



Citation: *DH v Minister of Employment and Social Development*, 2023 SST 174

## Social Security Tribunal of Canada General Division – Income Security Section

# Decision

**Appellant:** D. H.  
**Representative:** Allison Schmidt

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated June 4, 2021 (issued by  
Service Canada)

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**Tribunal member:** Virginia Saunders

**Type of hearing:** Teleconference

**Hearing date:** February 9, 2023

**Hearing participants:** Appellant  
Appellant's representative  
Appellant's witness

**Decision date:** February 28, 2023

**File number:** GP-21-1752

## Decision

[1] The appeal is dismissed.

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

## Overview

[3] In April 2009, without warning, the Appellant started to have pain in his left shoulder. He was 37 years old. He hadn't injured himself. The pain radiated into his neck, arm, and ear. He got headaches. Soon he developed numbness, tingling, and pain in both hands. X-rays showed he had a cervical rib (an extra rib at the base of his neck). He was eventually diagnosed with thoracic outlet syndrome and secondary myofascial pain syndrome.

[4] The Appellant had been working as an assistant maintenance manager in a shopping mall. He went on medical leave. He expected to go back to work, especially after he had thoracic outlet surgery in 2012. But there were complications from the surgery. His whole right arm and hand became numb. He developed weakness in his right hand and shoulder. He didn't recover enough to return to his job. He didn't feel he could do a different type of job, so he didn't look. He hasn't worked anywhere since April 2009.

[5] The Appellant applied for a CPP disability pension in December 2019. 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.

[6] The Appellant says he can't work at any job because of pain and numbness, cognitive issues, sleep problems, and depression.

[7] The Minister says there is evidence the Appellant had work capacity despite his medical conditions, so he should have tried alternate work.

## What the Appellant must prove

[8] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged by December 31, 2011.<sup>1</sup> He also has to prove that his disability has been continuous since then.<sup>2</sup>

[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.<sup>3</sup>

[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, language ability, 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 regularly able to 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.<sup>4</sup>

[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.

[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 he has to show it is more likely than not that he is disabled.

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<sup>1</sup> 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 GD3-17.

<sup>2</sup> In *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>4</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## Reasons for my decision

[15] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2011, and continuously since then.

### The Appellant's disability wasn't continuously severe

[16] The Appellant's disability wasn't continuously severe. He had functional limitations that affected his ability to work. But there is evidence that he had some work capacity. Because he didn't try to find and keep a job that was suited to his limitations, I can't find that he had a severe disability.

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

[17] In 2011, the Appellant's diagnosis was chronic left C7 radiculopathy and myofascial pain syndrome of the neck and shoulder.<sup>5</sup> But I don't focus on his diagnoses.<sup>6</sup> I have to focus on whether he had functional limitations that got in the way of him earning a living.<sup>7</sup> I have to look at all of his medical conditions, not just the main one.<sup>8</sup> I have to think about how they affected his ability to work at December 31, 2011, and after that.

[18] The Appellant has functional limitations that have affected his ability to work since 2009. However, the objective evidence shows that he wasn't always as limited as he now remembers.<sup>9</sup> I am not suggesting that he is deliberately exaggerating. I recognize that it has been difficult for him. But the objective evidence is more reliable than the Appellant's memory, or his wife's.<sup>10</sup> I will explain why.

[19] First, the objective evidence is based in part on what the Appellant reported at the time to the health care provider or assessor. Common sense tells me that our

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<sup>5</sup> See GD2-284.

<sup>6</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>7</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>8</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>9</sup> When I say "objective evidence" in this decision, I mean reports by health care professionals, including the Appellant's doctors and the certified athletic therapist who did a functional capacity evaluation in August 2014.

<sup>10</sup> The Appellant's wife gave evidence at the hearing.

memories get worse, not better, as time passes. So, the Appellant was more likely to describe his condition accurately at the time, rather than several years later.

[20] Second, the health care professionals the Appellant saw were trained to observe and record his symptoms and limitations. There isn't any evidence to suggest they weren't capable of doing this, or that they didn't act professionally in his case.

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

[21] The Appellant and his wife told me his condition hasn't changed much since April 2009. He has chronic neck and shoulder pain that gets worse with any activity. It is unbearable. He has to spend most of the day lying down. He always has a headache. It gets worse after any activity or if there is too much noise. He couldn't do much with his hands before his surgery in 2012, and now things are worse because the surgeon accidentally cut his ulnar nerve. He often drops things. He is irritable and depressed.

