



Citation: *CC v Minister of Employment and Social Development*, 2021 SST 961

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: C. C.
Representative: Katie Conrad

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 14, 2020
(issued by Service Canada)

Tribunal member: Brianne Shalland-Bennett

Type of hearing: Videoconference

Hearing date: November 19, 2021

Hearing participants: Appellant
Appellant's representative

Decision date: December 31, 2021

File number: GP-20-1513

Decision

[1] The appeal is dismissed.

[2] The Appellant, C. C, isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant is 56 years old with a diploma in data entry and a teaching certificate from Montessori. She worked in a bank for 15 years as a customer service representative and did administrative work.

[4] Her last job was as a full-time junior and senior kindergarten teacher at Montessori. She worked there from September 2002 to January 2018. She also did some internal training with the Canadian Association of Montessori Teachers (CAMT).

[5] On January 10, 2018, the Appellant slipped on ice. She fractured and dislocated her left ankle. She had surgery on January 15, 2018.¹ She hasn't gone back to work since she fell because of her limitations.

[6] The Appellant applied for a CPP disability pension on May 10, 2019.² The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[7] The Minister says the Appellant may not be able to do her regular job as a teacher but, she might be able to do a different job. The Appellant also hasn't tried to return to any type of suitable work. It argues the Appellant has done conservative treatments and still has options remaining.³

¹ See GD2-365.

² See GD2-33 to 49.

³ See GD3, GD6, and GD10.

[8] The Appellant disagrees. She says she has pain, a restricted range of motion, and degenerative changes that prevent her from standing, walking, or sitting for too long. Her pain has affected her concentration and memory. She has been dealing with these issues for four years and her recovery has been extremely slow. Her conditions combined stop her from returning to work at any job.

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she has a disability that is severe and prolonged by the hearing date.⁴

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

[11] A disability is **severe** if it makes an Appellant incapable regularly of pursuing any substantially gainful occupation.⁵

[12] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on her ability to work. I also have to look at her background (including her age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether her disability is severe. If the Appellant is able to regularly do some kind of work that she could earn a living from, then she isn’t entitled to a disability pension.

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

[14] This means the Appellant’s disability can’t have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

⁴ Service Canada uses an appellant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on GD3-14 to 15. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

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

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

[15] The Appellant has to prove she has a severe and prolonged disability. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not she is disabled.

Matters I have to consider first

I accepted the documents sent in after the hearing

[16] The Appellant sent documents (GD-7) to the Tribunal on November 8, 2015. These documents were sent to the Minister on November 15, 2015. The Minister asked for time to submit arguments on November 19, 2021. I allowed the Minister time to do so. I also gave the Appellant time to reply to the Minister's arguments.

[17] The Minister's arguments were received on November 29, 2019.⁷ The Appellant's reply was received on December 3, 2019.⁸

Reasons for my decision

[18] I find that the Appellant hasn't proven she has a severe and prolonged disability by the date of the hearing.

Is the Appellant's disability severe?

[19] The Appellant's disability isn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations do affect her ability to work

[20] The Appellant has the following conditions:

- Chronic pain in her shin, foot, ankle, knees, shoulder, and neck.
- Loose bodies (bone fragments) in her left ankle.
- Degenerative changes in her back and spine.
- Arthritis in her left knee, right hip, and ankle.

⁷ See GD10.

⁸ See GD11.

- A partial tear in her left shoulder.
- Depression.

[21] However, I can't focus on the Appellant's diagnoses.⁹ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.¹⁰ When I do this, I have to look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affect her ability to work.¹¹

[22] I find that the Appellant has functional limitations.

– **What the Appellant says about her functional limitations**

[23] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. Here is what she says:

- She has a limited range of motion, mobility, and an abnormal gait.
- She has pain in her ankle, Achilles, and calf.
- She has pain in both knees and arthritis in her left knee.
- She can do the cleaning and her personal care, but it depends on her pain.
- She has a burning sensation at the top of her foot.
- She has pain at the back of her neck and in her shoulder.
- She had pain near her tailbone before the accident, but it has gotten worse.
- She can sit for one hour but has to shift. She has trouble standing up.
- She can stand for 10 minutes but has to shift her weight.
- She can walk slowly for about 40 minutes. Sometimes, she has to rest.
- Sometimes she gets headaches. She feels like her right eye is being pulled.
- She has a very hard time going up and down the stairs.
- She uses a motorized cart when grocery shopping with her husband.
- She has issues with her concentration and short-term memory. She uses an easel in her kitchen and her phone to help with her memory.

