



Citation: *DR v Minister of Employment and Social Development*, 2022 SST 982

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

Decision

Appellant: D. R.
Representative: Tami Cogan

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated May 10, 2021 (issued by
Service Canada)

Tribunal member: Brianne Shalland-Bennett

Type of hearing: Teleconference

Hearing date: August 23, 2022

Hearing participants: Appellant
Appellant's representative
Appellant's witness

Decision date: September 7, 2022

File number: GP-21-1196

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. R., isn't eligible for a Canada Pension Plan (CPP) disability pension.

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

Overview

[4] The Appellant was 53 years old by December 31, 2015. She has a grade 12 education. She worked as a manager for the Liquor Control Board of Ontario (LCBO) for about 25 years.

[5] The Appellant says she worked with fibromyalgia, migraines, and back pain. She stopped working because she had a pulmonary embolism sometime in 2013. She says the embolism made her conditions worse. She hasn't worked since.

[6] In March 2017, the Appellant was in a snowmobile accident. She fractured her wrist and spine.¹ She says the accident made her existing conditions worse.

[7] The Appellant applied for a CPP disability pension on November 6, 2020.² 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.

[8] The Appellant says she hasn't been able to work since her embolism in 2013.

[9] The Minister says the evidence doesn't show she had limitations that affected her ability to do all types of work by December 31, 2015.³

¹ See GD2-259 and 260.

² This is the Appellant's fourth application (see GD2-21 to 25). The Review Tribunal dismissed the Appellant's first application in 2003. The Appellant's second and third applications were made in February 2017 (see GD2-74 to 77) and May 2017 (see GD2-63 to 67). The Minister denied these applications.

³ See GD5.

[10] I find that the Appellant didn't have a severe disability by December 31, 2015. Although she had functional limitations, she was still regularly able to do work that she could earn a living from.

What the Appellant must prove

[11] 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.⁴

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

[13] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁵

[14] 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).

[15] This is so I can get a realistic or "real world" picture of whether her disability is severe. If the Appellant can regularly do some kind of work that she could earn a living from, then she isn't entitled to a disability pension.

[16] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁶

[17] 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.

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 explained in GD3.

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.

[18] 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

[19] 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?

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

– The Appellant had functional limitations that affected her ability to work by December 31, 2015

[21] By December 31, 2015, the Appellant had the following conditions:

- fibromyalgia
- anxiety
- chronic obstructive pulmonary disease (COPD)
- long-term effects from her pulmonary embolism

[22] However, I can't focus on the Appellant's diagnoses.⁷ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁸ When I do this, I have to look at **all** of her medical conditions (not just the main one) and think about how they affected her ability to work.⁹

[23] I find that the Appellant had functional limitations that affected her ability to work by December 31, 2015.

⁷ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[24] The Appellant says that her medical conditions have resulted in functional limitations that affected her ability to work by December 31, 2015. Here is what she says about her limitations:¹⁰

- She has fatigue, weakness, and shortness of breath.
- She is dizzy when she bends down and when walking up stairs or a hill.
- She can't sit for a long time.
- She can only walk short distances. If she goes to the store, she needs to take many breaks.
- She stopped doing most household chores because of her fatigue.
- She can't carry over five pounds.
- Her concentration and memory are very poor. Her husband goes to her medical appointments, because of her poor memory.
- Her sleep is poor because of anxiety, leg pain, and chest pain.
- She feels like her brain has trouble communicating with her body.
- She is anxious and irritated.
- She can't handle crowds or social situations.
- She makes many mistakes when emailing, filling out forms, or trying to spell.
- She relies on her husband for many things, like getting her socks on, because of her pain and fatigue.
- Because of her situation, she feels depressed.

[25] The Appellant said warfarin made her feel worse, as described above. Around 2014, after she stopped taking it, she noted some improvements to her overall condition. Her thoughts were clearer, she slept better, and she was less weak.

[26] The Appellant says she is always sore and has aches and pains in her hands, legs, shoulder, feet, elbows, thumbs, and arms because of her fibromyalgia. She can't

¹⁰ I have considered what the Appellant said at the hearing and what she wrote in her February 2014 questionnaire at GD2-230 to 236.

be too active because of her fatigue and shortness of breath, but if she isn't active her pain, soreness, and aches are worse. If she tries to be active, however, she still has aches, pains, and soreness.

[27] The Appellant says that she didn't have many issues with back pain until her accident. She also said she had migraine headaches, before December 31, 2015, but now they are manageable. She also had frequent muscle spasms but now (as of the date of the hearing) they only happen once a week.

[28] The Appellant's husband, A. R., testified at the hearing. He supports what the Appellant says. Here is what he says:

- After her embolism, her health wasn't good. She went from "100 to 0."
- She doesn't have the stamina to do things like cook or clean.
- She has to take many breaks and doesn't finish tasks.
- She gets exhausted after an activity, like watching their son's hockey game.
- Because she is weak and lightheaded, he has to be "on alert" when she showers, just in case something happens.
- Her concentration and memory are poor.
- She gets irritated and angry, which affects their marriage.
- She can't do her old hobbies like fishing and golfing.
- Her breathing is poor.

