



Citation: *AR v Minister of Employment and Social Development*, 2022 SST 1421

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. R.
Representative: Chantelle Yang

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 8, 2020 (issued
by Service Canada)

Tribunal member: Brianne Shalland-Bennett

Type of hearing: Teleconference

Hearing date: December 15, 2021

Hearing participants: Appellant
Appellant's representative
Witness for the Appellant

Decision date: February 9, 2022.

File number: GP-20-1549

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. R., 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 44 years old with a grade 12 education. She says that she has always had a hard time with school and described herself as a "B" or "C" student. She has work experience as a nanny and doing assembly line jobs. She worked at her last job from May 2009 to August 2012, doing machine spot welding on automotive parts.

[4] The Appellant started experiencing foot pain in 2010. She says she also had pain in her shoulders, neck, and upper back. She kept working with her symptoms. Sometimes, she asked other workers to help her with tasks that involved pushing or lifting. She didn't talk to her employer about her issues because she saw other workers get treated badly when they reported an injury.

[5] While working, the Appellant tried to manage her pain with physiotherapy, heat and ice, Tylenol, and wrapping her foot in a tensor band. The pain became too much and she stopped working in August 2012. She hasn't gone back to work since then.

[6] The Appellant's first application for a CPP disability pension was made on November 3, 2015.¹ The Appellant's second application for a CPP disability pension was made on March 8, 2017.² Both applications were denied.

[7] The Appellant's recent application for a CPP disability pension was on March 11, 2019.³ The Minister of Employment and Social Development (Minister)

¹ See GD2-549 to 557 and GD2-638 to 645.

² See GD2-353 to 356 and GD2-527 to 533.

³ See GD2-28 to 34.

refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[8] The Appellant says that she has had pain in her foot, shoulders, back, and neck before December 31, 2015. She focused on her foot pain with her doctors for insurance purposes. Because of her overall pain, she has physical, emotional, and cognitive limitations that stopped her from going back to work or retraining.

[9] The Minister says the Appellant's fibromyalgia, chronic fatigue, anxiety, and depression happened after her minimum qualifying period. It accepts that she might have had some limitations with her right foot and pain by December 31, 2015. However, the medical evidence shows that she had the capacity to do other work or retrain by December 31, 2015. It's irrelevant that her conditions got worse after then.⁴

What the Appellant must prove

[10] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2015. This date is based on her contributions to the CPP.⁵

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

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

[13] 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

⁴ See GD3 and GD6.

⁵ 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 GD3-17.

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

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.

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

[15] 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.

[16] 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

[17] I find that the Appellant hasn't proven she had a severe and prolonged disability by December 31, 2015.

Was the Appellant's disability severe?

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

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

[19] The Appellant has the following conditions:

- Peroneal tenosynovitis.
- Plantar fasciitis.
- Achilles enthesopathy.
- Chronic fatigue.
- Fibromyalgia.
- Anxiety.
- Depression.

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

[20] However, I can't focus on the Appellant's diagnoses.⁸ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁹ 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.¹⁰

[21] I find that the Appellant has functional limitations.

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

[22] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. Here is what she says:

- She has constant pain in her right foot that goes up her shin to her knee. She describes the pain as an 8 to 9 out of 10.
- She has pain in her back, neck, and shoulders. This pain is constant. She describes the pain as a 7 out of 10.
- Her pain is worse now than it was in December 2015.
- She can't walk or stand for more than 15 minutes.
- She can't sit for more than 30 minutes.
- She spends most of the time lying down.
- She has "good days" two days a week. On those days she can do some light cleaning or help get supper ready.
- She has "bad days" four or more days a week. On those days, she can't do much. This includes showering, washing her hair, or most daily activities.
- She has low energy, low mood, and is easily fatigued.
- Her pain makes her unreliable. She has a hard time keeping plans with her friends or family because she doesn't know what her days will be like.
- Her partner does most of the housework and childcare.
- Her partner or other family members have to drive her around.
- Her anxiety makes it hard for her to go out of the house or be in a car.

⁸ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁰ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- Sometimes, if she is having a bad day and no one else is available, she can't take her kids to school. This happens 10 to 15 times a year.

