



Citation: *JH v Minister of Employment and Social Development*, 2023 SST 554

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. H.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 4, 2021 (issued by
Service Canada)

Tribunal member: James Beaton

Type of hearing: Videoconference

Hearing date: January 23, 2023

Hearing participants: Appellant
Appellant's witness

Decision date: January 24, 2023

File number: GP-22-9

Decision

[1] The appeal is allowed.

[2] The Appellant, J. H., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of February 2021. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 61 years old. She last worked as an assistant designer / florist. She was laid off in March 2020 because of the covid pandemic. She hasn't worked since then. She says she has been disabled since May 2011 due to various mental health conditions. She says her daughter suffered a permanent brain injury in an accident in 2008. Caring for her daughter after the accident gradually took a significant toll on the Appellant. Eventually, she determined that she could no longer work.

[4] The Appellant applied for a CPP disability pension on December 14, 2020. 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 Minister says the Appellant worked for years after 2008, and only stopped working when she was laid off due to covid. Although she has chronic mental health conditions, that doesn't mean she is severely disabled. The Minister believes she can still do some type of work, even if she can't return to her fast-paced assistant designer / florist job.

What the Appellant must prove

[6] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2021. This date is based on her contributions to the CPP.¹

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

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

[9] This means I must look at all of the Appellant’s medical conditions together to see what effect they have on her ability to work. I must also look at her background (including her age, level of education, language abilities, 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 capable regularly of doing some kind of work that she could earn a living from, then she isn’t entitled to a disability pension.

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

[11] 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.

[12] The Appellant must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means she must 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 GD7-11 and 12.

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.

Reasons for my decision

[13] I find that the Appellant had a severe and prolonged disability as of October 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?

[14] The Appellant’s disability was severe by December 31, 2021. I reached this finding by considering several factors. I explain these factors below.

– The Appellant’s functional limitations affected her ability to work

[15] The Appellant says she has various mental health conditions, including anxiety, depression, post-traumatic stress disorder (PTSD), social phobia, panic, and burnout. However, I can’t focus on the Appellant’s diagnoses.⁴ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living by December 31, 2021.⁵ When I do this, I must look at **all** of the Appellant’s medical conditions (not just the main one) and think about how they affected her ability to work.⁶

[16] I find that the Appellant had functional limitations by December 31, 2021.

– What the Appellant says about her functional limitations

[17] The Appellant says her medical conditions have resulted in functional limitations that affected her ability to work by December 31, 2021.⁷ She says:

- Her focus and memory are poor. She has trouble thinking of the right words to say in conversations.

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁷ What the Appellant says about her functional limitations can be found at GD1-5, 15, and 16; GD2-18 and 33 to 52; GD3-2; GD8; and on the hearing recording.

- She does everything more slowly now. She is unmotivated and finds it difficult to complete tasks, plan, make decisions, and learn new things.
- She sometimes has trouble falling asleep. She sleeps in late (until about noon) and usually naps for an hour in the afternoon. She gets tired easily.
- She can't work under pressure or adjust well to change.
- She prefers to stay home rather than deal with people or go out in public. She rated her ability to work in a team and ask co-workers for help as poor.
- She struggles to control her emotions.

[18] The Appellant's husband testified that the Appellant gets overwhelmed easily. He manages administrative tasks for their household, like filling out paperwork, because she would not be mentally able to process the information. He doesn't believe any employer would hire her if they knew about her limitations.

[19] The Appellant provided a letter from Mr. Hui, her employer from 1994 to May 2017.⁸ He wrote that she had been more anxious in the last couple of years. Her focus and performance were worse, and she missed some time. According to the Appellant, she missed one or two days per month (she was scheduled to work three days per week).⁹

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

[20] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2021.¹⁰

[21] The Appellant provided medical evidence from:

- Dr. Syed (her psychiatrist from October 9, 2020, to February 19, 2021)¹¹

⁸ This letter is at GD5-2. Mr. Hui wrote that the Appellant was employed intermittently from 2013 to 2019. The Appellant's application says she was employed there from 1994 to 2019 (GD2-43). At the hearing, she clarified that she worked there off and on over the years, beginning in 1994. She stopped working there in May 2017 when she moved to a different city. She started her last job, also as a florist, in 2019.

