



Citation: *MG v Minister of Employment and Social Development*, 2025 SST 1177

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** M. G.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Andrew Kirk

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**Decision under appeal:** General Division decision dated April 7, 2024  
(GP-22-2070)

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**Tribunal member:** Pierre Vanderhout

**Type of hearing:** Teleconference

**Hearing dates:** January 31, 2025, and March 17, 2025

**Hearing participants:** Appellant  
Respondent  
Respondent's representative

**Decision date:** November 12, 2025

**File number:** AD-24-491

## Decision

[1] The appeal is allowed in part. The Appellant is entitled to a Canada Pension Plan (CPP) disability pension, with an onset date of January 2014. However, his argument on incapacity does not succeed. The start date of his pension payments is July 2015.

## Overview

[2] In this decision, I shall refer to the Appellant, M. G., as the “Claimant.”<sup>1</sup> I shall refer to the Respondent, the Minister of Employment and Social Development, as the “Minister.”

[3] The Claimant will be 70 years old in September 2025. He worked for many years as a psychotherapist. He said his last day of work was April 1, 2016.<sup>2</sup> He applied for a CPP disability pension on June 28, 2016. He said he was unable to work because of a major depressive disorder (MDD).<sup>3</sup>

[4] The Claimant originally said he was unable to work as of June 20, 2016.<sup>4</sup> However, he later modified this position. He said he met the CPP disability pension requirements as early as January 11, 1999, when he was involved in a serious car accident (the 1999 Accident).

[5] The Minister denied the Claimant’s application initially and upon reconsideration. The Claimant appealed the Minister’s decision to the Social Security Tribunal (Tribunal) on February 1, 2018. The Tribunal’s General Division issued a decision in early 2019.<sup>5</sup> Many years later, the matter is still before the Tribunal.

[6] Although the Claimant succeeded at the General Division, he sought leave to appeal at the Tribunal’s Appeal Division. He wanted additional retroactive benefits. He also made an unsuccessful “rescind and amend” application to the General Division. The Appeal Division denied leave to appeal the successful General Division decision,

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<sup>1</sup> The Claimant has, in the past, also been known as “M. H.”. This name appears on some documents.

<sup>2</sup> See GD2-149.

<sup>3</sup> See GD2-67 and GD2-150.

<sup>4</sup> See GD2-150.

<sup>5</sup> See AD1A-1.

but the Claimant then applied to the Federal Court of Canada for judicial review of that denial. The Federal Court granted the Claimant's application, and directed the Appeal Division to have a different member redetermine the matter.<sup>6</sup>

[7] On December 12, 2022, the Appeal Division sent the matter back to the General Division to be redetermined at that level.

[8] The current appeal derives from General Division decision dated April 7, 2024.<sup>7</sup> Once again, the Claimant was successful. But he still did not get the additional retroactive benefits that he desired. He then sought judicial review of the April 2024 General Division Decision at the Federal Court of Appeal. The Federal Court of Appeal found that his application for judicial review was premature, as he had not yet exhausted all administrative remedies available to him.

[9] The Claimant then sought, and was granted, leave to appeal at the Appeal Division. As a result, I conducted a *de novo* teleconference hearing on January 31, 2025, and March 17, 2025.

[10] Many concerns have been raised in this appeal. The scope of the evidence, submissions, and correspondence is vast. Many preliminary matters need to be addressed. However, the underlying issues are relatively simple. First, I need to decide whether the Claimant is entitled to a CPP disability pension. If he is, then I also need to decide when payments begin.

[11] The Claimant asserted that he had a severe and prolonged disability since at least December 2003. He believed he had been disabled since January 1999. He also said that he became incapacitated in 2011 and again in January 2014. As a result, he said his application date should be adjusted. This would result in additional retroactive disability pension payments.

[12] The Minister initially accepted that the Claimant had a severe and prolonged disability since January 2014. The Minister agreed he was entitled to a CPP disability

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<sup>6</sup> See AD33-1.

<sup>7</sup> See ADN1-1. Note that two documents bear this page number. The page number should be ADN1A-1.

pension based on his application date. However, the Minister disputed that he was disabled by the end of 2003. The Minister also said he did not meet the CPP incapacity requirements, and therefore did not qualify for any additional retroactive payments.

[13] However, by the end of the hearing, the Minister said it could no longer accept a disability onset in January 2014. The Minister said, due to the hearing evidence and the position taken by the Claimant, the Claimant did not qualify for a CPP disability pension. The Minister also maintained that the Claimant was not incapacitated as defined in the *Canada Pension Plan*.

[14] For the reasons set out below, I find that the Claimant is entitled to a CPP disability pension. His payments start as of July 2015. However, his incapacity argument fails.

## **Preliminary matters**

[15] Many of the concerns raised in this appeal were actually about the Claimant's other Tribunal proceedings. In this section, I will address the key concerns relating to this appeal only.

### *The Claimant did not attend the second part of the two-part hearing*

[16] This first part of the hearing took place on January 31, 2025. It lasted roughly three and a half hours. The Claimant and his witness, Dr. Lisa Keith (psychologist), attended the hearing. The Minister's representative and an assisting paralegal also attended, along with the Minister's witness and an observer. Due to the Claimant's concerns about the observer, I recommended that the Minister's observer leave the hearing. The observer left before any evidence was given.<sup>8</sup>

[17] The Claimant found the hearing process difficult. At the first part of the hearing, he had to leave several times. I eventually heard evidence from Dr. Keith and the Claimant. However, after giving evidence, the Claimant said he was unable to continue.

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<sup>8</sup> I explain this in more detail at ADN60-1. That letter responds to the Claimant's repeated concerns about the presence of observers at his hearing.

He also said he would not be able to make a closing statement. Dr. Keith also expressed concerns about his ability to process information. I had not yet heard evidence from the Minister's witness. Nor had I heard the closing submissions.

[18] To ensure that the Claimant could ask questions of the Minister's witness, and be able to make a closing statement, I decided that the hearing would continue at a later date. I said this would give the Claimant a chance to "regroup" and prepare questions. The continuation was scheduled for March 17, 2025.<sup>9</sup> I also arranged for a copy of the January 31, 2025, hearing recording to be sent to the parties before the continuation.<sup>10</sup>

[19] In the weeks that followed, the Claimant began to indicate that he would not be able to attend the hearing continuation.<sup>11</sup> At first, he said his attendance would depend on whether I would accept his late evidence and submissions.<sup>12</sup> However, he soon took the position that he would not attend the continuation in any event.<sup>13</sup>

[20] On March 3, 2025, Dr. Keith wrote a letter recommending that the Claimant be excused from attending the March 17, 2025, hearing for psychological reasons. She said she had consulted his family doctor.<sup>14</sup> The Minister suggested adjourning the March 17, 2025, hearing until such time that the Claimant could participate.<sup>15</sup>

[21] However, the Claimant affirmed that he would not participate due to psychological reasons.<sup>16</sup> He also said he would not participate in a hearing again or deal with any "further legal delay tactics of the Minister." He said he was not well. He did not think he was needed in the rest of the hearing process.<sup>17</sup> He also took the position that, "justice delayed is justice denied."<sup>18</sup>

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<sup>9</sup> See ADN0A-1.

<sup>10</sup> See ADN37-2.

<sup>11</sup> See, for example, ADN40-3 and ADN47-1.

<sup>12</sup> See ADN55-1.

<sup>13</sup> See, for example, ADN56-1 to ADN56-2.

<sup>14</sup> See ADN64-3.

<sup>15</sup> See ADN65-1 to ADN65-2.

<sup>16</sup> See ADN68-8, ADN69-1, and ADN70-3.

<sup>17</sup> See ADN70-2 and ADN70-3.

<sup>18</sup> See, for example, ADN34-9.

[22] I decided to proceed with the hearing on March 17, 2025, as the Claimant had said he would not participate further even if I adjourned the hearing scheduled for that date. However, I said my questions for the Minister's witness would consider the questions proposed by the Claimant in his earlier correspondence.<sup>19</sup> This would balance the Claimant's inability to attend with preserving procedural fairness.

[23] At the hearing continuation on March 17, 2025, the Minister's representative asked his own witness many of the questions proposed by the Claimant. Following the principles of procedural fairness and active adjudication, I asked the Claimant's remaining questions that could have some potential relevance in this appeal.

[24] The Minister made a closing statement at the end of the March 17, 2025, continuation. A copy of the March 17, 2025, hearing recording was then sent to the Claimant on March 18, 2025. I gave him until April 23, 2025, to provide a written closing statement.<sup>20</sup> I also gave him several extensions to provide that closing statement. The final deadline was June 6, 2025.<sup>21</sup>

[25] The Claimant provided a lengthy closing statement on June 6, 2025.<sup>22</sup> However, he also filed more than 60 other document batches between March 17, 2025, and June 6, 2025. These batches contained requests, submissions, and/or evidence.<sup>23</sup>

[26] In the circumstances, the Claimant had the best possible opportunity to participate fully in his hearing. While he did not attend the second part for medical reasons, his inability to attend personally was accommodated through a combination of having the recording and having any potentially relevant questions posed to the Minister's witness. I also gave him an extended period of time to make a closing statement. This approach also respected his desire to proceed with a hearing and decision as soon as possible. The Claimant supported this approach.<sup>24</sup>

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<sup>19</sup> See ADN72-1. See also ADN34-1, ADN34-3 to ADN34-9, and ADN70-3.

<sup>20</sup> See ADN74-1.

<sup>21</sup> See ADN78-1, ADN90-1, ADN105-3, and ADN119-4.

<sup>22</sup> See ADN146-1.

<sup>23</sup> See, generally, ADN73 to ADN146.

<sup>24</sup> See ADN76-28.

*Documents filed between the final response deadline and the first part of the hearing*

[27] The filing deadline in this appeal was November 18, 2024. The final response deadline, for parties to respond to anything filed up to November 18, 2024, was originally December 12, 2024.<sup>25</sup> However, at the Claimant's request, I granted a response period extension to December 31, 2024. Also at the Claimant's request, I extended the witness form deadline to December 31, 2024.<sup>26</sup>

[28] This means that nothing further should have been filed after December 31, 2024. The parties would have a chance to address any responding materials at the hearing itself. However, the Claimant filed several additional documents leading up to the hearing on January 31, 2024. One of these documents contained additional submissions.<sup>27</sup> One of them contained both submissions and new evidence.<sup>28</sup> Others were administrative in nature, but could perhaps qualify as submissions.<sup>29</sup>

[29] At the January 31, 2025, hearing, I explained that these documents were quite late and were filed well after the final response deadline of December 31, 2024. However, I decided that the overriding principle of fairness dictated that I allow all the documents to form part of the record. I asked if the Minister needed time to provide a written response to those documents. The Minister declined.

*Documents filed between the first and second part of the hearing*

[30] When the first part of the hearing ended on January 31, 2025, the parties agreed that they would not file any further documents before the hearing continuation on March 17, 2025.<sup>30</sup> However, within a week, the Claimant began to file submissions and new evidence.<sup>31</sup> Close to 30 batches of documents arrived by March 17, 2025. Some were

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<sup>25</sup> See ADN10-1.

<sup>26</sup> See ADN16-2 and ADN17-1.

<sup>27</sup> See ADN31.

<sup>28</sup> See ADN33.

<sup>29</sup> See ADN34, for example.

<sup>30</sup> See ADN37-1.

<sup>31</sup> See, for example ADN40 (mostly submissions) and ADN43 (mostly new evidence).

merely requests. But many of them were either submissions or new evidence. Some consisted of more than one document type.<sup>32</sup>

[31] I had advised the parties on several occasions that the filing deadline was December 31, 2024. Anything filed after that date could only be admitted in compliance with the *Social Security Tribunal Rules of Procedure* (the SST Rules). I said I would consider the newly filed documents in accordance with the SST Rules at the hearing continuation on March 17, 2025.<sup>33</sup>

[32] At the March 17, 2025, hearing, I said the SST Rules (as they then read) only provided a limited exception for late evidence. The SST Rules did not explicitly address late submissions then, although the treatment of submissions could be analogous to the treatment of late evidence.<sup>34</sup> I also noted that the SST Rules require fairness in the hearing process.<sup>35</sup>

[33] In reviewing the many late documents filed by the Claimant during this period, I noted that many of them purported to raise issues of procedural fairness. While some of those concerns arose from previous proceedings and had questionable relevance to this appeal, I felt it was important to preserve them as part of the record. In these unique circumstances, potential concerns about procedural fairness ought to be accessible. To do otherwise might itself raise the spectre of an unfair procedure.

[34] As for the late evidence, I observed that some of it was potentially highly relevant. For example, on February 7, 2025, the Claimant submitted more than 85 pages of e-mails sent or received by him between 2011 and 2016.<sup>36</sup> His disability and capacity status during that period is at the heart of this appeal. I believed it would be

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<sup>32</sup> See generally, ADN38 to ADN73.

<sup>33</sup> See, for example, ADN50-2.

<sup>34</sup> See section 42 of the *Social Security Tribunal Rules of Procedure* (SST Rules). This section was modified in May 2025 to address late written argument in the same way as late evidence.

<sup>35</sup> See sections 6 and 8 of the SST Rules.

<sup>36</sup> See ADN43-3 to ADN43-89.

unfair to exclude such evidence.<sup>37</sup> I also considered that the Claimant was self-represented and the difficulty he experienced at the hearing on January 31, 2025.

