



Citation: *SM v Minister of Employment and Social Development*, 2023 SST 1764

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant:	S. M.
Representative:	Chantelle Yang
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie

Decision under appeal:	General Division decision dated January 17, 2023 (GP-21-1972)
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Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	November 21, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	December 7, 2023
File number:	AD-23-361

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 42-year-old survivor of an abusive relationship. In September 2018, the Appellant was arguing with her then-boyfriend when he took out a gun and threatened to kill himself. When she heard a gunshot from the hallway, she thought he had followed through on his threat. However, it turned out he was bluffing and remained unharmed.

[3] At the time of this emotionally traumatic event, the Appellant had been working as an administrator at X for 13 years. She hasn't worked there or anywhere else since.

[4] The Appellant applied for a CPP disability pension in June 2020. She claimed that she could no longer work because of post-traumatic stress disorder (PTSD) and anxiety and depression. The Minister of Employment and Social Development refused her application after determining that she did not have a severe and prolonged disability as of December 31, 2021, the last time she had CPP disability coverage.

[5] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found that, although the Appellant had struggled with psychological issues, she still had some capacity to try another job.

[6] The Appellant then applied for permission to appeal to the Appeal Division. Earlier this year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Last month, I held a hearing to discuss her disability claim in full.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she is disabled under the CPP. The evidence shows that the Appellant, while subject to some functional limitations, is not disabled from all forms of regular employment.

Preliminary Matter

[8] In December 2022, the law governing the appeals to the Social Security Tribunal changed.¹ Under the new law, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division.² As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about whether the Appellant became disabled during her coverage period.

Issue

[9] For the Appellant to succeed, she must prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agreed that the Appellant's coverage ended on December 31, 2021.³

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.⁴ A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.
- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.⁵ The disability must be expected to keep the claimant out of the workforce for a long time.

[10] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2021.

¹ See section 58.3 of the *Department of Employment and Social Development Act* (DESDA). This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on April 16, 2023, after the new law came into force.

² The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

³ Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Appellant's CPP contributions are listed on her updated record of earnings at AD6-16.

⁴ See section 42(2)(a)(i) of the *Canada Pension Plan*.

⁵ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

Analysis

[11] I have applied the law to the available evidence and concluded that the Appellant did not have a severe and prolonged disability as of December 31, 2021. I am satisfied that the Appellant's psychological condition does not prevent her from regularly pursuing substantially gainful employment.

The Appellant does not have severe disability

[12] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.⁶ I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant may suffer from various medical conditions, I couldn't find enough evidence to suggest that they rendered her incapable of work.

[13] In her application, the Appellant described distressing scenes from her life with her former boyfriend. He was physically violent with her on several occasions and had made repeated threats to kill himself before pretending to do so in her presence. Later, after she ended their relationship, he continued to send her abusive text messages, despite a no-contact order. In July 2019, he attempted suicide and sent her a picture of him having just cut his throat.

[14] In the wake of the September 2018 shooting incident, the Appellant's landlord attempted to evict her. The RCMP got involved and managed to convince the landlord not to proceed, but the Appellant had to endure a long period of uncertainty about where she would live. In August 2019, her building was sold, and she was left without a place of her own. She found another apartment, but it was temporary because the building was set to be demolished. Not until June 2021 was she able to secure stable living accommodations.

⁶ See *Canada Pension Plan*, section 44(1).

[15] As a result of this turmoil, the Appellant was diagnosed with anxiety, depression, and PTSD. She said that she experienced symptoms including flashbacks, night sweats, mood swings, dizziness, headaches, stomach issues, and an inability to focus.

[16] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity.⁷ In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work during her coverage period. From what I can see, the Appellant was subject to some limitations at the time, but she was not incapacitated from all forms of work.

[17] I base this conclusion on the following factors:

– **The Appellant has capacity despite mental health problems**

[18] The available evidence confirms that the Appellant has struggled with anxiety, depression, and PTSD. However, the evidence also suggests that her problems were made worse by situational factors that converged within a short period.

