Citation: *TD v Minister of Employment and Social Development*, 2023 SST 129

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	T. D.
Representative on record:	Paul Sacco
Representative at the hearing:	Steven Sacco
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 31, 2021 (issued by Service Canada)

Tribunal member:	James Beaton
Type of hearing:	Teleconference
Hearing date:	February 7, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	February 13, 2023
File number:	GP-22-110

Decision

[1] The appeal is dismissed.

[2] The Appellant, T. D., 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 39 years old. He last worked as a civil engineering technologist. He stopped working in July 2018 because of anxiety and depression.[1] He also gets migraines.

[4] The Appellant applied for a CPP disability pension on June 9, 2021. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Minister argues that the Appellant hasn't exhausted all treatment for his medical conditions because he hasn't treated his cannabis use disorder.

[6] The Appellant says he has decreased his cannabis use and that stopping altogether would not change his condition.

[7] I agree with the Minister.

What the Appellant must prove

[8] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2020. This date is based on his contributions to the CPP.[2]

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[1] See GD2-227 and 228.
[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 at GD2-5.

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

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[3]

[11] 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 must also look at his background (including his 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 his disability is severe. If the Appellant is capable regularly of doing some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

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

[13] 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.

[14] 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 that it is more likely than not he is disabled.

Matters I have to consider first

I didn’t allow the Appellant to submit documents after the hearing

[15] At the hearing, the Appellant mentioned that he had participated in a psychiatric assessment the day before the hearing. The assessment was done by a psychiatrist he had not seen before, at the request of his private disability benefits insurer. His representative asked if they could submit the psychiatrist’s report after the hearing.

[16] The forthcoming report would be new evidence that could not have been filed earlier. Accepting the evidence would not be unfair to the Minister.

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[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.

[17] However, I decided not to give the Appellant time to submit the report because it would not have changed the fact that the Appellant hasn't followed the advice of three medical professionals to limit his cannabis use, as I will discuss later in this decision. In other words, the report would have been irrelevant to the determinative (key) issue in this appeal.

[18] Alternatively, if the report were to address the Appellant's cannabis use, I would still prefer the opinions of the three medical professionals whose reports I already have. Those professionals include two psychiatrists and the Appellant's family doctor. They all saw him multiple times, over a long period of time. The new psychiatrist only assessed him once, more than two years after December 31, 2020.

[19] In addition, the Appellant didn't know when he would get the report. Waiting for the report for an indefinite period of time would have unnecessarily delayed the resolution of this appeal.[5]

Reasons for my decision

[20] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2020.

Was the Appellant's disability severe?

[21] The Appellant's disability wasn't severe by December 31, 2020. I reached this finding by considering several factors. I explain these factors below.

– **The Appellant's functional limitations affected his ability to work**

[22] The Appellant has anxiety, depression, and migraines.

[23] However, I can't focus on the Appellant's diagnoses.[6] Instead, I must focus on whether he has functional limitations that got in the way of him earning a living by

[5] Section 42 of the *Social Security Tribunal Rules of Procedure* sets out the factors I must consider when deciding whether to accept late evidence.
[6] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

December 31, 2020.[7] 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 his ability to work.[8]

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

– What the Appellant says about his functional limitations

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

- He can't keep a regular sleep schedule. He wakes up very early (2:00 AM) or quite late (2:00 PM), and he naps during the day. He doesn't feel rested.
- He is unmotivated. He struggles to complete tasks. He doesn't eat proper meals, take care of his personal hygiene, or do many chores. Some days, he can't motivate himself to get out of bed.
- He has trouble focusing and remembering things.
- He gets anxious when dealing with people and feels "drained" afterward. He prefers to avoid dealing with people if possible.
- He gets migraines, which he described as a "nuisance" at the time that he stopped working. Their frequency has changed over time. He used to get two per month on average. He hasn't had a migraine now for three months.[9]

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

[26] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2020.[10]

[27] The medical evidence supports what the Appellant says.[11]

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[7] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[8] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[9] What the Appellant says about his functional limitations can be found on the hearing recording and at GD2-33 to 51. The Appellant's testimony about migraines is at 00:43:55 to 00:46:35 of the hearing recording.
[10] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[11] See, for example, GD2-90, 102 to 105, 116 to 119, 123 to 130, 180 to 182, 199, 208 to 210, 227, 228, 230, 234, 239, 251, 263, 264, 267, 364, 365, 368, and 369.

