



Citation: *AB v Minister of Employment and Social Development*, 2022 SST 728

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

**Decision**

**Appellant:** A. B.  
**Representative:** Tara Sciara

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated September 17, 2020  
(issued by Service Canada)

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**Tribunal member:** Sharon Buchanan

**Type of hearing:** Teleconference

**Hearing date:** July 21, 2022

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** July 27, 2022

**File number:** GP-21-364

## Decision

[1] The appeal is allowed.

[2] The Appellant, A. B., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of September 2018. This decision explains why I am allowing the appeal.

## Overview

[3] The Appellant is 61 years old. She left high school after grade 10. She worked in restaurants and bars. She cleaned houses. She waitressed part-time while raising her children. Her last job she worked full-time in a fast food business for seven years.

[4] The Appellant had two falls in 2017. In both incidents she had injuries that required surgery. And in both cases healing was complicated by Chronic Regional Pain Syndrome (CRPS). In January 2017 the Appellant dislocated her right elbow and injured her shoulder. She and her employer were discussing returning to accommodated work when she fell again in September 2017. She injured her right leg and ankle, and fractured her tibia. The Appellant has not returned to work.

[5] The Appellant applied for a CPP disability pension on August 8, 2019. 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.

[6] The Appellant says she has followed treatment recommendations, including surgery, therapy, medication, pain injections and assistive devices. But her health has not improved sufficient for her to work. At 61, she says with her lack of education and work history she is not suited for retraining.

[7] The Minister says that the medical evidence supports the Appellant has made significant recovery. While her condition may not be completely resolved, it is sufficient for her to return to many of her usual activities, including appropriate employment.

## What the Appellant must prove

[8] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2018. This date is based on her contributions to the CPP.<sup>1</sup>

[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 that she could earn a living from, 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.<sup>2</sup>

[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.

[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 had a severe and prolonged disability as of September 2017. I reached this decision by considering the following issues:

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

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<sup>1</sup> 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 page number GD2-5 in the file.

<sup>2</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## **The Appellant's disability was severe**

[14] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

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

[15] The Appellant had:

- Right tibia fracture complicated by CRPS, residual swelling and stiffness
- Residual contracture of her right ankle, ankle stiffness, swelling and pain
- Residual stiffness in her right arm and elbow complicated by CRPS

[16] However, I can't focus on the Appellant's diagnoses.<sup>3</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>4</sup> 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.<sup>5</sup>

[17] I find that the Appellant has functional limitations that affected her ability to work.

### **– What the Appellant says about her functional limitations**

[18] The Appellant says that her medical conditions have resulted in functional limitations that affected her ability to work. She was still using a wheelchair in March 2018. Her progress to a walker and later a cane was slow. She still uses her cane for certain activities when her husband isn't available to assist her.

[19] The Appellant says she has made good progress since her accidents, although she never has a day without pain. She says the residual stiffness and swelling in her arm, hand, leg and ankle, and uneven gait when she walks significantly limit her activities of daily living. I believe the Appellant. She was very credible. She freely

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<sup>3</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>4</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>5</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

admitted that she has improved a great deal. She gave straight-forward descriptions about the ongoing impact of her impairments.

[20] The Appellant is right-handed. She can't completely straighten her right elbow. She can't close her right hand or make a fist. These limitations in her dominant arm and hand make it difficult for her to complete basic tasks. For example:

- She can't pick up anything heavy.
- She can't grip with her right hand. She can't grip a pen for very long. She can't use a knife for preparing food. Her husband helps with meal preparation.
- She doesn't use a computer except for a Facebook account. For this activity she taps with her index finger. She doesn't use a cell phone because she can't manipulate the screen.

[21] The Appellant said that in late 2018 she was able to put weight on her foot and begin to walk again. However she said because she couldn't put her right foot flat on the ground she walked by shuffling her feet side to side. The resulting rocking gait aggravated her right hip and back. Her ankle would swell.

