



Citation: *AE v Minister of Employment and Social Development*, 2022 SST 1014

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. E.
Representative: Allison Schmidt
Chantelle Yang

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 22, 2020
(issued by Service Canada)

Tribunal member: Anne S. Clark

Type of hearing: Teleconference

Hearing date: February 28, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: March 15, 2022

File number: GP-20-1786

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. E., 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 43 years old. She was 34 when she last worked. She lives with her husband and young child. She completed high school, one year of college. She holds a Real Estate Licence and a Real Estate Brokerage Certificate. The Appellant was injured in a motor vehicle collision (MVC) in June 2013. She had several injuries requiring surgery. She now has chronic pain and functional limitations she attributes to the injuries.

[4] The Appellant applied for a CPP disability pension on June 29, 2015. The Minister denied the application and the Appellant filed a late request for reconsideration. The Minister denied the late request and the Appellant did not pursue the application further.¹ The Appellant filed a second application on February 5, 2019.² 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 Appellant says she had several very serious injuries that were not treated properly and have caused her to have chronic pain. She said the combined effects of all of the injuries make her unable to work. Even though she has some days that are not as bad as others they are unpredictable and she would not be a reliable worker. She said she tried to return to work. She planned to return to graphic design but her first attempt was not successful. She also attempted to run a chicken hatchery but it was not financially viable.

¹ The application is at GD2R-54 and the late request is at GD2R-45.

² The Appellant's application is at GD2R-37.

[6] The Minister says medical information shows the Appellant's conditions improved. Her pain specialist recommended she gradually return to her previous activity level. The Minister also wrote that the Appellant should be able to work in some capacity even with limitations. The Minister said the fact that the Claimant's pain worsened after she had her baby in 2019 does not prove she had a severe disability when she was last eligible to be considered for a CPP disability pension.

What the Appellant must prove

For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2014. This date is based on her contributions to the CPP.³

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

[8] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁴

[9] 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, 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 to earn a living, then she isn't entitled to a disability pension.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁵

[11] 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.

³ A person's years of contributions to the CPP are used to calculate the "minimum qualifying period". It is usually called the MQP and is often described using the date the period ended. In this case it is December 31, 2014. See subsection 44(2) of the *Canada Pension Plan*. The Appellant's contributions are on page GD2R-62.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

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

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

Reasons for my decision

[13] I find that the Appellant hasn't proven she had a severe and prolonged disability by December 31, 2014.

Was the Appellant's disability severe?

[14] The Appellant's disability wasn't severe by December 31, 2014. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations didn't affect her ability to work

[15] The Appellant had multiple injuries some of which required surgery.⁶ However, I can't focus on the Appellant's diagnoses.⁷ Instead, I must focus on whether she had functional limitations that got in the way of her 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 her ability to work.⁹

[16] I find that the Appellant didn't prove she had functional limitations by December 31, 2014.

– What the Appellant says about her functional limitations

[17] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says she has constant pain at a level of 7 or 8 out of 10. Pain is in her spine, limbs, feet and knees and neck. She has numbness

⁶ In her submissions at GD03 the Appellant listed these injuries. Compound fracture – right arm, fracture – right foot, damage to ligaments of left foot, right shoulder rotator cuff tear, chronic pain syndrome, C5-6 cord compression requiring surgery, nerve impingement – R arm, optical nerve impingement, myofascial pain, whiplash, migraines, right carpal tunnel syndrome (CTS), anxiety, severe osteoarthritis in the spine and Ehlers-Danlos Syndrome.

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.

in her arms and stiffness in her neck. She said every day was bad by December 31, 2014. She had no good days and she had daily flares of severe pain. About half of the time she could do nothing.

[18] The Appellant said the surgery to relieve spinal stenosis in her neck corrected some of the stenosis but did not improve the numbness she feels. She can ease the symptoms she has at night by moving her neck. Therefore she believes the symptoms are from the neck injury and not Carpal Tunnel Syndrome (CTS). Pain and stiffness in her neck also causes migraine headaches.

[19] The Appellant also said while she is hyper-flexible, symptoms of Ehlers-Danlos Syndrome have never affected her ability to work.

[20] The Appellant also said she showed she was incapable of working because her efforts to return to work were not successful. The Appellant said she started a chicken hatchery at her home. She set up the operation to accommodate her limitations but learned that it was not financially viable. She still keeps the hatchery but only as a hobby.

[21] The Appellant also attempted to obtain private contracts doing graphic design work. She took a contract for a neighbour but was not able to complete in a reasonable amount of time. She said she did not feel she could charge him for the work. She did not try other types of work.

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

[22] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2014.¹⁰ The Minister is correct to suggest that evidence showing the Appellant’s condition deteriorated after December 31, 2014, does not prove she had a severe disability by December 31, 2014.

