



Citation: *AA v Minister of Employment and Social Development*, 2023 SST 434

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. A.
Representative: Ashwin Ramakrishnan

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 15, 2022 (issued by
Service Canada)

Tribunal member: Wayne van der Meide

Type of hearing: Teleconference

Hearing date: September 14, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: September 25, 2023

File number: GP-22-1377

Decision

[1] The appeal is allowed.

[2] The Appellant, A. A., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of November 2019. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 61. He completed grade 10 high school and has some college education as well. His last job was as a meat cutter at a grocery store. He stopped working in July 2019. In 2020 he went back to work for a couple months but couldn't manage it and hasn't worked since.

[4] The Appellant applied for a CPP disability pension on June 25, 2021. 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 Appellant says he cannot work in any job because of several conditions and functional limitations which I will talk more about later. The Minister says the medical evidence doesn't show severe limitations **and** that the Appellant could work or re-train to work in a sedentary job.

What the Appellant must prove

[6] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2022. This date is based on his contributions to the CPP.¹

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 GD2-66, GD2-67 and GD2-74 to GD2-79.

[7] The *Canada Pension Plan* defines “severe” and “prolonged.”

[8] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.²

[9] 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.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[11] 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.

[12] 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.

Reasons for my decision

[13] I find that the Appellant had a severe and prolonged disability as of July 2019. I reached this decision by considering the following issues:

- Was the Appellant’s disability severe?
- Was the Appellant’s disability prolonged?

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.

Was the Appellant's disability severe?

[14] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affect his ability to work

[15] I can't focus on the Appellant's diagnoses.⁴ I must focus on whether he had functional limitations that got in the way of him earning a living.⁵ 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 affected his ability to work.⁶

[16] I find that the Appellant has functional limitations that affected his ability to work.

– What the Appellant says about his functional limitations

[17] The Appellant said he stopped working because he was in too much pain. After time off and treatment, he tried to go back to work but even with accommodations from his employer, he couldn't physically manage his job as a meat cutter. I will talk more about this later.

[18] The Appellant says because of his knee, back and hip pain, as well as numbness in his legs, he can only sit or stand for 10 to 15 minutes before it hurts him. He must either change positions all the time or lay down. He cannot stand long enough to finish shaving and has to elevate his legs often or they swell.

[19] The Appellant mostly stays in the house. He cannot play with or pick up his grandchildren. He tries to help his wife by sweeping or cooking an egg but cannot do much. He says most days are bad days and often he has to lay down most of the day. Sometimes his wife has to help him get around the house. He sold his home because he couldn't maintain the yard or shovel snow. He now lives in a house with a much smaller yard and even then, it takes him a long time to mow the lawn.

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[20] The Appellant says that because of the pain he has difficulty concentrating. Because of pain and other limitations, he has no quality of life.

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

[21] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2022.⁷

[22] The medical evidence shows that the Appellant has the following conditions:

- Meniscal tearing and arthritis in the left knee.⁸
- In his right knee he has a complex tear of the posterior horn and body of the medial meniscus and at least moderate osteoarthritis of the medial femorotibial compartment.⁹
- Multilevel facet joint disease in his neck.¹⁰
- Mild degenerative disc disease, scoliosis and lower lumbar facet arthropathy (joint disease) of the lumbar spine.¹¹
- Moderate right and mild left hip osteoarthritis.¹²
- Obstructive sleep apnea.¹³

[23] The medical evidence supports that the Appellant has the following functional limitations that affect his ability to work.

[24] In a medical report from July 2021, his family doctor, Dr. Habashi, said this about the Appellant’s limitations:

- The meniscal tear in his right knee meant that he couldn’t carry heavy weight, had difficulty with climbing stairs and with certain positions such as kneeling and squatting.

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁸ See GD2-238, GD2-385 and GD2-386.

⁹ See GD2-457 and GD259.

¹⁰ See GD2-112

¹¹ See GD2-134, GD2-460 to GD2-462, GD3-24 and GD3-25.

¹² See GD3-24 and GD3-25.

¹³ See GD2-448 to GD2-456.

- Degenerative disc diseases of his lower back caused him difficulty with extreme range of movement of the lower back and that forward bending was painful.
- Because of his obstructive sleep apnea, he had difficulty with night shifts and concentrating.¹⁴

[25] Dr. Habashi didn't talk with the Appellant about stopping work and didn't know if the Appellant could work in any job in the future.

