



Citation: *DC v Minister of Employment and Social Development*, 2022 SST 1201

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

## Decision

**Appellant:** D. C.

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated May 25, 2021 (issued by  
Service Canada)

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**Tribunal member:** Carol Wilton

**Type of hearing:** Teleconference

**Hearing date:** October 27, 2022

**Hearing participant:** Appellant

**Decision date:** October 31, 2022

**File number:** GP-21-1410

## Decision

[1] The appeal is allowed.

[2] The Appellant, D. C., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of April 2019.

[3] This decision explains why I am allowing the appeal.

## Overview

[4] The Appellant was 53 years old in March 2020 when she applied for a CPP disability pension. She last worked as a branch ambassador at a bank.<sup>1</sup> In May 2008, she was involved in a car accident. Her car was hit from behind, and she then hit the car in front of her.

[5] The Appellant started university in 2009, also working part-time at a bank until April 2010.<sup>2</sup> Her main medical conditions are chronic pain, depression, and anxiety.

[6] The Minister of Employment and Social Development (Minister) refused the Appellant's application initially and on reconsideration. She appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[7] The Minister stated that the Appellant is not entitled to a CPP disability pension. She did not have regular mental health treatment before 2014. In addition, her physical pain has improved since seeing a pain specialist in November 2014. Moreover, she completed a BA in 2013 and immigration courses after that. This shows that she had the capacity to work.

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<sup>1</sup> The job involved tasks such as helping clients by making appointments, answering questions, and accompanying them to their safety deposit boxes: GD2-III-55. Before that, the Appellant did office work from 2007 to 2008: GD2-III-10.

<sup>2</sup> GD2-III-25

## What the Appellant must prove

[8] For the Appellant to succeed, she must prove that it is more likely than not that she has a disability that was severe and prolonged by December 31, 2012.<sup>3</sup>

[9] The CPP defines “severe” and “prolonged.”

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.<sup>4</sup> If the Appellant is able regularly to 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.<sup>5</sup> The disability must be expected to keep the Appellant out of the workforce for a long time.

## Issues

[12] Did the Appellant’s health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2012?

[13] If so, was her disability long continued and of indefinite duration?

## Reasons for my decision

### The Appellant’s disability was severe by December 31, 2012

[14] By December 2012, the Appellant had well-documented physical and mental health concerns that interfered with her ability to work.

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<sup>3</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 pages GD3-5-6.

<sup>4</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>5</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[15] It is not the diagnosis of the disease, but the Appellant's capacity to work, that "determines the severity of the disability under the CPP."<sup>6</sup>

- **Physical health**

[16] At the hearing, the Appellant stated that her most serious health concern was her physical condition. However, she also stated that her pain levels affected her mental health in significant ways.

[17] Before December 2012, the Appellant's imaging reports showed:

- a small disc herniation of the cervical spine at C5-6;
- a disc herniation at L3-4 of the lumbar spine. It was impressing on the right L4 nerve root; and
- focal tendinitis in her right supraspinatus tendon.<sup>7</sup>

[18] The Minister submits that the imaging reports fail to show severe findings. However, the Appellant's major physical complaint is chronic pain. This condition does not typically turn up on imaging reports.

[19] Chronic pain is a recognized medical condition with a strong subjective component. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.<sup>8</sup>

[20] In August 2012, Dr. Peter Waxer, psychologist, stated that the Appellant reported pain virtually everywhere in her body at a level of between seven and nine out of ten in

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<sup>6</sup> See *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

<sup>7</sup> GD2-II- 87, 103, 104

<sup>8</sup> *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54

most areas.<sup>9</sup> She had severe daily headaches. With the worst ones, she also had sensitivity to sound and light, as well as dizziness and nausea.<sup>10</sup>

[21] In September 2012, an assessment by Dr. Tom Chen, physiatrist, stated that the Appellant had a chronic pain disorder. Dr. Chen diagnosed a number of physical problems. These included myofascial pain (muscle aches) in the Appellant's spine and limbs, insomnia, and aggravation of her pre-accident migraine headaches. Dr. Chen stated that the prognosis for full recovery was poor.<sup>11</sup>

[22] Dr. Chen reported that the Appellant's physical impairments meant that she had trouble sitting and standing. She had lost strength in her right arm, and range of motion in her spine and right shoulder. She had numbness in her right arm and left leg. Her sleep was poor.<sup>12</sup>

[23] Dr. Brian Klar, family doctor, began treating the Appellant in 2003. In January 2021, he stated that the Appellant's 2008 car accident resulted in ongoing fibromyalgia, chronic pain, anxiety, and migraine headaches.<sup>13</sup>

- **Mental health**

[24] In July 2009, Dr. Cheryl Walker, psychologist, assessed the Appellant, diagnosing her with major depressive disorder and somatization disorder.<sup>14</sup> The Appellant had low energy. She was passive and withdrawn. She had difficulty concentrating and making decisions.<sup>15</sup> The Appellant also reported the frequent occurrence of various minor physical symptoms and had vague complaints of ill health and fatigue.<sup>16</sup>

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<sup>9</sup> GD2-III-10. Ten out of ten would be the greatest pain imaginable.

