Citation: *CW v Minister of Employment and Social Development*, 2022 SST 846

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	C. W.
Representative:	Ashwin Ramakrishnan
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 18, 2020 (issued by Service Canada)
Tribunal member:	Anne S. Clark
Type of hearing:	Teleconference
Hearing date:	July 14, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	August 14, 2022
File number:	GP-21-418

Decision

[1] The appeal is dismissed.

[2] The Appellant, C. W., 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 56 years old. She worked for the X Hospital in Nova Scotia in 1991. Around that time several hundred employees became ill from exposure to certain fumes. The Appellant said she was also exposed and has been ill and unable to return to work since September 1991. The Appellant testified that she was not eligible for the same wage replacement and medical benefits other workers received. She said her employer agreed to keep employees like her on salary. She says that is why she continues to have an income even though she cannot work.

[4] The Appellant first applied for a CPP disability pension on April 2, 2002. The Minister of Employment and Social Development (Minister) refused her application.[1] The Appellant appealed the Minister's decision to the Office of the Commissioner of Review Tribunals (OCRT). The OCRT denied her application on March 26, 2003. She did not appeal that decision.[2]

[5] The Appellant applied for a CPP disability pension on December 20, 2019.[3] The Minister refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division (Tribunal). That is the decision under appeal.

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[1] The Minister was the called the Minister of Human Resources Development Canada in 2002.
[2] The OCRT's decision sets out the facts of the Appellant's application and the evidence from that time. It begins at page GD2-118.
[3] The application begins at page GD2-18.

[6] The Minister says the Appellant did not establish that she had a disability between March 27, 2003, and July 14, 2022. The Minister says the Appellant cannot rely on evidence the OCRT considered in the decision in 2003. The Minister also says the evidence after 2003 does not prove the Appellant has a severe and prolonged disability.

What the Appellant must prove

[7] The Appellant and Minister agreed that, for the Appellant to succeed, she must prove she became disabled after March 26, 2003, and by the hearing date.[4] For reasons I will set out in the decision I agree with the parties' submissions on this point.

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

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

[10] 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.

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

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[4] 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. The Appellant's MQP will end in the future. This means the end date, for the purpose of this appeal is the hearing date, July 14, 2022. The Appellant's appeal is also affected by the OCRT decision. That decision was dated March 26, 2003. It found the evidence did not prove the Appellant had a disability within the meaning of the CPP. The Decision begins at page GD2-118. The parties agree the Appellant must prove she became disabled between March 27, 2003 and July 14, 2022.
[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.

[12] 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.

[13] 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.

Matters I have to consider first

– The OCRT decision of March 26, 2003 is final and binding

[14] The Tribunal cannot decide a case that was already decided. This rule is called *res judicata*. It applies when the parties to the appeal are the same; the issues are the same; and, the earlier decision was final. When the rule applies, a tribunal cannot make another decision on the same issues. [7] There is an exception to the rule but it does not apply in this appeal.

[15] Even though the current appeal meets the three requirements for *res judicata* to apply, I can still decide to proceed with the appeal and not apply *res judicata.* The law allows me some discretion but I cannot use that discretion randomly. In other words, I cannot refuse to apply the rules for just any reason. My objective must be to ensure the application of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice.[8]

– The Appellant cannot rely only on evidence the OCRT considered in 2003

[16] As I noted earlier the Minister and the Appellant agree the Appellant needs to show her disability became severe and prolonged between March 27, 2003, and July 14, 2022. This means I cannot consider **only** the evidence the OCRT considered to make a different decision. The Appellant must show evidence to prove her condition **became** severe and prolonged **after** the OCRT decision, March 26, 2003.

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[7] See *Danyluk v. Ainsworth Technologies Inc.,* [2001] SCC 44.
[8] See *Danyluk, supra* at paragraph 67.

– **The exception to *res judicata* does not apply**

[17] The Appellant was represented by counsel in this appeal. She did not say she felt the rules of *res judicata* would cause an injustice. I reviewed the previous decision and evidence. The file does not disclose any potential injustice if I apply *res judicata*. I am satisfied the parties are correct and the Appellant must prove her disability became severe and prolonged between March 27, 2003, and July 14, 2022.

Reasons for my decision

[18] I find that the Appellant hasn't proven her disability became severe and prolonged between March 27, 2003, and July 14, 2022.

Is the Appellant's disability severe?

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

– **The Appellant did not prove functional limitations affect her ability to work**

[20] The Appellant has:

- Environmentally induced dysfunction
- Chronic fatigue
- Myalgia
- Folliculitis
- Recurrent Pharyngitis.

[21] However, I can't focus on the Appellant's diagnoses.[9] Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.[10] 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.[11]

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

[22] I find that the Appellant did not prove she has functional limitations that affect her ability to work.

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

[23] The Appellant says that she has medical conditions that resulted in functional limitations that affect her ability to work. She says she requires more than 10 hours of sleep a day. She has night sweats and hyperventilates. She says she cannot read, spell, comprehend or work on computers. Any exposure to fumes makes her sick. It causes a rapid decline in her disability.

[24] The Appellant has chronic fatigue and that means she cannot work full-time. She believes that makes her unemployable. She said she often has vertigo. It made her fall off a ladder once and she cannot go on a boat. She has had several appointments to try to obtain a diagnosis. Unfortunately she has no medical evidence about this condition.

[25] The Appellant said she does not receive any treatment for her conditions. The only thing she can do is “police” her health herself and avoid known irritants. She believes the fact that there is no effective treatment for her proves that her health condition is severe. She cannot access any treatment that would help her symptoms. She tried to get a referral to the ICCS.[12] She said she was told she will not be put on the intake list for assessment and treatment.

[26] The Appellant plans to consult a specialist for neurocognitive testing. She believes it will cost thousands of dollars. She hopes it will provide evidence about her condition and possible treatment. The Appellant said she is more concerned with her health than with finding work. She tried to work a couple of times but became sick because of poor air quality.[13]

[27] The Appellant said she attended school since she stopped working. She completed certificates in accounting and French. She completed the certificate in

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[12] The Appellant said this is the former Environmental Clinic that assessed and treated many X employees.
[13] The Appellant said she worked for the Canada Revenue Agency from October 2014 to March 2015. She also worked for Elections Canada in October 2019.

accounting in 2013. She said that does not show she can work because it was distance learning and she could pace herself and do most of the school work at home. It took more than one attempt to complete some of the school work. She said that is because she can't read, spell, comprehend, or work on a computer. She applied for jobs but was unsuccessful. She believes that was because she can only work part time.

[28] The Appellant submitted she is unlikely to be able to work in any consistent way. She has been disabled since 1991 and she should not be asked to return to work.

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

[29] I do not question that the Appellant believes she is disabled from an exposure to toxic fumes in 1991. She believes she has been disabled since that time and there is no "treatment" that can help her.

[30] The Appellant must provide some medical evidence that supports her position that her functional limitations affected her ability to work between March 27, 2003, and July 14, 2022.[14]

[31] The medical evidence doesn't support what the Appellant says. I agree with the parties that I cannot revisit the OCRT's decision dated March 27, 2003. That means I cannot consider **only** the evidence from before March 27, 2003, to decide whether the Appellant had a disability after March 27, 2003. The OCRT already decided that evidence did not prove she had a severe and prolonged disability.

[32] The Appellant's family physician has treated the Appellant since 1992.[15] He said she became ill in 1992 and has been unable to be gainfully employed since then. He said she had no positive response to treatment and her condition is chronic. Dr. Matheson completed a questionnaire for the Appellant's representative and said he believes her disabling symptoms have been present since the onset of her condition.[16]

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[14] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[15] Dr. Matheson said this in November 2021. His letter is at GD6. He also confirmed this information in his report dated September 25, 2009 beginning at page GD105.
[16] The questionnaire begins at page GD7-54.

[33] The file contains copies of Dr. Matheson's handwritten chart notes. Unfortunately they are mostly illegible. There is very little readable information in the notes. I asked the Representative if he felt there was important information in the notes. If so, I asked him if he thought he could obtain readable copies. We discussed the fact that I can only consider what I can read. The Representative agreed the notes were mostly illegible. He said the Appellant cannot obtain other evidence to decipher the notes. He also acknowledged that I cannot consider illegible or unreadable notes.

[34] After March 27, 2003 the evidence consists of Dr. Matheson's letters to confirm his opinion that the Appellant was disabled in 1991.There are also notes from a gynecologist about her symptoms of menopause. There are notes including reports from a plastic surgeon about a finger injury. There are reports of X-rays of her finger and neck. There is a letter regarding a lesion on her back from exposure to sun. There is confirmation that the Appellant contacted Mental Health and Addictions to request information to support her CPP appeal.[17]

[35] The information in Dr. Matheson's letters and questionnaire is essentially the same as the evidence that was before the OCRT in 2003. His opinion has not changed. As I noted earlier, I cannot revisit the OCRT's decision about whether the Appellant was disabled by March 27, 2003. Information other than Dr. Matheson's letters does not address whether the Appellant has functional abilities caused by health conditions. The evidence does not support the Appellant's position.

[36] The medical evidence doesn't show that the Appellant has functional limitations that affected her ability to work after March 27, 2003. As a result, she hasn't proven she has a severe disability.

[37] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics.

[38] This allows me to realistically assess an appellant's ability to work.[18]

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[17] These letters and test results are in Dr. Matheson's medical chart submitted in folder GD6.
[18] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[39] I don't have to do that here because the Appellant did not prove functional limitations affected her ability to work after March 26, 2003. This means she hasn't proven her disability was severe.[19]

[40] The Appellant said she is still pursuing a diagnosis of her condition and possible treatment. Nothing in this decision is intended to address the impact future evidence may have on the Appellant's entitlement to benefits.

Conclusion

[41] 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.

[42] This means the appeal is dismissed.

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

[19] See *Giannaros v Minister of Social Development*, 2005 FCA 187.