



Citation: *KA v Minister of Employment and Social Development*, 2024 SST 420

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant:	K. A.
Representative:	Andrew Stein
Respondent:	Minister of Employment and Social Development
Representative:	Andrew Kirk

Decision under appeal:	General Division decision dated May 18, 2023 (GP-22-92)
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Tribunal member:	Pierre Vanderhout
Type of hearing:	Videoconference
Hearing date:	February 8, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	April 23, 2024
File number:	AD-23-792

Decision

[1] The appeal is allowed. The Appellant is entitled to a Canada Pension Plan (CPP) disability pension. The pension payments start as of May 2020.

Overview

[2] The Appellant is 40 years old. He was a long-haul truck driver. Unfortunately, he was in an accident on January 7, 2019. The main point of impact was his right knee, although he has reported pain in other parts of his body. He has not worked as a truck driver since then. He tried to work in a grocery store in August 2023, but he was not successful.

[3] The Appellant applied for a CPP disability pension on April 30, 2021.¹ He said he was unable to work because of chronic knee and back pain. He was unable to hold positions or move for extended periods of time.² The Minister of Employment and Social Development (Minister) denied his application initially and on reconsideration.

[4] The Appellant then appealed to the Social Security Tribunal (Tribunal). The Tribunal's General Division dismissed his appeal in May 2023.³ However, he then appealed the General Division decision to the Tribunal's Appeal Division.

[5] The Appellant said I must consider the combined effect of all his conditions, which now include depression and anxiety. He also said I must consider his work capacity in a real-world context. He said his limited education, narrow work experience, and lack of computer skills leave him with very limited job prospects. His functional limitations do not let him do any of those jobs. He said he followed all treatment recommendations. As a result, he said he has established a severe and prolonged disability by December 31, 2021, that continues to this day.

[6] The Minister said I must focus on the Appellant's limitations, as opposed to the diagnoses, that existed by the end of 2021. The Minister also said the Appellant's

¹ See GD2-129.

² See GD2-64, GD2-67, and GD2-68.

³ This decision is at AD1-13.

limitations have improved over time. The Minister added that the Appellant has an obligation to seek work that is within his limitations. The Minister disputed the Appellant's lack of real-world opportunities, by pointing to his successful completion of a high-school diploma. Finally, the Minister said the Appellant failed to mitigate his conditions, as he did not follow several treatment recommendations.

[7] I must decide whether the Appellant had a severe and prolonged disability by December 31, 2021. This date is the end of his minimum qualifying period (MQP).

[8] I find that the Appellant had a severe and prolonged disability as of January 2019. As a result, his appeal is allowed.

Issues

[9] The issues in this appeal are:

- a) What were the Appellant's functional limitations by the end of 2021?
- b) Do these functional limitations and the Appellant's personal circumstances establish a severe disability by the end of 2021?
- c) If so, is the Appellant's disability also prolonged?
- d) If the Appellant's disability meets the severe and prolonged criteria, what is the start date of the Appellant's CPP disability pension?

Analysis

[10] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2021.⁴ This date is based on his CPP contributions.

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

⁴ Service Canada uses a person's years of CPP contributions to calculate his 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 Appellant's CPP contributions are at GD6-21.

[12] A disability is **severe** if it makes a person incapable regularly of pursuing any substantially gainful occupation.⁵

[13] This means I must look at the Appellant's medical conditions together to see what effect they have on his ability to work. I must also look at his background (such as his age, education, language ability, 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 he can regularly do some type of work from which he could earn a living, then he is not entitled to a disability pension.

[14] A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁶

[15] This means the Appellant's disability cannot have an expected recovery date. The disability must be expected to keep him out of the workforce for a long time.

[16] The Appellant's hearing at the Appeal Division was a *de novo* hearing. The burden of proof is still on the Appellant. He must show, on a balance of probabilities, that he had a severe and prolonged disability. This means he must show it is more likely than not that he is disabled.

What were the Appellant's functional limitations by the end of 2021?