⁹ The Appellant said this at the hearing. Her work schedule is at GD2-43.

¹⁰ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹¹ See GD2-78, 81, 84, 87, 88, and 129 to 132.

- Dr. Kegel (her psychiatrist from April 13, 2021, to September 10, 2021)¹²
- Dr. Cooner (her family doctor)¹³

[22] The medical evidence supports what the Appellant says. It reflects that there have been periods of improved sleep, anxiety, and mood. But those improvements haven't been sustained. For example, the last medical evidence before December 31, 2021, reflects significant depression, fatigue (despite improved sleep), some panic, and anxiety.¹⁴

[23] The medical evidence supports that the Appellant's functional limitations prevented her from doing her job by December 31, 2021. She could not cope with the fast pace of her job or interact appropriately with customers. She was missing 1 shift out of every 6 to 12 shifts because she could not motivate herself to go to work.¹⁵

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

– **The Appellant followed medical advice**

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

[26] The Appellant followed medical advice. The Minister doesn't dispute this. She has tried a few different medications and continues to take venlafaxine daily at the highest dose she can tolerate.¹⁷ She regularly saw a psychiatrist.

[27] Dr. Kegel offered to refer her to an occupational therapist.¹⁸ The Appellant didn't follow up on that referral. She testified that she thought Dr. Kegel was referring her to another therapist. She didn't realize that an occupational therapist would be able to offer her different services than a therapist or counsellor. I accept her explanation. Neither

¹² See GD2-90 to 92, 95, 98, 101, 104, and 107.

¹³ See GD2-76 and 120 to 127; and GD3-4.

¹⁴ See GD2-76 and 107.

¹⁵ The Appellant testified that she was missing one or two shifts per month before she was laid off. She was scheduled to work three shifts per week (GD2-43).

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

¹⁷ She tried Topamax and Remeron (GD2-104). She currently takes 225 milligrams of venlafaxine per day. She had side effects on a higher dose (GD2-81 and 90 to 92).

¹⁸ See GD2-107.

she nor her husband recalled Dr. Kegel talking about an occupational therapist, but they did recall her talking about a therapist.

[28] The Appellant had already tried therapy, including grief counselling from 2009 to 2011 after her daughter's accident.¹⁹ She felt that counselling had nothing else to offer her.²⁰ As I noted, she was already seeing a psychiatrist, and the Minister didn't argue that the Appellant failed to follow medical advice by declining Dr. Kegel's offer.

[29] 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**

[30] 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

[31] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say she can work.²²

[32] I find that the Appellant can't work in the real world. She was unable to work as of December 31, 2021.

[33] Unlike the Minister, I believe the Appellant's personal factors **negatively** impact her ability to work. She was already 60 years old as of December 31, 2021. Although

¹⁹ See GD2-37.

²⁰ The Appellant said this at the hearing.

²¹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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

she is fluent in English and has a high school education and a florist certificate, her experience is limited to working in retail and volunteering at a seniors' home.²³ She has no further education or experience that would give her transferrable skills. She testified that her computer skills are also poor.

[34] The Appellant's functional limitations further limit her ability to work. She sleeps until noon and still needs to take a nap in the middle of the afternoon. This limits the hours she would be available for work, especially since she gets tired easily. Working would only make her more tired.

[35] She is not suited to a job that involves interacting with the public, which is the only kind of work she has done. Because of her poor memory, focus, and ability to learn new things, she isn't suited to cognitively demanding work, or to retraining for another type of work.

