



Citation: *GL v Minister of Employment and Social Development*, 2022 SST 1319

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: G. L.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated April 28, 2021 (issued by
Service Canada)

Tribunal member: James Beaton

Type of hearing: Teleconference

Hearing date: December 7, 2022

Hearing participant: Appellant

Decision date: December 9, 2022

File number: GP-21-1643

Decision

[1] The appeal is allowed.

[2] The Appellant, G. L., is eligible for a Canada Pension Plan (CPP) disability pension from February 2019 to July 2022. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 65 years old. She worked as an elementary school music teacher. She stopped working in September 2017 due to pain in her neck, shoulders, back, right arm, and right hip.

[4] The Appellant applied for a CPP disability pension on January 23, 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.

[5] The Minister acknowledges that the Appellant's medical conditions cause functional limitations. But according to the Minister, they don't keep her from being able to do some kind of work that she could earn a living from. Since she hasn't tried any work other than her usual job as a teacher, the Minister says she isn't eligible for a disability pension.

[6] The Appellant says she can't work at all because of her functional limitations. That is why she hasn't tried to work since September 2017.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2020. This date is based on her 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

[10] This means I must look at all of the Appellant’s medical conditions together to see what effect they have on her ability to work. I must also look at her background (including her age, level of education, language abilities, 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 regularly able 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, or is likely to result in death.³

[12] 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.

[13] The Appellant must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means she must 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 at GD4-20 and 21.

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

[14] I find that the Appellant had a severe and prolonged disability as of September 2017. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

[15] The Appellant's disability was severe by December 31, 2020. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affected her ability to work

[16] The Appellant has:

- pain in her neck, shoulders, and back
- pain in her right arm and tingling in her right hand
- pain in her right hip
- poor sleep

[17] There is evidence in the Appellant's file that she has experienced headaches and has been anxious at times about the impact of her medical conditions.⁴ However, she testified that headaches aren't an ongoing problem for her. She doesn't consider herself to be an anxious person either. So I will not consider these medical conditions.

[18] I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living by December 31, 2020.⁶ When I do this, I must look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.⁷

⁴ See GD2-65 to 67, 85, 86, 128, 130, 131, and 164 to 167.

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[19] I find that the Appellant had functional limitations by December 31, 2020.

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

[20] The Appellant says her medical conditions have resulted in functional limitations that affected her ability to work by December 31, 2020. She says:

- she can't sit for more than 15 minutes—so she can't use a computer, drive or take public transit for more than 15 minutes either
- she can't walk more than 20 minutes
- she can't talk more than 20 minutes because it causes neck pain
- she can't read more than a few minutes because moving her eyes to read causes neck pain
- she can't lift pots for cooking; she has her groceries delivered because she can't lift them
- she hired a gardener and a housekeeper in 2017
- she no longer volunteers and she isn't as involved in physical activities as she used to be
- she wakes up every 2 to 3 hours due to pain, so she has to nap during the day (once or twice for at least 45 minutes each time)
- she has to be careful to avoid re-injuring her neck because she fractured a neck vertebra when she was 20 years old⁸

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

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

[22] The medical evidence supports **most** of what the Appellant says. It supports that she had functional limitations in the following areas by December 31, 2020:

- sitting, using a computer, and driving

⁸ See the Appellant's application at GD2-32 to 38, and the hearing recording.

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

- standing and walking
- lifting
- cleaning
- reaching and bending¹⁰

[23] It also supports that she had trouble sleeping by December 31, 2020.¹¹

[24] Her family doctor, Dr. Pilapil-Lee, wrote that the Appellant could not teach because minimal movement worsened her symptoms. In particular, writing aggravated the tingling in her arm, and standing increased her pain.¹²

[25] The medical evidence doesn't mention any difficulty with talking or reading. However, it doesn't contradict the Appellant's evidence either. Her reported functional limitations are consistent with her medical conditions. Therefore, I accept her evidence on this point.

[26] There are some instances where the Appellant told her healthcare providers that she continued to be physically active after September 2017.

[27] For example, she told Dr. Dewar (an orthopedic surgeon) in July 2020 that she was doing yoga and Zumba, and walking at least 45 minutes per day.¹³ I asked the Appellant about doing Zumba, which is something she said she had stopped doing in her application.¹⁴ She explained that she doesn't do Zumba in the same way that she used to. That is, it is less like a workout with dancing or jumping. Rather, she focuses on the hip movements and stretches. She believes she didn't fully explain this to Dr. Dewar.

[28] Similarly, she still tries to walk for 20 minutes per day. She said she has to do this for her mental health.¹⁵ She might have been walking more in July 2020. But I still

¹⁰ See GD2-66, 67, 82, 121 to 123, 130, 131, 159, and 160 to 172.

¹¹ See GD2-121 to 123.

¹² See GD2-168 to 172.

¹³ See GD2-87 and 88.

¹⁴ See GD2-34.

¹⁵ The Appellant said this at the hearing.

find that she was only able to walk for about 20 minutes at a time as of December 31, 2020. Dr. Dewar's report doesn't say how long she could walk for at a time, just how long she walked for in a day. So she might have gone for more than one walk per day. This is consistent with Dr. Pilapil-Lee's evidence that the Appellant could not walk for more than two hours in a day.¹⁶

[29] The medical evidence doesn't support that the Appellant has to restrict her movements to avoid re-injuring her neck. Dr. Zwimpfer (a neurosurgeon) concluded that the Appellant "is not at any greater risk for spinal cord injury [than] the general population."¹⁷

[30] The medical evidence supports that the Appellant's functional limitations prevented her from doing her job as a teacher by December 31, 2020. As a teacher, she had to stand and write. Dr. Pilapil-Lee confirmed that the Appellant could not teach anymore.¹⁸

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

– **The Appellant has followed medical advice**

[32] To receive a disability pension, an appellant must follow medical advice.¹⁹ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.²⁰ If they don't have a reasonable explanation, then I must also consider what effect, if any, the medical advice might have had on the appellant's disability.²¹

[33] The Appellant has followed medical advice.²² She has tried:

- physical therapy
- massage therapy

¹⁶ See GD2-159 and 160.

¹⁷ See GD3-3 to 5.

¹⁸ See GD2-170 to 172.

¹⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ See *Brown v Canada (Attorney General)*, 2022 FCA 104.

²¹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

- acupuncture
- chiropractic treatments
- trigger point injections.²³

[34] These provided only temporary relief. She doesn't do them anymore because she can no longer afford them. I accept her explanation. Since these treatments did provide temporary relief, I believe she would have continued with them if she could have afforded it. Furthermore, she told Dr. Pilapil-Lee that a lack of affordability was getting in the way of treatment.²⁴

[35] She reacts poorly to anti-inflammatories, so she doesn't take them. She tried nortriptyline, but it gave her stomach cramps and made her dizzy, depressed, and agitated. She occasionally takes Tylenol. She tried two medications to help her sleep, but neither of them worked.²⁵

[36] Dr. Pilapil-Lee and a physiotherapist both suggested steroid injections for the Appellant's neck pain.²⁶ The Appellant testified that she didn't try steroid injections because they weren't recommended to her by a **surgeon**. She said that neither the physiotherapist nor her doctor would have given her the injections themselves, so she didn't trust their recommendation. She could not remember if Dr. Zwimpfer (the neurosurgeon) recommended steroid injections.

[37] This explanation isn't reasonable. Dr. Pilapil-Lee had the medical knowledge as a general practitioner to make the recommendation, even if someone else would have administered the injections.

[38] But I don't think steroid injections would have made a difference in this case. Dr. Pilapil-Lee didn't given an opinion on whether they would work. The Appellant had already tried many treatments for her pain, including trigger point injections. It is

²³ These treatments are mentioned throughout the Appellant's file. See, for example, GD2-170 to 172. Trigger point injections are mentioned at GD2-134.

²⁴ See GD1-3 to 8, GD2-81, and the hearing recording.

