



Citation: *AV v Minister of Employment and Social Development*, 2022 SST 195

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. V.
Representative: Steven Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 5, 2021 (issued by
Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Teleconference

Hearing date: February 7, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: February 15, 2022

File number: GP-21-1515

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is a 58-year-old child and youth worker. He worked at a school board for 30 years, working with children with behavioural issues. He also runs his own business as a handyman. He has post-traumatic stress disorder (PTSD) related to his job at the school. He also has hypertension and has had hip replacement surgery.

[4] The Appellant applied for a CPP disability pension on September 30, 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 PTSD is severe, he has had this condition since 2012, and it is gradually worsening. Children assaulted him many times over the years at his job. He also has hypertension and has had a hip replacement that causes physical limitations. He argues he is unable to work because of his conditions.

[6] The Minister says that, while the Appellant may not be able to return to his job at the school, he has work capacity because he continues to oversee projects related to his self-employed business. The Minister argues that the gross income from his business is substantially gainful and that he can do other types of work.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by the hearing date, February 7, 2022.¹

[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 GD2-6. 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.

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 February 7, 2022. I reached this decision by considering the following issues:

- Is the Appellant's disability severe?
- Is the Appellant's disability prolonged?

Is the Appellant's disability severe?

[15] The Appellant's disability 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 PTSD, hypertension, and limitations in his right hip and leg due to a hip replacement. However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether he has functional limitations that get 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

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

– What the Appellant says about his functional limitations

[18] The Appellant says that his medical conditions have resulted in the following functional limitations that affect his ability to work:

- One leg is shorter than the other because of his hip replacement.
- He needs to use stairs slowly. He can't walk long distances and can't do heavy carrying.
- Due to his PTSD, he is hyper vigilant and easily startled. He is unable to have people behind him because he has been assaulted from behind a few times.

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.

- He isn't able to work with other people.
- He isolates himself from others. He feels anxious and depressed.
- He has flashbacks of being assaulted at work, and it makes him lose concentration.
- He has nightmares about three nights per week and is unable to function the next day due to anxiety and fatigue.
- He is afraid of being unable to control his behaviour if someone triggers him. Both he and his family are afraid of that unpredictability.

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

[19] The Appellant must provide medical evidence that shows that his functional limitations affected his ability to work by February 7, 2022.⁷

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

[21] In a medical report dated June 5, 2021, Dr. Terenzi, the family doctor, confirmed ongoing difficulty with the following: memory, attention, concentration, motivation, and sleep. She said that the Appellant's anxiety, flashbacks, and panic precluded gainful employment.⁸

[22] In a neuropsychological assessment dated May 12, 2020, Dr. Hope confirmed a diagnosis of PTSD. He said the Appellant slept about five hours per night and had nightmares two to three times per week that caused him to wake up afraid.⁹

[23] Dr. Hope also noted the Appellant was fearful of reacting physically and hurting someone if triggered in public. He startled easily. He feared someone would come up behind him. His responses were noted to indicate significant emotional distress. He avoided social events and situations.

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

⁸ See GD2-51.

⁹ See GD2-130.

[24] In a medical report dated June 6, 2019, Dr. Clair, the treating psychologist, confirmed having treated the Appellant on and off since 2012. He outlined various incidents of assaults by children over the years that caused flare-ups in the Appellant's medical condition.¹⁰

[25] According to Dr. Clair, the Appellant was urged to take time off work in 2018 due to his PTSD but wanted to try to keep working. He tried to use weekly treatment to help him cope and keep working until he was no longer able to do so after another assault.

[26] Dr. Clair confirmed persisting symptoms of PTSD, including:

- vigilance of risk and danger in interpersonal situations
- hyper-reactivity to loud noises
- fearfulness about people he perceives as unpredictable
- physiological tension
- sleep disturbance
- startle response
- anxiety when anyone approaches from behind

[27] Dr. Clair noted that, as a result of these symptoms, the Appellant should not be at work.¹¹

[28] In 2019, Dr. Clair said that the Appellant's likelihood of recovery and improvement was unclear because he had received only partial treatment while still being exposed to stressors (assaults) at work. While he is no longer exposed to work stressors, he hasn't improved despite continuing with his treatment.

