



Citation: *KR v Minister of Employment and Social Development*, 2023 SST 420

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: K. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated June 15, 2021 (issued by
Service Canada)

Tribunal member: Selena Bateman

Type of hearing: Teleconference

Hearing date: April 11, 2023

Hearing participants: Appellant
Witness

Decision date: April 21, 2023

File number: GP-21-1954

Decision

[1] The appeal is allowed.

[2] The Appellant, K. R., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of February 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 59 years old. She worked in office administration and continues to operate a seasonal campground. She has osteoarthritis in her knees. Her mobility is limited. She also has brain fog and a recent seizure disorder diagnosis.

[4] The Appellant applied for a CPP disability pension on January 4, 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 that on top of her osteoarthritis in her knees, she has difficulty walking and sitting due to plantar fasciitis and sciatica. She continues to work, but this job is flexible so she only does what she can with her many limitations. Others take over the rest of the duties.

[6] The Minister says that after considering the Appellant's totality of her conditions, the evidence doesn't support a severe and prolonged disability. The orthopedic surgeon expected an improvement after knee surgery, and other conditions are managed with treatment. The Minister notes that she continues to be self-employed part-time.¹

¹ See GD4 and GD9.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that is severe and prolonged by the hearing date.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 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.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 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.

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 GD5-3 to 4. 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.

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.

Matters I have to consider first

The Appellant asked me to adjourn the hearing

[14] The Appellant asked me to adjourn the hearing (that is, change the hearing date) because she had new medical evidence that addressed her recent condition. I rescheduled the hearing to allow the Minister time to reply. The Minister responded.⁵

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of April 2018. I reached this decision by considering the following issues:

- Is the Appellant's disability severe?
- Is the Appellant's disability prolonged?

Is the Appellant's disability severe?

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

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

[17] The Appellant has:

- Bilateral knee osteoarthritis
- Plantar fasciitis
- Seizure disorder

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.⁷ 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.⁸

⁵ See GD7 through GD13 and GD0C.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

[20] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says:

- Because of her osteoarthritis, she wakes from pain at night.
- Her walking remains limited, after the knee replacements. She continues to use a cane.
- She can sit for 10-15 minutes before she needs to stretch her knees.
- Because of her conditions, including a seizure investigation, she can't drive a vehicle.
- Plantar fasciitis causes difficulty with prolonged standing.
- Back pain and sciatica limit her ability to sit when she has flair ups.
- She has cognitive issues: brain fog from COVID and confusion from a seizure disorder.

[21] The Appellant has made modifications to her home to assist with mobility issues. She has installed a hand railing at home to assist with going up three steps. She uses a cane or a walker. She installed grab bars in her bathroom and uses a walk-in shower with a seat.

[22] The Appellant's husband, L. R., testified. In the last five years, he has taken over more of the cooking and cleaning at home. He observed that she isn't able to get up and move around for long periods of time. She needs to take breaks. Lately, she has become forgetful.

– **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 the hearing date.⁹

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

[25] The Appellant has degenerative changes and osteoarthritis in both of her **knees**. She had an onset of knee pain in April 2018. She has a limited ability to walk and sit. She cannot climb.¹⁰

[26] The medical report was completed in 2020 by Dr. Rabinovich. The Appellant couldn’t walk for more than fifty meters and couldn’t sit for more than twenty minutes. Her condition was likely to deteriorate (without surgery) and be continuous. He thought that her condition would improve after surgery, but would need modified duties.¹¹ The Minister raised this argument in its submissions.¹²

[27] I didn’t give this evidence as much weight as the more recent evidence, after her surgeries. Also, Dr. Rabinovich’s opinion was focused on one medical condition exclusively. This is important because I need to take into consideration the totality of her conditions.

[28] The Appellant received two knee replacements in 2022. Her walking ability improved after surgery. The medical evidence doesn’t say to what extent. Dr. Male (family doctor) isn’t sure how much she will recover.¹³

[29] The medical evidence supports that the Appellant had **plantar fasciitis**. Dr. Male says that the symptoms were resolved with orthotics and don’t cause problems with her

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See GD2-80.

