



Citation: *CP v Minister of Employment and Social Development*, 2022 SST 1689

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

## Decision

**Appellant:** C. P.

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated September 25, 2020  
(issued by Service Canada)

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**Tribunal member:** Lianne Byrne

**Type of hearing:** Teleconference

**Hearing date:** August 23, 2022

**Hearing participant:** Appellant

**Decision date:** November 23, 2022

**File number:** GP-20-1793

## Decision

[1] The appeal is allowed.

[2] The Appellant, C. P., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of March 2018. This decision explains why I am allowing the appeal.

## Overview

[3] The Appellant was 49 years old as of December 31, 2018. She worked as a heavy equipment operator until she was injured in a car accident in June 2015. Since then, she has been struggling with chronic pain and mental health problems. She returned to work as an apartment building manager until 2020. Her duties, hours and earnings were minimal.

[4] The Appellant applied for a CPP disability pension on May 30, 2019. 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.

[5] The Appellant says that she is unable to work. She finds it difficult just to get through the day. She did not want to ask for financial assistance from CPP, but is hopeful that her appeal will be successful.

[6] The Minister says that she is not disabled within the meaning of the CPP. While it is acknowledged that she is experiencing ongoing limitations, the objective medical evidence is not indicative of a disabling or life threatening pathology that would impose limitations preventing her from performing any type of work. She maintained the capacity to perform a suitable type of work despite her limitations. The medical consultants recommended treatment options that could improve her symptoms and function. However, she has not consistently attempted any of the recommended treatment options. She experienced a deterioration in her mental health in 2020.

However, this is irrelevant to a determination of disability, as it occurred well past her MQP.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2018. This date is based on her contributions to the CPP.<sup>1</sup>

[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.<sup>2</sup>

[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 that she could earn a living from, 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.<sup>3</sup>

[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.

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<sup>1</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 on GD3-11.

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

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## Reasons for my decision

[14] I find that the Appellant had a severe and prolonged disability as of November 2017. 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?

[15] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

#### – The Appellant's functional limitations did affect her ability to work as of December 31, 2018

[16] The Appellant has:

- Fibromyalgia
- Chronic Pain
- Headaches
- Depression

[17] However, I can't focus on the Appellant's diagnoses.<sup>4</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>5</sup> 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.<sup>6</sup>

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

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

[19] The Appellant says that her medical conditions resulted in functional limitations that affect her ability to work. She says that she was able to work in a physically-

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<sup>4</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>5</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>6</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

demanding job for many years as a heavy equipment operator. She started this work in approximately 1989. In approximately 2004, she completed one year of college in nursing. She worked for less than a year as a nurse, then returned to work as a heavy equipment operator.

[20] She continued doing this work until June 2015. Her duties included operating heavy haul trucks and rock trucks. She also trained other employees on these trucks. In addition, she worked “under the table” as an apartment manager in the 16-unit apartment building she lived in. Her duties included mowing the lawn, cleaning, interviewing potential tenants, preparing units for the next person, banking, and going to the post office. She was not paid a salary for this work, but instead was allowed to live in her unit rent-free. This amounted to approximately \$850 per month. She also volunteered at a hospital and nursing home. This involved taking people to their appointments.

[21] On June 15, 2015, she was transporting an elderly friend, who was recovering from surgery, to an appointment at the hospital. Unfortunately, she was involved in a motor vehicle accident, which left her in shock. Her injuries were mainly to the left side of her body. They included injuries to her arm, chest, back and neck. She also hit her head on a windshield.

[22] The Appellant went to a clinic. She was examined and told she could go home. Since the accident, she has had ongoing headaches and pain throughout her body, but mainly in her left arm and shoulder, lower back, and neck.

[23] She never returned to work as a heavy equipment operator after the accident. She also did not return to her volunteer positions. She did continue her work as an apartment manager, but many of her responsibilities had to be outsourced. She continued to go to the post office, do the banking, and interview potential tenants. However, she stopped cleaning and all outdoor work, such as mowing the lawn and shoveling the walkway.

