



Citation: *EM v Minister of Employment and Social Development*, 2023 SST 445

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: E. M.
Representative: Steven Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated November 17, 2021 (issued
by Service Canada)

Tribunal member: Anita Nathan

Type of hearing: Teleconference

Hearing date: March 22, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: April 25, 2023

File number: GP-22-234

Decision

[1] The appeal is allowed.

[2] The Appellant, E. M., 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 51 years old. She was working as a sales representative for a major retailer. She stopped working in March 2020 because of pain in her back and neck. This caused limitations with standing, sitting, lifting, and carrying, which were regular activities of her employment. The Appellant tried to return to work but her employer could not offer her a position with her limitations.

[4] The Appellant applied for a CPP disability pension on April 23, 2021. 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.

[5] The Appellant describes the pain in her back and neck as excruciating. She says she can't do even basic chores or errands without requiring hours or days of rest. She can't do sedentary work either because sitting aggravates her back. Therefore, she can't do any type of work.

[6] The Minister says the Appellant's doctors have not identified any severe functional limitations and her condition has improved with conservative treatment. Further, the Appellant was working as a psychic which shows she has capacity for some type of work.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2022. This date is based on her contributions to the CPP.¹

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

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

[10] 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 regularly able to do some kind of work that she could earn a living from, then she isn’t entitled to a disability pension.

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

[12] 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.

[13] 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.

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 GD5-10.

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.

Matters I have to consider first

I accepted the documents sent in after the hearing

[14] At the hearing, the Appellant referred to some documents that were not filed. I asked the Appellant's representative to file those documents as they are relevant to the Appellant's functional limitations and work capacity. I also accepted the Minister's submissions in response to the additional documents, so they were not prejudiced. The documents were sent within a few days of the hearing so there was no undue delay.⁴

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability by March 2020. 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 has degeneration in her back, chronic pain syndrome, and reactive depression and anxiety. However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether she had functional limitations that got 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

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

– What the Appellant says about her functional limitations

[18] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says due to her back condition she

⁴ See s. 42 of the *Social Security Tribunal Rules of Procedure*.

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

⁶ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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

experiences pain, soreness, and tightness in her back. In addition, she has pain, numbness, and a tingling sensation down her arms to her fingers, a pinching in her neck, and soreness around her right shoulder blade and under the armpit.

[19] The Appellant says her condition causes the following functional limitations:

- inability to lift even 5 pounds
- inability to carry any weight for more than 5 minutes
- inability to raise her arms above her head
- inability to turn her head without feeling a strain/pinching in the neck and pain or numbness in the arms and hands
- inability to turn her back without pain and soreness
- inability to type on a computer due to pain in her shoulder blade and forearm
- trouble bending
- inability to sit for more than 20 to 30 minutes without back support and 1 hour with back support, but her back gets very tight and stiff with any sitting
- difficulty walking due to tightness in her back

[20] The Appellant says she can't work as a salesperson because it involved a lot of carrying heavy clothes and constant motion of her upper body, which she can't tolerate anymore. She said she was using the fitting rooms to lie down daily and would take days off as she earned them.

[21] The Appellant says that she can't work any job because she is restricted from doing a lot of movements as they cause her pain. Basic chores like washing the dishes or laundry cause pain in her body requiring her to rest. Similarly, after running a few errands she also has to rest. Sometimes she needs to rest for hours, and other times days. For this reason, the Appellant says she can't be a reliable, consistent employee.

[22] The Appellant was credible. She testified in a direct manner. She testified based on her own memory and acknowledged when she did not recall things. Her evidence wasn't exaggerated. There were no major inconsistencies in her testimony.

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

[23] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2022.⁸

[24] The medical evidence supports what the Appellant says. I will review the records chronologically.

[25] The Appellant’s physiotherapist, Ms. Mariana Paz, wrote a letter to the Appellant’s employer dated March 2020, suggesting a period of short-term disability. She described worsening and more frequent episodes of “cervical nerve impingement with radicular symptoms in the right arm” (a pinched nerve in the neck causing pain, muscle weakness and numbness) since 2017. Ms. Paz noted that there was mild degeneration or arthritis in the neck. The letter states that the Appellant came to the clinic on February 7, 2020, complaining of 9/10 pain in her neck, right shoulder blade, right upper arm, forearm, and hand. She could not turn her head or look up. She complained of feeling so much pain she passes out at night. She also said driving was difficult because it was hard to turn her head to check her blind spots.⁹

[26] The Appellant had an x-ray in March 2020 which found there was degenerative changes in the spin at the C4-C5 and C5-C6 levels.¹⁰

[27] The Appellant had two MRIs in June 2020 which found multilevel degenerative change, worse at the C4-C5 level, moderate narrowing at C5-C6, and severe narrowing at C6-C7.¹¹

[28] Next is a letter from Dr. Pirouzmand, neurosurgeon, dated August 2020. They noted that the Appellant developed neck pain in the summer of 2016, with intermittent flare-ups which were triggered by manual work. This resulted in right-sided neck and shoulder pain, which radiated down the arm to the index finger and thumb. The

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁹ See GD4 – 250-251.

