



Citation: *AN v Minister of Employment and Social Development*, 2023 SST 452

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. N.
Representative: Steven Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 7, 2021 (issued by
Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Teleconference

Hearing date: April 20, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: April 26, 2023

File number: GP-21-1534

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. N., 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 46 years old. She is an early childhood educator ("ECE") at a day care centre. She last worked on November 5, 2019. On that day, she fell at work and broke her right knee. She also dislocated her kneecap. She re-injured the same knee on June 16, 2020. In 2022, she also began to have intermittent pain in her right hand, lower back, and buttocks.

[4] The Appellant suffers from pain, swelling, and stiffness in her knee. She says she cannot perform activities such as sitting or walking for any extended period of time. Outside her home, she walks with a cane. Her hand pain prevents her from holding objects. Her mood is sometimes affected too.

[5] The Appellant applied for a CPP disability pension on January 20, 2021. The Minister of Employment and Social Development ("Minister") refused her application. She appealed the Minister's decision to the Social Security Tribunal's General Division.

[6] The Appellant says she has had a severe and prolonged disability since her initial fall in November 2019. She says she hasn't recovered to the point that she has work capacity. She notes her family doctor's November 2021 opinion that she is still totally disabled from any form of work. She says her disability insurer has not suggested that she retrain for sedentary work.

[7] The Minister says the Appellant may not be able to return to her previous job but could perform alternate or modified work within her limitations. The Minister also says she didn't attempt alternate work or retraining for suitable employment.

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 CPP contributions.¹

[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.²

[11] 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, 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 she can regularly do some type of work from which she could earn a living, 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.³

[13] This means the Appellant’s disability can’t have an expected recovery date. The disability must be expected to keep her out of the workforce for a long time.

[14] 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.

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 s. 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on page GD2-6.

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.

Matters I have to consider first

[15] The Appellant filed medical documents on April 11, 2023 (indexed as “GD9”). This was only nine days before the hearing. The Minister filed submissions responding to GD9 on April 19, 2023 (indexed as “GD10”). This was the day before the hearing.

I accepted the documents sent in just before the hearing

[16] I decided to receive both GD9 and GD10 into evidence.

[17] GD9 contains specialist reports from the last year. These reports are potentially highly relevant to the appeal. Receiving the reports wouldn't cause delays or be unfair to the Minister, as the Minister already filed submissions on them.

[18] GD10 is simply a response to GD9. The Minister couldn't have filed GD10 earlier. GD9 was sent to the Minister late in the day on April 12, 2023. Receiving GD10 wouldn't cause delays or be unfair to the Appellant, as she had already reviewed GD10 before the hearing. In addition, the Minister could simply have made oral submissions on GD9 at the hearing. Finally, GD10 did not contain any new evidence.

Reasons for my decision

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

Was the Appellant's disability severe?

[20] The Appellant's disability wasn't severe by December 31, 2022. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations do affect her ability to work

[21] The Appellant has had right knee pain since having a dislocated fracture in 2019. Her knee was aggravated by another fall in 2020. In 2022, she developed right-hand pain and tingling.

[22] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether she had functional limitations that got in the way of earning a living.⁵ When I do this, I must look at **all** of her medical conditions (not just the main one) and think about how they affected her ability to work.⁶

[23] I find that the Appellant has functional limitations that affected her ability to work by December 31, 2022.

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

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

[25] When she applied for the CPP disability pension in 2021, the Appellant set out many of these functional limitations. She said she couldn't sit for more than 15 minutes. She couldn't sit on the floor. She couldn't stand for more than 10 minutes. At that time, she still used a crutch to walk. She could not jog, exercise, or go for a walk. She could not do housekeeping or home maintenance. She had lost her muscle strength. Her ability to do things like kneel, squat, or use stairs was poor. She also had emotional difficulties around people.⁷

[26] At the hearing, the Appellant mentioned many of these limitations, although some have improved slightly. For example, she says she could now sit for 20-25 minutes. She now uses a walking cane instead of a crutch when she leaves her home. However, she still has a hard time getting out of bed. She can no longer drive because she cannot put much pressure on her right knee. She says the tingling and pain in her right hand prevents her from holding things. She is right-handed.

