



Citation: *MM v Minister of Employment and Social Development*, 2023 SST 911

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** M. M.  
**Representative:** K. P.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Sandra Doucette

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**Decision under appeal:** General Division decision dated December 5, 2022  
(GP-22-933)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Videoconference  
**Hearing date:** May 24, 2023  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** July 13, 2023  
**File number:** AD-22-954

## Decision

[1] The appeal is dismissed. The Appellant does not qualify for a Canada Pension Plan (CPP) disability pension.

## Overview

[2] The Appellant is a 63-year-old former software developer and entrepreneur who for many years has suffered from epilepsy. He worked for X until 2000 and underwent brain surgery the following year. Other than brief employment as the head of a business start-up, he has not worked since.

[3] In January 2021, the Appellant applied for a CPP disability pension. He claimed that he had been unable to work because of seizures and memory problems. The Minister of Employment and Social Development (Minister) refused the application after determining that the Appellant did not have a severe and prolonged disability as of December 31, 2001, the last time he had CPP disability coverage.

[4] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found that the Appellant's surgery was successful and that his seizures were controlled with medication. The General Division also based its decision on the fact that the Appellant spent 10 months as the CEO of a U.S. high-tech venture in 2008.

[5] The Appellant then applied for permission to appeal to the Appeal Division. Earlier this year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. I then held a hearing to discuss his disability claim in full.

## Preliminary Matter

[6] On December 5, 2022, the rules governing the appeals to the Social Security Tribunal changed. Under the new rules, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division. As I explained at the outset of the hearing, that meant I would be considering all available evidence about whether the Appellant

was disabled, according to the definition set out in the *Canada Pension Plan*, as of his coverage period. I also made it clear that I would not be bound by any of the General Division's findings.

## Issue

[7] For the Appellant to succeed, he must prove that, more likely than not, he had a severe and prolonged disability during his coverage period.<sup>1</sup> In this case, the Claimant's earnings and contributions required him to show that he became disabled before December 31, 2001 and has remained so ever since.

[8] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup> A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.

[9] A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.<sup>3</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

[10] In this appeal, I had to decide whether the Appellant had severe and prolonged disability as of December 31, 2001.

## Analysis

[11] I have applied the law to the available evidence and concluded that the Appellant did not have a severe and prolonged disability as of December 31, 2001. Although the Appellant may not have been able to work at that time, he recovered and undertook significant business activities in the following years.

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<sup>1</sup> Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Appellant's CPP contributions are listed on his record of earnings at GD2-88.

<sup>2</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>3</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

### **The Appellant's disability was severe as of December 31, 2001**

[12] According to a history contained in his post-operative report, the Appellant suffered a severe head injury when he was 12 years old.<sup>4</sup> He said that for several years afterwards, he had one or two seizures a year. In his mid-teens, he stopped taking his seizure medication and was seizure-free until the age of 30. In the meantime, he attended university, trained in California, and returned to Toronto to write software.

[13] The Appellant began having seizures again at age 30. They occurred several times a year. By December 2001, he was having seizures about every two weeks, mostly at night. Medication failed to improve his condition and in December 2001 he underwent a left frontal lobectomy (removal of a lobe in his brain).

[14] The Appellant's condition was serious enough to require major brain surgery, which happened to take place in the same month when his CPP disability coverage period ended. I am satisfied that, as of December 31, 2001, the Appellant was regularly incapable of substantially gainful employment.

### **The Appellant's disability was not prolonged**

[15] The Appellant may have had a severe disability more than 20 years ago, but it did not continue to be severe. There is evidence that his brain surgery restored his ability to function in a work environment.

#### **– Medical evidence suggests that the Appellant's seizures were under control after his surgery**

[16] The file contains limited medical evidence about the Appellant's condition in the immediate aftermath of his brain surgery. Dr. Posen, his family physician, kept office notes, but the first record of an appointment after the coverage period was dated July 2003. It, like all of Dr. Posen's handwritten entries, was almost entirely illegible, and I did not see anything that was clearly related to the Appellant's seizure disorder.<sup>5</sup> Except

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<sup>4</sup> See post-operative lobectomy report dated December 3, 2001, by Dr. Kamal Thapar, general surgeon, GD10-3.

