



Citation: *JR v Minister of Employment and Social Development*, 2022 SST 243

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

Decision

Appellant: J. R.

Respondent: Minister of Employment and Social Development

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

Tribunal member: Shannon Russell

Type of hearing: Teleconference

Hearing date: March 2, 2022

Hearing participant: Appellant

Decision date: March 22, 2022

File number: GP-21-1808

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. R., isn't eligible for Canada Pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant is a 35-year-old woman who has chronic pain. The pain began after she fell down some stairs in December 2018.¹ The affected areas include her back, (going down to her buttock), the right side of her neck, and her right shoulder (going down her arm).²

[4] At the time of her injury, the Appellant had two jobs. She worked 42 hours a week as a customer service representative for the City of Toronto, and she worked 7 to 10 hours a week as a chemistry teacher's assistant. She stopped both jobs because of her injury. She stopped working at her City of Toronto job in January 2019, and she stopped working as a teacher's assistant at the end of April 2019.³

[5] The Appellant applied for CPP disability benefits in June 2019. In her application, she reported that she can't work because she can't use her right arm efficiently and because she can't bend, twist, turn or sit for more than 5 minutes at a time. She also said that she has nerve pain in her right (dominant) arm.⁴

[6] Shortly after applying for benefits, the Appellant was diagnosed with fibromyalgia.⁵

[7] The Minister of Employment and Social Development (Minister) denied her application, at both the initial and reconsideration levels of adjudication.

¹ Pages GD1-9, GD2-71, and GD2-109.

² Page GD2-71.

³ Pages GD2-29, GD2-72 and GD1-9.

⁴ Page GD2-21.

⁵ The Appellant was diagnosed with fibromyalgia in August 2019 (pages GD2-57 and IS9-43 to IS9-45).

[8] The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[9] A Tribunal Member heard the Appellant's appeal in March 2021. That member dismissed the Appellant's appeal because she decided that the Appellant's disability was not severe.

[10] The Appellant did not agree with that decision, and so she appealed it to the Tribunal's Appeal Division (AD). The AD allowed the appeal. This was because the General Division did not give sufficient reasons for its decision. The AD returned the matter to the General Division for a reconsideration.

[11] The appeal is now before me.

[12] The Appellant says she is disabled because her disability is both severe and prolonged. She says she has many limitations that prevent her from working.

[13] The Minister says the Appellant is not disabled because even though she has limitations she should be able to do light or modified work.

Matters I have to consider first

I accepted documents filed late

[14] When I scheduled this hearing, I set the filing and response deadlines as January 18, 2022 and February 18, 2022, respectively.

[15] The Minister filed submissions on February 22, 2022.⁶ Although these submissions were filed late, I decided to accept them into the record. The submissions were only a few days late, and the Appellant confirmed at the hearing that she had read them.

⁶ The submissions are at pages IS10-1 to IS10-17.

Change to the Minimum Qualifying Period (MQP)

[16] Up until the Minister's most recent submissions, the Minister said the Appellant's minimum qualifying period (MQP) was December 31, 2021. The MQP is the date that an appellant has to be disabled by. The Minister's most recent submissions say the MQP is December 31, 2022.

[17] I was unable to verify the new MQP calculation because the Minister's submissions did not include an updated copy of the Appellant's Record of Earnings. The Minister also did not send a representative to the hearing, despite previously saying a representative would be in attendance.⁷

[18] I explained the MQP issue to the Appellant. I also explained that she could ask for an adjournment if she felt it was important to her case to have the MQP sorted out before the hearing. The Appellant said she would go ahead with the hearing. This approach made sense to me because the Appellant told me that nothing changed with respect to her disability between December 31, 2021 and the hearing date.

[19] After the hearing, I wrote to the Minister and asked for an updated copy of the Appellant's Record of Earnings.⁸ The Minister provided the document on March 8, 2022, and it showed earnings in the year 2020.⁹ This means the Appellant's MQP is December 31, 2022.

What the Appellant must prove

[20] For the Appellant to succeed with her appeal, she must prove she has a disability that is severe and prolonged by the hearing date.¹⁰

⁷ See page IS10-15 at paragraph 19.