¹⁰ See GD4 – 101.

¹¹ See GD2 – 70-71 and GD4 – 100.

Appellant also had another flare-up in March 2020 which caused her to stop working. Dr. Pirouzmand notes that the Appellant's radiculopathy (pinched nerve) had improved and the pain in her neck felt better. She was determined to be neurologically well and advised to do activities as tolerated. In terms of treatment, she was recommended to continue with physiotherapy and medication, and she didn't need surgery.¹²

[29] The Minister argues that the Appellant's condition has improved with conservative treatment. The only medical record that notes symptom improvement is the letter by Dr. Pirouzmand. Improvement is only noted with regard to the pain in the Appellant's neck. Dr. Pirouzmand didn't address the Appellant's main condition, namely her back. At this point, the Appellant had stopped working, so it is expected that she would have some improvement as the constant strain of working wasn't present. This doesn't equate to the Appellant's condition being improved enough to return to work.

[30] The Appellant's family doctor, Dr. Petrescu, wrote a letter dated September 2020 which stated that any return to work had to be gradual and modified with no lifting above the shoulder and no carrying over five pounds.¹³

[31] Dr. Petrescu also completed a medical report dated July 2021 and wrote a letter dated February 2022. She identified the Appellant's conditions as cervical spine entrapment with severe limitation (spinal stenosis), lumbar sacral spine, chronic pain syndrome, and reactive depression and anxiety. She noted that the Appellant's condition affects her activities of daily living and her work. She listed the following functional limitations:¹⁴

- inability to reach
- inability to lift or carry over 5 pounds
- inability to lift overhead
- inability to sit or stand more than 30 minutes to 60 minutes

¹² See GD2 – 72.

¹³ See GD4 – 255.

¹⁴ See GD2 – 62-68.

- difficulty walking

[32] Finally, an April 2022 letter from the Appellant's employer summarizes a medical functional abilities assessment by an unidentified health care provider. The report concluded that the Appellant could not return to work in the foreseeable future. It lists the following functional limitations and restrictions:¹⁵

- inability to walk, sit, or stand for more than 30 to 60 minutes
- no lifting from floor to waist or waist to shoulder
- no above-shoulder work
- no bending/twisting
- limit stair use to 1 flight
- limit shifts to 3 hours

[33] The medical evidence supports that the Appellant's functional limitations affected her ability to work as a salesperson.

[34] I disagree with the Minister that the records don't support severe functional limitations. The records note limitations with walking, sitting, standing, bending, twisting, reaching, lifting, and carrying. Lifting and carrying is limited to under five pounds. Sitting, standing, and walking limitations are as low as 30 minutes.

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

– **The Appellant has followed medical advice**

[36] To receive a disability pension, an appellant must follow medical advice.¹⁶ If an appellant doesn't follow medical advice, then she must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on her disability.¹⁷

¹⁵ See GD8-2 to GD8-3.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁷ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[37] The Appellant has followed medical advice.¹⁸

[38] The Appellant has taken medication, done physiotherapy and massage therapy, used a TENS machine and heat therapy as recommended. No other treatment was recommended.

[39] 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.¹⁹

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

[40] 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

[41] 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.²⁰

[42] I find that the Appellant can't work in the real world. I will assess the various factors that led me to this conclusion.

[43] The Appellant's personal circumstances would help her re-enter the workforce again. The Appellant is 51 years old. She still has a number of working years before retirement. She has a degree in chemistry. She has years of work experience in sales

¹⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

and office administration. Her education and transferrable skills would help her find work again. She is also proficient in English.

[44] The Appellant's previous job wasn't particularly strenuous, yet she could not fulfill her job duties. She had a number of responsibilities as a sales representative that aggravated her condition. She described symptoms when using the point-of-sale system to make a purchase, reaching down for bags, folding clothes, spacing hangers on racks, carrying clothing to and from the fitting rooms, and walking around the store.

