



Citation: *LT v Minister of Employment and Social Development*, 2023 SST 730

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: L. T.
Representative: S. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated June 18, 2021 (issued by
Service Canada)

Tribunal member: Jackie Laidlaw

Type of hearing: Videoconference

Hearing date: March 23, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: March 28, 2023

File number: GP-21-1750

Decision

[1] The appeal is dismissed.

[2] The Appellant, L. T., 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 a 45-year-old man. He has had a series of short-term jobs throughout his life. In November 2018, he had been working for 10 weeks as a lube technician, along with driving Uber for three weeks and owning and running his own food truck on weekends. He got in a car accident and has not worked at any job since. In April 2019 he had a heart attack and received a stent in 2020. He is claiming daily headaches, heart issues, bilateral knee pain, lower back pain, neck pain, rotator cuff tears in both right and left shoulders causing pain, and mental health problems of cognitive issues, stress, depression, anxiety, anger, post-traumatic stress disorder (PTSD) and somatic pain have all prevented him from working.

[4] The Appellant applied for a CPP disability pension on October 16, 2020. 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 Appellant says he cannot return to his old jobs which were physical in nature because he cannot walk, sit or stand for long periods. He cannot concentrate.

[6] The Minister says the Appellant has functional limitations but an absence of a severe pathology to show he is unable to work at any job. He has not attempted to work.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2020. This date is based on his contributions to the CPP.¹

[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.² This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, 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 able to regularly do some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

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

[11] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

Reasons for my decision

[12] I find that the Appellant hasn’t proven he had a severe and prolonged disability by December 31, 2020.

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 GD 5-29.

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.

Was the Appellant's disability severe?

[13] 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 don't affect her ability to work

[14] The Appellant has:

- A previous heart attack in April 2019;
- Torn rotator cuff in the right shoulder and pain in the left shoulder;⁴
- Adjustment disorder with depressed mood, anxiety disorder, major depressive disorder and chronic pain;⁵
- Headaches; and,
- Bilateral knee and lower back pain.

[15] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁷ 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 his ability to work.⁸

[16] I find that the Appellant doesn't have functional limitations that affected his ability to work.

– What the Appellant says about his functional limitations

[17] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work.

⁴ These two conditions are noted in the medical report of family physician Dr. Ramirez December 11, 2019.

⁵ This is according to psychologist Dr. Fiati in March 2019. See GD 1-637.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[18] He says that his headaches come four times a week and currently last a half day. They used to last a full day. When he gets one, he takes melatonin and Tramadol or Advil. He calms his mind and puts a wet cloth on his head.

[19] The Appellant stated that because of his heart attack he is unable to take certain medications. His heart is fine now, but he has been told not to work at any heavy lifting jobs due to the condition.

[20] His knee pain makes walking difficult. He can walk 10 to 15 minutes. Sometimes his knee gives out and he falls. He has been wearing a knee brace for a year and a half, which helps when he is walking but he cannot wear it while driving. He uses a cane, which he got two weeks after the accident. He has never gone to a specialist for his knees, and has been told to get massage, physiotherapy and lose weight.

[21] His neck pain has been worse since the right shoulder surgery in 2020. He cannot turn his head left or right.

[22] His right shoulder had a rotator cuff tear from the accident and surgery was delayed because of his heart attack, and then Covid. He could not scratch his back or have the strength to hold a bottle of water. He had surgery in July 2020 and six months of physiotherapy. It is suspected the physiotherapy caused another tear in the rotator cuff. He still cannot scratch his back or lift his arm while dressing. He must continue with home exercises, or his shoulder will freeze.

[23] His left shoulder had surgery many years ago in 1994. Because he has been using the left arm over his dominant right arm, this shoulder has pain too and suspected tears. He has been told he can get surgery on his left shoulder, but he is reluctant as the right shoulder surgery did not work. He has been told if he does not get the surgery, he should not lift anything above his shoulder. He has been referred for a shot, presumably a cortisone shot, for his left shoulder.

[24] The Appellant stated that he cannot bend or move too quickly because of his lower back. He cannot sit up or sit down quickly or he will get pain. When he is on the

treadmill or bicycle, he has more pain. He has never seen a specialist about his back, but his family physician told him to take Tramadol for the pain. He also received cuppings on his back.

[25] The Appellant stated that mentally he has anger issues and depression. Emotionally he gets overwhelmed and cannot breathe. He cries at times. His mental health impacts his ability to work due to his anger. As well, he has a difficult time listening to people talking and he cannot focus or think.