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

[22] The medical evidence supports that the Appellant had some limitations that affected his ability to work by December 31, 2011.<sup>11</sup>

[23] Dr. Nelems' report of October 2009 documented pain in the neck, shoulders, and arms, and numbness and tingling in both hands. These problems got worse when the Appellant was driving for long distances, working with his arms elevated, carrying heavy objects, or doing repetitive activities. On his left side, he also had weak grip, hand fatigue, and poor fine motor control.<sup>12</sup>

[24] The Appellant saw a psychiatrist, Dr. Yu, in January, March, and June 2011. Dr. Yu noted his persistent chronic neck pain and sensory changes in both hands. He had problems maintaining positions for long periods, lifting, and fine motor coordination. Dr. Yu noted the Appellant had difficulty with prolonged sitting and increased arm activity.

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<sup>11</sup> The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2011. See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>12</sup> See GD2-404.

She said this was based on the Appellant's report, and she recommended a functional capacity evaluation.<sup>13</sup>

[25] There's no suggestion that the Appellant's condition changed in the next seven months. I find that the limitations that Dr. Yu described in June 2011 were the Appellant's limitations on December 31, 2011.

– **The Appellant improved after December 2011**

[26] The Appellant improved after December 2011. He had a nerve traction injury during his right-sided thoracic outlet surgery in October 2012. His left-sided surgery was put off as a result.<sup>14</sup> But by December 2012, Dr. Nelems (who performed the surgery), said the Appellant was showing "definite signs of recovery" from the nerve injury. He was weak, but his muscle power was improving, and he felt that he was gradually getting better. His sensory function was also improving.<sup>15</sup>

[27] Between February and May 2013, Dr. Nelems reported the Appellant's recovery had slowed. In April 2013, the Appellant had a new onset of winging of the right scapula. But Dr. Nelems did not suggest that the Appellant's condition was worse. He hoped that he would continue to improve over the long term. He didn't mention the Appellant's neck pain, back pain, or headaches.<sup>16</sup> This tells me that, while these problems may not have gone away entirely, they weren't as limiting as they had been.

[28] The Appellant saw his family doctor, Dr. Tereposky, in May 2014. She noted that she hadn't seen him since January 2013, and that he hadn't been to any other doctor for more than a year. She said the only objective sign that prevented him from working in his own occupation was "mild weakness of his right hand." She said he reported pain and he felt he would never regain full strength in his right hand. Dr. Tereposky said the

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<sup>13</sup> See GD2-294-300

<sup>14</sup> See GD2-403 and 409.

<sup>15</sup> See GD2-392.

<sup>16</sup> See GD2-388-391.

Appellant needed to start considering alternatives and needed to be assessed by a comprehensive rehabilitation team.<sup>17</sup>

[29] The Appellant disagrees with what Dr. Tereposky said. As I explained above, he says he always had significant limitations in both arms and hands, as well as chronic, debilitating neck and shoulder pain. He says he did not go a year without seeing a doctor. He told me he was seeing Dr. Nelems until Dr. Nelems retired, then he was transferred to a different surgeon to have surgery on the left side, but “it just never happened.”

[30] However, I don't believe the Appellant saw Dr. Nelems after May 2013. Dr. Nelems sent copies of his reports to Dr. Tereposky, so she would have received any after May 2013.<sup>18</sup> In addition, Dr. Yu noted in July 2014 that the Appellant hadn't had any specific follow up since May 2013.<sup>19</sup>

[31] I recognize that the Appellant was waiting to hear from the new surgeon. However, if his pain and other issues were as big a problem as he remembers, he likely would have gone back to his family doctor before May 2014.

– **The Appellant had work capacity after December 2011**

[32] Dr. Tereposky referred the Appellant back to see Dr. Yu. He saw Dr. Yu in July 2014. He told Dr. Yu that his right arm strength had improved over time but had not returned to normal. He had persistent weakness in his shoulder and hand. The numbness in his arm had improved significantly, but he still had it in his fingertips. At times, he had sharp shooting pains in his shoulder. On his left side, he had shoulder pain and numbness across his fingertips. When he leaned on his elbows, both arms would go numb.<sup>20</sup>

[33] Dr. Yu did a physical examination and electrodiagnostic studies. She diagnosed the Appellant with left ulnar neuropathy localized above the elbow, and a recovered

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<sup>17</sup> See GD2-380-382.

