



Citation: *CY v Minister of Employment and Social Development*, 2022 SST 840

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

Decision

Appellant: C. Y.
Representative: Z. Z.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated December 3, 2021 (issued
by Service Canada)

Tribunal member: Virginia Saunders

Type of hearing: Teleconference

Hearing date: July 27, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: August 15, 2022

File number: GP-22-253

Decision

[1] The appeal is allowed.

[2] The Minister of Employment and Social Development (Minister) did not prove that the Appellant, C. Y., stopped being disabled. This means the Appellant is eligible to continue receiving a Canada Pension Plan (CPP) disability pension.

[3] This decision explains why I am allowing the appeal.

Overview

[4] The Appellant used to have a seasonal job in a chocolate factory. She normally worked from July to January. She was off work when she was diagnosed with breast cancer in June 2011. She started chemotherapy almost immediately. She was also scheduled to have surgery and radiation therapy. Because of her treatment, she didn't return to work when she had expected to in the summer of 2011.

[5] The Appellant started receiving a CPP disability pension as of October 2011. The Minister granted the pension because the Appellant's treatment would take a long time and she would then need time to recover. She likely would not be able to return to work for more than a year.¹

[6] The Appellant had completed surgery, chemotherapy, and radiation treatments by February 2012. She started tamoxifen therapy, which was to last for 10 years.

[7] The Appellant never returned to her old job, nor has she done any other work.

[8] In May 2021, the Minister reviewed the Appellant's situation to see if she was still disabled. In August 2021, the Minister decided the Appellant wasn't eligible to continue receiving a disability pension after January 2021. The Minister demanded the Appellant

¹ See GD2-160.

repay the \$5,645.36 she had received for the disability pension from February 2021 to August 2021.²

[9] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[10] The Appellant says she is still disabled because she has a mental illness, and because she is vulnerable to COVID-19. She also says it is unfair for the Minister to decide retroactively that she stopped being disabled, or to expect her to have returned to work when unemployment was so high due to the pandemic. She cannot afford to repay the amount the Minister says she owes.

[11] The Minister says the Appellant's disability was better by the end of December 2020, when there was a measurable improvement in her medical condition. The Minister says the Appellant did not report any significant mental health issues until June 2021, and that there is no medical evidence that she has a severe mental health condition.

What the Minister must prove

[12] A CPP disability pension is no longer payable after the month that a person stops being disabled.³

[13] The Minister has to prove that the Appellant stopped being disabled.⁴ The Minister has to prove this on a balance of probabilities (that it is more likely than not).

Reasons for my decision

[14] I find that the Minister did not prove that the Appellant stopped being disabled.

[15] Here are the reasons for my decision.

² The Minister's first decision about this is at GD2-13-15. The Appellant asked the Minister to reconsider. The Minister's reconsideration decision is at GD2-5-6.

³ See section 70(1) of the *Canada Pension Plan*.

⁴ The Federal Court of Appeal said this in *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

The test for disability under the *Canada Pension Plan*

[16] The *Canada Pension Plan* says a person is disabled if they have a physical or mental disability that is severe and prolonged.⁵

[17] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁶

[18] This means if the Appellant is regularly able to do some kind of work that she could earn a living from, then she isn't entitled to a disability pension.

[19] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁷

[20] 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.

[21] The disability has to be **both** severe and prolonged. This means that the Minister has to prove that the Appellant's condition stopped being severe, or that it stopped being prolonged. The Minister doesn't have to prove both.

I have to base my decision on the law

[22] I recognize that the Minister's retroactive decision has caused worry and financial hardship for the Appellant and her family. I also recognize that in 2021 it would have been very difficult for the Appellant to find a job, because so many workplaces were closed due to the COVID-19 pandemic.

[23] However, I can't base my decision on what I think it would be fair, or what might help the Appellant in difficult circumstances. I can't base my decision on unemployment conditions either.⁸

⁵ See section 42(2)(a) of the *Canada Pension Plan*.

⁶ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁷ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁸ See *Minister of Human Resources Development v Rice*, 2002 FCA 47, and *Minister of Human Resources Development v Angheloni*, 2003 FCA 140.

[24] I have to do what the law says. If the Minister proves that the Appellant stopped being disabled, I have to find that she is no longer eligible to receive a CPP disability pension.

The Appellant's mental health was not severe at December 2020

[25] I agree with the Minister about the Appellant's mental health issues. There is no evidence they were severe at the end of December 2020, or at any time.

[26] The Appellant and her husband told me the Appellant has been depressed, "not lively," quick to anger, and has lacked confidence since she was first diagnosed with cancer. She doesn't sleep well, and can't focus during the day.

[27] I accept that this is what the Appellant remembers. But the medical evidence doesn't support what she says.

