



Citation: *DS v Minister of Employment and Social Development*, 2022 SST 1569

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: D. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated February 9, 2021 (issued by
Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Teleconference

Hearing date: November 30, 2022

Hearing participants: Appellant

Decision date: December 5, 2022

File number: GP-21-2428

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. S., 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 currently 58 years old. He is a certified gas fitter, although he has worked in a broad range of jobs. He attributes the start of his disability to a January 2011 workplace accident.¹ He fell and hurt his back. He later tried many different jobs, but was unable to hold any of them for very long. His symptoms included back pain, poor sleep, weakness, and shortness of breath. He also had other medical conditions, such as chronic obstructive pulmonary disease ("COPD").

[4] This is the Appellant's second application for a CPP disability pension. He first applied in 2015. The Minister of Employment and Social Development ("Minister") denied that application. The Appellant did not appeal it to the Tribunal. The Appellant applied again for a CPP disability pension on October 9, 2019. The Minister refused his application. The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal ("Tribunal").

[5] At the hearing, the Appellant said he has been unable to work since his 2011 workplace accident. He said he had tried many jobs since then, but was never able to hold on to any of them. He said he took extensive amounts of painkilling medication but it wasn't enough. His back condition continued to get worse, and he has developed other medical conditions. He hasn't worked at all for the last 2-3 years. While the

¹ At the hearing, the Appellant referred to a 2010 workplace injury that resulted in a worker's compensation claim. However, the file documents indicate that this injury actually took place on January 3, 2011. See, for example, GD2-208, GD2-211 and GD2-284. The Appellant did have a separate injury in January 2010, but that affected his left shoulder (GD2-219).

Appellant gave several other disability onset dates, none of them were before his 2011 workplace accident.

[6] The Minister says the Appellant may be unable to work now, but was not disabled at the end of 2002. That was when his qualifying period for a CPP disability pension ended. The Minister notes that the Appellant has worked extensively since then, including an extended period in 2018 when his earnings were over \$20,000.00. At the relevant times, his medical conditions did not prevent all types of suitable work. The Minister notes that the Appellant does not claim to have been disabled since the end of 2002. Instead, the Appellant only claimed to be disabled in 2016.

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, 2002. This date is based on his CPP contributions. It is also known as the “MQP”.²

[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.³

[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 usually must also 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 he can regularly do some type of work from which he could earn a living, then he isn’t entitled to a disability pension.

² 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 s. 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on pages GD3-9 to GD3-10.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

[12] This means the Appellant's disability can't have an expected recovery date. The disability must be expected to keep him 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 it is more likely than not that he is disabled.

Reasons for my decision

[14] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2002.

Was the Appellant's disability severe?

[15] The Appellant's disability wasn't severe by December 31, 2002. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations didn't affect his ability to work

[16] By 2015, the Appellant's conditions included chronic low back pain, a herniated disc at L5-S1, chronic narcotic use, COPD, a prostate condition, and rotator cuff tears/tendonitis on both sides.⁵

[17] 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 his medical conditions (not just the main one) and think about how they affected his ability to work.⁸ Importantly, I need to consider this as of December 31, 2002.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁵ GD2-558

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

⁷ See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

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

[18] I find that the Appellant didn't have functional limitations that affected his ability to work by the end of 2002.

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

[19] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. However, he does not say that these functional limitations existed by the end of 2002 (and continuously since).

[20] The Appellant has given several different dates for when his functional limitations affected his ability to work. As noted, he said at the hearing that he had been unable to hold a job since his January 2011 workplace injury.

[21] Before the hearing, the Appellant gave some later dates. In September 2015, he said that he had been unable to work since March 21, 2015. His back pain affected his sleep and his ability to stand and lift. His COPD left him out of breath, tired, and weak.⁹

[22] In October 2019, the Appellant said he had been unable to work since August 2016. He found it hard to breathe. He also had constant back and leg pain.¹⁰

[23] In June 2020, the Appellant said his disability had prevented him from working since 2016. He blamed this on his worsening COPD and back pain. Those conditions were making it harder for him to keep a job. He said he wasn't claiming to have been disabled since 2002.¹¹

[24] In November 2021, the Appellant affirmed that he suffered a herniated disc in a workplace injury. He specifically denied that he was claiming a disability from 2002, and pointed to 2016 as the key date.¹²

[25] The Appellant isn't claiming any functional limitations that limited his ability to work since December 31, 2002. This would appear to prevent any chance of success

⁹ See GD2-564 and GD2-565.