[36] She doesn't cope well with pressure. I disagree with the Minister that the Appellant might succeed in a work environment that wasn't as fast-paced as her old job. In April 2021, Dr. Kegel wrote that she didn't believe the Appellant could work.²⁴ In September 2021, Dr. Kegel wrote that the Appellant was considering returning to work out of financial necessity, but was worried about the fast pace of her old job.²⁵ While a slower pace would likely help, the Appellant's other limitations and negative personal factors would still make her regularly unable to work.

[37] I find that the Appellant's disability was severe as of October 2020, when she started seeing Dr. Syed for help managing her symptoms.

[38] I don't accept that she has been disabled since May 2011 as she states in her application. She managed to keep a job for years after that, even though it was difficult and she missed some shifts. She wasn't laid off from her jobs due to poor performance.

²³ See GD2-43 and 44, and the hearing recording.

²⁴ See GD2-90 to 92.

²⁵ See GD2-107.

In fact, she was being trained for cashier duties at her last job until her training was interrupted by the covid pandemic.²⁶

[39] In addition, her earnings from 2012 to 2016 were relatively consistent.²⁷ In 2014, the *Canada Pension Plan Regulations* were changed to define a “substantially gainful income.” An income is substantially gainful if it is at least as much as a person could get from a disability pension.²⁸ The Appellant’s income from 2014 to 2016 was substantially gainful.²⁹

[40] In 2017, she was laid off due to a lack of work. When she went back to work in 2019, her earnings for that year weren’t substantially gainful, but I believe that is because she didn’t work a full year.³⁰ Her scheduled hours were comparable to her scheduled hours in years when she was earning a substantially gainful income.³¹ Both jobs (in 2017 and 2019) were florist jobs and likely would have offered comparable hourly wages. So if she had worked a full year, she would likely have earned a substantially gainful income in 2019 as well.

[41] It was the worsening of her symptoms **after** she was laid off that made her disability severe. Although Dr. Cooner’s December 2020 medical report indicates that her symptoms got worse one or two years earlier, the earliest medical evidence is Dr. Syed’s notes from October 2020.³²

[42] The Appellant must prove not only that she became disabled, but when. On a balance of probabilities, I find that October 2020 is when she became disabled.

²⁶ See the hearing recording.

²⁷ See GD2-13 and 14.

²⁸ See section 68.1 of the *Canada Pension Plan Regulations*.

²⁹ Her income was \$19,173 in 2014; \$18,906 in 2015; and \$17,475 in 2016 (GD7-13 and 14). A substantially gainful income was \$14,836 in 2014; \$15,157 in 2015; and \$15,490 in 2016.

³⁰ Her income was \$11,313. A substantially gainful income was \$16,348.

³¹ See GD2-43.

³² See GD2-120 to 127 and 129 to 132.

Was the Appellant's disability prolonged?

[43] The Appellant's disability was prolonged by December 31, 2021.³³

[44] The Appellant's mental health conditions are longstanding. The latest medical evidence and the Appellant's testimony confirm that they have continued since October 2020.³⁴

[45] The Appellant's conditions will more than likely continue indefinitely. Despite treatment, there has been no lasting improvement in her symptoms. She has managed to find a medication and a dosage that gives her some relief without side effects. However, Dr. Cooner still believes her disability is permanent.³⁵ Her functional limitations remain severe. There is no evidence of upcoming treatment that might help the Appellant further.

[46] I find that the Appellant's disability was prolonged as of October 2020.

When payments start

[47] The Appellant's disability became severe and prolonged in October 2020.

[48] There is a four-month waiting period before payments start.³⁶ This means payments start as of February 2021.

Conclusion

[49] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged by December 31, 2021.

³³ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant must show a severe and prolonged disability by the end of their MQP and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

³⁴ See GD3-4 for the latest medical evidence.

³⁵ See GD3-4.

³⁶ Section 69 of the *Canada Pension Plan* sets out this rule.

[50] This means the appeal is allowed.

James Beaton
Member, General Division – Income Security Section