⁸ My request is at page IS11-1.

⁹ The Appellant's updated Record of Earnings is at pages IS12-1 to IS12-3.

¹⁰ 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 subsection 44(2) of the CPP. The Appellant's CPP contributions are on pages IS12-2 to IS12-3. In this case, the Appellant's coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

[21] The words “severe” and “prolonged” are defined in the CPP.

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

[23] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.¹²

Reasons for my decision

[24] I find that the Appellant hasn’t proven she has a severe and prolonged disability.

The Appellant’s disability is not severe

[25] I accept that the Appellant has pain and that she has other conditions including mental health conditions. I also accept that the Appellant has limitations that may affect the types of jobs she can do. However, I am unable to find that the Appellant’s disability is severe. I will explain why.

– The evidence about the Appellant’s functional limitations is not reliable

[26] I am unable to get a true sense of what the Appellant’s functional limitations are. This is because the Appellant has, in my view, overstated her limitations. There are several examples I could give, but I will focus on two.

[27] Here is the first example. When the Appellant applied for benefits in June 2019, she said she has a “poor” ability to walk a block (about 100 meters) on flat ground.¹³ However, just a few months later, in August 2019, the Appellant told a specialist (Dr. Mittal) that she walks on a treadmill 30 minutes a day, two to three times a week¹⁴. In October 2019, the Appellant told another specialist (Dr. Shamis) that she walks 20-30 minutes a day and works one day a week as a security guard.¹⁵

¹¹ The word “severe” is defined in subparagraph 42(2)(a)(i) of the *Canada Pension Plan*.

¹² The word “prolonged” is defined in subparagraph 42(2)(a)(ii) of the *Canada Pension Plan*.

¹³ Page GD2-24.

¹⁴ Page IS9-43.

¹⁵ Pages IS9-50 to IS9-51.

[28] Here is the second example. In September 2020, the Appellant wrote to the Tribunal and provided a long list of limitations that prevent her from working. These limitations included an inability to focus or concentrate, and a “severely impacted” ability to walk. The Appellant also implied that she spends most of her time at home in Toronto where she lives with her parents. She wrote: “Now, I sit at home waiting for my meds to kick in, to sit and watch my 4-year-old nephew play with his dinosaurs”.¹⁶

[29] What the Appellant didn’t say is that at the time she wrote the letter she was living, working and studying in Victoria, B.C. She was enrolled as a full-time student in a Master of Chemistry program¹⁷, and she was working as a teaching assistant and as a research assistant. All of this had been ongoing since January 2020¹⁸.

[30] I have looked at what the doctors have said about the Appellant’s limitations. However, it is difficult for me to accept all of the limitations identified in the medical reports.

[31] First, much of what is reported is simply based on what the Appellant was telling her doctors. This is because the Appellant’s illness is not one that can be measured objectively. For example, in May 2019, the Appellant told Dr. Ganty that she has almost constant, shooting and burning pain down the right arm. Dr. Ganty noted that recent radiograph and ultrasound examination did not show any pathology that could explain the Appellant’s symptoms. Dr. Ganty also said that an MRI from January 2019 of the thoracolumbar spine was reported to be near normal without any evidence of any pathology that could explain the pain.

[32] I am not saying that the Appellant’s imaging results are inconsistent with the level of pain she reports. I recognize that the Appellant’s pain cannot be measured by objective imaging exams. What I am saying is that pain conditions are based largely on

¹⁶ Page GD1-9.

¹⁷ The Appellant told me that she was enrolled as a full-time student because her program did not offer part-time studies.

¹⁸ Page IS6-1. Due to the pandemic, there was a period from about May 2020 to July 2020 when the Appellant pursued her studies and job activities from her home in Toronto.

subjective reports, and as I said before, I believe the Appellant has a tendency to overstate her limitations.

