



Citation: *JL v Minister of Employment and Social Development*, 2023 SST 1818

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. L.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated April 19, 2023 (issued by
Service Canada)

Tribunal member: Sharon Buchanan

Type of hearing: Teleconference

Hearing date: November 21, 2023

Hearing participants: Appellant
Appellant's spouse (support)

Decision date: December 1, 2023

File number: GP-23-1500

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. L., 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 60 years old. He has worked as a long-distance truck driver for over 35 years. He stopped working August 2021 because of bilateral knee pain. He says that the knee pain became too much, and he was no longer able to manage the multiple times in and out of the truck, shifting loads all day long. The Appellant had a left knee replacement in May 2023 and is waiting for surgery to replace his right knee. He hasn't returned to work.

[4] The Appellant applied for a CPP disability pension on June 3, 2022. 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 Minister says the Appellant has yet to undergo all recommended treatments. The Minister says that it is premature to assume the Appellant's condition will severely impact or preclude basic functioning or work capacity on a permanent basis. It is reasonable to expect a successful outcome from the planned joint replacements and rehab, allowing for a return to the Appellant's usual work in a part-time or accommodated setting.

[6] The Appellant says he still has pain, and his movements are still restricted. He can't work at anything until his treatment is complete. He said he doesn't know whether he can ever work again, no one does.

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.¹

[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.²

[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.³

[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.

Matters I have to consider first

The Minister submitted late documents.

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 GD2-59 and GD2-60 from the file.

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.

[14] The Minister submitted a document after the hearing. The post hearing document was an updated record of earnings for the Appellant. It does not add anything new to the record, and does not change the Appellant's minimum qualifying period.

[15] I did not accept or consider this document. The Minister provided no explanation for why it was late. The updated record of earnings did not disclose any new information. There is no prejudice to either party in not accepting this document.

Reasons for my decision

[16] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2021, or continuously after that.⁴

The Appellant's disability isn't prolonged.

[17] The Appellant's disability isn't prolonged.

[18] I recognize that the Appellant stopped work because of pain and tenderness in both his knees.

[19] The medical evidence provided by the Appellant's orthopedic surgeon Dr. Allanach, who assessed him in October 2021 supports that the Appellant had limitations that impacted his ability to do his job as a long-distance driver. Dr. Allanach says the Appellant was forced to stop work August 31, 2021 because of pain and tenderness in both knees due to bilateral osteoarthritis. He said the Appellant was unable to lift, stand, or drive for prolonged periods.⁵ The surgeon said although the Appellant was not prevented from driving, he was unable to return to work at that time.

[20] Dr. Allanach said the treatment for the Appellant's knee pain was replacement of both knees, to be followed by physiotherapy.

⁴ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court of Canada said that an appellant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

⁵ See GD2-306

[21] At the time the Appellant filed his appeal with the Tribunal in August 2023, he had just completed his physiotherapy treatment following the May 2023 replacement of his left knee.

[22] The Appellant said he has problems with his left knee swelling if he walks too much. He said that even sitting can make the knee swell. With the swelling he gets pain.

[23] The Appellant is still waiting for a date for surgery on his right knee. He said his physiotherapist told him often there is a year between surgeries to enable recovery after the first knee replacement.

[24] The Appellant hasn't proven that it is more likely than not that his condition is prolonged because the only medical evidence about the prognosis for his condition is from a month after he stopped working, and before he had received any treatment. And, he still hasn't completed the recommended treatment for his condition.

[25] The Appellant does not see a family physician. The only medical evidence available is the orthopedic surgeon's initial assessment of the Appellant's knees in October 2021. This assessment was in support of his short-term disability application.⁶ At that time, Dr. Allanach said the Appellant required two full knee replacements, and he didn't know what the prognosis or expected duration of disability would be.

[26] There is no medical evidence since this initial report.

[27] This is significant because circumstances have changed since that medical report. The Appellant is part way through the recommended treatment for his condition, and he is waiting for his second surgery.

[28] I accept that the Appellant is experiencing residual pain, swelling and limitations following his first knee replacement. However, he did say that his left knee has improved since his surgery. He has just completed several months of physiotherapy. The only medication that he takes for pain now is Advil. He said that Advil does help to

⁶ See GD2-306, 307

relieve the pain, although it doesn't always take it completely away. Some days are better than others.

[29] The Appellant is waiting for a date for his right knee surgery. He said he is seeing his surgeon the week after the hearing. The purpose of this visit is a follow up appointment to see how he is progressing post surgery. He has only seen his surgeon twice since the surgery – once to remove the stitches, and a second follow up appointment three months post surgery. The Appellant doesn't know whether there will be any further treatment for his left knee.

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

[31] The Appellant hasn't proven that it is more likely than not that his condition is prolonged, because there is no medical evidence about the outcome of his surgery and the expected prognosis, and there is still treatment available to the Appellant that may impact his disability.

Conclusion

[32] I find that the Appellant isn't eligible for a CPP disability pension because his disability isn't prolonged. Because I have found that his disability isn't prolonged, I didn't have to consider whether it is severe.

[33] This means the appeal is dismissed.

Sharon Buchanan
Member, General Division – Income Security Section