



Citation: *AT v Minister of Employment and Social Development*, 2023 SST 1273

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** A. T.  
**Representative:** Chantelle Yang

**Respondent:** Minister of Employment and Social Development  
**Representative:** Sandra Doucette

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**Decision under appeal:** General Division decision dated October 11, 2022  
(GP-21-966)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Teleconference  
**Hearing date:** July 20, 2023  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** September 14, 2023  
**Corrigendum date:** September 19, 2023  
**File number:** AD-23-6

## Decision

[1] The appeal is allowed. I am granting the Appellant a Canada Pension Plan (CPP) disability pension.

## Overview

[2] The Appellant is a professional engineer with a long work history. He also has a master's degree in psychology. In January 2018, he sustained a concussion in a car accident. After a few days off, he attempted to return to work but left after a month because he found it overwhelming. He has not worked since and is now 57 years old.

[3] In August 2019, the Appellant applied for a CPP disability pension. He claimed that he was unable to work because of post concussion syndrome and post traumatic stress disorder (PTSD). The Minister of Employment and Social Development (Minister) refused the application after determining that the Appellant did not have a severe and prolonged disability as of December 31, 2021, the last time he had CPP disability coverage.

[4] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found that, while the Appellant could no longer work as an engineer, he was probably capable of less stressful jobs.

[5] The Appellant then applied for permission to appeal to the Appeal Division. Earlier this year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Last month, I held a hearing to discuss his disability claim in full.

## Preliminary Matters

### This appeal operated under new rules

[6] On December 5, 2022, the rules governing the appeals to the Social Security Tribunal changed.<sup>1</sup> Under the new rules, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division. As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about whether the Appellant became disabled during his coverage period.

### The parties reached a post-hearing settlement

[7] After the hearing, I gave the parties permission to submit additional material and allowed them both reasonable response periods.<sup>2</sup> After reviewing the Appellant's post-hearing evidence, the Minister conceded that the Appellant was disabled during his coverage period and requested a settlement conference to discuss the matter further.<sup>3</sup>

[8] At the settlement conference, the parties reached an agreement. They have asked me to prepare a decision that reflects that agreement.<sup>4</sup>

## Issue

[9] For the Appellant to succeed, he must prove that, more likely than not, he had a severe and prolonged disability during his coverage period. The parties agree that the Claimant's coverage ended on December 31, 2021.<sup>5</sup>

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<sup>1</sup> The Appellant is subject to the new rules because his application for permission to appeal was filed with the Tribunal on December 29, 2022.

<sup>2</sup> See Minister's post-hearing submissions dated July 26, 2023 (AD11) and Appellant's post-hearing submissions dated August 3, 2023 (AD12).

<sup>3</sup> See Minister's letter dated August 29, 2023, AD13,

<sup>4</sup> Refer to recording of settlement conference held on September 14, 2023.

<sup>5</sup> Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Appellant's CPP contributions are listed on his record of earnings at GD2-88.

[10] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>6</sup> A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.

[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>7</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

[12] In this appeal, I had to decide whether the Appellant became disabled before December 31, 2021, and has remained so ever since.

## **Analysis**

[13] I have applied the law to the available evidence and concluded that the Appellant had a severe and prolonged disability as of December 31, 2021. I am satisfied that the Appellant's mental and psychological conditions do not permit him to deliver the kind of regular performance demanded in a commercial workplace.

### **The Appellant's disability is severe**

#### **– The Appellant's car accident left him with significant impairments**

[14] Prior to his car accident, the Appellant had a demanding job as a project manager for an engineering firm. Among other things, he supervised multi-disciplinary teams of engineers and designers in planning and executing large scale industrial projects.

[15] On January 14, 2018, while driving, the Appellant struck another vehicle that had suddenly pulled ahead of him on a highway. He sustained "whiplash" injuries to his head and neck but, at the time, they did not seem serious enough to warrant medical attention. The next day he went to work, but he couldn't read, and he couldn't focus. He

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<sup>6</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>7</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

got through his workday and saw his family doctor, who set out a treatment plan and referred him to a wide variety of therapists and specialists.

[16] In the month following the accident, the Appellant kept trying to work but was unable to cope with the pressures of his job. He experienced the following symptoms:

- Short-term memory loss
- Inability to concentrate
- Anxiety and panic attacks
- Constant headaches of varying intensity
- Nausea associated with anxiety and headaches
- Sleeplessness
- Daytime fatigue
- Mood fluctuations

[17] The Appellant's condition has improved with treatment, but he no longer has the analytical or executive functioning necessary to do his old job. More to the point, his cognitive and psychological impairments render him regularly incapable of **any** substantially gainful employment.