[24] Her health problems continued to worsen over time. As of December 31, 2018, she was struggling physically, mentally, and emotionally. She had migraine headaches, but these slowly subsided over time. Her pain, on the other hand, was and remains very high. She had pain on her left side, back, and neck. She was an emotional wreck. She was crying “at the drop of a hat”.

[25] She could not sit for a long time, unless she was lying in a recliner. Her pain increased with walking and standing. She could only walk one block and back. She had difficulty cleaning her apartment. She could drive 30 minutes to her appointments, but struggled to drive longer than that. Her memory and concentration were poor due to her pain.

[26] In 2020, she had to stop her work as a building manager. She could not handle the demands of the job. This resulted in her having to move out of her rental unit because she could not afford the rent. She has not looked for another job since then. She does not think there is any work she can do.

[27] She was asked whether she was capable of retraining for another job as of December 31, 2018. She thinks that her pain would have made sitting and concentrating too difficult.

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

[28] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2018.<sup>7</sup>

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

[30] There are numerous reports on file from Dr. Barend Herbst, family physician, including the following:

- In the CPP Medical Report dated March 27, 2019, which is a few months after the MQP, Dr. Herbst wrote that she has fibromyalgia since July 2015 as well as

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

chronic pain in her upper shoulder girdle and back. It was unknown if she could return to any type of work in the future. Dr. Herbst noted that the Appellant felt she cannot work due to pain, which is very difficult to diagnose. She fits the criteria for fibromyalgia.

- On March 27, 2019 and May 2, 2019, Dr. Herbst wrote that she is unable to return to heavy equipment operation due to medical reasons.
- On July 19, 2020, Dr. Herbst wrote that her pain is chronic and manageable on current medication. She fits the criteria for fibromyalgia. She was also formally diagnosed with bipolar mood disorder and recently admitted with manic episode.
- On October 26, 2020, she was noted to have bipolar disorder, fibromyalgia, and chronic pain disorder. Dr. Herbst asked that she be considered for CPP.
- On November 17, 2020, she was noted to be unable to work at her previous occupations due to her chronic pain, medication side effects, mental health, and fibromyalgia. She is able to do part-time training for a less physically demanding job.
- On December 20, 2021, it is noted that the onset of her bipolar disorder is unknown.

[31] These reports are all dated after the MQP. However, the CPP medical report was dated around the time of the MQP and it noted that she has had fibromyalgia and chronic pain since 2015. In addition, Dr. Herbst's clinical notes from July 10, 2018 and October 10, 2018 confirm that she has fibromyalgia.

[32] The remaining medical reports on file also note that her fibromyalgia and chronic pain began before December 31, 2018. On March 22, 2016, Dr. A.C. Grade, medical consultant at Life Mark, wrote that her back pain began following the birth of her first child in 1986 and increased in June 2015 following her motor vehicle accident. Diagnostic imaging shows degenerative changes.

[33] On May 30, 2016, Dr. Michael Chow, neurosurgeon, wrote that she has leg pain on both sides, but cannot explain why she is having this pain.

[34] On September 28, 2016, Dr. Ashokchand Baburam wrote that she has ongoing pain in her upper and lower back. She finds it difficult to move due to her ongoing back pain. Analgesics help alleviate much of her discomfort. Her pain does not bother her when she is still, but as soon as she moves, she is in a lot of discomfort.

[35] Dr. Mary Lou Myles wrote on November 6, 2017 that she presents with severe chronic pain disorder, most pronounced in the lower back, left neck, and left shoulder girdle.

[36] Dr. Omar Rahaman, Life Mark, wrote on January 1, 2018 that she was discharged from their clinic. Her poor attendance and compliance with treatment recommendations was noted.

