



Citation: *AK v Minister of Employment and Social Development*, 2023 SST 505

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. K.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated May 11, 2022 (issued by
Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Videoconference

Hearing date: April 19, 2023

Hearing participant: Appellant

Decision date: May 9, 2023

File number: GP-22-1014

Decision

[1] The appeal is allowed.

[2] The Appellant, A. K., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of May 2022. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 39 years old. She has dealt with chronic back pain for a long time. She had back surgery in November 2018, but her condition continued to decline. She tried working different part-time jobs, but the pain was too much to manage. She stopped working completely at the end of 2021.

[4] The Appellant applied for a CPP disability pension on November 8, 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 says she has a severe and prolonged disability. She feels constant pain in her back. She can't sit, stand, or do much of any activity. She lies down throughout the day to manage the pain. Her medication causes brain fog that limits her ability to function. There is no job she can do in her condition.

[6] The Minister says the evidence doesn't support a finding of disability under the CPP. The Minister acknowledges that the Appellant experiences back and neck pain. However, the objective medical evidence doesn't support functional limitations that would prevent her from doing some type of substantially gainful work. She took her hydromorphone medication infrequently. She was still able to perform physically demanding work until December 2021.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by the hearing date.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 able to regularly 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 at GD2-41 and 42. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

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

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

Matter I have to consider first

I accepted documents sent in after the hearing

[14] At the hearing, the Appellant read from a letter written by her family doctor, Dr. Leitner, dated May 31, 2022. She thought she had already submitted the letter. She also mentioned an MRI report dated November 22, 2021, that noted she had severe disc space narrowing. I requested that she file both documents because they were important to her appeal. They were received that same day.⁴

[15] I accept these documents because they are relevant to the appeal.⁵ The Minister had an opportunity to respond.⁶ They caused no delay in the completion of the appeal.

Reasons for my decision

[16] I find that the Appellant had a severe and prolonged disability as of when she stopped working in January 2022. 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?

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

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

[18] The Appellant has:

- chronic back pain
- degenerative disc disease/spondylosis
- disc bulge/protrusion

⁴ See Appellant's post-hearing documents dated April 19, 2023, at GD7.

⁵ See Tribunal's letter accepting post-hearing documents, dated April 20, 2023, at GD8.

⁶ See Minister's submissions on post-hearing documents, dated April 24, 2023, at GD9.

- left knee chondromalacia patella (damaged cartilage)

[19] However, I can't focus on the Appellant's diagnoses.⁷ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁸ 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.⁹

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

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

[21] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She tried her best to keep working but the pain became too much. She spends most of her time lying down because of the pain.

[22] The Appellant has dealt with back pain since she was a child. It worsened over time. She had back surgery in November 2018. She attended physiotherapy during her recovery but had to stop because it was too painful.

[23] The Appellant received cortisone injections in her back for pain relief after her surgery. They worked well at first, providing up to three months of pain relief. But by June 2021, the injections became ineffective. They would take a month to kick-in, then only relieve pain for a month. Her pain specialist, Dr. Cleveland, advised against continuing with the injections.

[24] The Appellant tried working since her surgery. Her family needed the financial support, so she pushed herself to work in pain. They moved to British Columbia in September 2019 and started a vineyard business. She worked for the business, including manual labour in the vineyard and bookkeeping. Her husband would often limit her work in the vineyard because of her condition and send her home after an hour. She

⁷ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁸ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

would have to lie down after any physical work. The bookkeeping was a small task (entering receipts) that would take about ten minutes once a month.

[25] She also worked part-time at a hospital in food service for about 6 months, starting in late 2019. She stopped because it was too much standing and she had to push a heavy cart. She worked part-time at a clothing retailer shortly after, but only lasted a few months. She found this job difficult too. The standing put a lot of pressure on her back. She would have a hard time sitting or lying down in bed after a shift.

[26] The Appellant also started a cleaning business in 2020. She cleaned houses with the help of someone she hired. She worked about four hours a day, three to four days a week. Having a helper cut down the work, but she was still pushing through a lot of pain. She lost the helper in October 2021 and had to give up most of her business because she couldn't do the job alone. She tried to keep two clients that had easy homes to clean, but by November she couldn't handle them either. It was too painful to continue. She made approximately \$10,000 to \$12,000 with the cleaning company. By the end of 2021, she stopped working completely, including for the family vineyard.

