



Citation: *TP v Minister of Employment and Social Development*, 2022 SST 177

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant:	T. P.
Respondent:	Minister of Employment and Social Development
Representative:	Ryan Bridges
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated October 31, 2019 (issued by Service Canada)
Tribunal member:	George Tsakalis
Type of hearing:	Teleconference
Hearing date:	December 22, 2021 and post-hearing submissions
Hearing participants:	Appellant Respondent's representative
Decision date:	February 28, 2022
File number:	GP-21-1693

Decision

[1] The appeal is allowed.

[2] The Appellant, T. P., 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 was born in X. He finished high school. He took a police foundations course in college, but never finished the program. The Appellant worked as a merchandiser for a soft drink company from May 2002 to September 2017. The Appellant left this job because of his medical condition.

[4] The Appellant applied for a CPP disability pension on April 12, 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 General Division dismissed the Appellant's appeal on October 7, 2020. The General Division decided that the Appellant did not have a disability under the CPP because he had work capacity.

[6] The Appellant appealed the General Division's decision to the Appeal Division of the Social Security Tribunal. The Appeal Division allowed the appeal based on an agreement with the parties. The parties agreed that the General Division made an error of fact by ignoring the Appellant's testimony where he said his doctor referred him to an orthopaedic surgeon or other back specialist. The Appeal Division sent the appeal back to the General Division. The Appeal Division asked me to set timelines for the Appellant to provide evidence he continued to gather from specialists, including from a neurologist. I held a prehearing conference on October 29, 2021. The Appellant told me he was gathering more medical information to support his appeal. I asked the Appellant to obtain this information as quickly as possible, so that the Minister could review the

information before a hearing. I set a hearing date for December 22, 2021 and a hearing took place on that day.

[7] The Appellant said at the hearing that he is eligible for a CPP disability pension. He said that he could not work at any job because of his medical condition. The Appellant suffers from severe chronic back pain.

[8] The Minister said that the Appellant is not eligible for a CPP disability pension. The Minister said that the Appellant could have worked at some type of job during his coverage period for CPP disability benefits.¹ The Minister's representative said that the Appellant's family doctor wrote that the Appellant could return to work on modified duties on May 15, 2018.²

What the Appellant must prove

[9] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2019. This date is based on his CPP contributions.³

[10] The *Canada Pension Plan* defines "severe" and "prolonged."

[11] A disability is **severe** if it makes an Appellant incapable regularly of pursuing any substantially gainful occupation.⁴

[12] 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.

¹ See IS7-5

² See GD7-14

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 GD2-4.

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

[13] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁵

[14] 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.

[15] 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.

I accepted documents sent in after the hearing

[16] The Appellant and the Minister both delivered documents after the hearing.⁶ I gave the Appellant and the Minister time to make submissions on these documents.⁷ I received and reviewed the post-hearing submissions of the Appellant and the Minister.⁸ I am now prepared to make a decision on this appeal.

Reasons for my decision

[17] I find that the Appellant had a severe and prolonged disability by December 31, 2019. 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?

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

⁵ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁶ See IS9 and IS10

⁷ See IS11

⁸ See IS12 and IS13

– **The Appellant’s functional limitations affect his ability to work**

[19] The Appellant has chronic back pain. However, I can’t focus on the Appellant’s diagnosis.⁹ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.¹⁰ 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.¹¹

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

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

[21] The Appellant says that his medical condition has resulted in functional limitations that affect his ability to work.

[22] The Appellant says that he did not do well in school. He took basic courses in high school. He had difficulty writing. He never finished a police foundations course that he took in college. He decided to enter the workforce in 2000. He worked as a cashier at a gas station. He worked as a waiter at a restaurant. He began working as a merchandiser for a soft drink company in 2002.

[23] The Appellant says the merchandising job was very physical. He had six or seven large retail stores that he visited. He would assess the amount of soft drinks that were sold and restock the shelves. He would drag skids across a store using a pump jack. The skids weighed two to three thousand pounds.