[33] Second, there are inconsistencies in the way the limitations are reported, and the inconsistencies are not explained. For example, on May 31, 2019, the Appellant's family doctor (Dr. Dunston) wrote a letter setting out the accommodations the Appellant would need for a position the Appellant was thinking of doing with the City of Toronto (location coordinator for summer camps). Dr. Dunston said the Appellant would need (among other things) the option to drive to off-location trips (rather than ride the bus).¹⁹ However, about two weeks later, Dr. Dunston filled out a CPP medical report and in that report Dr. Dunston said the Appellant cannot drive.²⁰

[34] Third, the reports do not fully address the Appellant's school and work activities. For example, in April 2020 and September 2020, Dr. Dunston wrote that the Appellant is unable to work²¹. However, Dr. Dunston did not address the fact that the Appellant was enrolled in a Master's program and was in fact working.

– **Some of the Appellant's treatments are helping her**

[35] In March 2019, the Appellant began lidocaine / ketamine infusions. The infusions are meant to help control the neuropathic part of the pain.²²

[36] The evidence shows these treatments have been helpful. In November 2019, Dr. Ganty reported that the Appellant's last infusion provided "significant improvement of pain".²³ Dr. Ganty said the same thing in March 2020, May 2020 and July 2020.²⁴

[37] The Appellant told me that the infusions only help for about four weeks and then she struggles until her next infusion. I accept that this may have been the case in the early months of the infusions. I note, for example, that the Appellant told Dr. Ganty on

¹⁹ Pages GD2-61 to GD2-62.

²⁰ Page GD2-54.

²¹ Pages GD1-11 and GD1-12 to GD1-13.

²² Pages GD2-109 and GD2-116.

²³ Page GD1-24.

²⁴ Pages GD1-18, GD1-20, and GD1-22.

October 2, 2019 that the infusions help for about 4 weeks and then the pain “comes back with a vengeance”. Dr. Ganty said he reassured the Appellant that, as her dose is adjusted, she should receive better pain relief for longer periods²⁵.

[38] Indeed, as time went on, the Appellant got longer periods of relief.

[39] First, Dr. Ganty’s subsequent reports make no mention of the Appellant only receiving relief for about 4 weeks. Those reports are dated November 27, 2019,²⁶ March 4, 2020²⁷, May 14, 2020²⁸, July 8, 2020²⁹, and October 2, 2020³⁰. In fact, on March 4, 2020, Dr. Ganty reported that the Appellant’s last infusion helped her for about three months.

[40] Second, the Appellant wrote a letter in April 2021 and in that letter she acknowledged the infusions last longer than 4 weeks. She said they were lasting for about 6 to 10 weeks.³¹

[41] I know that Dr. Ganty has recently noted a shortened period of relief. In October 2021, he said the Appellant was reporting 4 weeks of relief³². However, I do not know if this is something that can be improved with more adjustments to the dosages. What I do know is that in December 2021, the Appellant’s period of relief was increasing (now 5 weeks)³³, despite the fact that the Appellant did not receive her full dose in October 2021.

[42] The Appellant also told me that the infusions don’t help all of her pain. She said they only help the persistent nerve pain. This may be true, but this is still significant. I

²⁵ Page GD1-26.

²⁶ Page GD1-24.

²⁷ Page GD1-22.

²⁸ Page GD1-20.

²⁹ Page GD1-18.

³⁰ Page GD1-16.

³¹ Page AD1-4.

³² Page IS9-118.

³³ Page IS9-128.

say this knowing that one of the Appellant's specialists said that the infusions would be the most beneficial treatment for the Appellant's condition³⁴.

[43] Another treatment that has been helpful to the Appellant is the therapy she gets from Dr. Ong, Chiropractor, for her jaw pain. The Appellant explained that her pain comes from a dislocation she has in her TMJ joint. This treatment started in about June 2021³⁵ and continues to this day. The Appellant acknowledged during the hearing that these treatments help. Dr. Ong's reports say the same thing. For example, in October 2021, Dr. Ong wrote that the Appellant's jaw is much better than when she first started treatment³⁶.

- **There are still some treatments for the Appellant to try**

[44] Starting in about 2021, the Appellant began complaining of knee pain. She told Dr. Dunston in February 2021 that it had been ongoing for about three weeks, and she wondered if it was related to the hiking she was doing on uneven ground³⁷. In June 2021, the Appellant told Dr. Dunston that she had been having right knee pain and locking for one week³⁸. Dr. Dunston sent the Appellant for an MRI, and it showed a tear of the medial meniscus³⁹. Dr. Dunston explained that the knee is unlikely to heal and she referred the Appellant to a surgeon⁴⁰.

