Citation: *AT v Minister of Employment and Social Development*, 2023 SST 1228

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	A. T.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 2, 2022 (issued by Service Canada)

Tribunal member:	Jackie Laidlaw
Type of hearing:	Videoconference
Hearing date:	August 24, 2023
Hearing participants:	Appellant
Decision date:	September 6, 2023
File number:	GP-23-31

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. T., 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 a 36-year-old woman who has worked mainly as a cook. She has had overall body pain since 2020. She stopped working in January 2021. Currently she is receiving injections at a pain clinic in her neck, head, shoulders, and upper spine. She has not received any pain management techniques, such as mindfulness, pacing strategies, aquatherapy or core development. She is not performing any exercises or activities as recommended. Her family doctor is awaiting a second opinion on her condition.

[4] The Appellant applied for a CPP disability pension on January 27, 2022. 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 she is unable to sit or stand for a long period. All she does is massage her arms and legs. She cannot hold anything as she has no grip in her hands.

[6] The Minister says it accepts she has limitations from pain but there are many treatments left untried. As well, there is another consultation pending to determine the cause of her pain.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that is severe and prolonged by August 24, 2023, the hearing date.[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 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.[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 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.

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[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 GD2-6. In this case, the Appellant's coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.
[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.

Reasons for my decision

[14] I find that the Appellant hasn't proven she had a severe and prolonged disability by the date of the hearing.

Is the Appellant's disability severe?

[15] The Appellant's disability is not 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 a provisional diagnosis of fibromyalgia.[4]

[17] The Appellant also stated at the hearing she has attention deficit hyperactivity disorder (ADHD). She said there was no actual diagnosis, and she self-diagnosed the condition. As there is no medical evidence to support a diagnosis, I cannot accept this is a diagnosis of a condition which prevents her from working.

[18] However, I can't focus on the Appellant's diagnosis.[5] Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.[6] When 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 affect her ability to work.[7]

[19] I find that the Appellant has functional limitations that affect her ability to work.

– What the Appellant says about her functional limitations and treatments

[20] The Appellant says that her medical condition has resulted in functional limitations that affect her ability to work. She says the pain initially started at the top of her shoulder and was not as bad as it is today. Now it has gone down her legs and back. She had a family doctor, Dr. Taylor, and in a period of four years only saw her

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[4] See GD4-3 a letter from Dr. McLoughlin dated April 1, 2023.
[5] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[6] See *Klabouch v Canada (Social Development)*, 2008 FCA 33.
[7] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

once for the pain. As Dr. Taylor was leaving her practice, she told the Appellant to deal with the new family physician, Dr. McLoughlin.

[21] She was working at Tim Hortons in 2020 when the pain started. Dr. McLoughlin sent her for an MRI, CAT scan, and ultrasounds, all of which showed no cause for her symptoms. Her pain worsened. He sent her for more tests. Dr. McLoughlin did not tell her to stop working.

[22] She worked at Tim Hortons for six months and stopped to be a cook part-time, closer to home in Elgin where she lived. She did not stop working at Tim Hortons because of her pain. She continued to work as a cook, three days a week, four to five hours a day. She began to get tingling in her arms and legs and they would hurt after ten minutes. She left work at the restaurant after three months in January 2021 and went on regular Employment Insurance for a year.

[23] Dr. McLoughlin prescribed numerous medications, all of which hurt her stomach. She does not take any medications for pain. She only takes Tylenol and Advil. She was sent to KOPI pain management clinic by Dr. McLoughlin a year ago. She receives biweekly nerve block injections, and every two months another injection of lidocaine through her whole body by IV. The injections help for a few hours. She tried ultrasound which made her pain worse. The Appellant stated at KOPI they are trying to figure out how to control the pain. However, she has never received any pain management techniques or cognitive behavioural therapy at KOPI or elsewhere.

[24] She cannot do dishes, sweep, mop floors or do any housework. All of that is done by three of her four children. Her partner does the rest of the housework.

[25] She knows how to use a computer but cannot type, or write, because her hands start to hurt after two or three minutes.

[26] She states that she sees Dr. McLoughlin infrequently, and only when she needs to. He does not do anything for her. He is sending her to another specialist.