⁹ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹¹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- She has trouble reaching. For example, putting on a seat belt is hard from her left side or putting on a bra can be an issue.
- She was experiencing depression, but her mental health is now stable.

[24] Driving is the Appellant's freedom. She enjoys driving because she feels trapped in most other ways. She can drive for about an hour, but she has trouble getting out of the car after. Once a month she gets confused or has brain fog when she drives.

[25] The Appellant did volunteer work with the church during the pandemic.¹² The Appellant's representative argues the Appellant's ability to do volunteer work doesn't show that she can regularly engage in substantially gainful employment.¹³

[26] I agree. The Appellant's experiences with volunteering don't reflect regularly working a substantially gainful job. She taught communion classes on Zoom with the other teachers for one hour, once a week, for about sixteen weeks. She didn't have much trouble with volunteering. She stayed seated but shifted. If she had pain, the other teachers would fill in. She could not stand up to get the children's attention.

[27] When I consider the Appellant's pain, I can't just look at objective findings. I have to look at the Appellant's experience with pain.¹⁴

[28] The Appellant explained she feels some relief for a few days after with treatments. She spends most of her time seated, but shifting. Sometimes she can vacuum a floor in her home. Sometimes, not. It depends on if she's having a good or bad day. She says she can't predict the pain she might feel. Usually, she has "better days" 3 days a week and "bad days" 4 days a week. After doing an activity for long, her pain is a 6 or 7 out of 10.

¹² This is from the audio recording of the November 19, 2021, hearing at 1:12:36 to 1:14:48.

¹³ See GD4-5.

¹⁴ *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 (CanLII), [2003] SCR 2 504

– **What the medical evidence says about the Appellant’s functional limitations**

[29] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by the date of the hearing.¹⁵

[30] The medical evidence supports what the Appellant says.

[31] Dr. Palombo is the Appellant’s family doctor. Here is what she says:

- She has pain in her calf, knees, and Achilles tendon. Her foot is sensitive to touch. She has a limited range of motion in her knees. Her recovery is slow.¹⁶
- In April 2020, she thought the Appellant’s fracture caused chronic hip, back, knee, and ankle issues.¹⁷ MRIs done in 2019 confirmed the Appellant has arthritis in both hips and her left knee.¹⁸
- In August 2019, the Appellant could not return to work because of her limitations, even with modifications. She needed three to six months off.¹⁹
- In September 2019, she reported the Appellant would have a hard time going on modified duties at her job as a teacher. This is because of the small desks and chairs, going down on the floor with children. There would be no place for her to sit even if she did sedentary duties.²⁰
- She gets tension headaches in the eyes.²¹
- In October 2020, she was feeling down but wasn’t depressed.²²
- In October 2021, she was experiencing a lot of pain in her left shoulder and neck.²³ An X-ray confirmed the Appellant’s shoulder was partially torn.²⁴

[32] Dr. Benmofteh is the Appellant’s orthopedic surgeon. Here is what he says:

¹⁵ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁶ See GD2-286.

¹⁷ See GD4-111.

¹⁸ See GD4-46 and GD2-180

¹⁹ See GD2-344.

²⁰ See GD2-327.

²¹ See GD2-105.

²² See GD4-104.

²³ See GD4-105

²⁴ See GD4-30.

- In July 2019, the Appellant has chronic pain in her ankle and stiffness based on her left ankle fracture and dislocation in 2018. He expected the Appellant's condition to stay the same and be continuous and she may be able to do modified work in 6 to 12 months.²⁵
- In January 2020, he noticed degenerative changes in her ankle with loose bone fragments. There was stiffness in her ankle but, she was improving.²⁶

[33] In November 2019, Dr. Lansang, an orthopedic surgeon, said post-traumatic arthritis is a complication of her condition. He thought she might have Achilles tendinosis. He recommended physiotherapy.²⁷

[34] The Appellant saw Dr. Ghavanini, a neurologist. He didn't think there was any evidence of a significant injury that could be reversed with surgery. He recommended that the Appellant see a pain specialist to manage her pain.²⁸

[35] Dr. Paleksic, a physiatrist, treated the Appellant in March 2020 for her pain. She found her improvement plateaued. The pain from her ankle spread to her left knee, left hip, right knee, and right hip. She thought the Appellant may improve in three months.²⁹

[36] In May 2021, Dr. Singer, an orthopedic surgeon, found there were bone fragments in the Appellant's ankle that cause pain. She suggested that the Appellant do surgery to remove the fragments. She says that might improve her intense pains and range of motion, but the results aren't guaranteed.³⁰

[37] In October 2021, Dr. Cuddihy, a pain specialist, reported the Appellant has a hard time walking with a normal gait. The pain from her ankle has caused pain in her knees, hips, and back. She believes a nerve injury causes the Appellant's pain. She doesn't think going back to work would be possible with the Appellant's mobility now.

²⁵ See GD2-88 to 95 and GD2-172.

²⁶ See GD2-79.

²⁷ See GD2-83.

²⁸ See GD2-316 to 317.

²⁹ See GD2-348 to 350.

³⁰ See GD9-8 and 9.

However, she doesn't know how the Appellant's upcoming surgery will affect her range of motion and mobility.³¹

[38] The medical evidence supports that the Appellant has limitations that prevented her from doing some tasks and her regular job by the date of the hearing.

[39] Next, I will look at whether the Appellant followed medical advice.

– **The Appellant has followed medical advice**

[40] The Appellant has followed medical advice.³²

[41] To receive a disability pension, an Appellant must follow medical advice.³³ If an Appellant doesn't follow medical advice, then she must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on her disability.³⁴

[42] The Minister says the Appellant has done conservative treatments and still has options remaining.³⁵

[43] I agree that the Appellant has some options remaining. However, the Appellant had surgery in 2018 and is doing another in 2021. I don't find invasive surgery to be conservative.

[44] The Appellant has done many other treatments to try to manage her conditions. Here is what I have considered:

- She speaks with her family doctor and sees a pain specialist.
- She went to aqua therapy, goes to physiotherapy, and does massage therapy.³⁶ The therapies give her some benefit.
- She uses CBD oil. It reduces her pain to a point where she can fall asleep.

³¹ See GD5-4 and 5.

³² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

³³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

³⁴ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

³⁵ See GD3 and GD6.

³⁶ See GD7-9.

- She wears orthotics daily and it helps her to walk a little bit better.
- She tried Oxycodone, Naproxen, and Gabapentin for her pain. The side effects made her stomach hurt so she stopped taking them.
- She uses moringa for her inflammation.
- She takes Tylenol Extra Strength when her pain is severe.
- She uses ice when there is swelling on her body, or heat for pain.
- She has done surgery for her ankle after her accident. In November 2021, she will be doing another surgery to remove bone fragments in her ankle.
- Dr. Benmofteh recommended injections.³⁷ She didn't do it because she got a second opinion from her family members, who are physiotherapists. They said it would be a "quick fix" and may cause more harm to her Achilles. I find this is a reasonable reason to not take the injections, and she has been managing her pain in different ways.
- Her depression is managed through her faith.

[45] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.³⁸

– **The Appellant can't work at her regular job because of her limitations**

[46] The Appellant's representative says her job as a teacher was mostly sedentary.³⁹ She can't work at that job, so she can't work at other sedentary jobs.

[47] I agree, in part. The Appellant's regular job involved some sedentary work. Her job also needed the Appellant to do many physical activities, such as stand for a long time to provide outdoor supervision, squat, crouch, sit on the ground, and sit on small chairs. I accept that the Appellant would not be able to do her regular job because of the combination of her limitations. This is also supported by the medical evidence.⁴⁰

³⁷ See GD2-336.

³⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

³⁹ See GD4-244.

⁴⁰ See GD2-327 and GD2-344.

– **The Appellant can work in the real world**

[48] When I am deciding whether the Appellant can work, I can't just look at her medical conditions and how they affect what she can do. I must also consider factors such as her:

- age
- level of education
- language abilities
- past work and life experience

[49] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that she can work.⁴¹

[50] I find that the Appellant can work in the real world.

[51] The Minister says the Appellant's personal characteristics may help her find a different job or retrain. They say her age may limit her job opportunities but her education, language skills, and work experience are positive factors.⁴²

[52] The Appellant's representative says the Appellant's data entry diploma is outdated and her Montessori certification doesn't allow her to do other teaching jobs.⁴³

[53] I agree with the Minister. The Appellant has transferable skills from her education and work history. She is 56 years old, which might negatively affect her ability to find other work. However, she speaks English fluently and is educated. She worked as a teacher for a long time and used her skills to teach at church on a computer. She also has skills from her experiences working at the bank.

[54] To be severe, the Appellant's functional limitations must regularly prevent her from working at any **substantially gainful occupation**, not just her usual job.⁴⁴

⁴¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁴² See GD3-10.

⁴³ See GD11-4.

⁴⁴ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

[55] The *Canada Pension Plan Regulations* say a substantially gainful occupation is one that pays a salary or wages equal to or more than the maximum annual amount a person could receive as a disability pension.⁴⁵ The maximum CPP disability pension is about \$16,000 per year.⁴⁶

[56] I asked the Appellant if she thought she may be able to do some type of work. She said, "If it's on a computer or something."⁴⁷ But, she doesn't know what she could do.

[57] The Minister says the Appellant doesn't have to have a full recovery or resume her former level of capacity to be a productive individual. Just because she may not be able to perform her regular job, she may be able to do alternative work.⁴⁸

[58] I agree with the Minister. I accept that the Appellant would not be able to even do light physical work. I also accept the Appellant says she can't do some things because of her pain. However, I find she might be able to do a job where she isn't doing much physical work. Though her concentration is affected by her pain, she can drive for an hour. This shows she can stay seated and focus for an extended period of time. She can use a computer. She can sit for an hour but has to shift. Combined with her work and life experience, I think she may be able to find substantially gainful employment, even if part-time.

– **The Appellant didn't try to find and keep a suitable job**

[59] If the Appellant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical conditions.⁴⁹ Finding and keeping a job includes retraining or looking for a job that accommodates her functional limitations.

⁴⁵ See section 68.1 of the *Canada Pension Plan Regulations*.

⁴⁶ [See Canada Pension Plan \(CPP\) Maximum Monthly Amounts of New Benefits - Open Government Portal.](#)

⁴⁷ This is from the audio recording of the November 19, 2021, hearing at 1:45:55 to 1:46:40.

⁴⁸ See GD10.

⁴⁹ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[60] I accept that the Appellant may have limitations that may affect her ability to do full-time work or her regular job. I also accept that she enjoyed working with kids and wanted to continue working at her old job with accommodations (through Zoom) after her accident. Unfortunately, her employer couldn't accommodate her limitations.⁵⁰

[61] The Appellant explained that in 2019, her employer asked her to return to work as a receptionist and would train her to use Excel. I accept that, at that time, the Appellant wouldn't be able to work. However, I find the Appellant may be able to work part-time or try another job, now.

[62] The Appellant didn't make efforts to work a job suitable to her conditions and limitations. I asked her if has tried to find work with her limitations. She said, she doesn't know what job she would be able to do, but she hasn't tried.

[63] Therefore, I can't find that the Appellant had a severe disability by the date of the hearing.

Conclusion

[64] I find that the Appellant isn't eligible for a CPP disability pension because her disability isn't severe.

[65] Because I have found that her disability isn't severe, I didn't have to consider whether it is prolonged.

[66] This means the appeal is dismissed.

Brianne Shalland-Bennett
Member, General Division—Income Security Section

⁵⁰ This is from the audio recording of the November 19, 2021, hearing at 1:46:28 to 1:46:49.