Citation: *LN v Minister of Employment and Social Development*, 2022 SST 981

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	L. N.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated July 27, 2021 (issued by Service Canada)

Tribunal member:	Selena Bateman
Type of hearing:	Teleconference
Hearing date:	May 10, 2022
Hearing participant:	Appellant
Decision date:	May 12, 2022
File number:	GP-21-2425

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Appellant is 49 years old. He was born in Yugoslavia (now Serbia). He has high school education from Yugoslavia and forklift training. In 2015, he was in a motor vehicle collision. He recovered, and started work again in June 2018. He worked in maintenance and renovation. He slipped and fell on ice in January 2019. He hurt his neck and his back. He tried to return to work in June 2019, but he worked for a few days before the pain was too much. He hasn't worked since.[1]

[4] The Appellant applied for a CPP disability pension on March 10, 2020. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says that his health is worsening. He received regular physiotherapy over 77 times. He still can't work any job. In 2021, he tried to retrain by taking a high school equivalency online program. He couldn't complete the program because of his pain.[2]

[6] The Minister says that the Appellant was working his usual duties at December 31, 2018. The Appellant is capable of doing lighter work, rather than his previous physically heavy job. He didn't have a severe and prolonged disability by the possible proration period between January 1, 2019 and April 30, 2019.

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[1] See GD2-261.
[2] See GD1-1.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he has/had a disability that is/was severe and prolonged by December 31, 2018. This date is based on his contributions to the CPP.[3]

[8] The Appellant had CPP contributions in 2019 that were below the minimum amount the CPP accepts. These contributions let the Appellant qualify for a pension if he became disabled from January 1, 2019 to April 30, 2019.[4]

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

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[5]

[11] 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.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.[6]

[13] 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.

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[3] Service Canada uses a Appellant's years of CPP contributions to calculate their coverage period, or "minimum qualifying period" (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Appellant's CPP contributions are on GD2-32 to 33.
[4] This is based on sections 19 and 44(2.1) of the *Canada Pension Plan*.
[5] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[6] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[14] 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

[15] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2018 or the prorated period from January 1, 2019 to April 30, 2019.

Was the Appellant's disability severe?

[16] The Appellant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affect his ability to work

[17] The Appellant has a spine and right hip strain. However, I can't focus on the Appellant's diagnoses.[7] Instead, I must focus on whether he has functional limitations that got in the way of him earning a living.[8] 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.[9]

[18] I find that the Appellant h functional limitations.

– What the Appellant says about his functional limitations

[19] The Appellant argues that his health is deteriorating. He says that the physiotherapist reports (increase of limitations) and his family doctor's reports (suggested retraining) are evidence of this.

[7] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[8] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[9] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[20] The Appellant says that his medical conditions resulted in functional limitations that affect his ability to work. He says he has the following functional limitations:

- He has pain in his back that ruins down his legs, and pain in his neck and shoulder. His neck pain is unpredictable.
- It is very hard to bend, twist, do stairs, lift heavy objects and reach above the shoulders.
- He has hearing loss in his left ear and some damage on his right side.
- He can walk for 20 minutes at times. He can stand in one spot for a few minutes and maybe sit for an hour at the most.
- Driving is difficult because it is hard to turn his head. He can drive for 30 minutes.
- Activities of daily living are very difficult because he can't stand in one spot for long. Cleaning is also difficult, it is hard to bend and reach.
- He is able to get small loads of groceries.

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

[21] The Appellant must provide medical evidence that shows that his functional limitations affected his ability to work by December 31, 2018, or within the proration period from January 1, 2019 to April 30, 2019.[10]

[22] The Appellant was in a motor vehicle collision in 2015. He had spine, right hip and shoulder strain. Walking was difficult. He had chronic pain. He also had tinnitus and hearing loss. He was unemployed until June 2018. Then, he resumed pre-accident

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

physically demanding work.[11] The Appellant and Minister both agree that he fully recovered from his motor vehicle injuries.

[23] The Appellant had audiology testing in 2016. He has left ear hearing loss.[12] The Appellant was able to work with the hearing loss, but he doesn't hear well in one ear.

[24] The evidence doesn't support that he had a severe disability by his minimum qualifying period. The Appellant worked for a property management employer doing maintenance and renovation, starting in June 2018. The Appellant said he didn't have any limitations, restrictions or accommodations at work during this time. By December 31, 2018 the Appellant was working his usual job.

