



Citation: *EC v Minister of Employment and Social Development*, 2023 SST 1290

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: E. C.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 21, 2022 (issued by
Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Teleconference

Hearing date: August 15, 2023

Hearing participant: Appellant

Decision date: September 12, 2023

File number: GP-22-1207

Decision

[1] The appeal is allowed.

[2] The Appellant, E. C., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of July 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 63 years old. In 1981, he broke his back in a traumatic mining accident. He's had many serious health problems since then, but he managed to work consistently for many years. Over time, chronic pain and PTSD made it more and more difficult to work. Other health issues got in the way too. He tried returning to work in 2019 after a long period without working because of his health. He had to stop working completely in September 2020 because of the extreme pain he was in when he worked.

[4] The Appellant applied for a CPP disability pension on June 15, 2021.¹ 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 Appellant says he has a severe and prolonged disability. He tried to work for as long as he could, but it became impossible. His constant pain was aggravated by working. He couldn't stand straight, sit for long, or walk without significant pain. All treatments failed. He wanted to keep working but eventually had to give up.

[6] The Minister says the evidence doesn't support that the Appellant is disabled within the meaning of the CPP. The evidence shows that he was able to work within his capacity after the date by which he must be found disabled. He worked full-time in 2019 and 2020, which supports that he had the capacity to work.

¹ The Minister accepted the date the medical report was received (which was before the Appellant's CPP application was received) as the date of application. See Minister's submissions at GD8-3.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2017. This date is based on his contributions to the CPP.²

[8] The Appellant had CPP contributions in 2018 that were below the minimum amount the CPP accepts. These contributions let the Appellant qualify for a pension if he became disabled between January 1 and 31, 2018.³

[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.⁴

[11] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, 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 able to regularly do 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.⁵

[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.

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 GD8-16 to 20.

³ This is based on sections 19 and 44(2.1) of the *Canada Pension Plan*.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁵ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[14] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability by December 31, 2017. I reached this decision by considering the following issues:

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

Was the Appellant's disability severe?

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

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

[17] The Appellant has:

- chronic pain (sacrum, lower back) from multi-trauma injury (pelvis and sacrum fractures)
- lumbar spondylosis and facet arthrosis (back)
- osteoarthritis (hips)
- bladder, bowel, and erectile dysfunction
- PTSD

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁷ 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 affected his ability to work.⁸

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[19] I find that the Appellant had functional limitations that affected his ability to work.

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

[20] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. Chronic pain, mobility problems, and symptoms of PTSD prevent him from working any job.

[21] The Appellant says that his medical conditions caused the following limitations by at least December 31, 2017:

- **Sit / Stand / Walk** – Pain causes him to constantly shift positions. He can't stand for any length of time. He can't sit for longer than 20 minutes. He can only walk about 100 yards before needing a rest.
- **Sleep** – He normally wakes up every two hours. Sometimes it's the pain, other times it's nightmares about his accident that wake him.
- **Concentrate** – He can struggle to stay focussed and on task.
- **Crowded or enclosed spaces** – He has a hard time coping with people in his personal space, especially in smaller spaces. It triggers his PTSD.
- **Mood** – He can be irritable and angry when his PTSD is "acting up."
- **Bowel / Bladder problems** – He carries a medical kit with him to deal with ongoing issues with his bowel and bladder. Some days he has chronic diarrhea.

[22] The Appellant pushed himself to work for years after his traumatic injury in 1981. He was buried in an underground mining accident and broke his back. He's had over 50 surgeries since that time but kept working when he could. He did various jobs, including diamond drilling and driving trucks. He also worked in the city utilities and engineering departments in the early 2000s but found the office work triggered his PTSD symptoms. He went back to diamond drilling, and later truck driving.

[23] In 2014, he was driving a truck full-time. He was in a lot of pain. His hip and back were bothering him so much he couldn't sleep. He stopped working in early 2015 because of chronic issues related to a penile prosthesis that he had inserted after his accident in 1981. He needed multiple surgeries between 2015 and 2017 and was chronically ill in between. He didn't work at all during this period. He also continued to suffer from longstanding problems with chronic pain and PTSD.

