



Citation: *JD v Minister of Employment and Social Development*, 2021 SST 827

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. D.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 15, 2021 (issued
by Service Canada)

Tribunal member: George Tsakalis

Type of hearing: Teleconference

Hearing date: September 27, 2021

Hearing participant: Appellant

Decision date: October 6, 2021

File number: GP-21-758

Decision

[1] The appeal is allowed.

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

Overview

[3] The Claimant was born in 1957. She has a college diploma in accounting. She has operated her own bookkeeping business since March 1986. The Claimant says that she has not been able to work at any type of substantially gainful job because of her medical condition since May 2016, when she underwent heart surgery. The Claimant suffers from a heart condition and she has also been left with serious health problems since suffering a stroke in January 2019.

[4] The Claimant applied for a CPP disability pension on November 5, 2019. The Minister of Employment and Social Development (Minister) refused her application for the CPP disability pension. The Minister awarded her a Post-Retirement Disability Pension (PRDB). The Minister said her disability for the purposes of the PRDB began in November 2019, when the Claimant stopped working. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division. The Claimant believes that she is eligible for a CPP disability pension.

[5] The Minister says that the Claimant is eligible for the PRDB. The PRDB provides disability protection for CPP retirement pensioners who are disabled on or after their retirement pension start date, who have not reached 65, and have made CPP contributions. However, the Minister says that the Claimant is not entitled to a CPP disability pension because she became disabled in November 2019, which was after she began receiving her CPP retirement pension.

What the Claimant must prove

[6] In order to qualify for a disability pension, the Claimant cannot collect a retirement pension at the same time.¹ The Claimant can request a withdrawal of her retirement pension in favour of a disability pension if she is deemed disabled before the retirement pension became payable.² The Claimant began receiving her retirement pension in October 2018. In order to succeed on this appeal, the Claimant must prove she had a disability that was severe and prolonged by September 30, 2018.

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

[8] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.³

[9] This means I have to look at all of the Claimant’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 Claimant 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.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

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

[12] The Claimant 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 See paragraph 44(1)(b) of the *Canada Pension Plan*.

² See subsection 66(1.1) of the *Canada Pension Plan* and subsection 46.2(2) of the *Canada Pension Plan Regulations*.

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

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

Reasons for my decision

[13] I find that the Claimant had a severe and prolonged disability by September 30, 2018. I reached this decision by considering the following issues:

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

Was the Claimant's disability severe?

[14] The Claimant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

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

[15] The Claimant has heart disease and she suffered a stroke in January 2019. However, I can't focus on the Claimant's diagnoses.⁵ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁶ When I do this, I have to look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect her ability to work.⁷

[16] I find that the Claimant has functional limitations.

– What the Claimant says about her functional limitations

[17] The Claimant says that her medical conditions resulted in functional limitations that affect her ability to work.

[18] The Claimant says she has had health problems since she had a heart attack in 2001. She began operating a bookkeeping business in March 1986. She also worked as a controller for a technology company from the mid-1990s to the time of her 2001 heart attack. She also worked at a funeral home from 2009 to 2010, but she stopped working at the funeral home in 2010 because of her heart issues. The Claimant acknowledged that she has continued working. But she argued that she has worked on a casual basis

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

at her bookkeeping business since May 2016, when she had heart surgery that led to the insertion of two stents.

[19] The Claimant says she began downsizing her business in 2010 because of her health problems. She applied for and received a disability tax credit from 2010 to September 30, 2018.

[20] The Claimant's job at her bookkeeping business was sedentary and casual. She would deal with HST remittances, complete WSIB forms, and T4 slips. She also did the payroll for her clients.

[21] The Claimant's daughter took over the bookkeeping business for about four months after her January 2019 stroke. A contractor and friends of the Claimant's also helped with the business after her stroke.

[22] The Claimant says that she continued working after November 2019. She made \$5,700 in 2020. She has only worked about 8 to 10 hours in 2021.

