



Citation: *AE v Minister of Employment and Social Development*, 2022 SST 1583

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. E.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated May 27, 2021 (issued by
Service Canada)

Tribunal member: Connie Dyck

Type of hearing: Videoconference

Hearing date: December 7, 2022

Hearing participants: Appellant

Decision date: December 9, 2022

File number: GP-21-1736

Decision

[1] The appeal is allowed.

[2] The Appellant, A. E., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2022. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 44 years old. In 2017, she suffered a concussion. She had some cognitive limitations from post-concussion syndrome. She last worked as a property manager in June 2020 when she was diagnosed with stage III breast cancer. She had chemotherapy and radiation treatments. She says she is unable to work because of cancer fatigue and cognitive difficulties.

[4] The Appellant applied for a CPP disability pension on September 18, 2020.¹ 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 Appellant says she has cancer fatigue and needs to nap one to two hours each day. She also has brain fog which impacts her ability to concentrate, focus, and understand. She needs to take hormone therapy drugs. These medications come with side effects including dizziness, headaches and fatigue. She has tried to stop some of her medications to reduce the side effects. However, despite this effort, she continues to have fatigue which limits her ability to do activities of daily living and work.

[6] The Minister says:

- the expectation is with ongoing treatment and recovery time, the Appellant should be able to return to some type of work in the foreseeable future.

¹ The disability application starts at GD 2-19.

- despite symptoms due to post-concussive syndrome, the Appellant was able to return to alternate work.
- recommended treatments including a Memory and Attention Adaptation Training program (MAAT) for cognitive impairment remained outstanding.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that is severe and prolonged by the hearing date.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 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.

[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 the Appellant out of the workforce for a long time.

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 section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on GD 2-39 - 40. In this case, the Appellant’s coverage period ends after the hearing date (December 31, 2022) so I have to decide whether she was disabled by the hearing date.

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

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

[13] 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

[14] I find that the Appellant had a severe and prolonged disability as of August 2021. 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 had breast cancer and a post-concussion syndrome.⁵

[17] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁷ 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 affect her ability to work.⁸

[18] I find that the Appellant has functional limitations that affect 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 the medications make her tired and have a lack of energy. Her fatigue has worsened and became limiting after her cancer

⁵ This information is at GD 2-146 and GD 3-15.

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.

treatments. She has headaches, dizziness and diarrhea. She also has head “fogginess” and difficulty concentrating and focusing.

[20] She really wants to return to work, but she is not capable. She doesn’t see how she could do any other job, even part-time. She is trying to volunteer for seven hours a week. She volunteers three hours at a food bank and in a hospital doing administrative work. She says she can’t volunteer two days in a row because she is too fatigued and needs the remainder of the day and the next day to rest.

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 the hearing date.⁹

Cognitive functional limitations

[22] The Appellant has had headaches, dizziness, sleep disturbance and reduced attention and memory problems since 2017 when a shelf fell on her head.¹⁰ The Appellant was able to continue working with these limitations for several years.

[23] However, since her cancer treatments, her cognitive impairments have worsened.¹¹ Although there are conflicting medical opinions whether the cognitive impairments were because of the post-concussion syndrome or because of the cancer and treatments, the doctors agree that her cognitive limitations are significant.¹²

[24] The Appellant completed a Memory and Attention Adaptation Training (MAAT) program.¹³ She believes it was in April 2022. She also completed a “Cognitive Symptoms at Work Checklist”. This was to measure self-reported difficulties with cognition that would interfere with work. The Appellant’s score showed 16/20 items with high severity and 1/20 with very high severity. In August 2022, Dr. Laidlaw relied on the

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

¹⁰ Dr. Bogod’s report is at GD 6-2.

¹¹ Dr. Laidlaw’s report is at GD 8-3.

¹² The reports are at GD 5-14, GD 5-19, GD 6-10 and GD 8-2.

¹³ Dr. Laidlaw’s report is at GD 8-3. The Appellant testified the test was completed in April 2022.

results of these tests to conclude the Appellant had very significant cognitive impairments.¹⁴

Cancer fatigue

[25] The Appellant also has what is described as cancer fatigue.

[26] Dr. Shan (Oncologist) said it was expected that chemotherapy and radiation would cure the Appellant's cancer.¹⁵ There is no evidence to suggest that the cancer is not presently in remission. However, it is not the cancer that is limiting the Appellant. Rather, it is the remaining affects of the treatments.

[27] Dr. Shan noted that a side effect of chemotherapy and radiation is fatigue.¹⁶ After her first treatment in July 2020, the Appellant did experience fatigue.¹⁷ Dr. Shan said that after the 7th treatment, the Appellant had more fatigue.¹⁸ In March 2021, the Appellant told Dr. Laidlaw that she continued to be easily fatigued.¹⁹

[28] In August 2022, after the Appellant completed chemotherapy and radiation, Dr. Laidlaw noted that a significant limiting factor for the Appellant was cancer related fatigue and she tired very easily. It was Dr. Laidlaw's opinion that the Appellant would not have the physical stamina to maintain any type of gainful employment.²⁰

[29] I give considerable weight to Dr. Laidlaw's evidence because she is an expert in cancer care and treatment. She has also provided regular care for the Appellant for several years.

[30] The medical evidence supports that the Appellant has cognitive impairments. She has difficulty concentrating, focusing and "brain fog". These impairments and her

¹⁴ This report is at GD 8-3.

¹⁵ Dr. Shan's report is at GD 2-53.

¹⁶ Dr. Shan's report is at GD 2-165 and GD 2-173.

¹⁷ This is at GD 2-175.

¹⁸ This is at GD 2-86.

¹⁹ Dr. Laidlaw's report is at GD2-106.

²⁰ Dr. Laidlaw's report is at GD 8-3.

cancer fatigue prevent her from not only returning to her previous job, but any job, even part-time work.

[31] When I consider her cognitive impairments together with her cancer fatigue, I am persuaded that on the balance of probabilities she can't return to not only her previous job, but any type of employment even part-time.

The Appellant's volunteer attempts are not evidence of work capacity

[32] I considered whether the Appellant's volunteer efforts were evidence that she had work capacity. I don't believe they are for the following reasons.

[33] The Appellant volunteers three hours a week at a food bank sorting and handing out food. She is able to sit for these three hours and can take breaks when needed. There are more hours available, but this is all she can do. She can't volunteer two days in a row, because she needs to rest for several days to recover because of fatigue.

[34] Since August 2022, the Appellant volunteers at a hospital doing administrative work since August 2022. She says she folds letters and puts them in envelopes. She also puts dates and addresses on template letters. Again, more hours are available but she is not physically able to do more. She says she is really exhausted after four hours and she is not sure how long she will be able to continue.

[35] I don't see how these volunteer attempts show work capacity. The Appellant is volunteering the most hours that she is physically capable of, seven. She also must spread these seven hours over a week, because she needs days to rest and recover from the fatigue. These volunteer tasks are flexible and there are no expectations, deadlines or productivity requirements. The Appellant is able to sit, take breaks when she needs to and work at her own pace. This isn't comparable to a real world work situation, nor does it suggest the Appellant would be capable regularly of gainful employment.

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

The Appellant has followed medical advice

[37] To receive a disability pension, an appellant must follow medical advice.²¹ 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.²²

[38] The Appellant has followed medical advice.²³

[39] The Appellant regularly sees her family doctor. She follows up with her cancer doctors. She has done surgery, chemotherapy and radiation. She has tried numerous hormone therapy medications even when these medications cause significant side effects.

[40] The Minister said that because treatment and investigations had not yet been completed, it was too soon to determine if the Appellant's medical conditions would prevent her from all types of work indefinitely. I disagree.

[41] The Appellant completed chemotherapy and radiation more than one year ago. She has also completed numerous investigations and tests regarding her cognitive impairment.

[42] In submissions of July 2022, the Minister said the recommended treatment of a Memory and Attention Adaptation Training program (MAAT) for cognitive impairment remained outstanding. However, as reported by Dr. Laidlaw in August 2022, this program was completed.²⁴ Dr. Laidlaw partially relied on the results of program to conclude that the Appellant had very significant function cognitive impairments.

[43] The one treatment recommendation that has not been completed is an occupational therapy assessment by a neuro-OT specialist. However Dr. Laidlaw notes this service is not available at BC Cancer or in the public system. The Appellant said

²¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²² See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁴ This is at GD 8-3.

she had talked to her long term disability provider about this treatment, but they have not been willing to proceed with this treatment. The financial cost is high, around \$5,000. I accept the Appellant's reason that she can't afford this treatment on her own. The Appellant testified that another deterrent in having this assessment was that her work place didn't think it was necessary.