[35] Given the Claimant's repeated concerns about procedural fairness, I elected to allow all the new evidence, whether or not it appeared to be potentially relevant. It was often difficult to untangle what constituted new evidence and what was actually a submission. However, the principles of fairness also dictated that I should give the Minister an opportunity to respond to the many late submissions and evidence. The Minister waived the opportunity to respond to those documents.<sup>38</sup>

*Documents filed after the second part of the hearing*

[36] After the March 17, 2025, hearing, I advised the parties that I would only accept two further documents. The first was the Claimant's closing statement, although he appeared to have filed part of that statement already. The second was the Minister's reply to the Claimant's (final) closing statement.<sup>39</sup>

[37] As noted, however, the Claimant filed more than 60 further document batches between March 17, 2025, and June 6, 2025. These batches mostly contained requests and submissions. However, some of them contained new evidence as well. At least some of that new evidence was potentially relevant. For example, he submitted new medical evidence dating from June 2009 to July 2011.<sup>40</sup> Some batches contained more than one document type.

[38] For all these late documents, I took the same approach as I did to the late documents filed between January 31, 2025, and March 17, 2025. I accepted them all as part of the record. However, as with the previous batches of late documents, I gave the

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<sup>37</sup> See sections 42(1) and (2) of the SST Rules.

<sup>38</sup> See ADN74-1. See also section 42(2)(d) of the SST Rules.

<sup>39</sup> See ADN74-1 to ADN74-2.

<sup>40</sup> See ADN118-3 to ADN118-9.

Minister an opportunity to reply to them and to the Claimant's closing statement. The Minister again declined to respond to anything filed after March 17, 2025.<sup>41</sup>

*By changing its position at the hearing, did the Minister violate the Claimant's procedural fairness rights?*

[39] In written submissions dated November 8, 2024, the Minister conceded that the Claimant became disabled in January 2014.<sup>42</sup> However, in the March 2025 closing statement, the Minister said it could no longer maintain that position. The Minister said the Claimant's evidence, including the evidence of Dr. Keith, indicates that he did not become disabled at that time. Specifically, the Minister said the Claimant challenged the General Division's finding that he became disabled in January 2014.

[40] I see no reason why the Minister could not change its position at the end of the hearing. A party may change its position based on the evidence that was adduced. In my view, this is only a problem if the Claimant did not have an opportunity to respond to the Minister's change in position. That would raise the issue of procedural fairness.

[41] But, as noted above, the Claimant had a copy of the hearing recording. He had more than two months to respond to the Minister's change in position. The Claimant filed more than 60 batches of documents during that period. He also did not argue a January 2014 disability onset date at the hearing. He said he was disabled in January 1999, and certainly by the end of 2003. He said he was incapacitated in January 2014.

[42] As a result, I see no fairness concerns with the Minister's change in position.

*Did the Minister's conduct otherwise interfere with the Claimant's right to procedural fairness?*

[43] The Claimant made various allegations about the Minister's conduct in this appeal. For example, he was critical of the Minister's witness at the March 17, 2025,

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<sup>41</sup> See ADN147-1 and ADN148-1. For some document batches that contained evidence, I provided permission to rely on them at the time they were submitted. See, for example, ADN119-1.

<sup>42</sup> See ADN9-4 and ADN9-7.

hearing. The Claimant likened him to a seagull, who would “swoop in to testify...then [defecate] on other people’s heads.”<sup>43</sup> The seagull references were repeated later.<sup>44</sup> The Claimant also suggested that the Minister’s submissions were “pure and complete bullshit”.<sup>45</sup>

[44] My decision cannot be concerned with the effectiveness of a witness or a submission. My concern would be if any act by the Minister interfered with the Claimant’s ability to present his case or otherwise receive a fair hearing.

[45] I do not see that in this case. The Claimant received many opportunities to file evidence and submissions, even after the filing deadline. When he could not attend the second part of the hearing for medical reasons, he received a copy of the hearing recording and ultimately had more than two months to make final submissions based on that recording. As noted, either the Minister’s representative or I asked the Minister’s witness all the Claimant’s potentially relevant questions.

[46] The Claimant may not have appreciated the Minister’s written submissions. But I do not see anything in those submissions that amounts to a breach of procedural fairness.

[47] Cross-examining a witness can sometimes raise concerns about procedural fairness. However, in cross-examining the Claimant at the Appeal Division hearing, the Minister only asked the Claimant two questions. The Minister asked whether the Claimant had anything else that he’d like to share, and whether he felt that he’d had a fair process. In response, the Claimant even thanked the Minister’s representative for “not grilling Dr. Keith,” and said all he wanted was a civil dialogue.

[48] Again, I do not see anything in the Minister’s conduct that constitutes a potential breach of procedural fairness.

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<sup>43</sup> See ADN97-5.

<sup>44</sup> See, for example, ADN109-2, ADN120-16, ADN130-5, and ADN136-11.

<sup>45</sup> See ADN98-2.

### *Concerns with the use of Tribunal Navigators*

[49] The Tribunal has taken several initiatives to help parties with procedural aspects of their appeals. These are aimed at unrepresented or underrepresented parties. One of these initiatives is the Navigator program. A Navigator provides certain services to parties who may need assistance. This includes providing reminder calls about upcoming hearings and providing copies of documents. A Navigator can also provide basic information about how hearings might proceed.

[50] The Claimant suggested that he was unfairly denied access to a Navigator for certain tasks.<sup>46</sup>

[51] Despite the Claimant's assertion, Navigators are not legal professionals.<sup>47</sup> Nor are they a substitute for the same. They do not provide legal advice. They are not a form of Legal Aid. The scope of their services is limited. They do not work for or against a party. They must be neutral. They are not analogous to legal service providers that other parties might have.<sup>48</sup> Navigator assistance is also limited to the current appeal. They cannot help with other matters, legal or otherwise, that a party might be facing.

[52] I note that the Tribunal has no statutory obligation requirement to provide Navigators. Nor is the Tribunal obliged to provide representation for unrepresented parties. Finally, the Tribunal does not need to ensure that each party in a dispute has the exact same level of legal representation.

[53] Even at a very late stage in this appeal, the Claimant made repeated requests for immediate and extensive time with his assigned Navigator. For example, on May 21, 2025, he said he required "extensive time" with her to "extract the big medical-legal picture" of his appeal. The next day, he requested 5-10 hours of the Navigator's time to "fact check" his submissions.<sup>49</sup> He also wanted her help:<sup>50</sup>

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<sup>46</sup> See, for example, ADN110-4, ADN114-2, ADN114-3, ADN146-24 and ADN146-25.

<sup>47</sup> See ADN124-4.

<sup>48</sup> See the Tribunal's website at <https://sst-tss.gc.ca/en/your-appeal/navigators>, which affirms the limits on what Navigators will do.

<sup>49</sup> See ADN110-4 and ADN114-4. See also ADN118-1.

<sup>50</sup> See ADN114-3.

to “extract” the “Big Picture” of the [Claimant’s] administrative case file, especially in forensic “tracing” of the “**Big Lie**” [emphasis in original], and false perception, and “false picture”, the Minister’s [*sic*] of Employment, and Justice have attempted to “create”, via their “propaganda framing” of [the Claimant].

[54] In my view, these constitute requests for legal advice or representation.

[55] The Claimant received an exceptional amount of assistance from his assigned Navigator during this appeal. Even a cursory review of the record would confirm this. However, his recent requests went beyond even a generous interpretation of what a neutral Navigator could provide. As a result, I cannot find that he has been denied procedural fairness in that regard. I advised him of this on May 27, 2025.<sup>51</sup>

#### *Charter allegations*

[56] The Claimant made several submissions about the *Canadian Charter of Rights and Freedoms* (the Charter). These included allegations that his Charter rights had been infringed. For example, he claimed to be “psychologically detained by an administrative authoritarian system.” He also said his Charter-protected voice has been silenced.<sup>52</sup> It appears that most of the Claimant’s Charter-related concerns pertain to the conduct of the Minister.

[57] However, the Tribunal’s jurisdiction with respect to Charter concerns is limited. The Tribunal can only adjudicate Charter issues arising in the CPP legislation itself. The Tribunal cannot adjudicate Charter complaints about the conduct of parties. The Tribunal must also follow a special separate procedure for Charter matters. I made the Claimant aware of these limits.<sup>53</sup>

[58] I do not see any later attempt to impugn a specific CPP provision under the Charter, although the Claimant did refer to Charter rights generally. He also indicated

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<sup>51</sup> See ADN119-2.

<sup>52</sup> See, for example, ADN68-6, ADN68-7, ADN71-1, ADN73-6 to ADN73-17, ADN126-7, and ADN146-35 to ADN146-38.

<sup>53</sup> See ADN127-2. See also section 1 of the *Social Security Tribunal Regulations*.

that he would be addressing Charter issues at the federal courts and/or the criminal courts.<sup>54</sup> As such, I will not be making any findings on Charter-related issues.

*Demand for removal of the Minister's representative*

[59] The Claimant recently demanded that the Minister's representative be removed. This was not the first such request. He directed the latest demand at the Minister of Justice.<sup>55</sup> But a litigant cannot dictate who advocates for an adverse party. In any case, I do not have the authority to remove a party's representative.

*Demand for settlement*

[60] The Claimant asked me to compel the Minister to settle this matter, including the payment of damages.<sup>56</sup> I refused to take such action, noting that the Tribunal cannot compel any party to settle an appeal. However, I also explained to the Minister that they could respond to the Claimant's settlement desires if they wished.<sup>57</sup> I also note that the parties tried, and failed, to settle the matter as recently as November 2024.<sup>58</sup>

*The May 2025 potential allegation of bias*

[61] The Claimant made many allegations against Tribunal members assigned to his previous Tribunal proceedings. He has tried to file complaints against many of them.<sup>59</sup> On May 22, 2025, the Claimant expressed concern about various procedural matters. This included my handling of his request for access to a Tribunal Navigator.<sup>60</sup> I addressed the Navigator concern above.

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<sup>54</sup> See ADN146-8 to ADN146-9, ADN146-11 to ADN146-17, ADN146-20, and ADN146-36 to ADN146-38.

<sup>55</sup> See, for example, IS22-2, ADN21-2, ADN124-2, and ADN124-5.

<sup>56</sup> See, for example, ADN76-4 to ADN76-5 and ADN79-1.

<sup>57</sup> See ADN80-1.

<sup>58</sup> See ADN10-1.

<sup>59</sup> See, for example ADN113.

<sup>60</sup> See ADN114.

[62] On May 23, 2025, the Claimant twice said that if I did not comply with his recent Navigator requests, he would “immediately proceed to Criminal Court and file a ‘Criminal Complaint.’”<sup>61</sup>

[63] Out of an abundance of caution, I asked the Claimant by letter if he were making an allegation of bias against me in the current appeal. I explained that I would need to deal with any such allegation immediately, before taking further steps in this appeal. In that May 27, 2025, letter, I outlined the steps and the test I would have to apply.<sup>62</sup>

[64] In response, the Claimant suggested that he did not want to proceed with an allegation of bias in the present proceeding. He indicated that the issue was inconsequential in the present proceeding, as he intended to seek relief elsewhere. He also said he had made no prediction of how I would decide his appeal. He added that I had “listened the most” and had “accepted most of [his] submissions.”<sup>63</sup>

[65] I also note that, at the Appeal Division hearing, the Claimant agreed that he had a “fair process” that day. He said that I and another Appeal Division member (who handled his leave to appeal application) had “tried their damndest” to provide a fair process. Earlier, he acknowledged how much time I had taken to conduct the two hearings.<sup>64</sup>

[66] In his response to my letter about bias, the Claimant added that, “justice delayed is justice denied,” and believed he would go directly to the federal courts if I did not continue handling this appeal.<sup>65</sup>

[67] As a result, I did not take the bias allegation steps set out in my May 27 letter. In my view, the Claimant did not want to proceed with a formal allegation of bias. I explained this in my May 30, 2025, letter.<sup>66</sup>

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<sup>61</sup> See ADN116-1 and ADN116-4.

<sup>62</sup> See ADN119-3.

<sup>63</sup> See ADN124-2 to ADN124-3 and ADN126-8. See also ADN123-6.

<sup>64</sup> See ADN76-12.

<sup>65</sup> See ADN124-2 to ADN124-3.

<sup>66</sup> See ADN127-2.

[68] On May 31, 2025, the Claimant affirmed that he did not want to “rehash” the question of administrative bias. He added that I needed to rule on the merits of his appeal.<sup>67</sup> This further supports that he did not want to proceed with a formal allegation of bias. However, in the first week of June, his position was no longer so clear.

*The June 2025 potential allegation of bias*

[69] On June 5, 2025, the Claimant appeared to suggest that his concerns with my handling of the appeal were contingent on my eventual decision.<sup>68</sup>

[70] On June 6, 2025, the Claimant made his lengthy final submissions. Some, but not all, parts seem to contradict the position he took the week before on a potential allegation of bias.

[71] The first part of those submissions expressed hope that I would follow in the footsteps of another Tribunal member who had granted the Claimant leave to appeal in this proceeding. The Claimant hoped that I would not follow in the footsteps of “so many other Members and SST-Chairs.” He hoped that I would “see the light.”<sup>69</sup>

[72] In my view, this is inconsistent with an allegation of bias. The Claimant does not express concern that I am unable to adjudicate the appeal fairly. Only a week before, he was unable to predict how I would decide the appeal. He also said I had listened the most, and had accepted most of his submissions.

[73] However, as his June 6 submissions progressed, the Claimant’s tone changed.

[74] Firstly, the Claimant suggested that I tried to “frame the conversation” at the January 31, 2025, hearing. This was rooted in an exchange where, in my view, the Claimant began to cross-examine me. I informed him that, as the Tribunal member, my role was to conduct the hearing and set limits on it. Specifically, I used the phrase “I’m

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<sup>67</sup> See ADN130-7 and ADN130-10.

<sup>68</sup> See ADN145-1.

<sup>69</sup> See ADN146-10 and ADN146-11.

asking the questions.”<sup>70</sup> In my view, this is an appropriate position for a Tribunal member to take when a witness is trying to take control of the hearing.

