



Citation: *AT v Minister of Employment and Social Development*, 2023 SST 1352

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. T.

Respondent: Minister of Employment and Social Development
Representative: Joshua Toews

Decision under appeal: General Division decision dated November 29, 2022
(GP-22-722)

Tribunal member: Neil Nawaz

Type of hearing: Teleconference

Hearing date: September 19, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: October 9, 2023

File number: AD-23-68

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant is a 55-year-old woman with experience in the retail sector. Her last job was as a cashier in a flower shop. At the time, she was living in Alberta. In August 2011, she left her job because of back pain. At the same time, she moved back to New Brunswick, her home province.

[3] Since then, she has tried to return to the workforce twice. In 2015, she attempted to work at a gas bar but only lasted a day. In 2019, she took a similar job but didn't make it past training.

[4] The Appellant applied for a CPP disability pension in October 2020. She claimed that she could no longer work because of degenerative disc disease and other medical conditions, such as an ovarian tumour, left hand tendonitis, and depression and anxiety.

[5] The Minister of Employment and Social Development (Minister) refused the application after determining that the Appellant did not have a severe and prolonged disability as of December 31, 2013, the last time she had CPP disability coverage.

[6] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found insufficient evidence showing that the Appellant was incapable of substantially gainful employment during her coverage period.

[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.

Preliminary Matter

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

Issue

[9] In this appeal, I had to decide (i) whether the Appellant became disabled during her coverage period and (ii) whether she has remained so ever since.

Analysis

[10] I have applied the law to the available evidence and concluded that the Appellant had a severe and prolonged disability as of December 31, 2013. I am satisfied that the Appellant's mental and psychological condition at the time did not permit her to deliver the kind of regular performance demanded in a commercial workplace.

CPP disability claimants must show that they had a severe and prolonged disability during their coverage period

[11] For the Appellant to succeed, she had to prove that, more likely than not, she became disabled during her coverage period and has remained so ever since. Under the CPP, a disability must be severe and prolonged:

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.² A claimant isn't entitled to a disability

¹ The Appellant was subject to the new rules because her application for permission to appeal was filed with the Tribunal on January 17, 2023.

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

pension if they are regularly able to do some kind of work that allows them to earn a living.

- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.³ The disability must be expected to keep the claimant out of the workforce for a long time.

[12] The parties agreed that the Appellant's CPP disability coverage ended on December 31, 2013.⁴ That meant I had to assess the Appellant's condition as of that date and decide whether she had functional limitations that got in the way of her earning a living.

The Appellant had a severe disability during her coverage period

[13] In her application for benefits, the Appellant reported that she is unable to work because of spinal stenosis and degenerative disc disease in the lower spine. In response to a question asking about her other disabling conditions, the Appellant said she had a large solid mass between her left ovary and uterus, and that she would be undergoing surgery for that condition. She added that in May 2018 she had had surgery to repair the tendons and nerves in her left index finger and thumb, leaving her with 80 percent usage in her dominant hand.⁵

[14] However, the Appellant's recent condition is far less relevant than what she was able to do 10 years ago, when she was still covered by the CPP. The courts have repeatedly said that disability claimants must produce at least some objective medical evidence of disability from their coverage period.⁶

[15] Since much of the Appellant's medical evidence was dated years after her coverage period, I gave it limited weight. I saw nothing to indicate, for instance, that the

³ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

⁴ 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 record of earnings at GD2-46.

⁵ See Appellant's application for the CPP disability pension dated October 27, 2020, GD2-25.

⁶ See *Canada (Attorney General) v Dean*, 2020 FC 206 and *Canada (Attorney General) v Angell*, 2020 FC 1093.

Appellant's left-hand tendonitis or her pelvic tumour, for which she underwent surgeries in 2018 and 2021 respectively, produced functional limitations before 2014.

[16] That said, the Appellant did submit some medical evidence from her coverage period. It was enough to convince me that she had significant physical and psychological problems during her coverage period.

– **The Appellant's physical complaints correspond with her family doctor's office notes**

[17] Dr. John Henderson, who is based in New Brunswick, has been the Appellant's family doctor since 2012.⁷ A copy of what I presume are his complete office notes are on file. They show that, in the last two years of her coverage period, the Appellant saw Dr. Henderson regularly, on average every two months.⁸

[18] The notes also show that the Appellant came to Dr. Henderson with a wide variety of symptoms and conditions — heart palpitations, chest tightness, asthma, sinusitis, and bronchitis. The Appellant also had frequent complaints about joint pain — in her neck, back, right knee, right shoulder, and right wrist. It appears that Dr. Henderson referred the Appellant to an orthopedic surgeon — or at least considered doing so — but it is not clear whether a consultation ever took place.

[19] However, Dr. Henderson did send the Appellant for imaging on several occasions. The resulting reports revealed significant degenerative changes to the Appellant's spine — changes that happened to be consistent with the back pain that she reported both before and after her coverage period.

⁷ See Appellant's application for CPP disability benefits dated October 27, 2020, GD2-35. Around the same time, Dr. Henderson wrote that he had been treating the Appellant for her "primary medical condition" (presumably back pain) since May 2015 (see CPP medical questionnaire dated September 2020, GD2-210). However, Dr. Henderson's office notes go back as early as February 2012 — see GD2-140.

⁸ Dr. Henderson's office notes indicate that he saw the Appellant 11 times over during the last two years of her coverage period: February 3, 2012; April 26, 2012; July 17, 2012; September 26, 2012; October 15, 2012; November 7, 2012; December 13, 2012; March 27, 2012; April 3, 2012; August 14, 2012; and October 30, 2012.

– **Imaging reports confirm significant pathology during the coverage period**

[20] Imaging reports by themselves do not prove disability, but they can reveal objective signs of damage that explain why a claimant might be subject to functional limitations.

[21] From 2011 to 2015, the Appellant was sent for numerous x-rays, CT scans, and MRIs of her upper and lower back. The results were not always consistent with one another but, taken together, a picture emerges of significant pathology in at least two nodes of the Appellant's lumbar spine:

- An October 2011 x-ray of the lumbar spine showed grade one anterolisthesis (disc slippage) at the L4-5 and L5-S1 vertebrae;⁹
- A December 2011 MRI of the lumbar spine showed degenerative disc disease and moderate stenosis (narrowing of the spaces in the spinal column) at L4-5 and L5-S1;¹⁰
- A January 2012 CT scan of the lumbar spine showed moderate stenosis and severe bilateral facet hypertrophy (joint enlargement) with grade one anterolisthesis at L4-5 and L5-S1;¹¹
- An October 2012 MRI of the lumbar spine showed a mild degree of spinal stenosis at L4-5 and L5-S1;¹² and
- A July 2015 MRI of the lumbar spine showed moderate to severe anterolisthesis and osteoarthritis at L4-5 and L5-S1.¹³

[22] I am satisfied that there was at least some organic basis for the Appellant's complaints about her back pain during her coverage period. That pain was not the only cause of her disability but, combined with other factors, it was a major contributor to it.

⁹ See x-ray of the lumbar spine dated October 25, 2011, GD1-31.

¹⁰ See MRI of the lumbar spine dated December 25, 2012, GD1-33.

¹¹ See CT scan of the lumbar spine dated January 23, 2012, GD1-24.

¹² See MRI of the lumbar spine dated October 27, 2012, GD1-27.

¹³ See MRI of the lumbar spine dated July 2, 2015, GD1-28.

– **The Appellant had significant mental health problems during her coverage period**

[23] In her application for benefits, the Appellant claimed that she was disabled in part by depression and anxiety, which was getting progressively worse. She said that she had regular panic attacks and had suffered three breakdowns.

[24] At the hearing, the Appellant testified that she is easily overwhelmed under pressure and can't focus or multitask. She said she had no desire or ambition and was increasingly wary of other people.

[25] There is no doubt that the Appellant has had significant psychological problems in recent years. She was taken to hospital at least once after experiencing an emotional crisis,¹⁴ and she is currently seeing a mental health counsellor.¹⁵

[26] However, the law requires evidence of disability during a claimant's coverage period, which in the Appellant's case, ended nearly a decade ago. The evidence from that period is sparse, but there is one item confirming that the Appellant was diagnosed with major depressive disorder as early as 2003.¹⁶

[27] It is not clear whether, beyond taking medication, the Appellant received any treatment for her anxiety and depression. However, I am satisfied that her mental health condition has been continuous since at least 2003. Even if it wasn't her main problem, it contributed to a severe disability in the period leading up to the end of her coverage.

