



Citation: *JH v Minister of Employment and Social Development*, 2023 SST 1058

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. H.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated February 23, 2022 (issued by Service Canada)

Tribunal member: Selena Bateman

Type of hearing: Teleconference

Hearing date: June 27, 2023

Hearing participant: Appellant

Decision date: June 29, 2023

File number: GP-22-882

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is 28 years old. She worked in social services. In September 2019 she began experiencing pain, weakness, muscle twitching, and numbness in her body. She has left eye optic neuritis that causes headaches and vision problems. She also has irritable bowel syndrome with abdominal pain.

[4] The Appellant applied for a CPP disability pension on April 29, 2021. 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 that she lives with severe pain, which can't be shown in objective tests. She is incredibly exhausted. She is doing many treatments, but they haven't helped her enough to be able to return to work. She says she can't be a reliable employee with her limitations, and that a vocational assessment shows this.

[6] The Minister says that the evidence doesn't support a severe disability. The Minister says that the treatments have helped to manage her symptoms. The Minister argues that there is no evidence of an alternative work attempt.¹

¹ See GD6 and GD9.

What the Appellant must prove

[7] 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.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 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.

[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 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.

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 GD9-6.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Matters I have to consider first

I accepted a late document sent in by the Minister

[14] The Minister submitted further submissions a week before the hearing. I accepted this document because it was a reply to evidence and submissions of the Appellant. I also accepted it because the Appellant said she had reviewed the document and was ready to respond to the Minister's arguments from this document at the hearing.⁵

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of September 2019. 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. I reached this finding by considering several factors. I explain these factors below.

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

[17] The Appellant has:

- Chronic regional pain syndrome (CRPS)
- Optic neuritis
- Irritable bowel syndrome (IBS)

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁷ When

⁵ See GD9.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ 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.⁸

[19] I find that the Appellant doesn't have functional limitations that affected her ability to work.

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

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

- Because of CRPS, she is incredibly weak. She can't lift laundry or a mop. She bathes only once per week because of the exhaustion and the pain.
- She has left limb parathesis and tingling from CRPS.
- Because of her optic neuritis, she can't drive safely anymore. She has double vision and headaches. Her left eye gets swollen.
- Her IBS causes abdominal pain, gas, constipation, and nausea. This causes her to need to rest for hours and affects her at least every other day.

[21] The Appellant says that since September 2019 her life has changed dramatically. She used to volunteer and go to the gym six days a week. Now, she says she can barely get off the couch because of exhaustion.

[22] The Appellant was candid and genuine. What she said was consistent with the medical evidence. I believe what she told me about the severity of her pain and how her pain affects her. I considered her testimony in conjunction with the medical evidence.

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

[23] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2022.⁹

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

[25] The medical evidence supports the Appellant has left **optic neuritis**. She has night vision glare, double vision, and blurry vision. When she turns her head she has peripheral vision issues. She has eye strain if she reads a book or uses a computer screen. She has headaches once per week. These symptoms began in September 2019. She has seen multiple neurologists and an ophthalmologist.¹⁰

[26] The medical evidence supports that the Appellant has **IBS**. She has abdominal pain, bloating, and constipation. In March 2022 she changed her diet which helped to improve her abdominal pain.¹¹

[27] The medical evidence supports that the Appellant has **CRPS**. Her symptoms began in September 2019 with left sided numbness and weakness. She was diagnosed with this condition in September 2020. Her left leg can be discoloured and cold compared to her right leg. She has episodes of paresthesia, tingling, twitching, numbness, and a burning electrical feeling. She is left-handed and has left-handed grip issues. She has difficulty with prolonged sitting or standing. She walks with a cane. Her pain causes poor quality sleep and she needs daily naps.

The role of objective findings in chronic pain

[28] The Minister argues that there isn't medical evidence to support a severe pathology or impairment that would prevent the Appellant from working. The Minister says that the doctors found no neurological or rheumatological causes for her symptoms.¹²

[29] The Appellant argues that evidence from her pain consultant and anesthesiologist Dr. Shenderoy must be considered. Dr Shenderoy wrote that "pain and degree of severity are subjective and can exist without any objective findings.

¹⁰ See GD2-176.

¹¹ See GD4-16 to 17 and 22.

¹² See GD6.

Therefore, **dismissing pain due to lack of objective evidence is no longer acceptable.**¹³

[30] Dr. Shenderey's evidence is in line with teachings from a case called *Martin*.¹⁴ In this case, the Supreme Court of Canada said chronic pain is a potentially disabling condition, even where there is a lack of objective findings.

[31] The Appellant's file contains diagnoses, observations, limitations, and her prognosis. I find that she has met the requirements¹⁵ to provide objective medical evidence.