<sup>10</sup> GD2-III-11

<sup>11</sup> GD2-III-4

<sup>12</sup> GD2-III-5

<sup>13</sup> GD2-III-42

<sup>14</sup> GD2-III-33. Somatization disorder involves an unusual degree of concern about physical function and health matters.

<sup>15</sup> GD2-III-30

<sup>16</sup> GD2-III-31

[25] The Minister's submissions missed the fact that the Appellant received treatment for mental health issues in 2009-2010. In November 2010, Dr. Walker and M. Kot, psychotherapist, completed a report on the Appellant's discharge from treatment. They stated that her emotional state had improved somewhat, but she still had trouble coping with chronic pain, depression, and poor sleep hygiene.<sup>17</sup>

[26] In August 2012, Dr. Waxer diagnosed a chronic pain disorder associated with both psychological factors and a general medical condition; and chronic adjustment disorder with anxiety and depressed mood. He estimated the Appellant's Global Assessment of Functioning score (GAF score) at 45-50 (serious symptoms or serious impairment in social, occupational, or educational functioning).<sup>18</sup> He believed her prognosis was extremely guarded.<sup>19</sup>

[27] In September 2012, the Appellant saw Dr. M. Mrozek, psychiatrist, for medication review. The Minister submitted that Dr. Mrozek stated that the Appellant was not clinically depressed and was functioning reasonably well. However, I prefer the diagnoses of Dr. Walker, who actually treated the Appellant. Dr. Mrozek only saw her once.<sup>20</sup>

- **The Appellant has generally followed medical advice**

[28] To receive a disability pension, an appellant must take reasonable steps to follow medical advice.<sup>21</sup> If they don't, then they must have a reasonable explanation for not doing so.<sup>22</sup>

[29] In 2009, the Appellant reported that she had attended a clinic two or three times a week in 2008 for physiotherapy, massage, and chiropractic treatments.<sup>23</sup>

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<sup>17</sup> GD2-II-110. See also the summary of a psychological Insurer's examination, which agreed with Dr. Walker's diagnoses.

<sup>18</sup> GD2-III-18

<sup>19</sup> GD2-III-20. Dr. Waxer completed this assessment for the Appellant's lawyer.

<sup>20</sup> GD2-III-87

<sup>21</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>22</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>23</sup> GD2-III-26

[30] At the hearing, the Appellant testified that in 2011 she had a course of nerve blocks with Dr. Alan Kaplan.<sup>24</sup> She stopped this treatment because she had a bad reaction to it.

[31] In 2012, the Appellant was receiving counselling for help with her daughter through Blue Hills Family and Child Services.<sup>25</sup> She was going to start parenting classes.<sup>26</sup>

[32] In January 2021, Dr. Klar stated that the Appellant had tried physiotherapy and counselling. Her medications had included Tylenol #3 (opioid); antidepressants duloxetine, nortriptyline, and quetiapine; and the anti-anxiety medication clonazepam.<sup>27</sup>

[33] I find that the Appellant generally followed medical advice.

### **The Appellant cannot realistically earn a living because of her disability**

[34] In deciding whether the Appellant's condition was severe, I must take a "real world" approach. This means I must consider factors such as her age, level of education, language abilities, and past work and life experience.<sup>28</sup> I must think about how these matters realistically affected the Appellant's ability to earn a living.

[35] Where there is evidence of work capacity, an appellant must provide evidence of employment efforts and possibilities.<sup>29</sup> They must also show that efforts at obtaining and maintaining employment have been unsuccessful because of their health condition.<sup>30</sup>

[36] In 2009-2010, the Appellant tried working 15 hours a week at a bank. She had trouble with the standing, walking, and bending the job involved. Her pain, fatigue, and

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<sup>24</sup> See also GD2-II-108.