[24] The Appellant says he sustained an upper back injury in 2006. The back pain reoccurred in 2013. By April 2014, his back pain worsened. He thinks his employer lightened his work load by removing one store from his area of responsibility. He injured his shoulder in 2016, which led to restrictions with overhead lifting. He had a trainee working with him that stocked the higher shelves. But the Appellant’s condition continued to worsen. He experienced severe back pain. He had a hard time walking. He

⁹ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹¹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

was dragging his leg. He took one day off work in August 2017. He returned to work with difficulty for two days, and then he had a planned 10 day holiday. He worked full-time for two weeks in September 2017. He has not worked at any job since September 2017.

[25] The Appellant does not believe he can work at any job because he cannot walk or sit for long periods. He has to lie down throughout the day. He cannot lift. He has a hard time putting on his socks. He is limited with his housekeeping tasks. He sold his condominium because he could not take care of it. He moved back with his mother in December 2018. He relies on his mother to cook and do the grocery shopping. He has difficulty sleeping. He cannot drive for long periods because of back pain.

[26] The Appellant wants to work, but he does not think he can do so because of his impairments. He does not believe he could work in an office because of difficulty sitting. He has little experience using computers. He does not think he can retrain. He cannot concentrate. He has a poor memory. His condition has not improved, despite receiving treatment.

[27] The Appellant said that he experienced anesthesia in his genitals, buttocks and inner thighs on January 26, 2018, which led to an emergency room visit and a lumbar spine MRI.

[28] The Appellant experience daily constant pain in 2019. He experienced back pain, spasms and numbness. His right shoulder and neck hurt. His legs hurt.

[29] The Appellant's condition has deteriorated with time. He began experiencing urinary frequency and incomplete emptying in 2020. He saw a physiatrist on October 13, 2020. The physiatrist was so concerned about his neurological symptoms that she recommended that he go straight to the emergency room to see if he had a myelopathy or cauda equine syndrome. The Appellant's doctors are not sure if he has myelopathy. They think he might have a tumour. His doctors have confirmed that he has congenital narrowing of the spinal canal.

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

[30] The Appellant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2019.¹²

[31] The medical evidence supports what the Appellant says about his functional limitations and inability to work.

[32] The medical evidence shows that the Appellant had a MRI of the thoracic spine on March 30, 2014. The MRI showed degenerative disc disease and mild spinal cord impingement.¹³

[33] The Appellant saw his family doctor on August 25, 2017. The Appellant experienced lower back pain and hip pain that went down his right leg. The Appellant had limited range of motion in his lower back. His family doctor prescribed anti-inflammatory medication.¹⁴

[34] The Appellant saw his family doctor on September 13, 2017. The Appellant complained of right sciatica type pain. The Appellant’s family doctor prescribed physiotherapy and arranged a MRI of the lumbar spine.¹⁵

[35] The Appellant had the MRI on November 5, 2017 and he discussed the MRI results with his family doctor on December 12, 2017. The MRI showed degenerative disc disease and two bulging discs. The Appellant’s family doctor did not believe that surgery was required. The Appellant’s family doctor diagnosed the Appellant with mechanical lower back pain. The Appellant had two protruding discs in his lumbar spine that caused pressure on the surrounding nerves. The Appellant’s family doctor believed that it could have taken anywhere from two to six months to resolve this issue with physiotherapy, rest, and medication.¹⁶

¹² See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹³ See IS3-4

¹⁴ See GD7-15-16

¹⁵ See GD7-15-16

¹⁶ See GD7-15-16

[36] The Appellant's family doctor completed a form for a private insurance company on January 16, 2018. The Appellant's family doctor said that the Appellant had severe restrictions with driving, walking, standing, climbing, bending, and lifting. The Appellant was unable to lift or sit. He said the Appellant was totally disabled from his own occupation for four to six months. He also said the Appellant was not a suitable candidate for trial employment or rehabilitation.¹⁷

