



Citation: *LS v Minister of Employment and Social Development*, 2022 SST 1683

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: L. S.
Representative: J. S.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 23, 2020 (issued by
Service Canada)

Tribunal member: Tanille Turner
Type of hearing: Videoconference
Hearing date: August 18, 2022
Hearing participants: Appellant
Appellant's witness
Decision date: October 12, 2022
File number: GP-21-1182

Decision

[1] The appeal is allowed.

[2] The Appellant, L. S., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of May 2018. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 63 years old. He has a Grade 11 education and a certificate as a sheet metal journeyman. He has only done sheet metal work. He stopped working because of chronic pain in 2004. He felt weak. His degenerative disc disease made him feel dizzy. It was hard to turn his neck. He had extreme fatigue.

[4] The Appellant applied for a CPP disability pension on April 24, 2019. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says his degenerative disc disease diagnosis has gone from moderate to severe from 2001 to 2019. He hasn't worked since 2004 because of his condition. He can't work because his pain and issues are unpredictable.¹

[6] The Minister says the Appellant's doctor suggested the Appellant work part-time one year after his coverage period. The doctor wrote that the Appellant couldn't work five years after his coverage period. The Appellant's headaches became an issue after his coverage period.²

¹ See GD1-5.

² See GD6-6 and GD6-12.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2006. This date is based on his contributions to the CPP.³

[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.⁴

[10] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether his disability is severe. If the Appellant is able to regularly do some kind of work that he could earn a living from, then he 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.⁵

[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 he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

³ 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 GD2-103 to 104.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁵ 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 as of April 2004. 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 affect his ability to work

[16] The Appellant has:

- Degenerative disc disease
- Chronic pain:
 - Shoulders
 - Low back
 - Right arm
 - Neck
- Carpal Tunnel
- Post-concussion syndrome

[17] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁷ 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 affected his ability to work.⁸

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[18] I find that the Appellant had functional limitations that affected his ability to work.

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

[19] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work in the following ways:

- He can't sit in a straight backed chair for more than 20 minutes. This would make his neck hurt. This leads to a headache or migraine. He gets relief from the dizziness by lying down.
- He has trouble trying to bend over or kneel down. Getting up makes him dizzy.
- He doesn't sleep well at night. He tosses and turns. He wakes up three times during the night. He has to nap for three to four hours during the day to feel rested.
- His headaches and migraines are affected by rain and changes in air pressure.
- He can drive for one or two hours. After that he has to stop and walk around to take a break. Concentrating on the road causes stress on his neck. The lights at night time give him a headache.
- Noises trigger his headaches. For example, clanging of dishes. His ears are constantly ringing. He can't be in the room while his wife does the dishes. It causes a sharp pain in his ears. He rates this as 8/10 and lasts for a few minutes.

[20] I found the Appellant and his wife, J. S. to be credible. They offered that felt sincere and honest.

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

[21] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2006.⁹

[22] The medical evidence supports what the Appellant says. The following medical evidence in the record supports his limitations before the end of his coverage period.

[23] Dr. Chaudhari is the Appellant’s family doctor. He provided a medical report dated April 10, 2019. He says the Appellant stopped working in 2003 [sic] due to neck pain with decreased range of motion and carpal tunnel syndrome in the left hand.¹⁰

[24] The Appellant says he stopped working in 2004. Reference to stopping working in 2003 was an error in the appeal record.

[25] The Appellant saw Dr. Prutis-Misterska at a physical medicine and rehabilitation centre for his cervical spondylosis and rotator cuff tendonitis in March 2006.¹¹

[26] Dr. Prutis-Misterska wrote a letter in June 2001 that gave details of the Appellant’s pain symptoms from his original injury in December 2000. She wrote that his pain started in his occipital area and radiated to his left upper extremity. It got worse with prolonged sitting, neck extension and rotation. His left shoulder had pain that was made worse by overhead activities and shoulder abduction.¹²

[27] The Appellant says when he returned to work in 2001 after his accident in December 2000, his arms would lock when he lifted them. He needed help bringing them back down. This scared him. It also meant he couldn’t do his regular job anymore.

[28] On May 29, 2006, Dr. Chaudhari diagnosed the Appellant with the following conditions:

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See GD1-20.

¹¹ See DG5-4

¹² See GD2-172.

- Cervical strain
- Elbow tendonitis
- Shoulder strain.¹³

[29] The medical evidence supports that the Appellant's chronic pain and inability to move his neck and shoulders prevented him from doing his usual job and other activities of daily living like driving or getting restful sleep.

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

– **The Appellant has followed medical advice**

[31] To receive a disability pension, an appellant must follow medical advice.¹⁴ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.¹⁵

[32] The Appellant has followed medical advice.¹⁶

[33] Dr. Prutis-Misterska prescribed the following treatments to the Appellant on March 15, 2006:

- Cervical traction
- IFC
- Ultrasound and laser
- Exercises.¹⁷

[34] On May 29, 2006, Dr. Chaudhari prescribed acupuncture for the Appellant's strain in the shoulder and cervical spine, and tendonitis.¹⁸

¹³ See GD5-3.

¹⁴ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁵ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁷ See GD5-4.

¹⁸ See GD5-3.

[35] The Appellant says he has tried a number of treatments since his injury to improve his conditions. These have included the following:

- Medications
- physiotherapy
- Bowen technique therapy
- Chiropractic treatments
- Massage therapy.

[36] This is supported by Dr. Chaudhari in his medical report.¹⁹

[37] 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 him from earning a living at any type of work, not just his usual job.²⁰

– **The Appellant can't work in the real world**

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

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

[39] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.²¹

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

¹⁹ See GD1-17 to 19.

²⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[41] The Appellant is 63 years old. He hasn't completed high school. He attempted a retraining program in 2007 but had to stop on the advice of his doctor because his conditions got in the way.²²

[42] He has worked as a sheet metal worker for his entire career. He doesn't have transferable skills.

[43] I find that the Appellant's disability was severe as of April 2004. This is when he had to stop working because of his conditions.

Was the Appellant's disability prolonged?

[44] The Appellant's disability was prolonged.

[45] The Appellant's conditions began in April 2004. These conditions have continued since then, and they will more than likely continue indefinitely.²³

[46] The Appellant stopped working in 2003. It has been 19 years since then. His conditions have only gotten worse. His prognosis is poor: Dr. Chaudhari doesn't expect he will be able to return to any type of work in the future.²⁴

[47] He has tried as many treatments as he can afford. The Appellant had to pay for his therapies and prescriptions out of pocket. They eventually became too expensive. He says they only provided temporary results.

[48] The Appellant's wife says she has noticed the Appellant isn't able to socialize. The noise and bright lights gives him a headache that leads to a migraine. He has to lie down. She and her daughter have to attend family gatherings without him.

²² See GD1-20.

²³ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

²⁴ See GD1-20.

[49] The Minister argues the Appellant's headaches started after his coverage period, in 2007. The Appellant says they started in 2001. He developed migraines in 2002.²⁵

[50] I find that the Appellant's disability was prolonged as of April 2004.

When payments start

[51] The Appellant had a severe and prolonged disability in April 2004.

[52] 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.²⁶ After that, there is a 4-month waiting period before payments start.²⁷

[53] The Minister received the Appellant's application in April 2019. That means he is considered to have become disabled in January 2018.

[54] Payments of his pension start as of May 2018.

Conclusion

[55] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged.

[56] This means the appeal is allowed.

Tanille Turner

Member, General Division – Income Security Section

²⁵ See GD4-56.

²⁶ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁷ 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.