



Citation: *BF v Minister of Employment and Social Development*, 2023 SST 1438

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** B. F.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Ériégna Bernard

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**Decision under appeal:** General Division decision dated May 11, 2023  
(GP-22-84)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Teleconference

**Hearing date:** October 6, 2023

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

**Decision date:** November 1, 2023

**File number:** AD-23-574

## Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

## Overview

[2] The Appellant is a 63-year-old woman with varied work experience as a labourer and cleaner. Her last significant job was as a line worker for a family-owned dunnage (freight packing) manufacturer. That came to an end after her in-laws took over the business in 1998. Since then, she has had sporadic part-time jobs as a cashier and dishwasher, among other roles.

[3] The Appellant has applied for a CPP disability pension three times. Her first two applications were made in 2001 and 2008. Both were refused by the Minister of Employment and Social Development (Minister). The Appellant chose not to appeal those refusals.

[4] The subject of this appeal is the Appellant's third application, submitted in February 2021. In it, the Appellant claimed that she could no longer do any kind of work because of severe pain caused by pelvic organ prolapse. The Minister refused this application after finding that the Appellant did not have a severe and prolonged disability as of December 31, 2000, the last time she had CPP disability coverage.

[5] 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 that the Appellant was regularly incapable of substantially gainful employment during her coverage period.

[6] 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.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she is eligible for a CPP disability pension. The

evidence shows that the Appellant, while subject to some functional limitations, did not have a severe disability at the end of 2000 and thereafter.

## Preliminary Matter

[8] In December 2022, the law governing the appeals to the Social Security Tribunal changed.<sup>1</sup> Under the new law, 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.<sup>2</sup> 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] For the Appellant to succeed, she had to prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agreed that the Appellant's coverage ended on December 31, 2000.<sup>3</sup>

[10] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>4</sup> A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.<sup>5</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

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<sup>1</sup> See section 58.3 of the *Department of Employment and Social Development Act* (DESDA). This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on May 30, 2023, after the new law came into force.

<sup>2</sup> The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

<sup>3</sup> 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 updated record of earnings at GD2-74.

<sup>4</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>5</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

[12] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2000.

## **Analysis**

[13] I have applied the law to the available evidence and concluded that the Appellant did not have a severe and prolonged disability as of December 31, 2000. I am satisfied that the Appellant's medical conditions at the time did not prevent her from regularly pursuing substantially gainful employment.

### **The Appellant does not have severe disability**

[14] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.<sup>6</sup> I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant might have suffered from impairments during her coverage period, I couldn't find enough evidence to suggest that they rendered her incapable of work.

[15] In her application for benefits, the Appellant described her main disabling condition as chronic pain from pelvic organ prolapse.<sup>7</sup> As a result of this condition, she reported many limitations, including an inability to sit or stand for extended periods and problems with her powers of concentration and memory. She said that she could no longer work as of January 2008.

[16] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity at the relevant time.<sup>8</sup> In this case, the

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<sup>6</sup> See *Canada Pension Plan*, section 44(1).

<sup>7</sup> See Appellant's application for CPP disability benefits dated September 21, 2020, GD2-23.

<sup>8</sup> A CPP disability claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*. In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work before December 31, 2000.

[17] I base this conclusion on the following factors:

– **The Appellant’s main condition arose well after the end of her coverage period**

[18] In her most recent application, the Appellant declared that pelvic organ prolapse prevented her from working as of January 2008. This creates a problem for the Appellant: by her own account, she did not become disabled until seven years after her CPP disability coverage ended.

[19] In support of her application, Dr. Marais, the Appellant’s family doctor, filled out a medical report. In it, she said that she had been treating the Appellant for her primary medical condition — chronic pelvic pain — since February 2016. She indicated that the Appellant had undergone surgery in 2008 to insert a mesh in her vaginal wall to support her pelvic organs. She said that the mesh had to be removed after a manufacturer recall, leaving her with “erosions” and increased pain. Dr. Marais concluded that the Appellant was severely disabled and could not work at all.<sup>9</sup>

[20] This account is largely supported by other evidence. In 2007, the Appellant was sent for imaging of her abdomen and pelvic region after being diagnosed with a prolapsed uterus. Ultrasounds revealed that the Appellant’s uterus and gallbladder had been previously removed. They also showed that the Appellant had a fatty liver and small complex ovarian cyst.<sup>10</sup>

[21] In November 2007, Dr. Tuffnell, a gynecologist, reported that the Appellant had a pelvic organ prolapse that occurred during the summer. After discussing options, the

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<sup>9</sup> See CPP Medical Report by Dr. Ilke Marais, family physician, dated April 17, 2021, at GD2-110.

<sup>10</sup> See ultrasounds of the abdomen and pelvic region dated, respectively, May 30, 2007 (GD2-157) and November 1, 2007 (GD2-158).

