



Citation: *HP v Minister of Employment and Social Development*, 2023 SST 644

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

# Decision

**Appellant:** H. P.  
**Representative:** Donald Pressé

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated December 14, 2021 (issued  
by Service Canada)

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**Tribunal member:** Connie Dyck

**Type of hearing:** Videoconference

**Hearing date:** February 6, 2023

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** February 9, 2023

**File number:** GP-22-519

## Decision

[1] The appeal is allowed.

[2] The Appellant, H. P., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2019. This decision explains why I am allowing the appeal.

## Overview

[3] A large dog collided with the Appellant on September 15, 2018. Her right knee suffered an injury. She worked as a barista at a university cafeteria. She said she was no longer able to work because of the knee injury. She said she has significant pain when sitting, standing, or walking.

[4] The Appellant applied for a CPP disability pension on November 16, 2020.<sup>1</sup> 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 (Tribunal).

[5] The Appellant says she has knee mobility issues, chronic pain, and fatigue. She says she can't work because of these conditions.

[6] The Minister says the Appellant probably can't do her regular job. But the Minister believes the Appellant can regularly do other suitable work.

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<sup>1</sup> The application is at GD 2-44.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2020. Her contributions to the CPP determine this date.<sup>2</sup>

[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.<sup>3</sup>

[10] This means I must look at all the Appellant’s medical conditions together to see what effect they have on her ability to work. I also must 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 can regularly 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.<sup>4</sup>

[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 that she must show that it is more likely than not she is disabled.

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<sup>2</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 GD 1-96 to 97.

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

<sup>4</sup> 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 2018. 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. I reached this finding by considering several factors. I explain these factors below.

#### – The Appellant's functional limitations do affect her ability to work

[16] The Appellant has arthrofibrosis, right knee trauma and regional pain syndrome (chronic pain).

[17] However, I can't focus on the Appellant's diagnoses.<sup>5</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>6</sup> When I do this, I must look at all the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.<sup>7</sup>

[18] I find that the Appellant has functional limitations that affected her ability to work.

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

[19] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says:

- She had pain in her right knee since the dog ran into her in September 2018. The pain got worse after that. She can't fully extend her leg. This makes walking difficult. She had knee surgery in February 2020. But she still has limitations.

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<sup>5</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

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

<sup>7</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- Since the surgery, her right leg from her groin to her toe is numb. This causes her upper right leg not to work.
- She has pain every day. She never knows from day to day what it will be like. She has had to cancel many planned activities. Because of the uncertainty, she and her family stay home. They can't commit to going out for supper or to a movie.
- Her energy level is very low and any stress causes her pain to flare-up.
- She can't focus or concentrate because of pain. This would make retraining for anything impossible.
- If she goes for a short walk with her husband or son, she uses a walking stick. The next day her pain increases to about 9/10. She can't do anything the next day. She went on two bike rides in 2021. But after each of these rides, she was in severe pain for the next few days and unable to do anything.
- She can stand 15-20 minutes and sit 25 minutes. She can drive a car for 10 minutes before she needs to stop because of pain.
- If she tries to make food for her son, it takes all day with many breaks. If she makes muffins, she will mix the dry ingredients and then need a rest break. She will then mix the wet ingredients before needing a rest break. She can then mix the ingredients, and again she needs a rest break.

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

[20] I believe the Appellant that her pain is very limiting since September 2018. But she must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2020.<sup>8</sup>

[21] The medical evidence supports what the Appellant says.

[22] The Appellant had right knee pain since September 2018 when a dog ran into her knee. Dr. Hickey (family doctor) recommended the Appellant stop working in

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<sup>8</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

September 2018.<sup>9</sup> He thought the Appellant's condition would improve. He hoped she would return to work within one year.<sup>10</sup>

[23] But, the following year, Dr. Hickey said the Appellant had a significant right knee impairment.<sup>11</sup> She was unable to fully extend her knee. She had difficulty standing and sitting. She was unable to return to work.

– **Knee surgery did not improve the Appellant's condition**

[24] In October 2019, Dr. Leighton (orthopedic surgeon) was modestly optimistic that surgery would provide some relief for the Appellant. The Appellant had right knee surgery in February 2020.<sup>12</sup> But she continued to have decreased motion in her knee due to pain.