[17] I will first look at the functional limitations identified by the Appellant. I will then see whether there is medical support for those limitations, since a CPP disability claimant must provide some medical evidence about the underlying conditions.⁷

– Functional limitations identified by the Appellant

[18] Shortly after the January 2019 accident, the Appellant reported pain in the right knee, left ankle, lower back, chest, and neck. The pain was constant, disturbed his sleep, and increased with activity. The pain was made worse by walking, standing,

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

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

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377, and *Canada (Attorney General) v Dean*, 2020 FC 206.

sitting, bending, turning to the left, driving, and using the stairs.⁸ He had extreme difficulty with performing heavy activities, getting into or out of a car, walking two blocks, or using stairs. He had quite a bit of difficulty tasks such as lifting objects, rolling over, or prolonged sitting or standing.⁹ He was already worried about his limitations.¹⁰

[19] In June 2019, the Appellant had knee and back pain all the time. He also had some ankle and neck pain. He reported that he could only sit for 30-40 minutes at a time. He could no longer do any leisure activities, due to pain. These were a big part of his life before the accident. His energy was very low. He was tired throughout the day. He reported being irritable, sad, and depressed. His pain made it hard to focus. He had trouble sleeping, due to both pain and worrying about his financial situation.¹¹

[20] The Appellant continued to make similar reports. For example, he told Jessica Kay (physiotherapist) in January 2020 that his driving tolerance was 45 minutes (at the most) and had not changed recently. His back and knee pain interfered with his sleep. They also limited his walking distance and his ability to squat and lift.¹² In March 2020, he told Dr. Litchfield (orthopedic surgeon) that his sitting tolerance was only 30-40 minutes.¹³

[21] In October 2020, Renee Guillemette (occupational therapist) noted the Appellant's reported difficulty with kneeling, squatting, bending, lifting, and prolonged walking, standing and sitting.¹⁴

[22] When the Appellant completed his disability pension application in March 2021, he said he could not sit, stand, or walk for extended periods. Due to pain, he could not bend his right knee for long. He reported extensive pain if he stood, sat, or walked for too long. He also had trouble with climbing stairs and bending.¹⁵

⁸ See GD1-344.

⁹ See GD1-340.

¹⁰ See GD1-338.

¹¹ See GD1-258, GD1-259, GD1-260, GD1-261, GD1-263, and GD1-265.

¹² See GD2-143.

¹³ See GD2-154.

¹⁴ See GD3-517.

¹⁵ See GD2-67, GD2-68, and GD2-71.

[23] The Appellant rated many of his functional abilities as poor. Such abilities included:¹⁶

- Sitting for 20 minutes
- bending down to pick up objects from the floor
- getting down into a kneeling or squatting position (and back up again)
- going up and down 12-15 steps
- driving a car
- pushing or pulling a heavy door
- managing anxiety
- persevering at difficulty tasks
- figuring out what to do under stress
- remembering to do important things
- concentrating for at least 30 minutes
- remembering what he was doing
- learning new things
- deciding between two options
- dressing himself
- housekeeping and home maintenance without frequent breaks

[24] At the hearing, the Appellant talked about some of his limitations in 2021. He said his sitting tolerance was 35 minutes; it had been 20-25 minutes in 2019 and was now 50-55 minutes if he was “pushing it.” However, if he “pushed it,” he would need to recline for three to four hours to recover. His right knee pain made bending his knee very difficult; he could not walk more than 15-20 minutes. He put weight on his left knee instead.

[25] The Appellant said depression set in once he realized his injuries were worse than originally thought. He became irritated by everything. He also felt worthless.

¹⁶ See GD2-71 to GD2-74.

[26] I will now see if the medical evidence supports the limitations identified by the Appellant.

– **Is there medical support for the Appellant's limitations?**

[27] There is medical support for the Appellant's claimed limitations.

[28] In May 2019, Dr. Litchfield said the Appellant was likely having patellofemoral symptoms from the impact injury he suffered in the January 2019 accident.¹⁷ In October 2019, Alfredo Marroquin (psychotherapist) referred to diagnoses earlier that year of moderate depression and severe anxiety.¹⁸

[29] In January 2020, Ms. Kay said the Appellant's knee injury and chronic back pain remained the primary barriers to his recovery.¹⁹ In November 2020, Dr. Litchfield noted that the Appellant's right knee pain was spreading. He also had an intermittent electric shock-like pain that was worse with prolonged standing or sitting. While he could keep his knee bent for up to an hour, spine surgery was a potential option.²⁰

[30] In 2021, Dr. Taylor-Wall (family doctor) made multiple references to the Appellant's depression. She also prescribed Wellbutrin, an antidepressant, for him.²¹

[31] In April 2021, Dr. Taylor-Wall prepared a detailed medical report for the Appellant's disability pension application. Dr. Taylor-Wall said the Appellant's main medical conditions were right knee pain (menisco-capsular tear) and L4-L5 disc herniation. She said the tear and the herniated disc both appeared on MRIs.²²

[32] Dr. Taylor-Wall said the Appellant faced the following limitations from these conditions:²³

- Cannot do stairs without pain

¹⁷ See GD2-140.

