Citation: *FA v Minister of Employment and Social Development*, 2023 SST 393

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	F. A.
Representative:	Claire Michela
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 15, 2021 (issued by Service Canada)

Tribunal member:	James Beaton
Type of hearing:	Videoconference
Hearing date:	April 3, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	April 11, 2023
File number:	GP-22-109

Decision

[1] The appeal is dismissed.

[2] The Appellant, F. A., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant was born in Romania. He is 61 years old. He worked as an engineer. In September 2003, he stopped working because of depression. He hasn't worked since then.

[4] The Appellant applied for a CPP disability pension on August 22, 2019.[1] The Minister of Employment and Social Development refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says he has never recovered enough since 2003 to be able to work. His treatment is now focused on improving his quality of life rather than preparing him to return to the workforce.[2]

What the Appellant must prove

[6] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2006. This date (called the "minimum qualifying period" or MQP date) is based on his contributions to the CPP.[3] Sometimes, an appellant's work history outside Canada can extend their MQP date. The Appellant worked in Germany and Romania at most from 1986 to 1994.[4] He didn't work enough years outside Canada to extend his MQP date.[5]

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[1] The Appellant previously applied for a CPP disability pension in May 2010 (GD2-74 to 77 and GD2-504 to 510), but he didn't appeal the Minister's decision on that application.
[2] The Appellant made submissions at GD1-5 and at the hearing.
[3] See section 44(2) of the *Canada Pension Plan*. The Appellant's CPP contributions are at GD3-7.
[4] See GD2-38 and 77. At the hearing, the Appellant confirmed that he didn't work until he graduated from university, which was in 1986 (GD2-49).
[5] If the Appellant had worked at least 14 years outside Canada, his MQP date would have been December 31, 2007. See section 44(2)(a)(i.1) of the *Canada Pension Plan*.

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

[8] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[6]

[9] 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.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.[7]

[11] 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.

[12] 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 accept the Minister’s late documents

[13] The Minister made written submissions (arguments) after the deadline.[8] The Appellant’s representative objected to the Minister’s late documents. She said it would be unfair to the Appellant if I accepted the documents. She referenced section 42 of the *Social Security Tribunal Rules of Procedure* (Rules).

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[6] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[7] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.
[8] The Minister’s submission deadline was February 10, 2023. This was 30 days after the original deadline of January 11, 2023, which was extended by 30 days because the Appellant submitted evidence on January 11. The Minister didn’t make its submissions (GD6) until March 10, 2023.

[14] Section 42 tells me what to consider when deciding whether to accept late evidence, not late submissions.[9] However, the Rules allow me to decide the procedure for anything that the Rules don't cover.[10] The Tribunal advised the Minister that the deadline applied to **all** documents (not just evidence).[11] Therefore, I believe it is in the interests of justice to apply section 42 to late submissions as well.

[15] The Minister's submissions are relevant to the issues in the appeal. They are new. Accepting the submissions would not delay my decision, since the Appellant's representative already responded to them at the hearing, in case I accepted them.

[16] However, the Minister didn't explain why it could not file submissions within the deadline. Although the Minister could have made submissions orally at the hearing, it chose not to do that. It would be unfair to disregard the Minister's deadline without a good reason.

[17] Therefore, I didn't consider the Minister's submissions when deciding this appeal. This doesn't mean that the Appellant automatically succeeds, though. The Appellant must still prove that he meets the requirements for a disability pension.

The Appellant asked to limit public access to his appeal record

[18] At the hearing, the Appellant's representative asked me to limit public access to his appeal record. In other words, she asked me to grant a confidentiality order.[12] I have decided not to grant a confidentiality order.

[19] By default, appeal records are open to the public. This is called the "open court principle." Although the Tribunal isn't a court, the principle still applies to it.[13]

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[9] Section 5 of the *Social Security Tribunal Rules of Procedure* (Rules) defines "evidence."
[10] See section 8(5) of the Rules.
[11] This was communicated to the parties in a letter dated February 3, 2022.
[12] Section 36 of the Rules requires these requests to be filed with the Tribunal (that is, made in writing). However, I accepted the request orally under section 8(4) of the Rules because it was in the interests of justice to do so. It made the appeal process simpler and quicker (see rule 8(1)).
[13] See *SL v Canada Employment Insurance Commission*, 2017 SSTADEI 115.

[20] Despite this principle, the Tribunal may restrict public access to all or part of an appellant's appeal record if it determines that reasonable alternative measures can't adequately mitigate a serious risk that could result from public access.

[21] There are four types of serious risk that I can consider. One of those is a serious risk that the disclosure of personal information would cause undue hardship to a person that outweighs the societal interest in the appeal record being public.[14]

[22] The Appellant's representative argues that public access to the appeal record would result in a serious risk of undue hardship because it would jeopardize the Appellant's health and could lead to discrimination against him and his family based on his mental health status.

[23] There are three reasons why I find that public access to the appeal record would not result in a serious risk of undue hardship.

[24] First, when a member of the public wants to access an appeal record, they must ask for access. Before the Tribunal grants access, it removes personally identifying information from documents. It does the same thing when it publishes a decision.[15] The Tribunal does this even when there is no confidentiality order in place. The Tribunal's policy makes it unlikely that a member of the public could identify the Appellant from his appeal record.

[25] Second, while I understand the Appellant's concerns, I find that they are the sort of concerns that appellants typically have when they appeal to the Tribunal. There is no evidence in this case that gives rise to a **serious** risk of **undue** hardship (compared to **any** risk of **any** hardship that many appellants before the Tribunal face).

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[14] See section 3 of the *Social Security Tribunal Regulations, 2022*.
[15] Identifying information includes names, dates of birth, addresses, contact information, social insurance numbers, driver's licences, passports, and bank accounts numbers. See https://www.sst-tss.gc.ca/en/decisions-laws-and-policies/open-justice-and-privacy.

[26] Third, there is a societal interest that appeal records be public. I have to weigh this interest against the Appellant's interests in privacy. Without evidence of a serious risk, the societal interest outweighs the Appellant's privacy interest.

Reasons for my decision

[27] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2006.

Was the Appellant's disability severe?

[28] The Appellant's disability wasn't severe by December 31, 2006. I reached this finding by considering several factors. I explain these factors below.

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

[29] The Appellant bases his application on depression and anxiety. He also has diabetes, neck and back pain, headaches, and a hearing impairment in his right ear.

[30] However, I can't focus on the Appellant's diagnoses.[16] Instead, I must focus on whether he has functional limitations that got in the way of him earning a living by December 31, 2006.[17] 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.[18]

[31] I find that the Appellant had functional limitations by December 31, 2006.

– What the Appellant says about his functional limitations

[32] The Appellant says his medical conditions have resulted in functional limitations that affected his ability to work by December 31, 2006. He described his functional limitations at the hearing. He also made two applications for a disability pension: in 2010 and 2019.[19] Since the Appellant must prove he was disabled in 2006, I will focus on

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[16] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[17] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[18] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[19] The Appellant's 2010 application is at GD2-74 to 77 and 504 to 510. His 2019 application is at GD2-37 to 55.

what his 2010 application says. It is more likely to reflect his condition in 2006 compared to his recollection in 2019 or now.

[33] In the Appellant's 2010 application, he says:

- he can't stand more than 30 minutes
- he can't walk more than an hour
- he is restricted with lifting, carrying, and bending
- the hearing in his right ear is impaired
- he gets headaches
- he has an irregular sleep schedule
- he has a poor memory
- he has trouble focusing
- he has trouble managing his anger
- he gets panicked—he has trouble breathing when this happens

[34] The Appellant didn't say much about depression in his 2010 application. However, he testified that depression makes him unmotivated so that he doesn't want to get out of bed or do anything. He isn't interested in his personal hygiene or eating.

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

[35] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2006.[20]

[36] The medical evidence supports some of what the Appellant says. It supports that he has limitations with his **neck and back**—like standing, walking, lifting, carrying, and bending. He has degenerative disc disease that is moderate to severe in his lumbar spine (low back), and mild in his cervical spine (neck).[21] He started having muscle pain in 2002.[22]

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[20] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[21] See GD2-454.
[22] In 2003, the Appellant reported having had muscle pain for over a year (GD2-298 to 300).

[37] The medical evidence shows that he has **mild hearing loss** in his right ear.[23]

[38] The medical evidence supports that the Appellant's **headaches** are infrequent, adequately treated with medication, and don't impact his ability to work. He worked with them before.[24] He started taking naproxen for them once per week by 2005.[25] He testified that naproxen "works well enough" to manage his headaches. By July 2006, he only got headaches occasionally.[26]

[39] The medical evidence supports that the Appellant may have been somewhat **fatigued** in 2006, but that an irregular sleep schedule wasn't a problem for him at that time. His sleep improved, along with his energy levels, by September 2006.[27] In November 2006, he was sleeping six to seven hours per night. He wasn't happy with his routine, but he wasn't "fully invested" in trying to follow a daily routine anyway.[28]

[40] The medical evidence supports that the Appellant had mild problems with **memory and focus** around December 2006. In July 2006, Dr. Bérubé did an extensive neuropsychological assessment. Dr. Bérubé concluded that the "mild intensity" of the Appellant's cognitive deficiencies "cannot justify a functional limitation for a return to work full time in his field of expertise or in any other gainful job." Furthermore, no treatment was necessary from a cognitive perspective.[29]

[41] I acknowledge the neuropsychological assessment report by Dr. Tellier from 2005.[30] Dr. Tellier found "considerable cognitive impairment" resulting from deficiencies in working memory, visual attention, complex learning, and other areas. However, he thought that the assessment results might have been affected by the Appellant's high anxiety levels during testing. He recommended that another assessment be done when the Appellant was less anxious. He predicted that the Appellant's cognitive issues would

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[23] See GD2-456.
[24] The Appellant said this at the hearing.
[25] See GD2-411 to 417.
[26] See GD2-402 to 410.
[27] See GD2-222 and 223.
[28] See GD2-198 to 201.
[29] See GD2-402 to 410.
[30] Dr. Tellier's assessment is at GD2-411 to 417.

improve with improvements to his anxiety and depression. He didn't rule out the possibility of the Appellant returning to work in the future.

[42] I believe Dr. Bérubé's assessment gives a more accurate picture of the Appellant's cognitive abilities than Dr. Tellier's assessment. Dr. Bérubé wrote that she considered her assessment results to be valid. This is in contrast to Dr. Tellier's view of his own assessment being impacted by the Appellant's anxiety levels. In addition, Dr. Bérubé's report is more recent than Dr. Tellier's, and closer to December 31, 2006.

[43] A psychiatry outpatient report in September 2006 (after both assessments) describes the Appellant's own concerns with memory and focus.[31] But these aren't supported by the most recent objective testing.

[44] There is no mention of **anger issues** in the medical evidence until 2010, when Dr. Paterniti (a psychiatrist) reported that the Appellant did an anger management course. Since doing the course, he can better control his anger.[32] There is no evidence about when he did the course or when he had problems controlling his anger—before or after December 31, 2006. So I don't accept that this was a limitation for him as of December 31, 2006.

[45] The medical evidence doesn't support that the Appellant's **anxiety** impacted his ability to work as of December 31, 2006. In July 2006, Dr. Bérubé believed that anxiety was a barrier to "high-level" or stressful employment.[33] By November 2006, his anxiety appears to have improved. He was making phone calls and leaving the house to take his daughter to school and to go shopping.[34]

[46] He participated in a psychiatry day treatment program from late 2006 to early 2007. The admission note says he presented as "pleasant" and "laid back."[35] The discharge summary says that the Appellant never appeared to be in distress during

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[31] See GD2-222 and 223.
[32] See GD2-500 to 503.
[33] See GD2-410.
[34] See GD2-198 to 201.
[35] See GD2-245.

group sessions (although he avoided talking about personal issues) and was taking ballroom dancing classes with his wife.[36] The Appellant's participation in the program on its own doesn't mean he had functional limitations from anxiety. Dr. Browne (another psychiatrist) referred the Appellant to the program based on the Appellant's subjective concerns, not objective findings.[37]

[47] Finally, the medical evidence doesn't support that the Appellant's **depression** impacted his ability to work as of December 31, 2006.

[48] A psychiatric outpatient report reflects improvements in his mood in September 2006. In November 2006, he was taking more care of his hygiene. He was exercising and cooking for himself and his daughter, which demonstrates motivation. He reported eating nutritious meals, although he didn't eat "regularly." The February 2007 discharge summary says he was better able to follow a routine. This practical outcome is more important than the summary's vague statement, highlighted by the Appellant's representative, that he "continued to struggle to apply the program's principles on a personal level."[38]

[49] Furthermore, the Appellant attended the Royal Ottawa Mental Health Centre from October 2008 to February 2009. At that time, he reported that his mood had steadily improved from 2004 to 2007 by 50%. Despite declining after that, his depression was considered mild to moderate in 2009.[39] This also suggests that his depression was mild in 2006. It didn't interfere with his ability to work.

[50] I acknowledge that the Appellant was still taking medications for his mental health conditions around December 2006.[40] I also acknowledge the opinion of Dr. Browne from February 2007 that the Appellant could not return to "remunerative

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[36] See GD2-186.
[37] See GD2-222 and 223.
[38] See GD2-186, 198 to 201, 222, and 223.
[39] See GD2-167 and 169 to 172.
[40] See GD2-401 to 410.

employment."[41] My focus, though, must be on the Appellant's functional limitations. Evidence of his functional limitations doesn't support Dr. Browne's conclusion.

[51] In summary, the medical evidence supports that, as of December 31, 2006, the Appellant had limitations with standing, walking, lifting, carrying, and bending. His hearing was mildly impaired, he was somewhat fatigued, and he had mild issues with memory and focus. These functional limitations (notably fatigue) prevented him from working full-time as an engineer.

[52] There is no issue as to whether the Appellant followed medical advice.[42]

[53] 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 him from earning a living at any type of work, not just his usual job.[43]

– **The Appellant can work in the real world**

[54] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

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

[55] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say he can work.[44]

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[41] See GD2-401.
[42] To receive a disability pension, an appellant must follow medical advice. See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[43] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[44] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[56] I find that the Appellant was still able to work in the real world as of December 31, 2006.

[57] Dr. Bérubé believed that the Appellant's problems with memory and focus alone would not have kept him from working full-time as an engineer. Instead, it was his anxiety and depression that were barriers to employment.[45] Both of those things got better by the end of 2006.

[58] The Appellant's limitations with standing, walking, lifting, carrying, and bending would not interfere with his ability to do sedentary work. He worked with a hearing impairment for four years before he stopped working.[46] The Appellant's fatigue would not have kept him from working at least part-time. There is also evidence that he was able to keep a routine in 2006, despite not being "fully invested" in doing so.[47] This means he could probably keep a predictable work schedule.

[59] The Appellant's personal characteristics strongly favour employability. He was only 45 years old as of December 31, 2006. He completed high school and six years of university education. He is fluent in English and Romanian, somewhat fluent in French and German, understands and speaks Italian, Spanish, and Portuguese, and can read Russian, Greek, and Latin. He has many years of work experience as an engineer.[48] All of these factors would have helped him find a suitable part-time job.

– **The Appellant didn't try to find and keep a suitable job**

[60] If the Appellant can work in the real world, he must show that he tried to find and keep a suitable job. He must also show that his efforts weren't successful because of his medical conditions.[49] Finding and keeping a suitable job includes retraining or looking for a job that he can do with his functional limitations.[50]

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[45] See GD2-402 to 410.
[46] See GD2-456.
[47] See GD2-198 to 201.
[48] See GD2-173 to 180 and 504.
[49] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[50] See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[61] The Appellant didn't make efforts to work. He testified that he hasn't looked for work since 2003.

[62] Therefore, I can't find that he had a severe disability by December 31, 2006.

Conclusion

[63] I find that the Appellant isn't eligible for a CPP disability pension because his disability wasn't severe by December 31, 2006. Because I found that his disability wasn't severe, I didn't have to consider whether it was prolonged.

[64] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section