[29] The medical evidence supports that the Appellant's various symptoms related to his PTSD prevent him from doing a job where he has to work with others, is exposed to sudden or unexpected noise, or could be approached from behind.

¹⁰ See GD2-52.

¹¹ See GD2-53.

[30] The Appellant's nightmares and flashbacks affect his ability to show up predictably as a worker and his ability to concentrate on work. His ability to work predictably is a key consideration when deciding whether he can work "regularly."¹²

[31] I find he was unable to work at his previous job by February 7, 2022.

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

– **The Appellant has followed medical advice**

[33] The Appellant has followed medical advice.¹³

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

[35] The initial treatment recommended for the Appellant was psychological counselling and medication. He is still consistently participating in counselling and taking his medication. But, he has had to reduce his treatment attendance from bi-weekly to monthly because he pays for it out of pocket at a cost of \$200 per session.

[36] The Appellant has followed recommendations from Dr. Hope, Dr. Clair, and Dr. Terenzi to have exposure therapy. It involves controlled exposure to things that scare him. He says he has been limited in this treatment because of the pandemic. Many places have been closed down or restricted, making exposure to people and places limited. He hasn't had the progress or improvement that was anticipated from this treatment.

¹² See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

¹³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁴ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁵ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[37] The Appellant uses his self-employment for his exposure therapy right now. It allows him to work at leaving the house and engaging with other people on a limited basis. He says this has been crucial for his mental health in the pandemic.

[38] The Appellant says that, while Dr. Clair is treating him over the phone, he doesn't find it as effective for him as in-person treatment, and this has also affected his ability to improve his condition.

[39] 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.¹⁶

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

[40] 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

[41] 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.¹⁷

[42] I find that the Appellant can't work in the real world. This is what I considered:

- The Appellant is 58 years old. His age could be a barrier for starting a new career.
- The Appellant has good English skills, and his ability to communicate would not affect his ability to work.

¹⁶ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁷ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

- The Appellant has a college education and could participate in re-training. However, he would have to work alone in a quiet space because of his functional limitations.
- While the Appellant has skills as a handyman, he says he doesn't have any formal skilled trade training of any kind.
- The Appellant has 30 years' experience working as a child and youth worker. However, I don't believe that he could use these skills at a new career, since his functional limitations mean he can't ever work with children or youth again.

[43] The Appellant made efforts to work. These efforts show that his disability gets in the way of earning a living. This is what I considered:

- The Appellant is self-employed as a handyman.
- He says that, when he was first diagnosed with PTSD in 2012, he had to modify this work and start using subcontractors to do all the actual jobs. This was because he was unpredictable to work regularly and felt unable to control himself if he got upset.
- His tasks are to speak to a customer by phone to understand the job and then find someone to do the work. Sometimes, he is able to go and inspect work on site, but this depends on whether he has had a bad night before and how he feels emotionally.
- He says the business suffered a significant loss in profits when he switched to this model in 2012 and stopped doing the work himself.
- This job fits his functional limitations because he can do most of the work from a quiet room in his home as his symptoms allow.
- He says all of his tasks take approximately four hours per week in total.
- He is unable to maintain a schedule or attend to any work on a predictable basis. If he has poor sleep or night terrors, he can't function the next day. He can't predict the days this will happen, but it is generally two to three times per week.
- Due to being unpredictable and feeling emotionally triggered, he sometimes won't even go to work sites to inspect a job.

- He takes only jobs based on referrals from friends or family in his network. He doesn't advertise or engage with the public.
- He says he no longer does this work for the income. He does it as a form of therapy to keep him sane. He says it helps him to continue his exposure therapy in a limited capacity and within his limitations.

[44] The Minister argues that, despite the significant modifications to self-employment, it still qualifies as gainful work based on the gross income the Appellant reported for the business. The Minister points to the fact that he reported gross income from self-employment of \$39,965 in 2020 and \$12,245 in the first five months of 2021.

[45] When considering whether income from self-employment is gainful, it is appropriate for me to look beyond the gross income of the business to determine whether there is actually a profit leading to income.¹⁸

[46] In 2019, the gross income of the Appellant's business was \$10,674. The expenses of the business were \$4,123.61 for "purchases during the year."¹⁹ This left the business with \$6,550, from which additional expenses were payable (auto, insurance, utilities, etc.).

[47] The business ended up reporting a loss of \$9,639.35 for 2019.

[48] I asked the Appellant about these "purchases" expenses. He told me that his business paid for all the materials for a job. For example, if they are going to do tile work, they will buy the tiles first. This is a direct, out-of-pocket expense of doing business.

[49] In 2020, the gross income of the business was \$39,965 for the full year. The expenses were \$22,648.45 for "purchases" and \$5,000 for "subcontracts". The

¹⁸ See *Minister of Employment and Social Development v TH*, 2016 SSTADIS 338.

¹⁹ See GD2-25.

“subcontracts” expense is what he pays for other people to do the work. This left the business with \$12,316.55.²⁰

[50] After the additional expenses of auto, insurance, and utilities, the business made a profit or income of \$200.02 for the full year of 2020.

[51] In the Statement of Business or Professional Activities covering the period from January 1, 2021, to May 31, 2021, where the gross income was \$12,245, the Appellant reported expenses that included \$8,864.07 for “purchases” and \$1,250 for “subcontracts.”²¹ After this, expenses such as auto, insurance, and utilities were payable, and the business was reporting a loss of \$472.97 for the year.

[52] When I consider these business expenses, the Appellant isn’t left with an actual income in 2021 from self-employment. He says that the business didn’t make any other income in 2021.

[53] I find that the Appellant’s self-employment doesn’t amount to gainful employment.²²

[54] The Appellant says he continues the work, despite not really earning an income, for therapeutic purposes. He is able to do it only because it is about four hours per week, alone at home, and at his own pace.

[55] I find that the Appellant’s disability was severe by February 7, 2022. His efforts show that, by then, he could not regularly do any work he could earn a living from.

Is the Appellant’s disability prolonged?

[56] The Appellant’s disability is prolonged.

²⁰ See GD2-46 and GD2-47.

²¹ See GD2-20.

²² Section 68.1 of the *Canada Pension Plan Regulations* says work 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. This amount in 2021 was \$16,963.92. In 2022, the amount is \$17,489.40.

[57] The Appellant's PTSD began 2012. This condition has continued since then, and it will more than likely continue indefinitely.²³ The evidence confirms that the condition has worsened over time, until the Appellant could no longer work.

[58] While improvement was expected after exposure therapy, the Appellant has been unable to participate fully in it due to the pandemic. His self-employment has created a limited ability to engage in exposure. As a result, he hasn't had the improvement that was expected.

[59] The Appellant says that his condition has deteriorated since 2020 due to the pandemic. He has been more isolated and spends a lot of time alone in his room. None of his symptoms have resolved.

[60] In a medical report dated October 18, 2019, Dr. Terenzi noted the Appellant's condition was stable and that she didn't believe he would ever be able to return to any gainful employment.²⁴

[61] Based on the evidence available, there is no indication that the Appellant's condition has improved since that time. His evidence was that it has deteriorated due to limitations in treatment from 2020 to the present.

[62] I find that the Appellant's disability was prolonged by February 7, 2022.

When payments start

[63] The Appellant had a severe and prolonged disability in April 2019. This was the date that he could no longer regularly work at substantially gainful employment.

²³ 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.

²⁴ See GD2-165.

[64] 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.²⁵

[65] The Minister received the Appellant's application in September 2020. That means he is considered to have become disabled in June 2019.

[66] Payment of his pension starts as of October 2019.

Conclusion

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

[68] This means the appeal is allowed.

Sarah Sheaves
Member, General Division – Income Security Section

²⁵ 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.