[19] There is nothing in the file about mental health issues before September 2018. That month, Dr. Aung, her family physician, noted that the Appellant was experiencing resulting from a traumatic event causing nausea, sleeplessness, tearfulness, forgetfulness, and cognitive decline. Dr. Aung said the Appellant was progressing well and was expected to recover. The plan was to start her on Zoloft (sertraline) and follow up with professionals.⁸

[20] The Appellant was referred for counselling. She attended seven sessions between December 2018 and February 2019, during which reported a continuing ability to participate in activities of daily living amid periodic disruptions due to mood

⁷ A claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*. In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

⁸ See Great West Life Short-Term Attending Physician's Statement completed by Dr. Stephanie Aung, family physician, on September 24, 2018, GD2-261.

fluctuation. The counsellor found that the Appellant had made progress in her recovery, although it was slow because of her traumatic history and “extraneous psychosocial factors.”⁹

[21] An initial assessment for further counselling listed testing results for several parameters: concentration 2/4; organization/planning 2/4; decision making 2/4; communication 3/4; learning/memory 3/4; social interaction 2/4; and emotional management 2/4. The Assessor stated that the Appellant’s main task at the moment was arranging new living accommodation, which she would be able to do, along with other tasks, when provided with guidelines, options, and possibilities. The assessor concluded that the Appellant had an adequate ability to perform daily tasks and demonstrated a mature attitude, willingness to explore current challenges and new and more effective ways to meet these challenges.¹⁰

[22] In August 2020, the Appellant was assessed a psychologist commissioned by her employer’s long term disability insurance provider.¹¹ Dr. Nader diagnosed the Appellant with PTSD, major depressive disorder, and cannabis use disorder. He explained that the Appellant was experiencing significant functional impairments in terms of her activities of daily living. For example, she had difficulty remembering and following directions to the extent that she struggled to help her son with his homework. She remained in her pyjamas all day and did not get dressed unless she had to go out. She ate only one meal a day. She did not cook regularly and relied on meal deliveries.

[23] Addressing her work capacity, Dr. Nader said that the Appellant was restricted from working in an environment in which would be potentially exposed to:

- threatening behaviour or loud noises;
- deadlines, time pressures, or high productivity expectations;

⁹ See Great West Life questionnaire dated February 8, 2019 completed by Heather Scott, registered clinical counsellor, GD2-241.

¹⁰ See Great West Life Initial Psychotherapy Report dated July 8, 2019 by Gloria McArter, registered clinical counsellor, GD2-146.

¹¹ See independent medical examination report dated August 28, 2020, by Dr. Rami Nader, clinical psychologist, GD2-73.

- complex tasks or multi-tasking;
- tasks in which reduced concentration would greatly affect the error rate;
- situations requiring her to learn and retain new information;
- frequent contact with customers or other co-workers;
- a high probability of interpersonal conflict; and
- working an entire workday or work week.

[24] Dr. Nader concluded that, even with appropriate treatment, the Appellant's prognosis for improvement in her PTSD and depression was poor. He considered it unlikely that she would experience complete resolution of her symptoms, but he remained hopeful that appropriate psychological treatment would help her become more functional in her day-to-day activities.

[25] Dr. Nader identified numerous limitations on the Appellant's ability to function in a workplace, and he seemed relatively pessimistic about the prospects for her recovery when he examined her three years ago. If this had been the last assessment of her condition on file, I might have been more inclined to find of the Appellant disabled as of her coverage period. However, I could not ignore evidence that the Appellant's mental health had significantly improved since then.

– The Appellant's mental health has likely improved

[26] The available evidence suggests that the Appellant left her job because of specific, psychologically traumatizing events that came to a head during a two-year period. First, she was persecuted and harassed by her boyfriend. Second, she was evicted from her home and endured months and years of uncertainty about where she would live next. It appears that she attempted to cope with these twin crises by self-medicating with alcohol and cannabis.

[27] However, these factors have been mitigated or resolved in the last few years:

- She is no longer with her abuser, and he does not appear to be an immediate threat to her safety in the way that he was in 2018;
- She testified that she finally secured social housing for herself and her children in 2021; and
- She testified that she has given up alcohol and cannabis.

[28] There are also indications on file that the Appellant has benefitted from counselling. From December 2020 to April 2021, the Appellant had weekly counselling sessions at X Family Life.¹² The Appellant's family physician then referred the Appellant for counselling at Share Family and Community Services, where she attended six sessions. According to her discharge summary, the focus of the counselling was to help the Appellant address her PTSD symptoms following her eviction and introduce coping skills for independent and community support. The summary noted that the Appellant met more than 80 percent of her treatment goals and, in particular, displayed an "increased sense of capacity for stress, regrouping and improved self trust."¹³

[29] The Appellant has denied that therapy had led to a dramatic improvement in her condition, but I prefer to give more weight to a professional who was involved in her treatment. Further evidence of improvement can be seen in Dr. Aung's office notes, which document the Appellant's progress after her crisis years:

- In January 2020, the Appellant reported improved sleep, appetite, and interactions with her son. Her weight had returned to normal, and she felt quite stable.¹⁴
- In August 2020 the Appellant reported that, after three months on Zoloft, she thought that it made her tired, but she felt better and was walking daily.¹⁵

¹² See Dr. Aung's office note dated January 4, 2021, GD2-67.

¹³ See discharge summary dated January 19, 2022 by Carly Degenstein, counsellor, GD5-13.

¹⁴ See Dr. Aung's office note dated January 10, 2020, GD2-108.

¹⁵ See Dr. Aung's office note dated August 12, 2020, GD2-110.

- In May 2022, the Appellant reported that she was doing well, and her mood was “pretty much stable.” Zoloft was working well, and she had no side effects.¹⁶

[30] I realize that two of these notes are dated before Dr. Nader’s relatively pessimistic one-time assessment in August 2020, but I choose to give them weight because they were prepared by the Appellant’s primary physician in the context of ongoing treatment.

– The medical evidence doesn’t support a finding of significant physical limitations by December 31, 2021

[31] The Appellant’s application for CPP disability benefits was almost entirely focused on impairments caused by her mental health problems. The Appellant complained of headaches, dizziness, night sweats, and nausea, but they appear to have been symptoms of her PTSD and depression and anxiety, as much as anything else. Later the Appellant testified that she developed severe neck, back and shoulder pain during her coverage period, but the available medical evidence did not back her up.

[32] The Appellant did not mention neck, back or shoulder pain in her application. Indeed, she reported that she had a “fair” to “good” ability to do a number of physical tasks such as remaining on her feet for at least 20 minutes, walking a block, going up and down stairs, sitting for at least 20 minutes in a straight back chair, picking up two bags of groceries and walking a block, and staring at a screen for 20 minutes.¹⁷

[33] The Appellant testified that she didn’t mention neck and back pain in her application because, at the time, her main condition was psychological, not physical. She said that she had neck and back pain before June 2020 but that it started to get worse later. She said that she continues to get flare-ups, whose intensity she rated as a

¹⁶ See Dr. Aung’s office note dated May 9, 2022, GD5-6.

¹⁷ See Appellant’s application for CPP disability benefits dated June 18, 2020, GD2-23.

seven or eight on a scale of ten. When they happened, she took Tylenol and Advil, which helped but only temporarily.

[34] However, the Appellant's medical records suggest the Appellant's neck and back pain was short-lived. There is no mention of such pain on file until September 2020, when the Appellant told her doctor that she had low back pain that sometimes made it difficult to move.¹⁸ But the doctor's notes indicate that the back pain had apparently resolved by November 2020.¹⁹ There is mention of back pain until November 2021 when the Appellant reported a three-day history of having some lower and middle back pain.²⁰ Over multiple visits in the following months, the Appellant's doctors did not mention any complaints of back pain again.²¹

[35] The Appellant first mentioned neck pain during a phone consult with her doctor in October 2021. She said that she'd had neck pain since a visit to Vancouver Island during September long weekend.²² Her family physician thought the problem was likely neck strain, and an X-ray later showed degenerative changes. She suggested core exercises, noting the Appellant was "just feeling localized neck pain."²³

[36] The Appellant's shoulder pain also appears to have been mild and short-lived. In November 2020, the Appellant told her family physician that for the previous two to three weeks, she had been experiencing left shoulder pain — it felt like a "cramp" when she took a deep breath, and it hurt to have a strap over it when carrying a bag.²⁴ The Appellant took Naproxen for the pain.

[37] Again, despite many consults, the doctors' notes contain no more mention of shoulder pain for another 18 months. In May 2022, Dr. Aung wrote that the Appellant had been feeling left shoulder for more than two months, although it wasn't hurting as much as the previous week. She said that it had arisen after playing basketball in a

¹⁸ See telehealth consult note by Dr. S.A Payten dated October 7, 2020, GD2-63.

¹⁹ See Dr. Payten's telehealth consult note dated November 12, 2020, GD2-64.

²⁰ See telehealth consult note by Dr. Lisa Wang dated January 6, 2022, GD5-4.

²¹ The available office notes go as far as October 2022.

²² See Dr. Aung's office note dated November 2, 2021, GD5-2.

²³ See Dr. Aung's office note dated December 13, 2021, GD5-4.