¹⁸ See GD1-20 and GD1-21.

¹⁹ See GD2-143.

²⁰ See GD2-156.

²¹ See GD3-94, GD3-183, and GD3-186.

²² See GD2-133 and GD2-134.

²³ See GD2-133 and GD2-134.

- Cannot sit for more than 30 minutes without pain
- No prolonged walking without pain
- Mood and sleep affected by pain
- Reduced range of motion
- Cannot stand for a prolonged time

[33] Dr. Taylor-Wall added that the Appellant had been unable to work since January 2019. She initially thought his inability would be short-term, but his symptoms had not improved.²⁴

[34] In May 2021, Dr. Taylor-Wall said the Appellant had chronic knee and back pain. He could no longer do computer work. He was frustrated and worried by his limitations.²⁵ In August 2021, Dr. Taylor-Wall said he could not stand for long or walk on uneven surfaces due to back pain. He continued to struggle with a lack of progress.²⁶ In September 2021, Dr. Taylor-Wall said his back pain was worsening. It limited his mobility and activity.²⁷ His back and knee problems continued in October 2021.²⁸

[35] In May 2021, Jenny Bailey (physiotherapist) observed depression symptoms. The Appellant's tolerance for sitting, walking, biking, bending, twisting, lifting, and squatting was also limited due to knee and back problems.²⁹ In September 2021, Alison Higgins (physiotherapist) affirmed these problems and most of his restrictions.³⁰

[36] The Appellant saw Tricia Dunlop (psychotherapist) on several occasions in the spring and summer of 2021. Ms. Dunlop's notes show that the Appellant experienced worry, self-doubt, shame, and guilt.³¹

²⁴ See GD2-136.

²⁵ See GD3-186.

²⁶ See GD3-206.

²⁷ See GD3-213.

²⁸ See GD3-225.

²⁹ See GD3-404, GD3-405, and GD3-406.

³⁰ See GD3-345, GD3-346, and GD3-347.

³¹ See GD3-578, GD3-593, GD3-598, GD3-601, and GD3-603.

[37] In September 2021, Silvia Toth (kinesiologist) recommended the following restrictions for a very limited return to work:³²

- 5-10 minutes of walking or standing
- 15 minutes of sitting upright
- Avoid lifting from floor to waist
- Occasional lifting from waist to shoulder
- Some stair climbing, but no ladder climbing
- Driving up to 30 minutes
- Restrict bending, twisting, pushing and work at or above shoulder
- Avoid exposure to vibration
- Avoid operating motorized equipment
- Start with simple tasks and build up to more complex tasks, with breaks for emotional regulation as needed

[38] When I compare that medical evidence to the Appellant's reported symptoms, I find that it supports his claimed physical limitations. In fact, the medical evidence often identifies his functional limitations in addition to the conditions causing them. While the medical evidence mentions his mood concerns, it does not explicitly mention his claimed cognitive limitations. However, as depression was diagnosed, I accept that there is medical evidence relating to those limitations. I also have no reason to disbelieve the Appellant's testimony and self-reporting about his cognitive limitations.

– **The Appellant's functional limitations by the end of 2021**

[39] I find that the Appellant had significant functional limitations by the end of 2021. He would not have been able to sit, stand, or walk for prolonged periods. He was limited in physical demands such as climbing stairs, lifting, bending, and pushing. His overall range of motion was also limited. He had some cognitive and mood-related limitations too, including considerable frustration with his reduced abilities. These could impact his ability to do complex or public-facing tasks.

³² See GD3-574 and GD3-575.

Do the Appellant’s functional limitations and his personal circumstances establish a severe disability by the end of 2021?

[40] I find that the Appellant’s functional limitations and his personal circumstances establish a severe disability by the end of 2021.

– Could the Appellant have worked in the real world?

[41] When deciding whether the Appellant had a severe disability, I must also consider factors such as his:³³

- Age
- Language ability
- Education level
- Past work and life experience

[42] These factors help me decide whether the Appellant can work in the real world. I will look at each of them in turn.

[43] The Appellant was only 38 years old at the end of 2021. He still had nearly 30 years until the traditional retirement age. His age does not limit his opportunities.