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

[26] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2020.⁹

[27] There are a number of clinical notes from the family physician, Dr. Tatiana Ramirez. There are reports from orthopaedic surgeons Dr. Ikejiani and Dr. Porte, both treating specialists. There is a report from Dr. Fiati, psychologist, who treated the Appellant from 2019 to 2020 for pain management. I am going to put more weight on the reports of all these above noted treating physicians. There are a number of medical/legal assessments, which were strictly done at the request of the Appellant’s lawyer for his litigation. Even Dr. Ramirez noted in her clinical records that the Appellant was going through assessments advised by the lawyer for litigation, therefore they were not requested by her, or any other medical professional.¹⁰ The physicians who wrote the medical/legal assessments were not treating physicians, or requested to assess the Appellant by any doctor, and therefore I will put less weight on their assessments and opinions.

[28] The Appellant’s most prominent physical conditions have been his shoulder pain and limitations, and the heart attack which happened after he stopped working. I also

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See GD 2 145.

will address his bilateral knee conditions, back pain, and headaches. His mental health conditions will be addressed as well.

The shoulders

[29] Initially Dr. Ikejiani found a partial tear of the right rotator cuff with no nerve dysfunction, despite his neck pain. The doctor noted there was improvement with physiotherapy and a full range of motion. He recommended ongoing physiotherapy and conservative treatment.¹¹ Dr. Porte found, in October 2019 that he required surgery but put it on hold for a year following the heart attack. Dr. Porte noted that “it would be optimistic to have a reasonable arthroscopic rotator cuff repair that would help with pain and motion.” He found his shoulder would not return to normal. Dr. Porte also advised that the Appellant should have an occupational change that does not require heavy lifting.¹²

[30] Therefore, even with surgery the Appellant’s shoulder would not return to its previous functioning. However, that is not the test for a severe disability. The test is the ability to work even with functional limitations.

[31] Dr. Porte noted post-surgery in July 2020 that it was a good surgical outcome and that his shoulder pain and mobility would improve.¹³ The Appellant stated that he has torn the rotator cuff again, presumably from the physiotherapy. He also stated his left shoulder has a tear. Despite this, Dr. Porte noted in November 2020 that he was encouraged to work on his shoulder motion, and it was anticipated with time and therapy he would be able to pursue suitable employment.¹⁴ Family physician, Dr. Ramirez also noted in October 2020 that he had a good response post-surgery to pain medications and physiotherapy. She indicated his shoulder condition would likely improve and expected him to return to his usual work within one to two years.¹⁵

¹¹ See GD 1 539.

¹² See GD 1 585.

¹³ See GD 1 618.

¹⁴ See GD 4 1053.

¹⁵ See GD 2 82

[32] After his MQP, in May 2021, the Appellant saw another orthopaedic surgeon Dr. Casses for his left shoulder. He noted a partial thickness tear on his left, with a complete range of motion in his left arm and no impingement. Conservative treatment of physiotherapy and anti-inflammatories was recommended. Dr. Casses also indicated the Appellant should change his occupation to avoid overhead movement.¹⁶

[33] The medical evidence shows that his right shoulder will not return to its initial functioning state as before the accident. He has testified that future cortisone shots have been recommended for his left shoulder. Dr. Ramirez felt he would be able to return to his previous job. Unfortunately, with the addition of the partial thickness tear on his left shoulder, he is limited from his previous job, but not all employment.

The heart attack

[34] The Appellant had a heart attack in April 2019, was discharged in stable condition and advised to avoid strenuous activity for only four weeks in 2019. By February 2020, his cardiologist Dr. Haqqi continued to emphasize the importance of weight loss and regular exercise and found his cardiac condition stable. The Appellant has not had any repeat heart attacks, he has lost weight and continues with his exercises. By September 2020, Dr. Haqqi noted a stable cardiac condition, and the Appellant was doing well.¹⁷ There is no indication his heart condition would prevent him from working.

The knees

[35] Dr. Ramirez noted in June 2020 that the Appellant's chronic knee pain was controlled with medication. She referred him to an orthopaedic surgeon for his knees and to get an MRI.¹⁸ The Appellant saw orthopaedic surgeon Dr. Ikejiani in December 2020. Dr. Ikejiani noted that while the Appellant had pain and walked with a cane, he sat comfortably in a chair. He did not require surgery and ongoing conservative treatment was recommended. By February 2021, Dr. Ikejiani noted mild osteoarthritis in

¹⁶ See GD 4 1039.