[45] The Appellant saw the surgeon (Dr. Mehdian) in September 2021 and he recommended surgery. He also noted the Appellant agreed to proceed with the surgery⁴¹. However, the Appellant must have changed her mind because she told me at the hearing that she decided not to have it done. Instead, she is receiving PRP

³⁴ Page IS9-39.

³⁵ Page IS7-61.

³⁶ Page IS7-12.

³⁷ Page IS9-92.

³⁸ Page IS9-104.

³⁹ Page IS9-105.

⁴⁰ Page IS9-106.

⁴¹ Pages IS9-115 to IS9-116.

injections from a naturopath⁴². This tells me that the Appellant's knee pain is being managed. If it worsens, then surgery remains an option.

[46] I turn now to the Appellant's mental health. The Appellant has anxiety and depression. In January 2022, she had a psychological assessment done. The Appellant has a copy of the assessment, but she chose not to submit it into evidence. She explained that one of the reasons why she didn't submit it is because she was concerned the Minister would "flip" what the doctor wrote.

[47] As I don't have a copy of the assessment, I don't know what the psychologist recommended for treatment or what the psychologist said (if anything) about how helpful treatment might be in resolving the Appellant's symptoms and improving her functionality.

[48] The Appellant saw a therapist (Mr. Phillips) from May 2020 to December 2021, when she had to stop seeing him because of jurisdiction issues. (The Appellant had returned to Ontario and Mr. Phillips is in B.C.). The Appellant told me that, aside from \$500, she paid for all the sessions she had with Mr. Phillips, and the amount totalled about \$7,000. That's a lot of money, and it suggests to me that those sessions were helpful. Unfortunately, I only have one report from Mr. Phillips and it is from September 2020 when the Appellant was studying and working at the University. I do not know how the Appellant progressed (from Mr. Phillips' perspective) with the counselling sessions from September 2020 to December 2021.

[49] The gaps in the evidence from the mental health practitioners is concerning because there is a link between the Appellant's physical and mental conditions. In November 2019, Dr. Mittal wrote that the Appellant's pain is complicated by emotional distress and insomnia⁴³.

⁴² Page IS9-129 and the Appellant's testimony.

⁴³ Page IS9-52.

[50] As for the insomnia, the Appellant told me that she had a sleep study done in late 2021. I don't have a copy of that report, and so I don't know what, if any, recommendations were made.

– **There is evidence of work capacity**

[51] As I said earlier, I accept that the Appellant has chronic pain and fibromyalgia. I also accept that she has other conditions including depression and anxiety. However, this does not mean that the Appellant's disability is severe.

[52] In my view, there is evidence of work capacity. The Appellant moved to B.C. and pursued her Master's degree in chemistry while at the same time working as a teaching assistant and a research assistant. She did this over a long period of time (from January 2020 to April 2021, albeit with pandemic interruptions). She also did all of this during the period of time she was reporting debilitating pain and mental health symptoms.

[53] I also find it significant that the Appellant continues to look for and apply for jobs. The Appellant told me that she is still an employee with the City of Toronto and so she is able to apply for internal postings. She said she has not been successful because she does not meet the requirements for the jobs she has applied for. For example, she applied for jobs in water treatment and waste water treatment, but she failed the assessments for those jobs.

[54] The fact that the Appellant continues to look for and apply for jobs tells me that she feels she has work capacity.

[55] When I am deciding whether an appellant 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 and past work and life experience. These factors help me decide whether the Appellant can work in the real world — in other words, whether it is realistic to say that she can work.⁴⁴

⁴⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[56] I think it is realistic to say the Appellant can work. She is only 35 years of age, and so she has many years ahead of her before the standard age of retirement. She is also proficient in English. She is well educated, with a certificate in fitness and lifestyle management (June 2010) and a university degree in chemistry (June 2018)⁴⁵. Finally, she has work experience as a customer service representative and as a teaching assistant and as a research assistant. All of these jobs provide transferrable skills.