[29] The Appellant says she has difficulty remembering things about the past.

[30] I found the Appellant tried to describe her limitations to the best of her ability.

[31] During the hearing, I found there were times when the Appellant spoke clearly about her symptoms in the past and present. Other times, it wasn't clear to me what time period she was referring to, even with her representative and I trying to focus on her condition around December 2015. It seemed like she had difficulty focusing and her thoughts were fragmented. This made it hard to determine the severity of her limitations before and after her snowmobile accident.

[32] I acknowledge Mr. R.'s testimony supports the Appellant's testimony. However, I place greater emphasis on what the documentary evidence says about the Appellant's limitations by December 31, 2015. This includes medical evidence and what the Appellant said in her application and questionnaires. I find this evidence more reliably describes the Appellant's limitations by December 31, 2015, after her accident, and now.

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

[33] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2015.¹¹

[34] I find the medical evidence shows she had some limitations that affected her ability to work by December 31, 2015.

– **Evidence dated after the Appellant's snowmobile accident**

[35] Dr. Graff is the Appellant's family doctor. While Dr. Graff supports the Appellant's application, I don't place great emphasis on her reports. In the September 2020 medical report, Dr. Graff says the Appellant has limitations caused by her depression and anxiety that began around 2012. He also notes she had chronic back pain, but says the accident made it worse.

[36] Later, in January 2022, Dr. Graff says the Appellant can't work because of her fibromyalgia, shortness of breath, and anxiety.¹² She doesn't mention any limitations caused by the Appellant's accident in 2017.¹³

[37] I find Dr. Graff's evidence can't reliably show what the Appellant's limitations were and how they affected her ability to work by December 31, 2015. When she filled

¹¹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹² See GD2-119 to 130 and GD4-4.

¹³ See GD4-4.

out the medical report in September 2020, she knew the Appellant for less than a year and had met her once.¹⁴ This was about five years **after** December 2015.

[38] Ms. Cranmer is a social worker. Ms. Gour and Ms. Speers are occupational therapists. They report the Appellant said her conditions were manageable before the accident. Here is what they said:¹⁵

- She was independent in all her daily activities.
- She was always on the go.
- She could do outdoor activities.
- She managed her anxiety well.
- She had issues with her cognition.

[39] I don't find that Ms. Speers, Ms. Gour, or Ms. Cranmer can fully, accurately, or reliably describe the Appellant's limitations by December 31, 2015. Here is why.

[40] First, they didn't treat her around or by December 31, 2015.

[41] Second, I find their reports focus on her limitations after her accident.

[42] Third, they largely rely on evidence that I don't find reliable, which is the Appellant's memory of what her functional limitations were before her accident. They also support that she has major limitations with her memory and ability to participate in meaningful conversations.¹⁶

[43] Fourth, they didn't review much medical evidence from before the accident to support what the Appellant reported.¹⁷

¹⁴ See GD2-119 to 130.

¹⁵ See GD2-131 to 133, GD2-138 to 154, and GD2-1123 to 1147.

¹⁶ See GD2-131 to 133, GD2-138 to 154, and GD2-1123 to 1147.

¹⁷ Ms. Speers said that she didn't have medical evidence about the Appellant's limitations before the accident (see GD2-1071). Ms. Cranmer only reviewed Dr. Sawkiw's (the Appellant's old family doctor) disability certificate (see GD2-1019), which was dated after the Appellant's accident. Ms. Gour only reviewed the evidence from a psychiatrist, Dr. Matthew (see GD2-140).

[44] Given all the evidence, I prefer the evidence dated around December 2015. I find it is more reliable and relevant. I will discuss this evidence next.

– **Evidence dated before the Appellant's snowmobile accident**

[45] Dr. Koka is a psychiatrist. In his assessment, he summarized what the other doctors said about the Appellant's limitations.¹⁸ This includes Dr. Sawkiw, the Appellant's former family doctor, and Dr. Fonberg, a medical consultant.

[46] I reviewed what Dr. Sawkiw said from the evidence included in the appeal file. I have also reviewed what Dr. Koka summarized. Here is what I have considered.

[47] In April 2014, Dr. Sawkiw said she had chest wall pain, fatigue, and was short of breath since her embolism. He said her recovery had plateaued, but he expected her chest pain to resolve.¹⁹ He didn't mention any other limitations or conditions.

[48] In September 2014, Dr. Sawkiw said she had pain, fatigue, and shortness of breath. She could do desk work with no lifting, or a gradual return to work program.²⁰

[49] In December 2014, Dr. Fonberg thought her limitations might restrict her from duties outside of sedentary or light physical demands. This is because of her shortness of breath and fibromyalgia. Her anxiety might contribute to her symptoms. He didn't see symptoms consistent with a condition causing cognitive impairment.²¹

[50] In May 2015, Dr. Sawkiw said she had constant leg pain. She had a hard time focusing. She took medication to control her headaches and anxiety. She was taking medication for her embolism. She was trying to take care of her father with lung cancer, which made her anxiety worse. He thought she would be able to return to work.²²

¹⁸ See GD2-158 to 160. The Appellant's representative said I should consider this evidence to support the Appellant had limitations that affect her ability to work.

¹⁹ See GD2-226 to 229.

²⁰ See GD2-160.

²¹ See GD2-160.

²² See GD2-158.

[51] There is a reference to a June 2015 letter that said, “she is not able to return to work.”²³ There was no author included in this reference. There was no mention of any limitations that affected her ability to work or for how long she was to remain off work.

[52] In May 2016, Dr. Sawkiw said the Appellant’s fibromyalgia, chronic fatigue, and COPD had gotten worse since June 2015. She had **increasing** anxiety and depression because of her parent’s illness.²⁴

[53] In July 2016, Dr. Sawkiw didn’t see any improvement in her symptoms. He thought she was permanently disabled.²⁵

[54] Dr. Koka assessed the Appellant in October 2016.²⁶ He said she reported her depression, anxiety, and fibromyalgia got worse after her embolism. She was nervous, emotional, anxious, and agitated. She had low energy. Her physical health affected her mental health. Given all her symptoms, he didn’t think she would recover.

[55] Dr. Koka supports the Appellant’s application. But, I don’t find that Dr. Koka’s assessment accurately shows what the Appellant’s limitations were by December 31, 2015. His report is almost a year after 2015 and is shortly after Dr. Sawkiw said her symptoms got worse.

[56] When I consider all the evidence, I find the evidence shows the Appellant had limitations that affected her ability to do certain types of work. This includes fatigue, weakness, and shortness of breath. I don’t find she could have worked at her regular job by December 31, 2015.

– **The Appellant has followed medical advice**

[57] To receive a disability pension, an appellant must follow medical advice.²⁷ If an appellant doesn’t follow medical advice, then they must have a reasonable explanation

²³ See GD2-158.

²⁴ See GD2-161.

²⁵ See GD2-158 and 159.

²⁶ See GD2-157 to 177.

²⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.²⁸

[58] The Appellant has followed medical advice.²⁹

[59] The Appellant has taken medication to treat her embolism. She also did pulmonary rehabilitation. She does regular testing to monitor her condition.

[60] The Appellant takes Nortriptyline for her fibromyalgia and symptoms of depression. She says her dosage has increased to 25 mg, 4 times a day, from 5 mg, 1 time a day. She says it helps with her symptoms.

[61] The Appellant won't take stronger pain medications because they are addictive. She had a hard time stopping this type of medication after her accident. She doesn't want to go through that experience again. I find this is a reasonable answer.

[62] 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.³⁰

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

[63] 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

²⁸ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

³⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

[64] 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.³¹

[65] I find that the Appellant could work in the real world by December 31, 2015.

[66] I find the Appellant had some positive characteristics:

- Her age (53 years old by December 31, 2015) may have limited the type of work she could find, but she wasn't close to retirement age.
- She has a high school education and a good work history.
- She has done physically demanding tasks, like loading trucks and stock.
- She has done light work and administrative tasks, like handling bank deposits and hiring and firing employees.

[67] The Appellant says she can't return to her regular job because of her limitations.

[68] I agree.

[69] I don't think the Appellant could have gone back to her regular job as a manager at the LCBO with her limitations after her embolism.

[70] However, I don't find the Appellant's cognitive limitations were so severe that they precluded her from all types of work, even when I consider them with her other limitations, by December 31, 2015.

[71] The Appellant testified that when she stopped taking warfarin in 2014 her thought process was better and she could think more clearly. The medical evidence doesn't note any significant cognitive limitations until her accident in 2017.

[72] I acknowledge the Appellant had limitations caused by her worsening fibromyalgia, fatigue, shortness of breath, and anxiety. But, by December 31, 2015, I find on a balance of probabilities that she was regularly able to do substantially gainful work. This could be lighter duties or part-time work.

³¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[73] The medical evidence supports my findings. Towards the end of 2014, Dr. Sawkiw and Dr. Fonberg thought the Appellant might be able to do lighter duties. By May 2015, Dr. Sawkiw thought she might return to work.³²

[74] I find the Appellant likely could work a lighter or less physically demanding job by December 31, 2015.

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

[75] 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.³³ Finding and keeping a job includes retraining or looking for a job she can do with her functional limitations.³⁴

[76] The Appellant didn't make efforts to work.

[77] The Appellant said she hasn't tried to work since she stopped working in 2013. She didn't try sedentary or lighter duties. She didn't try part-time or modified work.

[78] Because the Appellant hasn't shown that she was unsuccessful in obtaining and maintaining a job suitable to her limitations, I can't find that she had a severe disability by December 31, 2015.

Conclusion

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

[80] This means the appeal is dismissed.

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

³² See GD2-160 and 161.

³³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³⁴ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.