[44] Although his representative suggested the Appellant had difficulty with the English language, I observed no difficulty at the hearing. It is the Appellant’s only language.³⁴ He speaks it fluently.

[45] The Appellant completed Grade 11 in Jamaica. At the hearing, he said this was typically the last year of high school for Jamaican students who do not intend to pursue post-secondary studies. He came to Canada in 2007. He later completed a “GED” diploma online in Ontario. He did this so he would have the required background for trade studies in Canada.

[46] The Appellant suggested that his GED diploma overstated his abilities. He said he received extensive help in his online studies from his wife. His wife also gave

³³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³⁴ See GD3-697.

evidence at the hearing. They said the Appellant would not have completed his GED without his wife's help. She arranged the courses, handled the technical aspects, did most of his typing, and made extensive spelling and grammar corrections to his handwritten work before submitting it online.

[47] I found the evidence of both the Appellant and his wife to be credible and reliable. While I did not find any problems with the Appellant's verbal English, I see evidence that he struggled with written English and numeracy.

[48] In November 2020, Kelly-Ann Smith (vocational evaluator) assessed the Appellant. She said he demonstrated levels of Grade 3 (word reading), Grade 4 (spelling and sentence comprehension), and Grade 5 (math computation).³⁵

[49] In December 2022, Markus Bachmann (vocational evaluator) assessed the Appellant too. Mr. Bachmann found that the Appellant's test scores put him at the Grade 4 (spelling and math), Grade 5 (vocabulary), and Grade 6 (reading) levels. Mr. Bachmann said this was inconsistent with completing an Ontario high school diploma.³⁶

[50] Given these two assessments, prepared by "opposing" parties and at different times, I accept that the Appellant's GED may overstate his real-world abilities.

[51] Despite these limitations, the Appellant obtained an AZ-class (later ACZ-class) driver's licence in Ontario. This means he could drive a truck or a coach bus. He also completed truck driving courses in Ontario. He had no formal trades training, but learned some carpentry, masonry, and steel work "on-the-job" in Jamaica.³⁷

[52] The Appellant's past work and life experiences include several years of construction work in Jamaica after leaving school. He continued this type of work when he first arrived in Canada. He then trained as a truck driver and did long-haul truck

³⁵ See GD3-699 and GD3-703, which refer to Ms. Smith's report. Ms. Smith's original report does not appear in the Tribunal file, although a short summary is at GD3-23.

³⁶ See GD3-703.

³⁷ See GD3-696.

driving from 2010 until his 2019 accident. This involved some paperwork. He started his GED studies in 2018 and completed them in 2020.³⁸

[53] The Appellant made a brief return-to-work attempt in August 2023. He was a meat clerk at a grocery store. After 17 hours of training, he only worked 11.5 regular hours before his employment ended.³⁹ He said he was planning on leaving because of his pain levels. However, the store chose to end his employment after his surgeon advised the store of his upcoming knee surgery.

[54] The Appellant appears to have limited computer skills. He testified that he never had a computer in Jamaica. In Canada, he did not use a computer until his GED studies began in 2018. He said he finds computers too complicated. His wife set up the computer. As noted, she provided considerable assistance with using the computer too. On his own, it would take him 4-5 hours to write less than half a page.

[55] The Appellant's abilities point to jobs requiring considerable physical demands (as in construction and the trades) or the need to sustain a position for a long period of time (as in truck driving). Many jobs demand both.

[56] However, I must consider the Appellant's functional limitations. His limitations point to sedentary work with a minimum of computer, complex, or public-facing tasks. Such work must also allow frequent position changes.

[57] There is a mismatch between the Appellant's real-world work options and his limitations. He is neither suited nor qualified for the narrow range of sedentary work that respects his limitations. He is also not likely to succeed with training in this area. This is due, in part, to his limited computer skills. His limitations with reading, writing, and numeracy also play a role.

[58] After considering the Appellant's personal circumstances, I find that he did not have any residual work capacity by the end of 2021. His lack of capacity started right

³⁸ See GD3-696 and GD3-697.

³⁹ See AD6-138 and AD6-146.

after the accident in January 2019. I will now consider whether he has had any residual work capacity since the end of 2021.

– **Has the Appellant had any residual work capacity since the end of 2021?**

[59] I find that the Appellant has not had any residual work capacity since the end of 2021 either. I set out the reasons for this in the following paragraphs.