<sup>5</sup> See the medical records of Dr. David Posen, general practitioner, GD6. Dr. Posen's first entry after the Appellant's MQP of December 31, 2001 appears to be dated July 17, 2003, see GD6-41.

for the odd word, Dr. Posen's subsequent entries were equally indecipherable, and they revealed little about the Appellant's condition after December 31, 2001.<sup>6</sup> That said, there appears to be a note from some time in 2004 indicating that Appellant had been "seizure-free since surgery."<sup>7</sup>

[17] From 2001 to 2018, the file contains only two specialist reports about the Appellant's seizure condition. In October 2007, Dr. Peter Carlen, a neurologist, wrote that that the Appellant was seizure free for 1½ years after his surgery, with the help of a medication called Tegretol:

Then he had one generalized tonic/clonic seizure after forgetting his medications and since that time, as long as he takes his medication regularly he has no seizures and if not, he will usually develop seizures, occurring in clusters, 2 of them, 2 hours apart, particularly in bed when he is sleeping and this occurs once or twice per year. Also, if he is highly stressed and even if he is taking his medications, he can have a seizure. This happened once when, after starting a new company with tremendous financial potential, he found that someone was stealing his intellectual property.<sup>8</sup>

[18] In a follow-up report dated January 2008, Dr. Carlen reported that the Appellant had had no seizures since his last visit, "except the one time on the day after he forgot to take his anticonvulsant medication." Dr. Carlen noted that the Appellant had accepted a job as the CEO of a high-tech start-up company in Austin, Texas, and he counselled him to avoid jet lag and high stress activities that might provoke seizures.<sup>9</sup>

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<sup>6</sup> Someone employed by the Appellant's legal representative later attempted to transcribe Dr. Posen's notes with limited success – see GD10-10. I will admit that I was unable to see how many of these transcriptions were derived from Dr. Posen's scrawl, particularly those from the post-surgery years. However, even if I accept the transcriptions at face value, they still indicate that the Appellant had no seizure complaints for at least two years after his lobectomy.

<sup>7</sup> See Dr. Posen's office note, GD6-35, supplemented by partial transcription, GD10-15.

<sup>8</sup> See report by Dr. Peter Carlen, neurologist, dated October 18, 2007, GD2-133. This report is missing its second page but, as suggested by his follow-up report, it appears that Dr. Carlen adjusted the Appellant's medications and/or started him on Carbamazepine.

<sup>9</sup> See Dr. Carlen's report dated January 31, 2008, GD2-134.

[19] The Appellant's medical file suggests that his seizures were largely under control with medication for at least the first six years after his surgery. The Appellant may have continued to experience occasional seizures, but most of them were at night, the predictable result of neglecting to take his medication.

– **The Appellant's current condition is of limited relevance to his pension eligibility**

[20] The key question in this appeal is whether the Appellant has had a prolonged disability since December 31, 2001. The answer to that question depends, in part, on whether his brain surgery restored his ability to regularly engage in a substantially gainful occupation.

[21] The Appellant last saw Dr. Carlen in 2008. After a long period of minimal medical intervention, he was referred to another neurologist for management of his epilepsy. In September 2018, Dr. Daniel Wong reported that the Appellant was experiencing seizures every two weeks, typically two at a time at night.<sup>10</sup> Six months later, having prescribed him with medical marijuana, Dr. Wong reported that the Appellant remained seizure free with no new symptoms.<sup>11</sup> Later, Dr. Wong confirmed that the Appellant continued to do well, with no reported seizure activity and no side effects from his medication.<sup>12</sup>

[22] It is true that Dr. Wong wrote subsequent reports that declared the Appellant unable to work because of "cognitive symptoms related to his epilepsy, brain surgery, brain injury, and side effects from medication."<sup>13</sup> However, this position stands at odds with the information in Dr. Wong's earlier reports, which suggested that the Appellant suffered no ill effects from either seizures or the medications he was taking to control them. It must be remembered that, by then, the Appellant had unsuccessfully applied for the CPP disability pension and was claiming to be experiencing seizures every two or three days. If the Appellant's condition did in fact take a dramatic turn for the worse, it

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<sup>10</sup> See report dated September 11, 2018 by Dr. Daniel Wong, neurologist, GD2-131.

<sup>11</sup> See Dr. Wong's report dated March 12, 2019, GD2-153.

<sup>12</sup> See Dr. Wong's reports dated March 17, 2020 (GD2-161) and March 11, 2021 (GD2-167).

<sup>13</sup> See Dr. Wong's reports dated August 11, 2021 (GD1-13) and December 30, 2021 (GD1-12).

did so years after the end of his coverage period and therefore had no bearing on his eligibility for the pension.<sup>14</sup>

[23] The medical evidence shows that, more likely than not, the Appellant's seizure disorder was not continuously severe after December 31, 2001. The Appellant may have been disabled in 2001, and he may be disabled now, but that does not mean he has been disabled during all of the past 22 years. Indeed, the evidence suggests otherwise.

– **The Appellant engaged in substantially gainful employment after his coverage period ended**

[24] As noted, the Appellant accepted the position as CEO of a Texas high-tech start-up in early 2008. This suggests that, whatever his symptoms, he felt up to performing the duties of what most people would regard as an extremely demanding job.

[25] The Appellant testified that an old friend needed help in attracting financing for a business that planned to develop audio chips. He said that his job involved putting together a business plan and giving presentations to potential investors and customers. He insisted that he was merely the "front man" for an operation in which others were doing the real work.

[26] However, the Appellant said that he had a salary of \$70,000 to \$80,000 per year and worked 40 hours per week.<sup>15</sup> It seems unlikely that a company, even a small one controlled by a friend, would pay him such a salary and trust him to be its public face, if it did not expect value in return. Moreover, the Appellant by his own admission helped raise \$2 million during his brief time with the company.

[27] The Appellant maintained that, despite serious health problems, he went to Texas in a desperate attempt to "get back in the saddle" and become a productive member of society again. He testified that, 10 months into the job, he was let go after

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<sup>14</sup> In *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that disability claimants have to show a severe and prolonged disability by the end of their MQP and continuously after that.

<sup>15</sup> See the Appellant's self-employment questionnaire dated November 22, 2021, GD2-35.

suffering a series of stress-induced seizures. That may be so, but his success in raising funds and his ability to maintain full time hours for nearly a year suggests that he had at least some work capacity.

– **The Appellant did not attempt to find suitable alternative work**

[28] When he attempted to resume his career, the Appellant took a what appears to be a particularly pressure-filled job, one particularly ill-suited to a person who had already been warned to avoid stressful situations. However, it is not hard to imagine the Appellant succeeding in any number of jobs that might have placed fewer demands on his energy and equilibrium.

[29] The law governing CPP disability requires claimants to make a reasonable effort to obtain and maintain alternative employment. In particular, a case called *Inclima* says that claimants who have at least **some** work capacity must also show that their efforts to obtain and maintain employment have been unsuccessful because of their health condition.<sup>16</sup> This test suggests that a decision-maker must first look at whether a claimant had the **residual capacity** to attempt some other form of work. In doing so, the decision-maker must take into account, not only the claimant's medical condition, but also their background and personal characteristics.<sup>17</sup>

[30] In this case, the Appellant was still relatively young—only 42—when his coverage period ended. He had a good education—a bachelor's degree in neurophysiology and computer science—and extensive work experience as a coder, corporate executive, and entrepreneur (there is evidence he sold a commercial property not long before undergoing brain surgery in 2001). There was nothing in his background or personal characteristics that presented an obstacle to his continued participation in the labour market at any level.

[31] Of course, the Appellant had a history of seizures—sometimes triggered by stress—overlaid by a tendency toward anxiety and depression. But the evidence

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<sup>16</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

<sup>17</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.



indicates that both conditions were controllable, provided that the Appellant took his medications and avoided certain situations. As we have seen, the Appellant did not succeed in a high-powered job, one that required him to make presentations to sophisticated investors and technology procurement professionals. But he might well have had the regular capacity to earn a living at a less demanding job if he had tried to find one. However, there is no evidence that he ever looked for such a job, either before or after his ill-fated venture in Texas.