<sup>25</sup> GD2-IV-41. The Appellant, a single mother, gave birth to a daughter in 2004. The daughter had serious behavioural problems and learning difficulties. For example see Dr. Klar's 2012 office notes at GD2-I-51-60.

<sup>26</sup> GD2-III-87

<sup>27</sup> GD2-III-42. For a complete list of the Appellant's medications from 2007 to October 2013, see GD2-I-20 ff.

<sup>28</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>29</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>30</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

cognitive impairment interfered with her ability to learn about banking services. She kept forgetting how to process computer transactions for customer inquiries. She had difficulty sleeping, and so had trouble arriving at work on time. She resigned from the job after only four months.<sup>31</sup> Her ability to keep the job was unsuccessful because of her health condition.

[37] The Appellant tried very hard to retrain for a suitable occupation. In 2013, she obtained a four-year BA from X. I accept that the Appellant's studies in 2009-2013 show that she had some work capacity. But I don't think they show that she had the regular capacity for substantially gainful employment.

[38] The Appellant explained that she was only able to graduate because she received extra time for exams, and flexible deadlines for submitting assignments. She did not have to be on campus every day. She had lengthy breaks between classes. She took advantage of these to rest when she had terrible neck or back pain or severe headaches. She stated that extreme fatigue, pain flare-ups, anxiety attacks, and the side effects of medications often kept her from attending scheduled exams and lectures. She was allowed to reschedule exams, and to get verbal summaries of lectures from professors.<sup>32</sup>

[39] Very few jobs would allow the Appellant the types of accommodations she received at university. An appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities.<sup>33</sup>

[40] In 2014, the Appellant looked for work. At the hearing, she testified that neither of the two jobs she remembered applying for led to employment. One prospect never replied to her application. The other job involved unsuitable hours.

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<sup>31</sup> GD2-I-19

<sup>32</sup> GD2-I-18-19. See also GD2-II-96-98: August 2020, report of the Director of Academic Services at Glendon College; and GD2-III-42, Dr. Klar's letter, January 2021. See also his note of November 30, 2012 at GD2-IV-2. At the hearing, she testified that her marks were generally in the "C" range.

<sup>33</sup> *MHRD v. Bennett* (July 10, 1997) CP 4757 (PAB). This decision is not binding on me, but I find it persuasive.



[41] The Appellant then decided to become an immigration consultant. In 2015 to 2016, she took online courses for this purpose. She testified that she passed the exams, but decided that the job involved too much detail. It would be hard for her to do it effectively with her difficulties concentrating. She then took another online course in preparation for working for the federal immigration department. She passed the course, but by that time the job search process had “taken a toll” on her. She never applied for a job in that field.

[42] The Appellant’s efforts to retrain for suitable work did not result in a job because of her physical and mental health conditions. She stated that her chronic pain, fibromyalgia, migraines, and mental health issues prevented her from work that involved prolonged sitting and standing. She needed frequent rest breaks. Her disabilities also prevented her from getting to work on time and going to work on a regular basis.<sup>34</sup> She could not have been a predictable worker. However, predictability is the essence of regularity in the CPP definition of disability.<sup>35</sup>

[43] People with disabilities must occupy themselves, try to improve their lot, and be active. Such activity does not necessarily indicate that they have the capacity for regular employment.<sup>36</sup>

[44] The Appellant testified that she applied for CPP disability in 2020 because she finally accepted that she was unable to work at any occupation. Because of her chronic pain, she could not do a physically demanding job. In addition, since before December 2012, she had had a great deal of trouble sitting. This meant that she was not suited to an office job.

[45] In August 2012, Dr. Waxer stated that the Appellant’s level of emotional distress was a substantial psychological impairment. It interfered with her efforts to maintain her academic studies and seek gainful employment.<sup>37</sup>

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<sup>34</sup> GD2-I-18-19.

<sup>35</sup> *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

<sup>36</sup> *Elwood v. MEI* (June 23, 1994) CP 2781 CEB & PG 8541).

<sup>37</sup> GD2-III-19

[46] The Appellant was 44 years old in December 2012. This is more than 20 years before the usual retirement age. She has a diploma in travel and tourism, a BA, and courses in immigration consultancy. She has experience in travel and tourism, customer service, call centres, and office administration.<sup>38</sup> She is fluent in English, and her first language was Italian. None of these personal characteristics would interfere with her job prospects.

[47] However, the Appellant's physical pain, lack of physical endurance, intolerance for sitting and standing, headaches, and sleep difficulties meant that she was unable to work at any substantially gainful occupation. In addition, her inability to focus, difficulty making decisions, and lack of energy prevented her from earning a living.

