



Citation: *JN v Minister of Employment and Social Development*, 2022 SST 333

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

Decision

Appellant: J. N.
Representative: Joel Yinger

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 24, 2021 (issued
by Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Teleconference

Hearing date: February 28, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: March 15, 2022

File number: GP-21-723

Decision

[1] The appeal is allowed.

[2] The Appellant, J. N., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of September 2019. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 39 years old and has a background working as a personal support worker for over 17 years. In 2019 she began to experience an arm tremor and increased neck and back pain. Her conditions have progressed and she now has tremors in her arms, legs, and her jaw. She also has headaches, depression, and anxiety.

[4] The Appellant applied for a CPP disability pension on August 25, 2020. 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.

[5] The Appellant says that none of her conditions are under control and they are all getting worse. She says when all of her conditions are considered together, they result in a total disability that is severe and prolonged.

[6] The Minister says the Appellant's conditions aren't severe and prolonged. It says she could do suitable work, within her limitations, including modified or part-time work. It says the Appellant could re-train and attend school.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by the hearing date.¹

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

[9] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.²

[10] 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.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[12] 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.

[13] 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.

¹ 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 GD2-5. 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.

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

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Reasons for my decision

[14] I find that the Appellant had a severe and prolonged disability by February 28, 2022. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

[15] The Appellant's disability was 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

[16] The Appellant has the following conditions:

- tremors in her arms, legs and jaw, with decreased strength and numbness
- constant low back and neck pain
- headaches
- depression and anxiety

[17] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁵ 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.⁶

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

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[19] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. I believe what the Appellant says because her medical records confirmed her evidence. She says:

- She has limited use of her hands due to tremors. She is unable to grasp, pinch, or hold items still. She drops things.
- She can't perform fine motor movements with her hands, like doing up buttons or a bra, or tying laces.
- Typing is difficult.
- She has reduced range of motion in her neck that limits her movements.
- She gets body aches and fatigue from the shaking in her limbs.
- Shakiness in her legs limits her ability to drive some days.
- She can't sit for over 10 minutes. She is constantly changing positions to stand, walk, or lay down, as needed.
- On a good day she can walk for 20 minutes. On a bad day her walking is reduced to about 10 minutes.
- Pain and shaking in her jaw sometimes affects her ability to talk and chew.
- If she is having a bad day for pain, she isn't able to get up or do anything.
- She doesn't like leaving the house anymore due to her anxiety and depression. She has panic attacks.
- Her sleep is disrupted by pain and she gets about three to four hours of full sleep per night. She is tired during the day.

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

[20] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by February 28, 2022.⁷

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

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

[22] In a report dated June 18, 2019, Dr. Mazidi, neurologist, saw the Appellant regarding her right arm and jaw tremor. He also noted dizziness, weakness on the right side, numbness in the right hand, headaches, and some hearing loss.⁸

[23] In his report, Dr. Mazidi thought the tremors might be psychogenic in nature, meaning psychological factors could play a role in their origin. I don't find that this suggestion, if it were true, invalidates the Appellant's condition. At this time, there is no definitive cause given for the Appellant's conditions.

[24] In an MRI of the head dated October 24, 2019, numerous "white matter foci" were detected in the Appellant's brain.⁹ The results were unchanged in a later MRI on August 30, 2020.¹⁰

[25] In a further MRI of the head on May 12, 2021, a lesion was also found on the Appellant's pituitary gland.¹¹ Another MRI of the head on June 1, 2021 confirmed the white matter foci were still present. Migraines, vasculitis and multiple sclerosis were noted to be associated with similar test results.¹²

[26] The Appellant told me that her doctor's have ruled out migraine as the cause of the abnormal findings in her testing. But no other condition has been confirmed as the cause yet.

[27] In a medical report for CPP dated September 18, 2020, the family doctor, Dr. Tran confirmed a tremor in both hands and arms with decreased strength and numbness. She said the Appellant can't lift over ten pounds and that she has reduced movement in her neck with headaches. She also reported anxiety, depression, insomnia and trouble concentrating.¹³

⁸ See GD2-49.

⁹ See GD2-52.

¹⁰ See GD2-57.

¹¹ See GD4-2.

¹² See GD5-3.

¹³ See GD2-64.

[28] The Appellant has also been seeing Dr. Savelli, neurologist, for treatment and review. On April 19, 2021, Dr. Savelli said that the Appellant was still having tremors and they were now occasionally in her lower limbs. She said the Appellant was feeling unsteady on her feet.¹⁴

[29] In a follow up letter dated May 2, 2021, Dr. Tran said the Appellant is unable to hold any job that requires use of her hands. She said chronic tremors affect the ability to grip and balance. She opined the condition was likely to last indefinitely.¹⁵

[30] In an MRI of the cervical spine dated June 5, 2021, the Appellant was noted to have several bulging discs, with moderate to severe narrowing of the foramen in her spine at C5-6.¹⁶

[31] In a report dated June 21, 2021, Dr. Savelli suggested that there may be a physical cause for the tremors. She thought the Appellant might have fibromyalgia. She asked for an MRI of the lumbar spine.¹⁷

[32] The Appellant also saw Dr. Sarkar, an internal medicine specialist regarding her pituitary gland lesion. In a report dated July 2, 2021, Dr. Sarkar suggested that the Appellant's conditions need to be monitored on an ongoing basis with MRI testing.¹⁸

[33] Dr. Tran provided an updated report dated November 11, 2021. Dr. Tran said that the cumulative effect of the Appellant's conditions affect her daily life and activities, and her ability to have a job. She confirmed the Appellant has seen several counsellors for depression and anxiety.¹⁹

[34] In that report, Dr. Tran noted that the Appellant's legs have given out on her spontaneously. She also confirmed impaired sleep and ongoing neck pain.

