



Citation: *KL v Minister of Employment and Social Development*, 2023 SST 1389

## Social Security Tribunal of Canada General Division – Income Security Section

# Decision

**Appellant:** K. L.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated March 3, 2022 (issued by  
Service Canada)

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**Tribunal member:** Connie Dyck

**Type of hearing:** Teleconference

**Hearing date:** October 11, 2023

**Hearing participant:** Appellant

**Decision date:** October 20, 2023

**File number:** GP-22-1097

## **Decision**

[1] The appeal is allowed.

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

## **Overview**

[3] The Appellant is almost 50 years old. She stopped working as a nurse in August 2018 because of her injuries from a car accident. She says since the accident, turning her head causes shooting pain and headaches. She has pain, dizziness, and neck spasms. She says she has been unable to return to any type of work since August 2018.

[4] The Appellant applied for a CPP disability pension in March 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 her conditions have not improved since August 2018. She still has daily headaches and pain. If she moves her neck from the neutral position, her pain and headaches increase.

[6] The Minister says although the Appellant may be unable to return to her job as an intensive care nurse, alternate work suited to her capacity would not be ruled out, including suitable part-time employment. The Minister says there are more treatment options available that might improve the Appellant's functional ability.

## 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, 2021. This date is based on her contributions to the CPP.<sup>1</sup>

[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.<sup>2</sup>

[10] This means I must look at all the Appellant’s medical conditions together to see what effect they have on her ability to work. I also must 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 regularly able to 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.<sup>3</sup>

[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 must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means that she must show that it is more likely than not she is disabled.

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<sup>1</sup> 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 GD2-50.

<sup>2</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## Reasons for my decision

[14] I find that the Appellant had a severe and prolonged disability as of August 2018. 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?

[15] 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

[16] The Appellant has:<sup>4</sup>

- Post-traumatic headache condition. This causes daily headaches with migraine features.
- Chronic neck pain with post-traumatic soft tissue injury to her cervical spine.
- Post-traumatic soft tissue injury to her left shoulder. There are also tears in the rotator cuff muscles.
- Cervicogenic dizziness related to the cervical neck pain.

[17] However, I can't focus on the Appellant's diagnoses.<sup>5</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>6</sup> When I do this, I must look at all the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.<sup>7</sup>

[18] I find that the Appellant has functional limitations that affected her ability to work.

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<sup>4</sup> GD8-19

<sup>5</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>6</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>7</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

- She tried rehabilitation exercises hoping she could return to work on a gradual basis. She says her symptoms and pain worsened with rehabilitation and she wasn't able to attempt to return to work.
- Oral medications provide some help with her pain and spasms. But they don't provide enough relief to give her capacity for work. She still has headaches, pain, and dizziness frequently throughout the day. These interfere with her activities of daily living.
- She is forced to lie down frequently and take medications. The medications help take the edge off, but since August 2018, she was never in any condition to resume work of any kind as turning her head to the left caused spasms.
- She can't look down at a computer screen for more than a couple of minutes. She can't do neck extensions. If she tries, it results in shooting nerve pain that brings on severe headaches requiring her to lie down, apply heat, and take medications.
- The gabapentin and muscle relaxants make her brain feel foggy. She can't think clearly, and they make her sleepy.
- She can only walk for 15 minutes in a day. She does not engage in social activities like outdoor activities or meetings with friends or family.
- She relies on her daughter and husband to do the household chores. She can't clean or vacuum. She can cook small easy meals and get dressed on her own.

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

[20] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2021.<sup>8</sup>

[21] The Appellant was in a car accident on August 9, 2018. She went to the hospital because of neck pain and left arm numbness. Two weeks later, Dr. Omar Al-Jawadi (family doctor) said she had Whiplash Associated Disorder (WAD) 2-3.<sup>9</sup> This was later upgraded to a grade 3-4 injury because of ongoing symptoms and neurologic changes in her upper extremity together with MRI findings.<sup>10</sup> An x-ray of her cervical spine taken in December 2018 showed worsening of her degenerated discs.<sup>11</sup> An MRI done in June 2019, showed degenerative discs with mild left neural foraminal narrowing at C3-4 levels.<sup>12</sup> An ultrasound showed a left shoulder partial supraspinatus tear.<sup>13</sup> An MRI showed partial thickness and width tear of the supraspinatus muscle. Dr Moola's (orthopedic surgeon) opinion was that her condition should be treated non-surgically. Dr Jaworski's (physiatrist) opinion was that she had myofascial pain in addition to degenerative disc disease of the cervical spine and left frozen shoulder.<sup>14</sup>

[22] Dr. Al-Jawadi noted the Appellant has been off work since the accident because of ongoing neck and left shoulder pain, left arm numbness, headaches, dizziness, and insomnia. His clinic notes from January 5, 2021, to March 2, 2022, say the Appellant has continually had neck pain, headaches, range of motion deficits and left shoulder and arm pain.<sup>15</sup>

[23] The Minister says in November 2020, Dr. Al-Jawadi said the Appellant was medically cleared to perform work within her restrictions.<sup>16</sup> It is important to note that these restrictions were limitations with lifting, pushing, pulling, reaching, and rotating her

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

<sup>9</sup> GD8-4.

