



Citation: *BH v Minister of Employment and Social Development*, 2021 SST 978

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

Decision

Appellant: B. H.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 24, 2021 (issued
by Service Canada)

Tribunal member: Brianne Shalland-Bennett

Type of hearing: Videoconference

Hearing date: November 2, 2021

Hearing participants: Appellant

Decision date: November 23, 2021

File number: GP-21-717

Decision

[1] The appeal is dismissed.

[2] The Claimant, B. N., 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 57 years old. She has a hospitality management degree and has a certificate in adult training and management. While working, she did some leadership courses. She has a work history in human resources and administration. At her last job, she was the director of human resources. She stopped working in September 2019 because of her left eye pain and post-concussion syndrome.

[4] In September 2017, the Claimant was hit in the face with a softball while playing baseball. Because of the accident, she started getting headaches eye pain. In June 2018, she was in a car accident. In September 2018, she was in another car accident. Her headaches and eye pain got worse after every accident. Since then, she has had extreme fatigue, trouble concentrating, and memory issues. She also has pain in her shoulder and neck.

[5] She tried to return to work gradually in 2019 with modifications. She was allowed to work from home. She worked every other day. She worked reduced hours. However, her insurer didn't think her job modifications were sustainable because her conditions weren't getting better. She has been on long term disability since 2019.

[6] The Claimant applied for a CPP disability pension on February 27, 2020.¹ 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.

¹ See GD2-134 to 141 and GD2-210 to 223.

[7] The Minister says the medical evidence shows she may not be able to return to her original job but can do lighter or other work. It says the medical evidence shows her condition is improving, treatable, and managed.²

[8] The Claimant disagrees. The pain in her left eye and her headaches limit what she can do. She tries manage conditions with treatments, which give her some relief. She tries to do different activities but doesn't know if she can manage until she does it. Sometimes, trying a new activity will stop her from doing anything for two weeks because of the pain. She is worried that her memory and concentration are getting worse. She can't see herself returning to work and managing her condition at the same time.

What the Claimant must prove

[9] For the Claimant to succeed, she must prove she has a disability that is severe and prolonged by the hearing date.³

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

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

[12] 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.

² See the Minister's arguments at GD3 and GD5.

³ 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 at GD3-15 to 16. In this case, the Claimant's coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

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 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.

[15] 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.

Reasons for my decision

[16] I find that the Claimant hasn't proven she has a severe and prolonged disability by the date of the hearing.

Is the Claimant's disability severe?

[17] The Claimant's disability isn't 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 but still show work capacity**

[18] The Claimant has left eye pain, post-concussion syndrome, and depression. However, I can't focus on the Claimant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁷ 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.⁸

[19] I find that the Claimant doesn't have functional limitations.

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

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

– **What the Claimant says about her functional limitations**

[20] The Claimant says that her medical conditions have resulted in functional limitations that affect her ability to work. Here is what she says:

- Her eye pain is always constant. She rates it a two or three out of ten at rest.
- Sometimes she has a burning feeling in her left eye.
- If the weather is hot, rainy, or if it is a low-pressure day, she gets a headache and pain in her left eye.
- Stress, fatigue, and being overly busy make her eye pain worse.
- She is sensitive to light, including computer and car lights.
- She can use the computer for 20 to 30 minutes.
- If she does a lot of activity or has a lot of tension, she gets headaches or feels pain in her head, neck, and shoulder.
- She can't read books anymore because it strains her eye.
- She has a hard time concentrating and with her memory. During the hearing, she stopped talking mid-sentence many times. Her daughter told her that her family was worried about her short term memory.
- She needs 12 hours of sleep, or else her conditions get worse.
- Her depression has caused her low energy. It makes her emotional.
- She has a bad day once a week. On these days, she has extreme fatigue and can hardly get out of bed. She will feel a lot of pressure in her head and hear a loud ringing.

[21] I found the Claimant honest when describing her experiences. I accept she genuinely believes that her conditions stop her from working all jobs. However, her limitations show that she has some capacity for other work. She can do 10,000 steps walking without pain. She doesn't have issues with most housework. She only doesn't mop the floors or do tasks that involve bending. She has learned to manage her pain. If she has a busy day, she has to take it easy the next day. For most things, she knows what she can and can't do. If she tries something new, she can't predict how her conditions will be affected.

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

[22] The Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by the date of the hearing.⁹

[23] The Minister argues the Claimant’s medical evidence shows that she has work capacity.¹⁰ I agree. The medical evidence also supports what the Claimant says about her limitations.