[25] After her surgery, a new issue arose. She had numbness, burning and prickling feelings from her right thigh to her toe because of a femoral nerve injury.<sup>13</sup> She was referred to neurologists.

– **The Appellant has complex regional pain syndrome**

[26] The neurologists said the tests were normal. They believe the symptoms were consistent with a complex regional pain syndrome.<sup>14</sup>

[27] In August 2020, Dr. Coady (orthopedic surgeon) examined the Appellant.<sup>15</sup> She said the Appellant had significant arthrofibrosis and pain in her leg. She still had numbness in her inner thigh.

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<sup>9</sup> The report is at GD 2-428.

<sup>10</sup> Dr. Hickey's report is at GD 2-433.

<sup>11</sup> Dr. Hickey's report is at GD 2-392.

<sup>12</sup> Dr. Leighton's report is at GD 2-399.

<sup>13</sup> This is at GD 1-21.

<sup>14</sup> The report is at GD 2-296.

<sup>15</sup> The report is at GD 2-394.

[28] Dr. Coady felt the Appellant had a permanent disability of her right leg. The Appellant could only sit for 30-45 minutes. She could only stand for 20-30 minutes. She recommended a referral to the Pain Clinic.<sup>16</sup>

[29] The Pain Clinic doctors concluded the Appellant had persistent pain syndrome.<sup>17</sup> They recommended a Pain Self-Management Group. The Appellant went to this program in September 2021.<sup>18</sup> The program made no change in the Appellant's function except she had a little improvement in confidence.<sup>19</sup>

– **The Appellant has a permanent impairment**

[30] In February 2022, Dr. Leighton said he agreed with Dr. Coady that the Appellant's condition was a permanent impairment. He noted orthopedic surgery, neurology and the pain clinic did nothing to improve her condition. It was his opinion that there was nothing else that orthopedics had to offer surgically or from a physiotherapy standpoint that would lead to a predictable improvement. Total knee replacement would likely make it worse with no benefit. Dr. Leighton reported that the Appellant felt weak every day. Her energy was down. She couldn't sit or stand more than 35-40 minutes.<sup>20</sup>

[31] Dr. Leighton said the Appellant's condition had not improved. It was actually worse in 2022 because of sensory changes in her leg secondary to the nerve block.<sup>21</sup>

[32] The medical evidence supports that the Appellant's right knee, chronic pain and fatigue prevent her from doing any type of work, even sedentary jobs. Further, her ability to do any task is limited to less than 30 minutes before she needs to stop and rest. Her pain is unpredictable. This makes her incapable regularly of going to work.

[33] The Appellant doesn't just have a knee injury. She also has chronic pain. The Appellant's doctors believed her when she reported pain. She was referred to the Pain Clinic. Chronic pain doesn't always show up on tests and imaging. But it can still affect a

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<sup>16</sup> Dr. Coady's report is at GD 2-394 to 395.

<sup>17</sup> This is at GD 1-38.

<sup>18</sup> This is at GD 1-30.

<sup>19</sup> The scores are at GD 1-31.

<sup>20</sup> Dr. Leighton's report is at GD 1-20.

<sup>21</sup> This report is at GD 1-25.

person's ability to work.<sup>22</sup> Chronic pain prevents the Appellant from doing any task more than a few minutes without a break. This includes sitting. I don't see how she would be regularly able to work at a sedentary job with this functional limitation.

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

– **The Appellant has followed medical advice**

[35] To receive a disability pension, an appellant must follow medical advice.<sup>23</sup> If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.<sup>24</sup>

[36] The Appellant has followed medical advice.<sup>25</sup>

[37] She had many sessions of therapy, including physiotherapy, laser, muscle stimulation and acupuncture. She went to a pain management program offered by the Pain Clinic.<sup>26</sup>

[38] She has tried several medications. Both Lyrica and Gabapentin had cognitive side effects. She said the Gabapentin numbed the pain but didn't fix it. Also, she couldn't speak properly.

[39] She tried Chinese herbs, CBD oil and marijuana. Presently, she uses marijuana to help manage the pain. It doesn't take the pain away, but it takes the edge off.<sup>27</sup>

[40] She also has a crash kit bag. She uses items in this bag when she has a sudden flare-up of pain. In the bag are topical creams, a hot water bottle, ice packs, tensor bandages, and medication.