[22] In 2019 and 2020 the Appellant had numerous treatments to try to address the residual limitations in her arm, leg, foot and ankle. She says the treatments have helped some of her pain, reduced swelling and other symptoms of CRPS and improved her mobility. However she describes limitations that continue to impact basic activities of daily living. She says:

- With her orthotics and shoe lift she is almost able to put her foot flat on the floor. It doesn't help her walk like others, but it does help with her pain.
- She wears her special lift shoes and orthotics all of the time, indoors and out.
- She has difficulty standing for long. She still gets swelling in her right leg and pain. She can only sit for short periods before she has pain in her back and hip. She still has difficulty with swelling in her ankle when she sits.
- Her day is a series of calculated steps and movements.

- Her husband does the house cleaning. She can dust but she can't manage the motion of mopping.
- She can't kneel because she lacks the strength to get back up. She is unable to extend her right foot behind her, or use it to support standing from a kneeling position.
- She no longer showers because she can't stand that long. Her husband assists her in and out of the tub.

– **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 December 31, 2018.<sup>6</sup>

[24] The medical evidence supports what the Appellant says.

[25] On January 18, 2018, the Appellant's specialist, physiatrist Dr. Harvey, said the Appellant had developed:

- CRPS in her right leg
- Significant contracture of right ham strings and right hip – that she was holding her hip at about 30 degrees flexion.

[26] Dr. Harvey went on to say “even if she gets excellent fracture healing now, if we do not overcome the stiffness in her ankle, knee and hip, she is going to be left with a severe disability”.<sup>7</sup>

[27] In August 2019, Dr. Harvey said the Appellant had reached maximum medical recovery.<sup>8</sup> He said she had residual stiffness in her right elbow with limitations in her ability to do repetitive tasks using her right arm. She had residual swelling and stiffness

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<sup>6</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>7</sup> See GD2-89

<sup>8</sup> See Medical Report GD2-137

and ankle pain. This resulted in reduced walking ability and increased swelling if she was sitting or standing for more than a few minutes.<sup>9</sup>

[28] In September 2019, Dr. Lin, a physiatrist who specializes in orthotics, saw the Appellant to assess the Appellant's gait. Dr. Lin said the Appellant had quite the "abnormality and imbalance" in her gait, and it was causing a chain reaction with pain in the hip girdle and the right knee especially.<sup>10</sup>

[29] This is supported by Certified Orthotist Matthew Snyder who said in November 2019 that the Appellant's plantarflexion contracture of the right ankle was causing debilitating pain and hypersensitivity when the Appellant walked on her right foot.<sup>11</sup>

[30] The Minister says the medical evidence supports that the Appellant was expected to heal and return to work. For example in May 2018 Dr. Harvey says that with continued recovery there is no medical basis that would preclude the Appellant from being able to resume some type of work activity.

[31] Indeed the medical record does include very positive comments from the Appellant's physicians about her recovery. However those same comments also note that her progress is complicated, and not without ongoing functional limitations or complications regarding treatment. For example:

- On June 13, 2017, Dr. Harvey said there was dramatic improvement in the Appellant's right arm. Pain was down. ROM was improved. However he noted that there were still issues with her elbow.<sup>12</sup>
- On August 1, 2019, Dr. Harvey wondered whether there was a shoe that would make the Appellant's gait smoother and questioned whether a release of the Achilles tendon would allow for more ankle flexion to improve the Appellant's gait. He also asked specialists whether further surgery would be

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<sup>9</sup> See GD2-137

<sup>10</sup> See GD2-116

<sup>11</sup> See GD5-168

<sup>12</sup> See GD2-76

advisable given her history of developing CRPS following the last two surgeries.<sup>13</sup>

- In January 2020, after the Appellant had been fitted with shoe lifts built into orthopaedic shoes, Dr. Lin said that the Appellant's gait had dramatically improved, and that her plantarflexion contracture had improved. But she said it was still significant. And that the Appellant still had global pain in the right foot and ankle.<sup>14</sup>
- In January 2020, Dr. Harvey said the Appellant had regained full range of motion (ROM) of her knee, but was left with a heel cord contracture with the inability to fully flex the right ankle. He said that this was in spite of multiple therapeutic interventions, exercises and medications.<sup>15</sup>

[32] I agree with the Appellant that one can have significant improvement of a debilitating injury, yet still remain incapable of engaging in substantially gainful work. That is the case for this Appellant.