¹¹ See GD2-80 to 83.

¹² See GD4.

¹³ See GD2-68, 71, GD12-7 to 10 and 97.

knees.¹⁴ The Appellant says she continues to have issues with prolonged standing because of her feet.

[30] The medical evidence notes that she has had **sciatica** since 2012, with intermittent flares. This makes walking more difficult. Her low back pain was largely resolved with chiropractic care.¹⁵

[31] The medical evidence from February 2023 notes that the Appellant has **confusion, brain fog, and forgetfulness** after having COVID. She has difficulty with concentration.¹⁶

[32] The Appellant also has a **seizure disorder** as of February 2023. It is under investigation with treatment pending.¹⁷ Little medical evidence was provided on this condition. I accept that the Appellant is waiting to see a specialist in relation to this new condition.

[33] The medical evidence supports that the Appellant's physical limitations and cognitive limitations prevented her from doing the full breadth of her usual duties in campground administration.

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

– **The Appellant has followed medical advice**

[35] To receive a disability pension, an appellant must follow medical advice.¹⁸ 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.¹⁹

¹⁴ See GD12-7.

¹⁵ See GD12-7.

¹⁶ See GD12-7 to 10 and 97.

¹⁷ See GD12-9.

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

¹⁹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[36] The Appellant has followed medical advice.²⁰ The Minister didn't make an argument otherwise. In my review, I see no concerns of adherence to medical recommendations.

[37] 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.²¹

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

[38] 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

[39] 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.²²

[40] I find that the Appellant can't work in the real world.

[41] The Appellant is 59 years old. She has high school level education. Her age and level of education present a barrier to retraining before the usual age of retirement. Her work history has been in office administration and running a campground, including physical work such as cleaning and lawn care. She has good employment odds for similar work and entry level positions.

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

²¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[42] I next factored in the Appellant's limitations – both physical and cognitive. The combination of both show that her limitations prevent work that is substantially gainful.

[43] While her walking has improved to some degree after the knee surgeries, she has been further impacted by brain fog in 2022 and a seizure disorder in 2023. These conditions eliminate any realistic capacity for sedentary work that she could earn a living from. My conclusion is reinforced by Dr. Male's medical opinion that cognitive effects of her conditions prevent her from doing administrative work.²³ Yet even before she had brain fog and a seizure disorder, her previous limitations prevented her from working enough to earn a living.

– **The Appellant works in a family business**

[44] The Appellant is a co-partner with her brother in a seasonal campground with 40 sites. The campground has been in her family prior to her ownership. She began to work at the campground when she was ten to twelve years old. It is open from May to October each year.

– **Her earnings are not substantially gainful**

[45] The Appellant ended her job in trucking administration during 2006. She quit because she needed the summers off to help out at the campground. After this, she worked exclusively at the campground.

[46] The medical evidence and testimony doesn't point to a severe disability in or around 2006. It wasn't until years later that her limitations impacted her working. This leads me to put less weight on the role of her earnings in relation to her work capacity.

[47] Her earnings are not substantially gainful, with the exception of 2018 where she earned \$44, 828.²⁴ I asked the Appellant about her 2018 earnings. The Appellant said

²³ See GD12-9.

²⁴ However, this is only one factor to consider in determining her capacity for work. Section 68.1 of the Social Security Tribunal Regulations associates "substantially gainful" with a specific dollar amount, depending on the year. Any amount earned over the maximum annual amount is deemed to be gainful.

that her income was in relation to the ownership of the campground. She had no other job in 2018.

[48] The Appellant doesn't earn a set hourly wage or salary. She says that her reported income is from the proceeds of the campground, after deductions, split equally with her brother. This in itself does not tell me about her capacity to earn a living. It tells me that the business has modest revenue.

[49] Next, I examine the work that she is able to do in the business.

