



Citation: *DB v Minister of Employment and Social Development*, 2023 SST 1004

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

# Decision

**Appellant:** D. B.  
**Representative:** Ashwin Ramakrishnan

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated December 21, 2021 (issued  
by Service Canada)

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**Tribunal member:** Selena Bateman

**Type of hearing:** Teleconference

**Hearing date:** July 25, 2023

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** July 31, 2023

**File number:** GP-22-755

## Decision

[1] The appeal is dismissed.

[2] The Appellant, D. B., 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 32 years old. He worked as a cable technician. He has fibromyalgia with diffuse pain, depression, migraines, and mild cognitive issues. He currently works in a security job.

[4] The Appellant applied for a CPP disability pension on February 8, 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 had to stop working his cable technician job because of back pain, difficulty walking, and not being able to lift more than ten pounds. Since then, his condition hasn't improved. In September 2022, he began working a security job out of financial need. He has kept this job.

[6] The Minister says that the medical evidence supports an improvement in his fibromyalgia since 2021. The Minister argues that he is managing his conditions with treatment. The Minister says that he has the capacity to care for his children. In the real world, he has transferable skills and the ability to retrain.

## 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, 2021. This date is based on his contributions to the CPP.<sup>1</sup>

[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.<sup>2</sup>

[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.<sup>3</sup>

[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.

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<sup>1</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 on GD2-70 to 71.

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

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## Reasons for my decision

[14] The severity of a disability refers to the capacity of an appellant to work. In this case, the Appellant has been successfully working and likely earning a substantially gainful income since September 2022, despite his cumulative limitations. His disability wasn't continuous.

[15] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2021.

### Was the Appellant's disability severe?

[16] 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 affect his ability to work

[17] The Appellant has fibromyalgia, irritable bowel syndrome (IBS), gastroesophageal reflux disease (GERD), and depression.

[18] However, I can't focus on the Appellant's diagnoses.<sup>4</sup> Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.<sup>5</sup> 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.<sup>6</sup>

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

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<sup>4</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>5</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>6</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

- Because of fibromyalgia, he can stand for up to ten minutes. He can't walk one block.
- He has numbness in his legs.
- He also has fatigue, fainting, dizziness, and migraines.
- Because of his back pain, he can't bend.
- He has abdominal pain from irritable bowel syndrome.
- It is hard to adjust to changes because of concussion issues. He gets side tracked easily. He has a poor memory. Learning is difficult.

– **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, 2021.<sup>7</sup>

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

[23] The Minister argues that no specific medical evidence discussed his **migraines**.<sup>8</sup> In my review, I found records to support that he had migraines. They occur about once per month with varying severity. He takes Advil.<sup>9</sup>

[24] The medical evidence supports that the Appellant has **fibromyalgia**. He has diffuse body pain, fatigue, dizziness, impaired memory, low mood, and low energy.<sup>10</sup> The Appellant has also reported sporadic loss of sensation in his legs from time to time.<sup>11</sup>

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<sup>7</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>8</sup> See GD5-10.

<sup>9</sup> See GD4-566.

<sup>10</sup> See GD2-296.

<sup>11</sup> See GD2-219.

[25] The medical evidence supports that the Appellant had **dizziness** and **fainting** episodes. The Appellant believes that the fainting was caused by gabapentin medication. When he stopped taking this medication, he mostly stopped fainting. In January 2022, he had occasional dizziness about once per week. This improved over the last three years.<sup>12</sup>

[26] The medical evidence supports that the Appellant has **irritable bowel syndrome**. He has recurrent abdominal pain.<sup>13</sup> In January 2022, he reported that he experiences only mild constipation and rare diarrhea. These issues weren't as severe in the past because he found ways to manage them through diet and medication.<sup>14</sup>

[27] The Appellant has gastroesophageal reflux disease (**GERD**). He has heartburn, nausea, and vomiting.<sup>15</sup>

[28] The medical evidence supports that the Appellant has a diagnosis of **depression** with intermittent episodes and **somatic symptom disorder**. The appeal file contains one psychiatric assessment made in early 2022 by Dr. Lawson. I recognize that this is after the end of 2021, but I accept that the Appellant had these symptoms before the end of 2021. By the time the Appellant saw Dr. Lawson, the Appellant said his mood had improved. Dr. Lawson felt that he didn't have a current episode of depression.<sup>16</sup>

[29] The Minister argues that no severe psychological functional limitations were noted.<sup>17</sup> I agree with the Minister to the extent that the evidence doesn't support he is completely disabled because of his psychological limitations.