**– The Appellant's recovery has likely plateaued**

[18] Following his accident, the Appellant's early outlook for recovery was optimistic. In March 2018, Dr. Wilson, his family doctor at the time, said that the Appellant was "making progress" and would likely be back at work within a month.<sup>8</sup> In June 2018, Dr. Josephs, his neuropsychologist, expected the Appellant to make a gradual return to work by the fall: "While the prognosis for full recovery is good, if a careful titrated plan is not adhered to for work return, he can regress to feeling overwhelmed and fatigued."<sup>9</sup>

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<sup>8</sup> See office note by Dr. Richard Wilson, general practitioner, dated March 20, 2018, GD2-126.

<sup>9</sup> See Great West Life questionnaire completed on June 5, 2018, by Dr. Edward Josephs, neuropsychologist, GD2-102.

[19] These reports indicate that the Appellant's condition was delicate in the months after his accident. Still, Dr. Josephs continued to report "slow" progress.<sup>10</sup> In January 2020, the Appellant's insurer referred him to Emma Haley, an occupational therapist. On assessment, Ms. Haley found that the Appellant did not meet the required physical, functional, or cognitive job demands of performing his pre-disability position of senior engineer.<sup>11</sup> She did not comment on his fitness for another occupation, but she did make the following observations:

- The Appellant was able to sit for 120 minutes and endure reaching activities for 60 minutes. He was able to use a desk top computer for 40 minutes but reported feeling terrible afterwards.
- Testing for visual motor speed and reaction time produced scores in the lowest decile. The Appellant's cognitive efficiency index score (0.26) yielded a result just above poor.
- The Appellant's response to stress was rated "severe and his fatigue was rated "moderate."

[20] Ms. Haley concluded that the Appellant was limited due to fatigue, pain, overstimulation, and cognitive functioning. She added that she had spoken to Dr. Josephs, who said that the Appellant's brain was still recovering from the concussion, and that healing might take another six months to a year.<sup>12</sup>

[21] However, despite Dr. Joseph's hopeful estimate, the medical evidence shows that the Appellant was still struggling with symptoms from his head injury more than a

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<sup>10</sup> See Dr. Joseph's reports dated January 14, 2020 (GD2-93)

<sup>11</sup> See Concussion Clinic Assessment Report dated January 15, 2020 by Emma Haley, occupational therapist, GD2-78.

<sup>12</sup> Dr. Josephs reinforced this view in a report written around the same time: "At present, although his symptoms have reduced, he is not able to return to work. It is crucial for a maximal recovery, that he be afforded the time that it takes to recover from what is considered to be a brain injury." See report dated January 14, 2020, GD2-93.

While he may be able to return to his previous job in the future, it is by no means a certainty.

year later. Dr. Wilson and his successor as the Appellant's family physician, Dr. Maleki, documented the Appellant's ongoing memory, anxiety, and cognition problems.<sup>13</sup>

[22] In December 2020, the Appellant's insurer commissioned an independent neuropsychological assessment.<sup>14</sup> The assessor, Dr. Rachele Dominelli, found that the Appellant had strong reasoning, mathematic, and visual-perceptual abilities with only "mild" anxiety and neurocognitive symptoms. However, she also noted a "high level of distress associated with engaging in cognitively demanding tasks." Asked about returning to alternative employment with lower cognitive demands, Dr. Dominelli replied that the Appellant's prospects were "fair to good":

[The Appellant] has the cognitive abilities to succeed in alternative employment with lower cognitive demands. The factors currently limiting a return to paid employment are his fatigue, limited stamina/tolerance for cognitive/physical tasks and high level of distress when faced with performance/time pressure. These persistent issues would likely make him susceptible to decompensate in a work environment at present. With continued treatment for persisting psychological distress, consolidated sleep, and increased activity stamina, he may be able to attempt a gradual return to alternative employment with lower cognitive demands on a part-time, flexible work schedule.

[23] These many qualifiers suggest that, notwithstanding Dr. Dominelli's outward optimism, she did not view the Appellant's successful re-entry into the work force, even at a low level, as a certainty.

[24] By April 2022, more than four years after the Appellant's accident and only a few months after the end of his coverage period, Dr. Josephs continued to see progress, albeit slow progress. Still, his formerly positive prognosis had undergone an evolution:

At this point, I do not feel that the patient would do well with increased demands and pressure of a job. He is able to do some limited work in his home environment because he is able

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<sup>13</sup> See office notes by Dr. Wilson dated November 3, 2020 (GD6-8) and by Fariba Maleki dated November 18, 2021 (GD6-6).

