Citation: *SB v Minister of Employment and Social Development*, 2025 SST 827

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. B.
Representative:	Paul Rochford
Respondent:	Minister of Employment and Social Development
Representative:	Marcus Dirnberger

Decision under appeal:	General Division decision dated March 13, 2023 (GP-21-801)

Tribunal member:	Kate Sellar
Type of hearing:	Videoconference
Hearing dates:	December 20, 2023 and June 13, 2025
Hearing participants:	Appellant Appellant's representative Respondent Respondent's representative
Decision date:	**August 7, 2025**
File number:	AD-23-360

Decision

[1] I'm allowing the Claimant's appeal. This means that the Claimant is entitled to a Canada Pension Plan (CPP) disability pension because he had a severe and prolonged disability within the meaning of the CPP before the end of the coverage period he established after he split his pension credits.

[2] Payments start in August 2024.

[3] These are the reasons for my decision.

Overview

[4] S. B. (Claimant) was a press operator for many years. This is a physically demanding job. He had a gradual onset injury at work. He has explained that as a result of that workplace injury, he has been living with chronic pain for most of his adult life.

[5] He was eventually retrained through workers compensation and secured a pilot's license, but he never worked as a pilot. In the years after the retraining, he had a series of jobs including some self-employment.

[6] The Claimant worked at a marina for seven months until November 2012. He started a small business in construction in July 2013. He eventually transitioned to a small business focussed only on excavation work. At some point in 2015, he had stopped working altogether.

[7] The Claimant applied for the disability pension in March 2020. He explained that he could no longer work as of March 2013. He said he couldn't work because of chronic bilateral shoulder problems, bilateral carpel tunnel, chronic neck pain, extremity numbness, cervical spinal stenosis, and chronic back and hip pain.

[8] The Minister of Employment and Social Development (Minister) refused his application initially and on reconsideration. The Claimant appealed to this Tribunal and the General Division dismissed his appeal. He received permission to appeal to the Appeal Division. The oral hearing was adjourned for a lengthy period at the request of

the parties during which time he applied for and received a credit split. The hearing reconvened in June of this year.

I decided an issue first at the hearing.

– **The parties disagreed about whether I should allow the Minister's witness to testify at the hearing.**

[9] I allowed the Claimant to make arguments at the hearing in June about whether I should refuse to allow the Minister's professional witness, who did not treat the Claimant, to testify. The Minister made arguments in support of permission to call their witness.

[10] The Claimant argued generally about the necessity and reliability of the witness' evidence, which are factors that come from court decisions about allowing expert evidence. The Minister argued that it's not clear whether the common law test for expert evidence applies at the Tribunal, but that necessity of the evidence probably isn't a factor I should consider. The Minister suggested that I should consider instead whether the evidence might be useful and helpful.

[11] The Claimant argued that the testimony from that witness wasn't necessary to assist me because the medical evidence isn't complex and the medical reports speak for themselves. However, the Minister noted that this was simply an assertion.

[12] In my view, I cannot meaningfully assess the necessity of the testimony prior to hearing it. Unlike the court system where the necessity test comes from, I don't have a detailed medical report to review in advance of the proposed testimony.

[13] The Claimant argued that as an experienced adjudicator at this Tribunal, I have the expertise necessary to review the evidence from the Claimant and his treating professionals to decide the appeal. The Minister pointed out that it isn't practical to base decisions about hearing from professional witnesses on the relative experience of any given Tribunal member. I agree that this approach could be more arbitrary than principled.

[14] The Claimant also argued generally that the importance of the evidence from the Minister's witness (the probative value) didn't outweigh the prejudicial effect that calling this evidence would have on the Claimant.

[15] The Minister's witness is a family physician and is not an occupational health specialist and neither does she seem to have any particular expertise in neurology or orthopedics specific to the Claimant's medical conditions.

[16] Further, the Claimant argued that the witness is employed by the Minister, and that practically speaking, allowing her to testify then invites the Claimant to hire an expert to refute her evidence, which is an onerous burden and not consistent with access to justice principles.