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

[28] The leading case on the interpretation of "severe" is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Appellant as a "whole person"

¹⁴ See emergency report dated March 10, 2016, GD2-146.

¹⁵ See report dated March 23, 2022 by Dr. Sanjay Siddhartha, psychiatrist, GD4-3. The Appellant testified that, in accordance with Dr. Siddhartha's recommendation and referral, she was currently receiving monthly counselling through New Brunswick Mental Health Services.

¹⁶ See Dr. Siddhartha's outpatient note dated July 4, 2003, GD4-2.

in a real-world context.¹⁷ Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.” Those circumstances fall into two categories:

- A claimant’s background — matters such as “age, education level, language proficiency and past work and life experience” are relevant;
- A claimant’s medical condition — this is a broad inquiry, requiring that the claimant’s condition be assessed in its totality.

[29] In this case, I don’t think that the Appellant had anything left to offer a real-world employer by the end of 2013. It is true that she was only 45 years old at the time, but her combined physical and psychological conditions made her incapable of reliable performance.

[30] The Appellant has secretarial training from a career college, but she has never worked in an administrative setting. She has worked in call centres, but that type of job requires extended sitting, which would only aggravate her back pain. She has also worked in stores, but sales positions usually involve extended sitting or standing, and they often require some element of carrying and lifting. Such work is ill-suited to a person with a damaged back. Her capacity is further diminished by persistent anxiety.

[31] With these conditions, the Appellant could not sustain a job, nor was she a suitable candidate for retraining. I can’t see how the Appellant could have succeeded in the competitive labour market in her condition.

– **The Appellant took reasonable steps to get better**

[32] According to a case called *Lalonde*, disability claimants must mitigate (do what they can to alleviate) their impairments by following their treatment providers’ recommendations.¹⁸ *Lalonde* also requires decision-makers to consider whether a

¹⁷ See *Villani v Canada (Attorney General)* 2001 FCA 248.

¹⁸ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211. See also *Sharma v Canada (Attorney General)*, 2018 FCA 48 and *Brown v Canada (Attorney General)*, 2022 FCA 104.

claimant's refusal of recommended treatment is unreasonable and, if so, what impact that refusal is likely to have on the claimant's disability status.

[33] The Appellant's medical records during her coverage period are admittedly patchy. Matters have undoubtedly not been helped by the fact that the Appellant has periodically moved from her home in Miramachi to Fort MacMurray to follow her then-spouse as he pursued work in the Alberta oilfields.

[34] Chronic back pain is difficult to treat. The record does not indicate whether the Appellant has ever seen an orthopedic specialist, but she testified that she did not ask for a referral and left matters up to her family doctors. The law requires disability claimants to make a reasonable effort to comply with their healthcare providers' medical recommendations, but it doesn't go as far as to demand that they take a proactive role in their own treatment. If the Appellant chose to defer to her primary caregiver, that does not disqualify her from the disability pension.

[35] In his CPP medical report, Dr. Henderson raised the possibility of back surgery to address the Appellant's spinal stenosis.¹⁹ However, it is not clear whether such surgery has ever been a viable option. There is no mention of surgery in Dr. Henderson's office notes and, as noted, it does not appear that he ever referred the Appellant to an orthopedic specialist. Moreover Dr. Henderson later wrote that the Appellant was not a surgical candidate.²⁰ What happened to change Dr. Henderson's mind is unknown. The Appellant testified that she recalled a long-ago conversation with Dr. Henderson, in which he discussed back surgery but gave it only 50/50 odds of success.

[36] Otherwise, the Appellant has tried a number of treatment options. She tried Naproxen (an anti-inflammatory pain reliever) but it upset her stomach. She avoids narcotic painkillers because she is worried about becoming addicted to them. Dr. Henderson referred the Appellant for physiotherapy in early 2012, but it appears that

¹⁹ See Dr. Henderson's CPP medical report dated September 22, 2020, GD2-210.

²⁰ See Dr. Henderson's letter dated April 21, 2020, GD3-3.

there wasn't enough available staff to provide her with treatment.²¹ The Appellant testified that she didn't have the money to pay for physiotherapy out of pocket.²²

[37] As for her depression and anxiety, the Appellant, as noted, sought psychiatric help 20 years ago. She has been taking Paxil for many years, albeit with limited effect. Again, I do not think the Claimant's mental health problems are the primary source of her disability, but it is likely that they aggravate and intensify her physical conditions. Dr. Henderson's office notes from 2012–13 confirm that the Appellant had difficulty managing life pressures, although the family doctor appears to have done little about it except renew her prescriptions.