[44] I see no suggestion in any of the medical evidence that the Appellant didn't follow advice. In fact, she has been persistent in pursuing treatment and trying to reduce her medications to improve her fatigue. Unfortunately, this has not been successful.

[45] 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.²⁵

The Appellant can't work in the real world

[46] 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

[47] 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.²⁶

[48] I find that the Appellant can't work in the real world.

²⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁶ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[49] The Appellant is still only 44 years old and speaks English fluently. She also has two years of university and she completed a X/rental real estate course in October 2013. These are all positive factors.

[50] The Appellant has worked as a X manager since January 2014. She managed trades, obtained quotes, developed properties and prepared budgets. This is a job that requires high cognitive function.

[51] The Minister appears to accept that the Appellant may not be able to do her usual job or jobs that require increased mental tasking.²⁷ I agree. The real question is whether it is realistic for her to do anything else in the real world.

[52] Before she worked as a X manager in January 2014, the Appellant worked at low level entry jobs including as a gas jockey and in a retail store. Presently, the Appellant volunteers doing very basic administrative tasks and sorting food donations. All of these jobs would provide the Appellant with very few transferable skills.

[53] The Minister says the Appellant should be able to perform less demanding work suitable to her limitations. While I agree that she may have transferable skills for work that requires less cognitive skill, her fatigue is still a barrier for this type of work. The Appellant can't work at a sedentary volunteer task for more than 3-4 hours and needs several days to rest and recover afterwards. She has no productivity expectations and can work at her own pace.

[54] Based on both her cognitive limitations and her chronic fatigue, it is not realistic to expect that the Appellant could be employed in the real world.

[55] I find that the Appellant's disability was severe as of August 2022. This is when the medical evidence shows the Appellant's cognitive limitations were a very significant functional impairment in her ability to work. Her fatigue was ongoing since the start of her chemotherapy treatments in 2020. But by August 2022, it deteriorated to the point the Appellant would not have the physical stamina to work at anything for more than a

²⁷ This is in the Minister's submissions at GD 7-9.

few hours. Dr. Laidlaw said she would not have capacity to maintain any type of gainful employment.²⁸

Is the Appellant's disability prolonged?

[56] The Appellant's disability is prolonged.

[57] The Appellant's cognitive limitations began in 2017. However, when a disability begins and when it becomes severe is a question of fact.²⁹ The Appellant was able to continue at modified duties after her injury in 2017. But, after her cancer treatments in 2020, her cognitive abilities worsened.³⁰ By August 2022, Dr. Laidlaw said the Appellant had very significant functional cognitive impairments.³¹

[58] Her cancer fatigue began in 2020 while in chemotherapy treatments.³² The Minister says the expectation was with ongoing treatment and recovery time, the Appellant should return to some type of work in the foreseeable future. However, this has not been the case in over two years.

[59] The medications she needs to continue to take for her post-cancer therapy continue to cause her fatigue. In August 2022, Dr. Laidlaw said the Appellant fatigued very easily. It was her opinion that the Appellant did not have capacity to maintain any type of gainful employment.

[60] I recognise that in September 2020, Dr. Shan said the Appellant may be able to return to other work in 6-12 months. However, this was a conditional prognosis dependent on the Appellant's recovery.³³ The Appellant's treatments had only started when he completed his report. Two years after treatments, her cognitive limitations and fatigue had actually worsened.

²⁸ This report is at GD 8-3.

²⁹ See *Forrester v. MHRD* (November 7, 2003), CP 20789 (PAB). This decision is not binding on me, but I find it persuasive.

³⁰ The reports are at GD 5-14, GD 5-19, GD 6-10 and GD 8-3.

³¹ This report is at GD 8-3.

³² This report is at GD 2-86.

³³ This is at GD 2-149.

[61] The Appellant's cognitive limitations and cancer fatigue have continued since 2020 and they will more than likely continue indefinitely.³⁴

[62] I find that the Appellant's disability was prolonged as of August 2022 when Dr. Laidlaw concluded the Appellant would not have capacity for any type of work.

When payments start

[63] The Appellant's disability became severe and prolonged in August 2022.

[64] There is a four-month waiting period before payments start.³⁵ This means that payments start as of December 2022.

Conclusion

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

[66] This means the appeal is allowed.

Connie Dyck

Member, General Division – Income Security Section

³⁴ 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.

³⁵ Section 69 of the *Canada Pension Plan* sets out this rule.