[24] The Claimant’s family doctor, Dr. Bourne, recommended that the Claimant stop working in September 2019. This is because of her fatigue, headaches, pain, photophobia, and concentration caused by her post-concussion syndrome and trauma. It was unknown when she would be able to return to work.¹¹ In January 2021, Dr. Bourne said the Claimant’s symptoms are persistent. She thinks the Claimant’s conditions affect her quality of life and ability to work.¹²

[25] In July 2019, Dr. Valentin, a neurologist, said that the Claimant’s eye pain, fatigue, and irritability stop her from going back to her pre-accident level of employment.¹³

[26] In 2021, Dr. Valentin says there is an improvement in her cognitive abilities compared to 2019. The Claimant has ongoing physical, emotional, and cognitive problems that are serious impairments. She doesn’t think the Claimant can do any job that her employment, experience, and training show she could do. She diagnosed the Claimant with severe major depressive disorder. She doesn’t think the Claimant has achieved maximum medical recovery.¹⁴

[27] In 2021, Dr. Bodenstein, a psychologist, said that the Claimant has a sleep disorder, post concussion syndrome, and an adjustment disorder. Her pain is a one to

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

¹⁰ See GD3 and GD5.

¹¹ See GD2-165 to 175.

¹² See GD1-9.

¹³ See GD1-37 to 63.

¹⁴ See GD4-6 to 32.

three out of ten most of the time. She didn't have any issues in doing self-care and household chores. She described her future as "fifty-fifty."¹⁵

[28] In 2021, Dr. Tam, a physiatrist, said the Claimant reached the maximum medical recovery. In his assessment, the Claimant said she had a 50-60% overall improvement of her physical condition. He says that the Claimant would not be able to do full-time hours even with accommodation. He thought that the Claimant might try to redirect the energy she used to spend driving towards working.¹⁶

[29] In 2021, Dr. Liu, a chiropractor, did a functional abilities evaluation. During the evaluation, the Claimant's headache and eye pain were worse. They are the main factors stopping her from working full-time. He thought that she would be able to do a job with light physical demands.¹⁷

[30] The medical evidence supports that the Claimant has limitations that stopped her from doing her old job by the date of the hearing.

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

– **The Claimant has followed medical advice**

[32] The Claimant has followed medical advice.

[33] To receive a disability pension, a claimant must follow medical advice.¹⁸ If a claimant doesn't follow medical advice, then she must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on her disability.¹⁹

[34] The Claimant has followed medical advice.²⁰ Here is what I have considered:

- She does physiotherapy, massage therapy and craniosacral therapy.

¹⁵ See GD4-89 to 121.

¹⁶ See GD4-122 to 131.

¹⁷ See GD4-132 to 141.

¹⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

- In March 2021, Mr. Gannon, a registered massage therapist, reported that the Claimant gets temporary relief from her symptoms from massage therapy. It prevents symptoms from getting worse and helps to manage her pain and tension.²¹ The Claimant agrees.
- She wears tinted glasses. They help to remove the glare from the computers and help with light sensitivity.
- She uses Nortriptyline to help her sleep. If she doesn't, she has trouble sleeping.
- She saw a psychotherapist. She recommended that the Claimant listen to her body when it tells her to slow down. The Claimant said she does.

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

[35] 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

[36] 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.²²

[37] I find that the Claimant can work in the real world. The Claimant is 57 years old. Her age may affect her ability to find a job. That being said, I think she has transferrable skills that would allow her to retrain or find other work. She speaks fluent English. She is educated and has upgraded her skills while working. She can sit, stand, walk, and do housework. I think these characteristics are factors that would positively impact her ability to try a different type of job, not just her regular job.

²¹ See GD1-31.

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

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

[38] 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 her efforts weren't successful because of her medical conditions.²³ 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).²⁴

[39] The Minister says there is no evidence the Claimant has tried to do other work suitable to her conditions.²⁵

[40] I agree. The Claimant didn't make efforts to work.

[41] I asked the Claimant why she didn't make efforts to work. Here is what she said:

- She is still employed and gets long-term disability benefits from her old job.
- She can't see herself driving 1.5 hours to work and back.
- She can't see herself working part-time or full-time work.
- If she doesn't sleep for 12 hours, she doesn't see herself being able to work.
- She doesn't know what activities will make her condition worse. She says she depends and will only know when she tries.
- She doesn't know when her "concussion-y" days are going to hit her. She doesn't know how often she would have to call in sick. She doesn't think she would be a reliable employee.
- She hasn't tried to work a less demanding, part time or alternative job.

[42] While I sympathize with the Claimant, I have to follow the law. The Claimant has to show that she tried to work, but could not because of her health condition.²⁶ She hasn't tried. Therefore, I can't find she had a severe disability by the date of the hearing.

²³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁴ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

²⁵ See GD3 and GD5.

²⁶ *Inclima v. Canada (A.G.)*, [2003 FCA 117](#)

Conclusion

[43] I find that the Claimant isn't eligible for a CPP disability pension because her disability isn't severe. Because I have found that her disability isn't severe, I didn't have to consider whether it is prolonged.

[44] This means the appeal is dismissed.

Brianne Shalland-Bennett
Member, General Division – Income Security Section