– **The Appellant made unsuccessful attempts to return to work**

[38] 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.²³

[39] This passage suggests that, if a claimant retains at least **some** work capacity, the General Division must 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.

²¹ See Miramachi Regional Hospital Professional Services Request form completed by Dr. Henderson on February 15, 2012, GD1-20. See also Miramachi Regional Hospital physiotherapy department form letter dated December 1, 2012, GD1-21.

²² At the Appeal Division hearing, the Minister's representative announced that he would be abandoning his prior argument that the Appellant failed to mitigate her back condition through physiotherapy.

²³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[40] On top of that, disability claimants must make **meaningful** attempts to return to work.²⁴ 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.²⁵ Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[41] 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. Her last sustained job was at a flower shop, which she says she left in August 2011 because she couldn't manage lifting heavy buckets of water. As we have seen, the Appellant's age and education limited the jobs for which she might have been qualified.

[42] Nevertheless, the Appellant did make two attempts to return to work. In 2014, she got a job at a gas bar. She testified that she knew she wasn't capable of working but applied anyway because she needed the money. She said that she only lasted a day — she had a hard time standing and was so unfocused that she forgot to remove the gas pump from a customer's tank. She tried working again in 2019, taking job as a cashier at a convenience store. This time, she didn't make it past training. She said that she felt "mentally overwhelmed" by the paperwork (the job involved selling lottery tickets and filling out forms when a winner sounded) and overburdened by her physical duties, which involved lifting crates and mopping floors.

[43] Given this evidence, which I find credible, I have no hesitation in finding that the Appellant's efforts at obtaining and maintaining employment were unsuccessful because of her health condition. Put simply, the Appellant's back pain and her anxiety made it impossible for her to succeed in two relatively undemanding and low-impact jobs.

²⁴ 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.

²⁵ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

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

[44] The Appellant was a sympathetic and forthright witness. She explained in detail how back pain regularly immobilized her during her coverage period. She described how, at the same time, she was frequently overwhelmed by anxiety and depression, leaving her unable to concentrate on even simple tasks. At the hearing, when asked why she wasn’t able to work at a relatively low-stress retail job, the Appellant replied:

It's the mental aspect of it. I can't focus. I have anxiety. I have panic attacks. Sometimes, I go into shake mode that lasts 20 minutes or longer. I have major memory loss. I can't concentrate or focus. Reading material — I have to read it over and over again. I can't multitask, I just get overwhelmed. I can't make simple decisions, like making appointments, grocery lists.²⁶

[45] This testimony, combined with the available medical evidence, paint a picture of an individual with significant physical and psychological impairments — impairments that prevented her from dependably fulfilling work duties in the period before December 31, 2013.

[46] Case law has held that severity is predicated upon the claimant being able to come to work and perform their duties whenever and as often as necessary: “Predictability is the essence of regularity.”²⁷ On balance, the available evidence suggests that the Appellant is no longer able to offer such predictability.²⁸

The Appellant had a prolonged disability

[47] The Appellant’s testimony, corroborated by contemporaneous medical reports, indicates that she has suffered from a severe disability — chronic back pain with an overlay of anxiety and depression — since her coverage period nearly a decade ago. The medical evidence since then indicates that her condition has not improved, and I

²⁶ Refer to recording of Appeal Division hearing at 53:45.

²⁷ See *Minister of Human Resources and Development v Bennett* (July 9, 1997), CP 4757 (PAB).

²⁸ See *Atkinson v Canada (Attorney General)* 2014 FCA 187.

see no prospect that it will improve, even with further treatment or medication. She has been, and will continue to be, effectively unemployable for an indefinite period.

Conclusion

[48] I find the Appellant disabled as of August 2011, the last time she held a job for any length of time. Since the Minister received his application for benefits in October 2020, the Appellant is deemed disabled as of July 2019.²⁹ That means the effective start date of the Appellant's CPP disability pension is November 2019.³⁰

[49] The appeal is allowed.



Member, Appeal Division

²⁹ Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension.

³⁰ According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability.