



Citation: *JP v Minister of Employment and Social Development*, 2023 SST 317

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. P.
Representative: Steven Wilder

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated October 20, 2021 (issued by Service Canada)

Tribunal member: Selena Bateman

Type of hearing: Videoconference

Hearing date: March 21, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: March 27, 2023

File number: GP-22-126

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Appellant is 39 years old. He worked as an x-ray technician. In December 2018, he was in a motor vehicle accident. He has headaches, neck pain, depression, and anxiety. The Appellant stopped working in December 2018. He returned to work in September 2022.

[4] The Appellant applied for a CPP disability pension on April 19, 2021. 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.

[5] The Appellant says that he is disabled. He wakes up with the feeling of pressure and tension in his neck and eyes. He usually has headaches. Staying in a static position causes an increase in these symptoms. He is limited by pain and feels emotionally down. Driving or being a passenger in a vehicle increases his anxiety.

[6] The Minister says that the evidence doesn't show a severe disability that prevents him from doing suitable work within his limitations by December 2020 and continuously thereafter. The Minister notes that the Appellant returned to work in 2022 in his usual role, with accommodation.¹

¹ See GD5.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2020. This date is based on his contributions to the CPP.²

[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.³

[10] 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, 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 able to regularly do some kind of work that he could earn a living from, then he 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.⁴

[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 he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

² 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 GD5-12.

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

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

Reasons for my decision

[14] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2020. I understand that the Appellant has continued limitations. But I can't find that his limitations prevent him from earning a living at any job continuously.

Was the Appellant's disability severe?

[15] The Appellant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations do affect his ability to work

[16] The Appellant has:

- Chronic pain
- Headaches
- Depression
- Anxiety
- Adjustment disorder
- Somatic symptom disorder

[17] However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether he had functional limitations that got in the way of him 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 affected his ability to work.⁷

[18] I find that the Appellant has functional limitations that affected his ability to work.

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

⁶ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

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

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

[19] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. He says:

- He has neck pain. This causes him to take numerous breaks
- He can't lift heavy weight, bend, or twist
- He has almost constant headaches and a pressure type sensation
- His sleep is variable. He sometimes has sleep and energy issues
- Some days he stays in bed to delay the feeling of pain and discomfort. Some days he takes multiple showers for temporary relief
- His depression has gotten worse
- He has driving anxiety

[20] I believe what the Appellant told me at the hearing. He gave straightforward, plausible evidence about how his conditions impact him. I accept his evidence about what he can and can't do.

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

[21] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2020.⁸

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

[23] The Appellant has **chronic pain, headaches**, and a **cervical strain** since December 2018. He has a limited cervical range of motion and limited ability to sustain activity because of his headaches.⁹

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

⁹ See GD1-38.

[24] The Appellant had a functional abilities evaluation in November 2019. His overall strength rating was considered “light”. He couldn’t lift from waist to shoulder or sustain multiple reaching activities.¹⁰

[25] In December 2020, Dr. Bartol (orthopedic surgeon) says that the Appellant couldn’t lift or transfer patients. He has impairments to prolonged sitting with static neck posture, lifting, carrying, rotation of the neck, and overhead movements. These movements or positions cause pain.¹¹

[26] The Appellant has had **depression** and **anxiety** since 2019. He has reduced concentration and memory. In a September 2020 assessment, the Appellant met the criteria for an adjustment disorder with mixed anxiety and depressed mood and somatic symptom disorder with predominant pain.¹² In November 2020, psychologist Dr. McGory recommended twelve therapy sessions to address symptoms of depression, anxiety, and pain management.¹³

– **Some of the Appellant’s assessors and treatment providers ruled out work**

[27] The Appellant had a chronic pain assessment by Dr. Goldstein in November 2020. Dr. Goldstein says that he would likely be unable to do any suitable work because of his pain, headaches, and physical limitations.¹⁴

[28] In the medical report of April 2021, Dr. Carlini didn’t think the Appellant would return to work. Dr. Carlini says that he has had minimal improvement despite treatment. Dr. Carlini didn’t expect further improvement in his symptoms.¹⁵

[29] The medical evidence supports that the Appellant has functional limitations that affect his capacity to work his usual job without accommodation.

¹⁰ See GD2-119.

¹¹ See GD361, 100 and GD2-105.

¹² See GD1-39.

¹³ See GD1-124.

¹⁴ See GD3-103.

¹⁵ See GD1-41.

– **The Appellant has followed medical advice**

[30] To receive a disability pension, an appellant must follow medical advice.¹⁶ 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.¹⁷

[31] The Appellant has followed medical advice.¹⁸

[32] The Minister didn't raise the argument that the Appellant failed to follow medical advice. In my review, I see no evidence to indicate that the Appellant didn't comply with medical recommendations.

[33] The Appellant tried physiotherapy, massage therapy, yoga, and facet joint injections. He takes gabapentin and Trintellix.

[34] 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 him from earning a living at any type of work, not just his usual job.¹⁹

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

[35] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

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

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

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

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

¹⁹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

[36] 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.²⁰

[37] I find that the Appellant could work in the real world.

[38] His background and personal characteristics aren't barriers to work. The Appellant was 37 years old at the end of 2020. He doesn't have a language barrier. He is college educated. He has experience as a network administrator and general labourer. He retrained around 2012 and worked as an x-ray technician. He has marketable skills across diverse fields.

[39] The Minister argues that the Appellant's college education and work experience provide him with an increased ability to retrain.²¹ The Appellant says that he can't afford to retrain. While this may be the case, I find it likely that he has the capacity to retrain, if necessary. He has done so before and found suitable employment. His limitations don't prevent him from retraining.

[40] The Appellant has physical limitations to lifting, pulling, overhead movements, neck rotation, and static neck posture. I accept that a previous foot injury would affect his ability to work in physical jobs.

[41] The Appellant says that his driving anxiety would impact his ability to work some jobs. While this may be so, I find it likely that the Appellant is able to do other types of suitable work. His limitations aren't severe enough to prevent him from succeeding in the competitive labour market.

[42] The Appellant is able to perform activities of daily living. He gets groceries, although heavy items and pushing a heavy cart causes headaches and pressure. He cooks. He takes breaks with housekeeping because of pain.

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

²¹ See GD5-9.

The Appellant's medical assessments are outweighed by the fact that he was doing substantially gainful work

[43] The medical evidence overall was doubtful that the Appellant would be able to earn a living because of his disability. This includes records from before the end of 2020 and those more recently.

[44] For example, the medical evidence contains a January 2022 psychological opinion. Dr. Amitay says that the Appellant couldn't work from a psychological perspective for the foreseeable future.²² I didn't give weight to this opinion in favor of the oral evidence from the Appellant at the hearing. About eight months after Dr. Amitay wrote this, the Appellant returned to work and was able to maintain employment despite his limitations. I discuss the return-to-work efforts next.

The Appellant returned to work with accommodation

[45] If the Appellant can work in the real world, 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.²³ Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.²⁴

[46] The Appellant made efforts to work. But these efforts don't show that his disability gets in the way of earning a living.

[47] I gave significant weight to his return-to-work evidence. Some medical opinions say that he wouldn't likely be able to work due to a combination of pain, physical limitations, and mental health symptoms. But the evidence I heard at the hearing didn't suggest that this turned out to be the case for the Appellant.

²² See GD1-151.

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

²⁴ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[48] The Appellant returned to work on September 6, 2022. He had a four-week gradual return to work. After that, he worked eight-hour shifts. He earned \$37/hour and made a total of \$24,578 in 2022. He made substantially gainful earnings.²⁵

[49] The Appellant had accommodations. He had a porter to assist with patient lifts and transfers. He also had the option of taking breaks from steady computer use. He testified that he didn't need extra breaks. The evidence doesn't support that the employer experienced hardship because of this accommodation. The accommodation didn't go beyond what is expected in the marketplace. He didn't have a benevolent employer.²⁶

[50] I don't have evidence that would suggest he wasn't performing productive work. Aside from the lifting and transferring task, he was able to fulfil all other work duties. The Appellant didn't have complaints about his job performance. This suggests to me that the employer was at least reasonably satisfied with his work performance.

[51] He was able to maintain a predictable schedule from September 2022 to February 2023. He didn't take sick time due to his medical conditions that relate to his disability claim. The evidence doesn't show that he needed to change his work hours or work schedule due to his limitations. This tells me that his headaches and mental health symptoms didn't impact his ability to earn a living by the time he made his return-to-work effort in 2022.

[52] The evidence shows that the Appellant was capable regularly of performing substantially gainful work. The Appellant's work efforts didn't convince me that his limitations prevented him from working his usual job with an accommodation.

²⁵ The CPP section 68.1 associates disability with an income threshold. Substantially gainful wages are equal to or greater than the maximum annual amount that a person can receive as a disability pension. For 2022, the maximum amount was about \$17,600. This figure is significantly below what the Appellant made.

²⁶ A benevolent employer is one who alters work conditions, productivity expectations, and/or other terms of employment to accommodate an employee. The fact that an employer makes accommodations may not be enough for it to be considered a benevolent employer. See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

[53] The Appellant wasn't able to keep working, but this was for reasons outside of his functional limitations. The Appellant stopped work on February 15, 2023. The problem was that he didn't reinstate his medical radiation registration. Because of this, his employer suspended him. The Appellant says he then reinstated his registration on March 10, 2023.

[54] The Appellant has looked for other work in his usual field. The Appellant hasn't applied to any jobs on the advice of his union. He has considered other imaging clinics and hospitals. He has concerns that some machines have equipment that requires repetitive overhead movement.

[55] The Appellant hasn't explored other potentially suitable work. The evidence doesn't support that he has looked for work outside of his usual profession where he may not need an accommodation to lifting and transferring patients.

[56] I wasn't persuaded that the Appellant doesn't have the capacity to retrain. The fact that he is considering retraining as a possibility suggests he thinks he may be able to do other work.

[57] Therefore, I can't find that the Appellant had a severe disability by December 31, 2020.

Conclusion

[58] 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.

[59] This means the appeal is dismissed.

Selena Bateman

Member, General Division – Income Security Section