



Citation : *CL v Minister of Employment and Social Development*, 2024 SST 1222

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: C. L.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 2, 2024 (issued by
Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Videoconference

Hearing date: September 24, 2024

Hearing participant: Appellant

Decision date: October 11, 2024

File number: GP-24-990

Decision

[1] The appeal is allowed.

[2] The Appellant, C. L., is eligible for a *Canada Pension Plan* (CPP) disability pension. Payments start as of October 2023. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 43 years old. He worked as a construction foreman, with a specialization in human performance and workplace safety.

[4] The Appellant was in a motorcycle accident in June 2023. He sustained multiple fractures to his thoracic spine, sacroiliac joint, and pelvis. His left leg was amputated above the knee following the accident. He hasn't returned to work because of his conditions.

[5] The Appellant applied for a CPP disability pension on November 15, 2023. 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.

[6] The Appellant says his conditions are severe and prolonged. He is unable to walk without supportive aids and doesn't have a working prosthesis. His recovery will be prolonged. While he is motivated and hopes to return to work again one day, there is no clarity about when that could be, and what type of work he could do.

[7] The Minister says the Appellant's condition has improved since his accident, and will likely continue to improve. The Minister appears to argue that the Appellant's condition isn't prolonged, and he will be capable of some sort of work in the future.

What the Appellant must prove

[8] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by the hearing date. In other words, no later than September 24, 2024.¹

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

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

[11] 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 capable regularly of doing some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

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

[13] 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.

[14] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he 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 GD2-8. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether he was disabled by the hearing date.

² Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability. Section 68.1 of the *Canada Pension Plan Regulations* says a job is “substantially gainful” if it pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

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

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of June 2023. He continues to be disabled. 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?

[16] 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

[17] The Appellant has:

- fractures in his thoracic spine at T10 and T11, with spinal fusion
- fractures of the acetabular and pubic bones, on both sides of his pelvis
- a fracture of the sacroiliac joint
- a left leg amputation above the knee
- chronic pain and fatigue

[18] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether he has functional limitations that got in the way of him 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 affected his ability to work.⁶

[19] I find that the Appellant has functional limitations that affect his ability to work.

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

⁵ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

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

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

[20] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. He says:

- Standing is limited to less than 10 minutes.
- His ability to sit is unpredictable, because of back and leg pain. Leg pain gets worse with sitting. This also affects the capacity to drive.
- Walking is limited to less than 100 metres on a “good” day, with the use of a walker or crutches.
- Use of a prosthetic causes sores on his skin and nerve pain in his leg, even after it has been removed.
- He has difficulty urinating due to his conditions.
- He has lost his strength. He feels weak.
- He can’t bend when using a prosthetic. He can’t tie his shoes.
- He can’t crouch, kneel, or squat. He has difficulty using stairs and must go very slowly. He can’t take any items up or down stairs.
- He can’t carry items because he needs to use aids to walk.
- He has difficulty sleeping, due to phantom leg pain and muscle pains. He sleeps about four hours per night.
- He has chronic fatigue. He has to lay down during the day, especially if he has participated in any physical treatment.
- He needs help with personal care and housekeeping.
- He has an upset stomach because of his medication.

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

[21] The Appellant must provide some medical evidence to support that his functional limitations affected his ability to work no later than September 24, 2024.⁷

[22] 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.

[23] There are hospital records detailing the Appellant's conditions. They say he sustained fractures of his sacroiliac vertebral body, at T10 and T11 of his spine, and bilaterally (on both sides) at the acetabular and superior root of the pelvis. Spinal fusion surgery was performed.⁸

[24] The Appellant developed osteomyelitis, or a bone infection of his spine. He required additional surgery to treat the infection.

[25] The records also confirm a left leg amputation above the knee.

[26] The Appellant's treating nurse practitioner completed a CPP medical report in November and December 2023.⁹ She said the Appellant isn't able to walk without crutches or a walker and is limited for standing, walking, and using stairs.

[27] The nurse practitioner said the Appellant has chronic pain and fatigue, limited movement, difficulty with sleep, and must rely on others for cooking, cleaning, and assistance with activities of daily living.

[28] The medical evidence supports that the Appellant's functional limitations prevented him from doing any regular work since June 2023.

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

– **The Appellant followed medical advice**

[30] To receive a disability pension, an appellant must follow medical advice.¹⁰

[31] The Appellant followed medical advice.

[32] The Appellant had spinal fusion surgery and surgery to amputate his left leg.

[33] The Appellant was hospitalized for a significant amount of time, and developed infections that required ongoing care.

⁸ See GD2-109 to GD2-151.

⁹ See GD2-102 and GD2-162.

¹⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[34] The Appellant currently attends occupational therapy, physiotherapy four times per week, and massage therapy once per week. He also attends bi-weekly treatment at the amputee clinic.

[35] The Appellant has followed all the medical recommendations made by his health care providers. He is proactive in seeking treatment.