[60] The clinical notes from Dr. Taylor-Wall from the end of 2021 to the hearing date affirm the Appellant's ongoing struggles with chronic pain.⁴⁰ So do the treatment notes from Dr. Viana (physiatrist), who started treating the Appellant in April 2022.⁴¹

[61] In May 2022, a health care provider completed a functional abilities form for the Appellant. While the provider said he could return to work, this was only with restricted hours and modified duties. The restrictions were also far-ranging. For example, he could only stand for 15 minutes, walk for 15-20 minutes, and sit for 30 minutes. He had to avoid lifting from the floor, using a ladder, and vibrations. He needed microbreaks.⁴² In my view, this did not represent real-world work capacity.

[62] Ms. Toth (kinesiologist) completed a similar form for the Appellant on August 31, 2023. Ms. Toth said a return to work with restricted hours and modified duties was possible. However, once again the restrictions were far-ranging.⁴³

[63] Ms. Toth said the Appellant could only do sedentary tasks. He had a maximum sitting tolerance of 30 minutes but also needed to be able to elevate his right leg. He had to change positions every 20-30 minutes. He had to avoid lifting, ladder climbing, bending, twisting, and repetitive movements. He could not drive a car. He could only start with simple tasks and needed "microbreaks" for emotion regulation.⁴⁴ Again, in my view, this did not represent real-world work capacity.

⁴⁰ See, for example, GD3-244, GD3-251, AD6-37, and AD6-40.

⁴¹ See, for example, GD3-302, AD6-148, and AD6-150.

⁴² See GD3-692. Note that only the first page appears in the file. More than one type of handwriting appears on the form. However, elements of the handwriting resemble the writing of both Dr. Taylor-Wall (see, for example, her writing at GD2-136) and Silvia Toth (see her writing at AD6-77).

⁴³ See AD6-77.

⁴⁴ See AD6-77.

[64] The Appellant tried to work in early August of 2023. He had a job in the deli area at a grocery store. He packed fridges when they were empty. He said it was very hard work. He had to take a lot of breaks, although he only worked for four hours every other day. His back and knee pain made him take 15-minute breaks about every 35 minutes. He said he did not complete his assigned work. He also did not learn quickly enough.

[65] The Appellant was about to quit because of his functional limitations. However, his employer terminated him because of his upcoming knee surgery. In my view, this brief and unsuccessful attempt did not establish residual work capacity either.

[66] The Appellant had knee surgery on August 24, 2023. Dr. Litchfield repaired his torn meniscus.⁴⁵ The Appellant said the surgery had not changed much. He still had pain and the same limitations that he had before. Bending, weight-bearing, putting pressure on the knee, and using stairs were very difficult before the surgery. He could not walk for more than 15 minutes. In October 2023, Jincy Joseph (physiotherapist) noted knee discomfort and a sore lower back.⁴⁶

[67] At the hearing, the Appellant said he still had problems with his back and knee. He had burning, shooting, and electrical pain in his back. It was worse when he sat, stood, or walked for too long. His sitting tolerance had increased to 50-55 minutes if he “pushes it,” but he then must recline for 3-4 hours to “normalize.” His wife said his sitting tolerance was only about 30-40 minutes.

[68] The Appellant also continued to have depressive symptoms, although he appeared to feel most disabled by his back and knee pain. He said he felt worthless. Everything irritated him. However, Wellbutrin took some of the edge off, as it made him feel more relaxed. His wife also mentioned his ongoing depression.

[69] While the Appellant’s lack of residual work capacity since January 2019 points to a severe disability, I must first determine whether he failed to comply with recommended treatment. If so, I must decide whether it prevents a finding of severity.

⁴⁵ See AD6-52.

⁴⁶ See AD6-102.

– **Did the Appellant fail to comply with recommended treatment?**

[70] The Minister said the Appellant did not follow treatment recommendations. The Minister placed considerable emphasis on the Appellant's apparent failure to take recommended antidepressant medication. I will first set out the relevant history.