[45] Multiple medical records cautioned that if the Appellant continued to work as usual as a sales representative, her condition would deteriorate. The Appellant's physiotherapist said that if she didn't take short-term disability, her condition would worsen, and she would risk having permanent nerve damage and motor weakness in her right arm.²¹ Her family doctor said that if she goes back to her regular job she will end up with more damage to her cervical spine with unwanted severe consequences.²²

[46] The Appellant's limitations prevent even modified work. Her limitations are wide-ranging from sitting, standing, and walking to twisting, lifting, and carrying. The Appellant's previous employer, who is a very large retailer, could not provide her with modified or part-time work based on her limitations. As a result, the Appellant's employment was ended due to frustration of contract.²³ If such a large retailer, who had a previous employment relationship with the Appellant, could not provide her with suitable work, it is unlikely the Appellant could find another employer to accommodate her limitations.

[47] The Appellant can't do sedentary work. The Appellant can sit for a maximum of 30 to 60 minutes. Based on this it may seem that sedentary work is possible. However, the Appellant testified that while sitting even with lumbar support she gets pain, stiffness, and soreness in her back. Most sedentary work is not completely sedentary. It involves bending, twisting, and looking down. These are all things the Appellant has

²¹ See GD4 – 250-251.

²² See GD4 – 255.

²³ See GD8 – 3-4.

difficulty doing. Further, the Appellant says she can't type for very long due to severe pain in her shoulder blade, which is only relieved with lying down. Most sedentary jobs require computer use, which the Appellant can't do for long.

[48] The Appellant can't do part-time work. The Appellant can't do basic chores and errands without requiring rest for hours or even days. Some days she is in bed for half or the full day. The functional abilities assessment summarized in her employer's letter of April 2022 says the Appellant is limited to three-hour shifts.²⁴ The Minister argues this demonstrates capacity for part-time work. This doesn't take into consideration the strain caused by basic activities of daily living. The Appellant says even basic chores like washing dishes and laundry require her to rest her back and neck.

[49] The Minister says that the Appellant has work capacity because she worked as a psychic, but the Appellant testified that it wasn't substantially gainful work. Between December 2022 and February 2023, the Appellant was dedicating 12 hours a week to working as a psychic. I say "dedicating" and not "working" 12 hours a week because she would log onto a platform for a total of 12 hours a week but would not necessarily be working for all those hours. Several other psychics were available on the platform and customers would choose who to call. In fact, the Appellant had very few customers and was making only \$20 to \$40 a week. This is not substantially gainful work. She began taking a program in February 2023. In that program she learned she wasn't supposed to charge since she wasn't accredited, so she stopped working.

[50] The Appellant's efforts to become an accredited psychic don't demonstrate work capacity. Currently, the Appellant has classes for two hours a week and her homework is meditating for one hour a day. I don't consider the meditation as demonstrating work capacity. It is done in the Appellant's own time, with breaks, and without many physical demands on her body. Taking a class for two hours a week also doesn't demonstrate work capacity for substantially gainful employment. The Appellant said if she continues with the classes, she could become an accredited psychic in October 2025. Currently,

²⁴ See GD8-3.

she is taking the course out of interest. She doesn't think she could do it as a regular job.

[51] The Appellant is also taking a skin care course which takes between two to five hours of her time on a good week. The course is self-directed, and she does it based on how she is feeling. Some weeks she does nothing because she is not feeling well enough. This doesn't demonstrate that the Appellant could be a consistent employee.

[52] Due to the Appellant's functional limitations the Appellant doesn't have any work capacity.

[53] I find that the Appellant's disability was severe by March 2020 when she stopped working.

Was the Appellant's disability prolonged?

[54] The Appellant's disability was prolonged as of March 2020.

[55] The Appellant testified that her back condition began in 2000 and progressed to her neck and other parts of her body. These conditions have continued since then, and they will more than likely continue indefinitely.²⁵

[56] It has been 22 years since the Appellant's back condition began. It has only gotten worse and has spread to her neck, shoulder, and arms.

[57] There are no recommended treatments left for the Appellant to try.

[58] The Appellant's family doctor says her prognosis is guarded and she doesn't know if the Appellant can return to any type of work.²⁶

²⁵ In the decision *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.

²⁶ See GD2 – 62-68.

When payments start

[59] The Appellant's disability became severe and prolonged in March 2020.

[60] There is a four-month waiting period before payments start.²⁷ This means that payments start as of July 2020.

Conclusion

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

[62] This means the appeal is allowed.

Anita Nathan
Member, General Division – Income Security Section

²⁷ Section 69 of the *Canada Pension Plan* sets out this rule.