²⁴ See Dr. Payten's telehealth consult note dated November 12, 2020, GD2-64.

park. It came and went, although some days it was so painful, she had a hard time putting clothes on. On examination, Dr. Aung found no abnormalities but wondered whether the pain was osteoarthritic.²⁵ She sent the Appellant for an X-ray, which later came back normal.²⁶

[38] Based on the above medical evidence, I am satisfied that the Appellant's neck, back and shoulder pain was limited, transitory, and manageable. As for the Appellant's other medical conditions, I don't see how they affected her ability to work either. For example, her gastroesophageal reflux disease was managed with medication with little apparent effect on her day-to-day activities.²⁷ There is little evidence that the Appellant's dizziness caused her significant issues — it appeared to be episodic, and her family physician linked it to her consumption of soft drinks and coffee.²⁸ An internal medicine specialist noted that the Appellant had experienced night sweats since her 20s — well before she stopped working — and described the condition as secondary to her stress, PTSD, and menstrual cycle. He gave no indication that this condition would prevent the Appellant from work.²⁹

[39] In all, the Appellant's physical conditions did not contribute to a severe or prolonged disability as of December 31, 2021. I accept that the Appellant has experienced occasional pain and other physical symptoms including gastro-intestinal discomfort, dizziness and excessive night sweats since as far back as October 2021. However, I'm unable to find that the Appellant's overall condition prevented her from to work during her coverage period.

²⁵ See Dr. Aung's office note dated May 31, 2022, GD5-8.

²⁶ See Dr. Aung's office note dated June 6, 2022, GD5-8.

²⁷ See Dr. Aung's office note dated August 11, 2021, GD5-1.

²⁸ See Dr. Aung's office note dated June 28, 2021, GD2-65.

²⁹ See reports dated March 26, 2020 (GD2-101) and July 14, 2020 (GD2-98) by Dr. Sebouh Matossian, specialist in internal medicine.

– **The Appellant’s background and personal characteristics don’t affect her employability**

[40] I find that the Appellant’s psychological and physical conditions, considered as a whole, have left her with at least some ability to work. I am reinforced in this belief when I look at her overall employability.

[41] When deciding whether the Appellant can work, I can’t just look at her medical conditions. I must also consider factors such as her age, level of education, language abilities, and past work and life experience. These factors help me decide whether the Appellant can work in the real world.

[42] The Appellant has longstanding mental health issues and is prone to stress, but she has several assets that would give her an advantage in a job search. She is a high school graduate and has 13 years of experience working in a corporate environment. She is fluent in English and French and, when her coverage period ended, she was only 40 years old — far from the usual age of retirement.

[43] The Appellant, even with her impairments, had residual capacity as of December 31, 2021. However, as we will see, that capacity imposed on her an obligation.

– **The Appellant has not attempted alternative employment**

[44] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

[45] Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.³⁰

³⁰ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[46] This passage suggests that, if a claimant retains at least **some** work capacity, the General Division must conduct an analysis to determine (i) whether they attempted to find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

[47] On top of that, disability claimants must make **meaningful** attempts to return to work.³¹ They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.³² Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[48] In this case, the Appellant had at least some work capacity — enough to trigger the obligation to pursue employment that might have been better suited to her limitations. However, the Appellant never worked, or tried to work, after leaving X in September 2018. At the hearing, she testified that her last job became more than she could handle after witnessing her former boyfriend's real and staged suicide attempts. I asked her whether she had considered looking for employment that might have been easier on her nerves. She replied that she needed time to work on her mental health — her mind was like a "tornado." She also said that she would have a hard time doing any job that required her to deal with the public.

[49] I found these explanations unconvincing. As we have seen, the bulk of the evidence suggests that the Appellant's mental health conditions were aggravated by situational factors that have either resolved or stabilized. In any event, there was little on the record to suggest that the Appellant's PTSD or depression and anxiety prevented her from holding down a regular job.

[50] In the end, I was unable to properly assess the severity of the Appellant's disability as of December 31, 2021. That's because she didn't make a serious effort to look for employment that might have been better suited to her functional limitations. If

³¹ See *Tracey v Canada (Attorney General)*, 2015 FC 1300, in which the Federal Court stated that the onus is on claimants to show that they made "sincere" efforts to meet the employment efforts test.

³² See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

she had attempted a job with, say, fewer hours or less stress, she might have been able to carry on working.

I don't have to consider whether the Appellant has a prolonged disability

[51] A disability must be severe **and** prolonged.³³ Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it is also prolonged.

Conclusion

[52] There is evidence that the Appellant has mental health problems, but I am not convinced that they amount to a severe disability. The Appellant's doctors have never barred her from returning to work. She has residual capacity but has never tried a job that might be less mentally and psychologically demanding than the one she had as a client services administrator.

[53] The appeal is dismissed.



Member, Appeal Division

³³ See *Canada Pension Plan*, section 42(2)(a).