¹⁷ See GD 1 150 and GD 1 577 and GD 1-615

¹⁸ See GD 1 627.

both knees with a small meniscal pathology. Dr. Ikejiani did not believe his knee issue was a meniscal problem, but rather “patellofemoral chondromalacia”. This is just pain and swelling around the knee with a feeling of grinding when the knee moves. Dr. Ikejiani recommended physiotherapy, bracing, Tylenol, icing and anti-inflammatories.¹⁹ Dr. Ramirez’s office note indicated mild findings in the knees in February 2021.

[36] An X-ray of both knees in April 2019 showed mild osteoarthritis.²⁰ A right knee ultrasound on June 4, 2019, showed a suggestion of a meniscal tear, but the soft tissue was unremarkable. An ultrasound of the left knee on the same day was suggestive of an underlying tear. MRI’s for both were recommended to confirm meniscal tears. The MRI showed mild osteoarthritis with a small meniscal pathology. As indicated, Dr. Ikejiani did not recommend any surgery and determined the pain was not a meniscal cause, rather patellofemoral chondromalacia.

[37] Even though the Appellant stated he falls at times because his knees give out, the medical evidence shows his knees are only mildly osteoarthritic and require conservative treatment. There are no limitations noted that would prevent him from working because of his knee pain.

The lower back

[38] Dr. Ramirez noted he endorsed back pain with right sided numbness in June 2020.²¹ However, a CAT scan of his lumbar spine taken in December 2020 showed mild multilevel degeneration, no disc herniation or spinal cord impingement.²² The Appellant stated he has only been taking Tramadol for his pain, over-the-counter Deep Relief, and did some cupping treatments.

¹⁹ See GD 1 757 and GD 4 1043.

²⁰ See GD 1 587.

²¹ See GD 1 627.

²² See GD 1 472.

[39] The CAT scan, along with the lack of intervention by any specialist and the conservative treatments show the Appellant may have pain but would not be prevented from working due to mild degeneration of the spine.

The Headaches

[40] At the time of his accident, Dr. Ramirez never mentioned headaches. She did not note them in the statement to the insurer in December 2018.²³ She did not note them in his medical report of December 2019.²⁴ She did not note them in her medical report of October 13, 2020.²⁵ As well, an MRI of the head in March 2019 found no abnormalities.

[41] A medical-legal report from neurologist Dr. Gawel diagnosed post-traumatic headaches in October 2019. In that report, he also indicated the Appellant had not received headache treatments so treatment with prophylactic migraine medication was recommended.²⁶ The Appellant stated he is taking Tramadol for pain, which is also for his headaches but only when they are very bad. He just calms his mind and puts a wet cloth on his head.

[42] Two other assessors noted headaches. Occupational Therapist Ms. Poon in September 2020 indicated intermittent headaches and dizziness but no treatment or recommendations.²⁷ And rehabilitation and vocational psychologist Dr. Scherer noted non-specific headaches three to four times a day for 10 to 15 minutes in August 2020. There were no treatment or recommendations noted.²⁸

[43] While the Appellant may experience headaches, he is not receiving any treatment for them other than taking conservative measures. He has not been sent to a migraine clinic, nor is he seeking specialist intervention.

²³ See GD 2 1070.

²⁴ See GD 2 102.

²⁵ See GD 2 82.

²⁶ See GD 11 776.

²⁷ See GD 1 673.

²⁸ See GD 1 876.

[44] I find his headaches add to his chronic pain. This will be addressed in his psychological conditions.

Psychological Conditions

[45] The Appellant has chronic pain. Dr. Ramirez has noted numerous times he has musculoskeletal pain and has recommended pain medication.

[46] After leaving work, The Appellant had counselling with registered psychologist Dr. Fiati for about a year from 2019 until 2020. Dr. Fiati diagnosed adjustment disorder with depressed mood, anxiety disorder, major depressive disorder and chronic pain.²⁹ Dr. Fiati provided pain management, diet management, and family counselling. The Appellant stated she had helped him with his diet and to calm himself. In 2019, he saw a psychiatrist once who prescribed Sertraline for depression. He stated the medication helps his depression.

[47] Unfortunately, in September 2020 the Appellant overdosed on Melatonin and was taken to hospital. He was on a Form 1 for a day and a half, due to fears of personal harm. Dr. Nathalie Corriveau, psychiatrist, recommended he receive eight weeks of counselling. The Appellant stated he is continuing with psychotherapy from a Lubin Lukers at Dr. Pilai's office for anxiety and anger management.

