



Citation: *MS v Minister of Employment and Social Development*, 2023 SST 1827

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: M. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated October 13, 2022 (issued
by Service Canada)

Tribunal member: Connie Dyck

Type of hearing: Videoconference

Hearing date: December 20, 2023

Hearing participant: Appellant

Decision date: December 22, 2023

File number: GP-22-1741

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is 42 years old. She stopped working as a legal administrative assistant in February 2020. She says she was dismissed from this job because she couldn't fulfill her duties because of back pain. In March 2020, she injured her back while at the gym. She couldn't even sit in a chair. She went to the hospital and a CT scan showed she had herniated discs. She and her doctor hoped her condition would improve, but in 2021, her doctor recommended she apply for a disability pension since, her pain and functional ability was not improving.

[4] The Appellant applied for a CPP disability pension on December 29, 2021.¹ 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 is in pain everyday despite having spinal injections and using Lyrica and Percocet. She says the medications cause "brain fog" and fatigue, but she is unable to sleep more than 3-4 hours at night because of her back pain.

[6] The Minister says the damage to the spinal nerves was resolving and the Appellant's symptoms were improving. An MRI showed that her disc herniation had reabsorbed and there was no evidence of nerve root compression or displacement. Steroid injections and spinal blocks gave her almost a month of pain relief. She also had partial pain relief with Oxycocet and Pregabalin.

¹ GD2-47 to 69

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by the hearing date. In other words, no later than December 20, 2023.²

[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 must look at all the Appellant’s medical conditions together to see what effect they have on her ability to work. I also must 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 capable regularly of doing 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 must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means she must show it is more likely than not that 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 GD2-71 to 72. In this case, the Appellant’s coverage period ends after the hearing date (December 31, 2023), 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. Section 68.1 of the *Canada Pension Plan Regulations* says a job is “substantially gainful” if it pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

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 had a severe and prolonged disability as of March 2020. She continues to be disabled. 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?

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

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

[16] The Appellant had a disc herniation with radiculopathy. Although the disc herniation has improved, the Appellant continues to have mechanical low back pain which Dr. Grant says is not uncommon given the pathology at her L5-S1 disc.⁵

[17] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.⁷ When I do this, I must look at all the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.⁸

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

– What the Appellant says about her functional limitations

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

⁵ GD4-32

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.

- She is unable to sit more than 30 minutes before the pain becomes unbearable
- She takes 2 pills of oxycodone or Percocet 4-6 times a day, but still has pain, especially at night
- She only gets 2-4 hours of sleep a night because of her back pain despite using Lyrica
- She has headaches, nausea, and fatigue
- She has difficulty concentrating and focusing because of her pain and medication
- She can only do a household chore for 30-60 minutes before she needs to rest for 30 minutes and use heat, cream or exercise to manage her increased pain
- She relies on her mother to help with cooking, cleaning and grocery shopping
- She relies on her children to do the laundry

– **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 no later than the hearing date.⁹

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

[22] The Appellant injured her back in March 2020. A CT scan showed a large disc herniation at the L5/S1 level eccentric to the left. There was impingement of the L5 and SI nerve roots at this level.¹⁰ A decompression and discectomy was scheduled.

[23] However, the Appellant’s leg pain had improved substantially, so surgery was cancelled.¹¹

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

¹⁰ GD2-112

¹¹ GD4-32

[24] Unfortunately, the Appellant continued to have ongoing issues with mechanical low back pain. Dr. Grant (orthopedic surgeon) said this was not uncommon following a disc herniation, because the disc wasn't healthy.¹²

[25] Dr. Grant noted that despite epidural steroid injections and narcotic medication, the Appellant's symptoms had not lessened.¹³ She continued to have difficulty bending, lifting, twisting, prolonged standing, walking, and sitting. He noted she also had a lot of pain at night. Dr. Grant said the Appellant continued to struggle with her activities of daily living due to her ongoing pain. It was his opinion the Appellant wouldn't be able to return to work, even in a sedentary occupation.

[26] Dr. Jamensky (anesthesiologist) confirmed the Appellant only has about one month of pain relief after a steroid injection.¹⁴ And, the Appellant can only have these injections a maximum of four times a year.