[36] 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.¹¹

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

[37] 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

[38] 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.¹²

[39] I find that the Appellant can't work in the real world. He hasn't been able to work since June 2023.

[40] The Appellant's personal characteristics don't present a barrier for working in the real world. He is 43 and still young enough to find work and retrain. He has a carpentry trade certification and human performance certification from a university. He speaks

¹¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

English as a first language. He has years of experience working and supervising in construction, and working in health and safety.

[41] The Appellant's significant functional limitations are a barrier for working in the real world.

[42] The Appellant has limitations for sitting, standing, and walking. He needs help with many activities of daily living. He is limited on stairs. He can't bend, kneel, or crouch. He has an arduous rehabilitation schedule.

[43] The Appellant continues to have significant mobility restrictions. He is in constant pain. He has chronic fatigue that makes him unreliable in terms of performing tasks. He needs to lay down and rest daily.

[44] The Appellant's functional limitations prevent him from regularly working in the real world. It would be completely unrealistic to expect that he could find work to accommodate his limitations now or in the foreseeable future.

[45] I find that the Appellant's disability was severe as of June 2023. This was the date of his accident and the onset of his various conditions.

Was the Appellant's disability prolonged?

[46] The Appellant's disability was prolonged.

[47] The Appellant's conditions began in June 2023. These conditions have continued since then.¹³

[48] The Appellant's conditions will more than likely continue indefinitely.

¹³ 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 no later than the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

[49] The Appellant's leg amputation is a permanent condition which will cause lifelong limitations. He doesn't have a workable functional prosthetic and the last model he tried resulted in deterioration of his condition and function.

[50] It is likely the Appellant will eventually find the prosthetic device that works best for him. However, he will also then need to learn how to walk with it, and will need ongoing therapy and treatment to adjust to it, before considering whether he can return to some form of work. There is no proposed timeline for how long this process could take.

[51] The Appellant has expressed an admirable determination to try to return to working and independence. However, none of his current health practitioners is willing to provide him with an estimate of when he will potentially be recovered enough to work.

[52] The Minister appears to have focused its submissions on the perception that the Appellant's conditions aren't prolonged, and that he will improve enough to return to work.

[53] The Appellant's treating nurse practitioner may have contributed to this position, as she indicated the Appellant would likely be able to return to work within 6 to 12 months. She later suggested 12 to 24 months for recovery, depending on healing and mobility.¹⁴

[54] The Appellant says he was still confined to a wheelchair and heavily medicated when the nurse gave her prognosis for a return to work.

[55] With due respect to the nurse, these predictions were more than optimistic, given the nature of the Appellant's conditions. I find that factually, they have proven to be incorrect and unrealistic. I give this prognosis no weight.

¹⁴ See GD2-102 and GD2-162.

[56] There is no insight in the evidence as to how the nurse practitioner came to this prognosis, particularly given the nature of the injuries and the Appellant's functional status at the time it was made.

[57] It has been 11 months since the nurse predicted a return to work, and the Appellant still has significant functional limitations for activities of daily living. He still requires a personal support worker in his home a few days per week and help from his family daily.

[58] The Appellant doesn't have a working prosthetic. His condition is unstable and regressed recently after he had a bad experience with a trial prosthetic.

[59] As of the date of the hearing, there is no predictable return to work date. The Appellant isn't close to a level of function that would result in a return to work he could regularly perform, and that would also be substantially gainful.

[60] The Minister has also argued the Appellant's conditions have improved and will likely continue to improve. This is likely true.

[61] The Appellant was completely incapacitated after his accident and in a coma for nearly one month, with a fractured spine, pelvis, and amputated leg. He has improved. He has overcome post-operative infections. He is out of the hospital. He can use a walker and crutches, instead of a wheelchair.

[62] However, he currently hasn't improved to the extent that his functional limitations don't prevent him from regularly being able to work.

[63] Hypothetical projections for future improvement aren't facts. There is no evidence as to the level of function and stamina the Appellant is expected to achieve when he is at maximal medical recovery, or when he would achieve it by. This means the disability is indefinite, or will continue for an unknown length of time.¹⁵

¹⁵ In *Canada (Minister of Human Resources Development) v Henderson*, 2005 FCA 309, the Federal Court of Appeal said that a disability of indefinite duration is considered prolonged.

[64] As the Appellant's ongoing recovery has lasted over 15 months and will continue for an indeterminate amount of time, his condition is prolonged.

[65] I find that the Appellant's disability was prolonged as of June 2023.

When payments start

[66] The Appellant's disability became severe and prolonged in June 2023.

[67] There is a four-month waiting period before payments start.¹⁶ This means that payments start as of October 2023.

Conclusion

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

[69] This means the appeal is allowed.

Sarah Sheaves
Member, General Division – Income Security Section

¹⁶ Section 69 of the *Canada Pension Plan* sets out this rule.