Citation: *AC v Minister of Employment and Social Development*, 2022 SST 526

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	A. C.
Representative:	Sunish Uppal, Vismay Merja
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 10, 2019 (issued by Service Canada)
Tribunal member:	Carol Wilton
Type of hearing:	Videoconference
Hearing date:	December 6, 2021, March 22, 2022
Hearing participants:	Appellant Appellant's representatives
Decision date:	May 10, 2022
File number:	GP-20-435

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. C., is not eligible for a *Canada Pension Plan* (CPP) disability pension.

[3] This decision explains why I am dismissing the appeal.

Overview

[4] The Appellant was 60 years old in June 2017 when she applied for a CPP disability pension. She worked as a nurse in Canada from 1978 to 1984 and from 1988 to 1989. In 1989, she moved to Florida. She had earnings there from 1990 to 2004 and from 2007 to 2008. After neck surgery (cervical disc fusion) in April 2006, she returned to work part-time and then *per diem* as a registered nurse at an office doing cataract surgeries.[1]

[5] In January 2017, the Appellant began receiving a CPP retirement pension. In June 2017, she applied for a CPP disability pension.[2] In January 2018, she asked for her CPP retirement pension to be cancelled in favour of a CPP disability pension.[3]

[6] The Minister of Employment and Social Development (Minister) refused the Appellant's application initially and on reconsideration. She appealed the Minister's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal).

---

[1] GD2-I-11, 31, 35. The Appellant's income from employment in the United States is at GD2-270. I discuss the Appellant's work history later in the decision.
[2] GD2-I-4
[3] GD2-I-289. The rules about cancelling a CPP retirement pension in favour of a CPP disability pension are in sections 66.1 of the CPP and 46.2 of the CPP *Regulations.*

Matters I must consider first

The form of hearing

[7] March 22, 2022, was the **seventh** scheduled hearing date for this appeal. The first hearing date scheduled was April 29, 2021, eleven months before.

[8] The previous hearings were all adjourned. In one case, the Appellant's representative, Mr. Sunish Uppal, wanted more time to submit additional evidence. The other reasons for adjournments were: there was a conflict with the representative's schedule; the representative was ill (twice); the representative was unable to connect to the videoconference from India; and the Appellant had a panic attack.[4]

[9] The Appellant's representative appeared at the March 22, 2022, hearing. He declined to allow the Appellant to participate.

[10] The law states that the *Social Security Tribunal Regulations* must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals.[5] In addition, I must conduct proceedings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit."[6]

[11] The Appellant has had seven opportunities over almost a year to attend a hearing and give evidence. The law provides that, if a party fails to appear at a hearing, the Tribunal may proceed in their absence if satisfied that she received the notice of hearing.[7] I am satisfied that the Appellant and her representatives received the notice of hearing.[8]

---

[4] GD0B to GD0I. I was assigned to the file in September 2021.
[5] Section 2 of the *Social Security Tribunal Regulations*.
[6] Paragraph 3(1)(a) *Social Security Tribunal Regulations*.
[7] Subsection 12(1) of the *Social Security Tribunal Regulations*.
[8] The notice of hearing was sent to both the Appellant and Mr. Uppal. The file contains no record of any difficulty with delivery of the notice of hearing.

The issue of bias

[12] At the hearing on December 6, 2021, Mr. Uppal stated that I was biased. His opinion was based on my having identified a gap in the evidence and asked for the Appellant's submissions on her medical condition in 2009. At the hearing, I decided that this did not give rise to a reasonable apprehension of bias. Mr. Uppal asked that I recuse myself from this appeal. I declined to do that.

[13] On December 8, 2021, I wrote to Mr. Uppal.[9] I explained that making a decision that identified a gap in the evidence and requesting the Appellant`s oral submissions (or testimony) did not give rise to a reasonable apprehension of bias. If Mr. Uppal wished to raise other arguments regarding a reasonable apprehension of bias, he should provide submissions about this to the Tribunal by December 20, 2021. Mr. Uppal did not provide further submissions.

[14] On March 22, 2022, the Registry Officer contacted the office of the Appellant's representative to remind him about the hearing. The Registry Officer disclosed that I was the adjudicator.