Appellant agreed to undergo surgery (colposacropexy with a mesh).<sup>11</sup> That surgery was later reversed, as detailed in a surgical report more than eight years later.<sup>12</sup>

[22] At her hearing, the Appellant testified that “everything suddenly dropped” around 2005. I believe her, but this only confirms that the condition to which she largely attributes her disability came too late to benefit her.

[23] It is possible, even likely, that the Appellant has been disabled by pelvic pain for many years. Unfortunately, that doesn’t mean she is entitled to the CPP disability pension. All the available evidence indicates that her pelvic pain didn’t become a significant problem until several years after her coverage period ended.

– **The Appellant did not have a severe disability during her coverage period**

[24] If the onset of the Appellant’s disability can’t occur after December 31, 2000, what does the available evidence say about the Appellant’s condition before that date? In my view, none of the medical reports originating from the Appellant’s coverage period convincingly point to disability.

[25] The Appellant certainly had medical problems at the time, but they didn’t prevent her from working.

***Vision:***

[26] The Appellant lost her right eye as a child. In April 1999, the Appellant’s orbital prosthesis was entirely replaced.<sup>13</sup> In August 2001, her eye surgeon noted that the Appellant had excellent vision in her left eye. The Appellant clearly had impaired vision at the end of her coverage period, but it never prevented her from working or performing other tasks such as driving.<sup>14</sup>

***Fibromyalgia:***

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<sup>11</sup> See letter from Dr. Clayton Tuffnell, gynecologist, dated November 29, 2007, GD2-155.

<sup>12</sup> See surgical operative note dated April 4, 2016 by Dr. Darren Lazare, specialist in obstetrics and gynecology, GD2-134.

<sup>13</sup> See report dated April 1, 1999 by Dr. Peter Hoppe, ophthalmologist, GD2-180.

<sup>14</sup> See Dr. Hoppe’s letter dated August 28, 2001, GD2-163.

[27] In April 1997, a rheumatologist assessed the Appellant for joint pain. He tentatively diagnosed her with fibromyalgia, although he noted that “this lady does not need any management for her fibromyalgia since she is getting better with what would be recommended therapy.”<sup>15</sup>

[28] In September 2002, another rheumatologist confirmed the Appellant’s fibromyalgia while also diagnosing her with Raynaud’s disease on her hands and feet. However, he noted that “she is functioning well and is physically quite active.”<sup>16</sup>

[29] The Appellant has been diagnosed with two chronic pain conditions, but diagnosis can’t be equated with disability.<sup>17</sup> When I consider the impact of these conditions on the Appellant’s functional capacity, I can’t conclude that they prevented her from working in the period leading up to December 31, 2000.

– **The Appellant’s background and personal characteristics didn’t affect her employability**

[30] Based on the medical evidence, I find that the Appellant had work capacity. I am reinforced in this belief when I look at her overall employability.

[31] When deciding whether the Appellant can work, I can’t just look at her medical conditions. I must also consider factors such as her 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 when she had coverage.<sup>18</sup>

[32] As of December 31, 2000, the Appellant had impaired vision and a chronic pain condition, but she also had several assets that gave her an advantage in the employment market. She was relatively young — only 40 years old at the time — and was a native-born English speaker. True, the Appellant did not graduate from high school, but I am satisfied that, with a relatively mild form of fibromyalgia, she was still capable of low-skilled and low-impact retail or counter work.

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<sup>15</sup> See report dated April 15, 1997 by Dr. Daniel McLeod, rheumatologist, GD2-185.

<sup>16</sup> See report dated September 11, 2002 by Dr. A.S. Russell, rheumatologist, GD2-152.

<sup>17</sup> See *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

<sup>18</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

## **The Appellant is not eligible for the PRDB**

[33] The Appellant has also applied for the post-retirement disability benefit (PRDB). However, she has not met its eligibility requirements.

[34] According to the law, a PRDB claimant must have valid contributions in at least four of the six years immediately before she started receiving her CPP early retirement pension.<sup>19</sup> The Appellant does not meet this requirement, as she does not have sufficient earnings or contributions from 2014 to 2019. Her last year of valid contributions was in 1998.

## **I don't have to consider whether the Appellant has a prolonged disability**

[35] A disability must be severe **and** prolonged.<sup>20</sup> Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it might also be prolonged.

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<sup>19</sup> See *Canada Pension Plan*, sections 44(1)(h) and (4). The Appellant started receiving her early CPP retirement pension in February 2020 (GD2-92) and applied for the CPP disability pension in February 2021 (GD2-22).

<sup>20</sup> See *Canada Pension Plan*, section 42(2)(a).



## Conclusion

[36] The Appellant's prolapse has significantly affected her health, but all the evidence suggests that it did not become a problem until several years after the end of her coverage period. The Appellant had medical conditions as of December 31, 2000, but I am not convinced that they amounted to a severe disability. I saw nothing from that time to convince me that the Appellant was unable regularly to pursue substantially gainful employment.

[37] The appeal is dismissed.



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Member, Appeal Division