



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Tribunal File Number: GP-19-317

BETWEEN:

**Robert Russell**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Raymond Raphael

Claimant represented by: Zeitoon Vaezzadeh

Teleconference hearing on: October 15, 2020

Date of decision: October 21, 2020

## **DECISION**

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension with payment starting as of March 2016.

## **OVERVIEW**

[2] The Claimant was 35 years old when he applied for a CPP disability pension in February 2017. He worked as an electrician. In August 2015, he suffered serious injuries in a car accident. He has not worked since. He stated that he has been unable to work because of several conditions. These include neck and back pain, anxiety, depression, and a lack of sleep.<sup>1</sup> The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] The Minister's position is that the evidence does not establish that the Claimant suffers from a severely disabling physical or mental health condition that renders him unable to pursue all work activity. The Minister recognizes that the Claimant has limitations. However, it states that he has the ability to retrain for and/or pursue suitable work within his limitations.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.<sup>2</sup> The Claimant's disability is severe if it causes him to be incapable regularly of pursuing any gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration.

[5] For the Claimant to succeed, he must prove that it is more likely than not that he became disabled by the end of his Minimum Qualifying Period (MQP).<sup>3</sup> His MQP – the date by which he has to prove he was disabled – is December 31, 2018. This date is the last date when he had valid contributions to the CPP in four out the last six years.<sup>4</sup>

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<sup>1</sup> GD2-143

<sup>2</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>3</sup> Paragraph 44(1)(b) CPP

<sup>4</sup> Record of Contributions: GD7-11

## ISSUES

1. Did the Claimant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by December 31, 2018?
2. If so, is his disability long continued and of indefinite duration?

## ANALYSIS

### *Severe Disability*

### **The Claimant's medical conditions interfered with his ability to work by December 31, 2018**

#### *The Claimant's account*

[6] The Claimant described the car accident as "high speed, multiple impact." Another car struck the car in which he was passenger. His car rolled over several times and came to a stop on its roof after colliding with a third car. His head, arms, neck, and back were "crushed" into the roof of the car.

[7] He described his disabling conditions as of December 2018:

- Severe neck pain
- Upper back pain
- Left shoulder pain: he had difficulty using his left arm.
- Headaches: he felt constant tension because of his neck pain. As a result, he suffered from severe headaches two to three times a week.
- Depression and anxiety: As a result, he had difficulty focusing. He couldn't sit in front of a computer for more than 20 minutes.
- Chronic fatigue: he could only "get going" for ½ hour at a time. About three days of week, he would just stay in bed.
- Poor memory: He was very forgetful. He often couldn't remember things such as whether he took his medications, turned off the stove, and locked the door when he went out. He also had trouble remembering appointments.

[8] In 2016, he sold his condominium because he could no longer afford the payments. He moved into the basement of his grandmother's house. His grandmother is 94. He is only able to do light housekeeping. His mother and aunt do most of the grocery shopping. His uncles and older brother cut the lawn and shovel the driveway. Even doing light housekeeping, makes his pain worse and depletes his energy. He feels constant "shooting, stabbing" pain. The pain is aggravated if he does any lifting or stands in one spot for too long. He has to lie down continually. He has no pain-free days. His pain has been getting worse. He is constantly depressed and anxious. His condition has been getting worse.

### *Medical Evidence*

[9] His family doctor and numerous specialists have treated the Claimant. He has gone for extensive physical and psychological treatments. He has gone to numerous clinics. He has taken extensive medication and undergone injections. He has also participated in several assessments for insurance benefit purposes. I am setting out below the reports I consider most significant.

### *Family Doctor*

[10] Dr. Freedman has been the Claimant's family doctor since birth. In his February 2017 CPP medical report, he diagnosed multiple soft tissue injuries (mostly in the neck), jaw pain, post-traumatic stress disorder, and fibromyalgia. He stated that the Claimant's prognosis was poor and that the Claimant was not able to control his pain.<sup>5</sup>

[11] In October 2017, Dr. Freedman stated that the Claimant had developed chronic pain syndrome with features of fibromyalgia. This was because of the combination of disturbed sleep, chronic pain, depression, and anxiety. The Claimant was awaiting further treatment and assessment at a chronic pain clinic. A combination of medications that included Amitriptyline, Cymbalta, and Gabapentin was not working. The Claimant displayed memory loss and mild cognitive impairment. Dr. Freedman concluded that the Claimant could not return to his work for the near future. He also concluded that the Claimant could not be trained for other work because of his depression, pain, and decreased cognition.<sup>6</sup>