[37] The Appellant saw his family doctor throughout 2018 for back pain and right shoulder pain. His family doctor said he had right shoulder tendonitis.¹⁸

[38] The Appellant saw a pain clinic doctor on July 17, 2018 for lower back pain. The pain clinic doctor noted the Appellant had constant back pain that went into his arms and legs. The Appellant had difficulty sitting, standing, and walking. The pain clinic doctor said the Appellant had a lumbar strain with radiculopathy. The pain clinic doctor recommended injections and physiotherapy.¹⁹

[39] The Appellant went to the hospital on August 5, 2018 because of frequent back spasms. The Appellant was taking Tramacet and muscle relaxers for back spasms, but these medications were not working. The Appellant had difficulty changing positions. The emergency room doctor gave the Appellant a Toradol prescription.²⁰

[40] The Appellant's family doctor completed a medical report for the Minister on April 12, 2019. He said he last saw the Appellant on March 25, 2019. The Appellant continued to experience back pain that went into his legs. He did not expect the Appellant to return to work.²¹

[41] The Appellant testified at his previous General Division hearing on October 1, 2020 that he had been referred to an orthopaedic surgeon or another back specialist. It turned out that the Appellant had been referred to a physiatrist. The physiatrist saw the

¹⁷ See GD7-17-19

¹⁸ See GD4-2-4

¹⁹ See GD4-11-14

²⁰ See GD4-9

²¹ See GD2-58-66

Appellant on October 13, 2020. The physiatrist was very concerned about the Appellant's neurological symptoms. She asked the Appellant to immediately go to the hospital to look at whether he had cauda equina syndrome or cervical myelopathy.²² The physiatrist said the Appellant needed an MRI of his spine and brain.²³

[42] The Appellant had a spine and brain MRI on October 14, 2020, which did not show any significant abnormalities.²⁴

[43] The Appellant saw a neurologist on October 23, 2020. The neurologist noted that the Appellant had experienced saddle anesthesia since July 2020. The Appellant arms had become heavy and less coordinated in the three weeks before this appointment. The neurologist asked the Appellant to come in for an appointment, which took place on October 29, 2020. The Appellant told the neurologist that he experienced chronic back pain and he suffered from urinary frequency and incomplete emptying. The neurologist suggested that the Appellant undergo further testing to help diagnose his medical condition.²⁵

[44] The Appellant saw a physiatrist on February 1, 2021. The physiatrist noted that the Appellant had difficulty with sitting and standing. The Appellant continued to experience chronic back pain, fatigue, and numbness.²⁶

[45] The Appellant saw another neurologist on March 15, 2021. A nerve conduction test was normal, but the Appellant showed neurological symptoms on his examination. The neurologist believed the Appellant had image negative myelopathy.²⁷

[46] The Appellant underwent a spinal tap on May 5, 2021. The procedure did not show any evidence of any structural abnormality. The neurologist said that the cause of

²² See AD1-8

²³ See IS10-41-43

²⁴ See IS3-9 and 37

²⁵ See IS3-10

²⁶ See IS10-12-13

²⁷ See AD1-6-7

the Appellant's symptoms was unclear.²⁸ His neurologists decided to monitor his condition.²⁹

[47] The Appellant underwent a cervical spine MRI on July 23, 2021. The MRI did not show nerve root compressions, but it did show that the Appellant had a congenitally narrow spinal canal.³⁰

[48] The Appellant saw another doctor on November 5, 2021. The doctor noted the Appellant had mildly worse neurological symptoms.³¹

[49] The Appellant underwent a MRI of the right shoulder on November 26, 2021 that showed likely mild chronic adhesive capsulitis.³²

[50] The Minister had three main arguments about the medical evidence:

- The medical evidence did not support a finding of a severe disability;
- The medical evidence showed that the Appellant had work capacity by December 31, 2019; and
- The medical evidence showed that the Appellant's medical condition deteriorated after December 31, 2019.

