



Citation: *FF v Minister of Employment and Social Development*, 2022 SST 186

## Social Security Tribunal of Canada General Division – Income Security Section

# Decision

**Appellant:** F. F.  
**Representative:** Katie Conrad

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated November 12, 2020 (issued by Service Canada)

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**Tribunal member:** Connie Dyck

**Type of hearing:** Teleconference

**Hearing date:** February 17, 2022

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** ~~February 24, 2022~~

**Corrigendum date:** March 11, 2022

**File number:** GP-20-1940

## Decision

[1] The appeal is allowed.

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

## Overview

[1] The Appellant worked as an envelope machine operator at X from 2006 until 2014 when his back pain forced him to stop working. He was only 35 years old. He has not been able to maintain any employment since then.

[2] The Appellant applied for a CPP disability pension on November 1, 2019.<sup>1</sup> 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.

[3] The Minister says the evidence does not support that the Appellant cannot do some type of work, including modified and part-time employment. While he has made several unsuccessful attempts to return to the workforce, they have all been in physical jobs. The Minister recognizes he has limited education; however, there is no indication he has attempted retraining or on-the-job training.

## What the Appellant must prove

[4] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2021. This date is based on his contributions to the CPP.<sup>2</sup>

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<sup>1</sup> The CPP disability application is at GD 2-43.

<sup>2</sup> 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 GD 7-13.

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

[6] A disability is **severe** if it makes a Appellant incapable regularly of pursuing any substantially gainful occupation.<sup>3</sup>

[7] 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.

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

[9] 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.

[10] 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.

## **Reasons for my decision**

[11] I find that the Appellant had a severe and prolonged disability by December 31, 2021. I reached this decision by considering the following issues:

- Was the Appellant’s disability severe?
- Was the Appellant’s disability prolonged?

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

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

## **Was the Appellant's disability severe?**

[12] The Appellant's disability was 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**

[13] The Appellant has severe kyphosis, osteoarthritis in his knee and rotator cuff issues in his shoulders.<sup>5</sup> However, I can't focus on the Appellant's diagnoses.<sup>6</sup> Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.<sup>7</sup> 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.<sup>8</sup>

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

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

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

- His main symptoms are chronic back pain; pain in his shoulders, legs, knees, and ribs; disturbed sleep; poor memory; depressed mood; and anxiety attacks.
- He says the back pain goes down his legs and up to his neck. This causes headaches on a daily basis.
- His anxiety started around 2010, the same time as his back pain. He has mental breakdowns at least 3-5 times a month that feel like he is having a heart attack. He no longer leaves his house and has given up his driver's license because he does not feel safe driving.
- He cannot sit straight more than a few seconds. He needs to sit hunched over with his elbows on his knees.

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<sup>5</sup> These diagnoses are provided by Dr. McFarlane at GD 8-19.

<sup>6</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>7</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>8</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- He has difficulty with memory and concentration. He has to use notes. He can't remember what he has read.
- He relies on his wife to do all of the errands and grocery shopping. He relies on his children to help with household chores.
- Before he does any task, he needs to take Percocet to manage his pain. Even with Percocet, he is only able to do a task for a maximum of 15 minutes before he needs to go and lay down to ease his pain
- Percocet helps take the edge of his pain for about 3 hours. He needs to use between 10-14 pills in a 24 hour period, including during the night when he wakes from pain.
- His pain interferes with his sleep, so he needs to take naps and rest breaks during the day.

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

[16] The Appellant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2021.<sup>9</sup>

[17] Dr. McFarlane (family doctor) reported that since 2011, the Appellant's kyphosis has progressed and degenerative changes in his spine are visible on x-rays.<sup>10</sup> The x-rays of the Appellant's spine from 2011 to 2021, showed a steady worsening of his degenerative disc disease, osteoarthritis, kyphosis and spondylosis.

- An x-ray of the lumbar spine in April 2011 showed degenerative disc disease changes and sclerosis of the facet joints in keeping with facet osteoarthropathy.<sup>11</sup>
- The x-rays of August 2013 showed degenerative disc disease in the mid and lower thoracic spine. There was also mild spondylosis.<sup>12</sup> Dr. McFarlane

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<sup>9</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>10</sup> Dr. McFarlane's letter is at GD 8-19.