[27] The Appellant is in constant pain. On a scale of 0 to 10, her level of back pain is often a 9. The pain sometimes travels to her legs, which can go numb. She also developed neck, shoulder, and right arm pain and numbness. She has pain in her left knee, but it doesn't really limit her. She takes strong medication (hydromorphone), but not as often as prescribed. The medication causes severe side effects like brain fog and makes her feel sedated, which keeps her from functioning.

[28] Her husband testified at the hearing. He confirmed that the Appellant can't function when taking hydromorphone as prescribed. His wife is very strong willed and independent and pushed herself trying to help the family. She wanted to help him in the vineyard, but he would send her home. Sometimes she would be laid out for a couple of days at a time after working in the vineyard. He sees her condition rapidly degrading. The Appellant's friend submitted a letter.¹⁰ The letter described her observations of the

¹⁰ See letter dated June 15, 2022, at GD3.

Appellant's worsening back condition over the last 10 years, including recent examples of her sitting and walking limitations.

[29] The Appellant has had the following limitations since she stopped working at the end of 2021:

- **Stand** – She can't stand for longer than 30 minutes. The pain becomes too much to bear. Her lower back feels like it is compressed, and she loses feeling in her legs. If she pushes herself, she must lie down and sleep and take strong medication that prevents her from functioning for the rest of the day.
- **Sit** – Sitting is uncomfortably painful. She must keep shifting positions. 30 minutes is about her maximum. If she pushed it towards an hour, she would have to lie down after.
- **Activity** – She does very little independently. Her main task is driving the kids when her husband can't. She can only walk for about 20 to 30 minutes before she must stop. Since she stopped working, she spends at least 4 days a week mainly on the couch because of the pain. Lately, it's more like every day.
- **Brain fog** – Her hydromorphone medication causes severe brain fog. She can't function properly with this medication, including driving. It makes her feel like a zombie.
- **Mood** – She's been feeling depressed over the last year or so because she can't do anything.

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

[30] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by the hearing date.¹¹

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

¹¹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

[32] The Appellant's family doctor, Dr. Leitner, said in his November 2021 medical report that she has chronic back pain.¹² She had microdiscectomy surgery in 2018. Her condition limits her range of motion, movement, and flexibility. She feels constant daily back pain. He expected her condition to deteriorate.

[33] Dr. Leitner followed up with a letter in February 2022.¹³ He said she consulted with a back specialist and wasn't a surgical candidate. She was unable to work in any capacity at any occupation due to her back and would be off work indefinitely.

[34] Dr. Leitner wrote another letter in May 2022, restating his position on her inability to work.¹⁴ He said she has daily back pain with frequent worsening of her symptoms with little if any light activity aggravating her already moderate/severe condition. In his opinion, her condition would make her an extremely unreliable worker in any occupation.

[35] The Appellant met with pain specialist, Dr. Cleveland. He diagnosed chronic mechanical back pain, likely related to degenerative disc changes.¹⁵ She received several cortisone injections from Dr. Cleveland between August 2020 and June 2021, which provided some temporary pain relief.¹⁶

[36] Medical imaging supports her doctors' opinions. An MRI on her lumbar spine dated November 22, 2021, found mild bilateral foraminal (opening where nerves leave spinal cord) narrowing and severe disc space narrowing.¹⁷ An MRI and CT scan of her cervical spine in August 2022 found moderate stenosis (narrowing of spinal canal), moderate facet arthropathy (facet joint degeneration), mild spondylosis (degeneration of

¹² See Dr. Leitner's medical report, dated November 24, 2021, at GD2-68 to 74.

¹³ See Dr. Leitner's letter, dated February 1, 2022, at GD2-67.

¹⁴ See Dr. Leitner's letter, dated May 31, 2022, at GD7-2.

¹⁵ See Dr. Cleveland's letter, dated August 19, 2020, at GD2-89 and 90.

¹⁶ See Dr. Cleveland's letters, dated August 19, 2020, November 23, 2020, March 23, 2021, and June 29, 2021, at GD2-87 to 92.

¹⁷ See MRI report dated November 22, 2021, at GD7-3.

the spine), and a disc bulge/protrusion.¹⁸ Imaging of her left knee dated April 24, 2021, noted mild to moderate chondromalacia patella (damaged cartilage).¹⁹

[37] The medical evidence supports that the Appellant's functional limitations affected her ability to work.