[37] With respect to her mental health, the following post-MQP reports are on file:

- On March 5, 2020, Dr. Dmitry Matveychuk, resident in psychiatry, wrote that she has no formal psychiatric history. She was behaving bizarrely in the emergency department. She was certified under the Mental Health Act and admitted to the psychiatric unit. She has bipolar disorder with a recent manic episode. She also has somatic disorder and fibromyalgia.
- On March 5, 2020, Dr. Mustafa Siddiqui, neurologist, wrote that she appears to be in a manic state with possible psychotic features.
- On February 3, 2022, Dr. Shahnawaz Khan, psychiatrist, wrote that she is doing well and her mood is stable. Her bipolar affective disorder is currently in remission. She may benefit from financial support as it will take away some stress, which could aggravate relapse into a mood episode.

[38] There is no medical evidence to indicate that Appellant was diagnosed with depression, bipolar disorder or any other mental health problem prior to the MQP.



However, there are multiple medical reports on file that confirm that she was suffering from fibromyalgia and chronic pain for several years before the MQP and that these problems are ongoing. These are also the health problems that the Appellant says affected her ability to work.

[39] The medical evidence supports that the Appellant's fibromyalgia and chronic pain prevented her from returning to physically-demanding work, including her work as a heavy equipment operator or a nurse.

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

– **The Appellant hasn't followed medical advice**

[41] To receive a disability pension, an appellant must follow medical advice.<sup>8</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>9</sup>

[42] The Appellant hasn't followed medical advice. She gave a reasonable explanation for not following the advice.

[43] The Minister submits that the medical consultants recommended treatment options could improve her symptoms and function. However, she has not consistently attempted any of the recommended treatment options.

[44] It is evident from the medical reports on file that the Appellant has not tried all of the treatment recommendations. Dr. Herbst noted that a pain clinic was recommended, but she was rejected due to multiple no-shows. Dr. Grade recommended a multidisciplinary active rehab program. However, it is noted that she declined attending this program in 2016 and again in 2018. Dr. Mary Lou Myles also wrote that she may benefit from a multidisciplinary chronic pain program.

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<sup>8</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>9</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[45] The Appellant was asked about her failure to follow up on these recommended programs. She explained that none of these programs are available within a reasonable distance from her home. They required her to drive to X, which is 4.5 hours away from her home. She did attend an appointment with a rehab specialist who explained to her that she could work out in their building and see a dietician. The Appellant thought this sounded great, but could not commit to making this drive regularly. She also didn't have the money to stay in X get these treatments.

[46] She did, however, attempt to find treatment closer to her home. These include chiropractic treatment, massage therapy, and laser therapy. She continues to get these treatments today. Her chiropractor was hoping to hire a rehab therapist, but, unfortunately, that has not happened.

[47] She was getting SI injections every three months, but these were stopped because were in effective. She has tried numerous pain medications. She has tried medical marijuana, which was not helpful.

[48] With respect to her mental health, she is on medication and has been seeing a therapist at her Church. Her mental health is stable with medication.

[49] The Appellant gave a reasonable explanation why she didn't follow medical advice. So, it doesn't matter that she didn't follow it. She also attempted to find treatments closer to home, which she still does to this day.

[50] 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.<sup>10</sup>

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<sup>10</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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

[51] 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

[52] 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.<sup>11</sup>

[53] In this case, the Appellant was 49 years old as of the MQP. She completed one year of college. She has worked mainly as a heavy equipment operator. However, she has also worked as a bartender, nurse, and apartment manager. She is fluent in the English language.

[54] Although the Appellant is relatively well-educated and is fluent in the English language, she has worked mainly in physically-demanding jobs. Her pain and functional limitations would prevent her from returning to these jobs or from doing any other physically-demanding work.

[55] With respect to sedentary work or retraining for lighter work, Dr. Herbst wrote after the MQP on November 17, 2020 that the Appellant is able to do part-time training for a less physically-demanding job. He wrote on November 7, 2019 that she can try retraining for a different job. On October 18, 2019, Dr. Herbst wrote that he noted she can work, but the Appellant disagrees.

