



Citation: *KD v Minister of Employment and Social Development*, 2023 SST 1312

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: K. D.

Respondent: Minister of Employment and Social Development
Representative: Andrew Kirk

Decision under appeal: General Division decision dated October 6, 2022
(GP-21-1204)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference

Hearing date: September 20, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: October 2, 2023

File number: AD-23-14

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 44-year-old woman with a long history of anxiety and depression. She experienced sexual violence as a child and was later in a car accident that left her with a hearing impairment.

[3] The Appellant earned a master's degree while working as an information agent for the X. She then worked as a staff representative for Y where, among other duties, she handled grievances and advised members on policy and procedure.

[4] Her mental health began to get worse. She pushed herself to keep working but went on medical leave in May 2018 after having suicidal thoughts. Other than a brief attempt to return to her job in early 2022, she hasn't worked since.

[5] The Appellant applied for a CPP disability pension in April 2020. She claimed that she could no longer do any kind of work because she had no tolerance for stress. The Minister of Employment and Social Development refused her application after finding that she did not have a severe and prolonged disability.

[6] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by videoconference and dismissed the appeal. It found that, although the Appellant struggled with anxiety and depression, she still had some capacity to try another job.

[7] 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 her disability claim in full.

[8] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she is disabled under the CPP. The evidence shows

that the Appellant, while subject to some functional limitations, is not disabled from all forms of regular employment.

Preliminary Matter

[9] On December 5, 2022, the law governing the appeals to the Social Security Tribunal changed.¹ Under the new law, 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.² 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 her coverage period.

Issue

[10] For the Appellant to succeed, she must prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agree that the Appellant's coverage ended on December 31, 2022.³

[11] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.⁴ 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.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.⁵ The disability must be expected to keep the claimant out of the workforce for a long time.

¹ See section 58.3 of the *Department of Employment and Social Development Act* (DESDA). This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on December 30, 2022, after the new law came into force.

² The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

³ 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 her updated record of earnings at AD6-16.

⁴ See section 42(2)(a)(i) of the *Canada Pension Plan*.

⁵ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

[13] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2022.

Analysis

[14] I have applied the law to the available evidence and concluded that the Appellant did not have a severe and prolonged disability as of December 31, 2022. I am satisfied that the Appellant's psychological condition does not prevent her from regularly pursuing substantially gainful employment.

The Appellant does not have severe disability

[15] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.⁶ I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant may suffer from significant mental health conditions, I couldn't find enough evidence to suggest that she was incapable of work.

[16] In her application for benefits, the Appellant said that she was unable to work because of increasing anxiety and depression. She said that she reacted negatively to any change in her routine. She said that she had no energy to do anything except maintain a basic level of personal hygiene. She said that she was reluctant to leave her house because she had difficulty dealing with other people.⁷

[17] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity.⁸ In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing

⁶ See *Canada Pension Plan*, section 44(1).

⁷ See Appellant's application for CPP disability benefits dated April 17, 2020, GD2-183.

⁸ An appellant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*. In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

suitable work during her coverage period. From what I can see, the Appellant is subject to limitations, but she was not incapacitated from all forms of work.

[18] I base this conclusion on the following factors:

– **The medical evidence suggests that the Appellant has some work capacity**

[19] The available evidence confirms that the Appellant has long struggled with symptoms related to anxiety, depression, and post-traumatic stress disorder (PTSD). However, the evidence also suggests that her problems were made worse by situational factors that came to a head in 2019.

[20] The Appellant testified that, in December 2017, she moved from her home in Prince George to take a job in Terrace with Y. She said that she soon started to feel pressure from her new boss. At the same time, the Appellant was seeing changes in her family life: Her 21-year-old child announced that they intended to have gender reassignment surgery.

[21] After taking leave from her job in May 2019, the Appellant's family physician referred her to a psychiatrist. Dr. Udumaga noted that she displayed depressive symptoms, including low mood, emotional lability, and insomnia. He diagnosed her with generalized anxiety disorder and major depressive disorder, which he said affected her cognition and made it hard for her to relate to others.⁹ In Dr. Udumaga's opinion, the Appellant could not perform her duties at work.

[22] However, despite his diagnosis and prognosis, Dr. Udumaga did not rule out a potential return to employment. He also said that a "progressive return to work will be suitable once she is psychiatrically stable ... I think [the Appellant] is keen to go back to work."¹⁰

⁹ See reports dated August 2, 2019 (GD2-101) and June 17, 2020 (GD2-119) by Dr. Ejike Udumaga, psychiatrist.

¹⁰ See Dr. Udumaga's report dated April 27, 2020, GD2-108.

[23] The Appellant's long term disability insurer commissioned a "virtual psychiatric assessment" in November 2020.¹¹ Dr. Lazar reported that the Appellant experienced a series of triggering events in early 2019, including her child's impending surgery, some cases at work that recalled her early sexual trauma, and the isolation that she felt in Terrace living apart from her family. Dr. Lazar said these triggers affected the Appellant's ability to compartmentalize her trauma and led to increased anxiety and "significantly impairing mood symptoms." She concluded that the Appellant was not currently able to manage her workplace role and responsibilities.

[24] However, Dr. Lazar did not say that the Appellant was completely disabled from all forms of employment. Although she found that the Appellant was no longer capable of performing her duties as a union rep, she did not prohibit her from attempting another, potentially lower stress job. Dr. Lazar also suggested that, although the Appellant suffers from deep-seated anxiety and depression, the specific pressures that led her to leave her job in May 2019 were situational. Dr. Lazar concluded that the Appellant's work ethic, work history, and interest in returning to work were positive indicators of a successful return to work. She recommended 12 to 16 weeks of further treatment, after which a gradual return to work plan would be considered.

[25] Dr. Birmingham, a specialist in psychiatry and internal medicine, saw the Appellant in June 2021. At that time, an electroencephalogram showed marked abnormalities in the Appellant's brain, consistent with concussion, mood disorder, and anxiety.¹² The following year, after the Appellant's abortive attempt to return to her job, Dr. Birmingham completed a CPP medical report.¹³ In it, he said the Appellant had had major depressive disorder since 2019, generalized anxiety disorder since 2004, and PTSD since 2004. He said that these conditions caused impairments such as low mood, loss of focus, memory problems, sleep disturbance, diminished energy, continuous

¹¹ See virtual assessment report dated November 25, 2020 by Dr. Susan Lazar psychiatrist, GD2-78.

¹² See report dated June 23, 2021 by Dr. Carl Laird Birmingham, specialist in internal medicine and professor of psychiatry GD3-13.

¹³ See CPP medical report completed by Dr. Birmingham on May 13, 2022, GD3-4.

fatigue, and social avoidance. He also mentioned panic attacks requiring hospitalization and visual blurring due to “unequal damage to her eye fields.”

[26] However, Dr. Birmingham didn’t rule out all forms of employment. Indeed, he suggested that, even with her functional limitations, the Appellant could still work, but “her job would have to be chosen based on her limitations.”¹⁴

– **The Appellant’s background and personal characteristics don’t affect her employability**

[27] Based on the medical evidence, I find that the Appellant had at least some capacity to work. This finding is reinforced when I look at the Appellant’s overall employability.

[28] When deciding whether the Appellant can work, I can’t just look at her medical conditions. I must also consider factors such as her age, level of education, language abilities, and past work and life experience. These factors help me decide whether the Appellant can work in the real world.

[29] The Appellant has longstanding mental health issues and is prone to stress, but she has several assets that would give her an advantage in a job search. She is well educated, with two post-secondary degrees. She has experience in challenging administrative roles and previously worked in the retail and food service sectors. She is fluent in English and is only 44 years old — far from the usual age of retirement.

[30] The Appellant has a hearing loss in one ear, but it was caused by a car accident that occurred in 2007.¹⁵ It did not prevent her from carrying on a significant job at X for nearly nine years.

[31] I find that, even with her impairments, the Appellant, has at least some work capacity. However, as we will see, that capacity imposes on her an obligation.

¹⁴ See Dr. Birmingham’s CPP medical report, GD3-11.

¹⁵ On October 10, 2018, Dr. Neil Longridge, an otolaryngologist, described “mild” tinnitus, which he felt was unlikely to worsen (see GD1-44). On January 27, 2009, Dr. Donald Cameron, a neurologist, noted loss of hearing and tinnitus in the left ear (see GD1-54).

– **The Appellant has not attempted alternative employment**

[32] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.¹⁶

[33] This passage suggests that, if a claimant retains at least **some** work capacity, I have to conduct an analysis to determine (i) whether they attempted to find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

[34] On top of that, disability claimants must make **meaningful** attempts to return to work.¹⁷ They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.¹⁸ Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[35] In this case, the Appellant had at least some work capacity — enough to trigger the obligation to pursue employment that might have been better suited to her limitations. The Appellant did make an attempt to return to work, but she went back to her old job and the same stressful environment that had defeated her previously.

[36] The Appellant testified that her condition improved in late 2021. She attributed the improvement to LORETA neurofeedback, a treatment that she had been regularly receiving from Dr. Birmingham for several months. She said that the treatment didn't

¹⁶ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

¹⁷ See *Tracey v Canada (Attorney General)*, 2015 FC 1300, paragraphs 43 and 45, in which the Federal Court stated that the onus is on claimants to show that they made “sincere” efforts to meet the employment efforts test.

¹⁸ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

work until her eighth session, when it suddenly produced a dramatic effect — “like a fog lifting.” She and Dr. Birmingham put together a treatment plan and, at the beginning of January, she returned to Y on a graduated basis.

[37] She worked 20 hours per week for the first two weeks, then 30 hours, and by mid-February she was back to regular full-time hours. But once again she soon felt overwhelmed. She couldn’t concentrate and started missing deadlines. In March, her child’s mental health sharply deteriorated. That in turn sent her into a crisis that required intervention by the RCMP’s mental health unit. She was in hospital for two weeks.

[38] In the end, I was unable to assess the severity of the Appellant’s disability as of December 31, 2022. Although the Appellant tried to work, she didn’t try to work at a job that was suited to her functional limitations. She stayed with the same job that had contributed to sending her into crisis in the first place. If she had continued with part-time hours, or found another less demanding job, she might have been able to keep working and earn a substantially gainful income while doing so.

– **The Appellant admits that she can return to work**

[39] By her own account, the Appellant wants to return to work. More than that, she believes that she eventually will return to work. She testified that she had a recent appointment with Dr. Udomaga, who made her think that she might be able to go back to work within a year. Her mood has improved and she’s sleeping better. She remains anxious but is developing coping mechanisms.

[40] Asked whether she could imagine herself performing a less stressful job, she replied that she was “working her way back up.” Her main problem, she said, is social anxiety. To avoid people, she goes grocery shopping with her partner at 8:00 a.m. She’s still fatigued but is building up her stamina.

[41] The Appellant testified that she could see herself trying work that does not involve dealing with people. In fact, she has identified a job that she feels might suit her: fish shocker. It is seasonal position that involves catching fish by stunning them with a high voltage cathode.

[42] I agree with the Appellant that “hope is not the same as “functionality.” But I see something more than hope here. The Appellant has a plan, one specifically intended to place her in an occupation that will expose her to fewer stressors than her previous positions.

I don't have to consider whether the Appellant has a prolonged disability

[43] A disability must be severe **and** prolonged.¹⁹ Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it is also prolonged.

Conclusion

[44] There is ample evidence that the Appellant has mental health problems, but I am not convinced that they amount to a severe disability. The Appellant's doctors have never barred her from returning to work. She has residual capacity but has never tried a job that might be less mentally and psychologically demanding than the one she had as a union rep.

[45] The appeal is dismissed.



Member, Appeal Division

¹⁹ See *Canada Pension Plan*, section 42(2)(a).