[24] He loved working and wanted to give a return to work his best shot. He retrained in 2018 and went to work driving a truck for a septic service company. He worked a couple of days in May 2018 before fracturing his elbow falling from the truck. It took some time to recover from that injury.

[25] He went back to work full-time in April 2019 for the septic service company. When he was finally able to try working, he found it very difficult. His constant pain worsened. He struggled to get in and out of the truck. He couldn't stand up straight. He had to constantly adjust his position to complete his work, including lying down on the ground while cleaning septic tanks with a hose and vacuum.

[26] He stopped working in October 2019 because he was laid off. He was relieved to get laid off. He was in a lot of pain and feeling tired. As he put it, he was "done." He could tell he was getting to the end because of the pain.

[27] He tried regular injections for his pain from December 2019 to June 2021. The injections helped at first. But by June 2020, he wasn't getting a good response from the injections.⁹ He continued with injections until June 2021, but stopped because it wasn't working.

[28] He went back to work in June 2020. He was "itching" to get back to work. He liked doing what he was doing and was hoping for the best. However, it was the same experience as before. His constant pain worsened again. The injections weren't improving his symptoms. In fact, it's around the time he went back to work that the medical evidence supports a reduction in the effectiveness of the injections. By

⁹ See Dr. Ganesan's letters, dated July 17, 2020, at GD2-181, and June 8, 2021, at GD2-189.

September 2020, he simply couldn't do it anymore. It was "impossible" to continue working because of the pain he was in.

[29] He continues to deal with chronic pain. He had a hip replacement in June 2022. It improved his walking to some extent, but he still has a lot of pain, especially in his lower back. He's due for a hip replacement on his other hip soon.

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

[30] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2017.¹⁰

[31] The medical evidence supports what the Appellant says.

[32] The Appellant's family physician, Dr. Wannenburg, said in a medical report dated May 27, 2021, that he sustained a significant multi-trauma injury in 1981 with pelvis and sacrum fractures that have since caused persistent pain and mobility deficits.¹¹ Dr. Wannenburg listed the following physical limitations related to this injury with a symptom onset date of 1981:¹²

- constant pain in his sacrum and lower back
- unable to sit or stand for extended periods – can walk 100 yards and has to sit, rest, and stretch
- bladder, bowel, and sexual dysfunction

[33] There is further medical evidence of longstanding issues with his back. There is medical imaging from April 2008 showing bilateral facet arthropathy in his lower back/sacrum.¹³ A clinical note from Dr. Wannenburg in November 2017 says "ongoing lower back pain; degenerative changes and facet arthropathy" in the context of not

¹⁰ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹¹ See medical report, dated May 27, 2021, at GD2-301.

¹² See medical report, dated May 27, 2021, at GD2-294 to 303; and Dr. Wannenburg's letter dated March 30, 2022, at GD2-16.

¹³ See medical imaging report, dated April 18, 2008, at GD2-97.

being able to return to work.¹⁴ In a letter dated November 21, 2022, Dr. Wannenburg said that the Appellant had a right hip replacement and has severe osteoarthritis in his left hip.¹⁵ He also has lumbar spondylosis (degeneration of the vertebrae and discs of the lower back) with moderate facet arthrosis (arthritis of the facet joints).¹⁶

[34] There is also medical evidence of PTSD. There is a diagnosis of PTSD in March 2015.¹⁷ Dr. Wannenburg said in his May 2021 medical report that his PTSD symptoms (onset 2017) include that he can't concentrate/focus, is easily overwhelmed, and can't cope with work demands.¹⁸

[35] The Appellant was in a treatment and assessment program with a psychologist and occupational therapist in early 2017.¹⁹ Although he made good progress in the program, he continued to experience persistent symptoms, including "anxious arousal, intrusive experiences, and dissociation."²⁰ From a psychological perspective, he was found fit to return to work with the following limitations and challenges:²¹

- no shift work or consistent night shifts
- no working in underground settings
- no crowds or noisy settings for prolonged periods or as integral part of job
- challenges working in close proximity to others or enclosed spaces (small office / cubicle)
- challenges in work situations that are high pressure, fast paced, and which require multi-tasking

[36] Dr. Wannenburg's opinion is that the Appellant has been unable to work since October 2020 (shortly after he stopped working completely) due to multiple medical

¹⁴ See Dr. Wannenburg's clinical note, dated November 10, 2017, at GD7-34 and 35.