[23] The Claimant says she had numerous functional limitations by September 30, 2018. She experienced shortness of breath if she stood too long. She had problems lifting. She had difficulty concentrating because of severe fatigue. She could not walk for long periods because she would get shortness of breath or angina attacks. Her daughter began living with her in 2016 and began doing the Claimant's housework. The Claimant would get tired vacuuming. The Claimant would do light cooking, but she could not stand for long periods. The Claimant began experiencing falls in 2017, including one that led to a broken shoulder.

[24] The Claimant says her family doctor told her to stop working after her May 2016 heart surgery. She continues to see a cardiologist and takes medications to deal with her heart condition. She acknowledges that her January 2019 stroke made her health worse, but she had been working on a casual basis since May 2016.

[25] The Claimant acknowledged that she said she worked six hours a day for seven days a week when she applied for the disability pension in November 2019. But she

said that was because when she had to work, she worked unproductively. She only worked casually and it took her far longer to perform her tasks because of her health problems. She said her job was seasonal and involved bookkeeping for nine companies and doing some personal taxes. She did not work year round on a consistent and reliable basis.

[26] The Claimant also said that she suffered from depression for many years. She has taken anti-depressant medications since 2002 or 2003.

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

[27] The Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by September 30, 2018.⁸

[28] The medical evidence before September 30, 2018 supports what the Claimant says. The Claimant’s family doctor said that the Claimant had a heart attack in 2002. She had one stent inserted in 2002, another stent was inserted in 2006 and two stents were inserted in 2016. She suffers from atrial fibrillation. Her most recent stenting procedure was in May 2016.⁹

[29] The Claimant sustained a serious right upper arm fracture that required surgery and the insertion of hardware in 2017. Her orthopedic surgeon said she made a good recovery from that injury.¹⁰ But the Claimant’s heart issues continued.

[30] The Claimant saw a cardiologist in May 2018 for a fast heart beat and coronary artery disease. Testing did not show a continuous irregular heart beat. But the Claimant had chest discomfort with walking and had to use nitroglycerin spray. She experienced shortness of breath while using the stairs.¹¹

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁹ See GD2-142-143

¹⁰ See GD2-138

¹¹ See GD2-135-137

[31] The Claimant's heart problems continued after her January 2019 stroke. She continued seeing a cardiologist.

[32] I agree that the Claimant's health deteriorated after her January 2019 stroke. Her stroke led to significant memory impairments. However, I am satisfied that the Claimant suffered from health problems before September 30, 2018 that affected her ability to work. The Claimant's family doctor said in his medical report to the Minister that the Claimant had suffered from COPD, heart problems, and shortness of breath for years.¹² The Claimant's family doctor also said that the Claimant suffered from chronic shoulder pain. She had difficulty with lifting and bending.¹³

[33] The Minister says that the medical evidence did not show that the Claimant had a severe disability by September 30, 2018. But her family doctor recommended that she stop working in June 2018.¹⁴ I place significant weight on the family doctor's comments because he had treated the Claimant since 2002, and would have significant knowledge about her functional impairments.

[34] The medical evidence supports that the Claimant's functional limitations, which included severe fatigue and shortness of breath prevented her from engaging in substantially gainful employment by September 30, 2018.

[35] Next, I will look at whether the Claimant followed medical advice.

– **The Claimant has followed medical advice**

[36] To receive a disability pension, a claimant must follow medical advice.¹⁵ I find that the Claimant has followed medical advice.

[37] The Claimant has had several heart surgeries. She has seen cardiologists. She took medications to deal with her heart problems, and anti-depressant medications.¹⁶ She saw neurologists after her stroke and she has continued to see her family doctor.

¹² See GD2-99

¹³ See GD2-98

¹⁴ See GD2-103

¹⁵ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁶ See GD2-107

She also made lifestyle decisions to help improve her medical condition, including quitting smoking.