[51] I agree with the Minister that some of the medical evidence did not show severe findings. The Appellant's doctors could not determine the cause of the Appellant's symptoms through MRIs and other testing. However, I am still satisfied that the Appellant suffered from debilitating chronic back pain by December 31, 2019 that led to restrictions in his ability to sit, drive, walk, stand, climb, bend, and lift. His doctors may have struggled to determine the cause of his symptoms, but I do not see evidence that they doubted the extent of his symptoms and how they affected his daily life.

²⁸ See IS10-5-6

²⁹ See IS10-17-18

³⁰ See IS3-17

³¹ See IS10-9-10

³² See IS10-25

[52] Many people who suffer from chronic pain have difficulty proving their cases. This is because chronic pain sufferers are impaired by a condition that cannot be supported by objective medical findings.³³ Many chronic pain cases come down to an Appellant's credibility. I found the Appellant to be a credible witness. He had a good work ethic. He worked at the same job for 15 years, even though he had suffered from medical problems since at least 2014. The Appellant has experienced negative economic consequences because of his inability to work. He had to sell his condominium because he could not take care of it and he moved in with his mother in 2018. I believe the Appellant could work if he could, but I am satisfied that he could not do so because of his medical condition.

[53] The Minister's representative argued that the medical evidence showed the Appellant had work capacity by December 31, 2019. This is because the Appellant's family doctor wrote a note on March 7, 2018 that said the Appellant was fit to return to work on modified duties on May 15, 2018.³⁴

[54] The Appellant testified that he wanted to go back to work at a modified job, but he never recovered to the point that he could return to work. I do not place much weight on the family doctor's March 7, 2018 note. The family doctor said on December 2, 2017 that the Appellant was unfit for work and had a poor prognosis for six months.³⁵ The Appellant's family doctor provided another opinion on January 16, 2018, which said the Appellant was totally disabled from his own occupation for four to six months and was not a suitable candidate for trial employment or rehabilitation.³⁶ I did not see anything in the medical records that suggested the Appellant's medical condition improved to the point he could return to modified work from January 16, 2018 to March 7, 2018. I accept the Appellant's evidence that this note was more a reflection of his desire to work, as opposed to a realistic appraisal of his ability to work.

³³ See *Nova Scotia (W.C.B.) v. Martin*, 2003 SCC 54

³⁴ See GD7-14

³⁵ See GD7-20-21

³⁶ See GD7-17-19

[55] The Minister's representative argued the Appellant's medical condition deteriorated after December 31, 2019. He pointed out that a neurologist's said the Appellant was "previously well prior to July 2020 when he began experiencing migratory severe back spasms."³⁷ I disagree that the Appellant was "well" before July 2020. The medical evidence showed that the Appellant suffered from severe back pain since at least August 2017 that led to severe functional impairments, which affected his ability to work. In addition, the report that said the Appellant was well before July 2020, also confirmed that the Appellant suffered from chronic lower back since 2017.³⁸

[56] I agree with the Minister that the Appellant must show that he suffered from a severe and prolonged disability by December 31, 2019, and it is irrelevant if his condition deteriorated after that date. I agree that the Appellant's medical condition seemed to worsen in 2020. The Appellant's family doctor in a January 25, 2020 report said that the Appellant's back pain was unchanged from 2018. He added that the Appellant was still unable to any bending or lifting or twisting of his lower back.³⁹

[57] I am satisfied that the medical evidence supports that the Appellant's difficulties with driving, walking, standing, climbing, bending, and lifting prevented him from working by December 31, 2019.

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

– **The Appellant has followed medical advice**

[59] To receive a disability pension, an Appellant must follow medical advice.⁴⁰ I find that the Appellant followed medical advice.