[23] The Appellant says her pain affects her concentration and memory. The Minister says that the Appellant didn't complain of these issues by December 31, 2015.¹¹

[24] In the Appellant's first questionnaire, which is dated close to her minimum qualifying period, she didn't report any issues with her concentration or memory.¹² She did report issues with her sleeping, driving, sitting, walking, lifting, carrying, and reaching.¹³ In later questionnaires, she reported that her conditions affect her short-term memory, make her feel "foggy," and cause her to be easily distracted.¹⁴

[25] While it might not have been included in the Appellant's first application, I find it reasonable that her pain would have some impact on her concentration and memory. However, even though these limitations were present by December 2015, I find they weren't severe. The evidence supports that they got worse with her chronic fatigue, depression, and fibromyalgia.

[26] The Appellant's partner, M. R., testified at the hearing about the Appellant's conditions. Here is what he says:

- Before - she was very outgoing, athletic, and she maintained her friendships.
- She has pain in her right foot, neck, shoulders, and back.
- She has issues with her concentration and memory.
- By December 2015 and onward, she had physical limitations. For example, she could not stand for a long time and had a hard time going up the stairs.
- When they spoke to doctors, they focused on her leg and foot issues for insurance reasons. However, her pain in other parts of her body was still there.
- She uses a heating pack and lies down to try and get some relief.

¹¹ See GD3.

¹² See GD2-638 to 645.

¹³ See GD2-638 to 645.

¹⁴ See GD2-181 to 187 and GD2-329.

- They used to split the housework and childcare. Eventually, he became responsible for 80–90% of the housework and most of the childcare.
- She drives if she has to, which is rare.
- Near the end of 2015, she was depressed and irritable. She hardly did anything and was often tired.

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

[27] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2015.¹⁵

[28] The Minister accepts the Appellant had limitations caused by her right foot pain. However, the medical evidence shows she has some capacity to work or retrain by December 31, 2015. It also argues the medical evidence doesn’t show that the Appellant’s issues with fibromyalgia, chronic fatigue, anxiety, and depression were severe by December 31, 2015.

[29] I agree with the Minister. Here is what I have found:

- By December 31, 2015, the Appellant had limitations that affected her ability to do her regular job. This is because of her right foot conditions and pain.
- Though the Appellant has limitations, the medical evidence supports some capacity for other work or retraining by December 31, 2015.
- The Appellant’s fibromyalgia, chronic fatigue, anxiety, and depression contribute to her pain and make her overall condition worse. The medical evidence shows that these conditions started after December 2015. So, they can’t be considered severe by her minimum qualifying period.

[30] Dr. Paradis is the Appellant’s family doctor. He has been the main doctor treating the Appellant’s symptoms. He also filled out all of the medical reports.

¹⁵ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

[31] The first medical report is dated November 2015. Dr. Paradis listed her conditions as peroneal tenosynovitis, right peroneal strain, and plantar fasciitis with an unsuccessful peroneal tendon repair. She had ongoing ankle pain with limited mobility.¹⁶

[32] The second medical report is dated February 2017. Dr. Paradis added fibromyalgia (as of March 2016) to her existing conditions.¹⁷ She had poor function and pain control, with treatment. She could not walk for a long time. She had body aches and fatigue. Her pain was significant and the fibromyalgia impacted her quality of life.

[33] In the most recent medical report, Dr. Paradis included depression and anxiety to her conditions.¹⁸ Her limitations include chronic pain, diffuse body aches, low energy, low mood, and poor social interaction. He recommended that she stop working in August 2012. Because she had been off work for several years, it was unlikely she would go back to work at that point.

[34] I have also considered Dr. Paradis' evidence outside of the medical reports. They support that the Appellant has had ongoing limitations with her right foot. They affect her ability to do her regular job. Here is what I have considered about Dr. Paradis evidence by December 31, 2015:

- Her foot pain is chronic, even after surgery. It has been ongoing since 2010.¹⁹
- She can't walk any great distance or stand for long.²⁰ She has poor mobility.²¹
- Dr. Paradis said, she didn't think that she could go back to work because of her mobility and pain but she was open to retraining to a sedentary position.²²

At the hearing, the Appellant disagreed with his assessment. She explained that knew how limited she was by her conditions. She didn't think she could work, but, Dr. Paradis stressed that she is young and should be working.