[75] The Claimant has been vigorously advocating for himself throughout the various proceedings at the Tribunal. However, vigorous advocacy cannot extend to cross-examining the adjudicator and replacing the adjudicator’s hearing management with his preferred form.

[76] Ultimately, the adjudicator must remain the master of proceedings. The Claimant described this as an attempt to “enslave” him.<sup>71</sup> The underlying question raised by the Claimant is who sets the limits at hearings and in procedural management at an administrative tribunal. Is it the Tribunal member or the Claimant? In my view, this role must fall to the Tribunal member. A party to the proceedings cannot “frame” those same proceedings. A duty of procedural fairness is owed to all parties, not just one of them. The Tribunal member is positioned to do that.

[77] Secondly, the Claimant went on to direct the following comments toward me near the end of his June 6, 2025, submissions:<sup>72</sup>

[Tribunal Member], your “protests” that the December 24, 2024 letter was uploaded, is in fact ethically disgusting...

Your belief that somehow [the Claimant] was wanting the SST-Navigator to “advocate” for him, is in fact a disgusting Big Lie...

As I have stated elsewhere you continue to administratively “grasp at straws”... This Dante’s “Divine Comedy” administrative “last ditch effort”, in this the eighth circle of “Hell”, will fail.

[Tribunal Member], if this is “where you want to hang, your ‘I’m asking the questions’ hat...then [Tribunal Member] please feel free” to “take sides” with the “Big Lie” Minister....

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<sup>70</sup> See ADN146-21.

<sup>71</sup> See ADN124-4.

<sup>72</sup> See ADN146-22 to ADN146-26.

[The Claimant] believes that the abusive cruel and unusual punishment by SST Members is well documented, and heard time and again in the “audiotapes”. [The Claimant’s] “security” has been threatened numerous times. Fact. The March 17, 2025 hearing is just one more “instance”...

Be advised, [Tribunal Member], as Dante stated; “Abandon all hope, ye who enter here.”

... Everything is indeed “on this Devil’s table”, [Tribunal Member], including a Criminal complaint, for the criminal perversion, and the “obstruction of the course of justice”.

You do “understand”...?

The Navigator will figuratively play the “role” of “Devil’s advocate”, in navigating the “Road to Hell”, and the “Deal with the Devil”.

Have you also made this administrative deal with the Devil? Sold your soul? Very Goethe’s “Faust” like....

Is [Tribunal Member who granted leave to appeal] the only Member with a “moral, ethical, and legal compass”?...

Are you also complicit? ...

[78] In my view, these submissions require me to consider whether the Claimant was making another potential allegation of bias. But I must consider it in context. Had such a submission shown up in any other proceeding, I almost certainly would have taken the steps mandated by the Supreme Court of Canada in a 1978 decision called *Committee for Justice and Liberty*.<sup>73</sup>

[79] Those steps would require evidence from the Claimant, my application of the test for apprehension of bias, and a written decision with my findings. If I found that there was a reasonable apprehension of bias, I would then have to step down and another Tribunal member would assume carriage of this matter.

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<sup>73</sup> See *Committee for Justice and Liberty v National Energy Board*, [1978] 1 S.C.R. 369, at page 394.

[80] However, in the unique circumstances of this case, I find that the Claimant's June 6 assertions do not constitute an allegation of bias.

[81] The Claimant's evidence would have to show that a reasonable person would view the situation as raising a reasonable apprehension of bias. The focus must be on what others would think of the situation. It is not about the Claimant's thoughts or mistrust of the process.<sup>74</sup>

[82] But the Claimant has not provided such evidence. And, in my view, he does not want to provide such evidence. He has made it very clear that he wants the Tribunal to decide the merits of his appeal, so he can pursue any further legal remedies at the federal courts. He believes those courts can provide him with the damages and costs he seeks, as he sees the Tribunal's decision as "inconsequential".<sup>75</sup> He has repeatedly referenced, with concern, the time it has taken to reach this point in his legal journey.<sup>76</sup>

[83] I also found that, only a week before the June 6 submissions, the Claimant was not interested in pursuing an allegation of bias. In the interim, I wrote only one substantive paragraph in response to his submissions leading up to June 6. That paragraph merely confirmed that I had made decisions on his arguments already.<sup>77</sup>

[84] In fact, as noted, parts of the Claimant's June 6, 2025, letter appeared to express hope that I would find in his favour. Similarly, only a week before, he said he had made no prediction of how I would decide his appeal. At that time, he said I had "listened the most" and had accepted most of his submissions.

[85] In the circumstances, I will not be taking any further steps with respect to a potential allegation of bias.

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<sup>74</sup> See *Committee for Justice and Liberty v National Energy Board*, [1978] 1 S.C.R. 369, at page 394. See also ADN119-3.

<sup>75</sup> See, for example, ADN124-2 to ADN124-3, ADN126-9, ADN142-1, ADN146-10, ADN146-12, ADN146-20, and ADN146-24.

<sup>76</sup> See, for example, ADN116-2 to ADN116-3, ADN124-3, ADN126-7, ADN126-10, and ADN142-1.

<sup>77</sup> See ADN133-1.

*The issue of anti-Semitism*

[86] The Claimant made many submissions about the conduct and motivations of the Minister, the Minister's representatives, and Tribunal members. In turn, many of these submissions make accusations of anti-Semitism.

[87] For example, the Claimant appeared to accuse the Minister of following a "Nazi playbook" including psychological warfare, propaganda, and associating Jews with rats. He also suggested that the Minister's approach to this appeal reflected the Minister's apparent belief that Jews also commit blood libel and eat your children.<sup>78</sup>

[88] The Claimant also accused the Minister of creating a hate-driven "Museum of Excrement." He suggested that the Minister's representative engaged in hate speech. He believed that the Minister tried to dispose of him as "garbage." He suggested that his appeal was partly about the "history of anti-Semitism in Canada, Europe, and globally."<sup>79</sup>

[89] The Holocaust was an unspeakable horror. The Claimant's parents survived it, but they both suffered from PTSD. In turn, the Claimant said he suffered intergenerational trauma. He also submitted that he has been the victim of anti-Semitism throughout his life. To give but one example, he indicated that his family's name change was in response to anti-Semitism.<sup>80</sup> I do not question any of those things.

[90] However, the alleged conduct of previous Tribunal members and Minister's representatives is not relevant to my assessment of his disability and incapacity.

[91] My role is not to adjudicate how the Claimant has been treated in the past. I must focus on his capacity to work. Depending on my findings on that issue, I may also have to look at his capacity to apply for a CPP disability pension. While anti-Semitism may

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<sup>78</sup> See ADN146-18 and ADN146-21.

<sup>79</sup> See ADN146-19.

<sup>80</sup> See, for example, ADN10-57 to ADN10-61.

ultimately contribute to his medical conditions and a lack of work capacity, I cannot make findings on who may have been motivated by anti-Semitism.

[92] As noted, I take allegations of procedural unfairness very seriously. But I am not persuaded that the Claimant was denied procedural fairness for any reason, including alleged anti-Semitism, during this appeal.

[93] The Claimant does appear to understand the Tribunal's limited mandate. Many of his submissions suggest that he merely wants to get evidence and arguments "into the record" so that the federal courts can deal with his concerns. If he pursues judicial review at the Federal Court of Appeal, that court will decide whether any of that evidence or argument is relevant to his judicial review application.

## **Issues**

[94] The issues in this appeal are:

- a) Did the Claimant have a severe disability by December 31, 2003?
- b) If the answer to a) is "no," has the Claimant had a severe disability by April 30, 2014, but starting no earlier than January 1, 2014?
- c) If the answer to a) or b) is "yes," is his disability also prolonged?
- d) If the answer to c) is "yes," did the Claimant suffer from an incapacity that permits additional retroactive disability payments?

## **Analysis**

[95] There are two ways for the Claimant to succeed on the primary issue in this appeal. The first is to prove that he had a disability that was severe and prolonged by December 31, 2003. The second is to prove that he had a disability that became severe

and prolonged between January 1, 2014, and April 30, 2014. These dates are based on his CPP contributions.<sup>81</sup>

[96] The *Canada Pension Plan* defines “severe” and “prolonged”.

[97] A disability is **severe** if it makes a person incapable regularly of pursuing any substantially gainful occupation.<sup>82</sup>

[98] When assessing severity, I must look at all of the Claimant’s conditions together to see what effect they have on his ability to work.<sup>83</sup> If he can regularly do some type of work from which he could earn a living, he is not entitled to a disability pension.

[99] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>84</sup>

[100] The Claimant’s hearing at the General Division was a *de novo* hearing. The burden of proof is still on him. 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.

### **Did the Claimant have a severe disability by December 31, 2003?**

[101] I find that the Claimant did not have a severe disability by December 31, 2003. I will start my severity analysis by looking at his functional limitations around that date.

#### **– What were the Claimant’s functional limitations by the end of 2003?**

[102] I find that the Claimant’s main functional limitations by the end of 2003 were:

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<sup>81</sup> Service Canada uses a person’s years of CPP contributions to calculate her coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Claimant’s contributions are at ADN29-21 to ADN29-22. The existence of a brief prorated period in 2014 is unusual. However, it flows from the Claimant’s history of periodically sufficient contributions over an extended time. See sections 19 and 44(2.1) of the *Canada Pension Plan*.

<sup>82</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition.

<sup>83</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47, at paragraph 8.

<sup>84</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition.

- significant fatigue, including the need to lie down during the day 3-4 times per week.
- limits on the amount and type of stress he could handle at one time, or else his functioning would decrease.
- frustration and irritability when faced with too many mental demands.
- decreased cognitive function beyond a certain level of work.
- memory limitations, requiring steps such as taking extensive notes.
- requiring more time than in the past to prepare reports.
- trouble organizing and processing new information.
- a maximum session length of three hours.
- limits on the types of clients he could work with.
- a loss of creativity.
- some physical impairments, especially after prolonged activity.

[103] I find that these functional limitations are consistent with the 2003 medical evidence. Specifically, the Claimant was diagnosed in 2003 with post-concussion syndrome (mild brain injury), a mild cognitive disorder, adjustment disorders, and malaise and fatigue.<sup>85</sup> I will now explain how I determined the above functional limitations.

[104] As noted, the Claimant did not apply for the CPP disability pension until June 2016. At that time, he said his mood, anxiety, and stress levels interfered with his ability to perform the essential tasks of his job. He also said he suffered from sleep problems, chronic pain, acid reflux, and cholesterol.<sup>86</sup> He also answered a questionnaire about specific functional limitations.<sup>87</sup>

[105] But the Claimant's evidence from 2016 is so far removed from the end of 2003 that I prefer to explore documents created around 2003. Many significant events, including the decline and death of his mother, also took place between 2003 and 2016.

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<sup>85</sup> See IS47-3 and IS50-29.

<sup>86</sup> See GD2-150.

<sup>87</sup> See GD2-151.

For the same reasons, I prefer evidence from 2003 to the evidence retrospectively given at the General Division hearing or at the Appeal Division hearing. I find the 2003 evidence of his psychologists to have the most relevance.

[106] The relevance and importance of this evidence is heightened by the fact that I see no medical documents between August 2003 and June 2009. Even then, the June 2009 documents pertained mainly to some chest discomfort and not to any of the Claimant's long-term concerns.<sup>88</sup> Other than a December 2009 biopsy (related to gastritis and esophagitis), I then saw no other medical documents until 2011.<sup>89</sup>

[107] In February 2003, John Sullivan (psychologist) said prior testing of the Claimant revealed deficits in working memory and cognitive efficiency. He also had a relative deficit in verbal memory.<sup>90</sup>

[108] Mr. Sullivan said the Claimant still had significant fatigue. The Claimant had days when he felt unable to accomplish much. He was frustrated and irritable when demands on his mental resources exceeded what he could manage. If he tried to give more than 15 hours of direct client service per week, the resulting feelings of fatigue, frustration, and pressure impacted his cognitive functioning. He had to take a lot of notes while serving clients, as he could not rely on his verbal retention capabilities.<sup>91</sup>

[109] Mr. Sullivan said the Claimant also had to devote a lot of time to work other than direct service, including consultation and report preparation. He required more than the usual amount of time to create comprehensive and effective reports.<sup>92</sup>

[110] Dr. Keith's August 2003 report echoed much of what appeared in Mr. Sullivan's report. In August 2003, the Claimant said he had trouble with short-term memory. He sometimes lost the thread of conversations, and had trouble organizing and processing new information. He also reported a functional maximum of 60 billable (direct service)

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<sup>88</sup> See ADN107-3 and ADN118-3.

<sup>89</sup> See ADN118-4.

<sup>90</sup> See IS50-30.

<sup>91</sup> See IS50-30.

<sup>92</sup> See IS50-30.

hours per month and a maximum session length of 3 hours. He had limits on the types of clients he could treat, and thought he worked best with supervision.<sup>93</sup>

[111] Dr. Keith also recorded that the Claimant needed to lie down during the day 3-4 times per week, due to fatigue. He had episodes of poor mood. He was limited in the amount and nature of stress that he could cope with at any one time. Once he hit that limit, his functioning deteriorated and he needed “another set of eyes” to keep him on track. He also reported a loss of creativity. He reported some physical impairments, including left hip and leg problems after prolonged activity.<sup>94</sup>

[112] I will now look at the Claimant’s personal characteristics.

– **What were the Claimant’s relevant personal characteristics?**

[113] When deciding whether the Claimant had a severe disability, I must consider factors such as his:<sup>95</sup>

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

[114] These factors will help me decide whether the Claimant could work in the real world. I will look at each of them in turn. At this stage, I will **not** be considering his functional limitations. That comes in the next stage of my analysis.