[71] The Appellant stopped taking Celexa (an antidepressant) after a few days in April 2021, due to intense side effects. However, Dr. Taylor-Wall immediately prescribed him Wellbutrin instead. He was supposed to take it daily.⁴⁷

[72] In May 2021, Dr. Taylor-Wall said the Appellant did not start Wellbutrin. She encouraged him to try it, given the connection between depression and pain. He said he wanted to avoid medication if possible, and said he was taking more pain medication.⁴⁸

[73] In August 2021, Dr. Taylor-Wall recorded that the Appellant had stopped taking Wellbutrin. Although the Appellant thought it helped, he had wanted to try being outside and active more instead. However, he said he was not feeling as well anymore and was thinking about taking Wellbutrin again.⁴⁹

[74] In October 2021, Dr. Taylor-Wall said the Appellant did not start Wellbutrin. The Appellant said the weather had been good, so he had been outside a lot. As a result, he did not think he needed Wellbutrin. However, he thought he might start it in the next few weeks due to the cooler weather.⁵⁰

[75] In January 2022, Dr. Taylor-Wall said the Appellant stopped taking Wellbutrin when it ran out. The Appellant said it had been beneficial. His mood suffered after he stopped taking it.⁵¹

[76] In April 2022, Dr. Taylor-Wall said the Appellant was only taking Wellbutrin on an as-needed basis. She told him he needed to take it daily to benefit from it, but he

⁴⁷ See GD3-183. Wellbutrin is also called Bupropion.

⁴⁸ See GD3-186.

⁴⁹ See GD3-206.

⁵⁰ See GD3-216.

⁵¹ See GD3-227 and GD3-228.

thought taking it on an as-needed basis was effective and he wanted to continue that. He also thought daily use had a sedative effect on him.⁵²

[77] Despite his doctor's advice, the Appellant was still taking Wellbutrin on an as-needed basis in May 2022. Dr. Taylor-Wall again encouraged him to take it daily, as it would be more effective. Later that month, he stopped taking Wellbutrin. His doctor once again suggested that he take it daily as it would be more effective for his mood and might also help his pain complaints.⁵³

[78] Finally, in October 2022, Dr. Viana said the Appellant was "started" on Wellbutrin a "couple of months" before. It had improved his mood significantly.⁵⁴

[79] I find that the Appellant failed to comply with the Wellbutrin recommendations in two ways. First, he declined to take Wellbutrin. Second, even when taking it, he did not take it regularly. In each case, he contradicted his doctor's recommendations. This failure began in April 2021 and continued until the summer of 2022. I must now decide whether this failure prevents a finding of severity.

– **Does a failure to follow recommended treatment defeat the Appellant's claim?**

[80] I must consider the Appellant's failure to follow recommended treatment in a "real world" context. This means I must first decide whether his failure was unreasonable. If it was unreasonable, I must then decide what impact that failure might have had on his disability status.⁵⁵

[81] I find the Appellant's failure to take Wellbutrin, or to take it regularly, was unreasonable. Despite Dr. Taylor-Wall's repeated encouragement, the Appellant said he wanted to avoid medication or could achieve the same result by being outside more. Even when he took the medication, he ignored her advice to take it regularly rather than

⁵² See GD3-244.

⁵³ See GD3-245 and GD3-246.

⁵⁴ See AD6-151.

⁵⁵ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

when he thought he needed it. Dr. Bégin, who gave evidence at the hearing for the Minister, said Wellbutrin was not addictive.

[82] The Appellant's failure to take the medication was also unreasonable given he acknowledged that they helped him. Similarly, it was unreasonable to not take it regularly after he observed that stopping the medication had impacted his mood. Despite regular visits, it took more than a year for the Appellant to follow Dr. Taylor-Wall's advice. Finally, Dr. Taylor-Wall is the same doctor that he trusted to file a report in support of his disability pension application.

[83] I must now consider what effect the Appellant's failure might have had on his disability status.

[84] The Appellant's disability status derives mostly from his chronic pain and his inability to handle sustained physical effort or positions. Mood plays a relatively small role. At first, the failure to take an antidepressant does not appear to be significant. However, Dr. Taylor-Wall noted a definite connection between depression and pain.⁵⁶ This means I must look more closely at the timing and likely impact of the failure.

[85] The evidence shows that the Appellant's mental health concerns had already existed for about two years before he was non-compliant (or only partly compliant) with taking Wellbutrin.

[86] The Appellant's mental health symptoms appeared soon after his January 2019 accident. In May 2019, psychotherapy was discussed after he reported low mood.⁵⁷ In June 2019, "negative thoughts" were a barrier to recovery. He had difficulty with focus and sleep. He felt sad, depressed, anxious, irritable, and "up and down". He had low energy. He was tired during the day.⁵⁸

⁵⁶ See GD3-186.

⁵⁷ See GD1-281.