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<sup>5</sup> GD2-114 to 117

<sup>6</sup> GD2-92 to 93

[12] In November 2018, Dr. Freedman stated that the Claimant had undergone many treatments and specialist consultations. He has also visited Dr. Freedman's office on multiple occasions for neck, shoulder, and headache pain as well as stress related symptoms.<sup>7</sup> In February 2019, Dr. Freedman stated that the Claimant continued to be disabled by chronic pain syndrome. He was continuing treatment with medication, physiotherapy, and psychotherapy.<sup>8</sup>

### *Neurologist*

[13] Dr. Morgenthau has been the Claimant's treating neurologist since May 2016. In May 2016, he stated that the Claimant's primary complaint was neck pain extending through his shoulders and upper back. This limited his arm activity. He was also having decreased sleep because of pain.<sup>9</sup> In November 2016, Dr. Morgenthau stated that the Claimant continued to complain of neck pain, headaches, low back pain, and other discomforts. On examination, there was a marked restriction in his neck range of motion.<sup>10</sup>

[14] In June 2017, Dr. Morgenthau stated that the Claimant was suffering ongoing pain in his neck, chest, and low back. He also complained of anxiety and cloudy thinking. His limited neck movement was "dramatic." His back movement was limited. The Claimant was taking gabapentin and Amitriptyline, but had difficulty tolerating this because it increased his cognitive complaints. He had gone for massage therapy, physiotherapy, and chiropractic treatments without benefit. He had also started a mindfulness-training program.<sup>11</sup>

[15] In January 2018, Dr. Morgenthau stated that the Claimant reported that his anxiety was the primary condition keeping him in the house and that he was experiencing decreased energy. The Claimant reported that his memory was poor and his thinking was "scattered." The Claimant reported that he would forget to lock the door, forget appointments, and misplace things. Dr. Morgenthau recommended psychological or psychiatric care for the Claimant's feeling of being 'trapped in the house.'<sup>12</sup>

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<sup>7</sup> GD9-255

<sup>8</sup> GD2-254

<sup>9</sup> GD1-29

<sup>10</sup> GD1-84

<sup>11</sup> GD1-83

<sup>12</sup> GD1-107 to 108

[16] In April 30 2018, Dr. Morgenthau stated that the Claimant continued to complain of cognitive changes.<sup>13</sup> In October 2018, Dr. Morgenthau stated that a pain clinic had suggested that the Claimant take infusions. The Claimant reported that he was experiencing more pain in his neck and left shoulder region. Dr. Morgenthau stated that the Claimant “clearly” presented with chronic regional pain syndrome but did not present features typical of this. Dr. Morgenthau believed that it was premature to start injections. He recommended psychotherapeutic evaluation and treatment<sup>14</sup>

### *Psychologists*

[17] In May 2016, Dr. Hewchuk, psychologist, diagnosed adjustment disorder with mixed anxiety and depressed mood as well as some symptoms of driver phobia and passenger fear. Dr. Hewchuk did not observe any pain-focused behaviours. The Claimant’s symptoms included depressed mood, memories of the accident, feelings of stress and nervousness, and severe pain. The symptoms affected all areas of the Claimant’s daily functioning. Dr. Hewchuk recommended psychological treatment including cognitive behavioural therapy.<sup>15</sup>

[18] In October 2016, Dr. Efendov, psychologist, diagnosed major depressive disorder, single episode, and symptoms consistent with post-traumatic stress disorder. The Claimant attended eight sessions of cognitive behavioural therapy for chronic pain with Dr. Efendov between October 2016 and January 2017.<sup>16</sup>

[19] The Claimant attended a 12-session mindfulness based stress reduction program from January 2017 to March 2017.<sup>17</sup> He also attended seven cognitive behavioural therapy sessions from June 2016 to September 2016 as well as three further sessions in September 2017. In October 2017, Nino Sekopet, registered psychotherapist, stated that the Claimant was very engaged and cooperative during the therapy. The Claimant reported persistent physical pain,

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<sup>13</sup> GD2-81

<sup>14</sup> GD2-76

<sup>15</sup> GD1-584, 591, 592,

<sup>16</sup> GD1-301

<sup>17</sup> GD1-358 to 387

inability to sleep, and overall frustration, anxiety, and depression. Ms. Sekopet's opinion was that the Claimant's emotional state was complex and far from stable.<sup>18</sup>

### ***Multidisciplinary Assessment***

[20] In September and October 2017, the Claimant attended for a multidisciplinary medical and legal assessment at the request of his lawyer. The purpose of the assessment was to determine if he was entitled to continued income replacement benefits. An orthopaedic surgeon, a neurosurgeon, and two psychologists assessed him. He also attended for a two-day situational assessment.