[15] On March 22, 2022, at 10 am., three hours before the scheduled hearing time, Mr. Vismay Merja, an associate lawyer at Mr. Uppal's law firm, submitted an email stating that I had been "very biased" throughout the hearing of December 6, 2021. The email concluded: "we require another adjudicator to attend this hearing."[10]

[16] Mr. Merja appeared at the hearing on March 22, 2022. He stated that at the hearing in December 2021, I had caused the Appellant to suffer a panic attack. He stated I had already drawn my own conclusion before the hearing began. He stated that I was rude to counsel. He submitted that the Appellant could not get a fair hearing from me. He asked that another adjudicator be assigned to the appeal.

[17] I explained the test for reasonable apprehension of bias to Mr. Merja. I stated that in this case there was no reasonable apprehension of bias. I would provide written

[9] See GD13.
[10] GD15

reasons about this as part of my decision. I pointed out that there had been several adjournments already and I was not prepared to grant any more.[11]

[18] I asked whether Mr. Merja would be willing to ask the Appellant to participate in the hearing. He said he would not. She had experienced a panic attack earlier that day when he told her that I would be adjudicating at the hearing.

[19] I informed Mr. Merja that I would write a decision on the basis of the materials in the file if he decided not to participate in the hearing. The Appellant could appeal if she disagreed with my decision. Having confirmed Mr. Merja's intention not to participate in the hearing, I ended the videoconference.

[20] After the March 22, 2022 hearing, the Tribunal received an email from Mr. Uppal. He stated that at the December 2021 hearing, I informed him that I did not want to hear from him, but wanted to hear directly from the Appellant. He stated that I had already made up my mind that the Appellant was not disabled. He stated that they would not proceed with the hearing that day (March 22, 2022) with me presiding.[12]

The meaning of bias in a legal proceeding

[21] In order to establish bias, the Appellant must show that I had an actual or apprehended bias.[13]

[22] I have no actual bias. I have no direct or financial interest in this matter. I do not know the Appellant or her representatives.

[23] The test for a reasonable apprehension of bias is whether a reasonable and well-informed person with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that my conduct gave rise to a reasonable

---

[11] Subsection 11(2) of the *Social Security Tribunal Regulations* states that if the Tribunal grants an adjournment at the request of a party, it must not grant the party a subsequent adjournment unless the party establishes that it is justified by exceptional circumstances. In addition, subsection 12(2) of the *Regulations* states that if the Tribunal previously granted an adjournment at the request of the party and the Tribunal is satisfied that the party received notice of the hearing, the Tribunal must proceed in the party's absence.
[12] GD16
[13] See *R. v. S. (R.D.),* 1997 CanLII 324 (SCC).

apprehension of bias.[14] Bias means that the decision-maker must be predisposed to decide a matter in a certain way that does not leave their mind open and impartial.[15]

[24] A finding of real or apprehended bias requires more than an allegation. Bias allegations are serious because they challenge the integrity of the decision-maker. The threshold for establishing bias is high.[16] A mere suspicion of bias is not sufficient.[17]

[25] The onus of proving that a decision-maker is biased rests with the party who is alleging it.[18]

The Appellant failed to show a reasonable apprehension of bias in this matter

a) Claim that I had pre-judged the outcome

[26] The Appellant's representatives stated that I had pre-judged the outcome before the hearing began. Presumably, they believed that I had decided against the Appellant. It seems that they based this conclusion on my stating that there was a gap in the evidence - there was no medical information in the file about the Appellant's main physical conditions between February 2009 and March 2010.

