



Citation: *WW v Minister of Employment and Social Development*, 2022 SST 836

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

## Decision

**Appellant:** W. W.  
**Representative:** S. W.

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated September 9, 2020  
(issued by Service Canada)

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**Tribunal member:** James Beaton

**Type of hearing:** Videoconference  
**Hearing date:** August 4, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** August 10, 2022  
**File number:** GP-21-814

## Decision

[1] The appeal is allowed.

[2] The Appellant, W. W., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2017. This decision explains why I am allowing the appeal.

## Overview

[3] The Appellant is 63 years old. His last job was operating heavy machinery for a construction company. In November 2015, he broke a bone in his right foot.<sup>1</sup> He was put in a cast that went up to his knee. The cast pinched the nerve below his knee, which caused nerve damage in his leg. His broken bone healed,<sup>2</sup> but his nerve damage didn't. He went back to work for a few months, but had to stop in October 2016. He hasn't gone back to work since then.

[4] The Appellant applied for a CPP disability pension on November 2, 2018. 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 he hasn't been able to work at all since October 2016. He says the nerve damage impacted his ability to walk, and it has only gotten worse since then. He says he can't do a sedentary job because sitting is also painful, and he is dyslexic. He only attended school up to Grade 7, and he never learned to read or write.

[6] The Minister says the Appellant can do at least part-time work. His pain is being managed and his condition is stable. He has transferable skills and there is no evidence that he is illiterate.

[7] I agree with the Appellant.

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<sup>1</sup> See GD2-31 and 32.

<sup>2</sup> See GD2-23, 26, and 27.

## What the Appellant must prove

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

[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.<sup>4</sup>

[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, language abilities, 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.<sup>5</sup>

[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 he has a severe and prolonged disability. He must prove this on a balance of probabilities. This means he must show that it is more likely than not he is disabled.

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<sup>3</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 at GD6-15.

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

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

## Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of October 2016. I reached this decision by considering the following issues:

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

### Was the Appellant's disability severe?

[16] The Appellant's disability was severe by December 31, 2018. I reached this finding by considering several factors. I explain these factors below.

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

[17] The Appellant has:

- nerve damage in his right leg
- back pain and arthritis
- headaches

[18] However, I can't focus on the Appellant's diagnoses.<sup>6</sup> Instead, I must focus on whether he has functional limitations that got in the way of him earning a living by December 31, 2018.<sup>7</sup> 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 his ability to work.<sup>8</sup>

[19] I find that the Appellant had functional limitations by December 31, 2018.

#### – What the Appellant says about his functional limitations

[20] The Appellant says his medical conditions resulted in functional limitations that affected his ability to work by December 31, 2018.<sup>9</sup>

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<sup>6</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>7</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>8</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>9</sup> See GD2-59, 60, 65 to 82, 223, and the hearing recording.

[21] Because of nerve damage in his right leg, he says:

- He can't sit for more than 20 minutes.
- He can't stand in one spot. He uses a handle for support when he showers, or he takes a bath instead.
- His right foot and leg are weak. He wears an orthosis (a type of brace) to support his ankle.
- He can't walk very long. He tries to walk for 15 minutes every day, but he goes very slowly. He sits down to pull weeds in the garden. He doesn't do housework. He drives his wife to the store, but he usually stays in the vehicle.
- He has poor balance. He stumbles and falls often.
- He has had to give up hobbies like fishing and swimming.

[22] He says he injured his back in the 1980s and developed arthritis. He says the nerve damage impacted his gait (how he walks). This has made his back pain worse. He only gets two to three hours of sleep each night due to pain. So he is tired during the day, and usually naps around dinner time. He has trouble lifting and bending.

[23] He says he has had frequent headaches since he was seven years old. As with his back pain, the nerve damage has made them worse.

[24] The Appellant has other medical conditions, but they don't impact his ability to work. He has a bunion on his right foot, but it doesn't bother him. He injured his left rotator cuff (shoulder) in September 2019, but it doesn't bother him anymore. He has anemia, which is treated with B12 injections.

[25] Finally, the Appellant says he has trouble remembering things and finding the right words to say in a conversation. However, he doesn't attribute these issues to a medical condition. He thinks they could be related to age.

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

[26] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2018.<sup>10</sup>

[27] The medical evidence supports **most** of what the Appellant says.

