



Citation: *RP v Minister of Employment and Social Development*, 2022 SST 326

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: R. P.
Representative: A. A.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated October 1, 2020 (issued by
Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Videoconference

Hearing date: March 14, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: March 18, 2022

File number: GP-20-1632

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is a 55 year old man, who worked as a machine operator making brake parts for vehicles. In August 2017, he had a sudden onset of hearing loss during a shift at his work. He lost total hearing in his right ear and partial hearing in his left ear. He developed ear pain, dizziness, loss of balance, sleep disturbance, and depression following this incident.

[4] The Appellant applied for a CPP disability pension on February 18, 2020. 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 that his conditions are severe and prolonged. They affect his ability to communicate, walk, sleep, concentrate, and use public transportation. He says that, based on his limitations and his work and educational background, there is no work he could do.

[6] The Minister says that the Appellant's conditions aren't severe and he could look for other work within his functional limitations. It argues he has not tried to look for, or re-train for any other work.

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, 2020. This date is based on his contributions to the CPP.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 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.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 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.

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 GD7-5.

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 December 31, 2020. 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 and is severe. I reached this finding by considering several factors. I explain these factors below.

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

[16] The Appellant has the following diagnoses:

- total hearing loss in the right ear and 20% hearing loss in the left ear
- tinnitus (constant ringing or buzzing in ears)
- ear pain and headaches
- dizziness and loss of balance
- sleep disturbance
- depression

[17] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether he had 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 affect his 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 his functional limitations**

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

- He has permanently lost hearing in his right ear.
- His has lost 20% of the hearing in his left ear.
- He has trouble listening and needs people to speak loudly and often to repeat themselves.
- He has to use closed captioning to follow a video or television.
- He can only read for a few minutes because of his difficulty concentrating.
- He has a constant ringing or buzzing in his ears. This makes it hard for him to think and remember things.
- His sleep is affected by the ringing in his ears, nightmares, and anxious thoughts.
- He gets about three to four hours of restful sleep per night.
- He often needs to nap during the day due to fatigue.
- He has pain in his right ear everyday. Loud noises and wind aggravate his ear pain. Cold weather can also make it worse.
- He needs to be in a quiet environment because of his condition.
- He feels dizzy several times per day. Dizziness affects his ability to walk for more than 5 to 10 minutes at a time. He usually doesn't go out alone.
- He has loss of balance due to his ear conditions. He walks on a slant and veers to the side. He has fallen several times and needs a cane to walk, even in the house.

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

[20] The Appellant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2020.⁷

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

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

[22] An audiology report from St. Michael's Hospital dated August 30, 2017, confirmed "severe and profound" hearing loss in the right ear and mild hearing loss in the left ear.⁸

[23] In a report dated March 29, 2018, Dr. Sze, a psychiatrist, diagnosed major depressive disorder with anxious stress. She noted the Appellant was having difficulty coping with his symptoms, which included low mood, low energy, issues with sleep and concentration, crying daily, and suicidal thoughts.⁹

[24] Dr. Rajasingham, the family doctor, completed a medical report for CPP on February 14, 2020. He said the Appellant is unable to function due to dizziness, swaying to the side, and an inability to concentrate due to pain and tinnitus.¹⁰ He confirmed the Appellant is depressed and that he didn't expect any return to work in the future.

[25] In a hand-written note dated April 3, 2020, Dr. Rajasingham said the Appellant is totally disabled from attending work.¹¹

[26] In July 2020, the Appellant's ear, nose, and throat specialist, Dr. Zirkle, diagnosed complete hearing loss in the right ear with vertigo, unsteadiness, and vestibular hypofunction when in motion.¹²

[27] In her report, Dr. Zirkle said the Appellant has persistent unsteadiness. Due to additional hearing loss in his left ear, she said he will have difficulty localizing sound and trouble with equilibrium. She noted he has pain in his ear at night and problems with TMJ, the joint in his jaw.

⁸ See GD1-11.

⁹ See GD1-13.

¹⁰ See GD2-116.

¹¹ See GD1-10.

¹² See GD1-7.

[28] In a report dated August 5, 2020, Dr. Rajendra, a psychiatrist, diagnosed an adjustment disorder with anxiety and depression. He noted the Appellant has continued suicidal thoughts because of his medical conditions.¹³

[29] The medical evidence supports that the Appellant's significant loss of hearing, dizziness, imbalance, tinnitus, and depression prevented him from doing his prior work as a machine operator by December 31, 2020.

[30] The Appellant's conditions affect his ability to hear, think clearly, remember things, and walk on a daily basis.