[27] I am bound by law stating that, in order to succeed, an appellant must provide objective medical evidence of their disability at the time they last qualified for CPP disability (their minimum qualifying period or MQP).[19]

[28] I am unable to understand Mr. Uppal's logic in stating I had already made up my mind about the Appellant's entitlement to CPP disability. If I had already made up my

---

[14] See *Committee for Justice and Liberty v. National Energy Board,* 1976 CanLII 2 (SCC), and *R. v. S. (R.D.),* 1997 CanLII 324 (SCC).
[15] See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.
[16] See *Joshi v. Canadian Imperial Bank of Commerce,* 2014 FC 552.
[17] See *Arthur v. Canada (A.G.),* 2001 FCA 223.
[18] See *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC).
[19] *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.), 2008 FCA 377; Gilroy v. Canada (A.G.), 2008 FCA 116;* and *Canada (A.G.) v. Hoffman, 2015 FC 1348; and* CPP *Regulations.* Also, 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.

mind about the outcome of the hearing, it is unclear why I would have asked for the Appellant to provide information that might contradict my conclusion.

[29] As a decision-maker, I am precluded from determining (or prejudging) the matter in advance. However, this does not prevent me from familiarizing myself with the contents of a file and noting potential weaknesses or matters that need to be canvassed at the hearing.[20]

[30] The Appellant's representatives provided no evidence that I had made up my mind before the hearing began as to what my decision would be. As a result, this allegation fails to support a reasonable apprehension of bias.

b) Claim that I did not want to hear from the Appellant's representative

[31] At the December 2021 hearing, Mr. Uppal stated that he proposed to take me through the documentary evidence in the file. I told him that I was willing to hear from him. However, the main purpose of the hearing was to hear the Appellant's evidence. As a legal representative, Mr. Uppal is unable to give evidence.

[32] Mr. Uppal stated that the Appellant "was not qualified to present her case on her own."[21] If the Appellant was unable to participate in a hearing by answering questions, her representative could have informed the Tribunal of this before the hearing. Alternate arrangements could have been made, such as a hearing by Questions and Answers, or a decision on the record.

[33] Mr. Uppal also stated that "evidence prior to 2009 has to be brought to the attention of the adjudicator and if the adjudicator does not want to listen to counsel, I do not understand how a fair hearing can be held."[22] However, this information had already been brought to my attention. In September 2021, Mr. Merja provided a 35-

[20] Robert W. Macaulay et al., *Practice and Procedure Before Administrative Tribunals* 52:11 (2022).
[21] GD16-1
[22] GD16.

page summary of the medical evidence in the appeal file.[23] Much of it concerns the Appellant's medical history before 2009.

[34] As a decision of the Appeal Division of this Tribunal stated: "the purpose of a hearing is to give the General Division another opportunity to gather information and, if necessary, assess credibility."[24]

[35] Mr. Uppal's claim does not support a reasonable apprehension of bias.

c) *Claim that I was rude*

[36] The opinion of Mr. Uppal about my attitude to him and my attentiveness during the proceedings cannot, standing alone, overcome the strong presumption in favour of my impartiality.

[37] On March 22, 2022, Mr. Merja stated that at the hearing on December 6, 2021, I "displayed very rude behaviour towards counsel." This included turning off my video camera during counsel's submissions and displaying irritation.[25]

[38] It is true that I turned off my video camera for maybe 60 seconds to sip a drink during Mr. Uppal's submissions at the December 2021 hearing. I am sorry that Mr. Uppal interpreted this as rude. Most of my hearings occur entirely by telephone, where I cannot see the representative and he or she cannot see me. This doesn't mean that I am rude or that I am not paying attention.

[39] Mr. Uppal's assessments are necessarily subjective.[26] Further, even if I was rude, this does not give rise to a reasonable apprehension of bias. The Ontario Court of Appeal put it this way:

> It takes much more than a demonstration of judicial impatience with counsel or even downright rudeness to dispel the strong presumption of impartiality. While litigants may not appreciate that presumption and thus may misread judicial

---

[23] GD10-9-44
[24] *T.L. v. Minister of Employment and Social Development*, 2020 SST 308. See also D.*B. v. Minister of Social and Economic Development*, 2015 SSTAD 806, para. 112.
[25] GD15-1
[26] See the decision in *Beard Winter LLP v. Shekhdar*, 2016 ONCA 493 at para. 12.

