



Citation: *GS v Minister of Employment and Social Development*, 2023 SST 1690

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** G. S.  
**Representative:** Jaswinder Johal

**Respondent:** Minister of Employment and Social Development  
**Representative:** Rebekah Ferriss

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**Decision under appeal:** General Division decision dated March 10, 2023  
(GP-22-1236)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** In Writing

**Decision date:** November 28, 2023

**File number:** AD-23-516

## 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 44-year-old former machine operator. She came to Canada from India in 2001 when she was 21 years old. In June 2016, she sustained an on-the-job injury to her right shoulder. She returned to work on light duties but went on short-term disability benefits in October 2017. She hasn't worked since.

[3] The Appellant applied for a CPP disability pension on November 30, 2020.<sup>1</sup> She said that she could no longer work because of shoulder pain, back and hand pain, stress, menstrual problems, sleep disturbances, gall bladder surgery, heart problems, and liver problems.

[4] The Minister of Employment and Social Development (Minister) refused the application after finding that the Appellant did not have a severe and prolonged disability as of December 31, 2020, 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 insufficient evidence that the Appellant was regularly incapable of substantially gainful employment during her coverage period.

[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. At the Appellant's request, I conducted a hearing by way of written questions and answers.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she is eligible for a CPP disability pension. The

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<sup>1</sup> This is the Appellant's second application for the CPP disability pension. Her first, submitted on February 12, 2019, was refused by the Minister because it was incomplete.

evidence shows that the Appellant, while subject to some functional limitations, did not have a severe disability at the end of 2020 and thereafter.

## Preliminary Matter

[8] In December 2022, the law governing the appeals to the Social Security Tribunal changed.<sup>2</sup> 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.<sup>3</sup> That means I am not bound by any of the General Division's findings. I can also consider all available evidence, including new evidence, about whether the Appellant became disabled during her coverage period.

## Issue

[9] For the Appellant to succeed, she had to 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, 2020.<sup>4</sup>

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>5</sup> 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.<sup>6</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

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<sup>2</sup> 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 May 16, 2023, after the new law came into force.

<sup>3</sup> The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

<sup>4</sup> 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 GD2-74.

<sup>5</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>6</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

[10] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2020.

## **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, 2020. I am satisfied that the Appellant's medical conditions at the time did 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.<sup>7</sup> 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 might have suffered from impairments during her coverage period, I couldn't find enough evidence to suggest that they rendered her incapable of work.

[13] In her application for benefits, the Appellant described her main disabling condition as right shoulder pain radiating down her back and arm.<sup>8</sup> She said that the pain prevented her from, pushing and pulling, reaching and lifting. She rated her ability to carry out daily activities as fair to good and her ability to do housework and home maintenance as poor. She did not mention any other disabling medical conditions or impairments.

[14] At her General Division hearing, the Appellant testified that she worked as a heavy equipment operator for an auto parts manufacturer. In June 2016, her right shoulder was injured when a heavy object fell on it. She didn't take any time off or go to a doctor. However, she told her supervisor, who then placed on her on light duties. After four months, her employer returned her to her regular job, but she found it increasingly painful and stressful. She finally quit in October 2017.

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<sup>7</sup> See *Canada Pension Plan*, section 44(1).

<sup>8</sup> See Appellant's application for CPP disability benefits dated March 3, 2021, GD2-58.

[15] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity at the relevant time.<sup>9</sup> In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work before December 31, 2020.

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

– **The Appellant’s medical reports do not suggest a severe disability**

[17] The Appellant had to provide medical evidence of functional limitations that affected her ability to work by December 31, 2020.<sup>10</sup> However, the reports on file don’t indicate a severe disability.

[18] In March 2018, the Appellant consulted an orthopedic specialist about her shoulder condition. She said that she felt pain when lifting and reaching and that her symptoms worsened at night when “sleeping on it.” The specialist diagnosed the Appellant with soft tissue pain: “Despite MRI findings, exam is not showing any primary shoulder problem — pain from trapezius and soft tissue — requires conservative treatment.”<sup>11</sup>

[19] In early 2019, Dr. Grewal, the Appellant’s family doctor, listed her diagnoses as right shoulder sprain. Nearly two years later, he reported that the Appellant had right shoulder pain and reduced range of motion because of tendonitis. He said that she was being treated conservatively with physiotherapy and medications. In both reports, Dr. Grewal indicated that he expected her to return to modified work.<sup>12</sup>

[20] It is notable that Dr. Grewal mentioned shoulder pain but nothing else. He submitted two reports in support of his patient’s disability claim, but neither one said that

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<sup>9</sup> A CPP disability 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*.