[115] The Claimant was 48 years old at the end of 2003. He still had 17 years until reaching the typical retirement age in Canada. In my view, his age would not have been a significant real-world work barrier in 2003.

[116] The Claimant speaks English fluently. English is one of Canada’s official languages. I find that he had no real-world work barriers related to language.

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<sup>93</sup> See IS4-5.

<sup>94</sup> See IS4-5.

<sup>95</sup> See *Villani v Canada (Attorney General)*, 2002 FCA 248.

[117] The Claimant is very well educated. He attended university for eight years and has a master's degree in clinical psychology. He has also pursued various "continuing education" programs related to his area of expertise.<sup>96</sup> His education would prepare him for a broad range of jobs in the mental health field. He would also be qualified for work in other fields that required advanced reasoning or language skills.

[118] A large part of the Claimant's work career has been in the psychotherapy field. Most of this was in his private practice, although he worked briefly as a staff therapist at a children's mental health facility. He also did nearly ten years of concurrent college instructing. He did some work as a "pedagogue" in Switzerland. He did media work related to psychotherapy. He maintained a website on dream research.<sup>97</sup> He has also had several short-term stints as an electoral worker.

[119] The Claimant's education, age, and language ability were all very positive factors as of December 31, 2003. His work experience focused mostly on psychotherapy, although he would also have had some related business management and computer skills. However, I do not see any evidence of work requiring significant physical labour or a combination of physical and cognitive demands.

[120] I do not find it realistic for the Claimant, in his late 40s, to begin work requiring significant physical exertion.

[121] Ultimately, that would also apply to work with a combination of physical and some cognitive demands. Such jobs would include, for example, working as a cashier or shop clerk. The Claimant clearly had the intellectual capacity, but his strong academic orientation and lack of retail experience would likely have made him unsuitable for such work. I also note that his experience always saw him "in control" of his essential tasks. This would not be the case in retail or similar roles.

[122] In my view, the Claimant's personal characteristics would have let him work as a psychotherapist or teach courses related to that area. He could have done clerical work

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<sup>96</sup> See GD2-149 and IS50-4.

<sup>97</sup> See IS50-3 to IS50-4.

supporting other mental health professionals. He could have done certain types of computer and office work that did not require extensive training. He could probably have done work based on writing or presenting, including some media roles. The question is whether his functional limitations left him with any residual capacity for those jobs.

[123] This question is important because the law imposes a requirement on a person with residual work capacity. When a CPP disability applicant has some work capacity, he must show that efforts at obtaining and maintaining employment have been unsuccessful because of his health condition.<sup>98</sup>

[124] I will now apply the Claimant's personal characteristics to his limitations, so I can determine whether he had any residual work capacity by the end of 2003.

– **Did the Claimant have any residual work capacity by the end of 2003?**

[125] The Claimant did have residual work capacity by the end of 2003. I will now explain why.

*The 2003 reports*

[126] The 2003 reports from Dr. Keith and Mr. Sullivan form the basis for the list of the Claimant's functional limitations. However, those reports also described what the Claimant could still do as a psychotherapist. In fact, he was still working as a psychotherapist in 2003 and for many years after. Although he had periods when he temporarily stopped working, or drastically curtailed his work, he did not permanently stop this work until April 2016.<sup>99</sup>

[127] Mr. Sullivan said the Claimant's injuries did not prevent him from working in his field, but they placed a ceiling on the amount he could do.<sup>100</sup>

[128] Mr. Sullivan said the Claimant's attempts to move beyond 15 hours per week of direct client service caused frustration, fatigue, and cognitive functioning problems. This,

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<sup>98</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117, at paragraph 3.

<sup>99</sup> See GD2-149.

<sup>100</sup> See IS50-31.

in itself, shows some work capacity, although it is less than the 25 hours/week of direct client service he did before the 1999 Accident.<sup>101</sup> But it is also important to note that psychotherapy involves both direct client service and supporting work. The supporting work could include report writing or administrative tasks.

[129] Dr. Keith reported an almost identical work capacity. The Claimant told her he thought he could manage 60 billable hours (e.g., direct client service hours) per month, if he limited the number of difficult cases and suicidal patients. Once again, this is less than the 100 billable hours per month that he did before the 1999 Accident.<sup>102</sup> But it also excludes supporting work.

[130] At the Appeal Division hearing, the Claimant said 60 billable hours was “wrong.” He believed he quoted that figure “out of denial.” He also suggested that this may have been an error by either himself or Dr. Keith. But I prefer the 2003 evidence over the 2025 evidence regarding his 2003 work capacity. Even for individuals with no memory concerns, contemporaneous evidence tends to be more reliable than evidence given many years later.

[131] It therefore appears that the Claimant had work capacity as of August 2003. The evidence points to a work capacity of 15 client service hours per week, where client service hours do not represent the entire time commitment. The August 2003 date is significant because that is the date of the last medical evidence in 2003. Further, at that time, Dr. Keith expected a further functional improvement.<sup>103</sup>

[132] I do not see any change in the Claimant’s work capacity between August 2003 and December 31, 2003. I see no contemporaneous evidence, medical or otherwise, from that period. In fact, I saw no medical documents at all for the period between August 2003 and June 2009. Also, at the Appeal Division hearing, he did not describe any medical treatment between 2003 and 2011. He said he took no medication during that period either. Dr. Keith said she did not see him during that period.

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<sup>101</sup> See IS50-30.

<sup>102</sup> See IS4-4 and IS4-5.

<sup>103</sup> See IS47-4.

[133] At the January 2025 Appeal Division hearing, the Claimant described the 2003-2009 period as a relative “eye of the hurricane.” He received a settlement in 2003, and things were calm in 2009. He had limitations, but said he was being responsible with his caseload. However, he said it was no longer appropriate for him to see people by 2011.<sup>104</sup> He provided an example of a detailed professional letter he wrote in February 2009.<sup>105</sup>

[134] Besides work activity, I can also consider activities of daily living when assessing work capacity.<sup>106</sup>

[135] Between 2006 and 2008, for example, the Claimant averaged \$4,432.82 each year in vehicle expenses and \$1,000.08 each year in book expenses.<sup>107</sup> This suggests he was regularly engaged in activities such as driving and reading. In 2008 and 2009, he built a website for commercial purposes.<sup>108</sup> In 2010, he went on a trip to Europe.<sup>109</sup> Around that time, he wrote a professional article and started working on another project in his area of expertise. He said he could still write and express himself.<sup>110</sup>

[136] All these activities, which took place after December 2003, display the Claimant’s ability to complete his activities of daily living. Such activities require the ability to focus on tasks and do complex activities such as driving a car. The Claimant himself stressed the importance of safe driving on many occasions, particularly as he grew concerned about his elderly mother’s ability to drive. He would either drive her to appointments or supervise her driving to ensure she did not endanger others.<sup>111</sup>

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<sup>104</sup> The Claimant made similar statements in the past. In 2022, he said he was not completely disabled and “muddled along” until his mother’s accidents began in 2009. See AD34-2.

<sup>105</sup> See ADN101-1 to ADN101-5.

<sup>106</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248, at paragraph 40.

<sup>107</sup> See GD10-3, GD10-4, GD10-8, GD10-9, and GD10-15.

<sup>108</sup> See the Claimant’s evidence at the Appeal Division hearing.

<sup>109</sup> See IS47-6.

<sup>110</sup> See ADN51-57.

<sup>111</sup> See, for example, GD1-8, IS80-2, and the General Division hearing recording at 1:46:01 to 1:47:53.

[137] Based on the Claimant's demonstrated and documented work capacity, including his ability to complete his activities of daily living, I conclude that he Had residual work capacity by December 31, 2003.

[138] Having residual work capacity does not, in itself, preclude a severe disability by the end of 2003. But, as he had some work capacity, the Claimant must show that efforts at obtaining and maintaining employment were unsuccessful because of his health condition.<sup>112</sup>

– **Were the Claimant's efforts at obtaining and maintaining work unsuccessful because of his health condition?**

[139] The Claimant has not proven, on a balance of probabilities, that his efforts at obtaining and maintaining work were unsuccessful because of his health condition. This applies to the period leading up to at least December 31, 2003. I will now explain why.

[140] Firstly, while I don't need to look beyond 2003 for this particular qualifying period, I note that the Claimant appeared to retain work capacity and work steadily for many years after that.

[141] For example, in December 2011, Dr. Keith said the Claimant's symptoms first appeared on October 15, 2010. Dr. Keith agreed he was substantially unable to perform the essential tasks of his employment at the time of his mother's October 2010 accident, because of that accident. But she also said he had **no** disease, condition or injury **before** the accident that affected his ability to perform activities such as his work.<sup>113</sup>

[142] Although he did not appear to be receiving any medical treatment for many years, the Claimant said he was looking for a doctor or psychologist in 2006 to supervise his caseload. He did this so that he could make professional diagnoses (as a psychologist would) rather than just provide therapy to his clients.<sup>114</sup> This also points to some capacity at that time.

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<sup>112</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117, at paragraph 3.

<sup>113</sup> See IS52-3 to IS52-5 and IS52-20. Dr. Keith made similar statements in September 2011 and June 2012: see IS52-8 and IS52-14.

<sup>114</sup> See the Claimant's evidence at the Appeal Division hearing.

[143] I agree that the Claimant did not work full-time hours in 2003 or afterward. Nor did he work as a college instructor or in the media. These appeared to be largely precluded by his health condition, at least in addition to his ongoing work as a psychotherapist. But capacity for full-time employment is not the threshold for a severe disability.

[144] As I will discuss in more detail below, the Claimant's **net** income likely wasn't "substantially gainful" during most (if not all) of the period starting in 2003. But as he had some residual work capacity, that is not the essential element of the test anyway. As he continued to work as a psychotherapist, albeit at a less than full-time level, the test is whether his efforts at maintaining that work were unsuccessful due to his health condition.

[145] I cannot find that the Claimant's efforts at maintaining his part-time psychotherapy practice were unsuccessful due to his health condition. He continued in this role for more than six years after his (initial) qualifying period expired on December 31, 2003. By any measure, I cannot consider his efforts unsuccessful. I find that he could persist in this role for many years until a setback triggered primarily by his mother's second car accident.

[146] Before moving on to the next question, I will look at the Claimant's reported income and determine its impact on a finding of severity by 2003.

#### *The Claimant's income*

[147] For the reasons set out in the following paragraphs, I find that the Claimant's reported income does not establish a severe disability by 2003.

[148] Over his work career, much of the Claimant's income has been through self-employment. He had a period of conventional employment in 1988. That year was also his second-highest earnings year (\$23,986.00) even without adjusting for inflation.<sup>115</sup>

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<sup>115</sup> See IS1-8.

[149] A “substantially gainful” occupation pays a salary or wages equal to or greater than the maximum annual CPP pension. But this definition was only introduced in 2014.<sup>116</sup> Before 2014, the Minister often cited a similar “guideline” that was not formally defined in the legislation. However, the Tribunal’s predecessor warned against applying that “guideline” mechanically.<sup>117</sup>

[150] Gross income consists of all amounts paid to the Claimant for his counselling services. If he purchased materials on behalf of his customers, he would deduct the cost of those materials from gross income to give his gross profit. Naturally, he did not make such deductions, as he provided a pure service rather than a combination of service and materials.

[151] The Claimant’s gross profit should correspond to the billable value of his labour for the year. He would then deduct his self-employment expenses from gross profit to give his net income for the year.

[152] Net income, plus any employment earnings, is what ends up on the Claimant’s record of CPP contributions. His record of CPP contributions suggests that he has not had substantially gainful earnings for many years. Certainly, he has not had any since the current definition of “substantially gainful” was introduced in mid-2014. If I were to apply the same definition to the preceding years, I would last see “substantially gainful” earnings for him in 2002.

[153] An important issue in this appeal is whether net income is an adequate reflection of the Claimant’s true work capacity. The Claimant’s position is that net income reflects work capacity. I do not agree that this is always the case. But I must still do a detailed analysis of his unique circumstances. It would be an error for me to not at least consider his net income.

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<sup>116</sup> See section 68.1(1) of the *Canada Pension Plan Regulations*.

<sup>117</sup> See, for example, the 2007 Pension Appeals Board decision in *Minister of Social Development v Nicholson*, CP 24143, at paragraphs 20 and 21. Pension Appeals Board decisions are not binding on the Tribunal.

[154] The Federal Court of Appeal said a business's profitability or loss is not necessarily an indicator of work capacity.<sup>118</sup> I agree. At the same time, self-employment requires a person to incur expenses that regular employees do not have. This is why an hourly labour charge to a customer usually significantly exceeds the hourly wage actually "earned" by the person doing the work. But failing to generate a "substantially gainful" profit does not, in itself, establish a severe disability.<sup>119</sup>

[155] A business's success is based on many variables. Many businesses lose money despite being run by people who are not disabled. Some businesses run by disabled individuals do not lose money. The Tribunal has also noted a natural tendency to overstate expenses and understate revenues for tax purposes.<sup>120</sup> While I make no findings about the Claimant's actions in that regard, it is nonetheless another factor to consider.

[156] As a result, self-employment earnings present many challenges in the context of a CPP disability claim. One of the reasons is that there is often a huge difference between gross income and net income.

[157] I will first set out the Claimant's reported earnings, for CPP purposes, during the period from 1988 forward:<sup>121</sup>

<u>Year</u>	<u>Unadjusted Pensionable Earnings</u>	<u>Self-Employment Flag</u>
1988	\$23,986	No
1989	(none shown)	?
1990	\$6,548	Yes
1991	\$17,049	Yes
1992	\$13,704	Yes
1993	\$14,787	Yes
1994	\$11,883	Yes
1995	\$14,988	No

<sup>118</sup> See *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316, at paragraph 7.

