



Citation: *DM v Minister of Employment and Social Development*, 2023 SST 394

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: D. M.
Representative: Mikolaj Grodzki

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 5, 2021 (issued by
Service Canada)

Tribunal member: Sarah Sheaves

Type of hearing: Teleconference

Hearing date: March 14, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: April 11, 2023

File number: GP-21-1912

Decision

[1] The appeal is allowed.

[2] The Appellant, D. M., is eligible for a *Canada Pension Plan* (CPP) disability pension. Payments start as of September 2019. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 37 years old. She worked as the manager of two coffee shops owned by her mother. She was in a motor vehicle accident in January 2013. She tore two of her arteries, had a concussion, and a suspected stroke. She has intercranial hypertension, or spinal fluid on her brain.

[4] The Appellant experiences numbness on the left side of her body, migraine headaches, and vertigo. She has neck and shoulder pain and feels angry all the time. She also has depression, post-traumatic stress, and fears related to possible future stroke, aneurysm, or re-tearing her arteries.

[5] The Appellant applied for a CPP disability pension on August 27, 2020. 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.

[6] The Appellant says that she has a catastrophic impairment "CAT" designation from her car accident claim, and this should automatically qualify her for CPP disability. She has mental and physical conditions that prevent her from working and are severe and prolonged.

[7] The Appellant says she was employed at a family business with the ability to work from home and accommodate her conditions, and she still could not continue working. She argues that the income she earned after 2015 was charity from her mother, and wasn't the result of a consistent or meaningful work effort.

[8] The Minister says the Appellant hasn't provided sufficient updated evidence of her conditions as of the hearing date. Substantially all the medical evidence is outdated, and the Minister argues there is no evidence of continuous prolonged conditions.

[9] The Minister also argues that the Appellant continued to earn substantially gainful income for many years after her car accident. It says her conditions can't be considered severe because of the levels of income she was able to earn up to 2018.

What the Appellant must prove

[10] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by the hearing date.¹

[11] The *Canada Pension Plan* defines "severe" and "prolonged."

[12] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.²

[13] 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.

[14] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

¹ 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 GD2-6. In this case, the Appellant's coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

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

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

[15] 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.

[16] 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.

Matters I have to consider first

I accepted documents sent in after the hearing

[17] The Minister filed written submissions with the Tribunal, after the hearing was complete.⁴ The submissions were a response to medical evidence the Appellant filed one day before the hearing.

[18] The Tribunal shared the Appellant's new medical evidence with the Minister near the end of operating hours on the day before the hearing.

[19] In the interests of fairness, I accepted the submissions of the Minister, because there was no opportunity for them to be filed before the hearing date.

[20] I provided the Appellant with an opportunity to respond to the Minister's post-hearing submissions in writing.

[21] The Appellant elected not to respond to the Minister's submissions.

Reasons for my decision

[22] I find that the Appellant had a severe and prolonged disability as of December 2016. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

⁴ See GD-8.

Was the Appellant's disability severe?

[23] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affect her ability to work

[24] The Appellant has:

- concussion
- vertigo
- suspected stroke
- artery tears
- neck and shoulder pain
- migraine headaches
- occipital neuralgia
- occipital hypertension
- numbness on her left side
- depression
- anger
- post-traumatic stress
- somatic symptom disorder

[25] However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁶ 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.⁷

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[26] I find that the Appellant has functional limitations that affect her ability to work.

– **What the Appellant says about her functional limitations**

[27] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says the following:

- She can't hold anything heavy with her left arm because it goes numb.
- She has no confidence to use her left hand for tasks because it shakes.
- She can't lift her arms overhead because they go numb.
- When she has migraines, she can't think and can't move. She has to be in a dark, quiet room. She can also have blurry vision.
- She has sensitivity to light and sound. She has difficulty looking at screens.
- She has no personal hygiene routine.
- When she has vertigo, she feels nausea and it affects her balance.
- She gets into a state of auto pilot. She has trouble thinking, remembering, and planning.
- She has trouble sleeping and needs to have naps during the day.
- She feels sad and angry all the time. It affects her relationships.
- She can only drive for 40 minutes as neck and shoulder pain will flare up. She lives in a rural area.
- She can start small activities at home but is unable to finish them.
- She can't go grocery shopping because stores are too bright and loud for her.
- She sometimes needs a break when taking stairs. It feels hard to lift her legs and she's out of shape.
- Walking, running, and lifting all cause her pain.
- She finds socializing exhausting and painful.

- She gets anxiety or panic a few times a week or when she has vertigo. She fears she is having another stroke or aneurysm.

– **What the Appellant says about her current medical status**

[28] The Appellant said she was hospitalized in 2017 for psychiatric conditions. She was admitted for over one month. She was able to start the process of treating her narcotic dependence syndrome.

[29] The Appellant attended psychotherapy from 2017 to 2022. She still sees a social worker but can't afford constant ongoing treatment.

[30] The Appellant was hospitalized for one week to try a lumbar puncture procedure. The purpose was to relieve pressure and try to remove spinal fluid from around her brain. The procedure didn't work.

[31] The Appellant said she had a neurotransmitter surgically implanted to help her with occipital nerve pain, in approximately 2018. The device does help to reduce pain, but only specifically in her occipital region.

[32] The Appellant says she was getting steroid injections in the back of her head every two weeks. She says she has tissue damage in the back of her head because of this.

[33] The Appellant says her mother-in-law has had to move in to help the family. She estimates she can participate in about 5% of household tasks.

[34] The Appellant testified that her children try to provide care for her and assist her.

– **The Appellant gave credible evidence**

[35] I found the Appellant was genuine and forthright in her testimony.

[36] She was able to answer all questions without hesitation. She was consistent in her evidence. Her evidence aligned to the medical information available.

[37] I find that all of the Appellant's evidence was credible.

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

[38] The Appellant must provide some medical evidence that outlines any physical or mental disability, and that includes the following:

- nature, extent, and prognosis for the disability
- findings upon which the diagnosis and prognosis were made
- limitations resulting from the disability; and
- any other pertinent information, which can include recommendations for treatment⁸

[39] The medical evidence supports **some** what the Appellant says.

[40] The Appellant said she has “slipped discs” in her neck. There was no medical evidence provided to confirm this condition. The medical evidence only supports that there is “neck pain”.

[41] The Appellant provided reports related to her CAT claim with her auto insurer. The reports are dated December 8, 2016.⁹

[42] Dr. Oshidari completed a physiatry CAT assessment.¹⁰ He said there was significant abnormality in the left greater occipital nerve. Moderate right great occipital neuralgi was also reported. Moderate sensory abnormality was found at the left greater auricular nerve distribution.

[43] The Appellant had complaints of headaches, neck and shoulder pain, numbness on the left side of her body, and photosensitivity. Dr. Oshidari thought her **physical** impairments amounted to a 19% whole person impairment.

⁸ See Section 68(1) of the *Canada Pension Plan Regulations*.

⁹ See GD4-7.

¹⁰ See GD4-20.

[44] Dr. Ranalli saw the Appellant for a neurological CAT assessment.¹¹ He noted the Appellant had been prescribed large doses of narcotics that had created an independent chronic pain condition and narcotic dependence syndrome.

[45] Dr. Suddaby performed a psychiatric CAT assessment.¹² He diagnosed major depression that was moderate to severe in nature. He also confirmed somatic symptom disorder, and a specific phobia for vehicle travel.

[46] Dr. Suddaby confirmed marked impairments in activities of daily living, social function, and work. A moderate impairment of concentration was also indicated.

[47] Dr. Suddaby rated the **mental** conditions at a 40% whole person impairment.

[48] While the CPP doesn't use catastrophic ratings or calculations of whole person impairment to determine entitlement, the level of physical and mental impairment is still evidence that the Appellant's conditions affected her significantly as of December 2016.

[49] A psychotherapy progress report from March 21, 2019, was provided.¹³ It says the Appellant has chronic post-traumatic stress disorder. It confirms that depressive symptoms were in the severe range and impacted on her ability to cope, concentrate, attend to, and manage her activities of daily living.

[50] This report says the Appellant continues to have suicidal ideation and that anger was significantly interfering with the family relationships and function.

[51] There are records from an emergency room visit on February 10, 2023.¹⁴ The visit was in relation to bilateral upper extremity weakness, altered speech and new numbness in the right hand. The Appellant was discharged with a diagnosis of vertigo and told to follow up with a neurologist.

¹¹ See GD4-28.

¹² See GD4-35.

¹³ See GD4-99.

¹⁴ See GD7-2.

[52] The hospital records are significant for confirming the Appellant's history of stroke, aneurysm, intracranial hypertension, and occipital neuralgia. They also confirm the Appellant had surgery to implant a neurostimulator, a device used to control pain.

[53] The medical evidence supports that the Appellant's mental and physical conditions would have interfered with her ability to work as the manager of two coffee shops.

– **The medical evidence alone didn't confirm a severe and prolonged disability as of March 14, 2023**

[54] The Minister suggested the Appellant hasn't provided sufficient medical evidence to support her claim, as of the hearing date.

[55] I agree that the evidence provided was sparse and outdated, particularly given the nature of the conditions, and the Appellant's evidence of ongoing medical treatment and procedures.

[56] Neither the Appellant nor her representative explained why they failed to submit all the relevant medical records available to them in support of the appeal.

[57] The Appellant did argue that once someone is deemed to have a catastrophic impairment, they have this status for the rest of their lives.

[58] While that may be the case with motor vehicle accident claims, the test for catastrophic impairment is not the same as the legal requirements for CPP disability benefits. Also, all the evidence used to determine catastrophic impairment wasn't put before this Tribunal.

[59] Additionally, the *Canada Pension Plan* requires proof of a prolonged and continuous condition that meets the requirements set out in the statute. Entitlement can also be re-examined by the Minister at future dates. These factors distinguish CPP claims from catastrophic impairment claims that are made under a different legal regime and adjudicated at a different tribunal.

[60] All of this to say, the CAT reports show that there were significant conditions present as of December 2016, but they do not automatically trigger entitlement to CPP as of March 14, 2023.

[61] The Appellant did still comply with the minimum medical evidence requirement outlined in the *Canada Pension Plan*.

[62] The Appellant's oral evidence supplemented the medical records and satisfied me that there has been no substantial improvement of her functional limitations.

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

– **The Appellant has followed medical advice**

[64] 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. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.¹⁶

[65] The Appellant has followed medical advice.¹⁷

[66] The Appellant has attended physiotherapy, acupuncture, and massage therapy. She still attends chiropractic treatment at least once per week.

[67] The Appellant attended psychotherapy for several years. She also had a lengthy stay in hospital for psychological conditions and narcotic dependence syndrome.

[68] The Appellant had surgical procedures. She had a neurostimulator implanted above her left breast. It helps her with occipital nerve pain. She also says she had a puncture/shunt procedure of her lumbar spine in an effort to drain fluid from her brain. It was unsuccessful.

¹⁵ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁶ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[69] The Appellant says she has tried every prescription medication recommended for her in an effort to treat her conditions.

[70] 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.¹⁸

– **The Appellant can't work in the real world**

[71] 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

[72] 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.¹⁹

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

[74] The Appellant is 37 years old. She has a high school diploma and has taken some college courses. She speaks English. She worked in retail fast food management.

[75] The above factors would not prevent the Appellant from working in the real world.

[76] The Appellant's combined mental and physical conditions prevent her from working in the real world. The oral and written evidence before me shows functional limitations regularly prevent work that is substantially gainful.

¹⁸ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

– **The Appellant worked for a benevolent employer**

[77] The Appellant made efforts to work. These efforts show that her disability got in the way of earning a living.

[78] The Appellant returned to work after her accident in 2014, on modified duties. Since she was the manager in a family business, she was able to adjust her hours and modify tasks for her conditions.

[79] The Appellant says over time her duties were taken away from her and assigned to others, because she was making mistakes and wasn't able to complete her tasks. She says she stopped regularly working in 2015.

[80] The Appellant says her mother continued to pay her at a reduced level of income, between 2015 and 2019. She said her mother did this to help her out, but she wasn't working regularly. She described it as a pity job.

[81] The Appellant said she would occasionally do tasks like scheduling or payroll but estimated she was only able to contribute once per month. The work wasn't scheduled or regular.

[82] When the Appellant's mother sold her businesses in 2019, the Appellant stopped receiving income.

[83] Based on the evidence of the Appellant, I find it most likely that her mother was a "benevolent employer" from 2015 to 2019.²⁰ During that time the Appellant was significantly accommodated.

[84] The Appellant didn't have regular work hours and did not attend the businesses for work. There were no specific tasks she was required to complete on a regular basis. She wasn't consistently engaging in meaningful work. She received a set salary regardless of her work effort.

²⁰ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

[85] I find that the Appellant's disability was severe. Her evidence shows that she was working for a benevolent employer between 2015 and 2019. The medical evidence confirmed marked impairment for work and work settings in December 2016.²¹

Was the Appellant's disability prolonged?

[86] The Appellant's disability was prolonged.

[87] The Appellant's conditions began in January 2013 following her auto accident. These conditions have continued since then, and they will more than likely continue indefinitely.²²

[88] The Appellant's confirmed that the only condition that has improved for her was her narcotic dependence syndrome. She required prolonged hospitalization to address this condition.

[89] Her other conditions have been present for over six years. This is a prolonged period. There is no evidence of improvement.

[90] The Appellant's treatment regime is focused on pain management and not on improvement. She attends ongoing chiropractic treatment, takes prescribed medications, and uses a neurostimulator to control pain.

[91] There have been no further recommendations for treatment that would improve the Appellant's daily function.

[92] I find that the Appellant's disability was prolonged as of December 2016. This was the date of her CAT reports that outlined significant physical and mental impairments.

²¹ See GD4-35.

²² 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.

[93] While the Appellant's conditions began before December 2016, there is no medical evidence or opinion to support that they were severe before that date. The doctors who completed the CAT reports weren't treating doctors.

When payments start

[94] The Appellant had a severe and prolonged disability in December 2016.

[95] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.²³ After that, there is a 4-month waiting period before payments start.²⁴

[96] The Minister received the Appellant's application in August 2020. That means she is considered to have become disabled in May 2019.

[97] Payments of her pension start as of September 2019.

Conclusion

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

[99] This means the appeal is allowed.

Sarah Sheaves
Member, General Division – Income Security Section

²³ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁴ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.