[25] I next needed to decide if the Appellant became disabled between January 1, 2019 and April 30, 2019, during the proration period.

[26] The Appellant stopped working during the prorated period. The Appellant had a slip and fall on ice on January 10, 2019. He has pain in the right side of his body. He was prescribed cyclobenzaprine and ketorolac.[13] He remained on this medication.

[27] The Appellant had treatment that suggested his physical tolerance improved over time. He saw a massage therapist for pain in February 2019.[14] The Appellant completed a physiotherapy and occupational therapy rehabilitation program. In February 2019, he had an estimated four hour work tolerance for light duties, with restrictions. In May 2019 he had an estimated 6 hour workday tolerance, for light to medium work. He had restrictions to bending, twisting, crouching, lifting/carrying, and squatting.[15]

[28] In May 2019, the Appellant had diagnostic imaging that showed arthritic changes of the cervical spine with disc space loss and osteophytosis.[16]

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[11] See GD2-84 to 96, GD2-99 and GD2-97.
[12] See GD2-132.
[13] See GD2-47.
[14] See GD2-244.
[15] See GD2-68 to 69 and GD2-173.
[16] See GD2-175.

[29] The Appellant attempted to return to work on June 24, 2019. His duties including plastering, painting doors, and cleaning. He had restrictions to lift up to 20 pounds, no stairs or ladders, and take breaks as needed from standing, kneeling, walking, and sitting. He worked four hours the first two days, took the third day off, and two hours the fourth day. The tasks made his pain worse. The return to work attempt ended on June 28, 2019, because of pain.[17]

[30] The Appellant continued with physiotherapy. The physiotherapist recommended further physiotherapy treatment in support of a second return to work attempt. A second return to work was suggested by the physiotherapist, with a lower lifting restriction of up to 10 pounds.[18]

[31] In July 2019, the family doctor, Dr. Mpiana noted the appellant's restrictions at that time as: breaks as needed for standing, kneeling, walking, and sitting, lifting under 20 pounds, and no stair climbing. Dr. Mpiana also noted to consider retraining.[19] The Appellant was referred the Appellant to a neurosurgeon.[20]

[32] The Minister argues that the Appellant has residual work capacity, evidenced by Dr. Mpiana's consideration for retraining and physiotherapy assessments supported return to work attempts.[21] I agree with the Minister. The evidence was supportive that the Appellant could do alternative, less physically demanding work.

[33] The medical report was completed in March 2020 by Dr. Mpiana. The Appellant has a lumbar spine strain, cervical spine strain and right hip strain, with the onset of January 2019. He has limitations to twisting, turning, carrying, reaching, and bending. He has a limitation to prolonged walking and standing. He had trouble sleeping and headaches. He had difficulty driving when in a pain flair up. His condition was expected

[17] See GD2-245 to 246.
[18] See GD2-191 to 192.
[19] See GD2-197.
[20] See GD2-197.
[21] See GD4-7.

to remain the same. His symptoms were stable. Dr. Mpiana didn't know whether the Appellant would return to work.[22]

[34] The Appellant saw a neurosurgeon, Dr. Murray. He had an MRI done, which showed multilevel degenerative disc disease in the cervical spine with stenosis.[23] Surgery was suggested to decompress his spinal cord. The Appellant wasn't interested in the surgery. Dr. Murray recommended more physiotherapy, since the Appellant hadn't had physiotherapy in some time.[24] I revisit this topic further on.

[35] The Minister argues that the Appellant had less limitations as of August 2020. He had mild improvement.[25] The Appellant's physiotherapy reports shows mild progress over time. In July and August 2020, he had functional limitations to: repetitive bending/twisting, prolonged standing and prolonged sitting.[26] This suggests that the Appellant had less limitations in 2020 compared to 2019.[27]

[36] I am satisfied that the Appellant's medical conditions limited his ability to do his usual job by April 30, 2019. It is clear that he could not return to his previous employment, or other physically demanding work, because of his health conditions.

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

– The Appellant hasn't followed medical advice for surgery

[38] To receive a disability pension, an appellant must follow medical advice.[28] If am 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.[29]

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[22] See GD2-254 to 260.
[23] See GD2-215 to 216.
[24] See GD2-210, GD2-220 and GD2-224.
[25] See GD4-8.
[26] See GD2-229 to 232, GD2-236 to 239, and GD2-240 to 243.
[27] SeeGD2-50 to 52 and GD2-65 to 67.
[28] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[29] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.