[28] The medical evidence supports that he has nerve damage in his right leg. This causes numbness and impacts his balance and gait.<sup>11</sup> I accept that he also has trouble standing in one spot, for the same reason. However, there is no medical evidence that he had trouble sitting. Dr. Kosarnia (a family doctor) reported in February 2019 that the Appellant’s nerve damage only impacted his ability to walk.<sup>12</sup> This suggests that sitting wasn’t a problem for him by December 31, 2018.

[29] Dr. Adebayo (another family doctor) reported that the Appellant injured his back in the 1980s and developed arthritis after that.<sup>13</sup> The nerve damage made the pain worse.<sup>14</sup> He was admitted to an integrated health centre (similar to a hospital) in October 2018 because of back pain.<sup>15</sup> The pain is constant, but it is especially bad at night.<sup>16</sup> This supports that the Appellant has trouble sleeping due to pain. I accept that the pain would also impact the Appellant’s ability to lift and bend.

[30] The medical evidence supports that the Appellant has had headaches since at least 2012.<sup>17</sup> More recently, in July 2018, he was admitted to an integrated health centre for a severe migraine.<sup>18</sup>

[31] These functional limitations prevented the Appellant from doing his usual job by December 31, 2018. He could not walk for very long. Although he worked for a few

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

<sup>11</sup> See Dr. Martins’ notes from March 2018 (GD2-26 and 27); the cast clinic report from September 2018 (GD2-20 and 21); and Dr. Nguigno’s medical report from November 2018 (GD2-260 to 268).

<sup>12</sup> See GD2-157 and 158.

<sup>13</sup> See GD2-146.

<sup>14</sup> See GD2-260 to 268.

<sup>15</sup> See GD2-13.

<sup>16</sup> See GD2-148.

<sup>17</sup> See GD2-46.

<sup>18</sup> See GD2-12.

months after his cast was removed, he testified that he did as little walking as possible. Eventually, he could not work on construction sites anymore because his poor balance made it dangerous.<sup>19</sup>

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

– **The Appellant has followed medical advice**

[33] To receive a disability pension, an appellant must follow medical advice.<sup>20</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>21</sup>

[34] The Appellant has followed medical advice.<sup>22</sup> He wears an orthosis for his ankle. Sometimes he uses a cane.<sup>23</sup> He went to 10 sessions of physiotherapy for his leg. But he was discharged from physiotherapy because he wasn't improving.<sup>24</sup> He takes medication and uses a TENS machine daily to help manage his pain and numbness.<sup>25</sup>

[35] The Minister doesn't dispute that the Appellant has followed medical advice. Rather, the Minister says the fact that the Appellant is receiving treatment to manage his pain means his disability isn't severe.<sup>26</sup> I disagree. The Appellant testified that his pain is still severe despite taking medication. He still can't sleep due to pain.

[36] 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.<sup>27</sup>

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<sup>19</sup> The Appellant said this at the hearing.

<sup>20</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>21</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>22</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>23</sup> See GD2-137.

<sup>24</sup> See GD2-18.

<sup>25</sup> See the hearing recording. The Appellant is currently taking baclofen, gabapentin, and naproxen. He also takes "stomach pills" to help with the side effects from his other medications.

<sup>26</sup> The Minister's submissions are at GD6.

<sup>27</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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

[37] 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

[38] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say he can work.<sup>28</sup>

[39] I find that the Appellant can't work in the real world. He can't do work that involves much standing or walking, especially where falling would be dangerous. That is why he could no longer work at a construction site, even part-time. His fatigue and trouble with lifting and bending further limit his ability to do any physical work. He worked with headaches before, so I find that they didn't influence his ability to work.

[40] The Appellant has no experience doing sedentary work. He did seasonal work operating construction equipment from 2011 to 2016. Before that, he was self-employed. He did some farming and carpentry work.<sup>29</sup> All of this work was physical.

[41] The Appellant's age and education negatively impact his ability to retrain for sedentary work. He was already 59 years old as of December 31, 2018. He only attended school up to Grade 7. He has never owned a computer.<sup>30</sup>

[42] Furthermore, the Appellant can't read or write. The Minister says there is no evidence of this. I disagree. The Appellant testified that he was illiterate. He had help filling out his application for a disability pension. He told a Service Canada employee

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<sup>28</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>29</sup> See GD2-76 and the hearing recording.

<sup>30</sup> See GD2-77 and the hearing recording.



that he was dyslexic.<sup>31</sup> There is no contradictory evidence. I have no reason to disbelieve the Appellant's evidence.

[43] I acknowledge that Dr. Kosarnia thought the Appellant could still work in February 2019, as long as he didn't have to walk or carry anything.<sup>32</sup> However, the Appellant's age, language abilities, education, and experience mean these limitations are significant. In giving his opinion, Dr. Kosarnia would not have considered these factors and whether the Appellant was able to work **in the real world**.

[44] I find that the Appellant's disability was severe as of October 2016. That is when he could no longer do his job at the construction site. For the above reasons, I have found that by then he was unable to regularly do any other work he could earn a living from.

### **Was the Appellant's disability prolonged?**

[45] The Appellant's disability was prolonged by December 31, 2018.

[46] The Appellant's main disabling condition is nerve damage. Nerve damage is at the root of all of his functional limitations. This includes his back pain and lack of sleep.

[47] The Appellant's nerve damage happened sometime between November 2015 (when he broke his foot) and October 2016 (when he stopped working). It has continued since then, and it will more than likely continue indefinitely.<sup>33</sup> A cast clinic report noted in September 2018 that he had probably reached maximum recovery.<sup>34</sup> Dr. Nguigno (the Appellant's family doctor) predicted in November 2018 that his condition would stay the same and that he would not be able to work again.<sup>35</sup> In February 2019, Dr. Kosarnia described the Appellant's limitations as permanent.<sup>36</sup>

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<sup>31</sup> See GD2-223.

<sup>32</sup> See GD2-157 and 158.

<sup>33</sup> 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.

<sup>34</sup> See GD2-20 and 21.

<sup>35</sup> See GD2-260 to 268.

<sup>36</sup> See GD2-157 and 158.

[48] There are no more treatments left for the Appellant to try. In February 2020, Dr. Bernacki (a specialist in physical medicine and rehabilitation) said that nothing else could be done to help the Appellant.<sup>37</sup> His medications provide some relief, but not enough so that he can work.<sup>38</sup>

[49] I find that the Appellant's disability was prolonged as of October 2016, when he stopped working. He has experienced periods of improvement since then, but they were always temporary. For example, in September 2018, his gait was better and he didn't have "foot drop" anymore.<sup>39</sup> Later, in February 2019, he was limping and he had "foot drop" again.<sup>40</sup> In July and August 2019, his gait and balance improved.<sup>41</sup> But by November 2019, he was falling two to three times a week.<sup>42</sup> Initially, physiotherapy seemed to help with walking.<sup>43</sup> Unfortunately, this didn't last.<sup>44</sup>

[50] The Minister says the Appellant's condition is stable, so he isn't disabled. I disagree. The Appellant testified that his condition is getting worse. Even if his condition had not gotten any worse since October 2016, it would not change the fact that he was already disabled by then.

## When payments start

[51] The Appellant had a severe and prolonged disability in October 2016. (This is called the **date of disability onset**.)

[52] 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>45</sup> After that, there is a four-month waiting period before payments start.<sup>46</sup>

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<sup>37</sup> See GD2-15 and 16.

<sup>38</sup> See GD2-7 and the hearing recording.

<sup>39</sup> See GD2-20 and 21. "Foot drop" is a condition where a person has trouble lifting the front of their foot.

<sup>40</sup> See GD2-146.

<sup>41</sup> See GD2-231 and 232.

<sup>42</sup> See GD2-139 to 141.

<sup>43</sup> See GD2-8.

<sup>44</sup> See GD2-18.

<sup>45</sup> Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

<sup>46</sup> Section 69 of the *Canada Pension Plan* sets out this rule. This means payments can't start more than 11 months before the application date.

[53] The Minister received the Appellant's application in November 2018. That means he is considered to have become disabled in August 2017. (This is called the **deemed date of disability**.)

[54] Payment of his pension starts four months later, as of December 2017.

– **The Appellant's CPP retirement pension is cancelled**

[55] The Appellant started receiving an early CPP retirement pension in April 2019.<sup>47</sup> To cancel his retirement pension and receive a CPP disability pension instead:

- his date of disability onset must be before April 2019
- his deemed date of disability must be before April 2019<sup>48</sup>

[56] The Appellant meets these requirements. His date of disability onset is October 2016, and his deemed date of disability is August 2017.

[57] This means the Appellant will receive a disability pension **instead of** an early retirement pension.

## **Conclusion**

[58] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged by December 31, 2018.

[59] This means the appeal is allowed.

James Beaton  
Member, General Division – Income Security Section

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<sup>47</sup> See GD6-8.

<sup>48</sup> See section 66.1 of the *Canada Pension Plan* and section 46.2(2) of the *Canada Pension Plan Regulations*.