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

– **The Appellant has followed medical advice**

[32] The Appellant has followed medical advice.

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

[34] The Appellant has followed medical advice.¹⁶

[35] The Appellant has taken medications to address pain in his ear and his tinnitus. Medications have not resolved his conditions. Sometimes the medications will give temporary relief from ear pain. There is no treatment for his tinnitus and vestibular imbalance issues.

[36] The Appellant told me he also went for ear therapy, which didn't have any effect on his condition.

¹³ See GD1-1.

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.

[37] The Appellant sees Dr. Rajasingham regularly. He sees Dr. Zirkle once a year.

[38] The Appellant had psychological counselling through the Scarborough Hospital for approximately two years. This was where Dr. Sze monitored his condition. Treatment was suspended in 2020 due to the pandemic.

[39] The Appellant told me he has been referred back to start psychiatric treatment again. He is waiting to hear about an appointment. At the hearing he was tearful as he related the suicidal thoughts he continues to experience at present, and his struggle with his mental health. His family checks on him several times per day due to this condition.

[40] The Appellant was told that a hearing aide would not improve his hearing condition.¹⁷ He told me a cochlear implant was suggested as a possibility for him by someone, but it isn't noted as a recommendation in his medical records.

[41] The Appellant said he doesn't want to get an implant because it's an invasive procedure. He was also told the implant is time limited and has to be surgically replaced every ten years. He was told it would not actually restore hearing in his right ear.

[42] I find it reasonable that the Appellant hasn't pursued a surgical implant to treat his hearing loss, based on what he told me at the hearing. It requires repeated invasive surgical procedures that have risks and he didn't receive assurances that it would improve his hearing. There is no confirmation it would improve the physical conditions and limitations that have prevented him from working.

[43] Also, it isn't clear who made the suggestion for the implant as it isn't mentioned by Dr. Zirkle or Dr. Rajasingham in their reports and records.

¹⁷ See GD1-1.

[44] 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.¹⁸

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

[45] 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

[46] 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.¹⁹

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

- The Appellant is 55 years old. He hasn't been in school for over 40 years. He would have difficulty returning to school or re-training given his age and the length of time since he was in school.
- The Appellant has a grade eight education from Guyana. This is a significant barrier for him to find a job in a new industry, or qualify for entry to an educational program.
- He may also have difficulty finding a job given his age and functional limitations.
- The Appellant doesn't have any computer skills that would help him get a job in an office.
- The Appellant has only worked as a labourer in Canada, specifically in the automotive industry.

¹⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

- The Appellant doesn't have a driver's license. He told me he failed the test in Canada.
- The Appellant has difficulty travelling on public transportation due to noise, dizziness, and imbalance.
- He speaks English well, and this is not a barrier for him in the labour market.

[48] I find that the Appellant's disability was severe by December 31, 2020. He has a limited education and work history. He doesn't have transferrable skills for office work.

[49] In addition, I don't find it realistic that he could work at any job, given his tinnitus, imbalance, difficulty concentrating and remembering, and his hearing impairment. The limitations from these conditions affect him on a daily basis.

Was the Appellant's disability prolonged?

[50] The Appellant's disability was and is prolonged.

[51] The Appellant's conditions began in August 2017. These conditions have continued since then, and they will more than likely continue indefinitely.²⁰

[52] The Appellant's hearing loss is permanent. He has been told he may continue to lose hearing in his left ear in the future.

[53] There are no medications or treatment for loss of balance and tinnitus. The Appellant will continue to have functional limitations from these conditions that affect his ability to hear, think, and remember things.

[54] There has been no improvement in the Appellant's physical conditions or his functional limitations since 2017.

[55] The Appellant's psychological condition didn't resolve, despite two years of counselling. He is waiting to start this treatment again. However, even if this condition

²⁰ 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.

improves in the future with more treatment, I don't find this would enable him to return to work, given his ongoing physical conditions and limitations.

[56] Given how much time has passed without improvement, it is unlikely the appellant's condition and limitations will change going forward.

[57] Dr. Rajasingham confirmed he does not expect the Appellant will be able to return to any work in the future.²¹

[58] I find that the Appellant's disability was prolonged by December 31, 2020.

When payments start

[59] The Appellant had a severe and prolonged disability in August 2017. This was the date of the workplace incident that caused his conditions. He has not worked since this time.

[60] 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.²²

[61] The Minister received the Appellant's application in February 2020. That means he is considered to have become disabled in November 2018.

[62] Payment of his pension starts as of March 2019.

²¹ See GD2-116.

²² 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

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

[64] This means the appeal is allowed.

Sarah Sheaves
Member, General Division – Income Security Section