<sup>11</sup> This information is at GD 2-97.

<sup>12</sup> The x-ray results are at GD 2-101.

noted that it looked like the Appellant's kyphosis was worsening.<sup>13</sup> It was Dr. Charron's (physiatrist) opinion that the Appellant's symptoms related likely to thoracic osteoarthritis, although there was also a myofascial component.<sup>14</sup>

- By May 2020, an x-ray showed further deterioration in the Appellant's condition. It showed moderate osteoarthritis in the lumbar spine which was worse on the right side.<sup>15</sup>
- An x-ray of the Appellant's spine taken in March 2021, noted he had advanced kyphosis. There was mild to moderate disc disease of the thoracic spine with loss of disc height.<sup>16</sup>

[18] I have given considerable weight to Dr. McFarlane's opinions, observations and findings. This is because Dr. McFarlane has been following and treating the Appellant's condition since it's onset in about 2009. His opinions are based on at least 12 years of regular consultations, examinations and treatments.

[19] Dr. McFarlane said the Appellant's greatest and most consistent complaint has been of back pain. This involves the whole spine. This condition is aggravated by lifting, pushing, pulling, anything that stresses the spine and puts it under the load.<sup>17</sup>

[20] Dr. McFarlane noted the Appellant complained of problems with his left knee and shoulder. He has some shoulder pain at rest which increases with the use of his arms. He has decreased range of motion and pain on both sides as he uses his arms. Dr. McFarlane said the Appellant was restricted in working involving any and all of these movements.<sup>18</sup>

[21] Dr. McFarlane thinks the Appellant is unfit for any work. His musculoskeletal conditions are degenerative and progressive, so the prognosis is poor.<sup>19</sup>

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<sup>13</sup> Dr. McFarlane's clinic note is at GD 5-145.

<sup>14</sup> Dr. Charron's report is at GD 2-193.

<sup>15</sup> The x-ray results are at GD 5-661.

<sup>16</sup> The x-ray results are at GD 5-670.

<sup>17</sup> The report is at GD 8-19.

<sup>18</sup> Dr. McFarlane's letter is at GD 8-20.

<sup>19</sup> This information is at GD 8-19.

[22] The medical evidence supports that the Appellant's back pain prevented him from doing any type of work by December 31, 2021. He is unable to lift, bend, twist or carry.<sup>20</sup> He is only able to walk, stand or sit hunched over for a short time.<sup>21</sup> He requires narcotic medication in order to perform a maximum of 15 minutes of a minimal task like washing dishes. His use of narcotic medication has steadily increased over the years. In 2014 he was using 8 Percocet per day.<sup>22</sup> By 2021, he was using 14, almost double the amount in 2014. This supports Dr. McFarlane's findings that the Appellant's condition has steadily worsened since and he is no longer able to work.

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

### **The Appellant has followed medical advice**

[24] To receive a disability pension, an appellant must follow medical advice.<sup>23</sup> 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.<sup>24</sup>

[25] The Appellant has followed medical advice.<sup>25</sup> The Appellant has tried numerous medications including the regular use of narcotics (Percocet). Dr. McFarlane noted that the medications are "somewhat helpful in pain control".<sup>26</sup> The Appellant confirmed the medications only take the edge off the pain. Dr. McFarlane has been the Appellant's primary care giver for more than 10 years and the Appellant has followed his advice.

[26] I note that Dr. Fleming (orthopedic surgeon) recommended physiotherapy.<sup>27</sup> This is the one recommended treatment the Appellant has not tried. I find the Appellant's explanation that he has no insurance coverage and cannot afford physiotherapy to be reasonable. I also considered that this recommendation was made to "help him cope

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<sup>20</sup> Dr. McFarlane's findings are at GD 2-89.

<sup>21</sup> This information is at GD 5-233.

<sup>22</sup> This information is at GD 5-192.

<sup>23</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>24</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>25</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>26</sup> Dr. McFarlane's comments are at GD 2-89.

<sup>27</sup> This is at GD 2-102.

with his chronic low back complaints”. However, it is not only his lower back that is causing him pain and limitations. It is his entire spine, headaches and shoulder pain as noted by Dr. McFarlane.

[27] 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.<sup>28</sup>

### **The Appellant can’t work in the real world**

[28] 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

[29] 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.<sup>29</sup>

[30] I find that the Appellant can’t work in the real world.