[48] I acknowledge that the Appellant has had a catastrophic determination from psychiatrist Dr. Leslie Kiraly³⁰ in February 2021, and I do not place much weight on this. A catastrophic determination is for insurance purposes to show how much money the insurance company is responsible to pay. Dr. Kiraly is not treating the Appellant. As well, I agree with the Minister that there had not been any formal cognitive evaluation of the Appellant by Dr. Kiraly to support a significant cognitive impairment.

[49] The Appellant has asked me to put weight on another medical/legal report. A neuropsychological assessment was done by Dr. Giselle Braganza in August 2020 at

²⁹ See GD 1 637.

³⁰ See GD 1 895.

the behest of the Appellant's lawyer.³¹ The Appellant stated the neurocognitive testing took one day and identified a host of neuro cognitive impairments. Dr. Braganza noted the Appellant has cognitive symptoms related to pain and did not expect a significant improvement in his psychological functioning over the next few months. She then recommended CBT, relaxation, mindfulness training, headache and pain management, and sleep management. Dr. Braganza found that the Appellant was not able to resume his pre-accident occupation or any other occupation for which he is reasonably suited. I find this opinion is a snapshot in time and not a long-range prognosis. As Dr. Braganza continued to make recommendations for treatments, which are quite conservative, and found the Appellant would not significantly improve over the next few months, it is reasonable to assume that with the treatment after a number of months the Appellant would improve.

[50] The psychological vocational rehabilitation evaluation with Dr. Scherer in August 2020 found that he had developed chronic pain. The psychological vocational rehabilitation evaluation took into account the Appellant's functionality, pain percets, mobility tolerances, emotional and psychosocial functioning, mental efficiencies, trainability and employability.

[51] Dr. Scherer felt because of the chronic pain it was unlikely he would substantially improve to be employable competitively. He was unsuited to return to his previous jobs as a lube technician and a cook. Chronic pain management, CBT, anger management, sleep hygiene and couples counselling were recommended. Much the same as the recommendations by Dr. Braganza. Dr. Scherer indicated that after he recovers from his recent shoulder surgery, and has a period of multidisciplinary rehabilitation, which he has done, a return to work would be best suited for a not-too cognitively demanding or emotionally straining job, likely part-time, and that he would need assistance from a vocational counselor.³²

[52] This indicates a capacity to retrain for suitable employment.

³¹ See GD 1 842 or GD 4 1417.

³² GD 1 876

[53] 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.³³

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

[54] 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

[55] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.³⁴

[56] The Appellant is a young man, age 42 at the time of his MQP. He stated he only has a Grade 8 education from Sri Lanka. His education may limit his prospects for work but would not limit his ability to retrain. He is fluent in English, though it is not his first language. Despite his education, and English not being his first language, he managed to find work immediately after arriving in Canada in 1997. He has worked on and off in a variety of jobs, the longest being in at a pizza restaurant for seven or eight years. He has risen to kitchen manager at one job, which was lost due to the company going bankrupt. He has worked on a car parts assembly line for a few months, and a building maintenance for a few months. He was doing three jobs when he got in the car accident. He had only been a lube technician for 10 weeks. He was driving Uber for three weeks. And, he had owned his own food truck since 2017, which he still owns but does not work any longer. The Appellant is resourceful and has a variety of transferable skills.

³³ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

³⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[57] He may not be able to return to a job when there is any heavy lifting, or overhead lifting. However, not all jobs, such as being an Uber driver, require heavy manual labour.

[58] He is continuing to receive psychotherapy as recommended by both Dr. Scherer and Dr. Braganza. Dr. Scherer felt he would be able to return to work with retraining. Dr. Braganza implied with therapy he may improve his cognitive symptoms. Dr. Ramirez found that due to his shoulder he would be prevented from his previous job as a lube technician but did not restrict him from all employment.

[59] His education has not prevented him from finding employment. He is young enough to retrain for a suitable job. And he has transferable skills.

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

– **The Appellant didn't try to find and keep a suitable job**

[61] If the Appellant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren't successful because of his medical conditions.³⁵ Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.³⁶

[62] The Appellant didn't make efforts to work or retrain.

[63] Therefore, I can't find he had a severe disability by December 31, 2020.

³⁵ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³⁶ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

Conclusion

[64] I find that the Appellant isn't eligible for a CPP disability pension because his disability wasn't severe. Because I have found that his disability wasn't severe, I didn't have to consider whether it was prolonged.

[65] This means the appeal is dismissed.

Jackie Laidlaw
Member, General Division – Income Security Section