> conduct, lawyers are expected to appreciate that presumption and, where necessary, explain it to their clients. Baseless allegations of bias or of a reasonable apprehension of bias founded on a perceived slight or discourtesy that occurred during a trial, will not assist the client's cause and do a disservice to the administration of justice.[27]

[40] As a result, Mr. Uppal's remarks do not raise a reasonable apprehension of bias.

d) *The Appellant's panic attack at the December 2021 hearing*

[41] At the December 2021 hearing, the Appellant stated that she had suffered greatly from pain since 2005. In 2006, a surgeon had performed unnecessary surgery on her neck.

[42] The Appellant stated that she felt I was biased, perhaps based on the colour of her skin. She also stated that in her opinion I had not gone through her file. This was because I had stated that Dr. Richard Hynes, her orthopedic surgeon, had not provided any information about her health condition in 2009, the year before her MQP. She stated that the only time she had seen Dr. Hynes was for surgery in 2006. His physician assistant, Damian Velez, saw her after that.

[43] With regard to whether Dr. Hynes examined her after 2006, I note that, for example, in March 2010, a follow-up report appears to be "electronically approved" by both Mr. Velez and Dr. Hynes.[28]

[44] The Appellant became increasingly agitated as she spoke. Neither her representative nor I could calm her down. We took a short break. After the break, she informed me that she was having a panic attack. As a result, I adjourned the hearing.

[45] The Appellant provided no evidence to support her claims that I was biased and failed to prepare for the hearing. As a result, she did not raise a reasonable apprehension of bias.

---

[27] *Kelly v. Palazzo*, 2008 ONCA 82, at para. 21
[28] GD2-I-81. See also GD2-I-43.

Conclusion on Bias

[46] I believe that that a reasonable and well-informed person with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that my conduct did not give rise to a reasonable apprehension of bias.

Reasons for my decision

What the Appellant must prove

[47] For the Appellant to succeed, she must prove that it is more likely than not that she has a disability that was severe and prolonged by December 31, 2009.[29] This means that I must focus on her condition at that date.

[48] In a case called *Dean*, the Federal Court of Canada recently stated that, in order to succeed, an appellant must provide objective medical evidence of their disability at the time of their minimum qualifying period (MQP).[30] The Federal Court has also stated that medical evidence dated after the MQP is irrelevant when an appellant fails to prove that they suffered from a severe disability before the MQP.[31]

[49] The CPP defines “severe” and “prolonged.”

[50] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[32] If the Appellant was able regularly to do some kind of work that she could earn a living from, then she wasn’t entitled to a disability pension.

---

[29] 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 pages GD2-280. Her record of earnings in the United States is at page GD2-270. The Minister’s calculations of her MQP taking her US income into account are at GD12-4.
[30] *Canada (A.G.) v. Dean,* 2020 FC 206, citing *Warren v. Canada (A.G.),* 2008 FCA 377; *Gilroy v. Canada (A.G.),* 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and CPP *Regulations*
[31] *Dean* (previous footnote), and *Canada (A.G.) v. Angell*, 2020 FC 1093
[32] Paragraph 42(2)(a) of the CPP gives this definition of severe disability.

[51] A disability is **prolonged** if it is likely to be long continued and of indefinite duration.[33] The disability must be expected to keep the Appellant out of the workforce for a long time.

[52] The Minister stated that the Appellant is not entitled to a CPP disability pension. She did not have a disabling medical condition in December 2009, when she last qualified for CPP disability. In addition, she failed to try alternate work more suitable to her limitations.

[53] The Appellant relies on the finding by the Florida Social Security Administration (SSA), Office of Disability Adjudication and Review (Office of Disability). In April 2011, it decided that the Appellant had been "unable to perform her basic work activities" since August 1, 2008 because of her medical conditions.[34]

Issues

[54] Did the Appellant's health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2009?

[55] If so, was her disability long continued and of indefinite duration?

The Appellant's disability was not severe by December 31, 2009

[56] The medical evidence shows that the Appellant's health conditions interfered with her ability to work by the end of December 2009. However, she failed prove that it was more likely than not that she lacked the regular capacity for substantially gainful employment by that date.

[57] The Appellant's major physical health problems at her MQP were neck and foot pain (plantar fasciitis) and fainting.

---

[33] Paragraph 42(2)(a) of the CPP gives this definition of prolonged disability.
[34] She received a disability pension in the US as of that date.Information in quotation marks is the words of the Appellant's representative: GD3-10.

Neck pain

[58] In 2005, the Appellant developed neck pain.[35] Conservative treatment failed to improve her condition. In April 2006, she had neck surgery (anterior cervical discectomy and fusion at C5-7). Her condition improved for a while, but early in 2008 she visited a back clinic with neck pain and spasms.[36]

[59] Steroid injection therapy later in 2008 failed to cure the Appellant's neck and thoracic spine pain.[37] However, in December 2008, Damian Velez, physician assistant to her orthopedic surgeon, reported that her condition had markedly improved with acupuncture.[38] In addition, James McClure, physiotherapist, saw the Appellant for neck pain for six weeks early in 2009. He reported that by February 2009, her range of motion, strength, and tolerance for activities of daily living had improved significantly.[39] This report does not indicate that the Appellant had functional limitations that meant she lacked the regular capacity for work.

[60] The Appellant reported that in December 2009, she travelled to India. She went to the gym there and watched her diet.[40]

[61] For more than a year after February 2009, the appeal file contains no records of the Appellant seeking further treatment for neck pain. This is in contrast to 2008, when she had steroid injections for severe myofascial discomfort in her neck. It is also a contrast to her treatment in 2011, when she had injections for facet pain in her neck and between her shoulder blades.[41]

[62] In March 2010, Mr. Velez stated that the Appellant's neck pain was at a level of 6/10, where 10 is the greatest pain imaginable. Significantly, though, she took no

---

[35] GD9-VIII-7. She also had some less significant pain in her upper and lower back.
[36] GD2-I-118
[37] GD2-I-119; GD9-8-68-70
[38] GD9-VII-77. Mr. Velez was the physician assistant for Dr. Richard Hynes, orthopedic surgeon, who had operated on the Appellant's neck in 2006.
[39] GD9-VIII-9
[40] GD9-VI-45. Since the Appellant was receiving treatment for foot pain through most of December, she likely visited India earlier in 2009.
[41] For 2008, see GD2-I-118-119. For 2011, see GD2-!-57-74, Dr. Esmailzadeh's records. In May 2011, the Appellant reported that the injections had reduced her neck pain by more than 50%: GD2-I-61.

narcotics or muscle relaxants. An anti-anxiety drug reduced her neck spasms. She also used a TENS machine.

[63] Regarding the X-rays of her neck, Mr. Velez stated: “The plate is perfect. The fusion is beautiful appearing. …Clinically she is doing fine.” He reported: “She tells me she modifies her lifestyle and things are reasonable.” He recommended additional physiotherapy. He would see her in a year, or sooner if there were any problems.[42] This report fails to support a finding that the Appellant had functional limitations that prevented her trying to find and keep work.

[64] In June 2010, the Appellant told the SSA a different story. In a pain questionnaire, she reported that pain in her neck, thoracic spine, and hip radiated down to her foot. The pain was constant at a level of 7-10 and worsened as the day progressed. Exercise increased her pain. She was unable to sit and stand for more than 15-20 minutes.[43] While her pain may have increased by June 2010, this was six months after her minimum qualifying period.

Fainting and headaches

[65] On December 31, 2009, the Appellant was admitted to the hospital because of a “presyncopal” episode (she had felt faint). She had also fainted once before in 2009 and had experienced faintness on other occasions. Doctors in internal medicine, neurology, and cardiology examined her and determined that her syncope was related to migraine headaches and to anxiety. She received a prescription for migraines. She also received advice to switch to an antidepressant that would make her less prone to fainting.[44]

[66] I am not convinced that occasional faintness meant that the Appellant was unable regularly to pursue any substantially gainful occupation. Further, her episodes of

[42] GD2-I-81
[43] GD9-III-2-3
[44] GD9-VIII-40-45

faintness do not appear to have been prolonged. In August 2010, she reported that she had noted decreased unsteadiness on Inderal (headache medication).[45]

Foot pain

[67] In December 2009, the Appellant began seeing Dr. Shelly Garrow, podiatrist, for pain in both feet at a level of 6-7/10, where 10 is the greatest pain imaginable. The treatments included ultrasound, electrical stimulation, myofascial release, injections and therapeutic exercises.[46] By the end of December 2009, the Appellant's pain level was down to 5/10.[47] At that time, she reported that her foot pain was worse when she got up in the morning, after standing from a seated position, with daily activity and increased activity towards the end of the day.[48] This account fails to show that the Appellant's foot pain, even combined with her neck pain and occasional faintness, meant that she lacked the regular capacity for substantially gainful work.