[28] I disagree with the Minister that there isn't enough medical evidence around 2020 to support that he had severe functional limitations by then. The Appellant saw his family doctor (Dr. Pezzutto) five times during that period.[12] In addition, he was seeing a psychologist (Dr. Nelson) throughout 2020.[13]

[29] Dr. Pezzutto's notes show that the Appellant's condition stabilized in 2020. At times, she even described him as doing well or having "ups and downs" but "no major issues." Yet at the same time, she wrote that he continued to experience low mood, an irregular sleep schedule, fatigue, and poor motivation. In context, her notes support the Appellant's testimony. Unfortunately, I have no notes from Dr. Nelson from 2020.[14]

[30] The medical evidence supports that the Appellant's functional limitations prevented him from doing his job as a civil engineering technologist by December 31, 2020. He could not predictably attend work due to his irregular sleep schedule and lack of motivation.

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

– **The Appellant didn't follow medical advice**

[32] To receive a disability pension, an appellant must follow medical advice.[15] If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.[16] 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.[17]

[33] The Appellant didn't follow medical advice. He didn't give a reasonable explanation for not following the advice.

[34] Dr. Pezzutto and two psychiatrists (Dr. Gangdev and Dr. Lefcoe) told the Appellant to decrease his cannabis use. The Appellant testified that Dr. Pezzutto

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[12] See GD2-400, 412, 414, 415, and 417.
[13] See GD2-116 to 119, 422, and 423.
[14] See GD2-400, 412, 414, 415, and 417.
[15] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[16] See *Brown v Canada (Attorney General)*, 2022 FCA 104.
[17] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.

wanted him to stop using cannabis completely. He stopped seeing Dr. Gangdev because Dr. Gangdev didn't think he could help the Appellant as long as he continued to use cannabis. Dr. Gangdev believed his cannabis use likely amounted to an addiction.[18]

[35] The Appellant hasn't adequately addressed his cannabis use. He attended an addiction treatment program three times, each time through the same provider. I have no records from that program, but it is referenced in Dr. Pezzutto's notes. Based on her notes and the Appellant's testimony, I understand that he attended:

- for the first time around October and November 2017, for 3 to 6 months in total, involving 5 to 10 appointments with a counsellor
- for the second time around October 2018, for 3 to 6 months in total, involving 5 to 10 appointments with a counsellor
- for the third time after August 2021, virtually (due to the covid pandemic)[19]

[36] He says he decreased his cannabis use each time. However, the evidence shows that he only did so temporarily. In February 2019, he was using 0.2 grams per day, down from 2 grams per day in November 2017 and August 2018. But by July 2019, he was using 1 gram per day, and by August 2020 he was using 2 grams per day. He was still using 1 to 2 grams per day in November 2020, and 1 to 1.5 grams per day in May 2021.[20]

[37] The Appellant's ongoing cannabis use isn't because he struggles with an addiction. This isn't a case where an appellant has tried to decrease or stop using a substance but was unsuccessful because of their addiction. Rather, the Appellant admits that he doesn't **want** to stop using cannabis, or limit it as much as his healthcare providers want him to. He attended treatment programs "at the behest of" Dr. Pezzutto, to "honour [her] request." The program counsellors had him set goals for himself when

[18] See GD2-140 to 143, 234, 415, 428, and 430. The Appellant's testimony about his cannabis use is at 00:49:00 to 00:49:40 and at 00:55:10 to 01:02:50 of the hearing recording.
[19] See the hearing recording and GD2-165 to 170, 199, 210, 284, and 385.
[20] See GD2-208, 209, 234, 364, 365, 369, 370, 415, 417, 422, and 423.

he enrolled in the program. He simply didn't share the same goals as Dr. Pezzutto or Dr. Gangdev, who wanted him to stop using cannabis.[21]

[38] He says he doesn't want to stop using cannabis because he stopped before, and he didn't notice a difference in his symptoms. But that was for 14 months in 2015 and 2016, when he was still working. There is no evidence that symptoms of anxiety or depression were impacting his ability to work then. His condition got worse after he started using cannabis again, although not immediately.