¹⁴ See GD8-39.

¹⁵ See GD3-2.

¹⁶ See GD5-4.

¹⁷ See GD8-46.

¹⁸ See GD8-48.

¹⁹ See GD8-3.

[35] In an MRI of the lumbar spine dated February 4, 2022, a disc bulge with a tear was noted at L4-5. This was seen to be affecting the L4 and S1 nerve roots in the spine.²⁰

[36] The Appellant told me she is currently waiting to see a specialist to check for fibromyalgia.

[37] In totality, the medical evidence suggests several conditions confirmed by objective testing. The functional limitations reported by the Appellant are noted within the medical records.

[38] The medical evidence supports that the Appellant's tremors, neck pain, and back pain, prevented her from doing most activities with her hands, prolonged sitting, standing, and walking by February 28, 2022. She is unable to work at her prior job as a personal support worker.

[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.

[41] To receive a disability pension, an appellant must follow medical advice.²¹ 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.²²

[42] The Appellant has followed medical advice.²³ She has participated in extensive testing, including at least eight MRI/CT scan tests. She follows up on all proposed testing in an effort to determine the cause of her conditions.

²⁰ See GD11-1.

²¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²² See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[43] The Appellant has consulted with several specialists, including two neurologists and an internal medicine specialist.

[44] The Appellant has participated in physiotherapy and massage therapy. She continues to attend massage therapy once per month. It doesn't resolve her conditions but it does help her to relax.

[45] The Appellant has engaged in psychological counselling. She exhausted her sessions available through the Centre for Addiction and Mental Health in 2020. She is on a waiting list for more counselling now.

[46] The Appellant has tried various types of medication to reduce her tremors and for pain, sleep and her mental health conditions. To date, she hasn't been able to find medications that control her tremors or her pain.

[47] 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.²⁴

– **The Appellant can't 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.²⁵

²⁴ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[50] I find that the Appellant can't work in the real world.

- The Appellant is 39 years old. Her age isn't a negative factor for being able to work in the labour market.
- The Appellant attended college and graduated in 2002. She has a good education and some transferrable knowledge from taking a college program.
- The Appellant's native language is English, there are no language barriers for her.
- The Appellant has only worked as a personal support worker. This was a medium to heavy physical job. Her work experience will provide limited transferrable skills given her conditions.

[51] While these factors may not impact on the Appellant's ability to work or re-train in the real world, I also have to consider if her conditions, taken as a whole, realistically result in an ability to regularly perform work she could earn a living from. I already found she wasn't able to return to her old job.

[52] The Appellant hasn't been able to regularly use her hands for about three years. The tremors in her hands and arms are now also in her legs and jaw. She says the tremors are activated by any prolonged physical activity or stress. She is unsteady on her feet and has trouble finding balance. Her back and neck pain cause her to constantly change positions.

[53] Given her physical conditions alone, I find it's unrealistic that she could engage in a re-training program or work, even part-time, on a regular basis at any job. There are many days she isn't able to engage in basic self care, like getting dressed, without help from her children.

[54] I find that the Appellant's ongoing functional limitations prevent her from working in the real world. This means her disability was severe by February 28, 2022.

Is the Appellant's disability prolonged?

[55] The Appellant's disability is prolonged.

[56] The Appellant's conditions began in April 2019. These conditions have continued since then, and they will more than likely continue indefinitely.²⁶

[57] The Appellant's conditions have not improved. A review of the medical evidence shows a clear worsening of her conditions as time goes on. The tremor that began in her right arm is now present in all of her limbs and her jaw.²⁷

[58] Based on the objective findings in the MRI tests of the brain, cervical and lumbar spine, the conditions are likely of permanent nature.

[59] No treatment has been suggested by the treating doctors to address the MRI findings. Aside from trying to find medications to help control symptoms, no other treatments are being recommended.

[60] I find that the Appellant's disability was prolonged by February 28, 2022.

When payments start

The Appellant had a severe and prolonged disability in April 2019. This was the date she had to stop working as a result of her conditions.

[61] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application. After that, there is a four-month waiting period before payments start.²⁸

[62] The Minister received the Appellant's application in August 2020. That means she is considered to have become disabled in May 2019.

[63] Payment of her pension starts as of September 2019.

²⁶ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

²⁷ See GD8-3.

²⁸ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.

Conclusion

[64] I find that the Appellant is eligible for a CPP disability pension because her disability is severe and prolonged.

[65] This means the appeal is allowed.

Sarah Sheaves
Member, General Division – Income Security Section