¹⁵ See Dr. Wannenburg's letter, dated November 21, 2022, at GD5-2.

¹⁶ See Dr. Wannenburg's letter, dated November 21, 2022, at GD5-2.

¹⁷ See Dr. Latimer's letter, dated March 24, 2015, at GD2-128.

¹⁸ See medical report, dated May 27, 2021, at GD2-298.

¹⁹ See rehabilitation and assessment reports, dated February 3, March 3, and March 14, 2017, at GD2-147 to 157 and 162 to 168.

²⁰ See rehabilitation and assessment report, dated March 14, 2017, at GD2-162.

²¹ See rehabilitation and assessment report, dated March 14, 2017, at GD2-162 and 163.

conditions and complications.²² He said that the Appellant trialed a return to work in 2019 but had to quit due to chronic pain.²³

[37] The Appellant has dealt with other medical problems related to his 1981 injuries. There is evidence of a penile prosthesis inserted in 1982 that became chronically infected from mid-1990 and required many surgical revisions.²⁴ The prosthesis was eventually removed in April 2015,²⁵ but he continued to suffer from recurrent infections and other symptoms that made him chronically ill and unable to work.²⁶ This required more surgeries, including in March 2017 to remove the prosthesis reservoir that was still in his body.²⁷

[38] The medical evidence supports that the Appellant's functional limitations affected his ability to work by December 31, 2017.

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

– **The Appellant has followed medical advice**

[40] To receive a disability pension, an appellant must follow medical advice.²⁸ 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.²⁹

[41] The Appellant has followed medical advice.³⁰ He follows his doctors' recommendations, including surgery. He is careful about taking painkillers because of his experience with them when he broke his back in the accident. Medication can also

²² See Dr. Wannenburg's letter, dated August 16, 2022, at GD3-2.

²³ See Dr. Wannenburg's letter, dated March 30, 2022, at GD2-16.

²⁴ See Dr. Nigro's letter, dated February 28, 2006, at GD2-98 and 99; and operative report, dated March 4, 2008, at GD2-116 and 117.

²⁵ See operative report, dated April 29, 2015, at GD2-129 to 131.

²⁶ See Dr. Wannenburg's clinical notes, dated February 27, 2015 to May 10, 2017, at GD2-212 to 252.

²⁷ See operative reports, dated July 15, 2015, August 4, 2015, and September 22, 2016, at GD2-132 to 138 and 144 to 145; Dr. Nigro's letter, dated January 30, 2017, at GD2-146; and Ms. Stauffer's letter, dated March 23, 2017, at GD2-159.

²⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

³⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

cause problems with his bowel and bladder. He uses the tools he learned in treatment for PTSD.

[42] He tried injections for his back pain, as well as rhizotomy treatment (deaden nerve endings). There is evidence that the injections helped for a period, but eventually he found them ineffective and stopped.³¹ The rhizotomy treatment was also ineffective.³²

[43] 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.³³

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

[44] 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

[45] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.³⁴

[46] If the Appellant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren't successful because of his medical

³¹ See Dr. Ganesan's letters dated December 10, 2019, to June 8, 2021, at GD2-169 to 190.

³² See Dr. Wannenburg's letter, dated March 30, 2022, at GD2-16.

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

³⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

conditions.³⁵ Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.³⁶

[47] I find that the Appellant can't work in the real world. His severe functional limitations prevent him from regularly doing any type of substantially gainful work. He was 58 years old at the end of 2017. He has a diploma in civil engineering technology (1996) and a certificate in heavy equipment operation (2018). He worked most of his life in mining or driving a truck. Some of these factors might have helped him find work, but they could not overcome his severe limitations that kept him from being regularly capable of substantially gainful work.

