



Citation: *GB v Minister of Employment and Social Development*, 2022 SST 1228

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: G. B.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated April 15, 2021 (issued by
Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Teleconference

Hearing date: November 22, 2022

Hearing participants: Appellant
Appellant's witness

Decision date: December 1, 2022

File number: GP-21-1605

Decision

[1] The appeal is dismissed.

[2] The Appellant, G. B., 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 56 years old. She has worked as a cleaner, cook, and cashier. She has mostly worked at fast food restaurants, where she was also a supervisor, and an assistant manager.

[4] The Appellant stopped working in 2013 in order to care for her daughter, who was diagnosed with terminal cancer. At that time she had back pain, right hip pain, and depression. She acted as a caregiver for her daughter until she passed away in 2016.

[5] Following the death of her daughter the Appellant's medical conditions deteriorated. She attempted to return to work in a fast food restaurant in 2018, where she worked full time until January 2020. In January 2020, the Appellant stopped working due to chronic pain.

[6] The Appellant applied for a CPP disability pension on March 24, 2020. 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.

[7] The Appellant says she spends most of her time in bed due to chronic pain, and she doesn't leave her house. She says she had to stop working because of her medical conditions. She says that her conditions are severe and prolonged.

[8] The Minister says the Appellant didn't stop working due to her medical conditions in 2013. It argues that she has demonstrated a capacity to work. It suggests that the Appellant's work after December 31, 2014 shows that she hasn't had a continuous

disability. Finally, it notes that there is no evidence of any testing or treatment prior to December 31, 2014, to confirm a severe and prolonged disability.

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2014. This date is based on her contributions to the CPP.¹

[10] The *Canada Pension Plan* defines “severe” and “prolonged.”

[11] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.²

[12] 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.

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

[14] 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.

[15] 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.

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 GD2R-7.

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.

Reasons for my decision

[16] I find that the Appellant hasn't proven she had a severe and prolonged disability by December 31, 2014. While she has developed conditions that currently affect her ability to work, her condition deteriorated after December 31, 2014, and I can't consider factors after that date when making my decision.

Was the Appellant's disability severe?

[17] 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 affected her ability to perform some of her work tasks

[18] The Appellant has:

- Low back pain
- Right hip pain
- Depression

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

[20] I find that the Appellant had functional limitations that likely affected her ability to perform some heavy cooking and cleaning tasks as of December 31, 2014.

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

What the Appellant says about her functional limitations

[21] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says the following about her limitations as of December 31, 2014:

- She had to walk slower because her back pain caused issues with balance.
- She could not do heavy lifting and assist her sick daughter with transfers out of bed.
- Standing for prolonged periods caused back pain. She needed supportive shoes.
- Sometimes she wasn't able to make meals or clean dishes due to back pain.
- She had low mood and sadness related to her daughters illness.
- She was unable to wash the floors on her hands and knees, in line with her cultural custom.

[22] The Appellant says her condition deteriorated in 2016, her daughter passed away.⁷

What the Appellant's witness says about her functional limitations

[23] The Appellant's daughter, A. B. gave testimony at the hearing. She said that she currently assists her mother with personal care and housekeeping.

[24] A. said that her mother's condition and ability to function deteriorated over time and that the Appellant was unable to work by 2016, when her daughter passed away.

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

[25] The Appellant must provide some medical evidence that outlines the nature and extent of her disability, findings related to her diagnosis and prognosis, and any

⁷ See GD1-11 and GD2R-37.

limitation resulting from the disability. This can also include other pertinent information, such as recommendations for treatment.⁸

[26] There is no medical evidence for the period prior to December 31, 2014. The earliest medical report available is an MRI report dated April 20, 2016.

[27] The only information available that addresses the Appellant's condition prior to December 31, 2014 are two reports of Dr. Bukovy, the family doctor, from 2020.

[28] Dr. Bukovy completed a medical report for CPP dated March 17, 2020.⁹ In this report he said the onset of the Appellant's conditions were in 2000. He said the depression was severe, however the only treatment was medication, which was started in 2020.

[29] Dr. Bukovy also diagnosed a chronic pain disorder since 2000 in the CPP report. The only limitation related to this was an inability to tolerate standing. Treatments for this condition were confirmed to have started in 2020 in this report.

[30] No supporting medical reports or records were provided with the report of March 17, 2020.

[31] In a narrative report dated September 1, 2020, Dr. Bukovy says the Appellant experienced significant back pain due to an injury in 1996.¹⁰ He said that a CT scan had indicated moderate spinal stenosis, osteoarthritis, and degenerative disc disease. The Appellant was treated with anti-inflammatory medications.

[32] Dr. Bukovy didn't provide a copy of the testing he referenced and the date of the test is unknown. He didn't provide any of his clinical records, despite treating the Appellant since 2000. He provided specialists' reports, however they were all dated after April of 2016.

⁸ See section 68(1) of the *Canada Pension Plan Regulations*; and *KB v. Minister of Employment and Social Development*, 2022 SST 915.

⁹ See GD2R-129.

¹⁰ See GD2R-47.

[33] Dr. Bukovy didn't outline any functional limitations the Appellant had prior to December 31, 2014 in his report, aside from noting the back pain was debilitating at times.

[34] Aside from Dr. Bukovy saying there was an intolerance for standing in his March 17, 2020 report, the only information I have about how the Appellant's back pain affected her ability to work in December 2014, is her testimony about her functional abilities, and the testimony of her daughter.

[35] However I note that the Appellant had engaged in substantially gainful work each year from 2006 until she stopped working to care for her daughter in 2013.¹¹ This is evidence that while her conditions may have been present since 2000, they didn't prevent continuous substantially gainful work for many years thereafter.

[36] There was no significant or material change in the Appellant's medical conditions reported by Dr. Bukovy or the Appellant, for the period from 2013 to December 31, 2014.

[37] There is an orthopaedic report from Dr. Marion dated November 21, 2017.¹² At that time, the Appellant told Dr. Marion her back pain was debilitating for approximately five years and had become severe with constant pain over the past two years.

[38] Unfortunately, Dr. Marion's report doesn't assist me to decide if the conditions were severe and prolonged as of December 31, 2014. I say this because he made only vague statements and he wasn't treating the Appellant prior to 2017.

[39] The Appellant has seen many specialists since 2016 to evaluate her medical conditions. However, none of them treated her or had access to her medical records prior to December 31, 2014 and their opinions aren't helpful in making a decision.

[40] The medical evidence suggests that the Appellant's back pain was at times significant. It is likely that when the Appellant was experiencing back pain that it affected

¹¹ See GD2R-7.

¹² See GD2R-55.

her ability to engage in heavy tasks of a cook and cleaner, including prolonged standing and heavy lifting.

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

The Appellant followed medical advice

[42] The Appellant has followed medical advice.¹³

[43] The Appellant currently takes medication for her conditions. In relation to the period prior to December 31, 2014, Dr. Bukovy said “she had tried Tramacet for a while”.¹⁴

[44] The Appellant has had numerous injections in her back and hip for pain since 2016.

[45] The Appellant told me she did some physiotherapy after she injured her back in 1996. She thinks she also did some physiotherapy in 2011.

[46] The Appellant said she saw a counsellor in 2005 in relation to the death of her brother and mother that year.

[47] The Appellant told me she didn’t have any treatment for physical or mental conditions until after 2016, because she was focused on caring for her daughter. However, there is also no indication that any treatment, aside from pain medication, was recommended during this time.

[48] The Minister hasn’t argued that the Appellant refused to comply with medical advice.

¹³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁴ See GD2R-49.

[49] 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.¹⁵

The Appellant could work in the real world

[50] 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

[51] These factors help me decide whether the Appellant could work in the real world—in other words, whether it is realistic to say that she could work as of December 31, 2014.¹⁶

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

[53] On December 31, 2014, the Appellant was 48 year old and she communicated in English. Her age and communication skills weren't a barrier to working in the real world.