<sup>119</sup> See, for example, *T.C. v. Canada (Minister of Human Resources and Skills Development)*, CP26949 (2011, Pension Appeals Board), at paragraph 33. While decisions of the Pension Appeals Board are not binding on the Tribunal, they can have persuasive value.

<sup>120</sup> See *Minister of Employment and Social Development v PC*, 2021 SST 530, at paragraphs 33-35. While other Tribunal decisions are not binding, they can have persuasive value.

<sup>121</sup> See IS1-8, IS81-17, and IS81-18.

1996	\$4,617	No
1997	\$9,369	No
1998	\$25,291	Yes
1999	\$5,500	No
2000	\$610	?
2001	\$2,430	?
2002	\$18,606	Yes
2003	\$8,145	Yes
2004	(none shown)	?
2005	(none shown)	?
2006	(none shown)	?
2007	(none shown)	?
2008	\$894	(No – based on T4)
2009	\$7,508	Yes
2010	\$13,184	Yes
2011	\$5,941	(No – based on T4)
2012	\$5,910	? (Maybe – no T4)
2013	(none shown)	?
2014	\$1,958	?
2015	\$2,411	(No – based on T4)
2016	(none shown)	?
2017	(none shown)	?
2018	\$522	(No – based on T4)
2019	\$2,288	(No – based on T4)
2022	\$3,134	(No – based on T4)

[158] In 2010, the maximum monthly CPP disability pension was \$1,126.76. This corresponds to an annual pension of \$13,521.12. That is only \$337.12 more than the Claimant's reported (net) income. This shows that he was very close to substantially gainful earnings in 2010 using the mid-2014 (and forward) definition.

[159] I will dig deeper to examine the nature of the Claimant's business earnings and expenses. Unfortunately, I only see detailed records (in the form of tax returns) for the years 2006 through 2008. Despite the limited scope of this information, the impact of self-employment expenses is very clear and consistent.

<u>Year</u>	<u>Gross income</u>	<u>Gross profit</u>	<u>Business expenses</u>	<u>Net business income</u>
2006	\$13,586.75	\$13,586.75	\$19,752.56	(\$6,165.81) <sup>122</sup>

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<sup>122</sup> See GD10-2 to GD10-4.

2007	\$18,142.25	\$18,142.25	\$19,375.41	(\$1,233.16) <sup>123</sup>
2008	\$20,512.25	\$20,512.25	\$23,391.74	(\$2,879.49) <sup>124</sup>

[160] The Claimant's gross income and gross profit for each of these years exceed the "guideline" for determining "substantially gainful." It is the high level of business expenses that reduces his net business income below zero for each of these years. But is net business income an accurate measure of his work capacity?

[161] I note, for example, that the Claimant deducted motor vehicle expenses of \$4,269.10 in 2006 and "meals and entertainment" expenses of \$394.74.<sup>125</sup> In my view, a counselling client would not expect these expenses to be part of the fees charged. This is different from a situation where a business owner has to bid on contracts or has to perform the work at the client's location. It would be reasonable to expect the price charged to cover some of those costs.

[162] I see similar expenses claimed in 2007. The Claimant deducted "meals and entertainment" expenses of \$417.12 and motor vehicle expenses of \$4,564.45.<sup>126</sup> Likewise in 2008: he deducted "meals and entertainment" expenses of \$413.12 and motor vehicle expenses of \$4,464.90.<sup>127</sup> This works out to nearly \$5,000.00 per year for these two expense categories for the years 2006 through 2008. These are just one part of nearly \$21,000.00 in annual expenses that he averaged during that period.

[163] At the Appeal Division hearing, the Claimant said that his business expenses during the 2006-2008 period would have been mostly typical of his business expenses for the years 2002 to 2014. It follows that his 2010 net income, for example, would likely significantly understate his actual earning capacity.

[164] Before the new 2014 definition of "substantially gainful", the Tribunal's Appeal Division commented on that term's meaning. The Appeal Division said "substantially

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<sup>123</sup> See GD10-7 to GD10-9.

<sup>124</sup> See GD10-12 to GD10-15.

<sup>125</sup> See GD10-3.

<sup>126</sup> See GD10-8.

<sup>127</sup> See GD10-15.

gainful” included compensation that reflected the appropriate award for the nature of the work performed.<sup>128</sup> Thus, regardless of the Claimant’s net business income, he could have been fairly remunerated if his work paid for personal expenses such as vehicle expenses, meals, and entertainment.

[165] Also, self-employment was not the only option available to the Claimant. Instead of self-employment, he likely would have been able to take on a part-time case load as an employed psychotherapist. If employed in that way, he would not have had any business expenses. He then would have been much more likely to have a substantially gainful income. As noted, even without adjusting for inflation, his second-highest year of earnings (1988) was a year in which he was employed rather than self-employed.

[166] At the Appeal Division hearing, Dr. Keith said a typical hourly rate for psychotherapy services between 2002 and 2010 would have been between \$100.00 and \$120.00 per hour. She affirmed that a full-time case load for a self-employed psychotherapist would be maybe 25-30 hours of direct client service per week. Report writing and administrative tasks would increase the workload to 40-45 hours per week. She did not know the hourly wage for an employed psychotherapist.

[167] While the Claimant would not have earned \$100.00 to \$120.00 per hour as an employed psychotherapist in the years following 2003, I find that his earnings would likely have exceeded his reported net income from self-employment. As a result, I cannot rely on his self-employment net income as a complete measure of his work capacity or his disability’s severity.

[168] The Claimant was also doing some unpaid work, such as building a website, around this time. This may have impacted the time or energy he had for paid work that would have been reflected in his net income.

[169] Considering all the above, I find that the Claimant could not have had a severe disability starting by December 31, 2003. This finding considers:

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<sup>128</sup> See *G. T. v Minister of Human Resources and Skills Development*, 2013 SSTAD 5, at paragraph 55. While other Tribunal decisions are not binding, they can have persuasive value.

- his work capacity by that date.
- his ability to continue his psychotherapy practice for several years afterward.
- his gross business income.
- his related activities (such as publishing work and building a website) that carried value.
- his ability to carry on substantial activities of daily living.

[170] Before looking at whether the Claimant became disabled in early 2014, I will briefly consider the issue of supervision over his professional work.

#### *The issue of supervision*

[171] I saw suggestions that the Claimant was always supervised. This could suggest a lack of independent work capacity.

[172] However, at the Appeal Division hearing, the Claimant said that he stopped having supervision in 2014 because he no longer did any diagnostics. He said he was always in a supervised practice, except for patients paying out of their own pockets. This suggests that supervision was not strictly required: that only happened when he went beyond therapy to a diagnostic role. As a result, I find that supervision is not determinative of whether he had a severe disability by December 31, 2003.

#### *Next steps*

[173] I have found that the Claimant did not have a severe disability by the end of 2003. But this is not the end of my analysis. I must now consider whether he began to have a severe disability in the first four months of 2014.

### **Did the Claimant have a severe disability by April 30, 2014, but starting no earlier than January 1, 2014?**

[174] This four-month period is a very narrow window in which to establish the onset of a severe disability. The near absence of any objective evidence from that period further complicates the task. However, on a balance of probabilities, I find that the Claimant became severely disabled in January 2014. I will now explain why.

– **The events leading up to the first four months of 2014.**

[175] The Claimant had a depressive setback after his mother's 2010 car accident and her adverse reaction to it.<sup>129</sup> An anticipatory grief reaction triggered this.<sup>130</sup> His doctor advised him to stop taking new patients in September 2011.<sup>131</sup> He was sleeping excessively and having nightmares.<sup>132</sup>

[176] The evidence points to a gradual improvement until August 2012, when Dr. Keith said the Claimant was ready to begin a graduated return-to-work program. Dr. Keith also said he would pace himself with the intention of **returning to full-time practice**. At the hearing, she said the Claimant also wanted to return to work.<sup>133</sup> Dr. Okorie (family doctor) supported a return to work too. The Claimant also believed he could return to work at this time.<sup>134</sup>

[177] The Claimant affirmed this medical support for work on several occasions. He said he was feeling more positive about his prospects, especially when the accident-related claims for him and his mother were resolved. They had legal help for those claims. His mother was feeling more positive too.<sup>135</sup>

[178] The Claimant said he “definitely had capacity to work again” around 2013. He even gave two university lectures in the fall of 2013.<sup>136</sup> He described this period as the “calm before the psychological storm.”<sup>137</sup>

[179] However, the Claimant was still very involved in helping his mother around this time. She relied heavily on him for practical and emotional support.<sup>138</sup>

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<sup>129</sup> See, for example, ADN20-8.

<sup>130</sup> See, for example, IS47-6 and ADN2-11. See also GD1-8.

<sup>131</sup> See IS47-7.

<sup>132</sup> See the General Division hearing recording at 1:48:12 to 1:48:57.

<sup>133</sup> See IS47-12, IS63-3, and Dr. Keith's testimony at the Appeal Division hearing.

<sup>134</sup> See ADN94-5, ADN109-1, and ADN146-28.

<sup>135</sup> See ADN33-8 and ADN97-16. See also the General Division hearing recording at 0:41:45 to 0:42:08.

<sup>136</sup> See ADN97-16.

<sup>137</sup> See ADN86-4.

<sup>138</sup> See IS51-8 and IS63-3.

[180] The Claimant said he suffered a major setback because of a series of events starting on January 11, 2014. His mother's dog became very ill, and had to be euthanized that day. His mother was convinced the dog had been poisoned, even though the dog's illness had nothing to do with poisoning.<sup>139</sup>

[181] The Claimant's mother had a rapid deterioration around this time. He said she began to exhibit extreme behaviour, including inappropriate nudity, sexuality, and violent (even homicidal) thoughts.<sup>140</sup> He said she had paranoid anxieties about being kidnapped.<sup>141</sup> In his words, she "went off the deep end" and "was out of control."<sup>142</sup> He said he had to threaten her with psychiatric hospitalization. This period, which may have extended into February 2014, was a breaking point for him.<sup>143</sup>

– **Changes in the severity analysis between 2003 and 2014**

[182] I already did a severity analysis for the period ending on December 31, 2003. However, my analysis for the first four months of 2014 recognizes that the Claimant's functional limitations would be slightly different from the 2003 functional limitations set out above.

– **Functional limitations around early 2014**

[183] I will first set out the Claimant's main functional limitations in early 2014. The subheading below will explain how I determined those limitations.

[184] I find that the Claimant's main functional limitations, by the end of April 2014 were:

- Emotional lability (lack of emotional control, tolerance, and stability).
- Lack of focus and concentration, including distractibility.
- Tangential communication.

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<sup>139</sup> See IS79-2 to IS79-3 and IS80-2. See also ADN97-16 and the General Division hearing recording, at 0:41:45 to 0:42:08.

<sup>140</sup> See IS63-3, IS80-2, and ADN2-9. See also the General Division hearing recording, at 0:42:01 to 0:42:42.

<sup>141</sup> See ADN2-9.

<sup>142</sup> See ADN86-4 and ADN97-4.

<sup>143</sup> See IS39-8, IS80-2, ADN86-4, and ADN97-16.

- Nightmares and difficulty sleeping, plus extended periods in bed.
- Memory difficulties, particularly short-term.
- Difficulty with organization and multitasking.
- Difficulty formulating treatment.
- Feeling helpless and overwhelmed.
- Suicidal ideation.
- Depressed mood and affect.
- Generalized rumination, anxiety, and worry.
- Various physical limitations, such as extended sitting, standing, reaching, and lifting.

[185] I see little or no medical evidence relating specifically to the Claimant in 2014 or 2015. However, I find that almost all of these functional limitations are consistent with the medical evidence from 2016.

[186] In June 2016, Dr. Keith diagnosed the Claimant with MDD. He also had an adjustment disorder with generalized and post-traumatic anxiety related to his mother's death.<sup>144</sup>

[187] Dr. Keith also mentioned physical complaints such as chronic pain, acid reflux, decreased physical stamina, and tinnitus. While she is a psychologist, not a family doctor, she was aware that the Claimant used Gravol and Nexium.<sup>145</sup> I therefore find it likely that the Claimant had acid reflux around this time. But I see little specific support for the other physical limitations he identified. These include difficulties with vision.<sup>146</sup>

[188] The two main mental health diagnoses could explain most, if not all, of the above limitations. The connection to the Claimant's physical limitations is not as obvious, but mental health and chronic pain can be connected. For this reason, I accept that the

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<sup>144</sup> See GD2-140.

<sup>145</sup> See GD2-142, GD2-144, and GD2-145.

<sup>146</sup> See GD2-151.

medical evidence may support the Claimant's physical limitations (other than vision and arrhythmia).

[189] I will now explain how I determined the above functional limitations. This is best shown by reviewing the evidence about the period between early 2014 and June 2017.

*Evidence about the period between early 2014 and June 2017*

[190] The Claimant said his mother's 2014 decline was a "traumatic blow," and his depression became much worse. He sometimes called it a delusional depression, with recurring nightmares.<sup>147</sup>

[191] The Claimant said his return to work failed at this time.<sup>148</sup> He said he no longer had emotional control, tolerance, or stability. He said he did not have the focus and concentration required for any type of work.<sup>149</sup>

[192] Dr. Keith affirmed that the Claimant experienced a serious emotional crisis in February 2014. It corresponded to a significant decline in his mother's mental health. He had high levels of depression, suicidal ideation, and nightmares. Accordingly, his return to work failed at this time.<sup>150</sup>

[193] The Claimant said he lost the will to live and contemplated suicide.<sup>151</sup> At the Appeal Division hearing, he said he was in bed for 12 hours on a typical day between January 2014 and June 2016. He said he was happy just to get his mother's funeral done.