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

– **The Appellant has reasonably followed medical advice**

[39] To receive a disability pension, an appellant must follow medical advice.²⁰ 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.²¹

[40] The Appellant has reasonably followed medical advice.²² She limits the amount of hydromorphone she takes, but her explanation is reasonable.

[41] The Appellant had surgery on her back in 2018. She is not a candidate for further surgery at this point. She tried injections for pain relief starting in 2018, which became less effective over time. She said Dr. Cleveland recommended she stop receiving injections. Dr. Cleveland suggested prolotherapy, but she could not afford it.

[42] She takes prescribed medication for pain, including gabapentin and hydromorphone. She doesn't take hydromorphone every four hours as prescribed because of the side effects, but she does take it regularly, especially now as her condition continues to decline. After her back surgery she took hydromorphone every four hours and started having suicidal thoughts. She also felt the risk of addiction. The hydromorphone also makes her sedated and her mind foggy. She has a hard time functioning when taking the medication.

¹⁸ See MRI report dated August 30, 2022, and CT scan dated August 18, 2022, at GD4-2 to 5.

¹⁹ See imaging report dated April 24, 2021, at GD2-83.

²⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²¹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[43] I find her explanation about why she limits her intake of hydromorphone reasonable. It is based on her personal experience and tolerance for this specific medication. In my view, she is trying to balance pain relief with the medication side effects in a reasonable way.

[44] 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.²³

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

[45] When I am deciding whether the Appellant can work, I can't just look at her medical condition and how it affects what she can do. I must also consider factors such as her:

- age
- level of education
- language abilities
- past work and life experience

[46] 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.²⁴

[47] If the Appellant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical condition.²⁵ Finding and keeping a job includes retraining or looking for a job she can do with her functional limitations.²⁶

[48] I find that the Appellant can't work in the real world. Her severe functional limitations leave her with no capacity for work. I disagree with the Minister that she isn't prevented from doing some type of substantially gainful work. She is young and has

²³ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁵ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁶ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

broad work experience, factors that could help her find other work. However, she can't overcome her serious limitations that keep her from doing any job.

[49] The Appellant's medical conditions severely limit her ability to do the following:

- **Complete basic physical tasks** – She is in constant pain. Any activity, even standing, increases the pain.
- **Complete sedentary tasks** – She can't sit for longer than 30 minutes, and that's with constant shifting. Her medication causes severe brain fog and makes her feel sedated.
- **Meet a schedule** – She must lie down many times a day to manage her pain. Many days are spent mostly on the couch. When she pushes herself, it can take her days to recover.

[50] Her efforts to work show that she wants to work but can't. Most jobs were part-time and flexible. None were strictly sedentary, but the clothing retail job was light duty with the ability to alternate between standing and sitting. In any event, sitting also causes increased pain, so I can't see how a sedentary job would lead to a different result.

[51] I find that the Appellant's disability was severe as of January 2022. She pushed herself to work until the end of 2021 but reached her limit. She hasn't been able to work any job since. She wants to work and help support her family and tried to do what she could. She says the pain became too much for her to manage and I believe her.

Was the Appellant's disability prolonged?

[52] The Appellant's disability was prolonged.

[53] The Appellant's conditions became disabling as of January 2022. These conditions have continued since then, and they will more than likely continue

indefinitely.²⁷ She's had chronic back pain for many years. Surgery in 2018 didn't help. She hasn't been able to work since the end of 2021 and her symptoms are only getting worse. Dr. Leitner expected her condition to deteriorate.²⁸ She isn't a surgical candidate. Cortisone injections were a short-term solution and are no longer recommended.

[54] I find that the Appellant's disability was prolonged as of January 2022.

When payments start

[55] The Appellant's disability became severe and prolonged in January 2022.

[56] There is a four-month waiting period before payments start.²⁹ This means that payments start as of May 2022.

Conclusion

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

[58] This means the appeal is allowed.

Michael Medeiros
Member, General Division – Income Security Section

²⁷ 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.

²⁸ See Dr. Leitner's medical report, dated November 24, 2021, at GD2-72.

²⁹ Section 69 of the *Canada Pension Plan* sets out this rule.