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

⁵ See *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

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

⁷ See GD2-34 and GD2-37 to GD2-40.

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

[27] The Appellant must provide some medical evidence to support that her functional limitations affected her ability to work by December 31, 2022.⁸

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

[29] In December 2022, Dr. Tsvetkov (Orthopedics) noted that the Appellant’s right knee injury had been taking quite a while to heal.⁹

[30] In September 2022, Dr. Ganty (Pain Clinic) observed the Appellant’s pain with various knee movements. She also had tenderness with movement and pressing. He thought her pain mostly resulted from tissue damage. He also thought injections might help because her pain likely had a myofascial element. Dr. Ganty thought her right hand pain could result from a trapped or compressed ulnar nerve.¹⁰

[31] In November 2021, Dr. Fung (Family Doctor) thought it would be impossible for the Appellant to do any sedentary job, as she could not sit for an extended period. He said she could only walk for a ½ block before requiring rest. He noted she used a crutch or cane to get around, had severe pain and stiffness in her right knee, and had limited knee movements. He observed muscle atrophy and significant tenderness. He also said it was impossible for her to travel.¹¹

[32] The medical evidence supports what the Appellant says. All her doctors point to her knee as the problem. The specialists suggest treatment focused on her knee. There may also be a medical explanation for her right hand issue.

[33] In particular, the medical evidence supports that the Appellant’s knee pain, movement restrictions, and limited positional tolerance would likely have prevented her from successfully performing her pre-injury job at the day care centre.

⁸ See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

⁹ See GD9-5.

¹⁰ See GD7-7 to GD7-8.

¹¹ See GD5-17.

[34] I have not yet considered whether the Appellant could do another job. First, however, I will look at whether she has followed medical advice.

– **The Appellant has followed medical advice**

[35] To receive a disability pension, an appellant must follow medical advice.¹² If she doesn't follow medical advice, then she must have a reasonable explanation. I must also consider what effect, if any, the medical advice might have had on her disability.¹³

[36] The Appellant has followed medical advice.¹⁴ She has been seeing Dr. Tsvetkov for more than three years. She has seen specialists in rheumatology and genetic diseases. She attends a pain clinic. She continues to have physiotherapy. She saw her family doctor regularly right after her initial injury, although her treatment is now in the hands of specialists.¹⁵

[37] The issue seems to be that the Appellant didn't respond to treatment as quickly as expected. The medical documents make several references to this.¹⁶ She also appears to have been compliant with treatment.¹⁷

[38] I must now 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.¹⁸

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

[39] 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 ability, and

¹² See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

¹³ See *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁴ See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

¹⁵ See, for example, GD7-7 to GD7-8 and GD9-4 to GD9-5.

¹⁶ See, for example, GD5-12, GD5-17, and GD9-5.

¹⁷ See GD2-149.

¹⁸ See *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

- past work and life experience.

[40] 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.¹⁹

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

[42] The Appellant is 46 years old. Her age should not be a factor in deciding if she can work in the real world. She speaks English fluently. She also has a college diploma in early childhood education.

[43] The Appellant's work experience has been significant, but it has also been rather narrow. Before her current ECE role, she worked in a similar role at a Montessori school. She also worked in childcare at a fitness centre and at the college she attended. She said all her work to date involved working with children. Children are her passion.

[44] Without considering the Appellant's medical conditions, I find that she would be capable of working with children in a caregiving or educating role. With her English fluency and college education, she could also do a broad range of jobs that did not require very specialized skills. This would include most office and retail roles. The question is whether her medical conditions would prevent her from doing all these things.

[45] The Appellant expressed some concern about working, as she thought her hand issues would make modified work inadvisable right now. She added that she could probably retrain now if she didn't have tingling in her hands.

[46] The Appellant was asked whether there was any job she could see herself doing now. While she said she didn't have much experience, she thought she could do a supervisory job where she could sit regularly. However, she said her employer did not

¹⁹ See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

have any supervisory openings right now. As for experience, I note that she had paid childcare work since 1998.²⁰

[47] This doesn't contradict the Appellant's other evidence. She said her functioning had gotten better since November 2019, although she still had bad days. She also suggested that every day was a challenge. She said her employer had not offered her a different or lighter job.