[48] The Appellant's medical conditions have severely limited his ability to do the following since at least December 31, 2017:

- **Complete physical tasks** – He can't stand for any period. Walking is painful and exhausting. He must stop frequently and rest.
 - **Complete sedentary tasks** – Sitting is painful. He can only do it for short periods, like 10 to 20 minutes. PTSD causes problems with concentration and staying on task. He can get overwhelmed when under stress.
 - **Function in public** – Crowds and enclosed spaces trigger PTSD symptoms. He struggles when people are in his personal space.
- **The Appellant's efforts to stay in the workforce don't show he was regularly capable of substantially gainful work**

[49] I disagree with the Minister that the Appellant had work capacity because he was able to retrain and find full-time employment after his MQP date. In my view, these failed work attempts showed instead that he was regularly incapable of work. Despite his incredible resilience and determination, he wasn't able to manage his symptoms and keep working for more than several months at a time.

³⁵ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³⁶ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[50] Work that an appellant does after their MQP expires can sometimes show they had work capacity; other times it doesn't because it is evidence of a "failed work attempt."³⁷ The length of a return to work is relevant to whether it is a failed or successful work attempt. The Federal Court of Appeal says that there is "no doubt" that a return to work that lasted only a few days would be a failed attempt, but that "two years of earnings consistent with what had been earned before cannot be a failed attempt."³⁸

[51] The Appeal Division of the Tribunal provided the following guidance when it comes to considering what post-MQP work tells us about whether an appellant was incapable regularly of any substantially gainful work:³⁹ I agree with this approach.

- Were they able to find and keep a job, go to work regularly, and be reliable? (that is the "incapable regularly" part of the definition of a severe disability)
- Were they capable of doing enough of the kind of work that would allow them to earn a living? (that is the "substantially gainful" part of the definition of a severe disability)
- Were they working for a benevolent employer? (the "work" part of the definition of a severe disability covers this)

[52] In my view, the Appellant's efforts to work in 2019 and 2020 were failed work attempts. While the work he did was substantially gainful from an earnings perspective⁴⁰, the evidence shows that he wasn't capable **regularly** of any substantially gainful work. As his doctor put it, he trialed a return to work and had to quit due to chronic pain.⁴¹ The Appellant wanted to do whatever he could to work. He went years

³⁷ See *DS v. Minister of Employment and Social Development*, 2022 SST 292 at paragraphs 36 to 38.

³⁸ See *Monk v. Canada (Attorney General)*, 2010 FC 48 at paragraph 10.

³⁹ See *DS v. Minister of Employment and Social Development*, 2022 SST 292 at paragraph 40.

⁴⁰ "Substantially gainful" is defined by s. 68.1 of the CPP Regulations. An appellant's income for a year is substantially gainful if it is equal to or more than the maximum amount they could get as a disability pension for that year. In 2019, the "substantially gainful" amount was \$16,347.60. In 2020, it was \$16,651.92.

⁴¹ See Dr. Wannenburg's letter, dated March 30, 2022, at GD2-16.

without working and tried to give it his best shot. He tried until it was “impossible” to continue. As his wife testified, he doesn’t quit. She noticed him in pain when he woke up, at the end of the workday, and through the night, but he tried to work anyway. However, even someone as resilient as him has limits and he finally gave up in September 2020.

[53] Below are the reasons why I think the Appellant’s post-MQP training and work doesn’t show he was regularly capable of working:

1. **The training doesn’t tell us much about his overall ability to work** – The capacity to complete a training course isn’t the same as work capacity.⁴² The training course was only for up to three months around March/April 2018. Being able to do something for three months doesn’t prove regular capacity. It also didn’t show that he was fit for sedentary/office work, since his PTSD prevented him from doing that kind of work.
2. **His failed work attempt in May 2018 says little about his work capacity** – The Appellant only worked a few days before fracturing his elbow. I find that if he had avoided that injury, it is likely that he would have had the same experience as when he worked in 2019 and 2020. His chronic pain was longstanding at that point and would have been aggravated by working.
3. **Work attempt from April to October 2019 was close to his limit** – He felt increased pain from working right from the beginning. He struggled to sit, get in and out of the truck, and to do the job. He couldn’t straighten up and would walk with a hunch. He was in pain with every step he took. He couldn’t stand at all. He would lie down while working to deal with the pain. He testified that by October he was “done” and relieved to get laid off. I find that he wouldn’t have lasted much longer (maybe a month or two) had he not been laid off.
4. **Collecting employment insurance benefits between October 2019 and June 2020 didn’t mean he had regular work capacity** – I find that he was

