



Citation: *AV v Minister of Employment and Social Development*, 2023 SST 241

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. V.

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: James Beaton

Type of hearing: Teleconference

Hearing date: March 8, 2023

Hearing participant: Appellant

Decision date: March 9, 2023

File number: GP-22-1994

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is 40 years old. He last worked as a network support representative for a telecommunications company. He took a medical leave from September 2015 to September 2016 because of poor mental health.¹ In June 2017, he found his friend dead in their shared apartment. This was very traumatic for him and compounded the impact of his pre-existing mental conditions. His family doctor recommended that he stop working on June 7, 2017.² He hasn't returned to work since.

[4] The Appellant applied for a CPP disability pension on August 19, 2019. 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 Minister says the Appellant might not be able to do his usual job, but he can still do some type of work. Because he hasn't tried, he isn't eligible for a disability pension. In addition, the Minister argues that the Appellant stopped taking medications without consulting his psychiatrist. This means he hasn't followed medical advice.³

[6] The Appellant says he isn't regularly capable of working at any job. His family doctor told him to stop taking his medications because of the side-effects.

¹ See GD2-127 to 132.

² See GD2-123 to 126.

³ The Minister's submissions are at GD4-2 to 11 and IS4.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2019. This date is based on his contributions to the CPP.⁴

[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.⁵

[10] This means I must look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I must also 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 capable regularly of doing some kind of work that he could earn a living from, then he 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.⁶

[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 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.

⁴ 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 IS4-16.

⁵ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

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

Matters I have to consider first

I accepted the Minister's late documents

[14] The Minister submitted written arguments after its deadline to do so. I decided to accept them because the Appellant was able to review them before the hearing, and the Minister could have made the same arguments at the hearing anyway.⁷

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of June 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?

[16] The Appellant's disability was severe by December 31, 2019. 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:

- post-traumatic stress disorder (PTSD)
- depression
- anxiety⁸

[18] However, I can't focus on the Appellant's diagnoses.⁹ Instead, I must focus on whether he has functional limitations that got in the way of him earning a living by

⁷ The Appellant confirmed at the hearing that he had the opportunity to review the Minister's late submissions, which are labelled "IS4."

⁸ The Appellant also has diabetes, but he testified that his diabetes is under control and doesn't affect his ability to work.

⁹ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

December 31, 2019.¹⁰ 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.¹¹

[19] I find that the Appellant had functional limitations by December 31, 2019.

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

[20] The Appellant says his medical conditions have resulted in functional limitations that affected his ability to work by December 31, 2019.¹² He says:

- He sleeps poorly. He can fall asleep fine, but he wakes up during the night from nightmares and flashbacks related to finding his dead roommate. Most days, he only gets two or three straight hours of sleep. So he is fatigued during the day. He tends to nap once or twice during the day as well.
- Because of his irregular sleep, he can't keep a schedule. He misses events like watching hockey games and attending church services.
- Due to fatigue, he feels like he has "brain fog." He has trouble focusing, recalling information, learning new things, communicating clearly, and making decisions.
- He is irritable, unmotivated, and easily stressed.

[21] He used to be anxious in public places. He says this isn't as much of an issue anymore.¹³

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

[22] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2019.¹⁴

¹⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹¹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

¹² What the Appellant says about his functional limitations can be found at GD1-9 and 10; GD2-22 to 35, 127 to 132, 161, and 162; and on the hearing recording.

¹³ The Appellant said this at the hearing.

¹⁴ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

[23] Evidence from Dr. Ho (his family doctor),¹⁵ Dr. Rizvi (a psychiatrist),¹⁶ and Dr. Palfy (a psychologist)¹⁷ all supports what the Appellant says about his diagnoses and his functional limitations. The evidence spans the period from January 2017 to September 2020 and documents the Appellant's consistent struggles with sleep, fatigue, and cognition. The medical records show that the Appellant cancelled appointments because of poor sleep.¹⁸ The medical evidence doesn't contradict anything the Appellant says.

[24] The medical evidence supports that the Appellant's functional limitations prevented him from doing his job as a network support representative by December 31, 2019. His lack of sleep impacted his ability to think clearly, while his irregular sleep patterns meant he could not keep a predictable work schedule.

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

– **The Appellant followed medical advice**

[26] To receive a disability pension, an appellant must follow medical advice.¹⁹ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.²⁰ If they don't have a reasonable explanation, then I must also consider what effect, if any, the medical advice might have had on the appellant's disability.²¹

[27] The Appellant followed medical advice. He tried multiple medications to help improve his mental health and his sleep.²² Currently, he uses CBD oil and gummies, as well as melatonin. These help him fall asleep, but he still wakes up with nightmares and

¹⁵ See GD2-54 to 56, 92, 109, 111, 122 to 126, 136 to 138, 140 to 142, 150, and 152 to 154.

¹⁶ See GD2-143 to 145.

¹⁷ See GD2-51, 52, 78 to 80, 83 to 85, 107, 108, 115, and 116.

¹⁸ See GD2-51, 52, and 78 to 80.

¹⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ See *Brown v Canada (Attorney General)*, 2022 FCA 104.

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

²² These include Cipralext, Prazosin, Quetiapine, Remeron, Seroquel, Trazadone, and Zoloft (GD2-92, 118 to 121, and 140 to 142).

flashbacks. He continues to see a psychologist regularly to address this issue. He is on a waiting list to see a psychiatrist, too.²³

[28] The Minister argues that the Appellant didn't follow medical advice because he stopped taking medications (Cipralext and Seroquel) without consulting Dr. Rizvi, who prescribed them. I disagree. I find that the Appellant followed medical advice.

