



Citation: *CB v Minister of Employment and Social Development*, 2023 SST 676

**Social Security Tribunal of Canada  
General Division – Income Security Section**

## Decision

**Appellant:** C. B.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated November 9, 2021 (issued by Service Canada)

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**Tribunal member:** Wayne van der Meide

**Type of hearing:** In person

**Hearing date:** May 16, 2023

**Hearing participants:** Appellant  
Appellant's witness

**Decision date:** June 1, 2023

**File number:** GP-22-193

## Decision

[1] The appeal is allowed.

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

## Overview

[3] The Appellant is 38 years old. She has a degree from Chatham College in Development Service Work. While in college she started working as a health care assistant. She continued working as a health care assistant for about 13 years, until she stopped working on March 10, 2020.

[4] The Appellant has hyperkalemic periodic paralysis (a temporary inability to move muscles in the arms and legs) and myotonia congenita (muscle spasms). The conditions are rare and can be caused by a mutated gene, which the Appellant has. She has other conditions which I will talk about later.

[5] The Appellant applied for a CPP disability pension on November 6, 2020.<sup>1</sup> The Minister of Employment and Social Development (Minister) refused her application.<sup>2</sup> The Appellant asked the Minister to reconsider its decision, but the Minister upheld its initial refusal.<sup>3</sup> The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[6] The Appellant says she cannot work because of her paralysis and spasms. She says that there are many days she struggles to get out of bed and do basic things to take care of herself and her home.

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<sup>1</sup> See GD2-7 to GD2-12.

<sup>2</sup> See GD2-39 to GD2-44.

<sup>3</sup> See GD2-31 to GD2-37 and GD2-13 to GD2-16.

[7] The Minister says the Appellant didn't always follow treatment recommendations and that there are other possible medications she could take. The Minister also says that she can do work that is less physically demanding than what she was doing, but the Appellant hasn't tried to find another job.

## What the Appellant must prove

[8] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2022. This date is based on her contributions to the CPP.<sup>4</sup>

[9] The *Canada Pension Plan* defines "severe" and "prolonged."

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.<sup>5</sup>

[11] 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.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>6</sup>

[13] 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.

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<sup>4</sup> 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 GD2-4 and GD2-5.

<sup>5</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>6</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[14] 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.

## **Reasons for my decision**

[15] I find that the Appellant had a severe and prolonged disability as of March 10, 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?**

[16] The Appellant's disability was severe by March 10, 2020. I reached this finding by considering several factors. I explain these factors below.

#### **The Appellant's functional limitations affect her ability to work**

The Appellant has:

- hyperkalemic periodic paralysis (a temporary inability to move muscles in the arms and legs) caused by a rare genetic anomaly and myotonia congenita (muscle spasms)<sup>7</sup>
- problems regulating her blood pressure<sup>8</sup>
- tendinitis in both wrists<sup>9</sup>
- knee joint deterioration<sup>10</sup>

[17] However, I can't focus on the Appellant's diagnoses.<sup>11</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>12</sup> When

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<sup>7</sup> See GD2-29 and GD2-76 to GD2-81.

<sup>8</sup> See GD2-85 to GD-87.

<sup>9</sup> See GD2-178 and GD2-179

<sup>10</sup> See GD2-88 to GD2-90.

<sup>11</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>12</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

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 her ability to work.<sup>13</sup>

[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 affected her ability to work.

[20] The Appellant says she has had daily episodes of muscle paralysis and spasms since March 2020. As a result of her hyperkalemic periodic paralysis and myotonia congenita she says that she has one decent day a week. She says that:

- sometimes she cannot get out of bed
- she struggles to do dishes and clean
- she eats things she can put in the microwave or eats a sandwich
- during a flare up physical activity makes her symptoms worse, sometimes extending the symptoms for days
- sometimes she has difficulty breathing (talking on the phone can be difficult) and getting to the bathroom
- there are nights she cannot sleep because of cramping and pain
- she cannot stand for long periods and sometimes she cannot stand for more than 5 minutes (for example, she now needs to use a chair to take a shower)
- eating can be difficult
- she cannot walk long (the walk to the bus stop is too long)
- her mother, who lives 10 hours away, often has to come to take care of her when she has bad episodes/flare ups.

The Appellant says that her knee often gives out even though she had two scopes (a procedure to remove scar tissue) when she was 19 and 28.<sup>14</sup>

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<sup>13</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>14</sup> See GD2-88 to GD2-90.

She says that since March 2020, she sits at home.

### **What the Appellant's witness says about the Appellant's functional limitations**

The Appellant's mother testified. Although not in as much detail, she confirmed what the Appellant said about her condition and functional limitations.