<sup>10</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377 and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>11</sup> See report dated March 22, 2018 by Dr. Manoj Bhargava, orthopedic surgeon, GD2-137.

<sup>12</sup> See initial CPP medical reports by Dr. Kamal Preet Grewal dated January 18, 2019 (GD2-153) and November 28, 2020 (GD2-121).

she was incapable of work; in fact, both suggested that she might be capable of returning to some form of employment in the future.

[21] The Appellant also submitted several imaging reports, but they presented a mixed picture:

- In October 2016, an MRI of the right shoulder suggested tendonitis, with no rotator cuff tear;<sup>13</sup>
- An ultrasound in March 2018 was normal;<sup>14</sup>
- An MRI in July 2019 showed degenerative tendinopathy with no full thickness defects;<sup>15</sup>
- An ultrasound in November 2020, showed a partial thickness tear of the rotator cuff.<sup>16</sup>

[22] Based on these reports, the Appellant did not have a rotator cuff tear at the time of her accident. It is not clear what might have caused the tear, but in any event, it was present when the Appellant still had CPP disability coverage. However, I am not convinced that it left her without **any** capacity to work.

[23] In July 2019, the Appellant consulted another orthopedic surgeon about her shoulder pain. On examination, he detected no structural pathology that required surgical intervention. He noted that she had previously received injections with no benefit and concluded that she would be best managed with symptomatic pain relief.<sup>17</sup>

[24] That same month, the Appellant saw a pain specialist. He noted tenderness on palpitation of her right shoulder muscles and “mild” limitation in movement of her shoulder and neck.<sup>18</sup> He recommended trigger point injections and obtained the Appellant’s consent to administer a first round.

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<sup>13</sup> See MRI of the right shoulder dated October 31, 2016, GD2-131.

<sup>14</sup> See x-ray and ultrasound of the right shoulder dated March 11, 2018, GD2-157.

<sup>15</sup> See MRI of the right shoulder dated July 17, 2019, GD5-92.

<sup>16</sup> See MRI of the right shoulder dated November 19, 2020, GD5-39.

<sup>17</sup> See consultation report dated July 15, 2019 by Dr. Edward Lansang, orthopedic specialist, GD2-133.

<sup>18</sup> See report dated July 23, 2019 by Dr. Sanaz Zarinehbaf, general practitioner, GD 2-135.

[25] At the General Division hearing, the Appellant testified that she went on to receive five or six rounds of injections.<sup>19</sup> She said that they relieved her pain for only a short time, although her family doctor's office notes suggested that she felt they were "helpful."<sup>20</sup> She stopped getting injections after the onset of the COVID-19 pandemic in early 2020 and didn't resume them until earlier this year.<sup>21</sup>

[26] The Appellant's account leaves me with doubt about the severity of her pain. I understand that it was difficult to see medical practitioners in person during the pandemic, particularly during its initial phase. However, it was not impossible and, as the pandemic wore on, restrictions eased, particularly for medically necessary interventions. The file indicates that the Appellant was referred to the pain clinic again in 2021 but didn't follow up.<sup>22</sup> She received another referral in February 2022 but cancelled her appointment.<sup>23</sup>

[27] If the Appellant's pain was as severe as she says it was, then one would expect her to have more aggressively pursued a proven means of relief. Dr. Zarinehbab suggested that if pain injections didn't work, she might consider taking medications such as Lyrica, Gabapentin, or Cymbalta. However, the Appellant has never been prescribed any of these medications and continues to use over-the-counter pain relievers such as Tylenol and Voltaren.

[28] In the most recent assessment on file, the Appellant was diagnosed with chronic right shoulder pain, which she said was worse with movement in all directions, better with rest. On examination, the Appellant's active and passive shoulder flexion were normal, except for pain when raising her arm above 90 degrees.<sup>24</sup>

[29] Although the Appellant might have experienced pain in her right shoulder at the end of her coverage period, the available medical evidence suggests that her condition

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<sup>19</sup> Refer to General Division hearing recording at 49:10.

<sup>20</sup> See Dr. Grewal's office note dated March 24, 2021, GD5-56.

<sup>21</sup> Refer to the Appellant's testimony at 50:30 of the recording of the General Division hearing.