[194] Dr. Keith was in contact with the Claimant in October 2014. She later admitted that she did not know first-hand how he was doing in the first few months of 2014. But she suggested that his October 2014 cognitive impairments would have been there in the spring of 2014 as well. Those impairments included difficulty with focus, short-term

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<sup>147</sup> See ADN1B-10, ADN2-10, and ADN139-3.

<sup>148</sup> See ADN20-8, ADN33-8, and ADN146-28.

<sup>149</sup> See ADN94-5.

<sup>150</sup> See IS63-3 to IS63-5. See also the General Division hearing recording, at 0:40:47 to 0:41:24.

<sup>151</sup> See, for example, ADN1B-10, ADN12-61, ADN33-8, ADN86-6, ADN97-16, ADN109-1, ADN139-3, and ADN146-28.

memory issues, tangential communication, and emotional lability. She also suggested that those impairments have never changed or improved.<sup>152</sup>

[195] In June 2016, Dr. Keith said the Claimant was unable to continue his work as a psychotherapist or return to any type of employment.<sup>153</sup> She noted disturbed sleep. His mood impairments included helplessness, depressed affect and irritability, episodes of tearfulness and reduced emotional control. He felt overwhelmed by environmental demands. He ruminated and had generalized anxiety and worry.<sup>154</sup>

[196] Dr. Keith also said the Claimant had several cognitive impairments. These included being easily distracted, having poor attention and concentration, and difficulty with organization and multitasking. Dr. Keith further noted physical complaints such as chronic pain, decreased physical stamina, tinnitus, and acid reflux. His various impairments interfered with his ability to participate in social events, family activities, and housekeeping.<sup>155</sup>

[197] The Claimant applied for a CPP disability pension in June 2016.<sup>156</sup> He said MDD caused issues with his mood, anxiety, and stress levels. He said these interfered with his ability to perform the essential tasks of psychotherapy. He also cited problems with sleep, chronic pain, acid reflux, and cholesterol.<sup>157</sup>

[198] In 2016, the Claimant said his functional limitations included:<sup>158</sup>

- Sitting/standing (30 minutes)
- Walking (4-6 blocks)
- Lifting/carrying (20 pounds, following a 2013 hernia operation)
- Reaching (problematic due to neck pain)
- Seeing (“having difficulties”)

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<sup>152</sup> See the General Division hearing recording, at 0:55:09 to 0:55:39, 0:57:28 to 0:58:23, and 1:03:27 to 1:03:54.

<sup>153</sup> See GD2-145.

<sup>154</sup> See GD2-144.

<sup>155</sup> See GD2-144 to GD2-145.

<sup>156</sup> See GD2-67.

<sup>157</sup> See GD2-150.

<sup>158</sup> See GD2-151.

- Remembering (“problems”)
- Concentrating (“problems”)
- Sleeping (“problems”)

[199] In 2016, the Claimant did not identify any real concerns with bending, personal needs (eating, washing hair, dressing), bowel/bladder habits, household maintenance (cooking, cleaning, shopping), speaking, or breathing.<sup>159</sup>

[200] In June 2017, the Claimant reported similar limitations that affected his ability to handle his job demands. Before he closed his practice, he had difficulty with concentration, short-term memory, and formulating treatment.<sup>160</sup>

– **What were the Claimant’s relevant personal characteristics in early 2014?**

[201] I must consider the Claimant’s relevant personal characteristics when deciding whether he had a severe disability. I already determined those characteristics as of December 2003. However, his personal characteristics by early 2014 must reflect that he was 10 years older. This would likely reduce his ability to retrain. But his other personal characteristics would be the same.

[202] For early 2014, the Claimant’s personal characteristics would have let him work as a psychotherapist or teach related courses. He could have done clerical work supporting other mental health professionals. He could probably still have done work based on writing or presenting (although I find it less likely that he could have done other forms of new computer or office work). The question is whether his functional limitations left him with any residual capacity for those jobs in early 2014.

[203] I will now apply the Claimant’s personal characteristics to his limitations, so I can determine whether he had any residual work capacity in the first four months of 2014.

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<sup>159</sup> See GD2-151.

<sup>160</sup> See GD2-120.

– **Did the Claimant have any residual work capacity in the first four months of 2014?**

[204] The Claimant did not have residual work capacity as of January 11, 2014. I will now explain why.

[205] January 11, 2014, is the key date because this is when the condition of the Claimant's mother deteriorated sharply. That was when her dog had to be euthanized. Her profound reaction placed demands on the Claimant that he was unable to handle. The analysis in the following paragraphs is based on his work capacity starting on January 11, 2014.

[206] I find that the Claimant was not capable of being a psychotherapist by early 2014. His cognitive and emotional limitations would have been too great. While he stopped doing therapy in 2014, he still carried professional insurance for another year, because some patients still needed legal closure of their files. Eventually, he transferred his clients who still needed therapy to other therapists.<sup>161</sup> He said his suicidal thoughts were not compatible with treating patients, as he risked doing harm to them.<sup>162</sup>

[207] I agree that being in a suicidal state precluded giving therapy. This does not require a detailed analysis. However, as noted, the Claimant's background left him capable of teaching courses or doing clerical work supporting other mental health professionals.

[208] Assessing work capacity for clerical support is not as clear as it is for therapy. I note that the Claimant still had a caseload of about five clients in 2014. He said it was just "housekeeping" to get the files to closure.<sup>163</sup> This "housekeeping" appears to have required some routine paperwork, which is akin to clerical support. Did he actually have the capacity for such support work?

[209] Ultimately, I cannot find that closing five files over a period of two or more years is indicative of work capacity. The Claimant would have been able to close those files

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<sup>161</sup> See IS85-2 and ADN51-88.

<sup>162</sup> See ADN94-4 to ADN94-6 and ADN97-4.

<sup>163</sup> See the General Division hearing recording, between 0:34:15 and 0:35:05.

on his own schedule. He appeared to have brief periods where he could do things. However, having periodic ability to do some paperwork is different from work capacity.

[210] To provide clerical support, the Claimant would need to conform to a schedule. He would also need to handle a significant file volume when he was working. His issues with sleeping, memory, organization, multitasking, and feeling overwhelmed were completely inconsistent with that. Furthermore, his problems with focus and concentration would have affected the quality of his work. As a result, I do not see any capacity for clerical work.

[211] The Claimant's background also left some options in teaching, writing, or presenting. These options would be precluded by the same limitations that precluded clerical work. Teaching, writing, and presenting usually also require significant personal interaction. His emotional lability, tangential communication, depressed mood and affect, and generalized anxiety and worry would further reduce any capacity for such work.

[212] The Claimant's other evidence also supports a lack of work capacity around this time. He appeared to have realized that his days of generating any meaningful income were finished. He said he sold his car, his condominium, and his guaranteed life insurance in early 2014.<sup>164</sup> In May 2014, he also terminated his "term" life insurance.<sup>165</sup>

[213] Similarly, Dr. Keith said the Claimant would be unable to guarantee adequate performance in any position on a consistent, regular basis. She said he would have difficulty with the cognitive demands necessary in any work environment, even with accommodations. She noted the need for rapid information processing, good short-term memory, good ability to perform under stress and time pressures, and good ability to multitask.<sup>166</sup>

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<sup>164</sup> See, for example, ADN1B-10, ADN12-61, ADN33-8, ADN97-16, ADN139-3, and ADN146-28.

<sup>165</sup> See ADN139-3 and ADN146-28.

<sup>166</sup> See GD2-145.

[214] As the Claimant had no work capacity by January 11, 2014, I must conclude that he was incapable regularly of pursuing a substantially gainful occupation. This means that he had a severe disability as of January 2014.

*The Claimant's periodic election work*

[215] The Claimant has been able to hold some extremely limited and temporary employment in the years since January 2014. However, in my view, this employment affirms the severity of his disability.

[216] The Claimant has frequently cited his intense belief in Canadian democracy. He has demonstrated that belief by assisting with various elections from time to time. These elections have been at the municipal, provincial, and federal levels.<sup>167</sup> The work was focused on the election days, but he appears to have done some work leading up to the election days too.<sup>168</sup>

[217] The Claimant said these brief periods of election work left him completely exhausted and incapable of doing anything for weeks afterward. He was paranoid about making errors or losing his focus.<sup>169</sup> Dr. Keith said that work remained challenging, and he received a complaint around 2019.<sup>170</sup> The Claimant also described a disastrous interview where he had to write things and use his working verbal memory.<sup>171</sup>

[218] The Claimant's inability to function after even minimal work affirms that he remained severely disabled and could not make a sustained contribution. In October 2019, he believed he would not be doing another election because of his age and the responsibility and stress that elections entail.<sup>172</sup>

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<sup>167</sup> See the General Division hearing recording, at 1:49:00 to 1:49:33. See also GD2-23, AD3-4, AD3-5, and AD13-3.

<sup>168</sup> See, for example, GD2-24.

<sup>169</sup> See the General Division hearing recording, at 1:10:50 to 1:11:23. See also AD13-3.

<sup>170</sup> See the General Division hearing recording, at 1:26:35 to 1:26:55.

<sup>171</sup> See the General Division hearing recording, at 1:27:43 to 1:28:27.

<sup>172</sup> See AD13-3.

[219] More generally, Dr. Keith did not draw a distinction between the Claimant's capacity in 2014 and his capacity by his 65<sup>th</sup> birthday on September 1, 2020.<sup>173</sup> This suggests that the Claimant likely remained severely disabled until at least then.

[220] Before deciding whether the Claimant's disability was also prolonged, I will briefly address the Minister's new position on a disability onset in early 2014.

*The Minister's new position on a 2014 onset*

[221] In finding that the Claimant became severely disabled in January 2014, I considered the Minister's modified position on this issue. At the hearing, the Minister said it could no longer support a disability onset date in the first four months of 2014. The Minister said its position changed because the Claimant and Dr. Keith gave evidence that he did not become disabled in that period. The Minister also said that, by initiating this appeal, the Claimant himself challenged the General Division's finding on this issue.

[222] I have already addressed the evidence concerning an onset date in the first four months of 2014. My findings did not align with the Claimant's position. But this does not mean that I must accept the Minister's position. I am not compelled to accept the position of either party: I must make a decision that is consistent with the law and the evidence.

[223] As for specific arguments against a disability onset in early 2014, the Minister said such a finding was precluded because the Claimant saw patients in 2014.

[224] As noted above, the Claimant stopped treating patients in 2014. In his suicidal state, giving treatment to patients was not appropriate. I agree that he still had some contact with a handful of patients. However, having periodic contact with patients does not itself prevent a finding of severity. He appeared to have brief periods where he could do some paperwork on his own schedule. But having periodic ability to do some unscheduled paperwork is different from work capacity.

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<sup>173</sup> See, for example, IS63-4.

[225] I also note that the Claimant's earnings from 2014 onward were likely not substantially gainful, as found above.

[226] I understand why the Minister modified its position at the hearing. However, I am not persuaded that I must adopt that modified position on the evidence before me.

### **Is the Claimant's disability also prolonged?**

[227] I find that the Claimant's disability is also prolonged. I will now explain why.

[228] While the Claimant has had suicidal thoughts, I am not persuaded that his disability will likely result in death. This means that his disability is only prolonged if it is likely to be long continued and of indefinite duration.

[229] In June 2016, Dr. Keith considered the Claimant's prognosis. She did not believe he was competitively employable in any job. She did not expect his psychological status to improve to the point where he could return to competitive, gainful employment. Such employment, even with part-time hours and modified duties, required consistent attendance and predictable performance.<sup>174</sup>

[230] Dr. Keith added that her prognosis for a full recovery was poor. She believed that the Claimant's depression, anxiety, and cognitive impairments were severe and prolonged. She said further treatment might assist in crisis situations, but it was unlikely to improve him enough to return to any type of work.<sup>175</sup> That same month, Dr. Keith believed that he had reached maximum recovery.<sup>176</sup>

[231] The issue of incapacity will be discussed intensively in the next section of this decision. While Dr. Keith's April 2019 declaration did not correctly interpret the meaning of incapacity in the CPP context, she considered the Claimant to have been incapable continuously from September 2011 until at least then.<sup>177</sup> This indirectly supports the ongoing nature of his disability.

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<sup>174</sup> See GD2-145.

<sup>175</sup> See GD2-146.

<sup>176</sup> See GD2-142.

<sup>177</sup> See ADN11-2.

[232] In September 2023, Dr. Keith suggested that the Claimant's emotional status started to decline further due to his ongoing legal proceedings. She tied the decline's start to the initial denial of CPP disability benefits in December 2016.<sup>178</sup>

[233] The above evidence persuades me that, as of January 11, 2014, the Claimant's disability was likely to be long continued and of indefinite duration. This means his disability was prolonged by the end of his prorated qualifying period on April 30, 2014.

[234] I will now consider whether the Claimant had an incapacity under the CPP at a material time. If he did, it could affect the start date of his disability payments.

### **Did the Claimant suffer from an incapacity that permits additional retroactive disability payments?**

[235] I find that the Claimant did not have an incapacity under the *Canada Pension Plan* beginning in January 2014 **or** sometime before he applied for the CPP. As a result, his CPP disability payments start as of July 2015. I will now explain why.

#### **– The general rule for retroactive disability payments**

[236] I found that the Claimant had a severe and prolonged disability by January 11, 2014. However, he is not entitled to begin receiving a CPP disability pension as of that date. According to the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before an application is made.<sup>179</sup>

[237] The Claimant applied for a CPP disability pension on June 28, 2016.<sup>180</sup> This means that he cannot be deemed disabled before March 2015. However, CPP disability payments can only start four months after the deemed disability date.<sup>181</sup> This means that his CPP disability payments do not start until July 2015.

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<sup>178</sup> See IS63-5. See also GD2-48.

<sup>179</sup> See section 42(2)(b) of the *Canada Pension Plan*.

<sup>180</sup> See GD2-67.

<sup>181</sup> See section 69 of the *Canada Pension Plan*.

[238] The only way an earlier payment date can apply is if a CPP pension recipient met the definition of incapacity under the CPP at a material time. I will now explore whether that provision applies to the Claimant.

– **Background for the CPP incapacity test**

[239] Under the CPP, **incapacity exists if a person is incapable of forming or expressing an intention to make an application for a benefit.**<sup>182</sup> If a person meets the incapacity criteria, their CPP pension application could be backdated. This is important because, as noted, the start of a CPP pension depends on the application date. With an earlier deemed application date, more pension payments would be available.

[240] However, the incapacity test is very difficult to meet. The ability to form or express an intention to make a benefit application is a very low threshold. The applicable test is not whether the applicant can make, prepare, process or complete an application for disability benefits. It does not depend on the physical capacity to complete the application. The test is whether the applicant has the mental capacity of forming or expressing an intention to do other things.<sup>183</sup>

[241] Similarly, it is not enough for an applicant to show that the idea of applying for a CPP disability pension did not occur to him. This can be particularly important when an applicant pursued other benefits at the relevant times.<sup>184</sup>

[242] The period of incapacity must also be a continuous one.<sup>185</sup> Intermittent periods of incapacity cannot be joined to create an extended period of incapacity.

[243] Before I review the applicable law in more detail, I note that the Claimant placed a lot of weight on the evidence from Dr. Keith. This included the Declaration of Incapacity completed by Dr. Keith on April 29, 2019.<sup>186</sup>

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<sup>182</sup> See section 60(9) of the *Canada Pension Plan*.

<sup>183</sup> See *Walls v Canada (Attorney General)*, 2022 FCA 47, at paragraphs 31 and 36.

<sup>184</sup> See *Maloshicky v Canada (Attorney General)*, 2018 FC 51, at paragraphs 44 and 45.

<sup>185</sup> See section 60(10) of the *Canada Pension Plan*.

<sup>186</sup> See, for example, AD1-2 and ADN11-2.

[244] However, medical evidence is not conclusive of incapacity: it is open to a decision-maker to measure that evidence against the relevant actions or activities of an applicant during the alleged period of incapacity. A Declaration of Incapacity is just one factor in such an analysis, not the determinative factor.<sup>187</sup>

[245] The Claimant also urged me to rely on the recent Federal Court of Appeal decision called *Blue*.<sup>188</sup> While *Blue* is just one of many binding decisions that consider the test for incapacity, it can still be a useful tool. The applicant in *Blue* also had a disability arising from psychological conditions. Accordingly, I will use *Blue* as the framework for my incapacity analysis.

– **Applying the CPP Incapacity Test**

[246] In *Blue*, the Federal Court of Appeal said the CPP incapacity test involves, at a minimum, consideration of the following matters:<sup>189</sup>

- (1) The applicant's evidence with respect to the nature and extent of his physical and/or mental limitations,
- (2) Any medical, psychological or other evidence adduced by an applicant in support of his incapacity claim,
- (3) Evidence of other activities in which an applicant may have been engaged during the relevant period, and
- (4) The extent to which these other activities cast light on the capacity of the applicant to form or express an intention to apply for disability benefits during that period.

[247] I will now look at each of these factors, with a focus on the period between January 11, 2014, and June 28, 2016.

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<sup>187</sup> See *Flaig v Canada (Attorney General)*, 2017 FC 531, at paragraph 22.

<sup>188</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211.

<sup>189</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211, at paragraph 42.

[248] January 11, 2014, is an important date because that is when the Claimant became severely disabled under the CPP. It would not make sense to explore incapacity in depth before that date, as the incapacity test is much more difficult to meet than the severe disability test. As retroactive payments could not predate the onset of a severe disability, there is also a limit on how far back incapacity would be relevant.

[249] June 28, 2016, is an important date because that is when the Claimant applied for a CPP disability pension. This act shows that he could form or express an intention to apply for disability benefits by that date. The question is whether he had that capacity during the relevant period leading up to June 28, 2016. If he didn't, the CPP incapacity provisions may help him get some additional CPP pension payments before July 2015.

*The Claimant's evidence about the extent of his physical/mental limitations*

[250] The Claimant made many explicit statements about whether he met the CPP definition of incapacity. He also made statements about when he met that definition. For example, in November 2024, he said he had been incapacitated since 1999. He also believed Dr. Keith would testify that he had been incapacitated since 1999.<sup>190</sup> In January 2025, he said he was incapacitated as of January 2014.<sup>191</sup>

[251] I prefer not to rely on mere assertions of incapacity by the Claimant. Those assertions may not have been consistent, or may have been based on an incorrect interpretation of the law. Instead, my summary of his evidence will focus on what he said about his specific physical and mental limitations and why he did not apply earlier. I can then consider that evidence together with the other *Blue* criteria.

[252] However, even when the Claimant discussed the specific reasons for not applying earlier, he provided at least two distinct narratives. One narrative was that he consciously chose not to apply for a CPP disability pension, and only applied in June 2016 when he had no other choice.

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<sup>190</sup> See ADN12-51, ADN12-53, ADN13-2, ADN13-3, and ADN13-5.

<sup>191</sup> See ADN34-5.

[253] For example, in February 2020, the Claimant said he would have continued to choose the same path (of not asking for assistance) if it would have been possible to reach age 65 without applying for a CPP disability pension. He took this position even though he believed he was entitled to such assistance. He said he was never a “free rider.” He stressed that he could have made other choices, such as applying for a CPP disability pension after the 1999 Accident.<sup>192</sup>

[254] The Claimant added that he also made a choice to care for his mother after her 2010 accident. He said this had major financial and psychological consequences. But he said he did it anyway because he was unwilling to put a price on his mother’s well-being. He asked, “how much is your mother worth?”<sup>193</sup>

[255] At the Appeal Division hearing, the Claimant again said he did not apply for the CPP disability pension until June 2016 because he has “never been a free rider.” He said his choice was between applying for the pension, suicide, or living in the gutter. He said he, “didn’t want to go through a nightmare...if I could have gotten to 2020, I would have.” The 2020 date appears to be a reference to when he would reach age 65. He said he was in bed twelve hours per day between January 2014 and June 2016.

[256] Another incapacity narrative focused on the Claimant’s conditions and limitations as an explanation for not applying earlier than he did.

[257] On August 2020, the Claimant said he did not apply for a CPP disability pension earlier because he was suffering from a major depression, disabled, and suicidal.<sup>194</sup>

[258] At the General Division hearing, the Claimant said he didn’t renew his Canadian Psychological Association membership or his professional liability insurance in 2016

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<sup>192</sup> See AD18-2.

<sup>193</sup> See AD18-2.

<sup>194</sup> See AD29-3.

because he was no longer doing therapy with clients. He said he was “out of his gourd” by that time.<sup>195</sup>

[259] In June 2025, the Claimant said he was “out of his gourd” after his mother’s November 2014 passing. He said he was “certifiably insane,” and added that there was “no way” he was going to be in a psychiatric hospital.<sup>196</sup>

[260] I have significant concerns about these competing narratives. Nonetheless, I will continue with a consideration of the medical evidence.

*Medical, psychological or other evidence adduced by the Claimant in support of his incapacity claim*

[261] I see little contemporaneous medical evidence relevant to the issue of incapacity before the Claimant applied for the CPP disability pension in June 2016. On June 20, 2016, Dr. Keith said his global assessment of functioning (GAF) score was between 45 and 55. This meant he had moderate to severe symptoms, and moderate to severe difficulty in social and occupational functioning.<sup>197</sup> But this is much more relevant to the question of disability than it is to the question of incapacity.

[262] Instead, Dr. Keith created most of the medical evidence regarding incapacity much later. Even so, Dr. Keith’s evidence has taken two distinct approaches. The first arose in April 2019. The second arose some years later, and is more consistent with her hearing evidence.

[263] In April 2019, Dr. Keith completed a Declaration of Incapacity form for CPP purposes. This is potentially highly relevant to the question of incapacity, for obvious reasons. Dr. Keith said the Claimant’s condition made him incapable of forming or expressing the intention to make an application. She said the medical condition causing the incapacity was MDD. She said his incapacity **began in September 2011 and was**

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<sup>195</sup> See the General Division hearing recording, at 0:52:40 to 0:53:33.

<sup>196</sup> See ADN139-3.

<sup>197</sup> See GD2-145.

**still ongoing.** She also said that no other physicians treated him during his incapacity.<sup>198</sup>

[264] As noted, a Declaration of Incapacity is not determinative. In this case, I do not assign much weight to the Declaration. It is inconsistent with the other evidence, including evidence from Dr. Keith herself.

[265] I do not see how the Claimant could have been incapacitated continuously from September 2011 to April 2019, as Dr. Keith suggests. In June 2016, he applied for a CPP disability pension. The very act of applying for the CPP pension precludes incapacity under the CPP. Dr. Keith was aware of this application, as she prepared a June 2016 medical report and a comprehensive letter in support of the application.<sup>199</sup> The Claimant said he applied for the pension after discussing it with Dr. Keith.<sup>200</sup>

[266] Furthermore, a continuous incapacitation from 2011 to 2019 also contradicts Dr. Keith's approval of the Claimant's return to work in August 2012. She said the Claimant could direct the pace at which he returned to full-time practice.<sup>201</sup> I cannot see how a person incapacitated under the *Canada Pension Plan* could be approved for work as a psychotherapist. As noted, Dr. Okorie also approved such a return.

[267] At the Appeal Division hearing, I asked Dr. Keith about the test she used for the April 2019 Declaration of Incapacity. She said she interpreted incapacity "pretty generally," and tied it to doing an application or thinking that he needed to do an application. This is not consistent with the statutory definition.

[268] In September 2023, Dr. Keith provided an account that was different from what she said in April 2019. While she maintained that the Claimant was incapacitated in September 2011, she said he could not make a "rational decision regarding his application" until 2016. She said he was incapacitated because he "could not reliably

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<sup>198</sup> See ADN11-2.

<sup>199</sup> See GD2-140 to GD2-146.

<sup>200</sup> See GD1-5.

<sup>201</sup> See IS47-12.

consider whether he should apply” for a CPP disability pension. She said 2016 was when he was no longer in an emotional crisis about his mother.<sup>202</sup>

[269] At the General Division hearing in April 2024, Dr. Keith said the Claimant was incapacitated when his symptoms interfered with his ability to file an application. She suggested that he was in denial about his ability to go back to work, and that this showed his incapacitation. She said it wasn’t until 2016, after an unsuccessful return, that he could accept that he could no longer work.<sup>203</sup>

[270] In December 2024, Dr. Keith told the Claimant her opinion had not changed since her September 2023 report and her April 2024 testimony. She used the same wording to assess incapacity as she did in September 2023. She said he was unable to appreciate the severity of his impairments and form the intent to apply. She believed that caring for his mother and negotiating her legal settlement(s) contributed to his incapacity.<sup>204</sup>

[271] At the Appeal Division hearing, the Minister asked Dr. Keith when the Claimant regained capacity after 2014. She said it was probably in early 2016, when the Claimant was working with his family doctor. The Claimant later told her that he needed to apply for a CPP disability pension. However, she also admitted that she didn’t see him clinically between 2014 and 2016, as they only communicated by e-mail.

[272] The Minister also asked Dr. Keith what “incapacity” meant in the CPP context. She said it meant an inability to form the intention to apply for a CPP disability pension. She then said that in 2011, the Claimant didn’t have the capacity to make a decision about applying for the CPP disability pension. She said he had no insight into the level of his disability: he couldn’t say, “Hey, I’m disabled, and I should apply for the disability pension.” She then affirmed that he was both incapacitated and disabled in 2014.

[273] The Claimant asked Dr. Keith if she believed he was completely incapacitated as of January 11, 2014. Dr. Keith replied, “You told me that later, yes.” She then agreed

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<sup>202</sup> See IS63-5.

<sup>203</sup> See the General Division hearing recording, at 1:08:04 to 1:09:54.

<sup>204</sup> See ADN51-106.

with the Claimant that he was incapacitated in 2011, and then again in 2014. This exchange strongly suggests that Dr. Keith relied on the Claimant's assessment of incapacity in 2014 in place of her own.

[274] As with the Claimant's evidence, I have reservations about Dr. Keith's evidence on incapacity. Her evidence has at least two distinct narratives, with the second only emerging in the last couple of years. But I am also concerned with her understanding of the legal test under the CPP.<sup>205</sup>

[275] Despite these reservations, I will continue a full *Blue* analysis by next looking at the evidence of other activities in which the Claimant was engaged.

*Evidence of other activities in which the Claimant was engaged during the relevant period*

[276] At the Appeal Division hearing, as noted, the Claimant said he was in bed for 12 hours each day between January 2014 and June 2016. He said he was just happy that he could get his mother's funeral done. I heard relatively little testimony about his exact activities during the relevant period.

[277] I recognize that the relevant period was approximately ten years ago. It is admittedly now difficult to provide accurate details of what the Claimant was doing and when. The following chart chronologically summarizes some of the activities in which he was engaged. Some entries are based on contemporaneous records, while others are based on later recollections.

<u>Date (or Date Range)</u>	<u>Activity</u>
2010-November 2014 <sup>206</sup>	Took care of his mother "nearly on a full-time basis" and supervised her daily while she drove (for public safety

<sup>205</sup> In addition to my concerns about Dr. Keith's understanding of "incapacity" under the CPP, Dr. Keith also struggled with the CPP meaning of "disability." She recently equated disability with a reduction in workload and associated income: see IS5-2. This is not the definition of disability under the CPP.