[32] The Federal Court of Appeal has stated that the severity of a disability depends on a claimant's inability to do any job, not just their regular job.<sup>18</sup> That means the Appellant could not restrict his job search to the kind of high-level corporate jobs that he had been doing previously. Rather, he had to show that he had attempted work that was conceivably within his limitations and had failed at it because of those limitations. In my view, the Appellant has not met that obligation.

– **The Appellant admits that he changed his story**

[33] The Appellant's credibility is in doubt because he told one thing to his treatment providers and another to Service Canada after he applied for the disability pension. He attempted to explain why he changed his story, but I did not find his explanations convincing.

[34] In August 2021, the Appellant received Service Canada's initial letter denying his application for CPP disability benefits.<sup>19</sup> The denial was based in part on the success of the Appellant's medications in preventing seizures. It noted that, as documented by Dr. Topp and Dr. Wong, the Appellant had reported only one seizure in 2019 and no seizures in 2020 and 2021.<sup>20</sup>

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

<sup>19</sup> See Service Canada's initial denial letter dated August 26, 2021, GD2-40.

<sup>20</sup> Service Canada referred to a report dated October 1, 2019 by Dr. Bruce Topp, medical cannabis doctor (GD2-156), as well as Dr. Wong's reports dated March 17, 2020 (GD2-161), September 16, 2020 (GD2-164), and March 11, 2021 (GD2-167).

[35] In November 2021, the Appellant's new family physician, Dr. Zoudis wrote this note:

Pt reviewed with me he was declined by CPP due to his self - report of being seizure free since starting medical cannabis.

He now tells me this is not the truth and he has actually been having 1-2 seizures per week for the last 2 years approximately last seizure was 4 days ago while in the backyard

pt states that he was untruthful due to wanting a driver's license for ID purposes and has not been driving

He has also discussed this with neurologist Dr. Wong, who has reported this to the MTO

we discussed that other forms of ID ie Passport, Age of Majority exist

we also discussed I can not alter my records to reflect this new information

I spoke with pt re: this new information coming in light of a rejected disability application is suspicious for secondary gains, and that although I don't refute his reported history of seizures it is concerning that he was untruthful about his medical condition for the same purpose.<sup>21</sup>

[36] Then, in December 2021, Dr. Wong wrote a letter that stood in contrast with the positive tone of his previous progress reports. He said that he had been "provided with new information that had not been previously disclosed to me by the patient." He said that, contrary to what the Appellant had told him previously, "The patient has continued to have frequent seizures throughout his life, even after his left frontal lobectomy in 2001," at an average frequency of one or two per week. In light of this new information, Dr. Wong did not think the Appellant would be able to return to any type of work in the future.<sup>22</sup>

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<sup>21</sup> See office note by Dr. Adam Zoudis, GD2-112.

<sup>22</sup> See Dr. Wong's letter dated December 30, 2021, GD2-126

[37] At the hearing, the Appellant admitted that for years he had deceived his doctors. He offered two explanations for not telling them the truth about the frequency of his seizures:

- As he told Dr. Zoudis, he didn't want to lose his driver's licence, which he used for ID purposes; and
- As he told Dr. Wong, he was frightened about possibly needing further surgery or new medications with unknown side effects.

[38] I don't find these explanations persuasive. As Dr. Zoudis noted, there are other forms of identification besides driver's licences, such as passports or provincial photo identity cards. In any case, the Appellant had already lost his driver's license in 2018, after Dr. Wong was obliged to report his new patient's epilepsy to the Ministry of Transportation.<sup>23</sup> From that point on, there was no reason for the Appellant to continue understating the frequency of his seizures for the purpose of holding onto his licence.

[39] If the Appellant's primary motivation for downplaying his condition was fear of further treatment, that makes little sense either. Like any patient, he always had the option to say no. However, that would have been inconsistent with his past behaviour: after all, he had previously demonstrated a willingness to seek treatment, having submitted to brain surgery and taken anticonvulsants with positive results.

