Citation: *DH v Minister of Employment and Social Development*, 2023 SST 1037

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	D. H.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated January 21, 2022 (issued by Service Canada)

Tribunal member:	Virginia Saunders
Type of hearing:	Teleconference
Hearing date:	July 5, 2023
Hearing participants:	Appellant
Decision date:	August 1, 2023
File number:	GP-22-821

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. H., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant used to work as a blaster in a mine. The job was physically demanding. He had been dealing with back pain for many years. By March 2018, he couldn't handle it anymore. He stopped working. He hasn't worked since then.

[4] The Appellant applied for a CPP disability pension in June 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.

What the Appellant must prove

[5] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged no later than December 31, 2022. This date is based on his contributions to the CPP.[1]

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

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

[8] 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

[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 on GD7-17 to 18.
[2] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

Appellant is regularly able to do some kind of work that he could earn a living from, then he isn't entitled to a disability pension.

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

[10] 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.

[11] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he is disabled.

Matters I have to consider first

I accepted late documents

[12] The Minister filed documents after the deadline.[4] They were:

- the Minister's written submissions (arguments), including the Appellant's record of earnings, dated May 30, 2023[5]
- the Appellant's records from his primary care clinic for the period of January 2021 to March 2023[6]
- the Minister's additional written submissions, dated June 28, 2023[7]

[13] Here is why I accepted the late documents.[8]

[14] The Minister delayed sending its first submissions because it was waiting to receive medical information from the Appellant's family doctor.[9] This was reasonable,

[3] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.
[4] The deadline was April 28, 2023, which was 365 days after the appeal was filed.
[5] See GD7. GD8 is the same as GD7.
[6] See GD9.
[7] See GD10.
[8] Section 42(2) of the *Social Security Tribunal Rules of Procedure* (Rules) sets out what factors I must consider when deciding whether to accept late evidence. Under section 8(5) of the Rules, I can apply these factors to late submissions (arguments) as well, even though these aren't considered evidence. Section 5 of the Rules defines "evidence."
[9] See GD3, GD4, GD5, and GD6.

since the evidence was likely to be relevant. When the family doctor didn't respond to the Minister's repeated requests, the Minister filed its submissions.

[15] The Appellant's medical records arrived soon after the Minister filed its submissions. They were relevant. Although the Appellant might have been able to get the records sooner, the Minister could not.

[16] The Minister's second submissions were in response to the new medical evidence. The Minister couldn't have prepared the submissions until it knew what that evidence was.

[17] Accepting the evidence wasn't unfair to the Appellant. He had the Minister's first submissions over a month before the hearing. This was more than enough time to review them. He received the new medical evidence and the additional submissions a few days before the hearing. I asked him if he wanted time to review and respond to the new documents after the hearing, but he did not. During the hearing, I asked him questions to allow him to address the Minister's arguments.

Reasons for my decision

[18] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2022.

Was the Appellant's disability severe?

[19] 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

[20] I have to focus on whether the Appellant has functional limitations that get in the way of him earning a living.[10] When I do this, I have to look at **all** of his medical

---

[10] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81 and *Klabouch v Canada (Social Development)*, 2008 FCA 33.

conditions (not just the main one) and think about how they affect his ability to work.[11] I have to consider the medical evidence as well as what the Appellant says.[12]

[21] I find that the Appellant has functional limitations that affect his ability to work.

[22] The Appellant had chronic low back pain radiating into both legs for many years. The pain was caused by isthmic spondylolisthesis and nerve root impingement. He had decompression and fusion surgery in March 2019.[13] His back pain improved a bit, but his nerve pain got worse. He started to get coldness and numbness in his hands and feet. He had trouble sitting, walking, and standing. He had to constantly move about because of his pain. He only slept two to three hours a night.[14]

[23] The Appellant's pain got even worse after he fell in early 2020. Some of the screws in his back fractured. He had a revision surgery in September 2020.[15]

[24] The Appellant told me that his leg pain got better after the surgery, but his back pain hasn't improved at all. He almost wishes he didn't have the surgery. He is still as limited as he was when he stopped working. He still can't sleep. He loses interest in what he is doing, and he can't focus because of his pain.[16]

[25] The Appellant also has chronic pain in both shoulders from osteoarthritis. This has slowly gotten worse over the last several years.[17] He told me he can't do any overhead work.

– **The medical evidence mostly confirms what the Appellant says**

[26] The Appellant's history of back and shoulder pain is well-documented.[18]

---

[11] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[12] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[13] See GD2-113.
[14] See GD2-94 to 95.
[15] See GD2-150 and 163.
[16] The Appellant told me this at the hearing. See also GD2-25 to 28.
[17] See GD2-127 and GD9-6 to 14.
[18] See GD2-234 to 238 and GD2-257 to 258.

[27] In December 2021—more than a year after the revision surgery—the Appellant's neurosurgeon wrote that a recent x-ray was reassuring, but the Appellant continued to have mechanical low back pain that was worse with mechanical loading of his lumbar spine. He also had sensory loss in his legs, but no radicular pain.[19] Since then, the Appellant's family doctor has consistently noted the Appellant's back and shoulder pain, his low mood, and his poor sleep.[20]

[28] The evidence shows that the Appellant would have difficulty doing any physical or seated work, either full or part time. His pain affects his sleep, his concentration, and his mood.

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

– **The Appellant didn't follow medical advice**

[30] To receive a disability pension, an appellant must follow medical advice.[21] If they don't, they must have a reasonable explanation for not doing so. If they don't have a reasonable explanation, then I must also consider what effect, if any, the medical advice might have had on their disability.[22]

[31] The Appellant hasn't followed some medical advice. He didn't give a reasonable explanation for not following advice to try a chronic pain program. Following the advice might have affected his disability.

[32] The Appellant did follow much of the advice he was given. He consented to two surgeries. He had nerve blocks, injections, and physical therapy. He has tried different medications. He only takes strong medication like oxycontin when he really needs to. His family doctor knows this and has not pushed him to take more.

---

[19] See GD9-26.
[20] See GD9-6 to 9.
[21] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[22] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.

– **A reasonable explanation for waiting to follow some advice**

[33] The Appellant had a reasonable explanation for waiting to follow some medical advice.

[34] I find that his reluctance to have shoulder surgery is reasonable. He told me he is afraid of more surgery, because of his failed back surgeries and difficult recoveries. This is understandable. It is important to note that, while he decided not to have shoulder surgery when it was offered to him about a year ago, he is back on the waiting list, and he may yet decide to have it. The fact that he is still considering it tells me that he is doing his best to follow this medical advice.

– **No reasonable explanation for not following other advice**

[35] The Appellant hasn't followed advice to get treatment for his chronic pain. He didn't have a reasonable explanation for this. Following this medical advice might have made a difference to his disability.

[36] In January 2022, the Appellant's family doctor, Dr. Hirst, recommended he start a program called Living Well with Chronic Pain. He told her he wasn't interested because he was doing well.[23] Dr. Hirst recommended the program again in July 2022, because the Appellant continued to complain of pain and interrupted sleep.[24] She discussed other programs he might try in October and December 2022.[25] In March 2023, she recommended he try a self-management program for chronic pain that could be done virtually.[26]

[37] The Appellant told me he hasn't tried any of these programs. He hasn't gone for counselling for his mood. He told me he talks to his family and friends, and he walks by the river. That is his therapy. He doesn't think programs will help him because they will only teach him how to accept his pain; they won't fix it.

---

[23] See GD9-8.
[24] See GD9-7.
[25] See GD9-6.
[26] See GD9-5.

[38] This isn't a reasonable explanation. It might have been, if the Appellant had actually tried the programs and found they didn't improve his level of function. But he had no way of knowing ahead of time if that would happen.

