellant has to prove his case on a balance of probabilities. This means that he has to show that it is more likely than not he was disabled.

Matters I had to consider first

The Appellant asked me to adjourn the hearing

[14] The Appellant asked me to adjourn the hearing (that is, change the hearing date) until circumstances would allow the hearing to proceed in person. He made written submissions and his representative attended a prehearing conference to explain why the Appellant felt it was necessary to hold a hearing in person.

[15] I refused the Appellant's request and gave a written decision with reasons.[7] In summary, I refused the request because:

- the rules require me to proceed as informally and quickly as fairness allows;
- a videoconference or teleconference is more efficient and quicker;
- the file did not disclose an issue of credibility that would require the Appellant to give his evidence in person;
- videoconference or teleconference would allow the Appellant to participate fully and know and respond to the Minister's case.

The Appellant's witnesses are experts in their areas of practice

[16] The Appellant filed reports and letters from three professionals. He requested that I qualify them as experts in their fields. The Minister did not object to the Appellant's request to qualify the witnesses as experts.

[7] My decision is in the file at GD10.

[17] Mr. Mark McGovern is a registered rehabilitation specialist. He filed his resume and list of courts and tribunals where he qualified as an expert in vocational rehabilitation and employability.[8] I find Mr. McGovern is qualified to give expert testimony on the Appellant's vocational rehabilitation and employability.

[18] Ms. Lynn Moore is a physiotherapist and specialist in functional capacity evaluations.[9] She filed her resume and list of courts and tribunals where she qualified as an expert in physiotherapy and functional capacity evaluation. I find Ms. Moore is qualified to give expert testimony on the Appellant's functional capacity.

[19] Laurence M. Braganza was a member in good standing of the College of Physicians and Surgeons in the area of Family Practice from 1975 until 2013. He testified that he was qualified as an expert witness in family practice by the New Brunswick Family Court. He was the Appellant's family physician when the Appellant was injured in 2003. He remained the Appellant's family physician until 2008 when he closed his practice. I find Dr. Braganza is qualified to give expert testimony on family medicine.

I did not allow the witnesses to hear the Appellant's evidence before giving their testimony.

[20] The Appellant requested the witnesses be permitted to hear his testimony before giving their own. The Appellant submitted this would be a reasonable process. He believes this is the normal procedure in courts and tribunals and excluding the witnesses would be unusual. The Appellant said it was necessary to allow the witnesses to hear the Appellant's testimony because of the following:

- It would allow the witnesses to respond to Appellant's testimony and address his evidence when they testify.

[8] Mr. McGovern's report is at GD9-4.
[9] Ms. Moore's report is at GD6-3

- It would respect the usual practice of tribunals and courts to allow witnesses to remain in the hearing room.
- It would follow the open court principle that tribunals are required to follow.
- There is no evidence that the witnesses would be influenced by the Appellant's testimony.

[21] The Minister did not agree with the Appellant's request and submitted that the usual practice is to exclude witnesses until they give their testimony.

[22] The Minister is correct. The Tribunal's usual practice is to exclude witnesses from the hearing until they give their testimony.[10] This is to ensure the witness' testimony is not unduly influenced by what someone may say. There could be exceptions to this procedure in the interest of fairness. The Appellant's submissions did not show any reason why I should not exclude the witnesses.

[23] The Appellant submitted that I could not exclude the witnesses without supporting evidence that they would be influenced by the testimony of others. He also said the witnesses would have the opportunity to hear the Appellant and, if necessary, provide their opinions on what he said during the hearing. This submission is not reasonable and further illustrates the need to exclude witnesses. It is not proper for a witness to hear the evidence of another and then be able to tailor his own evidence based on what another witness says.

[24] The Appellant said the open court principle requires me to allow the witnesses to be present in the hearing for all of the evidence. The open court principle does apply to the Tribunal. A hearing is open to the public unless the tribunal member decides that disclosure would subvert the ends of justice or unduly impair the tribunal's proper

[10] For example see the Appeal Division decisions in *M.F v. Minister of Employment and Social Development*, 2016 SSTADIS 14 and *S.T. v. Canada Employment Insurance Commission*, 2017 SSTADEI 14. I am not required to follow decisions of the Appeal Division but these decisions are instructive on this point.

administration.[11] I can only close the hearing in very exceptional circumstances. However, the open court principle applies to observers or the public. It does not apply to witnesses. I did not close the hearing and explained that each witness could remain on the call as an observer after giving their testimony.