[21] The orthopaedic surgeon diagnosed chronic myofascial pain of the cervical spine, bilateral shoulder strain, possible peripheral neuropathy, and post-traumatic headaches. The neurologist diagnosed a closed head injury with post-concussion syndrome, cervical strain/sprain possible disc rupture at C4/5, possible left ulnar neuropathy, and anxiety. The psychologists diagnosed major depressive disorder, adjustment disorder with anxiety, features of in-vehicular phobia, and pain disorder associated with both psychological factors and a general medical condition. The situational testing results established that the Claimant was not capable of performing the tasks of his pre-accident occupation or any occupation for which he was suited by education, training, or experience. The assessors concluded that the Claimant was not capable of competitively performing any occupations on a full or part-time basis. They agreed that he suffered a complete inability to engage in any employment or self-employment for which he was reasonably suited by training educations and experience.<sup>19</sup>

### ***My Findings***

[22] I must assess the Claimant's condition as a whole and consider all the impairments that affected his employability, not just his biggest impairments or his main impairment.<sup>20</sup>

[23] The Minister relies on the July 2016 report from Dr. Soric, physiatrist. Dr. Soric stated that the Claimant presented with a "very significant" degree of pain-focused behaviour and that

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<sup>18</sup> GD1-667 to 674

<sup>19</sup> GD1-109 to 114

<sup>20</sup> *Bungay v. Canada (Attorney General)*, 2011 FCA 47

his spontaneous neck movements were better than those he presented on examination. However, Dr. Soric saw the Claimant on only one occasion and did not appear to have taken into account the significant psychological component of the Claimant's disability. I find it significant that Dr. Hewchuk, a psychologist, saw the Claimant in May 2016 and stated that he did not observe any pain focused behaviours.<sup>21</sup>

[24] The Minister also relies on the July 2019 neuropsychological assessment report from Dr. Dowhaniuk, neuropsychologist. Dr. Dowhaniuk stated that the testing results suggested that the Claimant was over-endorsing his complaints and intentionally under-performing on tests. He concluded that the Claimant did not meet the criteria for any psychiatric diagnosis because his pain limitations and emotional distress could not be corroborated. He stated that the Claimant had not suffered a cognitive/neuropsychological impairment that impeded his ability to perform the duties of his previous occupation as an electrician.

[25] I do not accept these findings. Dr. Dowhaniuk only saw the Claimant on one occasion. He did not treat him. He performed an assessment solely for determining the presence and extent of any brain injury. His assessment was not part of a multidisciplinary assessment. He did not consider all of the Claimant's physical, cognitive, and psychological conditions. I prefer the findings of the numerous medical reports in paragraphs 10 to 21 above. None of those medical practitioners suggested the Claimant was feigning or exaggerating his symptoms.

[26] I find that the combined effect of the Claimant's physical, cognitive, and emotional conditions interfered with his ability to work by December 31, 2018.

### **The Claimant has established a severe disability**

[27] A disability is severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining his "employability".<sup>22</sup>

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<sup>21</sup> See para 17, above

<sup>22</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

[28] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a claimant's ability to work.<sup>23</sup> A claimant's capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.<sup>24</sup>

[29] The Claimant was only 37 years old at the December 2018 MQP. He completed high school as well as a college electrician diploma. He successfully completed the electrician apprenticeship program. He worked as an electrician setting up conventions and trade shows. He was promoted to sub-foreman. He has significant transferable skills. These are positive factors when considering his capacity to retrain for and/or pursue alternative less physical employment.

[30] However, he suffers from severe pain, headaches, sleep deprivation, as well as depression and anxiety. He has cognitive limitations that include memory problems and difficulty focusing. He has limited neck and back movement. He isn't able to sit at a computer for more than 20 minutes. He is constantly fatigued and can only function for about ½ hour at a time. He spends about three days a week in bed because of his severe pain and chronic fatigue. He depends on relatives for most household tasks and maintenance. He could not be a regular and reliable employee.

[31] I find that the Claimant has established that it is more likely than not that he has a severe disability in accordance with the CPP requirements.

### ***Prolonged Disability***

[32] The Claimant's physical and psychological disabling conditions have persisted for many years. Despite extensive treatment, there has been little improvement.

[33] The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the near future.

[34] I find his disability is prolonged.

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<sup>23</sup> *Ferreira v. Attorney General of Canada*, 2013 FCA 81

<sup>24</sup> *Klabouch v. Canada (Social Development)*, 2008 FCA 33

## CONCLUSION

[35] I find that the Claimant had a disability that was severe and likely to be prolonged in August 2015, when he was injured in the car accident. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.<sup>25</sup> The Minister received the Claimant's application in February 2017; therefore, the Claimant is deemed disabled in November 2015. Payments start four months after the deemed date of disability.<sup>26</sup> Payments will start as of March 2016.

[36] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>25</sup> Paragraph 42(2)(b) of the CPP

<sup>26</sup> Section 69 of the CPP