[33] The medical evidence supports that the Appellant's mobility limitations, her inability to sit for long or engage in repetitive movements with her dominant hand and arm prevented her from doing her usual work in the fast food restaurant.

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

– **The Appellant has followed medical advice**

[35] To receive a disability pension, an appellant must follow medical advice.<sup>16</sup> 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.<sup>17</sup>

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<sup>13</sup> See GD2-114

<sup>14</sup> See GD2-124

<sup>15</sup> See GD2-125

<sup>16</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>17</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.



[36] The Appellant has followed medical advice.<sup>18</sup> She had surgery for her dislocated elbow and fractured tibia. She saw specialists for over four years. She has had physiotherapy, acupuncture, medication, cortisone injections, nerve blocks, splints, and uses assistive devices.

[37] The Appellant decided not to proceed with surgery to release the Achilles tendon in her right foot. Her decision was supported by Dr. Lin.<sup>19</sup> I am satisfied that this decision was reasonable. There was concern that she was at risk for further CRPS. The record shows that CRPS is a debilitating and difficult condition to treat. There was also no guarantee that the surgery would be successful.

[38] 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.<sup>20</sup>

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

[39] 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, and past work and life experience.

[40] 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.<sup>21</sup>

[41] I disagree with the Minister's argument that the Appellant has work capacity. While it is possible for some people to have work capacity when they do not fully recover, that is not the case for the Appellant. The Appellant's treatment didn't improve her conditions enough to restore work capacity for appropriate work.

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<sup>18</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>19</sup> See GD2-124

<sup>20</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>21</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[42] I find that the Appellant can't work in the real world. I base this on the following factors:

- The Appellant was 58 at December 31, 2018. Her age would restrict her employment prospects.
- Her work experience is in the food service industry doing work that is largely physical and fast-paced. She has limited transferable skills outside of this trade.
- Her education will limit her ability to train. She left high school in grade 10 and other than required food and beverage server's certificates has had no further education.
- The Appellant has difficulty gripping a pen. She has no experience working with a computer. She has no keyboarding skills. She doesn't have an email account and has no experience with any other computer applications.

[43] The Appellant's inability to work in the real world is supported by Dr. Harvey. In August 2019, Dr. Harvey said that he recommended the Appellant stop working and said that **any** job would likely aggravate arm pain, leg swelling and leg pain.<sup>22</sup>

[44] The Appellant stopped working in January 2017 when she fell and dislocated her elbow. However the evidence from the Appellant and her physician is that there was almost full resolution of this injury. She has some residual limitations from this first fall, but I find that the onset of the Appellant's disability is related to the injuries and resulting complications that she sustained when she fell in September 2017.

[45] Therefore I find that the Appellant's disability was severe as of September 2017.

### **The Appellant's disability was prolonged**

[46] The Appellant's disability was prolonged.

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<sup>22</sup> See GD2-140

[47] The Appellant's disabilities began in September 2017, when she fell and fractured her tibia and injured her leg and ankle. Her disability has continued since then, and will more than likely continue indefinitely.<sup>23</sup>

[48] Five years have passed since the Appellant's injuries. I give significant weight to the opinion of Dr. Harvey who treated her fractures and the complications of CRPS.

- In August 2019, Dr. Harvey said that the Appellant had completed all of her treatments and had reached maximum rehabilitation. And the prognosis for her condition was that it would remain the same.<sup>24</sup>
- There is no further planned treatment.

[49] I find that the Appellant's disability was prolonged as of September 2017.

### **When payments start**

[50] The Appellant had a severe and prolonged disability in September 2017.

[51] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.<sup>25</sup> After that, there is a 4-month waiting period before payments start.<sup>26</sup>

[52] The Minister received the Appellant's application in August 2019. That means she is considered to have become disabled in May 2018.

[53] Payments of her pension start as of September 2018.

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<sup>23</sup> In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

<sup>24</sup> See GD2-113

<sup>25</sup> Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

<sup>26</sup> Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.

## **Conclusion**

[54] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged.

[55] This means the appeal is allowed.

Sharon Buchanan  
Member, General Division – Income Security Section