²⁵ See GD1-3 to 8 and GD3-3 to 5.

²⁶ See GD2-81, 121 to 123, and 134.

speculative to say that steroid injections would have provided enough relief, for long enough, to impact her overall disability.

[39] I also find it important that the Minister didn't argue the Appellant's failure to try steroid injections amounted to a failure to follow medical advice.²⁷

[40] 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.²⁸

– **The Appellant can't work in the real world**

[41] 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

[42] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say she can work.²⁹

[43] I find that the Appellant can't work in the real world. She was unable to work by December 31, 2020.

[44] The Appellant is well-educated. She has a bachelor's degree in music, another in education, and a master's degree in education. She has experience as a teacher. She is fluent in English.³⁰

²⁷ The Minister's submissions are at GD4-2 to 8.

²⁸ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³⁰ See GD2-32 to 38.

[45] However, the Appellant was already 63 years old as of December 31, 2020. Her age would have negatively impacted her ability to transition to work outside of teaching. It would have impacted an employer's willingness to hire her for such work, too.

[46] Furthermore, the Appellant's functional limitations were significant. She could not do physical work because of her limitations with standing, walking, lifting, reaching, and bending. She could not do sedentary work either. She could not sit for more than about 15 minutes at a time. In December 2018, Dr. Pilapil-Lee reported that she could not sit for more than two hours in a day.³¹ So the ability to take breaks throughout the day would not have allowed her to work more than two hours at a sedentary job.

[47] Even if the Appellant could work a predictable schedule of two hours per day, and she could find an employer willing to hire her for those hours, she would need to earn at least \$32 per hour to earn a substantially gainful income in 2020.³² I don't believe she could have earned a wage that high doing a job in which she had no previous experience. I don't believe private tutoring would have been a realistic option for her either, considering her physical limitations with reading and writing.

[48] I find that the Appellant's disability was severe as of September 2017. This is the date the Appellant gave in her application for when she could no longer work. It is, in fact, when she stopped working. She testified that she worked as long as she could. She loved her job and she didn't want to retire early. I accept her testimony. I find that she worked as long as she could. When she stopped working, it was because her disability was severe.

Was the Appellant's disability prolonged?

[49] The Appellant's disability was prolonged by December 31, 2020.³³

³¹ See GD2-159 and 160.

³² Section 68.1 of the *Canada Pension Plan Regulations* says that a substantially gainful income in 2020 was \$16,651.92.

³³ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant must show a severe and prolonged disability by the end of their MQP and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

[50] The Appellant's conditions began by September 2017 and continued up to the hearing date, which was December 7, 2022. Dr. Zwimpfer wrote in January 2022 that the Appellant's arm pain and tingling had improved over a couple years, but hadn't resolved.³⁴ There is no indication that her other medical conditions improved much during that time. When I consider this together with the Appellant's testimony, I am convinced on a balance of probabilities that her functional limitations continue to make her severely disabled.

[51] As of the hearing date, the Appellant was already 65 years old. An appellant can't get a disability pension after they turn 65.³⁵ So I don't need to consider whether the Appellant's disability will continue indefinitely.

[52] I find that the Appellant's disability was prolonged as of September 2017, when she stopped working.

When payments start

[53] The Appellant had a severe and prolonged disability in September 2017.

[54] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.³⁶ After that, there is a 4-month waiting period before payments start.³⁷

[55] The Minister received the Appellant's application in January 2020. That means she is considered to have become disabled in October 2018.

[56] Payments of her pension start as of February 2019. Her last payment is for July 2022. This is because she turned 65 that month.³⁸

³⁴ See GD3-3 to 5.

³⁵ See section 70(1)(c) of the *Canada Pension Plan*.

³⁶ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

³⁷ Section 69 of the *Canada Pension Plan* sets out this rule. This means payments can't start more than 11 months before the application date.

³⁸ See section 70(1)(c) of the *Canada Pension Plan*.

Conclusion

[57] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged by December 31, 2020.

[58] This means the appeal is allowed.

James Beaton

Member, General Division – Income Security Section