Other conditions

[68] In 1997, the Appellant received a diagnosis of ulcerative colitis. The condition went into remission, and she stopped taking medication for it. It began troubling her again only in June 2010, six months after her MQP.[49]

[69] In 2008, the Appellant received a diagnosis of hypothyroidism. As of her MQP, she had high blood pressure and high cholesterol. She also had impaired fasting blood sugar. She was receiving treatment for all these conditions.[50] No functional limitations were recorded for any of them as of the end of December 2009.

[70] The Appellant also has a history of anxiety and depression dating back to 1996. In 2009, she was reportedly treated by a Dr. Alavera, but there was no evidence about

---

[45] GD9-VI-45 Dr. Rajeh Desai, August 2010. See also report of Dr. Sunita Patel, November 2010, GD9-4-29.
[46] GD9-III-90
[47] GD9-IV-17
[48] GD9-III-90
[49] GD9-II-61; GD9-VI-71. Her 2008 colonoscopy was normal.
[50] GD9-VIII-44, report of Dr. Jill Miller, neurologist, January 1, 2010. See also report of Dr. Patel, November 2010, GD9-IV-29. On December 31, 2010, she was on a moderate dose of Cymbalta (20 mg.).

this treatment before me. In 2010, Dr. Miller, psychiatrist, prescribed Xanax and Cymbalta (20 mg.) for her. [51]

[71] In August and October 2010, two psychologists evaluated the Appellant for the SSA. Neither thought that her mental health issues interfered with her engaging in a substantially gainful occupation.[52]

[72] In October 2010, Dr. John Mallams, psychologist, reported that the Appellant was seeking psychotherapy.[53] He found the Appellant mildly anxious and moderately depressed. He established a schedule of appointments with her.[54] Significantly, his first appointment with her occurred almost a year after she last qualified for CPP disability.

Why I disagree with the Office of Disability Report, April 2011

[73] In April 2011, Vernis J. Worsham, an adjudicator for the Florida Office of Disability, found that the Appellant had been disabled since August 1, 2008.[55] She may have been right that the Appellant was disabled by April 2011. But I don't think that the Appellant was disabled according to the CPP criteria by December 31, 2009.

[74] The reasons I disagree with Ms. Worsham are as follows:

[75] First, Ms. Worsham focused on whether the Appellant was disabled as of the date of the review (April 2011). This was 16 months after the Appellant's MQP.

[76] Second, in making her finding, Ms. Worsham relied on information about the Appellant's neck and upper back pain in 2008. In 2008, the Appellant visited a pain

---

[51] GD9-IV-35, report of Dr. Mallams, October 2010. The Appellant first received treatment for depression in 1996, long before she stopped work. In December 2009, she was taking 20 mg. of Cymbalta (antidepressant) and 10 mg. of Ambien (for insomnia).
[52] GD9-VII-54, 64
[53] GD9-IV-35
[54] GD9-IV-35
[55] The report is at GD2-1-115-121. The test for disability that Ms. Worsham used is similar to the test for CPP disability, with one exception. Unlike the CPP, the U.S. Social Security Administration (SSA) requires than an adjudicator consider whether the SSA has proven that there is alternate work that exists in significant numbers in the national economy that the applicant can do, given their residual functional capacity, age, education, and work experience.

management specialist, Dr. Harold Cordner. In 2008, she had two MRIs of her neck. Further, Dr. Cordner gave her steroid injection therapy.