[39] The Appellant hasn't followed medical advice. He gave a reasonable explanation for not following the advice.

[40] The Appellant was referred to neurosurgeon, Dr. Murray and had an MRI done in 2020. Dr. Murray saw the Appellant three times: October 2019, March 2020 and June 2020. Dr. Murray examined the Appellant and reviewed the results of the MRI. He had restricted neck movement and pain. Dr. Murray recommended surgery to decompress the spinal cord. The process was explained to the Appellant. The proposed surgery was a laminectomy and a fusion.

[41] The Appellant declined the surgery. At the hearing, the Appellant said that he was terrified of a negative outcome. He didn't want his health to be worse. He spoke to Dr. Murray about his concerns. As the Appellant declined the surgery, Dr. Murray recommended more physiotherapy.[30] The Appellant said he didn't have any more appointments with Dr. Murray after.

[42] I find the Appellant's explanation, in conjunction with the medical evidence, to be reasonable. These are my reasons why:

- The Appellant accepted and participated in other treatments and diagnostic investigations (eg. x-ray, MRI, bone scan).
- The medical evidence doesn't show the chance of success from the surgery.
- No other doctors suggested surgery.
- Dr. Mpiana's records suggest that he accepted the Appellant's decision.
- The physiotherapy records show that the Appellant was slowly progressing with a method of treatment he preferred over surgery.
- The Appellant testified that he spoke to Dr. Murray about his concerns.

[30] See GD2-224.

[43] The Appellant gave a reasonable explanation why he didn't follow medical advice. So, it doesn't matter that he didn't follow it.

[44] 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.[31]

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

[45] 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

[46] 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.[32]

[47] I find that the Appellant can work in the real world.

[48] The Appellant is now 49 years old. He has high school education from Yugoslavia. He took English language classes. His English skills are not a barrier to employment. He completed some adult learning high school credits in Canada. In 2000, he attended university for one semester in environmental science as a mature student. He stopped because he went to Serbia for about 8 years for family reasons. He returned to Canada and worked as a cook in a restaurant, superintendent, and in renovation and maintenance. He has computer skills.

[49] His work history likely limits the full range of possible jobs he is qualified for, but I am not satisfied that he is unable to perform all work. I also considered the Appellant's

[31] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[32] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

hearing loss in addition to his more recent health conditions. He didn't require any accommodations or changes to his job because of the hearing loss.

[50] During the possible proration period, the evidence showed that the Appellant had capacity for lighter, alternate work and the possibility of retraining. I next discuss the retraining and return to work attempt.

– **The Appellant's retraining attempt**

[51] The Appellant testified that he took an assessment that showed he was "mentally ok" to learn. He says that in May 2021 he started an online high school equivalency program. The program was lecture based. No documentary evidence of the program attempt was provided. He stopped about 30% of the way through. He couldn't sit in one place, and couldn't concentrate because of pain.

[52] The medical evidence available doesn't support that the Appellant had limitations to concentration and focus. In the March 2020 CPP disability application, the Appellant noted his concentration was "ok for the most part", and his remembering was "ok". The medical report did not list impairments or limitations to concentration or focus.[33]

[53] The physiotherapy reports noted a limitation to prolonged sitting, but not all sitting. As the program was online, it would be reasonable to alternate positions to minimize discomfort, take breaks as needed, or request accommodation if required.

[54] I am not satisfied by the Appellant's attempt to retrain.

– **The Appellant's return to work efforts**

[55] If the Appellant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren't successful because of his medical conditions.[34] Finding and keeping a job includes retraining or looking for a job that

[33] See GD2-254 to 260 and GD2-261 to 268.
[34] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

accommodates his functional limitations (in other words, a job with special arrangements).[35]

[56] After the June 2019 attempt to return to work on lighter duties, the Appellant didn't make further efforts to work. He didn't think that an increased restriction on lifting at his usual job would be enough, so he didn't try.

[57] The Appellant didn't try to find other work.

[58] I am not satisfied by the Appellant's attempt at working. The Appellant failed to show that he made at least some effort to pursue work.

[59] Therefore, I can't find he had a severe disability by December 31, 2018 or the potential prorated period from January 1, 2019 to April 30, 2019.

Conclusion

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

[61] This means the appeal is dismissed.

Selena Bateman
Member, General Division – Income Security Section

[35] See *Janzen v Canada (Attorney General)*, 2008 FCA 150.