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

[23] There is evidence to confirm the Appellant had significant injuries in the 2013 MVC and required surgery.¹¹ The evidence shows the Appellant recovered strength and mobility after the surgeries. Considering the testing and medical recommendations by or shortly after December 31, 2014, it appears the Appellant recovered and regained functional ability but continued to have some pain and limitations. The doctors recommended conservative management and gradual return to work.

[24] The evidence shows the Appellant's recovered well from her injuries. By 2015 her therapist discussed gradual return to work.¹² Her surgeon noted she made excellent progress and had near full range of motion after the surgery on her wrist. Dr. Zeznik said she should continue to build her strength and increase her level activity.¹³ The Appellant disagrees with Dr. Zeznik's conclusions. There is no other evidence to suggest Dr. Zeznik's information or opinion is not reliable.

[25] In June 2015 the specialist recommended the Appellant manage her pain with conservative measures.¹⁴ He suggested a home stretching and strengthening program.

[26] In 2015 the Appellant appeared to develop symptoms of CTS. Two neurologists concluded certain ongoing symptoms of numbness in her hand were most likely related to CTS and not the neck injury. Testing confirmed the diagnosis.¹⁵ The Appellant does not agree with the doctors' opinions. There is no other evidence to support the Appellant's belief that those symptoms relate to the neck injury from 2013 or when the symptoms would have affected the Appellant's function.

[27] Sadly the Appellant had a pregnancy and miscarriage in December 2016. The chart notes confirm the event and ongoing care she required.¹⁶ The evidence doesn't describe any impact that may have had on her functional limitations.

¹¹ See the reports at GD2R-83 and 84.

¹² See the Progress Report at GD2R-224.

¹³ Dr. Zeznik's final report is at GD2R-225

¹⁴ See Dr. Plausinis' letter at GD2R-222.

¹⁵ Dr. Berry's report is at GD2R-136 and Dr. Goplen's is at GD2R-221.

¹⁶ See the notes beginning at GD2R-121

[28] In 2017 her family physician reported she remained “quite disabled” and needed an outdoor motorized mobility aid.¹⁷

[29] In 2018 the Appellant had a “fall down hill” and required emergency medical care.¹⁸ The Appellant could not remember the specifics of the fall or the injury. There is evidence on file about the Appellant’s preferred sports but it is not possible to determine what caused the fall or whether it affected her function. She said she likely fell because of the injuries from the MVC but there is nothing to confirm her opinion.

[30] In 2019 the Appellant had a baby. A specialist examined her prior to the delivery and reported she was otherwise healthy, had no medical issues, took no medication and had very good extension of her neck.¹⁹ After the baby was born in 2019, the Appellant’s doctor reported that the Appellant’s headaches and neck pain worsened from carrying the baby.²⁰ Dr. Vasil also said that since the birth of the baby the pain got “considerably worse” and there was “marked worsening”.²¹ In April 2020 Dr. Vasil referred the Appellant to a pain clinic for pain that had been getting worse particularly since the birth of her child.²²

[31] When I asked her to discuss Dr. Vasil’s comments about the pain getting worse the Appellant suggested the doctor meant the pain got better before the birth of the baby and then worsened after. The Appellant testified that the pain was bad for the first year or two after the MVC. It got better for some time but she didn’t say how long. She said things today are probably similar to what they were in 2014. The Appellant thinks Dr. Vasil likely meant that the pain worsened again after the baby’s birth. There is no evidence that Dr. Vasil meant the Appellant’s conditions improved and then worsened. Even if I could draw that conclusion there is no evidence to show when the condition improved and for how long.

¹⁷ See GD2R-88

¹⁸ GD2R-66 and 67.

¹⁹ See the full report beginning at page GD2R-101

²⁰ Dr. Vasil said this at GD2R-98

²¹ See Dr. Vasil’s report beginning at GD2-72

²² This note is at GD2R-74

[32] The evidence about Appellant's attempts to do some work is not proof that she has a severe disability. She still has the hatchery but not as a business because she found she could not earn money running it. There is no evidence to show her health conditions prevented her from completing the design contract.

[33] The evidence shows the Appellant may have had some limitations by December 31, 2014. She may have recovered and then worsened. She may have improved enough to return to work. It is possible she developed other limitations well after December 31, 2014. When there are different possible scenarios, the Appellant must present evidence that makes one more likely than the others. Unfortunately the evidence doesn't do that.

[34] The medical evidence doesn't prove that the Appellant had functional limitations that made her incapable of working by December 31, 2014. As a result, she hasn't proven she had a severe disability.

[35] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work.²³

[36] I don't have to do that here because the Appellant didn't prove she had functional limitations that prevented her from working by December 31, 2014. This means she didn't prove her disability was severe by then.²⁴

²³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁴ See *Giannaros v Minister of Social Development*, 2005 FCA 187.

Conclusion

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

[38] This means the appeal is dismissed.

Anne S. Clark
Member, General Division – Income Security Section