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<sup>22</sup> The Supreme Court of Canada said chronic pain is a potentially disabling condition, even if it isn't supported by objective findings. See *Nova Scotia (Worker's Compensation Board) v Martin*, [2003] SCC 54.

<sup>23</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>24</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>25</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>26</sup> This information is at GD 1-35.

<sup>27</sup> This information is at GD 2-396.



– **Treatments have not improved the Appellant’s conditions**

[41] The Appellant also had right knee arthroscopy and major debridement, plus manipulation of her right knee in February 2020. Unfortunately, the surgery did not improve her function or pain levels. In fact, it made her condition worse.

[42] There are no recommended treatment options that the Appellant has refused. Unfortunately, no more treatment options are available to her.<sup>28</sup> Dr. Leighton said the Appellant has done all the recommended treatments. Despite this she has remained with right leg deformity and discomfort secondary to complex regional pain syndrome plus stiffness of the knee.<sup>29</sup>

[43] I now must 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.<sup>30</sup>

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

[44] When I am deciding whether the Appellant can work, I can’t just look at her medical condition and how it affects what she can do. I must also consider factors such as her:

- age
- level of education
- language abilities
- past work and life experience

[45] 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.<sup>31</sup>

[46] I find that the Appellant can’t work in the real world.

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<sup>28</sup> This is at GD 1-25.

<sup>29</sup> Dr. Leighton’s report is at GD 1-26.

<sup>30</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>31</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[47] I acknowledge that if it was not for the Appellant's disability, she would be employable in the real world. She is young, being only 41 years old when she applied for a CPP disability benefit. She is proficient in at least one of Canada's two official languages. She has completed high school.

[48] The Appellant has limited job experience. She worked as a barista and was self-employed making crafts. Her work experience provides her with some transferable skills. She has experience with customer service and working independently. The Appellant has a work history of over 20 years.<sup>32</sup> She said she would work if she could. I believe her.

[49] The Appellant explained the statement in the pain clinic report that said she worked as a dog breeder. She said her dog has one litter of pups a year. She might take a phone call from someone interested in buying a pup, but there is no breeding business. She is not able to go for a walk with her dogs. Her husband and son do all the care for the dogs. She snuggles with them and basically "babysits" them.

[50] Before her injury, the Appellant sold crafts at flea markets. But she can't do this anymore because she can't physically set up a stand which takes about two hours. She also has no crafts to sell. She testified that at most she can work 30-60 minutes a day on crafts, and only if there are breaks during that time.

[51] She did return to work for a training day in August 2020.<sup>33</sup> She explained that this was a safety course. Attendance was mandatory. Even with changing positions frequently, she couldn't concentrate and was in pain. Her employer told her to go home. She received pay for seven hours but was only there for two hours.

[52] Despite her favourable attributes, I am unable to see how she could return to any type of work or retrain. Her constant pain is unpredictable. It can flare-up at anytime. She is unable to concentrate or focus because of her pain. She is unable to sit or stand

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<sup>32</sup> This is at GD 2-97.

<sup>33</sup> The ROE is at GD 2-32.

more than a few minutes. Any task is limited to a maximum of one hour, with many breaks in between.

[53] I find that the Appellant's disability was severe as of September 2018.

### **Was the Appellant's disability prolonged?**

[54] The Appellant's disability was prolonged.

[55] The Appellant's condition began on September 15, 2018. This condition has continued since then, and it will more than likely continue indefinitely.<sup>34</sup>

[56] Dr. Coady and Dr. Leighton both say the Appellant has a permanent impairment of her right leg. Dr. Leighton says that despite excellent treatment, she has not really improved. Her sensory changes in her leg after the femoral nerve block are worse.

[57] There are no further treatments available for the Appellant.

[58] I find that the Appellant's disability was prolonged as of September 2018.

### **When payments start**

[59] The Appellant had a severe and prolonged disability in September 2018.

[60] But, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.<sup>35</sup> After that, there is a 4-month waiting period before payments start.<sup>36</sup>

[61] The Minister received the Appellant's application in November 2020. That means she is considered to have become disabled in August 2019.

[62] Payments of her pension start as of December 2019.

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<sup>34</sup> In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

<sup>35</sup> Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

<sup>36</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.

## **Conclusion**

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

[64] This means the appeal is allowed.

Connie Dyck  
Member, General Division – Income Security Section