[48] I find that it is more likely than not that the Appellant's disability was severe by December 31, 2012.

### **The Appellant's disability is prolonged**

[49] The Appellant's disability was prolonged by December 2012. She had suffered from chronic pain and mental health difficulties since her accident in May 2008.

[50] The Appellant has continued to suffer from chronic pain, depression, and anxiety. At the hearing, she testified that she is still on Ativan (for anxiety) and Tylenol #3, as well as over-the-counter medications.

[51] The Appellant first saw Dr. Lekha Kurup, psychiatrist, in March 2014 through an outpatient mental health program.<sup>39</sup> She continued seeing the psychiatrist until the start of the pandemic in March 2020. Dr. Kurup eventually diagnosed persistent depressive disorder, cluster B personality disorder, and attention deficit hyperactivity disorder. The Appellant also had chronic pain associated with significant psychosocial dysfunction.<sup>40</sup>

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<sup>38</sup> GD2-III-28

<sup>39</sup> GD2-V-44 ff.

<sup>40</sup> GD2-V-10, February 2016. Dr. Kurup's reports 2014-2020 are collected at pages GD2-V-88-103. The diagnosis of cluster B personality traits went from "possible", to "cluster B personality traits," to "Cluster B personality disorder". Cluster B personality traits involve behaviour that is impulsive, self-destructive, emotional, and sometimes incomprehensible.

[52] In February 2020, Dr. Kurup reported that the Appellant still suffered from chronic pain. She had excruciating pain when grocery shopping or cleaning. She was exhausted. Further, she didn't think she could learn anything. In addition, she expressed anger, resentment, and frustration. She was emotionally intense. She was suffering from depression and anxiety. She was taking Ativan.<sup>41</sup>

[53] In 2014, the Appellant also began attending a pain clinic. In November 2014, she told Dr. Neil Leibovitz of that clinic that she had constant lower back pain from six to nine out of ten. Her neck pain was also constant, ranging from six to eight out of ten. It was aggravated by prolonged sitting and by driving. She also had headaches 15 to 20 days a month. The pain worsened with prolonged walking, standing, and bending.<sup>42</sup>

[54] Dr. Leibovitz diagnosed facet joint irritation in the Appellant's neck and lower back, myofascial pain in her neck and shoulders, and chronic headaches.<sup>43</sup> His office gave her intermittent nerve blocks. These reduced her pain up to 60% for as many as six days.<sup>44</sup> However, the improvement was not permanent. The Appellant testified that in August 2021, the injections stopped working.

[55] In March 2020, Dr. Johnny Nguyen, pain specialist, reported that the Appellant suffered from the following health conditions:<sup>45</sup>

- Fibromyalgia – severe diffuse myofascial pain. She was unable to walk, stand, or sit for prolonged periods of time;
- Migraines – made her unable to do cognitive tasks or go outside; and
- Anxiety – she had difficulty with decision-making and interacting with others.

[56] Dr. Nguyen stated that he did not expect the Appellant to return to any type of work in future.<sup>46</sup>

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<sup>41</sup> GD2-V-102

<sup>42</sup> GD2-II-50-51

<sup>43</sup> GD2-II-55

<sup>44</sup> GD2-II-42, July 2015. She testified that she stopped taking in August 2021 because they stopped working.

<sup>45</sup> GD2-V-66 ff. See also the Appellant's 2020 application for disability benefits at GD2-III-44..

<sup>46</sup> GD2-V-69. See also Dr. Klar's comments in January 2021 at GD2-III-42.

[57] In January 2021, Dr. Klar stated that the Appellant’s disabilities had been “highly limiting” to her life and her ability to hold a job since 2008.<sup>47</sup>

[58] The Appellant has suffered from serious health conditions for more than a decade. No health professional has stated that they expect her condition to improve significantly. I therefore find that her disability is prolonged.

### **When payments start**

[59] The Appellant had a severe and prolonged disability in April 2010, when she stopped working.

[60] However, the CPP says an appellant can’t be considered disabled more than 15 months before the Minister receives their disability pension application. After that, there is a four-month waiting period before payments start.<sup>48</sup>

[61] The Minister received the Appellant’s application in March 2020. That means that she is considered to have become disabled in December 2018.

[62] Payment of her pension starts as of April 2019.

### **Conclusion**

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

[64] This means the appeal is allowed.

Carol Wilton

Member, General Division – Income Security Section

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<sup>47</sup> GD2-III-42

<sup>48</sup> 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.