[60] The Appellant followed up with his family doctor. He saw a pain clinic doctor. The Appellant testified that he received pain injections at this clinic. The Appellant has seen physiatrists and neurologists. He has undergone numerous MRIs and diagnostic tests. He has tried medications to relieve his pain. He tried chiropractic treatment,

³⁷ See AD1-6

³⁸ See AD1-6

³⁹ See GD4-2-4

⁴⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

physiotherapy, and massage therapy. However, the Appellant is still left with severe chronic back pain. The Appellant mentioned that he discussed depression with his family doctor, but he has not had counselling. I do not place much significant on this because his family doctor did not refer him to counselling. I am also satisfied that the Appellant's medical problems are physical, as opposed to psychological.

[61] 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 his from earning a living at any type of work, not just his usual job.⁴¹

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

[62] 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

[63] 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.⁴²

[64] I find that the Appellant can't work in the real world. The Appellant was only 42 years old by December 31, 2019. The Appellant finished high school, but failed to finish community college. The Appellant says he struggled in school. His past work experience was largely restricted to physical jobs. He has little knowledge of computers. However, the Appellant understands English, which suggests that retraining for sedentary work is a realistic option for him. But I am still satisfied that the Appellant was

⁴¹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁴² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

incapably regularly of pursuing any substantially gainful occupation by December 31, 2019.

[65] I do not believe the Appellant could have handled any type of physical work by December 31, 2019 because of his difficulty with lifting and standing. I do not believe that the Appellant could have handled any type of sedentary work by December 31, 2019 because of his impairments, which included difficulty with sitting. I do not believe the Appellant could have upgraded his education and work on a computer because of his impaired concentration caused by chronic pain. I do not believe he could have handled a driving job because his back pain was aggravated with prolonged sitting. I accept his hearing evidence that his ability to perform his activities of daily living, including performing housekeeping tasks was impaired by December 31, 2019. I accept that the Appellant's pain levels were unpredictable and that he could not have worked on a regular basis at any type of job by December 31, 2019.

[66] The Minister says the Appellant had work capacity by December 31, 2019. However, the Appellant did not look for alternative work. I agree with the Minister that the law says that if the Appellant can work in the real world, he must show that he tried to find and keep a job.⁴³ However, the law also says that when an Appellant does not have any residual work capacity, they do not have to find alternative employment.⁴⁴ I do not believe that the Appellant has had the capacity to regularly pursue any substantially gainful occupation since he last worked in September 2017.

[67] The Appellant testified that he explored alternative occupations after he stopped working in September 2017. He thought he could work auditing merchandisers. He e-mailed his employer and asked if they could create a job for him upon his recovery. In June 2020, he spoke with his employer's human resources consultant asking for accommodation, but nothing came out of these discussions. He also asked the Workplace Safety Insurance Board to retrain him in June 2020. However, I do not believe that the Appellant was capable of working. I believe the Appellant was engaged

⁴³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

⁴⁴ See *Inclima v Canada (Attorney General)*, 2003 FCA 117 and *Balkanyi v. Canada (Attorney General)*, 2021 FCA 164.

in wishful thinking when he made enquiries about alternative work. I believe that his medical condition made him incapable of working at any type of job after September 2017.

[68] I find that the Appellant's disability was severe by December 31, 2019.

Was the Appellant's disability prolonged?

[69] The Appellant's disability was prolonged.

[70] The Appellant's condition began in at least August 2017. This condition has continued since then, and it will more than likely continue indefinitely.⁴⁵

[71] The Appellant's family doctor said that the Appellant's condition would likely deteriorate in his April 12, 2019 medical report to the Minister.

[72] The Appellant's family doctor said in January 25, 2020 that the Appellant's back pain remain unchanged from 2018. He said the Appellant's prognosis was poor at best and he remained unfit for work.⁴⁶

[73] I find that the Appellant's disability was prolonged by December 31, 2019.

When payments start

[74] The Appellant had a severe and prolonged disability in September 2017, when he last worked.

[75] 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.⁴⁷

⁴⁵ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that a 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.

⁴⁶ See GD4-2-4

⁴⁷ 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.

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

[77] Payment of his pension starts as of May 2018.

Conclusion

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

[79] This means the appeal is allowed.

George Tsakalis
Member, General Division – Income Security Section