[30] I find that he does have psychological limitations that impact his ability to work. I accept that the Appellant has struggles including a longstanding low mood and difficulty

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<sup>12</sup> See GD3-12.

<sup>13</sup> See GD2-297.

<sup>14</sup> See GD3-12.

<sup>15</sup> See GD2-206.

<sup>16</sup> See GD3-11 to 18.

<sup>17</sup> See GD5-9 to 10.

tolerating emotions. Anxiety shows up in his body as tension and pain with cognitive perceptual disruptions.

[31] The Minister argues that no specific information was in the appeal file related to **concussion symptoms**.<sup>18</sup> He told specialists that he had concussions by 2020. He believes this causes him emotional issues and poor memory. No brain or spinal abnormalities were found on an MRI.<sup>19</sup>

[32] Dr. Lynwood would have been his treating physician during the time of his last stated concussion. The evidence from Dr. Lynwood doesn't mention concussions or associated limitations. This doesn't mean that he didn't have concussions. Just that the medical evidence doesn't support that he had concussions and doesn't attribute limitations to this cause.

[33] I find that the Appellant has the limitations he stated, at least due to other health conditions. I accept that the Appellant has emotional issues related to depression and somatic symptom disorder. I accept that the Appellant has poor memory or 'brain fog' because of fibromyalgia.

– **Dr. Lynwood's medical opinion**

[34] The Appeal file contains disability opinions from Dr. Lynwood. Dr. Lynwood's medical opinion is that the Appellant is disabled from all work, including part-time and sedentary work.<sup>20</sup> Her opinion didn't change from October 2019 to May 2022.<sup>21</sup>

[35] I didn't disregard Dr. Lynwood records and medical opinion. I considered and weighed this evidence. I took the Appellant's functional issues as seriously as ones that can be shown by objective tests.

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<sup>18</sup> See GD5-10.

<sup>19</sup> See GD4-373 and 424.

<sup>20</sup> See GD3-2 to 6.

<sup>21</sup> See GD2-24 to 25, 108, 199, 292 to 311, and GD3-6.

[36] A finding of disability is not based on a medical diagnosis alone nor on the subjective evidence of an appellant. It is relevant only to determine whether the appellant is able to perform any substantially gainful occupation.<sup>22</sup>

[37] After Dr. Lynwood's last opinion, the Appellant began working and continued to work as of the date of the hearing. I can't ignore evidence of employment efforts in the context of a disability claim.

[38] I preferred the evidence from the Appellant's work attempt because this most accurately demonstrates whether the Appellant's disability is regular and whether real employers would hire and retain him in the commercial marketplace.

[39] The medical evidence supports that the Appellant's difficulty with fatigue, lifting, and walking due to sporadic leg numbness prevented him from doing his usual job.

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

– **The Appellant has followed medical advice**

[41] To receive a disability pension, an appellant must follow medical advice.<sup>23</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>24</sup>

[42] The Appellant has followed medical advice. The Minister didn't argue otherwise. In my review, I didn't see any concern of treatment adherence.

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

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<sup>22</sup> See *Gorgiev v Canada (Minister of Human Resources Development)*, 2005 FCA 55.

<sup>23</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>24</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>25</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.



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

[44] 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

[45] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.<sup>26</sup>

[46] I find that the Appellant can work in the real world.

[47] The Appellant has positive personal characteristics that support employability. The Appellant is in his early 30s. He has many years before reaching the usual age of retirement. He has college education in electronic engineering. He doesn't have a language barrier. He has held work experience in retail, as a cable technician, and now in security. He has transferable skills and computer knowledge.

[48] The Minister argues that the Appellant showed capacity to provide childcare for his young children, independently care for his activities of daily living, and do some housework and groceries.<sup>27</sup>

[49] The Appellant says he cared for his young children while his spouse worked full time until August 8, 2022, when the couple separated. He drove the children. He fed them. He says that he wasn't able to cook or clean because of limitations to bending, standing, and walking. He couldn't get groceries because of his inability to lift and carry. He uses a cane about once per month if his legs went numb.

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<sup>26</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>27</sup> See GD5-10.