– **I refused the Claimant's request. I allowed the Minister's witness to testify because it was consistent with fairness in the Tribunal context.**

[17] I refused the Claimant's request at the hearing. I said I would confirm my brief reasons in this decision. These are my reasons.

[18] **First, the Tribunal is not a court and doesn't strictly follow the rules of evidence as in civil and criminal courts**.[1] At this Tribunal, I decide how much weight to give the evidence the parties provide. I see no principled reason to stray from this approach when it comes to the Minister's proposed witness. Further, this Tribunal doesn't certify witnesses as experts, so much of the common law cases about whether to allow an expert to testify is not precisely on point.[2]

[19] **Second, the proposed evidence appeared to be useful**. Where the Minister employs doctors or other medical professionals to provide opinion evidence to guide their position in appeals about CPP disability pensions, there's good reason to believe that evidence will be useful in understanding the Minister's arguments about the claimant's eligibility.

---

[1] I didn't request (and the parties didn't provide) full arguments in writing about whether the requirements for allowing an expert witness to testify as set by the Supreme Court of Canada in *R v Mohan*, 1994 CanLII 80 (SCC) apply to these proceedings.
[2] See section 40(4) in the Social Security Tribunal Rules of Procedure ("Rules")

[20] The hearing is the Claimant's opportunity to establish how he is eligible for the disability pension. He might show that through his own evidence and witnesses, but he can also show that through possible concessions or argument that flow from cross examination of the Minister's witness.

[21] **Third, the *Social Security Tribunal Rules of Procedure* (Rules) anticipate the kind of evidence the Minister proposes to call.** The Rules provide guidance about giving notice if a party plans to call opinion evidence from a non-treating professional.[3] It seems to me that the Tribunal's Rules not only prevent parties from being ambushed by opinion evidence, but they also assist the decision maker to assess in advance how the evidence might be useful in advance.

[22] There are no rules or procedures at the Tribunal that dictate when such a witness can or should be refused access to testify. The Rules require parties who expect to call this kind of evidence to provide the witness' resume, and either a list of the documents they will give their opinion about, or a summary of what the witness will testify about.

[23] **Fourth, and most important, allowing the Minister to have their witness testify is consistent with fairness.** I must interpret the Rules in a way that makes sure that the appeal process is as simple and quick as fairness allows.[4]

[24] I must give both parties a full and fair opportunity to make their case because that's what fairness requires at this Tribunal.[5] Simply put, my job is to decide whether the Claimant gets the pension, and to provide a fair process by which the parties can make their case. In that context, the proposed witness' job is to make clear the Minister's path to its position that the Claimant's isn't eligible by providing opinion about the medical evidence in the appeal file.

[25] To the extent that the Minister's position on the appeal is formed by the opinion of a non-treating medical professional, it seems consistent with fairness that the Minister

---

[3] See section 40(c) and 41(3) to (5) in the *Social Security Tribunal Rules of Procedure* (Rules).
[4] See section 8(1) of the Rules.
[5] See *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

be allowed to lead that opinion evidence in hearing in order to respond to the Claimant's case.

Issues

[26] The issues in this appeal are:

a) Did the Claimant have a disability that became severe and prolonged within the meaning of the CPP on or before **December 31, 2015 (the last day of the first coverage period)?**

b) If no, did the Claimant have a disability that became severe and prolonged within the meaning of the CPP on or before **December 31, 2024 (the last day of the second coverage period)**?

c) If yes, **when do the Claimant's disability pension payments start** in accordance with the CPP?

Analysis

[27] **First**, I'll discuss what a claimant needs to prove to be eligible for the disability pension.

[28] **Second**, I'll explain how I've reached the conclusion that the Claimant had some capacity for work at the end of his first coverage period. I'll explain how I decided the Claimant wasn't able to show that efforts to get and keep employment were unsuccessful because of his disability. As a result, his disability isn't severe within the meaning of the CPP at the end of the first coverage period.

[29] **Third**, I'll explain how I've reached the conclusion that the Claimant's disability was severe and prolonged within the meaning of the CPP by December 2018, which was before the end of the second coverage period in December 2024.