[27] In November 2022, Dr. Sohanpal (pain specialist) noted the Appellant continued to have left lower back pain with intermittent radiation into her left leg. An MRI showed the Appellant had significant degenerative disc disease L5-S1 with a small annular tear. It was Dr. Sohanpal's opinion the Appellant most likely had discogenic back pain for which there was no intervention through the provincial health plan.¹⁵

[28] Dr. Seyon Sivagurunathan (family doctor) noted in March 2022, the Appellant continued to have significant chronic back pain that limited her activities of daily living and prevented her from returning to any type of employment.¹⁶ The family doctor noted the Appellant's progress had been slow and a date for return to work was unknown.

[29] I recognize there has been some improvement with the Appellant's herniated disc. However, the medical evidence supports she continues to have extreme back pain

¹² GD4-32

¹³ GD4-32

¹⁴ GD4-31

¹⁵ GD4-29

¹⁶ GD2-41

that significantly limits her functional ability, including standing, walking and sitting. Her pain interferes with her sleep despite using narcotics.

– **The Appellant followed medical advice.**¹⁷

[30] The Appellant has tried many treatments since 2020. She has participated in physiotherapy several times in 2020 and 2023.¹⁸

[31] Other treatments have included consultations with an orthopedic surgeon and a pain specialist, consultation with an anesthesiologist for epidural steroid injections, as well as narcotic pain medications which she takes daily.¹⁹

[32] Dr. Sivagurunathan noted these treatments only partially relieve the Appellant's pain. She continues to have constant, daily left lower back pain.

[33] There are some treatment options such as chiropractor, massage and aquacise that the Appellant has not tried. She said she couldn't afford them. I accept this reason. Further, there is no expectation that these treatments will improve her symptoms and function. Rather, they may help her manage the pain she has now.

[34] I now must 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.²⁰

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

[35] 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

¹⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁸ GD2-98-105 and GD4-37

¹⁹ GD 2-41, GD2-142-146 and GD2-96

²⁰ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

- language abilities
- past work and life experience

[36] 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.²¹

[37] I find that the Appellant can't work in the real world. She hasn't been able to work since March 2020.

[38] The Appellant is only 42 years old. She is fluent in English, has a high school education and computer skills. Her work experience as a legal administrative assistant would provide her with transferable skills, if not for her medical condition.

[39] However, the Appellant's positive characteristics don't outweigh the effect of her physical and cognitive limitations. The Appellant is in constant pain. Side effects from her medication include fatigue and "brain fog". She has difficulty with memory and concentrating. Her pain is worse with movement, and she can only sit for about one hour because of the back pain. She can't stand more than 30 minutes or bend forward.²² She only sleeps a few hours because of back pain.

[40] Other than narcotic medication, the primary treatment is spinal injections. However, she can only have these four times a year and they only provide some pain relief for about one month. It is unrealistic to expect any employer to hire the Appellant, knowing she would only be productive for four months of the year. Further, because of her chronic pain and functional limitations, she wouldn't be a reliable employee.

[41] Her functional limitations regularly prevent her from doing any type of work. So, her personal factors don't matter. Her medical conditions regularly prevent her from retraining or from doing skilled or unskilled jobs, whether they are physical or sedentary. Because her limitations are unpredictable and with her daily and get worse with activity, it's unlikely that she would be able to work part-time.

²¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²² GD

[42] I find that the Appellant's disability was severe as of March 2020.

Was the Appellant's disability prolonged?

[43] The Appellant's disability was prolonged.

[44] The Appellant has had back pain for a long time. But in March 2020, she suffered an injury. Since then, she has had constant daily pain that impacts her ability to function and even perform her activities of daily living without assistance from others.²³

[45] The Appellant's condition will more than likely continue indefinitely. She has had many treatments over the past 3 ½ years, but her functional ability has not improved. I realize there are some treatments still available that she can't afford, but there is no evidence from any doctor that these will improve her condition and allow her to return to work.

[46] In February 2023, now almost three years after her back injury, Dr. Jamensky said the Appellant's back pain was chronic.²⁴

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

When payments start

[48] The Appellant had a severe and prolonged disability in March 2020.

[49] However, the *Canada Pension Plan* says a person can't be considered disabled more than 15 months before the Minister receives their disability pension application.²⁵ After that, there is a 4-month waiting period before payments start.²⁶

²³ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant has to show a severe and prolonged disability no later than the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

²⁴ GD4-30

²⁵ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁶ 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.

[50] The Minister received the Appellant's application in December 2021. That means she is considered to have become disabled in September 2020.

[51] Her pension payments start as of January 2021.

Conclusion

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

[53] This means the appeal is allowed.

Connie Dyck
Member, General Division – Income Security Section