[48] I considered Dr. Fung's November 2021 opinion that the Appellant could not do any job. Dr. Fung pointed out that she could not be accommodated at her workplace as it would displace her co-workers. But this is not a factor when assessing disability under the CPP. I also note that Dr. Fung bases his opinion on a September 2021 exam of the Appellant, while her oral evidence is from April 2023.²¹ As noted, her functioning has improved since her initial injury.

[49] I note that Dr. Ganty's September 2022 report is the only document identifying a specific complaint about the Appellant's hands. I saw no subsequent reports about any of the Appellant's concerns from either Dr. Ganty or Dr. Fung. Dr. Ganty said further investigation of her hand "may be warranted" if her hand pain didn't resolve spontaneously. None of Dr. Ganty's recommendations involved her hands.²²

[50] I saw two medical documents after Dr. Ganty's report. Dr. Tsvetkov's December 2022 report focused on the Appellant's knee. He did not mention her hands at all.²³

[51] Dr. Morgenthau's February 2023 report was a genetics consultation.²⁴ He did mention migraines and "right-hand carpal tunnel" as existing neurologic issues. But he also recorded that the Appellant's knee fracture was the cause of her disability. He

²⁰ See GD2-6. She testified that all her work was in childcare.

²¹ See GD5-16 to GD5-17.

²² See GD7-7 to GD7-8.

²³ See GD9-4 to GD9-5.

²⁴ See GD9-6 to GD9-10.

didn't mention any hand issues in the medical history either. In the exam, he noted that the Appellant's hands were "unremarkable".²⁵

[52] I find that the Appellant's most significant current limitations relate to her knee. While she might not have been employable in her former "active" role at the day care centre, I find that she likely had real-world capacity for supervisory day care work where she could change positions as needed.

– **The Appellant didn't try to find and keep a suitable job**

[53] If the Appellant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical conditions.²⁶ Finding and keeping a job includes retraining or looking for a job she can do with her functional limitations.²⁷

[54] The Appellant didn't make efforts to work.

[55] At the hearing, the Appellant said she has not done any paid or volunteer work since November 2019. She also hasn't looked into or applied for any jobs since then. She said she was reluctant to pursue a position if she had to stop working after a couple of days or weeks.

[56] The Appellant explained that, right after her injury, it would have been very hard to work. She said that she now wants to get back to day care. However, with her hand and leg issues, she was concerned that she wouldn't have been able to perform to the best of her ability.

[57] I sympathize with the Appellant's position. I accept that she was passionate about children and would like to work in that field again. I also accept that she enjoyed working for her latest employer and would likely prefer to work there. She had worked there since 2013 and undoubtedly has developed many relationships at work.

²⁵ See GD9-6 to GD9-8.

²⁶ See *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

²⁷ See *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

[58] Even though it could mean working somewhere else, the Appellant still has a duty to look for work if she has work capacity. The Federal Court of Appeal set down this principle.²⁸ I am compelled to follow it.

[59] The Appellant's functional limitations mean that her work capacity wasn't the same as it was before November 2019. However, it is still real-world work capacity for the purposes of a CPP disability pension.

[60] Finally, I acknowledge that the Appellant has received long-term disability benefits from a private insurer. But this is not relevant to determining eligibility for a CPP disability pension. A person can receive benefits from a private insurer but not receive a CPP disability pension. The requirements are not the same.²⁹ It also doesn't matter that her insurer didn't suggest retraining.

[61] Considering all the above factors, I cannot find that the Appellant has had a severe disability since at least December 31, 2022.

Conclusion

[62] I find that the Appellant isn't eligible for a CPP disability pension because her disability wasn't severe by December 31, 2022. As I found that her disability wasn't severe, I didn't have to consider whether it was prolonged.

[63] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section

²⁸ See *Inclima v. Canada (Attorney General)*, 2003 FCA 117, and *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

²⁹ See, for example, the persuasive decision in *Heller-Pereira v. MHRD*, (2004) CP 18522.