[40] Furthermore, the Appellant's new story raises questions about whether he continued to do everything that he needed to do get better. If the Appellant told his treatment providers that his medications were working when, in fact, they were not working, then for years he denied them and himself opportunities to try alternative treatments that might have made a difference. This matters because, according to the law, CPP disability claimants must make reasonable efforts to follow medical advice.<sup>24</sup> If they don't, then they must have a reasonable explanation for not doing so.<sup>25</sup>

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<sup>23</sup> See Dr. Wong's letter dated September 11, 2018, GD2-131.

<sup>24</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>25</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[41] In my view, it is more likely that the Claimant was telling the truth when he told his treatment providers that his seizures were rare. It is telling that the Appellant changed his story only when it became clear to him that the infrequency of his seizures was a factor in the rejection of his disability application.

[42] Although his wife and sons supported the Appellant's account, I found the medical evidence more persuasive. All three witnesses testified that, in their recollection, the Appellant never stopped having seizures. However, all three had an emotional incentive to help their close family member. Moreover, the two boys, M. and M., were children in the years after their father's surgery, and their memories about his health at that time are unlikely to be reliable many years later.

– **The Appellant's mental health did not prevent him from working**

[43] The Appellant maintains that he is debilitated by mental health problems as much as epilepsy. He testified that he went into a deep depression after his 2001 surgery, robbing him of energy and motivation. He said that he cried every day and spent a year lying on the sofa. However, the Appellant has also said that depression was not the main reason he was unable to work.

[44] Years later, the Appellant told a psychiatrist that he had to convalesce for two years after his brain surgery,<sup>26</sup> but there is no contemporaneous medical evidence that he had severe depression at the time. Dr. Posen's office notes contain at least one reference to "depression" in 2003,<sup>27</sup> and it appears that the Appellant was taking Celexa (citalopram) in the same period, but there's no evidence he saw a psychiatrist until several years later.

[45] In January 2008, Dr. Carlen wrote that the Appellant had seen Dr. Sherese Ali, who had doubled the dosage of his antidepressant and made him "much, much better."<sup>28</sup> In September 2010, the Appellant saw another psychiatrist, Dr. Antony Amaladoss, who felt that that his "subtle mood disturbance" was aggravated

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<sup>26</sup> See report dated September 20, 2010 by Dr. A.S. Amaladoss, psychiatrist, GD06-90.

<sup>27</sup> See Dr. Posen's office note dated July 17, 2003, GD6-41.

<sup>28</sup> See Dr. Carlen's report dated January 31, 2008, GD2-134.

by situational stressors such as joblessness and marital strife. Dr. Amaladoss ruled out an organic mood disorder and assigned the Appellant a Global Assessment of Functioning score of 55, indicating moderate symptoms. He recommended psychotherapy, as well as an increase in the Appellant's Celexa dosage to 60 mg. It does not appear that the Appellant ever attended regular psychotherapy sessions, and years later he remained on 40 mg of Celexa, suggesting that his mood was stable.<sup>29</sup>

[46] There is also evidence that the Appellant's depression improved over time. In October 2019, his medical marijuana consultant stated that the Appellant's depression was "managed well with medication," while his scores on the Hospital Anxiety and Depression Scale assessment indicated only a mild condition.<sup>30</sup>

[47] In all, the medical evidence shows that Appellant's health, family, and career issues affected his mood. However, I see no indication that his mental health, alone or in combination with his epileptic condition, stopped him from regularly pursuing a substantially gainful occupation.

## Conclusion

[48] The Appellant is not eligible for a CPP disability pension. His disability might have been severe during his coverage period, but it stopped being severe with the help of surgery and medication. For that reason, I find that the Appellant's disability was not prolonged.

[49] The appeal is dismissed.



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Member, Appeal Division

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<sup>29</sup> See Dr. Wong's report dated September 11, 2018, GD2-131.

<sup>30</sup> See Dr. Topp's report dated October 1, 2019, GD2-156.