<sup>206</sup> See GD1-8 to GD1-9, GD6-2, IS80-2, ADN20-10, and ADN140-9. See also the General Division hearing recording, at 1:42:20 to 1:42:50 and 1:46:01 to 1:47:53.

reasons) or went for medical treatment. Helped his mother with driver retraining, due to her anxiety, as she didn't trust anyone else. Refused to "offload" her care, given his concerns about the state of long-term care in Canada. But recognized that her "cognitive steering" ability was completely gone.

- January 6, 2014<sup>207</sup> E-mailed Dr. Keith, discussing strategy for handling his mother's insurance claims. Recommended that Dr. Keith meet his mother with other therapists present.
- January 2014-2017<sup>208</sup> Maintained approximately five ongoing files. Tasks included "getting [clients] to the Criminal Injuries Compensation Board" and a form of client intake, but not therapy.
- After January 11, 2014<sup>209</sup> Threatened his mother with psychiatric hospitalization because of her unreasonable belief that her dog had been poisoned by her superintendent. Also dealt with the police about his mother's behaviour.
- After January 11, 2014<sup>210</sup> Sold his car, condominium, and guaranteed life insurance policy (before May 2014).
- January 29, 2014<sup>211</sup> E-mailed Dr. Keith and said he would have his mother sign an assessment request. He also spoke to a client by phone.
- February 11, 2014<sup>212</sup> E-mailed Dr. Keith, and asked about his mother's assessment.

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<sup>207</sup> See ADN43-81. See also IS53-22.

<sup>208</sup> See the General Division hearing recording, at 1:49:35 to 1:52:12.

<sup>209</sup> See the General Division hearing recording, at 0:32:51 to 0:33:12. See also IS80-2.

<sup>210</sup> See the General Division hearing recording, at 0:38:36 to 0:39:23.

<sup>211</sup> See ADN43-82.

<sup>212</sup> See ADN43-83.

- February 24, 2014<sup>213</sup> E-mailed Dr. Keith, as his mother was getting frustrated with delays. Asked Dr. Keith to send a treatment plan, and agreed to meet the next week.
- March 25, 2014<sup>214</sup> E-mailed Dr. Keith, to advise that the paralegal settled the file. Also asked for an occupational therapy referral for a client, and mentioned that he just had his kitchen redone.
- May 31-June 6, 2014<sup>215</sup> Worked as an Advance Area Manager for X.
- June 12, 2014<sup>216</sup> Worked as an Area Manager for X.
- September 2014<sup>217</sup> Supervised his mother's driving as she swerved to avoid something (that wasn't there).
- November 14, 2014<sup>218</sup> E-mailed Dr. Keith to advise of his mother's death, and asked to speak to Dr. Keith as he had a few questions.
- November 22, 2014<sup>219</sup> E-mailed Dr. Keith about his mother's funeral in Port Dover. Said he would try to call Dr. Keith on Monday.
- Unknown date(s), 2015<sup>220</sup> Worked for X and/or Y.
- Unknown date(s), 2015<sup>221</sup> Renewed Canadian Psychological Association membership and professional liability insurance for the last time.
- November 30, 2015<sup>222</sup> Moved into a safe place to stay.

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<sup>213</sup> See ADN43-84.

<sup>214</sup> See ADN43-86.

<sup>215</sup> See GD2-23 and GD2-24.

<sup>216</sup> See GD2-23 and GD2-24.

<sup>217</sup> See the General Division hearing recording, at 1:46:39 to 1:46:54. See also IS80-2.

<sup>218</sup> See ADN43-87 to ADN43-88.

<sup>219</sup> See ADN43-88.

<sup>220</sup> See GD2-23.

<sup>221</sup> See the General Division hearing recording, at 0:52:42 to 0:53:27.

<sup>222</sup> See ADN146-29.

End of 2015 <sup>223</sup>	Began to gain insight into the dynamics of his psychiatric presentation, and understood that it was treatable.
Early spring, 2016 <sup>224</sup>	Discussed CPP disability with Dr. Keith.
Unknown date(s), 2016 <sup>225</sup>	Didn't renew Canadian Psychological Association membership or professional liability insurance.
May 20, 2016 <sup>226</sup>	E-mailed Dr. Keith, asking for all clinical reports she wrote about his depression and his mother's accidents.
June 2016 <sup>227</sup>	Closed business after an ongoing discussion with Dr. Keith. They agreed it would be best for him and his clients.

[278] To conclude my *Blue* analysis, I will now examine how these activities are relevant to an assessment of incapacity under the CPP.

*The extent to which these other activities cast light on the Claimant's capacity to form or express an intention to apply for disability benefits during that period*

[279] The Claimant's other activities are strongly supportive of having the capacity to form or express an intention to apply for disability benefits during the period from January 2014 to June 2016.

[280] The Claimant could manage the "business end" of his psychotherapy practice throughout that period. While he did not provide therapy, he still provided some services to his remaining clients. He also held multiple short-term positions as an election worker. His limited ability to maintain such work beyond a day or two at a time is supportive of a disability but, in my view, it does not approach the threshold for incapacity.

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<sup>223</sup> See ADN146-29.

<sup>224</sup> See GD1-5.

<sup>225</sup> See the General Division hearing recording, at 0:52:42 to 0:53:27.

<sup>226</sup> See ADN43-89.

<sup>227</sup> See GD2-118 and GD2-119.

[281] Successfully applying for such work, not to mention doing it, requires the ability to form (or express) the intention with respect to choices faced by the Claimant.<sup>228</sup>

[282] Many other activities undertaken by the Claimant between January 2014 and June 2016 showed this ability.

[283] In the first few months, the Claimant sold his car, condominium, and guaranteed life insurance policy. He repeatedly communicated with Dr. Keith about his mother's assessment, treatment, and insurance settlement. He asked Dr. Keith for a referral for one of his clients. He had his kitchen redone. He took care of his mother on a "nearly full-time basis". This included supervising his mother's driving, helped with her driving retraining, and taking her to medical treatments.

[284] After his mother passed away in late 2014, the Claimant managed to get his mother's funeral done. In 2015, beyond his vocational activities, he also made decisions on renewing his professional membership and insurance. He made the decision to move into a new "safe" place. He gained insight into his psychological condition.

[285] In the first half of 2016, the Claimant discussed disability with Dr. Keith, and ultimately decided to apply for the CPP disability pension. He requested supporting documents related to his and his mother's conditions, and decided to close his psychotherapy practice.

[286] In my view, the Claimant's activities disclose an ongoing stream of decision-making by the Claimant. He was constantly facing choices and making them, whether it was to care for his mother (rather than leaving her in the care of strangers) or to adjust the nature of his work activities. I also note that capacity assessment is not limited to decision-making contexts. Activities such as driving, or making driving arrangements for safety reasons, also call for "specific intent to accomplish specific actions."<sup>229</sup>

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<sup>228</sup> See *Walls v Canada (Attorney General)*, 2022 FCA 47, at paragraphs 31 and 36.

<sup>229</sup> *Grosvenor v Canada (Attorney General)*, 2018 FC 36, at paragraphs 27 to 31.

[287] Before the *Blue* decision was released, the Claimant's activities alone may have been enough to dispense with the incapacity argument. The evidence of capacity is extensive.

[288] However, the *Blue* decision involved a very narrow and specific form of disability. The Federal Court of Appeal described it as "most unusual." The applicant's trauma and mental health issues arose from or related to engaging with hospitals, the medical profession, and persons in authority. Although she had capacity for many things, she lacked the specific capacity for expressing or forming an intent to apply for the CPP disability pension.<sup>230</sup>

[289] Although the *Blue* decision was "most unusual", it is still binding law. This means I must still carefully consider the nature of the Claimant's disability before reaching a final conclusion on incapacity.

[290] The Claimant, and the applicant in *Blue*, had a disability rooted in mental health. In my view, however, this is not enough. Something in the Claimant's disability must specifically preclude him from even contemplating an application for a CPP disability pension. I also note that a diagnosis of PTSD, as the applicant in *Blue* had, does not in itself establish incapacity.<sup>231</sup>

[291] As set out above, the Claimant provided at least two different narratives for not applying until June 2016. But I cannot find that the delay was specifically rooted in his disability. A desire not to be a "free rider" most certainly does not meet the threshold. That is a conscious choice not to apply because of a desire to be independent. Wishing to be independent is not a disability, nor is it the prominent feature of his disability.

[292] The Claimant tried to draw a parallel between his disability and the applicant's disability in *Blue*. But I do not see a similar explanation for not applying. He cannot be said to be traumatized by his encounters with the medical profession, hospitals, and

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<sup>230</sup> See *Blue v Canada (Attorney General)*, 2021 FCA 211, at paragraph 45.

<sup>231</sup> See *O'Rourke v Canada (Attorney General)*, 2018 FC 498, at paragraph 20.

persons in authority. In fact, he continued working within the medical profession in a psychotherapy practice (albeit no longer providing therapy) until June 2016.

[293] Furthermore, the Claimant engaged with Dr. Keith, his long-time treating psychologist, during the period in question. This is not indicative of trauma arising from his dealings with the medical profession. I see no traumatic experience with hospitals either.

[294] The Claimant did eventually argue that he had a fear of hospitalization. But this only appeared a decade after the relevant period, and consisted of his own assertions rather than objective evidence.

[295] The Claimant suggested that he had not told Dr. Keith everything because he was afraid that he might be hospitalized, and was also afraid of the associated stigma. At least some of these suggestions arose recently when describing parallels between his situation and the applicant in *Blue*.<sup>232</sup>

[296] In this case, the lack of contemporaneous evidence about such a fear is fatal to this argument. It is difficult to reconcile a fear of psychological stigma and hospitalization with the fact that the Claimant saw Dr. Keith over such a long period. It is even more difficult to reconcile with the fact that he himself is a psychotherapist.

*No relevant or analogous form of PTSD*

[297] The Claimant has suggested that he suffers from PTSD.<sup>233</sup> But I do not see such a diagnosis from Dr. Keith, even though she treated him over a period of more than two decades. Further, any reference to trauma does not appear to be related to the medical profession, hospitals, or persons in authority. I will now explain this further.

[298] In 2003, Dr. Keith diagnosed the Claimant with a mild cognitive disorder, adjustment disorders, and malaise and fatigue.<sup>234</sup> Dr. Keith's 2016 diagnoses were

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<sup>232</sup> See, for example, ADN51-103, ADN51-107, and ADN134-9.

<sup>233</sup> See, for example, ADN12-57 and ADN13-4.

<sup>234</sup> See IS47-3.

MDD and adjustment disorder with anxiety (generalized and post-traumatic).<sup>235</sup> While the words “post-traumatic” appear in connection with anxiety, Dr. Keith makes clear that the trauma in question was his mother’s accidents, health concerns, and death.<sup>236</sup> I see no reference to hospitals, the medical profession, or persons in authority.

[299] In April 2019, on the specific issue of incapacity, Dr. Keith prepared a medical certificate for CPP purposes. However, when asked which medical condition caused the incapacity, Dr. Keith only mentioned MDD.<sup>237</sup>

[300] The 2014-2016 activities chart above shows that even in February and March of 2014, after the onset of his severe disability, the Claimant was working within the “system” on his mother’s behalf to resolve her insurance claim. He also resolved his initial 1999 Accident claim in November 2003, to no apparent ill effect. In fact, he said that he was managing his life and finances very well between 1999 and 2010.<sup>238</sup> After his mother’s accidents, he made insurance claims for both his mother and himself.<sup>239</sup>

[301] But even before the settlement of those matters, the Claimant was described in September 2002 as always having been an outspoken advocate for his clients. The 1999 Accident appeared to exacerbate that “pre-existing personality presentation.”<sup>240</sup> Again, this does not point to an inability to pursue remedies. Nor does it appear analogous to the applicant in *Blue*.

[302] Ultimately, I do not need to resolve the multiple narratives and the resulting apparent contradictions in the incapacity-related evidence from both the Claimant and Dr. Keith. Nor do I need to address the Minister’s suggestion that Dr. Keith had moved beyond treating the Claimant to advocating for him.<sup>241</sup> The nature of the Claimant’s

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<sup>235</sup> See IS47-14.

<sup>236</sup> See IS47-13.

<sup>237</sup> See ADN11-2.

<sup>238</sup> See ADN1-2.

<sup>239</sup> See the General Division hearing recording, at 1:45:08 to 1:45:59. Dr. Keith’s evidence at the Appeal Division hearing reinforced this.

<sup>239</sup> See ADN43-89.

<sup>240</sup> See IS50-61.

<sup>241</sup> See ADN29-7 to ADN29-10.

disability simply does not bring him within the very narrow purview of the decision in *Blue*.

[303] I accept that it took the Claimant more than two years to apply for the CPP disability pension after his disability onset. He may not have appreciated, or wanted to believe, that he was severely disabled. That would be a testament to his desire to work. It would also be consistent with his expressed desire not to be a “free rider.” As admirable as those desires are, they do not bring him within the very narrow definition of incapacity under the *Canada Pension Plan*.<sup>242</sup>

[304] The burden is on the Claimant to establish incapacity under the *Canada Pension Plan*. I cannot find that he meets that test, either with or without the analysis set out in *Blue*.

## Conclusion

[305] The appeal is allowed in part. The Claimant is entitled to a CPP disability pension, as he had a severe and prolonged disability starting in January 2014. However, he has not established incapacity under the *Canada Pension Plan*. He is therefore not entitled to pension payments before July 2015. Payments start in July 2015 because he applied for the pension in June 2016. That means March 2015 is his deemed disability date. Payments can only begin four months after the deemed disability date.

Pierre Vanderhout  
Member, Appeal Division

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<sup>242</sup> In 2008, the Federal Court of Appeal considered a similar question. It said the fact that a particular choice may not suggest itself to an applicant because of his world view does not indicate a lack of capacity. See *Sedrak v Canada (Social Development)*, 2008 FCA 86, at paragraph 3.