



Citation: *DD v Minister of Employment and Social Development*, 2022 SST 723

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

Decision

Appellant: D. D.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated February 2, 2021 (issued by Service Canada)

Tribunal member: James Beaton
Type of hearing: Videoconference
Hearing date: July 12, 2022
Hearing participant: Appellant
Decision date: July 19, 2022
File number: GP-21-1090

Decision

[1] The appeal is allowed.

[2] The Appellant, D. D., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of October 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 53 years old. She last worked as a custodian doing janitorial work. She stopped in February 2019 when she injured her shoulder. Her shoulder got better, but her back pain (which she had before she stopped working) got worse. She hasn't gone back to work since.

[4] The Appellant applied for a CPP disability pension on September 14, 2020. The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Minister says the Appellant might not be able to go back to custodial work, but she can do some other type of work that isn't as physically demanding. Because she hasn't tried to work, or to retrain for work that she can do, she isn't disabled.

[6] The Appellant says she hasn't tried to work or retrain because she can't do any type of work.

[7] I agree with the Appellant.

What the Appellant must prove

[8] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by the hearing date, which was July 12, 2022.¹

¹ 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

[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.²

[11] This means I have to look at all of the Appellant’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, language abilities, 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 Appellant 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.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[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.

[14] The Appellant must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means she must show that it is more likely than not she is disabled.

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of June 2020. I reached this decision by considering the following issues:

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

section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are at GD6-12 and 13. In this case, the Appellant’s coverage period ends on December 31, 2022, after the hearing date, so I must decide whether she was disabled by the hearing date.

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

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Was the Appellant's disability severe?

[16] The Appellant's disability was severe by July 12, 2022. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affected her ability to work

[17] The Appellant has:

- diabetes
- high blood pressure
- obesity
- shoulder pain
- back pain that sometimes radiates into her hips and legs

[18] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living by July 12, 2022.⁵ When I do this, I must look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.⁶

[19] I find that the Appellant had functional limitations by July 12, 2022.

– What the Appellant says about her functional limitations

[20] The Appellant says her medical conditions have resulted in functional limitations that affected her ability to work by July 12, 2022.⁷ While I must consider all of the Appellant's medical conditions together, it was clear from her testimony that her **back pain** is what impacts her ability to work. She says:

- her **diabetes** is currently managed with insulin and medication
- due to **high blood pressure**, she sometimes gets lightheaded or dizzy if she exerts herself too much, but this isn't a major problem for her

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁷ See GD1-1 and 2; GD2-19 to 23 and 95 to 102; and the hearing recording.

- she doesn't think **obesity** impacts her ability to work, since she has "always" been overweight—she has been able to work despite being overweight
- she had surgery on both **shoulders**, and she only has occasional shoulder pain now; she has full range of motion in her shoulders

[21] In contrast, her back pain is nearly constant, although it moves around. Sometimes her lower back hurts the most; sometimes, the middle of her back hurts the most. Sometimes the pain is in her hips and legs as well.

[22] As a result of back pain, she says:

- she can't sit more than 10 minutes on a hard surface, or an hour in a recliner—after that, she usually has to lie down for about an hour
- she can't stand because there is too much pressure on her back
- she can't walk more than 20 minutes; stairs are especially hard, and sometimes her leg gives out on her
- she can't drive for prolonged periods of time
- she can't lift more than 25 pounds (less if she has to lift repetitively); she avoids lifting any heavy groceries
- she can't do housework without taking lots of breaks

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

[23] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by July 12, 2022.⁸

[24] The medical evidence supports what the Appellant says. Although diagnostic imaging doesn't show anything unusual in her hips, it does show degenerative changes throughout her lower and middle back.⁹ Her family doctor, Dr. Solomon, also reported in

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁹ See GD2-70 to 72, 74, 75, 83, 84, and GD5-40 to 42.

November 2020 that the Appellant had lumbar stenosis, degenerative disc disease, and facet joint arthropathy—all conditions that could cause back, hip, and leg pain.¹⁰

[25] More importantly, Dr. Solomon said that the Appellant's ability to sit, stand, walk, and drive was affected.¹¹ His office notes detail the Appellant's complaints of back pain (sometimes extending to her hips and legs) as early as May 2019. They suggest that this pain improved temporarily sometime between November 2020 and February 2021. Then her pain got worse again.¹²

[26] Dr. Solomon didn't mention restrictions with lifting in relation to back pain, but his evidence doesn't contradict the Appellant's testimony either. It makes sense that she would have trouble lifting due to back pain.

[27] The medical evidence supports that the Appellant's back pain prevented her from doing her job as a custodian by July 12, 2022. Her job involved hours of standing, walking, and lifting, which she could not do.

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

– **The Appellant has followed medical advice**

[29] To receive a disability pension, an appellant must follow medical advice.¹³ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.¹⁴

[30] The Appellant has followed medical advice.¹⁵ The Minister doesn't dispute this.

¹⁰ See GD2-10 and 11.

¹¹ See GD2-10 and 11.

¹² See Dr. Solomon's notes from May 17, 2019; May 29, June 23, and August 14, 2020; and February 1 and May 27, 2021. Dr. Solomon wrote on February 1, 2021, that the Appellant's "low back pain started again due to [a] fall," suggesting that the Appellant's pain had improved temporarily sometime after he wrote his report in November 2020.