¹⁶ See GD2-581 to 585.

¹⁷ See GD2-384 to 387.

¹⁸ See GD2-47 to 51 and GD2-103 to 111.

¹⁹ See GD2-385, GD2-112, GD2-115, GD2-119 to 123, and GD2-128 to 141.

²⁰ See GD2-129, GD2-132, GD2-195 to 196, GD2-203, GD2-205, GD2-227, GD2-229 and GD2-385.

²¹ See GD2-131 and GD2-581.

²² See GD2-126.

- In April and May 2015, he thought her pain would permanently affect her abilities. He thought she should be retrained in a sedentary career.²³

[35] Dr. Paradis' evidence supports that her other conditions started after her minimum qualifying period. Here is what he says:

- In March 2016, she reported experiencing global body aches.²⁴
- With treatment, her ankle pain was getting worse.²⁵
- In January 2016, he was in agreement for retraining.²⁶
- In April 2016, she felt depressed, tensed, and sad.²⁷
- In April 2016, she was encouraged to persevere in the return-to-work program, but she was struggling with it. She wondered if she would ever be able to go back to a productive life.²⁸
- In October 2017, she fell down the stairs which led to upper-body injuries.²⁹
- In October 2016, she had reactive anxiety.³⁰ In September 2017, her mood seemed okay.³¹ In March 2018, her anxiety was intermittent.³²
- In June 2019, she reported pain from her spine and left chest and was diagnosed with mechanical back pain.³³
- In February 2021, she was still reporting pain over her right foot and constant fatigue. He didn't anticipate any improvement in the foreseeable future.³⁴

[36] Dr. Hundt, an orthopedic surgeon, treated the Appellant for her right foot issues. In December 2013, he reported she has had ankle and foot pain for almost two and a half years. The pain went up her ankle and into her leg. The pain was constant and

²³ See GD2-122, GD2-227, and GD2-229.

²⁴ See GD2-384.

²⁵ See GD2-114.

²⁶ See GD2-120.

²⁷ See GD2-117.

²⁸ See GD2-116.

²⁹ See GD2-54.

³⁰ See GD2-113.

³¹ See GD2-53.

³² See GD2-56.

³³ See GD2-57.

³⁴ See GD4-2.

worse with activity. She had to take breaks after walking for 30 minutes.³⁵ She continued to have pain in July 2016, almost two years after her surgery.³⁶ There was no evidence of a tear or anything else surgery could improve on.

[37] In June 2016, the Appellant did an independent medical examination for her insurance company.³⁷ Dr. Jaroszynski, an orthopedic surgeon, reported the Appellant has had a longstanding history with pain. This pain started in her right foot and was now all over her body. The pain was constant and aggravated with standing, walking, and prolonged sitting. The prognosis for the Appellant going back to her old job was poor. The likelihood of success going back into the workforce was less than 50%.

[38] Dr. MacLeod, an orthopedic surgeon, assessed the Appellant for a second opinion in December 2016.³⁸ He thought she had some chronic irritation in her peroneal tendons as it hadn't improved two years after surgery. Her recent diagnosis of chronic pain syndrome and fibromyalgia contributed to her symptoms. Surgery might give some answers, but it might also make her pain worse.

[39] The Appellant attended a rehabilitation facility. In January 2016, Mr. Barlow, a rehabilitation consultant, said that the Appellant reported constant pain and trouble sleeping because of the pain. She could walk short distances but had a hard time with stairs. She relied on her husband for significant activities and heavy tasks.³⁹ She could do her personal care, light duties in the house, and drive short distances. With physiotherapy, she reported limited progress and ongoing pain.⁴⁰

[40] The medical evidence supports that the Appellant's right foot pain and conditions stopped her from doing her regular job by December 31, 2015.

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

³⁵ See GD2-177.

³⁶ See GD2-147 to 148.

³⁷ See GD2-488 to 499.

³⁸ See GD2-144.

³⁹ See GD2-455 to 457.

⁴⁰ See GD2-482 and GD484-485.