[54] The Appellant has a high school diploma. Her education isn't a barrier for working in the real world or qualifying to re-train for a sedentary job.

[55] The Appellant has worked in manual labour jobs as a cook and cleaner. She has spent years in front line customer service. She was also a supervisor and manager and was responsible for tasks like inventory, supply ordering, and scheduling.

¹⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹⁶ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[56] The Appellant's work experience isn't a barrier for working in the real world. She has residual transferrable skills for customer service and low level management.

[57] I also note that on December 31, 2014, the Appellant was acting as a primary caregiver for her daughter. She took her daughter to appointments, fed and bathed her, rubbed her down, and stayed by her side.

[58] The reason the Appellant wasn't working on December 31, 2014 wasn't related to her medical conditions.

[59] The ability to engage as a caregiver does indicate a capacity for light work.

[60] I find that the Appellant could work in the real world as of December 31, 2014.

The Appellant tried to find and keep a job

[61] 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.¹⁷

[62] The Appellant made efforts to work. But these efforts don't show that her disability gets in the way of earning a living.

[63] The Appellant worked full-time at a fast food restaurant from September 2018 to January 2020. She prepared food, stocked, cleaned, and worked customer service at the drive-thru window. Her shifts were eight hours usually.

[64] The Appellant says the constant standing was too difficult for her. She used special shoes, and a back brace. She would have to end her shift early because of her medical conditions. She quit her job due to her medical conditions.

[65] The Appellant's employer provided evidence that she didn't require accommodations to perform her tasks, or need help from co-workers. The employer

¹⁷ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

said the Appellant was fully capable of meeting her job demands, and had only used five sick days during the course of her employment.¹⁸

[66] The Appellant argued the evidence of the employer is unreliable, because it was provided by the general manager and not her direct supervisor, who had more knowledge.

[67] I find that while the general manager may not have directly supervised the Appellant for every shift, she would still have reliable information to provide. This includes whether the Appellant had required any type of task modification, formal accommodations, and the use of sick time.

[68] The Appellant testified that the general manager was present for a few hours at the end of her daily shifts. Therefore, the general manager would have some knowledge of the Appellant's abilities.

[69] The Minister argued that the Appellant's employment from 2018 to 2020 shows a capacity for work and that her disability wasn't continuous, and I agree with this. She was performing a manual job without accommodations at the full-time level for 17 months and was earning a substantially gainful income.¹⁹

[70] The *Canada Pension Plan Regulations* say that a substantially gainful job is one that pays a salary or wages equal to or more than the maximum annual amount a person could receive for a disability pension.²⁰

The Appellant didn't try to find a suitable job

[71] If the Appellant can work in the real world, she must look for a suitable job or re-train for a job that she could do within her functional limitations.²¹ This includes part-time work.

¹⁸ See GD2R-24.

¹⁹ See GD2R-7.

²⁰ See section 68.1 of the *Canada Pension Plan Regulations*.

²¹ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[72] The Appellant hasn't tried to find a suitable job she could do with her conditions.

[73] The only job the Appellant tried to do since 2013 was her customer service and food preparation job at the fast food restaurant.

[74] I asked her if she had tried reducing her hours and working part-time and she said she never considered working part-time. She said part-time work wouldn't earn enough money to pay her bills.

[75] The Appellant never looked for any type of light or sedentary work. She didn't try to work at any other job that would accommodate her conditions.

[76] The Appellant didn't ask her employer to modify her job tasks or her hours so she could try to continue working.

[77] The Appellant hasn't tried to re-train for work that was sedentary, and wouldn't require manual labour.

[78] Therefore, I can't find that the Appellant had a severe disability by December 31, 2014.

Conclusion

[79] I find that the Appellant isn't eligible for a CPP disability pension because her disability wasn't severe as of December 31, 2014. Because I have found that her disability wasn't severe, I didn't have to consider whether it was prolonged.

[80] This means the appeal is dismissed.

Sarah Sheaves
Member, General Division – Income Security Section