– **The Appellant has a benevolent employer**

[50] I find that the Appellant's work at her family business is benevolent.²⁵

[51] Her work tasks have reduced over the years due to her increasing number and progression of her limitations. The Appellant used to do physical work at the campground. As her physical limitations progressed, she completed only administrative tasks. She doesn't keep set work hours. More recently, she is limited to a portion of the administrative tasks she once had. She completes some bookkeeping tasks.

[52] The accommodations she receives goes beyond what is required of an employer in the competitive marketplace. She can't sit for more than ten to fifteen minutes because of her knee pain and poor concentration. She takes breaks and naps due to fatigue. She had a chairlift installed to the second floor living quarters because she can't climb stairs. She doesn't do any physical tasks.

[53] She doesn't have set hours and works at her own pace. It is difficult to assess whether the Appellant works at a competitive level, compared to other employees because this is a small family business. But it is hard to imagine a salaried position in the competitive marketplace that would accept minimal output on a variable schedule. It

²⁵ A benevolent employer changes the working conditions and lowers the expectations of an employee in keeping within their limitations. The performance, output, or product expected from the employee is considerably less than the usual performance expected from other employees. Accommodations provided go beyond what would be expected in the marketplace. See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

is clear that her performance standards are more relaxed than what one would reasonably expect in the marketplace.

[54] The Appellant's job doesn't demonstrate work capacity. The Appellant's work was productive in that she can do the limited tasks that are suitable to her limitations, on her own schedule, and at her own pace. What she can't do, her husband takes over.

[55] The Appellant's husband testified about his role in the Appellant's family business. I gave weight to his testimony, which was plausible and candid. Her husband has been helping out at the campground for more than twenty years. Ten years ago, his role increased because of the Appellant's physical limitations. He has gradually assumed more tasks over time.

[56] The Appellant's husband estimates his work hours to be six hour a day, three days a week from May to October. He cleans showers, communicates with campers, picks up supplies, opens/closes camp, and has taken on some bookkeeping. He receives no salary for his role. I asked the Appellant's husband why. He said that if he took a salary there would be no business proceeds. I accept this, given the Appellant's record of contributions and testimony.

[57] This job allows the Appellant to contribute how she can to a family business. Her role at the campground is benevolent. The role was tailored over time to suit her increasing limitations. Her husband took over many of her duties.

[58] The Appellant's disability is severe. I find that the Appellant doesn't have the capacity for pursuing any substantially gainful occupation. As of April 2018, she couldn't regularly do any work she could earn a living from.

Is the Appellant's disability prolonged?

[59] The Appellant's disability is prolonged.

[60] The Appellant's osteoarthritis started affecting her in April 2018. This condition continued since then, and will more than likely continue indefinitely.²⁶ I appreciate that her walking has improved to some degree after surgery. But as of March 2023, Dr. Male doesn't know to what degree she will recover.

[61] The prognosis of the Appellant's other health issues is medically uncertain. The medical evidence doesn't support a resolution or improvement. Yet, it is too soon to tell if they will be long continued and of indefinite duration:

- Dr. Male says that he cannot say what degree of permanent disability will result, if any from COVID brain fog.
- The Appellant's seizure disorder is under investigation and further treatment are pending. Her response to the medication is unknown.²⁷

[62] The medical evidence after the knee surgeries didn't suggest that she would be able to recover enough to earn a living at any job. I find that the Appellant's disability was prolonged as of April 2018, when she was significantly impacted by bilateral knee osteoarthritis.

When payments start

[63] The Appellant had a severe and prolonged disability in April 2018.

[64] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.²⁸ After that, there is a 4-month waiting period before payments start.²⁹

²⁶ 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.

²⁷ See GD12-8 to 10.

²⁸ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁹ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.

[65] The Minister received the Appellant's application in January 2021. That means she is considered to have become disabled in October 2019.

[66] Payments of her pension start as of February 2020.

Conclusion

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

[68] This means the appeal is allowed.

Selena Bateman
Member, General Division – Income Security Section