⁵⁸ See GD1-259, GD1-260, GD1-261, and GD1-265.

[87] In July 2019, the Appellant received a treatment plan for psychological treatment.⁵⁹ In August 2019, he felt depressed when he saw his soccer team play. His occupational therapist said a treatment goal was to help cope with depression.⁶⁰ He first saw a psychotherapist that month. Mental health testing revealed moderate depression symptoms and severe anxiety symptoms.⁶¹

[88] Besides the delay before his non-compliance, the Appellant had already suffered from chronic pain for a long time. To deal with his pain concerns, he was seeing multiple care providers by June 2019.⁶² By August 2019, Dr. Litchfield said the Appellant was a “diagnostic dilemma”. His subjective pain symptoms did not match what the surgeon could observe.⁶³ In September 2019, Ms. Kay named chronic pain as an issue.⁶⁴

[89] Dr. Fern (orthopedic surgeon) did not see the Appellant until August 2023. However, Dr. Fern commented on the timing of chronic pain. Dr. Fern said the passage of time meant that the Appellant’s impairments would likely be permanent.⁶⁵

[90] Dr. Fern added that the Appellant had reached maximal medical recovery. He said the Appellant had a well-established chronic pain disorder. Dr. Fern suggested a focus on management, rather than cure, of the chronic pain. Management could include treatments such as medications, injections, muscle relaxants, topical creams, nerve blocks, and nutritional supplements. It could also include therapies such as acupuncture, physiotherapy, massage, yoga, chiropractic care, and Pilates.⁶⁶

[91] Dr. Fern’s comments suggest that the impact of non-compliance is greatest at the earliest stages of a chronic pain condition. As time passes, the chronic pain condition is entrenched. Dr. Bégin also said it was best to stop the vicious circle earlier. She said the pain would become more chronic and entrenched with time.

⁵⁹ See GD1-20.

⁶⁰ See GD1-253, GD1-256, and GD1-269.

⁶¹ See GD1-20 and GD1-21.

⁶² See GD2-140 (orthopedic surgeon), GD1-197 (physiotherapist), and GD1-257 (occupational therapist).

⁶³ See GD2-148 and GD2-149.

⁶⁴ See GD1-195.

⁶⁵ See AD6-128, AD6-129, and AD6-130.

⁶⁶ See AD6-128, AD6-130, and AD6-131.

[92] Finally, the Appellant testified that the main benefit of Wellbutrin is its calming effect. While this is positive, the ultimate effect on chronic pain is less clear.

[93] After considering all this evidence, I cannot conclude that the Appellant's non-compliance with Wellbutrin would have had a significant effect on his disability status. The non-compliance was more than two years after the accident, and roughly two years after chronic pain had emerged as a concern. He eventually did start taking Wellbutrin in the recommended manner. This improved his mood, but his wife said he continues to have significant mental health concerns. He also reported side effects.

[94] This means the Appellant's non-compliance does not prevent a finding of severity.

[95] I find that the Appellant had a severe disability by December 31, 2021, the end of his MQP, as he had no residual work capacity by then. In fact, he has not had any work capacity since January 2019. I must now decide whether his disability is also prolonged.

Is the Appellant's disability prolonged?

[96] I will first consider the evidence of the Appellant's regular care providers.

[97] Dr. Taylor-Wall originally thought the Appellant would return to work. In April 2021, she still thought he would return. However, at that time, she could not estimate when that might happen. She said the cause of his symptoms was still unknown. She hoped that back and knee surgery might reduce his pain and improve his function.⁶⁷

[98] In June 2023, Dr. Taylor-Wall noted the Appellant's continued frustration with his lack of activity due to chronic pain. The lack of answers for his chronic pain condition also frustrated him. Together with the other evidence, this suggests that the Appellant's pain complaints are real, and that significant recovery is not foreseeable.⁶⁸

[99] Dr. Taylor-Wall also agreed with Dr. Viana that the prognosis for full resolution of the pain was guarded. This was because the accident occurred a long time ago. She

⁶⁷ See GD2-136.