[50] What the Appellant says is contrasted somewhat by the medical evidence. A February 2022 pain clinic report noted that the Appellant was able to do activities of daily living, grocery shopping, and light housework. However, he felt it took him a long time and he experienced pain.<sup>28</sup>

[51] I find it likely that the Appellant performed some degree of cooking and cleaning during when caring for young children on a frequent basis. These tasks are inherently part of childcare. The Appellant assumed this role for at least two years prior to the separation.

[52] The Appellant's functional limitations don't preclude all work. When I factor in the Appellant's limitations, it is unlikely that he could do a physical job that involves climbing, bending, reaching, and carrying. However, I think it's likely that he has some residual work capacity for light physical or sedentary work.

[53] Next, I discuss the Appellant's current work.

– **The Appellant found and kept a suitable job**

[54] 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.<sup>29</sup> Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.<sup>30</sup>

[55] The Appellant made efforts to work after the end of 2021. His efforts don't show that his disability gets in the way of earning a living. His disability can't be continuous.

– **The Appellant's work attempt was successful**

[56] The Appellant is successfully working. This demonstrates that he has residual work capacity. It also tells me that a real-world employer will hire him with his

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<sup>28</sup> See GD3-21.

<sup>29</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

<sup>30</sup> See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

cumulative limitations. He maintained employment over time. This supports that he has the ability to learn and complete new job tasks from an alternate line of work.

[57] The Appellant found employment to suit his skills and limitations. He began a security job around September 2022. He pursued work out of financial need after a separation from his spouse the month prior. His duties include watching security cameras, doing rounds of the building, filling out reports, and managing who comes in and out of the building.

[58] The Appellant has maintained employment despite his limitations and pain. The Appellant earned \$14 per hour initially, then his wage was increased to \$19 per hour. He worked full-time, but found it was too hard on him. Since January 2022, he works between 24-32 hours per week.

[59] The Appellant's work is productive. He provides value for his labour in today's competitive marketplace. He doesn't have any accommodations. He works alone often. The same amount of work was expected from him as compared with other employees. When he isn't there, other staff are called in. He believes his employer is satisfied with his work, and he hasn't received any warnings.

[60] The Appellant's disability doesn't regularly prevent him from working. He is largely able to be a reliable and predictable employee. He calls in sick once per month. On occasion, he calls in sick twice per month. About once per month he needs to leave work early due to vomiting, headache, or brain fog.

– **The Appellant's 2023 income is likely to be substantially gainful**

[61] In 2023, the Appellant's earnings are likely to be substantially gainful.<sup>31</sup> He earns \$19 per hour and works at least 24 hours per week, factoring in occasional missed shifts due to medical conditions.

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<sup>31</sup> The *Canada Pension Plan* defines a substantially gainful income. A substantially gainful occupation pays wages that are equal to or more than the maximum amount an appellant could get as a disability pension for that year. See section 28.1 of the *Regulations*. Also see <https://open.canada.ca/data/en/dataset/e547539b-7fc6-4879-be54-3d1f80ac9e9e>

– **The Appellant argues his work doesn't show capacity**

[62] The Appellant argues that he doesn't think he will be able to continue working. He feels that his health declines when he is employed. He says Dr. Lynwood doesn't support him working.

[63] I respect that the Appellant believes that is in poor health. I understand that he has limitations and lives with daily pain. However, he has been able to maintain suitable employment for close to one year. I can't ignore a successful work attempt. The evidence doesn't support that his employment was unsuccessful by reason of his health condition.

[64] There is no evidence to support that working is "ruining his health" or reasons to support why he cannot continue working, beyond the Appellant's belief. For example, the Appellant didn't provide an explanation of how his health has been impacted by working or say that there has been an increase in his functional limitations since he began employment.

[65] I don't have medical evidence to consider and weigh since the Appellant began working. Dr. Lynwood's last disability opinion was before he started the security position. There isn't medical evidence to show what Dr. Lynwood's opinion is about how working impacts his disability.

[66] The Appellant also says that he only works because of financial need since his separation. Unfortunately, I cannot consider financial need as a factor in establishing a severe disability.

[67] The Appellant says that he isn't a reliable employee. I found the Appellant to be a reliable employee.

[68] The Appellant hasn't proven that he couldn't maintain any type of employment because of his disability. This means that his disability isn't severe within the CPP definition.

## **Conclusion**

[69] 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.

[70] This means the appeal is dismissed.

Selena Bateman  
Member, General Division – Income Security Section