[39] The Appellant's belief that chronic pain programs won't help is different from having a mental condition or personal circumstances that prevent him from trying them. Dr. Hirst did not suggest there were any barriers to participation, nor did the Appellant. Trying these programs required little effort and no risk. So, it wasn't reasonable of him to refuse.

– **Following the advice might have made a difference**

[40] Following this medical advice might have made a difference to the Appellant's disability.

[41] Dr. Hirst recommended chronic pain programs because she thought they would help the Appellant. In October 2022, she noted that she discussed the benefit of the programs with the Appellant.[27] Two months later, she wrote that the Appellant still hadn't looked into an app-based program and that "he seems resigned to be in pain."[28] This tells me that, in Dr. Hirst's view, the Appellant didn't have to be in pain. It would improve if he tried the program.

[42] The Appellant's main problem is chronic pain and its effect on his mood, concentration, and sleep. So, it is reasonable to expect that treatment that improved his pain would also improve the other limitations that affect his ability to work. In other words, this treatment could make a difference to his disability.

[43] The Minister doesn't have to prove that a chronic pain program would have improved the Appellant's disability status. The Appellant has to prove that he is disabled. That includes showing that it is more likely than not that the recommended treatment **would not** have made a difference.

[27] See GD9-6.
[28] See GD9-6.

[44] The Federal Court of Canada dismissed an appeal by an appellant who didn't follow medical advice because he didn't think the treatment would work. The Court said the appellant "needs his doctors to say that there are no treatments that will help and that he has no capacity for any substantially gainful employment.…[H]e needed to produce medical evidence to support his position that his condition cannot be improved and he cannot work."[29]

[45] I recognize that the Appellant doesn't think a chronic pain program will help. But he hasn't produced medical evidence of that, which the Court says he needs.

[46] In December 2021, Dr. Yavin wrote that the Appellant continued to have mechanical back pain "and as a consequence he has not been able to return to work." He said that low back pain was rarely cured by lumbar fusion, but he expected further improvement for up to two years after the surgery.[30] He did **not** say there were no treatments that would help the Appellant return to the workforce.

[47] Dr. Hirst also wrote in December 2021 that the Appellant's chronic pain was unlikely to improve.[31] But this was her first meeting with the Appellant. She noted this as part of his past medical history. The Appellant saw Dr. Yavin about two weeks before he saw Dr. Hirst. Dr. Yavin's letter was addressed to the Appellant's other family doctor, who was at the same clinic as Dr. Hirst. So, it is reasonable to assume that Dr. Hirst read the letter and was repeating Dr. Yavin's opinion rather than stating her own conclusion. It is also reasonable to assume that she recommended a chronic pain program to increase the likelihood that the Appellant would improve in the two-year window that Dr. Yavin gave.

[48] Dr. Hirst started recommending chronic pain programs in January 2022.[32] She was still recommending them over a year later.[33] As I noted above, she did this because

---

[29] See *Cvetkovski v Canada (Attorney General)*, 2017 FC 193 at paragraph 59. I agree with this decision. Even if I didn't agree, I have to follow it.
[30] See GD9-26.
[31] See GD9-9.
[32] See GD9-9.
[33] See GD9-5.

she felt the Appellant would benefit from them. He hasn't provided any evidence from his doctors to say that he would not.

[49] A chronic pain program might not help the Appellant's problem with coldness and numbness in his hands and feet. However, in the past year he has received medical advice for how to treat this with medication.[34] He told me he doesn't take the medication because he has too many pills and he wants to focus on his back. There is no evidence that suggests he can't follow the advice or that he won't see improvement if he does.

[50] The Appellant didn't follow medical advice that might have affected his disability. This means that his disability wasn't severe.

[51] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work.[35]

[52] I don't have to do that here because the Appellant didn't follow medical advice and didn't give a reasonable explanation for not following the advice. The advice might have made a difference to his disability. This means he hasn't proven that his disability was severe by December 31, 2022.[36]

Conclusion

[53] 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.

[54] This means the appeal is dismissed.

Virginia Saunders

Member, General Division – Income Security Section

---

[34] See GD9-6.
[35] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[36] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.