<sup>10</sup> GD8-4.

<sup>11</sup> GD8-114.

<sup>12</sup> GD8-113.

<sup>13</sup> GD8-5.

<sup>14</sup> GD8-5.

<sup>15</sup> GD9-2 to 5.

<sup>16</sup> GD2-80.

neck. He also said she could start work “as tolerated.” The Appellant testified she was desperate to try and return to work on at least a gradual basis. This is because in December 2020, she would lose her position as a newborn intensive care unit nurse if she didn’t return to work. To this end, she started a rehabilitation program. Unfortunately, her headaches and dizziness worsened with rehabilitation exercises. In fact, she testified she couldn’t have any treatments for three weeks because of the increase in symptoms from the rehabilitation efforts.

[24] Further, by April 2021, Dr. Al-Jawadi said the Appellant’s whiplash associated disorder worsened from a grade 1-2 to a grade 3-4. He reported the Appellant continued to have headaches, dizziness, left arm pain and numbness affecting her ability to do prolonged computer work, turn her head and use her left arm for other activities.<sup>17</sup> The evidence shows that the Appellant wasn’t even able to tolerate rehabilitation exercises in an effort to return to some type of work.

[25] The Appellant’s functional ability has not improved. In November 2022, she had a physical capacity evaluation.<sup>18</sup> The occupational therapist (Ms. Morin) noted the Appellant could sit in a relaxed position for at least an hour. However, the Appellant had significant difficulties sitting in a work-intensive posture. This included sitting in combination with mild neck flexion and reaching. The Appellant would only be able to perform activities requiring this posture on an occasional basis for periods up to five minutes.<sup>19</sup>

[26] I believe the Appellant’s limitations of sitting and standing for a maximum of five minutes would not allow her to return to any type of work, even part-time. This was also the opinion of the occupational therapist based on the Appellant’s functional impairments and reduced activity tolerance due to her neck and left arm.<sup>20</sup>

[27] The Appellant also had a vocational assessment in November 2022. She continued to have neck pain that increased with looking up or down or moving her neck

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<sup>17</sup> GD2-140 to 145.

<sup>18</sup> GD8-31.

<sup>19</sup> GD8-35.

<sup>20</sup> GD8-40.

from side to side. It was Mr. Nordin's (vocational rehabilitation expert) opinion that unless the Appellant had significant improvement, she would likely not be able to return to the workforce as a nurse or in any other occupation.<sup>21</sup> He also believed the Appellant would not be able to cope with any kind of retraining.

[28] Dr. Toth (neurologist) noted in October 2022 that, despite ongoing physical therapy for four years, the Appellant still had a tightness over her left neck, headaches, and dizziness. He said these symptoms are present daily and fluctuate.<sup>22</sup> He also noted the ongoing soft tissue injury pain over multiple body regions would lead to ongoing difficulties over time with performance of all work-related activities. This would include both physical and mental capabilities. He believed the Appellant would not be able to perform occupations requiring physical labour because it would make her pain worse. Also, the impaired attention and concentration because of chronic pain would significantly impact her work efficiency and her ability to interact with others.<sup>23</sup>

[29] The medical evidence supports that the Appellant's left neck pain, dizziness and headaches prevented her from sitting or standing more than five minutes. It also shows that she is unable to move her neck up or down, or from side to side without pain and causing headaches.

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

– **The Appellant has followed medical advice**

[31] To receive a disability pension, an appellant must follow medical advice.<sup>24</sup> If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.<sup>25</sup>

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<sup>21</sup> GD8-90.

<sup>22</sup> GD8-12.

<sup>23</sup> GD8-20.

<sup>24</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>25</sup> See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.



[32] The Minister argues that there are further treatment options available that may improve the Appellant's functional ability. While there were some suggestions of possible treatments, these were not available options for the Appellant.

[33] Dr. Toth said the 100 milligrams of gabapentin the Appellant was using was too little to be effective.<sup>26</sup> The Appellant testified that she did try a 200-milligram dose, but she had severe side effects. She explained that even 100 milligram makes her feel sedated and groggy. She can only take this medication at night for this reason. Dr. Toth recognized the Appellant was very sensitive to medicines.<sup>27</sup>

[34] The Appellant testified that her family doctor did not agree with Dr. Toth's recommendation to prescribe Amitriptyline because it was sedating. Considering the Appellant's sensitivity to medicines and the sedating effect of gabapentin, even on a low dose, Dr. Al-Jawadi, did not recommend using Amitriptyline. I gave more weight to his opinion because he is the physician treating the Appellant on a regular basis for many years. She also told me that Dr. Al-Jawadi was concerned about side effects from Botox treatments because she already had neurological issues. He didn't recommend Botox treatments.

[35] The Minister argued it was reasonable to expect some functional improvement and better symptom management if the Appellant followed the recommended treatment options of Ms. Morin.<sup>28</sup> However, Ms. Morin recommended several services, equipment and supplies to increase the Appellant's level of independence. These were not expected to improve her functional ability to allow her to return to gainful employment. In fact, Ms. Morin noted it was the medical prognosis of Dr. Toth that the Appellant had likely achieved maximal medical improvement and she was unlikely to experience a significant improvement in her symptoms.<sup>29</sup>

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<sup>26</sup> GD8-22.

<sup>27</sup> GD8-22.

<sup>28</sup> GD11-6.

<sup>29</sup> GD8-41.

[36] Furthermore, the Appellant testified that since 2019, she does follow an exercise program developed for her.<sup>30</sup> Dr. Al-Jawadi noted the Appellant had participated in occupational therapy, kinesiology, physiotherapy, acupuncture and massage therapy.<sup>31</sup>

[37] I find the Appellant has met her duty to mitigate her condition and has followed medical advice.<sup>32</sup>

[38] I now must 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.<sup>33</sup>

– **The Appellant can't 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 abilities
- 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.<sup>34</sup>

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

[42] The Appellant was only 48 years old in December 2021. She is fluent in English and has a degree in nursing. She worked for eight years as a nurse. She would have transferable skills. These are favourable factors to the Appellant finding employment.

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<sup>30</sup> GD8-15.

<sup>31</sup> GD8-5.

<sup>32</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

<sup>33</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>34</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[43] But the Appellant's positive characteristics don't outweigh the effect of her physical limitations. Her functional limitations regularly prevent her from doing any type of work. These include daily headaches, an inability to stand or sit more than five minutes, and pain and headaches when she moves her neck.

[44] So, her personal factors don't help. Her medical conditions regularly prevent her from retraining or from doing skilled or unskilled jobs, whether they are physical or sedentary. Because her limitations are with her daily and get worse with activity, it's unlikely that she would be able to work part-time.

[45] I find that the Appellant's disability was severe as of August 2018 when she had her accident.

### **Was the Appellant's disability prolonged?**

[46] The Appellant's disability was prolonged.

[47] The Appellant's conditions began in August 2018. These conditions have continued since then, and they will more than likely continue indefinitely.<sup>35</sup>

[48] In August 2020, Mr. Tong (physiotherapist) said the Appellant was progressing gradually with physiotherapy and massage treatments. He felt her progress was proceeding as expected.<sup>36</sup> In November 2020, Dr. Al-Jawadi felt that work, other than nursing, couldn't yet be ruled out.<sup>37</sup> While both opinions were hopeful that the Appellant would improve enough to return to some type of work, this was not the case.

[49] Dr. Toth said that the Appellant's conditions have continued without improvement over time. It was more than four years after the accident, and he expected her

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<sup>35</sup> 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.

<sup>36</sup> GD2-107.

<sup>37</sup> GD2-80.

conditions of headache and soft tissue injury pain to not resolve or improve significantly.<sup>38</sup> He said maximal medical improvement had very likely been achieved.

[50] In September 2022, Dr. Al-Jawadi said the duration of the Appellant's neck pain, headaches, and left shoulder pain was unknown.<sup>39</sup>

[51] I find that the Appellant's disability was prolonged as of August 2018.

## **When payments start**

[52] The Appellant had a severe and prolonged disability in August 2018.

[53] 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.<sup>40</sup> After that, there is a 4-month waiting period before payments start.<sup>41</sup>

[54] The Minister received the Appellant's application in March 2021. That means she is considered to have become disabled in December 2019.

[55] Payments of her pension start as of April 2020.

## **Conclusion**

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

[57] This means the appeal is allowed.

Connie Dyck

Member, General Division – Income Security Section

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<sup>38</sup> GD8-20.

<sup>39</sup> GD8-4.

<sup>40</sup> Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

<sup>41</sup> 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.