[26] Dr. Alkinani a family doctor wrote a report in October 2022¹⁵. He said that the Appellant has more than one "severe" medical condition and that his medical conditions were "persistent/chronic and consistently limiting function". These limitations included prolonged **sitting and standing**. He said that "occupational assessment" was needed to say whether the Appellant's medical conditions "resulted in impairments in function that has interfered with maintaining gainful employment." He also said that the Appellant's reported symptoms (functional limitations) were consistent with his conditions.

[27] The Minister says that: "While the potential of functional issues was considered...orthopedic reports don't suggest severe limitations, restrictions or pathology [with] back and knee symptoms that would have precluded him from adjusting to alternate work, or to retrain."¹⁶ The cause of chronic pain doesn't always show up on testing.¹⁷

[28] I asked the Appellant at the hearing why no doctor told him not to work. He said they all told him that he knew his own body and whether he could or could not work. I believe him.

[29] When I look at all the medical evidence **and** consider the cumulative impact of all his conditions, the medical evidence supports what the Appellant says about his

¹⁴ See GD2-448 to GD2-456.

¹⁵ See GD3-5 to GD3-8.

¹⁶ See GD9-5.

¹⁷ See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 (CanLII).

functional limitations. The Appellant told Dr. Alkinani that he has trouble sitting. Dr. Alkinani accepted that this was consistent with the Appellant's medical conditions.

[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.¹⁸ 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.¹⁹

[32] The Appellant has followed medical advice.²⁰ The Minister doesn't argue otherwise, but I did ask him a couple questions about this at the hearing. First, he said that he stopped seeing physiotherapists and chiropractors because money was a problem and they said further treatments were not beneficial. Second, he did get over the counter orthotic inserts and comfortable shoes.

[33] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.²¹

– **The Appellant can't work in the real world**

[34] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language abilities

¹⁸ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁹ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

- past work and life experience

[35] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.²²

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

[37] The Appellant is 61 years old. He didn't finish high school. He has never worked in an office. He was an insurance salesman briefly. His only other jobs were as a mechanic, bartender, and meat cutter. Because of his limitations, with prolonged standing, he clearly cannot do any of these physical jobs.

[38] The Minister says he can retrain or directly enter a more sedentary job. He does have experience as an insurance salesman. But I disagree with the Minister because:

- He cannot retrain because he cannot sit for long or concentrate.
- He couldn't get a sedentary job. Although his son bought him and his wife a computer some years ago, they rarely use it. He checks email with his phone. The college course he took in accounting, payroll and administration was 18 years ago and he has never had a job in that field.

[39] Even if he could get a sedentary job, he couldn't do it. He cannot sit for more than 10 to 15 minutes at a time.

[40] I find that the Appellant's disability was severe as of July 2019. This is when he had to stop working because of his medical conditions.²³

[41] His return to work from July 27 to September 22, 2020, **does not** show that he was capable regularly of pursuing any substantially gainful occupation for several reasons²⁴:

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²³ See GD2-58 and GD7-35.

²⁴ *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 (CanLII)

- He worked for 15 minutes and then took a 15-minute break. This suggests that this was benevolent employment.
- He said he started working two hours shifts and it was only by the very end that he did a few eight-hour shifts.
- His symptoms were worse when he worked, and he hasn't recovered from that.

[42] Although the diagnosis and treatment of most of his conditions didn't start until after he stopped working, I believe the Appellant. He loved his job and his co-workers. He only stopped working because he physically couldn't. This is why he tried to return to work after initial treatment.

Was the Appellant's disability prolonged?

[43] The Appellant's disability was prolonged.

[44] The Appellant has had a bad back for many years. His other problems, such as pain in his knees, began in 2019. These conditions have continued and gotten worse since then, and they will more than likely continue indefinitely.²⁵

[45] Knee surgery provided the Appellant with temporary relief of some of his issues, but not others.

[46] The medical evidence shows that although treatments provided some temporary relief, his functional limitations will not get better.²⁶ In May 2022 his pain medications were accordingly increased.²⁷

[47] I find that the Appellant's disability was prolonged as of July 2019.

When payments start

[48] The Appellant's disability became severe and prolonged in July 2019.

²⁵ 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.

²⁶ See GD3-5 to GD3-8, GD6-3 and GD6-4 and GD7-12 to GD7-66.

²⁷ See GD3-26.

[49] There is a four-month waiting period before payments start.²⁸ This means that payments start as of November 2019.

Conclusion

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

[51] This means the appeal is allowed.

Wayne van der Meide
Member, General Division – Income Security Section

²⁸ Section 69 of the *Canada Pension Plan* sets out this rule.