[39] This doesn't mean his cannabis use explains all of his symptoms. But neither does it support his argument that cannabis use has no impact on his symptoms **now**.

[40] Furthermore, he told Dr. Pezzutto and Dr. Lefcoe that he stopped using cannabis before, and it didn't make a difference. He told Dr. Lefcoe that he had been using cannabis since age 15. Apparently, this didn't convince Dr. Pezzutto or Dr. Lefcoe, since they both still recommended that he further limit his cannabis use.[22]

[41] Finally, I note that this isn't a case of an appellant being discharged from a program where he didn't meet the expectations of the program providers.[23] There is no evidence that the Appellant was discharged early from the program any of the three times he attended. Indeed, the Appellant might have met the goals that he set for himself. In that sense, he completed the program successfully. The problem is that he didn't make **genuine efforts** to do what his family doctor and two psychiatrists told him to do. He testified that he disagreed with their advice. Going through the motions of attending a program, even three times, isn't the same thing as making reasonable efforts to follow medical advice.

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[21] See the hearing recording.
[22] See Dr. Lefcoe's notes at GD2-140 to 143. Dr. Pezzutto's latest notes say: "has tried quitting cannabis in past and did not help his condition" (GD2-422 to 423). However, Dr. Pezzutto still wanted him to stop using cannabis, according to the Appellant's testimony.
[23] The facts in this case are different than the facts in *Pinhorn v Minister (Employment and Social Development)*, AD-22-366.

[42] I must now consider whether following this medical advice might have affected the Appellant's disability.

[43] I find that following the medical advice might have made a difference to the Appellant's disability. Dr. Pezzutto, Dr. Gangdev, and Dr. Lefcoe all believed that cannabis use was contributing to the Appellant's anxiety- and depression-related symptoms.

[44] Dr. Pezzutto completed paperwork for the Appellant's private disability benefits insurer. She was asked to "describe all factors that may have contributed to the onset of the clinical problem(s) or may complicate their resolution." She listed marijuana. In a clinic note, she wrote "pot big factor" regarding the Appellant's symptoms of anxiety and low mood. In a separate clinic note, she wrote that cannabis use might be contributing to his low energy as well.[24]

[45] In one of his last reports to Dr. Pezzutto, Dr. Gangdev wrote that the Appellant continued to use "**marijuana all day every day**" (his emphasis), and recommended that he address this problem. In a later note, Dr. Gangdev wrote that the Appellant was using cannabis less frequently throughout the day, but that he still needed to address his problematic cannabis use. In fact, addressing his cannabis use (and excessive computer gaming) was his only recommendation at that time, apart from continuing with his medications.[25]

[46] After assessing the Appellant, Dr. Lefcoe concluded by recommending that he increase his Wellbutrin dosage, document his mood over a six-week period, exercise more, and decrease his cannabis use. Addressing his cannabis use was a key component of Dr. Lefcoe's treatment plan for the Appellant.[26]

[47] The Appellant testified that his other medical condition—migraines—was a "nuisance" that didn't make him incapable regularly of working before, and would not do

[24] See GD2-165 to 170, 284, and 414.
[25] See GD2-428 and 430.
[26] See GD2-140 to 143.

so now. I agree. He has had migraines for over a decade.[27] He doesn't take any medication for them anymore (he used to take Cambia) because they aren't as frequent.[28] He hasn't had a migraine for three months.

[48] The Appellant didn't follow medical advice that might have affected his disability. This means his disability wasn't severe.

[49] When I am deciding whether a disability was severe, I usually have to consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work.[29]

[50] I don't have to do that here because the Appellant didn't follow medical advice and didn't give a reasonable explanation for not following the advice. This means he hasn't proven his disability was severe by December 31, 2020.[30]

Conclusion

[51] I find that the Appellant isn't eligible for a CPP disability pension because his disability wasn't severe by December 31, 2020. Because I found that his disability wasn't severe, I didn't have to consider whether it was prolonged.

[52] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section

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[27] See GD2-208 and 209.
[28] See GD2-208, 209, and 239.
[29] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[30] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.