⁶⁸ See AD6-40.

agreed that the Appellant would always have some degree of pain. She added that the focus would have to be on trying to make the pain tolerable, as opposed to curing it. Earlier that month, Dr. Viana had counselled the Appellant on living with chronic pain.⁶⁹

[100] The Appellant's surgery was less than six months before the hearing date. This makes it harder to assess the surgery's impact on his future functional limitations. At the hearing, Dr. Bégin said she saw no mention of any surgical complications. She also said recovery from this type of surgery usually took about 4-8 weeks. However, the Appellant still had some knee discomfort 8 weeks after the surgery.⁷⁰

[101] The latest evidence is the Appellant's evidence at the Appeal Division hearing. He said his ability to sit had improved slightly since the accident. However, he needed 3-4 hours to recover if he "pushes it". He also said his back pain was still severe. It was worse when he sat, stood, or walked for too long. It was better when he reclined.

[102] Although Dr. Litchfield said the Appellant was doing "really well" overall in October 2023,⁷¹ the Appellant said he did not feel very different since the surgery. Dr. Litchfield told him that he needed to give it some time. But the Appellant said he still felt pain in the same areas that hurt before the surgery. He said his knee felt worse if he used the stairs or put too much pressure on it.

[103] The Appellant confirmed that he was no longer using crutches. He said he could put a little bit of weight on his knee "as tolerated." But he also said he would not be able to do sedentary work, such as a call centre job, if he had to sit most of the time.

[104] The Appellant said he got some temporary pain relief from Dr. Viana's injections. These were very painful, but they provided a 25% pain reduction for about three weeks. He had those injections three or four times.

⁶⁹ See AD6-40 and AD6-148.

⁷⁰ See AD6-49 and AD6-102.

⁷¹ See AD6-49.

[105] I do not place too much weight on the evidence of care providers who did not actively treat the Appellant. However, their opinions also support a prolonged disability.

[106] Dr. Fern did not treat the Appellant. Dr. Fern also gave his August 2023 opinion before the Appellant's knee surgery. However, Dr. Fern was aware of the upcoming surgery. As noted above, he said the Appellant had a well-established chronic pain disorder and had made maximal medical recovery. It was unlikely that the Appellant would significantly improve.⁷²

[107] Dr. Fern added that the Appellant's impairments were likely to be permanent, given the significant time (4½ years) that had already passed. Dr. Fern said this was because his central nervous system was already sensitized. This can lead to the self-perpetuation of pain, as well as more severe degrees of pain.⁷³

[108] Dr. Becker (psychologist) did not treat the Appellant either. However, her May 2023 opinion noted his reports of continuing pain, worry about worsening his pain, depressive symptoms, disturbed sleep, fatigue, reduced energy, anxiety, irritability, and cognitive difficulties. She said the breadth, severity, and chronic nature of his psychological symptoms left him with a prognosis of "guarded to poor".⁷⁴

[109] Dr. Becker's conclusions suggest that the Appellant faces significant mental health hurdles beyond his chronic pain disorder. These hurdles will make it even more difficult for him to overcome his current functional limitations.

[110] I see no evidence that the Appellant's disability is likely to result in death. This means his disability is prolonged only if it is likely to be long continued and of indefinite duration.⁷⁵ He must prove this on a balance of probabilities.

⁷² See AD6-128.

⁷³ See AD6-128 to AD6-130.

⁷⁴ See AD6-198.

⁷⁵ See section 42(2)(a) of the *Canada Pension Plan*.

[111] The Appellant still has significant pain complaints. In the five years since his accident, he has seen an improvement in his sitting tolerance. Even then, he must be careful not to sit too long. If he does, he requires significant recovery time.

[112] The Appellant may someday overcome enough of his functional limitations to be capable of working again in the real world. However, I find it more likely that his inability to do any real-world work will be long continued and of indefinite duration.

[113] This means that the Appellant has had a severe and prolonged disability since January 2019. In turn, this means his appeal must succeed. I must now determine the start date of the Appellant's CPP disability pension.

What is the start date of the Appellant's CPP disability pension?

[114] The Appellant has had a severe and prolonged disability since January 2019. However, the *Canada Pension Plan* says a person cannot be considered disabled more than 15 months before the Minister receives their disability pension application.⁷⁶ After that, a four-month waiting period must pass before payments start.⁷⁷

[115] The Minister received the Appellant's application in April 2021. That means he is considered to have become disabled in January 2020. His pension payments start as of May 2020.

Conclusion

[116] The appeal is allowed. The Appellant is entitled to a CPP disability pension, with payments starting as of May 2020.

Pierre Vanderhout
Member, Appeal Division

⁷⁶ See section 42(2)(b) of the *Canada Pension Plan*.

⁷⁷ See section 69 of the *Canada Pension Plan*. This means that payments cannot start more than 11 months before the application date.