[56] I considered that chronic pain and fibromyalgia are conditions with a strong subjective component. These conditions will affect each individual differently. The focus of the inquiry should be on the effect of the conditions on the particular individual

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<sup>11</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

in question.<sup>12</sup> The focus should be on whether the whole of the evidence, including the oral evidence, indicates that the Appellant suffers from a severe disability.<sup>13</sup>

[57] Throughout his medical reports, Dr. Herbst accepts that the Appellant suffers from chronic pain and fibromyalgia, but disagrees with the Appellant regarding her ability to work or retrain. He does not explain why he disagrees with her. Given that pain is subjective and affects each individual differently, I considered the Appellant's oral evidence regarding her pain.

[58] She stated that she had to stop working as a heavy equipment operator immediately after the accident. She continued to work minimal hours and for minimal remuneration as an apartment manager. However, most of the tasks she did prior to the accident had to be outsourced. She continued to do the light tasks, including banking, post office, and interviewing tenants. This did not amount to a part-time job and this is evident in her earnings.

[59] As of December 31, 2018, the Appellant was struggling with her pain and functional limitations. She was limited in her ability to sit, stand, walk, and move her back. Her memory and concentration were poor. Her pain worsened with any kind of activity. Given the Appellant's difficulty with sitting, remembering, and concentrating, I do not accept that she was capable of lighter or sedentary work or retraining.

[60] The Appellant was working as an apartment manager after December 31, 2018 so I considered whether this work was "substantially gainful". Substantially gainful, in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.<sup>14</sup>

[61] In this case, the Appellant's record of earnings does not show any earnings or contributions for the years 2019 or 2020. However, the Appellant testified that the work she did was in exchange for renting her apartment. She estimated this to be \$850 per

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<sup>12</sup> *Thawer v. MHRD* (December 3, 2003), CP 18204 (PAB)

<sup>13</sup> *Duncan v. MHRD* (December 8, 1999), CP 9220 (PAB)

<sup>14</sup> Section 68.1 of the CPP Regulations

months or \$10,200 per year. These earnings are below the maximum annual disability pension amounts established for those years.

[62] In addition, her hours were minimal and many of the tasks had to be outsourced. She was making an effort to remain in the workforce, but she was struggling. I find that her work as a manager of an apartment building was not substantially gainful.

[63] I find that the Appellant can't work in the real world. I also find that the Appellant's disability was severe as of November 2017, when Dr. Myles wrote that she presents with severe chronic pain disorder.

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

[64] The Appellant's disability was prolonged.

[65] The Appellant's conditions began in June 2015. These conditions have continued since then, and they will more than likely continue indefinitely.<sup>15</sup>

[66] Dr. Herbst wrote that her fibromyalgia has been present since July 2015. Dr. Grade wrote that her back pain began in 1986 and increased in June 2015. Dr. Myles wrote that she has severe chronic pain.

[67] After December 31, 2018, the Appellant was diagnosed with bipolar disorder. Although her mood became more stable, Dr. Khan wrote that the Appellant is not able to work due to fibromyalgia and arthritis. This is consistent with the Appellant's testimony.

[68] I also accept the Appellant's testimony that she has had ongoing pain since her motor vehicle accident in June 2015.

[69] I find that the Appellant's disability was prolonged as of November 2017.

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<sup>15</sup> 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.

## **When payments start**

[70] The Appellant's disability became severe and prolonged in November 2017.

[71] There is a four-month waiting period before payments start.<sup>16</sup> This means that payments start as of March 2018.

## **Conclusion**

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

[73] This means the appeal is allowed.

Lianne Byrne  
Member, General Division – Income Security Section

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<sup>16</sup> Section 69 of the *Canada Pension Plan* sets out this rule.