[29] The Appellant explained that he only saw Dr. Rizvi once for a consultation. No follow-up appointment was scheduled. Instead, the Appellant continued to see Dr. Ho. He told Dr. Ho that the medications weren't helping and were causing side-effects.²⁴

[30] There is no record of Dr. Ho specifically telling the Appellant to stop his medications. However, Dr. Ho did complete two insurance forms indicating that Cipralext and Seroquel were having a limited response.²⁵ The Appellant reported having headaches and an upset stomach, which he believed were side-effects.²⁶ Dr. Ho later confirmed that the Appellant had stopped taking medications, noting that Cipralext and Seroquel were ineffective and had side-effects.²⁷ Even if the Appellant initiated the decision to stop taking his medications, there is no evidence that Dr. Ho opposed that decision.

[31] I accept the Appellant's explanation for stopping his medications as reasonable. I acknowledge the Minister's argument that Dr. Rizvi was aware of the Appellant's previous medication trials and might have been able to make further recommendations based on his side-effects. However, Dr. Rizvi's own report says the Appellant was advised to contact Dr. Rizvi's clinic **or his family doctor** if he had side-effects.²⁸ That is what the Appellant did. I find that Dr. Ho, as the Appellant's family doctor, was at least as aware of the Appellant's medication history as Dr. Rizvi.

²³ The Appellant said this at the hearing.

²⁴ The Appellant said this at the hearing.

²⁵ See GD2-136 to 138 and 140 to 142.

²⁶ See GD2-127 to 132 and the hearing recording.

²⁷ See GD2-123 to 126 and 152.

²⁸ See GD2-143 to 145.

[32] 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.²⁹

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

[33] 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

[34] 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.³⁰

[35] I find that the Appellant can't work in the real world. He was unable to work as of December 31, 2019.

[36] The Appellant's personal characteristics favour employability. He is young and fluent in English. Since graduating from university in 2005, he has worked as a hotel night auditor, a salesperson at an electronics store, and most recently with a telecommunications company in a technical job.³¹

[37] The Appellant's functional limitations outweigh these positive factors. He is no longer suited to cognitively-demanding or stressful work. Most importantly, though, he can't keep a schedule. His poor and irregular sleep makes him unable to attend work predictably, regardless of the type of work or the number of hours. The Appellant testified that this is the most significant barrier preventing him from working. In fact, the

²⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

³⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³¹ See the hearing recording.

Appellant tried volunteering for his church and a food bank, but missed his scheduled shifts because of poor sleep.³²

[38] The Minister says Dr. Palfy's latest report supports that the Appellant has work capacity. Dr. Palfy wrote that the Appellant could not work in a "normal capacity" but might be able to work from home at his own pace.³³

[39] In my view, Dr. Palfy's report supports that the Appellant **does not** have work capacity. Dr. Palfy agrees that the Appellant can't work in any "normal capacity," which I understand to mean according to a set schedule. An employee who can work at their own pace and according to their own schedule isn't regularly capable of doing any occupation.³⁴

[40] I find that the Appellant's disability was severe as of June 2017, when his traumatic experience led to Dr. Ho recommending he stop work.

Was the Appellant's disability prolonged?

[41] The Appellant's disability was prolonged by December 31, 2019.

[42] The Appellant's mental health conditions combined to make him severely disabled in June 2017. The severity of those conditions has continued since then.³⁵

[43] The last medical evidence on file (from September 2020) confirms that he still can't work.³⁶

[44] This evidence is from more than two years ago. But I accept what the Appellant told me about how his functional limitations continue to impact him. His testimony was consistent with the medical evidence and what he told Service Canada. He answered

³² See the hearing recording. The Appellant told Service Canada that he had tried volunteering at a food bank but could not be relied upon to be there when scheduled (GD2-161 and 162).

³³ See GD2-51 and 52.

³⁴ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

³⁵ 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.

³⁶ See Dr. Palfy's report at GD2-51 and 52, which I have discussed earlier in this decision.

questions spontaneously and acknowledged that his anxiety has actually improved. This supports that his testimony was truthful and reliable.

[45] The Appellant's conditions will more than likely continue indefinitely. He has dealt with them for years now. Dr. Ho already considered his outlook to be guarded by April 2018.³⁷

[46] He continues to do what he can to improve his conditions by seeing a psychologist two to three times per month and discussing medications with Dr. Ho, who prescribed Trintellix a few months ago.³⁸ He hasn't noticed any impact from the Trintellix yet. On a balance of probabilities, these treatments don't offer a reasonable prospect that the Appellant will be able to work again in the foreseeable future. He has tried many medications already and has seen a psychologist for years.

[47] I find that the Appellant's disability was prolonged as of June 2017, when Dr. Ho told him to stop working.

When payments start

[48] The Appellant had a severe and prolonged disability in June 2017.

[49] 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.³⁹ After that, there is a 4-month waiting period before payments start.⁴⁰

[50] The Minister received the Appellant's application in August 2019. That means he is considered to have become disabled in May 2018.

[51] Payments of his pension start as of September 2018.

³⁷ See GD2-111.

³⁸ The Appellant said this at the hearing.

³⁹ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

⁴⁰ 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.

Conclusion

[52] I find that the Appellant is eligible for a CPP disability pension because his disability was severe and prolonged by December 31, 2019.

[53] This means the appeal is allowed.

James Beaton
Member, General Division – Income Security Section