[38] I now have to decide whether the Claimant can regularly do other types of work. To be severe, the Claimant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.¹⁷

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

[39] When I am deciding whether the Claimant 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

[40] These factors help me decide whether the Claimant can work in the real world—in other words, whether it is realistic to say that she can work.¹⁸

[41] I find that the Claimant can't work in the real world. The Claimant was 60 years old by September 30, 2018. But she had post-secondary education, understood English, and had experience working with computers. However, I am satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation because of her heart problems.

[42] I do not believe that the Claimant could have handled any type of physical work by September 30, 2018 because of problems lifting and fatigue associated with her heart condition. I do not believe that the Claimant could have handled any type of substantially gainful sedentary work, including driving, because of severe fatigue and shortness of breath caused by her heart condition. I do not believe that the Claimant

¹⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁸ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

could have handled any type of job that involved standing because of her shortness of breath. I accept that her ability to perform her activities of daily was impaired by September 30, 2018.

[43] The Minister's main argument is that the Claimant was not entitled to a disability pension because she continued to work after she began receiving her CPP retirement pension. The Claimant acknowledged at her hearing that she has continued to work, but she argued that the work she did was only casual. The Claimant is her own boss and she can work at her own pace, which would be unproductive in a real world setting.

[44] I agree with the Claimant that she has not engaged in substantially gainful employment since May 2016. When I look at her record of earnings after 2016, I agree with her that she has not engaged in substantially gainful employment since May 2016. The Claimant's record of earnings shows that she earned \$8,750 in 2016, \$9,500 in 2017, \$14,975 in 2018, \$15,800 in 2019 and \$15,357 in 2020.¹⁹

[45] The CPP Regulations contain a definition of "substantially gainful" as salary or wages that are equal to or greater than the maximum amount that a person can receive as a disability pension.²⁰ The Claimant record of earnings shows that she never made more than the maximum amount she could have received a disability since 2016.

[46] I agree with the Claimant that she has had a severe disability since May 2016. I accept that the work she performed since May 2016 has been irregular and not substantially gainful.

[47] I found the Claimant to be a credible witness. Her record of earnings shows that she worked for more than 30 years, despite suffering from serious health problems since 2002. There were some discrepancies between the Claimant's hearing evidence and the documentary evidence. She said at the hearing that she only earned about \$5,700 in 2020, but her record of earnings showed a higher figure. She said that she had a heart attack in 2001, when it was in 2002. But I do not place much weight on

¹⁹ See GD4-10

²⁰ See section 68.1 CPP Regulations

these discrepancies because they are minor. I also accept that the Claimant is struggling with her memory after her January 2019 stroke.

[48] I find that the Claimant's disability was severe by September 30, 2018.

Was the Claimant's disability prolonged?

[49] The Claimant's disability was prolonged.

[50] The Claimant's conditions began in 2002. These conditions have continued since then, and they will more than likely continue indefinitely.²¹

[51] The Claimant's family doctor said in his medical report to the Minister that he does not expect the Claimant to return to any type of work in the future. He also expected the Claimant's medical condition to deteriorate.²²

[52] The Claimant's family doctor also said that the Claimant was totally disabled due to her medical problems in a letter dated January 18, 2021.²³

[53] I find that the Claimant's disability was prolonged by September 30, 2018.

When payments start

[54] The Claimant had a severe and prolonged disability in May 2016, after she had her last heart surgery.

[55] However, the *Canada Pension Plan* says a claimant 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.²⁴

²¹ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that a claimant 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.

²² See GD2-92-105

²³ See GD2-21

²⁴ 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.

[56] The Minister received the Claimant's application in November 2019. That means she is considered to have become disabled in August 2018.

[57] Payment of her pension starts as of December 2018.

Conclusion

[58] I find that the Claimant is eligible for a CPP disability pension because her disability was severe and prolonged by September 30, 2018.

[59] This means the appeal is allowed.

George Tsakalis
Member, General Division – Income Security Section