<sup>14</sup> See Independent Neuropsychological Evaluation Report dated December 21, 2020 by Rachele Dominelli, neuropsychologist, GD9-3.

to go at his own pace and stop when it become too much, a very unpredictable schedule.<sup>15</sup>

[25] As the Appellant's primary treatment provider, it is perhaps understandable that Dr. Josephs would be predisposed to see ongoing improvement in his patient's condition. However, by his own account, such improvement, if any, has been modest at best. In his most recent report, Dr. Josephs concedes that, years after the accident, the Appellant is unable to withstand the demands and pressures of not just his previous job, but **any** job that requires a predictable schedule.

[26] Based on this evidence, I am satisfied that the Appellant's condition had effectively plateaued by the end of his coverage period.

– **The Appellant's impairments prevent him from delivering consistent performance**

[27] The Appellant suffers from anxiety and cognitive impairments that are a direct result of his car accident. The evidence indicates that Appellant's problems are mainly mental and psychological, but they are no less debilitating for that. At the hearing, the Appellant testified that he gets panic attacks roughly once a week—even though he is not working. He said that, because they are triggered by stressful situations, he could not manage the demands of any job:

I have to pace my activity level. I have not got to the point where I could apply to be a retail worker—come to work for 20 minutes and then say, well I gotta go take a break and then go have a panic attack because I'm surrounded by all this activity, such as the music that they're playing and all these people and the demands. So rather than having to put myself in a situation that results in a high probability of failure, I'm just pacing myself at home to see if I can get my endurance up.<sup>16</sup>

[28] The Appellant's account of his limitations corresponded with two recent reports, commissioned by the Appellant's lawyers, that were submitted after the oral hearing.

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<sup>15</sup> See Dr. Joseph's report dated April 10, 2022, GD7-3.

<sup>16</sup> Refer to recording of Appeal Division hearing, 126.30.



[29] Dr. Jeremy Quickfall, a neuropsychiatrist, diagnosed the Appellant with a mild traumatic brain injury, persistent post concussive symptoms, partial PTSD, along with behavioural disturbance including anxiety. Dr. Quickfall identified reduced tolerances in more intense levels of cognitively demanding work, stressful situations, and multitasking.

[30] Dr. Quickfall found it likely that the Appellant would remain disabled from his job as an electrical engineer/project manager for the foreseeable future. He also found that the Appellant's ability to engage in any kind of work or increased levels of activity would be hampered by his reduced tolerance to stress and his resilience has been highly impacted since the accident:

He remains easily overwhelmed and **prone to symptom flaring**... With additional medication treatment, there is a reasonable prognosis for some degree of symptom improvement. Nevertheless, given the duration of time since the accident, intractability of his symptoms, high degree of perceived disability, it is unclear how substantial any effect would be, and it is very unlikely that further treatment will result in [the Appellant] approaching/returning to his pre-accident baseline. As such, the expectation for impairments relating to the above accident-related diagnosis being indefinite is quite high [emphasis added].<sup>17</sup>

[31] Dr. Quickfall's assessment reinforces my impression that the Appellant's particular psychological condition would make it difficult for him to provide the kind of reliable work performance required by employers.

[32] Jessica Mullins, an occupational therapist, assessed the Appellant's functional capacity over two sessions earlier this year.<sup>18</sup> She found that the Appellant displayed a range of limitations, in particular a reduced tolerance to cognitively demanding activity, demonstrated by symptoms that included forgetfulness, reduced concentration, slow thinking, and difficulty finding words. Ms. Mullins concluded that the Appellant did not

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<sup>17</sup> See independent medical examination dated June 1, 2023 by Dr. Jeremy Quickfall, neuropsychiatrist, AD12-48.

<sup>18</sup> See Functional Capacity Evaluation report dated July 19, 2023 by Jessica Mullins, occupational therapist, AD12-4.

have sufficient capacity for a return to work in any alternate occupation, even on a graduated basis. She added:

While he has returned to completing self-care, yard work and simple household management and maintenance tasks, he requires extra time and strategies (pacing) when completing these activities. He requires assistance from his wife and external home support for majority of house management and maintenance tasks. He has returned to sedentary leisure activities, however he has been unable to return to his full range of outdoor leisure activities. **He requires significant time each day to participate in symptom management strategies...** [emphasis added].<sup>19</sup>

[33] Again, a picture emerges of an individual with significant cognitive impairments that would prevent him from dependably fulfilling work duties. Both of these recent reports are consistent with Dr. Josephs' finding that the Appellant would have a hard time coping with the demands of a workplace.

[34] I have been careful not to penalize the Appellant simply because he was once a high functioning individual who succeeded in a pressure-filled managerial role. It is tempting to conclude that such an individual, even in a much-diminished state, must be capable of **some** kind of "easy" or low-stress job. But that raises a question: how many jobs like that really exist in the real world and not in one's imagination? Even minimum-wage service jobs have their own pressures. Like any job, they come with expectations, and they come with bosses whose job is to get their employees to meet those expectations.