[28] There is no medical evidence to show there were any mental health concerns until July 2021, when the Appellant told her family doctor, Dr. Li, that she was depressed. She reported recent insomnia (sleeping problems) and anhedonia (being unable to enjoy life or feel pleasure).⁹ The Appellant saw or spoke with Dr. Li several times in 2020 and in early 2021, but she didn't mention these problems.¹⁰

[29] In addition, in December 2020 the Appellant's oncologist, Dr. Xing, noted that the Appellant denied any new health issues.¹¹ Dr. Xing's previous reports did not mention any mental health issues either.¹²

[30] The Appellant told me that Dr. Li and Dr. Xing didn't listen to her concerns. But she also told me she was preoccupied with her mother's health. It wasn't until she started having postmenopausal bleeding that she realized she had to start looking after herself. She didn't report this bleeding to Dr. Li until March 2021.¹³

⁹ See GD2-95.

¹⁰ See GD2-92-95.

¹¹ See GD2-115.

¹² See GD2-139, 145.

¹³ See GD2-94.

[31] I find it is likely that, if the Appellant's mental health was bad enough to keep her from working, she would have reported it to Dr. Li or Dr. Xing sooner than she did.

The Appellant's disability is still severe

[32] Because she has had cancer, the Appellant's disability continues to be severe.

[33] I agree with the Minister that the Appellant's breast cancer improved by December 2020. That was when Dr. Xing reported there was no evidence of breast cancer recurrence. The Appellant had been "doing quite well over the past year." She had finished active treatment at the B.C. Cancer Agency, and she no longer needed follow-up there. She was to have an annual breast exam and mammogram, and was to continue on tamoxifen until February 2022.¹⁴

[34] Despite this improvement, the Minister hasn't proven that the Appellant has been able to work in the real world since December 2020.

[35] I have to take a realistic or "real world" approach when I decide if a disability is severe. I have to look at the Appellant's background **and** her medical condition to see what effect they have on her ability to work. Her background includes things like her age, level of education, language abilities, and past work and life experience.¹⁵

[36] Because of the COVID-19 pandemic, the real world has changed. I take official notice of the following facts, because they are so generally accepted that reasonable people would not debate them.¹⁶

- Since early 2020, workplaces have had to manage the risk of spreading the COVID-19 virus. Many aren't as safe as they used to be.

¹⁴ See GD2-115-116.

¹⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

¹⁶ See *British Columbia (Minister of Water, Land and Air Protection) v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 1429 at paragraph 26.

- Workplaces are particularly unsafe for many people with chronic or other diseases, including some cancer survivors, because they are at higher risk of severe illness if they get COVID-19.

[37] The Appellant is one of those people. I accept her evidence that Dr. Li told her she should stay home to protect herself. She has done so, except when she has to go to medical appointments. I accept her evidence that she is fully vaccinated against COVID-19 with two initial doses and two boosters. I also accept her evidence that she received her vaccinations before other people her age because she has had breast cancer.

[38] I note that the Appellant received her first two vaccine doses **after** she was cancer-free, and she received her boosters **after** she had stopped all treatment. The fact that she was still given priority tells me that she remains at higher risk of severe illness if she gets COVID-19.

[39] Expecting the Appellant to go to a workplace where she might catch a severe illness is the same as expecting a person with serious back problems to work in heavy construction. They are unlikely to be **regularly** able to work, because the working conditions put their health at risk. This means their condition is severe.

[40] Someone else with the Appellant's condition might be able to work from home. But she can't. Although she has a university degree, she earned it in China. Since moving to Canada in 2002, she has only worked in food production and (briefly) as an office worker. She has limited English. She managed in her previous jobs because she could speak Mandarin at work. She doesn't have any current computer or clerical skills.

[41] It isn't realistic to expect the Appellant to be able to regularly work in a place where her health is at risk. And, with her personal characteristics, it isn't realistic to expect that she could find work that she could do at home.

[42] This doesn't mean that everyone who is at high risk from COVID-19 is entitled to a disability pension. They have to prove they have a severe and prolonged disability. But in this case, the Minister has the burden of proof.

[43] The Minister has to prove the Appellant's condition stopped being severe or stopped being prolonged. The Appellant raised the issue of her vulnerable status in her notice of appeal and at the hearing.¹⁷ She said she is at high risk from COVID-19 because she has had cancer. The Minister did not make any submissions on that issue.

[44] As a result, the Minister didn't prove the Appellant's condition stopped being severe.

The Appellant's disability is still prolonged

[45] I acknowledge that the Appellant's cancer treatment has ended. However, the Minister didn't file any evidence to show the risk that COVID-19 poses to the Appellant is not prolonged.

[46] As a result, the Minister didn't prove the Appellant's condition stopped being prolonged.

Conclusion

[47] I find that the Appellant is eligible to continue receiving a CPP disability pension.

[48] This means the appeal is allowed.

Virginia Saunders
Member, General Division – Income Security Section

¹⁷ See GD1-4.