



Citation: *LS v Minister of Employment and Social Development*, 2022 SST 1425

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

Decision

Appellant: L. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated February 24, 2021 (issued by Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Teleconference

Hearing date: October 4, 2022

Hearing participant: Appellant

Decision date: October 17, 2022

File number: GP-21-1201

Decision

[1] The appeal is allowed.

[2] The Appellant, L. S., is eligible for a *Canada Pension Plan* (CPP) disability pension. Payments start as of July 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 42 years old. She worked as a financial officer for the federal government. She has also worked in clerical jobs for the RCMP and at a provincial alcohol distributor. In her distant past she worked in retail and food service.

[4] In 2014 the Appellant began experiencing symptoms of chronic fatigue. She was diagnosed with fibromyalgia, chronic fatigue syndrome, vertigo, depression, anxiety and a somatic symptom disorder. She also gets numbness and tingling in her hands and feet.

[5] The Appellant applied for a CPP disability pension on June 23, 2021. 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 her conditions prevent her from returning to her sedentary office job. She tried three graduated return to work programs, and wasn't able to maintain part-time employment. She says she has followed through with every suggested assessment and treatment, without improvement. She argues that her conditions are severe and prolonged.

[7] The Minister says the Appellant has capacity for part-time employment, based on the medical evidence and that she hasn't shown sufficient employment efforts. It argues she hasn't seen a psychiatrist since 2017, which suggests her mental health condition isn't severe. It says her conditions aren't severe and prolonged.

What the Appellant must prove

[8] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by the hearing date.¹

[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.²

[11] 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.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[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 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.

¹ 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 GD2-6. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

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

³ 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 September 2019. 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. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affect her ability to work

[17] The Appellant has:

- Chronic fatigue syndrome
- Fibromyalgia
- Vertigo, tinnitus, and double vision
- Depression
- Anxiety
- Somatic symptom disorder
- Numbness and tingling in her hands and feet

[18] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁵ 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 affected her ability to work.⁶

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

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[20] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She said the following:

- There are days each week she is so tired she can't get out of bed.
- She estimates that she needs to spend over 60% of her day resting or sleeping.
- When she is exhausted her vision is affected. She gets double vision, or feels like she can't open her eyes.
- Her vision problems affect her ability to read, look at a screen, or drive.
- When she is tired she struggles with cognitive tasks including concentration, and memory.
- She can't focus on details or multi-task.
- She isn't able to sit or stand for more than 20 minutes at a time without needing a change. Her best position is laying down.
- Her walking is limited to 20 minutes, and she would need to lay down and recover afterwards.
- She is sensitive to light and sounds because of headaches, vision issues, and tinnitus.
- She is only able to do light tasks at home, by pacing it out and resting after. Some days she can't do anything.
- She has to wear sunglasses most days to limit light exposure.
- She only showers every 3 to 4 days due to fatigue and depression.
- Simple tasks or events overwhelm and upset her.
- It is difficult to write or type because of pain and tingling in her hands.

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

[21] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by October 4, 2022.⁷

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

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

[23] An extensive file of medical evidence was submitted, with records and investigations of the Appellant's symptoms and complaints going back to 2016. I am highlighting several, but not all of these, below.

[24] The Appellant saw Dr. Ghuman, psychiatrist, on November 7, 2017.⁸ He diagnosed major depressive disorder and generalized anxiety disorder with a background of fibromyalgia. He noted a recent attempt to return to work had failed.

[25] Dr. Ghuman said the Appellant was complaining of low energy and mood, fatigue, anxiety, sleep disturbance, joint and neck pain. She was seeking help with her medications.

[26] Dr. Wang, the family doctor, completed a report dated June 7, 2018.⁹ She said the Appellant had constant pain and swelling in her joints and muscles, with exhaustion, and extreme fatigue.

[27] Dr. Wang noted there was also headaches and migraines, vision problems, depression, anxiety, and difficulty with concentration. She said the Appellant's hand pain affected her ability to write, and her vision issues affected her ability to drive.

[28] Dr. George, rheumatologist, provided a report dated July 24, 2018.¹⁰ He said the Appellant had diffuse muscle and joint pain for four years, with constant pain in her hands, feet, and back. He said the Appellant had also been complaining of brain fog and memory issues. He thought she may have inflammatory arthritis.

[29] The Appellant saw Dr. Carleton, neurologist, on November 15, 2019.¹¹ She was seen for coldness and discolouration in her hands and feet. She was also reporting numbness and tingling in these areas as well.

⁸ See GD2-134.

⁹ See GD2-244.

¹⁰ See GD2-250.

¹¹ See GD3-700.

[30] The Appellant participated in a psycho-vocational assessment and functional capacity evaluation on April 6, 2021.¹² Dr. Gouws, psychologist, diagnosed somatic symptom disorder, major depressive disorder that is recurrent and moderate, and a generalized anxiety condition.

[31] Dr. Gouws the Appellant was so impaired by her fibromyalgia, chronic fatigue, and emotional reactivity, that she could not be functional in any job placement. He said her psychological status doesn't allow for adequate performance in any occupation. He noted a complete and total disability from any part-time or full-time employment.

[32] The Appellant was seen by Dr. Bindlish, otolaryngologist, on April 28, 2021.¹³ She was diagnosed with vertigo and bilateral tinnitus.

[33] The Appellant attended a psychiatry assessment on January 27, 2022.¹⁴ Dr. Ghouse diagnosed chronic fatigue syndrome, fibromyalgia, and chronic pain syndrome and said the Appellant has reached her maximal recovery.

[34] Dr. Ghouse said the Appellant has physical limitations for:

- Deep bending
- Turning movements
- Prolonged sitting
- Forward stooped postures
- Heavy lifting and carrying
- Prolonged standing and walking
- Climbing stairs

[35] Dr. Ghouse thought the most the Appellant was capable of, from a physical standpoint, was part-time work with restrictions, accommodations, assistive devices,

¹² See GD8-2.

¹³ See GD9-14.

¹⁴ See GD9-17.

and ergonomics. He said she was limited in her ability to do multi-tasking and to perform in a timely manner.

[36] The Appellant saw Dr. Molot, an environmental medicine specialist, on May 24, 2022.¹⁵ He confirmed a diagnosis of chronic fatigue syndrome, fibromyalgia, depression, anxiety, and irritable bowel syndrome.

[37] Dr. Molot said increasing any physical or energy demands with a return to work, even at a part-time level, wasn't advised and would only exacerbate the Appellant's symptoms and dysfunction.

[38] Dr. Molot said the Appellant is completely and permanently disabled from working at any job.

[39] The medical evidence supports that the Appellant's various physical and psychological conditions prevented her from doing her sedentary work as a financial officer with the federal government.

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

– **The Appellant has followed medical advice**

[41] To receive a disability pension, an appellant must follow medical advice.¹⁶ 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.¹⁷

[42] The Appellant has followed medical advice.¹⁸

[43] The Appellant has seen a significant amount of physicians for assessment of her conditions. This includes immunology, rheumatology, neurology, psychology,

¹⁵ See GD8-61.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

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

¹⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

psychiatry, physiatry, naturopathic, and environmental medicine. In some cases, second and third opinions were sought.

[44] The Appellant has participated in all recommended treatment and there is no suggestion she has failed to follow medical recommendations.

[45] The medical evidence shows that the Appellant has been persistent and consistent in seeking medical attention and following up on recommendations.

[46] The Appellant is currently taking numerous medications, including but not limited to Zoloft, Wellbutrin, Zizan, Ventolin, and Pantoprazole.

[47] The Appellant has tried counselling, physiotherapy, and massage therapy. She reports being limited in her access to treatment because she hasn't had income since 2019.

[48] The Minister argued the Appellant hasn't seen a psychiatrist since November 2017 and her condition can't be considered severe. However she has taken medications for her psychological conditions since that time, and was seen by Dr. Gouws in 2021, with confirmation of the same ongoing conditions.

[49] 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.¹⁹

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

[50] 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

¹⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

- past work and life experience

[51] 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.²⁰

[52] I find that the Appellant can't work in the real world because of her medical conditions.