[77] Ms. Worsham, however, failed to consider that there were no medical reports about the Appellant's neck condition from February 2009 to March 2010. The medical evidence shows that by early 2009 the Appellant's neck pain improved with physiotherapy and acupuncture. The Appellant was able to manage her condition with limited prescription medication by modifying her lifestyle. She was also able to travel to India in 2009 and attend the gym there. The evidence fails to support a finding that the Appellant's functional limitations were significantly disabling in 2009.

[78] Third, Ms. Worsham also failed to consider Mr. Velez's reports of 2010 and 2011. These showed that the Appellant was capable of significant physical activity after she last qualified for CPP disability. He recommended in both these years that the Appellant stop exercising at Curves.[56] In March 2011 he stated: "She is really doing a lot. She is in Curves. She is in yoga. She is staying extremely active, maybe too active at this point, and she is constantly exacerbating her pain."[57]

[79] Fourth, Ms. Worsham relied on a report from Dr. Krishna Vara. This report was dated July 30, 2010, more than six months after the Appellant's MQP. Dr. Vara assessed the Appellant for chronic neck and back pain. He reported that her symptoms had become worse "in recent months." He noted that she was in "mild to moderate discomfort." A "Range of Motion Report Form," attached to Dr. Vara's report, found that the Appellant had significant limitations in forward and backward movement of her neck. Ms. Worsham minimized the significance of Dr. Vara's opinion that the Appellant could function daily at jobs requiring no more than 2-4 hours of standing, walking, and bending.[58]

[80] Fifth, Ms. Worsham also relied on what the Appellant told Dr. Paul Keller, orthopedic surgeon, in October 2010. She told Dr. Keller that her pain level was 8-

---

[56] GD2-I-76-77; 81
[57] GD2-I-67-68
[58] GD9-VII-58-59. This report appears to have been prepared for the SSA.

10/10. She complained of severe neck, low back, and shoulder blade pain. She stated that her pain worsened with prolonged sitting, bending, lifting, and twisting. [59] Since this evidence relates to a period more than six months after the MQP, it is not relevant to the present appeal.

[81] For all of these reasons, Ms. Worsham's report fails to persuade me that the Appellant's disability was severe as of December 31, 2009.

My findings on the Appellant's health conditions at her MQP

[82] The Appellant has suffered from many health problems since 2005. In the year before December 31, 2009, however, most of them were in remission, like ulcerative colitis, or they were under control, like high blood pressure and high cholesterol. She managed her mental health issues with a low-dose antidepressant.[60]

[83] Early in 2009, the Appellant reported that her neck pain had improved significantly with acupuncture and physiotherapy. The file reveals no further investigation of her spinal condition until March 2010. At that time, she reported that her pain was at a level of 6/10. However, she was taking no prescription painkillers. She managed her neck spasms with an anti-anxiety medication.

[84] In 2009, the Appellant fainted once and had occasional faintness (syncope).

[85] In December 2009, the Appellant developed serious foot pain. This interfered with her mobility, but the evidence fails to show it would have otherwise affected her functionality. Still, I find that the medical evidence shows that, at the end of December 2009, the Appellant's foot pain interfered with her ability to work.

[86] Over time, the Appellant went on to develop worse pain in her neck, hips, and lower back. In his May 2017 CPP medical report, Dr. Hynes, orthopedic surgeon, stated that the Appellant had chronic back and neck pain, as well as inflammation in her hip

[59] GD9-IV-39-43
[60] GD9-IV-40: Cymbalta, 20 mg.

(trochanteric bursitis).[61] In January 2019, she had radiofrequency ablation at three levels of the spine in her lower back to deaden the transmission of pain.[62] The Appellant also developed serious shoulder problems. In August 2019, she had surgery for a partial thickness tear of her rotator cuff and associated problems.[63]

[87] However, I am unable to consider health conditions that developed or became significantly worse after the Appellant's MQP in December 2009. I have therefore not taken them into account in arriving at my decision.

The Appellant failed to prove that she could not realistically earn a living because of her disability

[88] In deciding whether the Appellant's condition was severe, I must take a "real world" approach. This means I must consider factors such as her age, level of education, language abilities, and past work and life experience.[64] I must think about how these matters realistically affected her ability to earn a living.