Reasons for my decision

[25] I find that the Appellant had a severe and prolonged disability as of January 2006. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

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

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

[27] The Appellant has:

- Head, neck and back injury.
- Post-concussion symptoms.
- Shoulder injury.
- Left jaw injury.
- Disc protrusion with pinched nerves.

[28] However, I can't focus on the Appellant's diagnoses.[12] Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.[13] When

[11] The Supreme Court of Canada discussed this in *Dagenais v Canadian Broadcasting Corp.* [1994] 3 S.C.R 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442.
[12] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[13] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

I do this, I have to look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected his ability to work.[14]

[29] I find that the Appellant has functional limitations that affected his ability to work.

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

[30] The Appellant says that his medical conditions have resulted in functional limitations that affected his ability to work. He says he had debilitating symptoms since the injuries in 2003. They did not improve with treatment. They made him unable to work by 2006. In fact, he believes he was put on the lay off list because of his injuries. Since he stopped working, the symptoms have changed but they have never gone away or improved enough for him to return to work. They include the following:

- Pressure in his head causing "blinding" headaches. The headache never goes away. They make him unable to eat or sleep.

- He has trouble with his hearing and with concentration. He is dizzy and trips a lot. He is very clumsy. His balance is poor and he needs a cane for stability.

- Moving his neck causes extreme pain in the bones. He has to hold his head in a specific spot to help ease the pain. Driving over a bump in the road makes the pain much worse.

- His arms ache and there is tingling into his fingers. The injury in 2003 reinjured a previous shoulder condition and makes him unable to use his arm fully.

- His mind feels "off". He is forgetful and has trouble forming sentences. He also finds he is and easily agitated.

- He is sensitive to light. His eyes water constantly. He has to wear sunglasses indoors and cannot look at a computer screen or read for any length of time.

[14] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- He is very sensitive to sound. He finds it very aggravating and makes the headaches worse.

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

[31] The Appellant must provide some medical evidence to show that his functional limitations affected his ability to work by December 31, 2007.[15]

[32] Medical evidence supports what the Appellant says. I will summarize the supporting information below. There is also a significant amount of evidence about the Appellant's conditions after December 31, 2007. As the Minister correctly noted the evidence must relate to the Appellant's disability before December 31, 2007. I will only rely on later evidence if I am satisfied it related to the Appellant's conditions before December 31, 2007.

[33] The Appellant filed medical reports and letters (some in duplicate) and academic journals and texts. It is not reasonable or helpful to summarize all of the information the parties submitted. I reviewed it all and considered all relevant information and evidence. However, I will only summarize the information necessary to explain my reasons.

[34] There is some medical evidence to support the Appellant's statement that pain and functional limitations prevented him from doing any of his previous job duties. He has constant pain in his head, jaw and neck. He has poor balance and limited use of his arms. He does not sleep well and movement increases his pain.

[35] The Appellant's former family physician, Dr. L. Braganza attended the hearing.[16] He said he treated the Appellant for the work injuries in 2003 and until 2008. He also said the Appellant gave reliable and valid information about his symptoms. He was not given to exaggeration and would likely try to minimize his symptoms.

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[15] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[16] Dr. Brazanga filed reports and letters and gave affirmed testimony as the Appellant's physician and as an expert in family medicine.

[36] Dr. Brazanga said the Appellant's symptoms included pain in his neck, back and arms. He returned to work but his symptoms continued to worsen. By the end of 2007, there was no real improvement in the Appellant's symptoms. He was disabled by headaches, trouble with his vision, pain in his jaw and neck, poor balance, numbness and tingling in his hands, and poor sleep.

[37] Dr. Braganza said the Appellant's description of the symptoms would be exactly what he would expect to hear from a patient who had a disc protrusion, pinched nerves and post-concussion symptoms. There was no treatment that would improve his symptoms enough for him to work. Even if he "pushed" himself to do something for a day, he would likely not be able to function for the next day or more.