[31] The Appellant is only 42 years old. Despite his young age, I find other factors outweigh this positive attribute. I also considered his failed work attempts as further evidence that he cannot work in the real world.

[32] The Appellant had a grade 10 education and his work history consists of only physically demanding, low skilled jobs, including working at a gas station and operating an envelope machine. Because of his chronic pain and physical conditions, these jobs would provide no transferable skills.

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<sup>28</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>29</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.



[33] The Appellant made efforts to work. These efforts show that his disability gets in the way of earning a living.

[34] After 2014, he attempted to work at a steel company which last only one week. He also worked at an aluminum company which lasted three weeks. He worked building windmills and this job lasted 3-4 months. He also worked at a tire shop, but this job ended after one month. The Appellant was fired from all of these jobs because he was unable to physically do these jobs for more than a few weeks.

[35] In his self-employment questionnaire, the Appellant said he was self-employed building fences. This was a word of mouth business by friends and family. He said he did not do any physical work.<sup>30</sup> It was his son and a friend who built fences. At the hearing, the Appellant testified that his involvement was speaking to the customer, going onsite to take measurements, ordering the wood and collecting payment. He said he spent about 2 hours per job on the phone and taking measurements. His son and friend did all of the work and he paid them. I asked why he declared the income as self-employment if it was his son who was doing the work. The Appellant explained it was because he was the one that had to pay for the lumber as his son could not afford this. I find that this income is not evidence of work capacity. It is a father purchasing lumber for his son to build fences during the summer. Taking some measurements a few times a summer and ordering lumber is not evidence of work capacity.

[36] Although he has no computer skills, I considered whether he would be able to retrain or perform some other type of light duty or sedentary work. I find he would not. This is because he is unable to sit, stand or walk more than a few minutes without pain, despite using Percocet.<sup>31</sup> He is also unable to use his shoulders and has shoulder pain even when they are resting.<sup>32</sup> His pain interferes with his sleep and he needs to nap during the day. He relies on his wife and children to help him with daily activities of

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<sup>30</sup> The questionnaire is at GD 6.

<sup>31</sup> This information is at GD 5-233

<sup>32</sup> This is at GD 8-19.

living. His cognitive abilities are impacted and this is why he is no longer able to drive a car.

[37] I find that his disability was severe. The Appellant's efforts show that, by December 31, 2021, he could not regularly do any work he could earn a living from.

### **Was the Appellant's disability prolonged?**

[38] The Appellant's disability was prolonged.

[39] The Appellant's conditions began about 2011. They continued to worsen and became severe as defined in the CPP by December 2014. These conditions have continued since then, and they will more than likely continue indefinitely.<sup>33</sup>

[40] The medical evidence, including the x-rays of the Appellant's spine, show a steady worsening of his condition. In May 2014, Dr. McFarlane said the prognosis was good with treatment and recovery was expected.<sup>34</sup> Unfortunately, this did not happen. In October 2019, Dr. McFarlane said it was unknown if the Appellant would ever be able to return to work.<sup>35</sup> He expected the Appellant's condition to deteriorate.<sup>36</sup> At the time of the Appellant's MQP, it was Dr. McFarlane's opinion that the Appellant's musculoskeletal conditions were degenerative and progressive and the prognosis was poor.<sup>37</sup>

[41] I find that the Appellant's disability was prolonged by December 31, 2021.

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<sup>33</sup> 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.

<sup>34</sup> Dr. McFarlane's statement is at GD 5-233.

<sup>35</sup> This is in the CPP medical report at GD 2-93.

<sup>36</sup> This is at GD 2-89.

<sup>37</sup> This prognosis is at GD 8-20.

## When payments start

[42] The Appellant had a severe and prolonged disability in December 2014 when he was no longer able to work in any capacity because of his physical limitations and back pain.

[43] 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.<sup>38</sup>

[44] The Minister received the Appellant's application in ~~October 2019~~ November 1, 2019. That means he is considered to have become disabled in ~~July 2018~~ August 2018.

[45] Payment of his pension starts as of ~~November~~ December 2018.

## Conclusion

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

[47] This means the appeal is allowed.

Connie Dyck  
Member, General Division – Income Security Section

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<sup>38</sup> 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.