[53] The Appellant is 42 years old, with a college education and excellent communication skills. She has worked in sedentary office jobs for many years. These factors don't affect her ability to work in the real world.

[54] The Appellant's medical conditions and functional limitations are the reason she can't work in the real world.

[55] The Appellant has numerous documented physical and psychological conditions that have prevented her from returning to work, even at a part-time capacity, at her sedentary job.

[56] The Appellant's employer worked to accommodate her work station, duties, and hours, in an effort to help her work in some capacity at her sedentary job. Three graduated return to work attempts were unsuccessful.

[57] Dr. Ghouse thought the Appellant may be able to return to work part-time, from a physical perspective.²¹ He suggested a need for restrictions, accommodations, assistive devices, and ergonomics. He noted that even with these in place, the Appellant wouldn't be able to multi-task or perform in a timely manner.

[58] Multi-tasking and ability to perform tasks in a timely manner are generally requirements of a real world job.

²⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²¹ See GD9-17.

[59] I don't find that Dr. Ghouse's suggestion is realistic, particularly given the three prior failed attempts to work part-time, with accommodations, that the Appellant had already tried.

[60] The Appellant made efforts to work part-time. These efforts show that her disability got in the way of earning a living.

[61] The Appellant was already working at a sedentary job when her conditions arose.

[62] She attempted two returns to work at a part-time capacity in 2017.²² These attempts failed and by November 2017, she was off work again because of her medical conditions.

[63] The Appellant told me there was a further attempt to return to work in 2019. She said she was unable to work consistently or reliably, even at a part-time capacity.

[64] The Appellant told me when she tried to work she wasn't dependable. She was unable to complete tasks on time, missed details, and was regularly calling in sick. Working increased her pain, and decreased her cognitive abilities.

[65] The Minister argued that the Appellant has a capacity to work part-time, within her limitations. I don't agree with this argument.

[66] The Appellant demonstrated multiple attempts to work at a sedentary part-time job over a two year period from 2017 to 2019. Her attempts failed. There hasn't been an improvement in her various medical conditions since 2019. This means her work capacity also wouldn't have changed since that time.

[67] In addition, both Dr. Gouws and Dr. Molot have both said the Appellant is completely disabled from working part-time.²³

[68] I find that her disability was severe. The Appellant's efforts show that, as of September 2019, she could not regularly do any work she could earn a living from. This

²² See GD2-158.

²³ See GD8-2 and GD8-61.

was the date of her last failed attempt to return to work and the last time she earned a level of income that can be considered substantially gainful.

[69] A job is considered substantially gainful if it pays a wage equal to or more than the maximum annual amount a person could receive for a disability pension.²⁴

[70] The Appellant hasn't earned any income since 2019.²⁵

Was the Appellant's disability prolonged?

[71] The Appellant's disability was prolonged.

[72] The Appellant's chronic fatigue and fibromyalgia conditions began in April 2015. Her depression and anxiety conditions worsened in 2017. These conditions have continued since then, and they will more than likely continue indefinitely.²⁶

[73] Dr. Gouws said the Appellant's psychological conditions were expected to continue without substantial improvement.²⁷

[74] Dr. Molot said the Appellant's prognosis for recovery from her physical conditions was poor, and that she was permanently disabled.²⁸

[75] Dr. Ghouse said the Appellant had reached a maximal recovery in relation to her numerous physical conditions.²⁹

[76] I find that the Appellant's disability was prolonged as of September 2019. This was the date she was no longer able to continue in her attempts to work on modified hours and duties.

²⁴ See section 68.1 of the *Canada Pension Plan Regulations*.

²⁵ See GD2-7.

²⁶ 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.

²⁷ See GD8-2.

²⁸ See GD8-61.

²⁹ See GD9-17.

When payments start

[77] The Appellant had a severe and prolonged disability in September 2019.

[78] 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.³⁰ After that, there is a 4-month waiting period before payments start.³¹

[79] The Minister received the Appellant's application in June 2021. That means she is considered to have become disabled in March 2020.

[80] Payments of her pension start as of July 2020.

Conclusion

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

[82] This means the appeal is allowed.

Sarah Sheaves

Member, General Division – Income Security Section

³⁰ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

³¹ 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.