¹³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁴ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁵ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[31] For back pain, she takes duloxetine and gabapentin. She has had one steroid injection so far. She thinks it has helped her leg to stop giving out on her when she walks. But it only relieved her back pain for two weeks.¹⁶

[32] She tried physiotherapy, but had to stop. It was reasonable for her to stop. She had to drive over an hour to get to appointments in another city, and an hour to get home. This caused too much pain. However, she continues to do many of the exercises at home. She does exercises to strengthen her core muscles. She uses exercise bands, an exercise ball, light weights, and an ab roller. She goes for short walks to try to increase her walking tolerance.¹⁷

[33] 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 her from earning a living at any type of work, not just her usual job.¹⁸

– **The Appellant can't work in the real world**

[34] When I am deciding whether the 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
- past work and life experience

[35] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say she can work.¹⁹

[36] I find that the Appellant can't work in the real world.

¹⁶ See GD2-10 and 11; GD5-22 and 27 to 30; and the hearing recording.

¹⁷ The Appellant said this at the hearing.

¹⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[37] Her level of education, language abilities, and experience are positive factors. She completed high school and four semesters of post-secondary studies. She is fluent in English. She has about 16 years of experience as a personal care attendant, followed by 7 years as a custodian. I don't consider her age (53) to be a significant factor in favour of, or against, her ability to work.²⁰

[38] However, her functional limitations outweigh these positive factors. She can't do physical work because she has trouble lifting repetitively, standing (for any length of time), and walking more than 20 minutes. She can't do sedentary work because she can't sit more than an hour. After that, she often needs to lie down for an hour before she can sit again. Realistically, no employer in the real world would hire her under such conditions.

[39] I asked the Appellant how much she thought she might be able to work now. Her testimony was genuine and spontaneous. I believe what she told me. Her testimony reinforces that she can't regularly do substantially gainful work.

[40] She thinks she could do up to two hours of custodial work, two days per week. Even before she stopped working, she had some back pain. She relied on having a four-day break after every four days of work to recover physically.²¹ Her pain is much worse now. I accept as accurate her estimate of how much she could work now. On this basis, at her wage of \$31 per hour,²² she would earn about \$6,448 per year—well below a substantially gainful income.²³

[41] She thinks she could do two or three hours of sedentary work per day, five days per week, if she could take the breaks she needed in between each hour of work. I have already found that it isn't realistic to expect an employer in the real world to accommodate a schedule like this. Even if the Appellant could find such a job, she would need to earn \$22.54 per hour to earn a substantially gainful income working 15

²⁰ See GD2-95 to 102 and the hearing recording.

²¹ The Appellant said this at the hearing.

²² At the hearing, the Appellant estimated that this was her hourly wage when she stopped working.

²³ Section 68.1 of the *Canada Pension Plan Regulations* sets out what a substantially gainful income is each year. For 2022, a substantially gainful income is \$17,577.96 or more.

hours per week. This is almost 50% above the minimum wage of \$15.20 in British Columbia, where the Appellant lives.²⁴ I find it unlikely that she would be able to earn that amount, given that she has no experience doing sedentary work.

[42] Because the Appellant had no residual capacity to regularly do substantially gainful work, she didn't have to try to do another job or to retrain for one.²⁵ Any efforts to do so would be pointless. They would only prove what the evidence already shows: that she can't regularly do work that she can earn a living from.

[43] I find that the Appellant's disability was severe as of June 2020. Although she stopped working in February 2019, she testified that was because she had injured her shoulder. Similarly, Dr. Solomon recommended that the Appellant stop working in March 2020 based on shoulder pain.²⁶ Her shoulder got better. Her disability is based on her back pain. She worked with back pain before.²⁷ But it got worse in June 2020. That is when Dr. Solomon wrote that back pain was impacting the Appellant's sleep and ability to function.²⁸ Since she wasn't working at the time, this means it was impacting her activities of daily living. Her back pain continued to get worse after that.²⁹

Was the Appellant's disability prolonged?

[44] The Appellant's disability was prolonged by July 12, 2022.

[45] The Appellant's back pain began sometime before she stopped working in February 2019. It has continued since then, and it will more than likely continue indefinitely.³⁰

²⁴ I have taken official notice of the current minimum wage in British Columbia.

²⁵ See *Janzen v Canada (Attorney General)*, 2008 FCA 150; and *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁶ See GD2-51 to 59.

²⁷ The Appellant said this at the hearing.

²⁸ See GD2-68.

²⁹ See GD2-69.

³⁰ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant must show a severe and prolonged disability by the end of their MQP and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

[46] Despite trying different medications and exercises, her condition hasn't improved. She was referred to a pain clinic in June 2021, but still doesn't have an appointment.³¹ It is speculative to say if or when she will get one, and what the impact will be on her disability.

[47] Dr. Solomon expected her to return to work by September 2021, although that prediction seems to have been based only on her shoulder pain.³² In any case, that date has come and gone. He hasn't offered a new timeline for her to get better.

[48] Based on the evidence I have, I am satisfied on a balance of probabilities that her disability will continue to be severe indefinitely.

[49] I find that the Appellant's disability was prolonged as of June 2020, the same time that it became severe. By then, she had already had some degree of back pain for over a year. It has only gotten worse since then.

When payments start

[50] The Appellant's disability became severe and prolonged in June 2020.

[51] There is a four-month waiting period before payments start.³³ This means payments start as of October 2020.

Conclusion

[52] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged by July 12, 2022.

[53] This means the appeal is allowed.

James Beaton
Member, General Division – Income Security Section

³¹ See GD5-28 and 29, and the hearing recording.

³² See GD2-51 to 59 and GD5-17.

³³ Section 69 of the *Canada Pension Plan* sets out this rule.