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

[27] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by the date of the hearing.[8]

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

[29] Dr. McLoughlin's last letter is from April 1, 2023 where he indicates a provisional diagnosis of fibromyalgia and there is another specialist opinion pending on the diagnosis. I am not as concerned as the Minister that there is another opinion on the diagnosis pending. Whether fibromyalgia is confirmed or not, it is clear the Appellant has chronic pain. In his letter, Dr. McLoughlin notes she is unable to work.[9]

[30] Dr. McLoughlin's medical report of January 8, 2021, and updated on February 25, 2022, indicates she does have functional limitations in walking and working with her hands and arms. The pain, which has not been determined to be fibromyalgia, affects all her limbs. He reports the numerous medications she has tried with minimal response.[10]

[31] In October 2022, Dr. McLoughlin noted she is not restricted in her activities of daily life and is only restricted by pain and not function. He indicated further treatments could include exercise, mindfulness and chronic pain programs. Her ability to work would depend on how her pain interfered with her quality of life.[11]

[32] One month later, on November 14, 2022, Dr. McLoughlin found she had severe chronic pain and fatigue with wide-reaching limitations and was unable to work. Again, he indicated that her ability to work would depend on how pain interfered with her quality of life.[12]

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[8] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[9] See GD 4-3.
[10] See GD2-47.
[11] See GD2-104.
[12] See GD2-158.

– The Appellant hasn't followed medical advice

[33] To receive a disability pension, an appellant must follow medical advice.[13] 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.[14]

[34] The Appellant hasn't followed medical advice. She didn't give a reasonable explanation for not following the advice.

[35] Physiatrist Dr. Ruggles performed an electrodiagnostic study in January 2022. He found her pain was suggestive of a generalized soft tissue disorder. Dr. Ruggles told the Appellant that if she did have fibromyalgia, "that continuing to remain as active as possible and doing some form of regular low impact aerobic exercise is the mainstay of management."[15]

[36] Months later, in August 2022, the Appellant was seen by another physiatrist, Dr. Gregory from the KOPI pain clinic. He concluded her pain was suggestive of a chronic widespread pain syndrome like fibromyalgia but did not specifically diagnose fibromyalgia. He recommended nerve blocks and lidocaine in the future, both of which she is continuing to receive. He recommended she should do:

- aquatherapy.
- swim or walk to develop her core. And,
- encouraged a pacing strategy to increase her level of exercise through either a pain program, mindfulness-based mobile apps, cognitive behavioural therapy (CBT) and counselling.

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[13] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[14] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.
[15] See GD2-120-122.

[37] Dr. Gregory stated that, “there is a need for exercises and rehabilitation as part of the management plan and important to be aware that medications nor interventions alone can replace good conditioning.”[16]

[38] I accept the Appellant has been compliant with numerous trials of drugs and is only able to take Tylenol and Advil. She has also been compliant with getting nerve block injections and lidocaine injections at the pain clinic to try and manage her pain.

[39] However, she has not been compliant with the recommendations for regular exercise. The Appellant stated she does not do any aquafit because she does not drive and would not be able to get there. She tries to walk but only to the end of the street and back before her legs hurt and she cannot go farther. She tried yoga but it made her pain worse. She does not exercise.

[40] The Appellant has not done any aquafit, exercise or conditioning. I accept she cannot drive to aquafit. However, conditioning, remaining active and exercising can be done anywhere. I cannot accept her reason for not doing so, given the benefits that she would receive. Exercise is something she can do on her own, at her own pace. I accept it would cause pain, but that is not reason enough not to do it. Dr. Ruggles, Dr. Gregory and Dr. McLoughlin were aware she had pain, and that exercise would likely cause some pain, and it was still recommended. The doctors were quite clear that being as active as possible is the key to managing her pain.

[41] I must now consider whether following this medical advice might have affected the Appellant’s disability. I find that following the medical advice might have made a difference to the Appellant’s disability.

[42] I am persuaded by both Dr. Ruggles and Dr. Gregory who have stressed that exercise and rehabilitation are imperative for pain management. As the specialists have stressed the importance of exercise “as a mainstay of (pain) management”[17], it is reasonable that had she been exercising, her pain would be more manageable.

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[16] See GD2-112 to 119.
[17] See GD 2-120 Dr. Ruggles.

[43] As Dr. McLoughlin determined, she is only restricted by pain and not function. He also determined that her ability to return to work was dependent on her ability to manage her pain. Pain management is the barrier to her returning to work as suggested by Dr. McLoughlin. The Appellant has not tried to manage her pain through exercise which is preventing her from working.

[44] I agree with the Minister that the Appellant has not followed medical advice and pursued all the recommendations on managing her pain, which may return her to some form of work.

[45] The Appellant hasn't followed medical advice that might affect her disability. This means that her disability isn't severe.

[46] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics.

[47] This allows me to realistically assess an appellant's ability to work.[18]

[48] I don't have to do that here because the Appellant hasn't followed medical advice and hasn't given a reasonable explanation for not following the advice. This means she hasn't proven that her disability was severe by the date of the hearing.[19]

Conclusion

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

[50] This means the appeal is dismissed.

Jackie Laidlaw

Member, General Division – Income Security Section

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[18] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[19] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.