⁴² See *Romanin v. MSD* (November 18, 2004), CP 21597.

near the end of his limit when he was laid off in October 2019. He started getting injections in December 2019, hoping it would relieve some pain and help him on his return to work. He wanted to try again. He realizes now that he had unrealistic expectations.

5. **Work attempt from June to September 2020 confirmed his severe limitations** – It was the same experience as before – working caused extreme pain and mobility issues. Unfortunately, the injections stopped working. A few days off between shifts wouldn't improve his condition. He decided that he couldn't possibly continue and finally stopped working.
6. **Dr. Wannenburg's opinion about being unable to work since October 2020 doesn't mean he had work capacity until then** – In my view, Dr. Wannenburg is simply saying that the Appellant could no longer work **at all** when he quit in September 2020. This opinion doesn't consider when he became regularly incapable of substantially gainful work. Dr. Wannenburg acknowledged that his work trial failed due to chronic pain.⁴³
7. **Work attempts between April 2019 and September 2020 must be put in the context of his recent work experience to understand why they don't show regular capacity for work** – The Appellant only managed to work for around 11 months total between February 2015 and September 2020 (and for only up to 7 months at a time). He stopped working in 2015 because of issues related to his prosthesis, but chronic pain and PTSD were already impacting his ability to work.

[54] I also find that the Appellant didn't have the capacity for less physical alternate work, like a sedentary office job. He testified that he had an office job in the past (when working for the city in early 2000s) and he found his PTSD overwhelming and had to quit. It was very stressful. He had problems focussing. He couldn't sleep. Also, a more recent assessment in 2017 supported that he would find it challenging to work in an

⁴³ See Dr. Wannenburg's letter, dated March 30, 2022, at GD2-16.

office setting (in close proximity to others or enclosed spaces.)⁴⁴ He also struggles with prolonged sitting, which would make sedentary work physically challenging too. I don't think it was realistic to expect that he could manage his symptoms and do this kind of work.

[55] I find that the Appellant's disability was severe when he stopped working in February 2015. The evidence shows that because of his medical conditions he could not regularly do any substantially gainful work since then. Medical evidence from 2017 confirmed that his chronic pain and PTSD symptoms were continuing to limit his ability to work. His work efforts in 2019 and 2020 showed that he wasn't regularly capable of substantially gainful work.

Was the Appellant's disability prolonged?

[56] The Appellant's disability was prolonged.

[57] The Appellant's conditions became disabling as of February 2015. These conditions have continued since then, and they will more than likely continue indefinitely.⁴⁵ Dr. Wannenburg's prognosis for his conditions are that they are likely to remain the same (PTSD) or deteriorate (chronic pain.)⁴⁶ Dr. Wannenburg's opinion is that he can no longer work any occupation due to his chronic medical conditions.⁴⁷

When payments start

[58] The Appellant had a severe and prolonged disability as of February 2015.

⁴⁴ See rehabilitation and assessment report, dated March 14, 2017, at GD2-162 and 163.

⁴⁵ 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.

⁴⁶ See medical report, dated May 27, 2021, at GD2-298 and 299.

⁴⁷ See Dr. Wannenburg's letter, dated March 30, 2022, at GD2-16.

[59] 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.⁴⁸ After that, there is a 4-month waiting period before payments start.⁴⁹

[60] The Minister received the Appellant's application in June 2021. That means he is considered to have become disabled in March 2020.

[61] Payments of his pension start as of July 2020.

Conclusion

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

[63] This means the appeal is allowed.

Michael Medeiros
Member, General Division – Income Security Section

⁴⁸ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

⁴⁹ 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.