<sup>18</sup> The reports at GD2-388 to 392 are all copied to Dr. Tereposky.

<sup>19</sup> See GD2-344.

<sup>20</sup> See GD2-344.

brachial plexus injury from the 2012 surgery. She didn't expect any further improvement, but she noted that his motor function had come back, and he was independent for day-to-day activities. She didn't think he could return to his previous work because of the significant hand and shoulder weakness on his right side. However, she supported his taking a vocational rehabilitation or job retraining program to look at alternative work.<sup>21</sup>

[34] The Appellant had a functional capacity evaluation in August 2014. It took place over three hours and included a physical examination and a functional abilities assessment. The assessor noted the Appellant's movements during the functional testing were appropriate and showed maximal effort. In her opinion, this meant that what the Appellant showed during testing accurately represented his full capabilities.<sup>22</sup>

[35] The assessor found the Appellant's performance was consistent with clinical findings and his reported activity level. He had demonstrated limitations with right grip strength, walking, manual handling, elevated work, crouching, and repetitive reaching overhead. But he could do the following activities frequently (34 to 66% of the day):

- sitting and standing
- floor to waist lifting up to 13.2 lbs
- waist to crown lifting up to 13.2 lbs
- front carry up to 24.2 lbs
- right carry up to 8 lbs
- left carry up to 30 lbs
- stairs
- repetitive reaching forward

[36] He could do the following activities occasionally (6-34% of the day):

- walking
- floor to waist lifting up to 24.2 lbs

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<sup>21</sup> See GD2-343-346.

<sup>22</sup> See GD2-358.



- waist to crown lifting up to 24.2 lbs
- front carry up to 46.2 lbs
- right carry up to 30 lbs
- left carry up to 41 lbs
- elevated work
- crouching, squatting
- repetitive reaching overhead<sup>23</sup>

[37] The Appellant argued that I shouldn't place much weight on the results of the evaluation, because it was only three hours long and because he was in pain afterwards.

[38] I don't agree with the Appellant's argument. The evaluation was designed to give an accurate assessment of his overall abilities and limitations, and to do so within a three-hour time frame. The Appellant didn't provide any evidence to show that the assessor was unqualified or that the evaluation didn't follow standard practices and procedures. The assessor noted the Appellant was in pain and that he expected his pain would get worse in a few hours. So, it is reasonable to expect that she considered that in reaching her conclusions.

[39] The functional capacity evaluation acknowledged the Appellant had limitations and pain. Despite these problems, the assessor concluded that he could do things like sitting, standing, light to medium lifting, and repetitive reaching, for up to 2/3 of the day. This is evidence of work capacity.

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

[40] Because the Appellant's symptoms and limitations didn't change between May 2013 and August 2014, I find that there is evidence of work capacity for at least 15 months. There is no evidence of any sleep, mental or cognitive issues affecting his ability to work during this period.

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<sup>23</sup> See GD2-359-360.

[41] When I am deciding whether the Appellant could work, I can't just look at his medical conditions and how they affected what he could do. I must also consider factors such as his age, level of education, language abilities, and past work and life experience. These factors help me decide whether the Appellant could work in the real world—in other words, whether it is realistic to say that he could work.<sup>24</sup>

[42] I find that the Appellant could work in the real world. All of his personal factors are in his favour. Between May 2013 and August 2014, he was in his early 40s. He had finished high school and trained as a refrigeration mechanic and gas fitter. He had some experience doing administrative duties as a maintenance supervisor. There were no language issues. Both Dr. Tereposky and Dr. Yu recommended that he think about alternative work. Neither of them suggested that he would have difficulty retraining.

[43] The Appellant took a three-day computer course. He thinks he did this in 2015. He says he didn't learn anything because he just sat at a table and got a certificate. But he didn't look for **any** work, regardless of whether it required computer skills. He argued that he wouldn't be able to work because of his limitations.

[44] There is evidence the Appellant had some work capacity for at least 15 months. His personal factors show that he could work in the real world. This means he can't just speculate that he wouldn't have been able to work. The law says that 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 conditions.<sup>25</sup> Finding and keeping a job includes retraining or looking for a job he could do with his functional limitations.<sup>26</sup>

[45] Because the Appellant didn't try to work, I can't find that he had a severe disability by December 31, 2011, and continuously after that.

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<sup>24</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>25</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

<sup>26</sup> See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

## **Conclusion**

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

[47] This means the appeal is dismissed.

Virginia Saunders  
Member, General Division – Income Security Section