[30] **Fourth,** I'll explain that since the Claimant became disabled only by way of the second coverage period as a result of the credit split, his payments start the month after

the credit split was attributed to him. The parties agreed at the hearing that the credit split was attributed to him in July 2024, so the payments start in August 2024.

1. What the Claimant needs to prove to receive a disability pension

– **The coverage period is important.**

[31] To be eligible for a disability pension, the Claimant must show that it's more likely than not that he had a disability that became severe and prolonged within the CPP on or before the end of his coverage period.

[32] In this case, the parties agree that the Claimant has two possible coverage periods as follows.

[33] The last day of the first coverage period is December 31, 2015. The first coverage period is based on his contributions to the CPP before he applied to split his pension credits.

[34] The last day of the second coverage period, based on his contributions to the CPP and the credit split he applied for and received between the two hearing dates is December 31, 2024.

– **The Claimant needs to show the disability is severe and prolonged within the meaning of the CPP.**

[35] A person with a severe disability is "incapable regularly of pursuing any substantially gainful occupation."[6] Each part of that definition has meaning to consider.[7] A severe disability in the CPP context links to what a person can and cannot do when it comes to work. The things people cannot do because of a disability are sometimes called "functional limitations."

[6] See section 42(2)(a) of the *Canada Pension Plan* (CPP).
[7] See paragraph 38 in *Villani v Canada (Attorney General)*, 2001 FCA 248.

[36] To decide whether the disability is severe, I must consider the following:

- the Claimant's **medical conditions** (which involves assessing the conditions in their totality: that is, all the possible **functional limitations** that could affect capacity to work)[8]
- the Claimant's **background** (including age, level of education, language abilities, and past work and life experience)[9]
- the steps the Claimant has taken to **manage** the medical conditions, and whether there is evidence to suggest that he has **unreasonably refused** any recommended **treatment**.[10] If a Claimant has refused recommended treatment, it's important to consider what impact the treatment may have had on the Claimant's disability status.

[37] If a review of the evidence shows that the Claimant had some (or, "residual") capacity to work, then for his disability to be severe within the meaning of the CPP, he needs to show that efforts to get and keep work were unsuccessful because of his medical conditions. I call this the "work efforts test."[11]

– The Claimant needs some objective medical evidence, but that evidence doesn't need to be the only source of information about the Claimant's functional limitations.

[38] Claimants need some objective medical evidence to support their application for the disability pension.[12] However, deciding which functional limitations a claimant has at any given time requires assessing all the evidence, including the claimant's testimony and the information they provide in the application form.

---

[8] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[9] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[10] See *Sharma v Canada (Attorney General)*, 2018 FCA 48; and *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[11] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[12] See paragraph 38 in *Canada (Attorney General) v Dean*, 2020 FC 206 ("Dean"). Dean was a case about a claimant who had given no objective medical evidence in support of the application for a disability pension.

[39] When considering medical reports, I'm not on a search for medical findings on scans labelled "severe." A person's disability can be severe within the meaning of the CPP because of the cumulative impact of their conditions on their ability to work, no individual scan needs to show that any particular medical observation is severe.

[40] I have yet to decide an appeal in which a claimant has a medical record that fully and accurately records all functional limitations without any gaps in time or missing information. Claimants neglect to describe an aspect of their condition to the doctors. Doctors can neglect to make a note of something their patients tell them.

[41] Perfect medical evidence isn't required — there will necessarily be "gaps" in medical records, either based in time or in content. The legal issue is whether the Claimant proved the disability on a balance of probabilities, so it's important not to make too much of perceived "gaps" in evidence or to fail to make reasonable factual inferences where needed. The Claimant argued that consistency of the disability itself is required, but there's no requirement in law for a perfectly consistent medical record.

[42] If the disability is severe, I must also consider whether it's prolonged. A prolonged disability is long-continued and of indefinite duration or likely to result in death.[13]

2. By the end of the first coverage period, the Claimant had some capacity to work. However, he isn't able to show that efforts to get and keep work were unsuccessful because of his disability.

[43] The Claimant's medical conditions (and corresponding functional limitations), along with his personal circumstances, show he had some capacity to work on or before December 31, 2015. The Claimant made some efforts to work before the end of the first coverage period, but they weren't all suitable. Accordingly, the Claimant's disability wasn't severe on or before the end of the first coverage period.

[44] I'll explain how I reached these conclusions.

---

[13] See section 42(2)(b) of the CPP.

– **The medical evidence and the Claimant's testimony show a history of multiple and overlapping medical conditions and functional limitations.**

[45] The medical evidence shows that the Claimant has a long history of medical problems with his wrists, back, and shoulders, and neck. These conditions resulted in functional limitations that impacted his ability to work in various ways.

[46] In October 2000, the Claimant's family doctor completed a functional abilities form for workers' compensation.[14] The form is important because it's an early indication of limitations as follows:

- Lifting floor to waist – as tolerated
- Listing waist to shoulder – as tolerated
- Limitations: neck bending/twisting, repetitive movement of neck and left shoulder. No above shoulder activity. Blow shoulder activity as tolerated. Reaching – moving/pushing or pulling with left arm.

[47] The Claimant's doctor stated that the Claimant has been mostly unable to work since 2004, and that he joined the doctor's practice in 2016.[15]

[48] More specifically, a rheumatologist diagnosed mild to moderate nerve compression in the Claimant's left wrist as early as April 1995. In April 2012, a neurologist documented that the Claimant had mild dysfunction of the ulnar and median nerves in his wrists and elbows.[16]

[49] The Claimant had varying shoulder pain for 20 years already by April 2014. Cortisone shots were of no benefit and the medical evidence says that he: "…may have to live with this until the early degenerative changes noted on the MRI get severe

[14] See AD6-17.
[15] See GD2-146.
[16] See GD3-13.

enough that joint replacement does some good." At the time, he was self-employed (but more on that later).[17]

[50] The diagnosis relating to the Claimant's back in April 2014 was foraminal stenosis and nerve root impingement in the cervical spine.[18] He also had moderate osteoarthritis, mild tenosynovitis, bone marrow edema, runner's knee, and a labral tear in January 2014.[19]

[51] In June 2014, the Claimant had surgery on his left shoulder (arthroscopy), a repair of the biceps muscle.[20]

[52] A few months later in October 2014, the Claimant was diagnosed with degenerative disc disease with foraminal stenosis in the neck. At that time, the Claimant had a consultation with an orthopaedic surgeon. He told the orthopaedic surgeon that he had numbness in arms with neck and arm pain 15 times a year. The surgeon's report says that he discussed both surgical and non-surgical options for treatment with the Claimant. The doctor noted that the symptoms were worse when the Claimant sat at a computer. The Claimant's limitations were the following:

- no over the shoulder activity
- no lifting anything greater than 10 to 15 pounds
- no repetitive or prolonged movements with neck

[53] The orthopaedic surgeon encouraged the Claimant to do physiotherapy, chiropractic care, aqua therapy, massage, acupuncture, and traction. The doctor described follow up care as being "in hands of the patient."[21]

---

[17] See GD3-17 to 18.
[18] GD3-17 to 18.
[19] See GD3-19. Runner's knee doesn't mean I find the Claimant was able to run. It means he had chrondromalacia patellae, a pain in the front of the knee around the knee cap.
[20] See GD3-20 to 21.
[21] See GD3-22-24.

[54] The Claimant testified about his activities of daily living in 2015 (the last year of his first coverage period). He said that he had trouble standing on his feet or doing repetitive motions with his hands necessary for preparing food. He had intermittent tingling in his legs and hands. Yard work was difficult, and he had people helping him. If he tried to clean, he would pay for it with pain his shoulders. He improvised with personal hygiene using one arm. He could bend but would need to lay down after.

[55] The Claimant testified that at the end of the first coverage period, he knew that he couldn't sit at a desk for work. It is not clear to me whether the functional limitations with numbness and pain would have resulted in restrictions for seated or sedentary work or retraining. The Claimant says it did, and he told his doctor that, so I find he had at least some limitation with respect to how long he could sit at a desk.

[56] In my view, the medical evidence shows that the Claimant had functional limitations that affected his ability to work. Certainly, many of his restrictions in terms of range of motion, lack of strength, and pain, would make it difficult for the Claimant to complete physical work. The Claimant's medical evidence documents the fact that working at a desk on the computer increased his pain, the medical evidence alone doesn't say he was incapable of any work.

[57] Similarly, the Claimant didn't testify that he was prevented from all work in 2014 or 2015, because he continued to look for work that he could complete that was within his restrictions. He knew reliability might be a problem, and he knew he couldn't do the physical work he did when he first got injured.

– **The Claimant took steps to manage his medical conditions, and he didn't refuse treatment unreasonably.**

[58] Claimants have an obligation to show efforts to manage their medical conditions. A disability may not be severe within the meaning of the CPP if the Claimant refused treatment unreasonably.

[59] In this case, I have no trouble concluding that the Claimant took steps to manage his medical conditions over a long period of time after he was injured at work, up to

December 31, 2015 (the last day of the first coverage period). The parties agree that the Claimant pursued surgical options for his shoulders and wrists before the end of the first coverage period. Particularly at the General Division, he testified that over the years following his workplace injury, he also tried:[22]

- Physiotherapy for his shoulder, neck, and back
- Chiropractic care
- Massage therapy for his back
- Cortisone shots numerous times for both shoulders
- Epidurals and nerve blocks in his back

[60] The Claimant wasn't able to narrow down in testimony or through documents in which years he tried many of these therapies. The Claimant has argued that medical records like physiotherapy reports aren't retained indefinitely.

[61] The bigger issue is whether the Claimant took reasonable steps to manage his medical conditions in 2014 and 2015 (just before the end of the first coverage period).

[62] Based on the Claimant's testimony, it seems that after the orthopedic surgeon discharged the Claimant from his care at the end of 2014, the Claimant concluded more broadly that there was nothing more that could be done about his remaining functional limitations. The orthopaedic surgeon did say that they were going to "leave well enough alone and I will be discharging him from my care."[23]

[63] The Claimant testified that although his neck was the worst it had ever been at that point, he was afraid of spinal surgery. He said he didn't understand what the outcome would be if he didn't have the surgery. He had already had wrist and shoulder surgery, and by December 2014 (six months after the left shoulder surgery) there was

[22] This testimony about treatment is in the recording of the General Division hearing and starts at about 1hr, 22 mins.
[23] See GD3-25.

no dramatic improvement. However, it was noted that he had full range of motion and good strength in his shoulder. The orthopaedic surgeon didn't need to see him further, and he was to see his family doctor.

[64] The Claimant testified that once he decided not to have the spinal surgery, he was under the impression that there was nothing more that could be done medically to help him.

[65] The Claimant argues that in light of the orthopaedic surgeon discharging the Claimant from his care, it is unsurprising that there are no medical records again until 2019, when the Claimant was experiencing numbness.

[66] The Minister argues that failing to follow up with a doctor after the surgical consult for a period of years to 2019 shows that the disability was not severe, or that he wasn't continuing with the kind of suggestions that the surgeon talked about in terms of physiotherapy, chiropractic care, aqua therapy, massage, acupuncture, and traction.

[67] The Claimant's testimony about these kinds of treatments from 2015 to 2019 was vague. The Claimant testified that he moved and changed doctors in 2016. He gave evidence about some of the frustrating aspects of his time receiving medical treatment, including when he had the impression that doctors were not really able to help him or were struggling in their own practices.

[68] I accept the argument from his representative that the Claimant wasn't always able to pinpoint precisely when he completed various treatments.

[69] Testifying at this Tribunal is not supposed to be a memory test about which practitioners a claimant consulted and when. I understand that the Claimant has had medical conditions that he has lived with over a protracted period of time. I've kept that in mind when reviewing his testimony.

[70] In terms of medication, the Claimant testified about having had Percocet after surgeries. His vague assertions that he has tried every drug does not seem to be

supported by any documents in the record about different classes of medications or recommendations for medications that the Claimant has tried.

– **The Claimant's background shows at least some additional barriers to re-employment before the end of the first coverage period.**

[71] When deciding whether the Claimant developed a severe disability before the end of the first coverage period, I also need to consider how employable the Claimant is in the real world given the following factors:

- age;
- education;
- ability to speak, read, and write in English; and
- past work and life experience.[24]

[72] On December 31, 2015 (the end of his coverage period), the Claimant was 48 years old. He had many years to the standard age of retirement in Canada. The Claimant provided social science evidence to suggest that it is harder for workers over the age of 45 to gain employment.[25] While this document is helpful to some extent in the aggregate, I will not infer based on that evidence alone that in this appeal, that the Claimant's age was working against him at the end of the first coverage period.

[73] I find the Claimant's education was somewhat of a barrier to employment, however, he has a high school diploma, but the retraining he completed after was for a very narrow and specific field (piloting) that did not have broad application in the workforce. However, completing the coursework for the pilot's license does suggest an ability to retrain in areas other than simply jobs involving heavy physical labour.

[74] The Claimant doesn't experience any barriers to employment relating to his ability to communicate and learn in English.

---

[24] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[25] See AD17-6.

[75] I find that the Claimant's past work and life experience here is also important in the sense that he is an injured worker. He got a gradual onset injury from a physically demanding job. Workers' compensation retraining was focussed on a job that was not as physically demanding, but he found he couldn't access work that paid enough in his geographical area. He tried a seasonal job at a marina, and that work wasn't available the second year. He was in financial difficulty.

[76] I know that the challenges of the job market in any given area aren't relevant when deciding whether a Claimant has met the work efforts test under the CPP. Instead, I'm noting it because as an injured worker, the Claimant's experience means that his restrictions meant he could no longer work in his chosen field. He spent some years of his working life receiving support in the form of retraining from workers' compensation. When that retraining didn't result in a new career, it's relevant to understanding the Claimant's personal circumstances.

[77] As an injured worker, I recognize that the Claimant experienced some additional barriers in the workforce because once retraining wasn't successful, he was on his own to find work within his restrictions in a new field while managing a disability. When supported retraining fails, injured workers may lack the financial resources to pursue more retraining independently.

[78] As an injured worker, the Claimant's past work and life experience tells me that he has tried several different ways to work after his injury when heavy physical labour was no longer possible. He described at least one of his attempts at employment as his last hope, which may be a reference to the barriers injured workers can face in the process of reimagining or reinventing themselves in the workplace.

– **The Claimant made some efforts to get and keep work, focussing on self-employment by the end of the coverage period.**

[79] Since I've concluded that there's some evidence that the Claimant had capacity for work both from the medical evidence and his testimony, I must consider whether he

showed efforts to get and keep work were unsuccessful because of this disability.[26] The issue I'm deciding, however, is whether the Claimant's efforts were reasonable. The Courts have also described the need for the efforts to be sincere. Efforts that are focussed solely on work that is unsuitable based on functional limitations won't meet this test.[27]

[80] The Claimant argues, and I agree, that this test can be quite difficult for an injured worker to meet because the efforts are judged in hindsight (unlike when work efforts are supported and occurring in real time in workers compensation schemes).

[81] The Claimant's efforts to become a pilot were not successful for reasons other than his medical conditions. The Claimant completed some seasonal work at a marina, but it wasn't available the following year. The Claimant didn't provide testimony about any other search for employment within his restrictions after that. He didn't give any detailed evidence about trying to identify other areas of work that wouldn't exceed his physical restrictions in terms of overhead work, lifting, range of motion in his neck, and sitting at a desk.

[82] Instead, the Claimant considered self-employment to be his last hope for work. The Claimant started his own business completing renovations in July 2013.[28] Medical documents suggest it was up and running as of April 2014. The Claimant explains that he started the business so that he could choose what work to take on and when. He didn't think he could reliably work for anyone else.[29]

[83] The Claimant testified that the renovations were residential, and included working on fences, decks, a pool shed, tiling, flooring, plumbing, and electrical. He says he completed any aspect of residential renovations, although there were a few exceptions. His wife kept the books, so he wasn't sitting at a desk for any extended periods.

---

[26] See *Inclima v Canada (Attorney General),* 2003 FCA 117.
[27] See paragraph 5 in *Yantzi v Canada (Attorney General)*, 2014 FCA 193, which references a sufficient search for "suitable" employment.
[28] See GD2-22.
[29] Not unlike the Claimant in *D'Errico v Canada (Attorney General)*, 2014 FCA 95.

[84] The parties agree that the Claimant didn't earn substantially gainful income from his business.[30] He testified, and I accept that the amount of work he did was not anywhere close to full-time.

[85] In the spring of 2015, the Claimant bought an excavator and stopped taking other renovation work because of his medical conditions.

[86] The excavation work was seated, using both hands to control the joysticks and pedals. He accepted short (2 to 4 hour) jobs, and he was able to take breaks throughout the work. The Claimant explained that he hoped the excavation work could eventually be completed by an employee, and that he would earn a substantially gainful income from owning the excavator.

[87] However, he wasn't able to generate enough business for that plan, and he stopped the excavator work too because of his disability.

[88] His corporate income tax returns do not show sales in the business (gross earnings) that are over the substantially gainful amount set out in the regulations.[31] In fact, in 2016 documents show he worked about 79 hours which was the best revenue year doing the excavation. He earned just under $6,000.[32]

[89] In my view, the Claimant made efforts to get and keep work, but they aren't sufficient to meet the work efforts test. Although I can understand why he would want to try self-employment because he could worry less about reliability and set his own hours, the tasks he was completing in renovation and even excavation seems to have been too physical for his functional limitations.

---

[30] Substantially gainful income is defined in section 68.1(1) of the *Canada Pension Plan Regulations*. It's an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person can receive in CPP disability pension payments.
[31] See GD2-28 to 29, 31, 37, and 41.
[32] See GD2-28.

[90] In my view, reasonable efforts to gain and maintain employment would have also involved a search for alternate work within his physical restrictions, either part time or full time.

[91] The Claimant's focus on self-employment despite the lack of revenue he was able to generate, and despite the physical nature of the work was not reasonable. Reasonable efforts to work should have included evidence of a search for employment within his restrictions. In the real world, his restrictions were such that he could have tried a variety of jobs that may have been more hours than he was doing in self-employment, but less onerous physically. Without the Claimant trying to find that work, I cannot conclude in a real-world way, that the Claimant was incapable regularly of pursuing **any** substantially gainful occupation.

– **My conclusion: the Claimant's disability wasn't severe within the meaning of the CPP on or before December 31, 2015.**

[92] The medical evidence together with the Claimant's testimony shows that the Claimant had some functional limitations that precluded him from working in physically demanding jobs. He had some additional barriers to employment as a result of his narrow work experience in physical labour and his relatively specialized post-secondary training in piloting — an area that did not result in a viable career.

[93] And while the Claimant had reasons to make the choices he made in terms of treatment, at the time of the MQP, he believed that there was really nothing more that could be done to assist him. He wasn't seeing a doctor regularly and there isn't clear evidence about what kind of other treatments (like massage and chiropractic sessions.) he was trying at that time.

[94] Since there was some evidence of capacity to work in the medical evidence and the Claimant's testimony, I considered whether he showed efforts to get and keep work were unsuccessful because of his disability. While it's clear that the Claimant made some efforts to get and keep work, the focus on self-employment in residential construction lacked suitability.

[95] Since I've concluded that the Claimant's disability was not severe within the meaning of the CPP on or before December 31, 2015. So, I don't need to consider whether it was prolonged at that time.

3. By September 2018, the Claimant's disability was severe and prolonged within the meaning of the CPP. This was well within the second coverage period, which ended December 31, 2024.

[96] The Claimant's medical conditions and functional limitations along with his personal circumstances show that his disability did become severe and prolonged by September 2018. By the fall of 2018, the totality of the medical evidence shows that the Claimant no longer had any capacity to work. I'm satisfied that the Claimant took steps to manage his conditions and didn't refuse treatment unreasonably.

[97] I'll explain how I reached these conclusions.

– The medical evidence shows significant change in the Claimant's pain and mobility in 2018.

[98] The Claimant's functional limitations clearly worsened by September 2018, as documented by the surgeon about a year later in September 2019.[33] His chronic neck pain was radiating down both arms. He had numbness in his feet and hands, and difficulty walking.

[99] In October 2019, the Claimant was in need of emergency care. He had a cervical spinal fusion.

[100] In September 2021, the Claimant had a phone consultation with his neurosurgeon because he was still having back pain and pain in both shoulders. The neurologist suggested trying medication for the numbness but confirmed that the neck x-ray didn't show any post-surgery problems.[34]

[101] In April 2022, the Claimant had a consultation with a rheumatologist for chronic diffuse joint pain. The rheumatologist ruled out any inflammatory arthritis or connective

[33] See GD2-155.
[34] See AD35-30.

tissue disease and noted that the Claimant had mild to moderate osteoarthritis of the right hip and mild osteoarthritis of the left hip. He was recommended to continue attending the pain management clinic.[35]

[102] The next month, the Claimant had a phone consult with an orthopaedic surgeon. The surgeon noted that the Claimant was still having pain in his right shoulder. Imaging showed moderate to severe glenohumeral osteoarthritis, which was bone-on-bone. They agreed he would have shoulder surgery. The doctor noted that even if the surgery were successful, it would not assist him with the pain he has below his elbow or his neck. The doctor noted that the Claimant still had chronic neck pain.

[103] In September 2022, he had ongoing numbness and tingling in both arms intermittently and constant to both legs. He had severe osteoarthritis. That same month, the Claimant had a right total shoulder replacement surgery.[36]

[104] In addition, just a few months after the end of the second coverage period, the Claimant was talking to his doctor about his mental health, including daily anxiety, some mild panic, chronic low mood, and disturbed sleep and passive suicidal ideation.[37]

– **The Claimant took steps to manage his medical conditions and didn't refuse treatment unreasonably.**

[105] I have no concerns about whether the Claimant was taken steps to manage his conditions in the lead up to the end of the second coverage period. He got emergency medical care and had a spinal fusion. He saw his family doctor, he attended referrals to a rheumatologist, a neurologist, and he had a consult and then surgery with an orthopaedic surgeon. He was attending a pain clinic and was trying different medications.[38]

---

[35] See AD35-17.
[36] See AD35-11.
[37] See AD35-37.
[38] See AD35-28.

– **The Claimant's personal circumstances changed by the end of the second coverage period because he was older.**

[106] At the end of this second coverage period on December 31, 2024, the Claimant was almost 58 years of age. In the real world, the age of 58 can present a barrier to employment, particularly retraining. I find this is the case since early retirement is available under the CPP at age 60, and disability pensions convert to retirement pensions at the age of 65.

[107] Considering the Claimant's functional limitations and personal circumstances together, it's particularly clear that he did not have any work capacity in September 2018. After years of attempts at work, his medical situation was deteriorating in terms of pain, numbness, and mobility. In my view, by September 2018, the possibility of regularly completing some kind of alternate work within his restrictions was over. Given his increasing age and history as an injured worker along with the further deterioration of his physical health, he no longer had any work capacity whatsoever. Within a year (by the fall of 2019) he needed emergency cervical spinal fusion.

4. The Claimant's CPP disability payments start the month after the credit split was attributed to him.

[108] According to the CPP, if a person is disabled within their coverage period only with the benefit of a credit split, then the pension payments actually start the month after the Minister attributes the credit split.[39]

[109] Since the Claimant became disabled only by way of the second coverage period as a result of the credit split, his payments start the month after the credit split was attributed to him. The credit split was attributed to him in July 2024, so the payments start in August 2024.

[39] See section 55.2(9) of the CPP.

Conclusion

[110] I've allowed the appeal. The Claimant is entitled to the disability pension because he proved his disability became severe and prolonged within the meaning of the CPP only within the coverage period he established as a result of the credit split. Accordingly, his disability pension payments start in August 2024, which is the month after the credit split was attributed to him.

Kate Sellar
Member, Appeal Division