[32] I don't interpret objective medical evidence to mean only diagnostic images or laboratory tests. In a 2018 Appeal Division decision, the Member said that objective medical evidence can also include clinical symptoms, established functional limitations, and diagnoses made by a health professional.¹⁶ I agree.

[33] The medical evidence shows that the Appellant's care providers believed that she experienced subjective pain. Her complaints were taken seriously. She was referred to pain doctors and treated. She has medical evidence to support the symptoms and limitations she experiences, before and after December 31, 2022.

[34] The medical evidence supports that the Appellant's pain, fatigue, weakness, and vision problems prevented her from doing her usual job.

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

– **The Appellant has followed medical advice**

[36] To receive a disability pension, an appellant must follow medical advice.¹⁷ If an appellant doesn't follow medical advice, then they must have a reasonable explanation

¹³ See GD5-5.

¹⁴ *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54.

¹⁵ See the *CPP Regulations* section 68(1)(a).

¹⁶ See *Minister of Employment and Social Development v L.F.*, 2018 SST 164. While Appeal Division decisions are not binding on the General Division, the Appeal Division's opinion is persuasive.

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

for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.¹⁸

[37] The Appellant has followed medical advice.¹⁹

[38] The Minister argues that the Appellant didn't see a psychiatrist as was recommended.²⁰ The Appellant says that her health condition is now understood to be CRPS. She had to wait enough time until she met the criteria for a CRPS diagnosis. She says she doesn't need to see a psychiatrist.

[39] The medical evidence supports what the Appellant says. The medical evidence shows that she received a CRPS diagnosis after the psychiatry recommendation. She was then treated for CRPS. Since the time of her CRPS diagnosis, no health professional has recommended that she see a psychiatrist.

[40] For CRPS issues, the Appellant saw multiple pain specialists, neurologists, her family doctor, a physiatrist, an occupational therapist, and physiotherapist. She takes gabapentin and duloxetine medication. She has monthly ketamine and lidocaine infusions. She takes topiramate to help her migraines.

[41] 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.²¹

¹⁸ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ See GD6-8.

²¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

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

[42] 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

[43] 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.²²

[44] I find that the Appellant can't work in the real world.

[45] The Appellant's personal characteristics don't add barriers to employability. The Appellant is young. She would typically have many years in the workforce before the standard age of retirement. She would have good odds of retraining. She speaks English. She is college educated and has experience in the field of social services.

[46] The Minister argues that she may have some residual symptoms, but didn't attempt work so it cannot be concluded that she is incapable of pursuing any occupation.²³

[47] The Appellant argues that she had a vocational assessment done in November 2021 that shows she can't work at any job. She has too many limitations due to her pain, fatigue, mobility, and frequent need for medical care (such as receiving infusions). No employer would likely hire her.²⁴

[48] I agree with the Appellant. I am satisfied that her limitations prevent her from earning a living. She would not be a reliable and productive employee in the commercial

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²³ See GD6-8.

²⁴ See GD4-44.

marketplace. She isn't capable of doing physical jobs because of weakness. She lacks the ability to do sedentary work due to her pain, fatigue, vision problems with screens, and difficulty with prolonged sitting. Retraining is also unlikely for the same reasons.

[49] I find that the Appellant doesn't have residual work capacity. Because of this, she doesn't need to show that she tried to find work and failed because of her health condition.²⁵

[50] I find that the Appellant's disability was severe as of September 2019, when she last worked.

Was the Appellant's disability prolonged?

[51] The Appellant's disability was prolonged.

[52] The Appellant's conditions began in September 2019. They have continued since then, and they will more than likely continue indefinitely.²⁶

[53] The Appellant has been out of the workforce for over three years. Since stopping work, her condition has deteriorated. Her family doctor, pain specialist, and the vocational specialist all agree that she is unable to work due to the extent of her limitations.²⁷

[54] The evidence doesn't show that future treatment will help her recover enough to be able to return to work.

[55] I find that the Appellant's disability was prolonged as of September 2019.

²⁵ The Federal Court of Appeal stated in *Inclima v Canada (A.G.)*, 2003 FCA 117 that where there is evidence of work capacity, a claimant must establish that she has made efforts to find and keep employment that were unsuccessful because of her health condition.

²⁶ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that you have to show a severe and prolonged disability by the end of your minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

²⁷ See GD1-31, GD4-34 and 54, and GD5-2 to 3.

When payments start

[56] The Appellant had a severe and prolonged disability in September 2019.

[57] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.²⁸ After that, there is a 4-month waiting period before payments start.²⁹

[58] The Minister received the Appellant's application in April 2021. That means she is considered to have become disabled in January 2020.

[59] Payments of her pension start as of May 2020.

Conclusion

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

[61] This means the appeal is allowed.

Selena Bateman

Member, General Division – Income Security Section

²⁸ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁹ 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.