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

[21] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2022.<sup>15</sup>

[22] The medical evidence supports what the Appellant says. In a report dated November 22, 2020, her family doctor (Dr. Makinde) said that the Appellant cannot:

- walk more than 100 meters
- carry more than 10 lbs
- sustain physical activities
- sit or stand for 2 hours continuously<sup>16</sup>

In 2019 a geneticist identified the Appellant's gene mutation. She said that the Appellant reported episodes which ranged from mild weakness to full body fatigue.<sup>17</sup>

In a report from June 2021, the Appellant's neurologist said that her "episodes have become quite frequent occurring on a daily basis and she is impaired for hours because of weakness and also due to the myotonia which can be uncomfortable and also cause impaired relaxation of her hands."<sup>18</sup>

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

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<sup>15</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>16</sup> GD2-162 to GD2-170.

<sup>17</sup> See GD2-88 to GD2-90.

<sup>18</sup> See GD2-29.

### The Appellant has followed medical advice

[24] To receive a disability pension, an appellant must follow medical advice.<sup>19</sup> 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.<sup>20</sup>

[25] The Appellant has followed medical advice.<sup>21</sup> The Minister says the Appellant unreasonably refused diet changes recommended by the geneticist who diagnosed her with a genetic mutation. I disagree with the Minister.

[26] The Appellant says that the dietary advice the geneticist gave her was unclear, if not contradictory.<sup>22</sup> She said that before that appointment she had done research about the relationship between her condition and diet. She said that she wasn't resisting advice, she was asking questions. I believe her.

[27] The Appellant continues to try modifications to her diet to prevent flare-ups of her condition. To assist her, she bought a potassium monitor at her own expense because the level of potassium in her body is important for her condition. Her neurologist confirmed in August 2021 that the Appellant is trying to eat in a way that **may** prevent flare ups of her symptoms. Unfortunately, that note also records that the Appellant's efforts to control her condition with diet hasn't worked.<sup>23</sup>

[28] 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.<sup>24</sup>

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<sup>19</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>20</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>21</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>22</sup> See the report of the appointment at GD2-125 and GD-126.

<sup>23</sup> See GD2-76.

<sup>24</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

### The Appellant can't work in the real world

[29] 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

[30] 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.<sup>25</sup>

[31] The Appellant can't work in the real world.

[32] The Appellant is relatively young, speaks English, has a good education and work experience that gives her transferrable skills. In this case, that doesn't matter. The Appellant simply cannot work in any job. Her functional limitations are too severe and frequent.

[33] I find that the Appellant's disability was severe as of March 10, 2020. This is why.

[34] By March 10, 2020, the Appellant couldn't even work doing something that **wasn't** physically demanding.<sup>26</sup> She went on unemployment insurance for about 16 weeks. In August 2020 her employer offered her another placement. She didn't accept the placement and hasn't worked since.

[35] The Minister says that the Appellant can do work which is less physically demanding compared to what she was doing. I disagree.

[36] When the Appellant stopped working, she **wasn't** doing a physically demanding job. At the hearing she explained that she hasn't been doing physically demanding jobs

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<sup>25</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>26</sup> See GD2-178 and GD2-179.



since 2012. After 2012, she would only work in homes where all she had to do was give clients medications, sit and watch tv with them, help them eat dinner and with showers, and drive them to appointments and outings.

[37] Even before she stopped working completely, the Appellant was absent from work because of flare ups of her conditions. By the time she stopped working in March 2020, one or more times a day, almost every day, the Appellant couldn't move, or could only move with great difficulty. When she pushed herself, to make a sandwich for example, her symptoms became worse and lasted longer. The severity of her functional limitations continues to now. If she cannot do these things, she cannot work at all, no matter how sedentary or physically undemanding a job may be.

### **Was the Appellant's disability prolonged?**

[38] The Appellant's disability was prolonged.

[39] As a teenager the Appellant started to experience mild episodes of weakness in her muscles once a year or so. This weakness started to become worse in about 2015 when she started having episodes of paralysis. She also started to experience painful cramping in 2015.<sup>27</sup>

[40] The Minister says that the Appellant isn't currently taking medications for her conditions and is waiting to see other doctors and try other medications.

[41] The Appellant **is** taking medications. She is taking a lower dose of mexiletine which she first started at a higher dosage in the summer of 2020. She stopped the higher dosage, as recommended, because of severe side-effects including glossy eyes, nauseousness, feeling light-headed and dizzy. She is also taking medication for her blood pressure.

[42] She has discussed other medications with her doctors and is waiting to see other specialists. But no doctor has ever suggested that there is a medication out there that is likely to significantly improve her conditions. Her condition is rare. The Appellant and

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<sup>27</sup> See GD2-88 to GD2-92, GD2-155 and GD2-156, GD2-162 to GD2-170,

her doctors are trying lots of options and adjusting dosages regularly. This doesn't mean that her condition isn't prolonged. At the hearing the Appellant talked about her ongoing efforts to follow-up with specialists she is seeing and has been referred to see.

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

### **When payments start**

[44] The Appellant's disability became severe and prolonged in March 2020.

[45] There is a four-month waiting period before payments start.<sup>28</sup> This means that payments start as of July 2020.

### **Conclusion**

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

[47] This means the appeal is allowed.

Wayne van der Meide  
Member, General Division – Income Security Section

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<sup>28</sup> Section 69 of the *Canada Pension Plan* sets out this rule.