[57] I also note that Dr. Dunston reported in June 2019 that she expected the Appellant to be able to do work that is not physical in nature, such as management / supervisory work.⁴⁶ I know Dr. Dunston later changed her opinion and said the Appellant could not work, but her opinion changed after the Appellant started improving with treatment. Also, as I said earlier, it is difficult to know why Dr. Dunston reported in April and September 2020 that the Appellant could not work when at that time the Appellant was in fact working (and studying).

- **The Appellant didn't try to find and keep a suitable job**

[58] If the Appellant 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.⁴⁷ 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).⁴⁸

[59] The Minister says the Appellant did not try to work at jobs that are within her limitations⁴⁹. I agree.

[60] The Appellant made efforts to work. But these efforts don't show that her disability gets in the way of earning a living.

⁴⁵ Page GD2-30.

⁴⁶ Page GD2-55.

⁴⁷ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

⁴⁸ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

⁴⁹ Page IS10-14.

[61] The Appellant returned to work for the City of Toronto for a short period of time after her injury in December 2018. This does not show me that the Appellant could not do that job. This attempt was made before the Appellant received treatment on a sustained basis. Also, the evidence shows that the Appellant wanted a stand-up desk, but her employer would not provide one. I don't know if the Appellant might have been able to work had she been able to use a stand-up desk.

[62] The Appellant made two attempts to work as a security guard. Both of the jobs were in bars. The Appellant told me the first attempt was from about September 2019 to the end of November 2019, though she did not work everyday. The second attempt was in September 2021, but it only lasted two weekends, and she did not work everyday. These jobs are not within the Appellant's limitations. The Appellant told me the job in September 2021 required her to stand for 8 hours and to go up and down stairs.

[63] The Appellant's research job at the University of Victoria appears also to have been physically demanding. The Appellant has written, for example, that being a chemist requires repetitive tasks involving the arms, shoulders, and torso⁵⁰. This is inconsistent with the limitations the Appellant previously reported in that she told a specialist that she is unable to do any form of repetitive or sustained activities at or above shoulder level⁵¹.

[64] Despite this, the Appellant has not shown that her efforts at school were unsuccessful because of her disability. This is because she has provided inconsistent information about what happened.

[65] On the one hand, the Appellant has said that because of her illness she could not perform well at the University and, as a result, she was "transferred out of the program"⁵². She also said her illness caused many memory lapses and made it difficult to grasp basic knowledge⁵³.

⁵⁰ Page AD1-3.

⁵¹ Page IS9-39.

⁵² Page AD1-5.

⁵³ Page IS6-3.

[66] On the other hand, the Appellant said she got 70% in her courses. She explained that she failed because the Master's program requires an 80% to pass.

[67] I don't have evidence from the school confirming that the Appellant got 70% in her program. There is, however, a suggestion in the evidence that the Appellant believes she performed better than what her grades reflect. In April 2021, for example, the Appellant told Dr. Ganty that she was appealing the failing grades⁵⁴. That said, even if the Appellant got 70% in her courses, I fail to see how that is indicative of a significant cognitive impairment. An ability to achieve grades of 70% in a Master's level science program, while dealing with chronic pain, is impressive and shows mental acuity. Added to this is the fact that the Appellant was not receiving regular infusions while she was in B.C. and so her pain levels would have been higher than they would have been with regular treatment.⁵⁵

[68] I also note that some of the difficulties the Appellant had at school were due, not so much to her disability, but rather to personal / professional conflict with some other students and one professor⁵⁶.

Conclusion

[69] The Appellant isn't eligible for CPP disability benefits because her disability isn't severe. As I have found that her disability isn't severe, I don't have to consider whether it is prolonged.

[70] The appeal is dismissed.

Shannon Russell
Member, General Division – Income Security Section

⁵⁴ Page IS9-98.

⁵⁵ The Appellant appears not to have had infusions from July 8, 2020 (page GD1-18) to December 16, 2020 (page IS9-92). In April 2021, Dr. Ganty wrote that the intensity of the Appellant's pain increases when there is a longer period of time between infusions (page IS9-98).

⁵⁶ See, for example, pages IS9-82, IS9-83, IS9-94, and IS9-95.