<sup>22</sup> See note dated August 25, 2021 from the Vaughan Pain Clinic, GDD5-11.

<sup>23</sup> See letter dated May 16, 2022 from the NeuPath Centre for Pain and Spine, GD5-3.

<sup>24</sup> See NeuPath Centre report dated January 31, 2023 by Dr. Johnny Nguyen, general practitioner, AD3-2.

was less than severe. In my view, the Appellant has some physical limitations, but not enough to prevent her from working.

– **The Appellant’s other medical conditions do not contribute to disability**

[30] After submitting her application for benefits, the Appellant claimed additional impairments. She said that she not only suffered from right shoulder and neck pain, but also anxiety and depression, as well as problems with her heart, liver, and gallbladder. However, I don’t see how these conditions contributed to a disability, either individually or in combination with others.

- The Appellant had her gallbladder removed in November 2021. This procedure would ordinarily be expected to resolve the gastrointestinal pain symptoms that she had been experiencing previously.<sup>25</sup>
- The Appellant’s heart and liver complaints are not supported by any medical information on file.
- The Appellant has complained of anxiety and depression, but her family physician has never referred her to a mental health specialist for assessment or counselling. In the past, she has been prescribed Paxil, an antidepressant, but not for the last six years.<sup>26</sup>

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

[31] Based on the medical evidence, I find that the Appellant had work capacity. I am reinforced in this belief when I look at her overall employability.

[32] The leading case on the interpretation of “severe” is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Appellant as a “whole person” in a real-world context.<sup>27</sup> Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.”

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<sup>25</sup> See operative report dated November 23, 2021, GD5-8.

<sup>26</sup> See active medications printout dated March 26, 2021 from the Mountainview Medical Centre and Walk-In Clinic, GD2-15.

<sup>27</sup> See *Villani v Canada (Attorney General)* 2001 FCA 248.



[33] 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 could work in the real world when she had coverage.

[34] The Appellant was 41 years old when she last had CPP disability coverage. She is an immigrant and has the equivalent of a high school education. English is her second language. None of these aspects of her background gives her an advantage in the Canadian job market. However, she has several assets that would have benefitted her in a job search.

[35] The Appellant has a varied work history. Over a 17-year span, she has had a number of jobs in Canada — in a bakery, as a packager and, most recently, as a machine operator. That last job was particularly physically demanding and appears to have involved a lot of repetitive motion. After the onset of her shoulder pain, she proved herself capable of performing light duties for several months. It was only when she was returned to heavier work that she stopped working.

[36] The Appellant was able to obtain, and presumably succeed at, these jobs even though her first language is Punjabi. The Appellant has taken ESL classes and she can speak some English, although not fluently. She has also benefitted from living in a community that has a large number of Punjabi speakers — many Brampton workplaces function partly or wholly in that language.

[37] In all, I am satisfied that, despite her background, the Appellant was equipped to return to the labour market during her coverage period. Although she was not young at the time, she had a lengthy work history. Even with her shoulder condition, the Appellant would have been capable of at least attempting certain customer service or light, unskilled manual jobs.

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

[38] In the end, I was unable to assess the severity of the Appellant's disability as of December 31, 2020. That's because she didn't make a serious effort to look for another job.

[39] 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:

[40] 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.<sup>28</sup>

[41] 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.

[42] On top of that, disability claimants must make **meaningful** attempts to return to work.<sup>29</sup> 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.<sup>30</sup> Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[43] The Appellant had at least some work capacity — enough to trigger the obligation to pursue alternative employment. However, the Appellant never attempted to work, or look for work, after leaving her job at the auto parts plant, even though there was little on the record to suggest that her functional limitations prevented her from performing lighter work.

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<sup>28</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

<sup>29</sup> 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.

<sup>30</sup> See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

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

[44] A disability must be severe **and** prolonged.<sup>31</sup> Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it might also be prolonged.

## **Conclusion**

[45] The Appellant has a shoulder condition, but the available evidence suggests that it did not prevent her from regularly pursuing a substantially gainful occupation during her coverage period. What's more, the Appellant has never made a real effort to seek employment that might have been better suited to her limitations. For these reasons, I am not convinced that the Appellant had a severe disability as of December 31, 2020.

[46] The appeal is dismissed.



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Member, Appeal Division

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<sup>31</sup> See *Canada Pension Plan*, section 42(2)(a).