¹⁰ GD2-30

¹¹ GD2-24

¹² GD1-4

on his appeal. However, I will still review the medical evidence around that date, to see if he actually had any functional limitations by then.

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

[26] The Appellant must provide some medical evidence to support that his functional limitations affected his ability to work by December 31, 2002. The CPP Regulations require an appellant to provide evidence of any limitation resulting from a disability.¹³ The Federal Court of Appeal and Federal Court considered this rule (in decisions called *Warren* and *Dean*) and confirmed that an appellant must provide proof of disability by the end of the MQP.¹⁴ Under the CPP, “severe disability” is defined by how a person’s health affects his ability to work. The Federal Court also confirmed that employability is a key measure of severe disability. Thus, to prove he had a severe disability, the Appellant must submit medical evidence to show how his conditions likely affected his employability by the end of 2002.

[27] Medical evidence around that time is minimal. From 1999 to 2002, I see only three medical documents. Those documents do not suggest that the Appellant had any functional limitations by the end of 2002.

[28] The first document is from August 2001, when the Appellant had an upper gastrointestinal X-ray. It showed a small hernia with some reflux, and likely duodenitis (inflamed duodenum).¹⁵ By the time of the next document in November 2001, the duodenitis had resolved.¹⁶ The third document records a visit to Dr. Kelton (family doctor) in November 2002, when the Appellant had cold symptoms.¹⁷

[29] The Appellant’s medical concerns leading up to the end of 2002 appear to have been merely passing. I cannot reasonably conclude that he had any significant

¹³ See s. 68(1) of the *Canada Pension Plan Regulations*.

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

¹⁵ GD2-136

¹⁶ GD2-135

¹⁷ GD2-128

functional limitations by that time. I also note that, in February 2011, Dr. Kelton said there was no history of back pain from 1997 to the beginning of 2011.¹⁸

[30] A much later medical document hints at another issue around 2002. In a June 2014 report by Dr. Goldman (psychologist), I see a reference to the Appellant's alcohol abuse between 2001 and 2003. Dr. Goldman also mentioned some pre-2011 injuries. However, Dr. Goldman added that there were no functional impairments.¹⁹ Also in June 2014, the Appellant said his prior alcohol use had not "affected his responsibilities".²⁰ Once again, this indicates that alcohol use did not affect his ability to work.

[31] The medical evidence doesn't show that the Appellant had functional limitations that affected his ability to work by December 31, 2002. As a result, he hasn't proven he had a severe disability by that date.

[32] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work in the "real world."²¹

[33] I don't have to do that here because the Appellant's functional limitations didn't affect his ability to work by December 31, 2002. Nor did he even allege that he was disabled by December 31, 2002. As a result, he hasn't proven his disability was severe by then. Federal Court of Appeal decisions called *Giannaros* and *Sharma* support that I don't have to consider the Appellant's "real world" characteristics.²²

[34] The *Giannaros* and *Sharma* decisions establish that where a claimant has failed to prove a severe disability, it is not necessary to consider his personal characteristics. The *Dean* decision also says that a claimant can fail to prove a severe disability by failing to provide medical evidence of disability before the key date (December 31,

¹⁸ GD2-211

¹⁹ GD2-187

²⁰ GD2-156

²¹ See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

²² See *Giannaros v. Minister of Social Development*, 2005 FCA 187, and *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

2002, in this case).²³ Decisions of the Federal Court and the Federal Court of Appeal are binding on the Tribunal. As another Tribunal member pointed out, it makes no sense to consider the “real world” context when doing so will not affect the result.²⁴

Conclusion

[35] I find that the Appellant isn’t eligible for a CPP disability pension because his disability wasn’t severe by December 31, 2002. Because I found that his disability wasn’t severe, I didn’t have to consider whether it was prolonged.

[36] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section

²³ See *Canada (A.G.) v. Dean*, 2020 FC 206.

²⁴ See the persuasive Tribunal decision in *Y. P. v. Minister of Employment and Social Development*, (2020) GP-19-135 (General Division).