[38] Lynn Moore provided an opinion based on her review of the Appellant's injuries and conditions before December 31, 2007. She said she reviewed all of the medical information and her opinion relates to the Appellant's functional abilities at that time. Even though Ms. Moore's assessment was after December 31, 2007, her opinion related to his injuries and limitations from before. As an expert in functional capacity evaluations, she said she did not have to physically examine the Appellant because the reports and tests from that time gave her enough information to assess his functional capacity. She said she was confident in her opinion that he did not have the functional capacity to work by December 31, 2007.

[39] Ms. Moore said the Appellant was involved in a significant incident. The injuries would have limited his ability to stand or sit for prolonged periods. She would expect them to continue and make him unable to work. Pain and limited mobility would have affected his ability to work and also retrain. She considered his functional limitations to be significant.

[40] Next, I will look at whether the Appellant has followed medical advice.

– The Appellant has followed medical advice

[41] To receive a disability pension, an appellant must follow medical advice.[17] If an appellant 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 appellant's disability.[18]

[42] The Appellant has followed medical advice.[19] The Appellant said he tried medication and therapy as it was recommended. Dr. Braganza said he participated in many consultations, investigation, therapies and medication trials after the 2003 injuries. He said the investigations went on for about four years. There is no evidence that the Appellant refused to follow any medical advice.

[43] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.[20]

– The Appellant can't work in the real world

[44] When I am deciding whether the Appellant 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

[45] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.[21]

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[17] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[18] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.
[19] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[20] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[21] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[46] I find that the Appellant can't work in the real world. There is no denying that he is young and his doctors initially thought he could retrain for a more suitable job. However, the limitations of his health condition prevent him from retraining or doing lighter work.

[47] At the hearing, the Appellant gave straightforward, plausible evidence about how his health conditions affect him. He said he would have continued working if he could have. I believe what he told me. He talked about how he felt he needed to work to take care of his children. He went back to work after each injury and wanted to keep trying. He tried using braces on his neck and back to keep working as long as he could.

[48] Even if the Appellant could retrain for lighter work, his conditions would prevent that. The limitations that prevent him from working at his previous job also prevent him from doing any other type of work, including part-time work. His conditions make his attendance unreliable. He would be unable to pursue retraining or employment.

[49] Mr. McGovern assessed the Appellant's employability and ability to be retrained. He interviewed the Appellant and reviewed his work history and education. He found he has limited transferrable skills. He couldn't identify any realistic employment opportunities for the Appellant with his skills and functional limitations.

[50] Mr. McGovern said the Appellant has a modest academic history. He repeated some school years and left at Grade 9. Given his physical limitations and his education, Mr. McGovern found there were no retraining opportunities.

[51] I find that it is more likely than not the Appellant's disability was severe as of January 2006. His injuries happened in 2003. However, he was able to push himself and worked until January 2006 when he was laid off. He has not been able to return to work since then.[22]

[22] The Employer's report, at GD2-174 confirms the Appellant worked from July 2004 to January 2006.

Was the Appellant's disability prolonged?

[52] The Appellant's disability was prolonged. Considering all of the evidence, I find his conditions are likely to be long continued and of indefinite duration.

[53] The Appellant's conditions began by April 2003. They have continued since then, and they will more than likely continue indefinitely.[23] The Appellant and Dr. Braganza explained that he tried different medication and therapy but it did not improve the pain and other symptoms. Dr. Braganza and Ms. Moore both consider the Appellant's functional limitations to be permanent (long continued).

[54] The evidence shows that the Appellant's conditions are unlikely to resolve or improve with time or treatment.

[55] I find that the Appellant's disability was prolonged as of January 2006. This was when he last worked. After that he was not able to pursue any substantially gainful employment because of his ongoing symptoms.

When payments start

[56] The Appellant had a severe and prolonged disability in January 2006.

[57] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.[24] After that, there is a 4-month waiting period before payments start.[25]

[58] The Minister received the Appellant's current application in September 2018. That means he is considered to have become disabled in June 2017.

[59] Payments of his pension start as of October 2017.

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[23] In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.
[24] Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.
[25] 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.

Conclusion

[60] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged.

[61] This means the appeal is allowed.

Anne S. Clark
Member, General Division – Income Security Section