



Citation: *AS v Minister of Employment and Social Development*, 2021 SST 923

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 29, 2020
(issued by Service Canada)

Tribunal member: Tyler Moore

Type of hearing: Teleconference

Hearing date: September 23, 2021

Hearing participant: Appellant

Decision date: October 21, 2021

File number: GP-20-2002

Decision

[1] The appeal is dismissed.

[2] The Claimant, A. S., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is 55 years old. She last worked as a full-time excise tax auditor from January 1991 until August 2017. She indicated that she could no longer work as of January 2016 because of right shoulder/arm loss of function and pain, as well as a severe rotator cuff tear that required surgery. She is right handed.

[4] The Claimant applied for a CPP disability pension on December 11, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Claimant says that she has already undergone two unsuccessful right shoulder surgeries. She is currently on a waiting list for have right shoulder reconstructive surgery. She has had two pervious surgeries on her left shoulder in the 1990s. She continues to have limited use of her right arm/hand and her left arm/hand is getting worse because she is compensating. The Claimant questioned how she could realistically do any type of work with the functional limitations she has.

[6] The Minister acknowledges that the Claimant has right shoulder/arm pain and loss of range of motion. Reconstructive surgery, however, is expected to improve her function. The limitations she is expected to have after the surgery may limit her ability to return to a physically demanding job, but she is expected to improve and be capable of modified work.

What the Claimant must prove

[7] For the Claimant to succeed, she must prove that she had a disability that was severe and prolonged by December 31, 2020. This date is based on her contributions to the CPP.¹

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

[9] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.²

[10] This means I have to look at all of the Claimant’s medical conditions together to see what effect they had 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 was severe. If the Claimant was able to regularly do some kind of work that she could earn a living from, then she 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 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.

[13] The Claimant has to prove that she had 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 was disabled.

¹ Service Canada uses a claimant’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 Claimant’s CPP contributions are on pages GD3-11 to 12.

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 Claimant hasn't proven that she had a severe and prolonged disability by December 31, 2020.

Was the Claimant's disability severe?

[15] The Claimant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Claimant had functional limitations, but they didn't preclude all work

[16] The Claimant has a chronic right rotator cuff tear, asthma, and hypertension. Her hypertension and asthma are stable and managed conservatively with medication. I can't, however, focus on her diagnoses.⁴ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁵ 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 affected her ability to work.⁶

[17] I find that the Claimant did have functional limitations, but they did not preclude her regularly from any substantially gainful work.

– What the Claimant says about her functional limitations

[18] Overall, I found that the Claimant was not completely forthright with her testimony. She was apprehensive, and her testimony was somewhat evasive. For example, when initially asked if she had/used a computer at home, she testified that she didn't use one because she did not own a computer. Through further questioning, her testimony changed and she acknowledged that she did use her son and daughter's computers at home. For that reason, I have given more weight to the medical evidence contained in the Hearing File.

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.

[19] The Claimant says that her medical condition has resulted in functional limitations that affected her ability to work. She says that:

- She has not driven since 2017 because her right arm is weak when holding the steering wheel. She uses public transportation.
- She has a hard time using a knife to cut food with her right hand.
- She has had to rely on her sister and her adult daughter to help with grocery shopping and home maintenance. Her sister has been coming over with food and groceries about 3 times per week.
- She would go out for coffee/lunch with friends/co-workers every week or so prior to COVID restrictions.
- She enjoyed going to the mall to walk or to a movie before COVID restrictions.
- She would cook a big batch of food at home that would last her for a few days.
- She stopped sewing in 2016 because it was too painful.
- She would take her son to baseball practices on the bus.
- She relied on her neighbour to shovel the snow.

[20] The Claimant testified that she was living in a 3-storey townhouse with her 14 year old son and adult daughter, when her daughter was not away at university. She described that a typical day around December 2020 involved getting up in the morning, getting ready/making breakfast, walking her teenage son to the bus stop, doing some reading, watching television, going out to walk, doing some chores around the house, and perhaps using her son or daughter's computer. She would do some cooking, grocery shopping, and laundry. She found laundry difficult, though, because it was stacked and she would have to reach. She attended church every few weeks, and went to aquatherapy regularly, again, before COVID restrictions.

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

[21] The medical evidence supports that the Claimant had limitations, but treatment had yet to be exhausted. For example:

- In April 2018, Dr. Hall, orthopedic surgeon, reported that the Claimant's restrictions included no overhead work, no lifting, no forceful pushing/pulling, and lifting limited to 10 lbs.
- In December 2018, Dr. Hall noted that previous right shoulder surgeries were not successful. The Claimant's last revision surgery was in August 2017, which is when she stopped working. Dr. Hall recommended right rotator cuff reconstruction surgery. He indicated that following the surgery, she would require permanent work restrictions.

[22] I must note that the medical evidence on file focused primarily on her right shoulder condition. There was no indication of left shoulder/arm functional limitations that would have impacted her ability to work as of December 31, 2020.

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

– **The Claimant had not exhausted all treatment options**

[24] The Claimant has followed medical advice overall, but the shoulder reconstruction surgery that is expected to improve her right shoulder/arm function has yet to be performed.⁷ The Claimant testified that she has:

- Attended physiotherapy until 2018 when her doctor reportedly advised her to stop going because it wasn't helping.
- Last taken Tramadol medication about a month before the hearing, and she was taking Oxycontin once or twice a week. She was also taking medication for hypertension and using an asthma inhaler infrequently.
- Participated in aquatherapy until COVID restrictions were implemented.

⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

- Been on a waiting list to have Dr. Hall perform right shoulder reconstructive surgery. Dr. Hall anticipated recovery of function within 6 to 9 months after the surgery.
- Set up a consult with a neurologist the day after the hearing to assess the recent onset of a left hand/arm tremor. According to the Claimant, however, the tremor has only been present for the last few months.

[25] In December 2010, the Claimant's medication use was conservative and infrequent, and she was on a waiting for surgery that was expected to improve her function.

[26] I now have to decide whether the Claimant can regularly do other types of work. To be severe, her functional limitations must have prevented her from earning a living at any type of work, not just her usual job.⁸

– **The Claimant work in the real world**

[27] When I am deciding whether the Claimant can work, I can't just look at her medical conditions and how they affected what she can do. I must also consider factors such as her:

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

[28] 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.⁹

[29] I find that the Claimant can work in the real world. She was 54 years old and fluent in English. She finished 3 years of university in administration and records

⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

management. She has worked in accounting, as a tax collector, and a tax auditor. She has good computer skills. I find that the Claimant has many transferable skills. I also recognize that she has functional limitations related to her right shoulder/arm, but she has demonstrated limited effort to find suitable alternate work or to re-train.

– **The Claimant didn't try to find and keep a suitable job**

[30] If the Claimant can work in the real world, she must show that she tried to find and keep a job. She must also show that her efforts weren't successful because of her medical condition.¹⁰ Finding and keeping a job includes retraining or looking for a job that accommodates her functional limitations (in other words, a job with special arrangements).¹¹

[31] After the Claimant's first right shoulder surgery in January 2016, she returned to her previous job. She described having a really hard time working full days on the computer. She used all of the vacation and sick time that she had available. That continued until she stopped working to have revision shoulder surgery in August 2017.

[32] The Claimant described that her job required sustained laptop use. She was also required to visit clients offsite to review their accounting records. That meant carrying a bag with her that weighed up to 40lbs. She had to drive frequently and long distances to meet with clients. Between her shoulder surgery in 2016 and the revision surgery when she stopped working in August 2017, the only modification that was made to her job was that she didn't have to travel to meet with clients. She continued to have to be on her laptop all day.

[33] The Claimant has been in receipt of long-term disability benefits through her employer since August 2017. She has not looked for other suitable work, or attempted to re-train. I recognize that the Claimant may not have been able to do full-time work using a laptop computer, but her limited effort to attempt alternate work has failed to convince me that she was incapable regularly of any work as of December 31, 2020.

¹⁰ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

¹¹ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[34] Therefore, I can't find that the Claimant had a severe disability by December 31, 2020.

Conclusion

[35] I find that the Claimant isn't eligible for a CPP disability pension because her disability didn't meet the definition of severe. Treatment options that could mitigate her circumstances remained, and she had not attempted any alternate work. Because I have found that her disability wasn't severe, I didn't have to consider whether it was prolonged.

[36] This means the appeal is dismissed.

Tyler Moore
Member, General Division – Income Security Section