– **The Appellant has followed medical advice**

[42] To receive a disability pension, an Appellant must follow medical advice.⁴¹ If an Appellant doesn't follow medical advice, then she must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on her disability.⁴²

[43] The Appellant has followed medical advice.⁴³

[44] The Appellant has tried different medications to manage her conditions. Their either gave her little to no benefit, caused her stomach pain and nausea, or they became too addictive. These medications include tramadol, cyclobenzaprine, amitriptyline, Cymbalta, and Lyrica. Now, she uses extra-strength Tylenol to help manage her pain. She also uses Lorazepam to help manage her anxiety.

[45] The Appellant has tried non-medicinal treatments. Here are her experiences:

- She did surgery in September 2014 to address her right foot issues, but she didn't see any result.⁴⁴ Her right foot pain was after surgery.
- She tried cortisone injections and shockwave therapy, but they didn't help.⁴⁵
- She went to a pain management program.⁴⁶ She had some benefit.
- She tried physiotherapy. Sometimes it helped and sometimes it made her pain worse.
- Now, she uses a TENS machine, heat, and ice to manage her pain.

[46] 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.⁴⁷

⁴¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

⁴² See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

⁴³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

⁴⁴ See GD2-242 to 243.

⁴⁵ See GD2-126, GD2-134, and GD2-177.

⁴⁶ See GD2-306.

⁴⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

– **The Appellant can work in the real world**

[47] 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
- past work and life experience

[48] 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.⁴⁸

[49] I find that the Appellant can work in the real world.

[50] I find the Appellant's age, language skills, and level of education are positive characteristics that might help the Appellant to retrain to a sedentary career. She is young - 44 years old. She has a grade 12 education and speaks English fluently.

[51] I accept that the Appellant would not be able to do physically demanding jobs as she had done in the past—especially jobs that involved prolonged standing or walking. Her work history consists of physically demanding activities. So, it might be hard for her to find other work based on her skills.

– **The Appellant didn't try to find and keep a suitable job by December 31, 2015.**

[52] If the Appellant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical conditions.⁴⁹ Finding and keeping a job includes retraining or looking for a job that accommodates her functional limitations (in other words, a job with special arrangements).⁵⁰

⁴⁸ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁴⁹ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

⁵⁰ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[53] The Appellant tried to do some retraining **after** December 31, 2015. She did a 20-hour preparation course in April 2016. The goal was to help her improve her computer skills to help her do clerical, customer service, or sit down assembly work.⁵¹

[54] I find the Appellant wasn't successful because of the combination of her symptoms. Here is what I considered:

- Her pain affected her focus, memory, and comprehension. It made it hard for her to participate in the program.
- Volunteering was recommended. She could not manage this activity. She was unreliable in a personal setting. She didn't want to start something she might not be able to commit to because of her pain and fatigue.
- Her pain limited her ability to function at home and beyond.⁵²
- She was only able to manage one hour a day because of her pain.⁵³
- She didn't think that she should be doing the course because of her limitations. Her insurance company didn't agree and made her participate.

[55] Mr. R,'s testimony also supported what the Appellant said about her participation in this program. Because of her pain, she could not concentrate long enough to do some tasks and felt tired. It didn't help that she felt forced by the insurance company to do the program. He had to help her sometimes. Even after the program, he didn't think her skills improved.

[56] During the hearing, the Appellant explained that she doesn't think she would have been a reliable employee because of her foot pain and fatigue. She says her pain stopped her from doing some things in her daily life because she could not stand or walk for too long.

[57] I accept that the Appellant had limitations that stopped her from working at her regular job. However, the medical evidence doesn't show that she wasn't able to work

⁵¹ See GD2-481 and GD2-486

⁵² See GD2-484

⁵³ See GD2-486.

at **any** job after she stopped working in August 2012. It supports that she **tries** to retrain for other work and her condition became severe after December 2015.

[58] I find that the Appellant might not be able to work **after** December 31, 2015. However, there is no evidence to show the Appellant tried to retrain or do other work with her limitations **by** December 31, 2015. Though she tried to retrain in 2016, I can't consider her efforts because they were after the end of her minimum qualifying period.

[59] Therefore, I can't find she had a severe disability by December 31, 2015.

Conclusion

[60] 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.

[61] This means the appeal is dismissed.

Brianne Shalland-Bennett
Member, General Division—Income Security Section