The Appellant's work history

[89] The Appellant provided inconsistent information about her work history.

[90] In her October 2017 letter requesting reconsideration, the Appellant stated that she had worked until 2013 on a *per diem* basis doing cataract surgeries. After this, she stated, her condition worsened.[65] The Minister's submissions relied on this letter to state that the Appellant retained the capacity for some type of work after the end of December 2009.[66]

[91] I believe it is more likely that the Appellant stopped work in 2008, as she stated on her June 2017 questionnaire for CPP disability benefits.[67] One reason is that the

---

[61] GD2-I-108
[62] GD2-I-205
[63] GD2-I-29
[64] *Villani v. Canada (A.G.),* 2001 FCA 248
[65] GD2-I-35
[66] GD14-4
[67] GD2-I-13

medical evidence from later periods fails to mention that she is working. The other is that her U.S. employment record shows no entries after 2008.[68]

The Appellant couldn't work as an operating room nurse by her MQP

[92] In November 2010, the Appellant reported to the SSA that she was unable to work as an operating room nurse because of her health conditions. She would be unable to stand for more than 8 hours, lift heavy metal trays, or lift obese patients. She reported that prolonged sitting and standing caused pain in her upper back that radiated down her spine.[69] I accept that the Appellant was unable to work at her former job by the end of December 2009.

[93] In November 2010, the Appellant stated that she had tried to do a sit-down job in the nursing field.[70] However, working 9-10 hours at a computer "made my condition unbearable." She stated that she had "tried different kind[s] of jobs, but level of pain incapacitates me."[71] The only other job that she mentioned was another nursing job.

The Appellant might have been able to do other work

[94] In November 2010, the Appellant's questionnaire for the SSA stated: "I have lost my identity since I cannot work. N[ursing] was the only job I knew." [72] However, the question is not whether the Appellant could have continued to work as a nurse. The question is whether she could have done any substantially gainful job.[73]

[95] The April 2011 Office of Disability report found that the Appellant had "the residual functional capacity to perform the full range of sedentary work."[74]

---

[68] GD2-I-270
[69] GD9-III-4
[70] Presumably, this was the job she had in 2007-2008.
[71] GD9-III-4
[72] GD9-II-12
[73] Paragraph 42(2)(a) of the CPP
[74] GD2-I-118. However, based on her age, education, and work experience, Ms. Worsham found that the Appellant was disabled: GD2-I-120.

[96] For the purposes of CPP disability, where there is evidence of work capacity, an appellant must provide evidence of employment efforts and possibilities.[75] They must also show that efforts at obtaining and maintaining employment have been unsuccessful because of their health condition.[76]

[97] Even if the Appellant stopped working in 2008, it is not apparent that she was unable to work afterwards because of her health condition. Her most serious health problems in 2009 were neck and foot pain. By early 2009, her neck pain had improved significantly. The only prescription pain medication she used was for neck spasms. There is no evidence that her neck pain would have seriously interfered with her ability to work. Her foot pain was first investigated only in December 2009. While it evidently interfered with her mobility, it is not apparent that it would have prevented her from undertaking all substantially gainful work.

[98] In December 2009, the Appellant was 53 years old. This is 12 years from the usual retirement age. The Appellant is English-speaking. She had a university education in nursing and 26 years of experience as a registered nurse. She had transferable skills. For example, she could use a computer. None of these personal characteristics would have been a serious barrier to alternate work or retraining for a job more suitable to her limitations. Yet there is no evidence that she tried to find alternate work or to retrain after 2008.

[99] I find that the Appellant has failed to prove that it is more likely than not that by December 31, 2009, she lacked the regular capacity for substantially gainful employment.

[100] I therefore find that the Appellant's disability was not severe by December 31, 2009.

[101] Because I found her disability was not severe, I do not need to consider whether it was prolonged.

---

[75] *Villani v. Canada (A.G.),* 2001 FCA 248
[76] *Inclima v. Canada (A.G.)*, 2003 FCA 117.

Conclusion

[102] The appeal is dismissed.

Carol Wilton
Member, General Division – Income Security Section