[35] Case law has held that severity is predicated upon the claimant being able to come to work and perform their duties whenever and as often as necessary: "Predictably is the essence of regularity."<sup>20</sup> On balance, the available evidence suggests that the Appellant is no longer able to offer such predictability.<sup>21</sup>

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<sup>19</sup> See Functional Capacity Evaluation report dated July 19, 2023 by Jessica Mullins, occupational therapist, AD12-4.

<sup>20</sup> See *Minister of Human Resources and Development v Bennett* (July 9, 1997), CP 4757 (PAB).

<sup>21</sup> See *Atkinson v Canada (Attorney General)* 2014 FCA 187.

**– The Appellant’s testimony was credible and persuasive**

[36] The Appellant was a sympathetic and forthright witness. He explained in detail how his anxiety and depression frequently overwhelm him, preventing him from delivering the kind of regular, consistent performance that employers demand. As he testified at the hearing:

Generally, when I do an activity, whether it’s something cognitive like looking at my bills or something, whether it’s physical, it tends to be around 20 minutes, sometimes longer, so that I need to go back when that happens and rest. I need to pace my activities, or I shut down and have an anxiety attack or a panic attack.<sup>22</sup>

[37] The Appellant’s credibility was bolstered by his work history, which shows more than 30 years of substantially gainful earnings in a variety of jobs going back to the mid-1980s.<sup>23</sup> The evidence indicates that the Appellant was a motivated and resilient participant in the labour market for his entire adult life until he sustained a significant head injury five years ago. One can reasonably assume that a person with his employment record would not have given up on work unless there was some genuine underlying cause.

**– The Appellant lacks capacity when viewed as a whole person**

[38] The leading case on the interpretation of “severe” is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Appellant as a “whole person” in a real-world context.<sup>24</sup> Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.” Those circumstances fall into two categories:

- The Appellant’s background — matters such as “age, education level, language proficiency and past work and life experience” are relevant;

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<sup>22</sup> Refer to the recording of Appeal Division hearing at 15:30.

<sup>23</sup> See Appellant’s record of earnings, GD2-50.

<sup>24</sup> See *Villani v Canada (Attorney General)* 2001 FCA 248.

- The Appellant's medical condition — this is a broad inquiry, requiring that the Appellant's condition be assessed in its totality.

[39] I don't think that the Appellant has anything left to offer a real-world employer. At 55 years old, he could no longer be described as young when he last qualified for benefits. He has an advanced education and rich work experience, but the skills that he has acquired along the way are no use if he is unable to cope with the routine pressures that come with any job. At the hearing, asked whether he perform a less cognitively difficult job, he replied:

Even a data entry activity would involve having limited endurance, having to pace myself, so how much attention I could put in that that fulfills, a reasonable expectation or schedule would be indeterminate and they may be times when I'm going through an anxiety attack in which case my activity level drops down to zero, where I'm mostly resting in order to try to recover, and depending on the severity of the attack, it could take days.<sup>25</sup>

[40] In my view, the Appellant can't sustain a job, nor is a suitable candidate for retraining. I cannot see how he can succeed in the competitive labour market in his psychological condition.

**– The Appellant did not have sufficient capacity to pursue alternative employment**

[41] A case called *Inclima* requires disability claimants with residual capacity to show that they have made reasonable efforts to obtain and secure employment and that those efforts have been unsuccessful because of their health condition.<sup>26</sup> In this case, the Appellant lacked the residual capacity to make such efforts. For that reason, I will not draw a negative inference from the lack of any evidence that he launched a job search or investigated retraining programs. The Appellant had a genuine belief that he could no longer do any kind of work, and the medical evidence bears that out.

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<sup>25</sup> Refer to the recording of Appeal Division hearing at 112:00.

<sup>26</sup> *Inclima v Canada (Attorney General)*, 2003 FCA 117.

## **The Appellant has a prolonged disability**

[42] The Appellant's testimony, corroborated by the medical reports, indicates that he has suffered from anxiety, depression, and PTSD since a January 2018 car accident. He has been effectively unemployable since then. It is difficult to see how his mental health will significantly improve, even with new medications or alternative therapies. In my view, these factors suggest that the Appellant's disability is prolonged.

## **Conclusion**

[43] I find the Appellant disabled as of January 2018, the date of his car accident. Since the Minister received his application for benefits in August 2019, the Appellant is deemed disabled as of May 2018.<sup>27</sup> That means the effective start date of the Appellant's CPP disability pension is September 2019.<sup>28</sup>

[44] The appeal is allowed.



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Member, Appeal Division

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<sup>27</sup> Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension.

<sup>28</sup> According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability.