



Citation: *SN v Minister of Employment and Social Development*, 2023 SST 1428

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: S. N.
Representative: S. D.

Respondent: Minister of Employment and Social Development
Representative: Joshua Toews

Decision under appeal: General Division decision dated February 3, 2023
(GP-21-960)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference
Hearing date: October 4, 2023
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: October 30, 2023
Corrigendum date: December 22, 2023
File number: AD-23-365

Decision

[1] The appeal is allowed. The Appellant is entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 48-year-old former assembly line worker. She was born in India and came to Canada when she was 20 years old. She has worked in warehouses, bakeries, and factories. In September 2017, she started working as a packer for a kitchen cabinet manufacturing company.

[3] In March 2019, the Appellant was diagnosed with squamous cell carcinoma. She had surgery to remove a large tumour from her right ear, leaving her with profound hearing loss. The Appellant has remained cancer-free since then but has never returned to work.

[4] In ~~September~~ August 2020, the Appellant applied for a CPP disability pension.¹ She claimed that she was unable to work because of deafness, dizziness, headaches, and other symptoms related to her cancer treatments. The Minister of Employment and Social Development (Minister) refused the application after determining 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 that, while the Appellant had some functional limitations, her condition did not prevent her from working.

¹ The Appellant's family physician submitted a CPP Medical Report with Service Canada on August 20, 2020 (see GD2-77). This was approximately one month before the Appellant submitted her formal Application for the CPP Disability Pension on September 21, 2020 (see GD2-34). I have reviewed two Appeal Division decisions that address the question of when an application is "made." I am satisfied that, in this case, the family physician's report contained enough information to qualify as an application under sections 43, 52, 60, and 68 of the *Canada Pension Plan Regulations*. See *Minister of Employment and Social Development v S.J.*, 2018 SST 204 and *Minister of Employment and Social Development v D.E.*, 2018 SST 1305.

[6] The Appellant then applied for permission to appeal to the Appeal Division. In May, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Earlier this month, I held a hearing to discuss her disability claim in full.

Preliminary Matter

[7] In December 2022, the rules governing the appeals to the Social Security Tribunal changed.² Under the new rules, 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. As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about whether the Appellant became disabled during her coverage period.

Issue

[8] In this appeal, I had to decide (i) whether the Appellant became disabled during her coverage period and (ii) whether she has remained so ever since.

Analysis

[9] I have applied the law to the available evidence and concluded that the Appellant had a severe and prolonged disability as of December 31, 2020. I am satisfied that the Appellant's physical and psychological condition at the time did not permit her to deliver the kind of regular performance demanded in a commercial workplace.

CPP disability claimants must show that they had a severe and prolonged disability during their coverage period

[10] For the Appellant to succeed, she had to prove that, more likely than not, she became disabled during her coverage period and has remained so ever since. Under the CPP, a disability must be severe and prolonged:

² The Appellant is subject to the new rules because her application for permission to appeal was filed with the Tribunal on April 17, 2023.

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.³ 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.⁴ The disability must be expected to keep the claimant out of the workforce for a long time.

[11] The parties agreed that the Appellant's CPP disability coverage ended on December 31, 2020.⁵ That meant I had to assess the Appellant's condition as of that date and decide whether she had functional limitations that got in the way of her earning a living.

The Appellant had a severe disability during her coverage period

[12] When I assess disability, I can't just focus a claimant's diagnoses.⁶ I also have to focus on whether their condition caused functional limitations that got in the way of her earning a living.⁷ When I do this, I have to look at all of her medical conditions, not just the main one.⁸

[13] In her application for benefits, the Appellant said that she was unable to work because of the following conditions and symptoms:⁹

- Squamous cell carcinoma in her right ear
- Disturbed sleep
- Head and neck stiffness
- Shoulder pain

³ See section 42(2)(a)(i) of the *Canada Pension Plan*.

⁴ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

⁵ 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 record of earnings at GD2-5.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Minister of Employment and Social Development)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁹ See the Appellant's Application for the CPP Disability Pension dated September 21, 2020, GD2-34.

- Frequent dizziness
- Headaches and migraines
- Low energy and fatigue
- Depression and anxiety

[14] The Appellant also said that she had difficulty bending and lifting, remembering and concentrating. Oddly enough, the Appellant did not explicitly cite hearing loss as a disabling condition even though, in my view, it is the major reason she is no longer capable of work.

– **The Appellant is completely deaf on her right side**

[15] In his submissions, the Minister consistently refers to the Appellant right-sided hearing “loss.” This term is somewhat misleading. In fact, the Appellant underwent surgery that resulted in the removal of her right ear and the closure of her auditory canal. She cannot hear from that side at all.

[16] In March 2019, imaging results revealed an extensive tumor on the right side of the Appellant head. A biopsy indicated a “rapidly expanding squamous cell carcinoma of the right external auditory canal.”¹⁰ The Appellant then underwent surgery comprising the following procedures:

- Temporal bone, partial auriculectomy (surgical removal of the ear);
- Right modified radical neck dissection (cutting and separation of tissue);
- Near total parotidectomy (removal of the parotid gland) with facial nerve preservation and decompression;
- Dissection of the right parapharyngeal space (a cavity in the head and neck occupied by cranial nerves and lymph nodes);
- Left anterolateral thigh free flap reconstruction (transplant of skin and tissue from the leg to the head); and

¹⁰ See operative report dated March 21, 2019 Danny Enepekides, otolaryngologist, GD2-87.

- Right lid lengthening procedure via right gold weight implant.¹¹

[17] The Appellant recovered well from her surgery, but she was left with no hearing whatsoever on her right side. She then embarked on a course of radiation therapy that she says left her with further deficits. I will discuss those next, but I should also mention the Appellant's left ear.

[18] At the hearing, the Appellant said that, as well as her right-side hearing loss, she has also experienced a deterioration of hearing on her left side. The file contains nothing that documents such a deterioration before December 31, 2020, but there is an audiology report dated nearly two years later. Testing indicated "mild, sloping to severe, sensorineural hearing loss in the left ear with virtually no conductive component."¹² The consulting audiologist said that the Appellant would benefit from amplification, and she confirmed at the hearing before me that she had been fitted with a hearing aid last year.

[19] I have no way to confirm the extent, if any, of the Appellant's left-side auditory deficit at the end of her coverage period. However, I think it is reasonable to assume that she must have had at least some hearing loss at that time. Between this and her more serious right-sided deafness, I am satisfied that, as of December 31, 2020, the Appellant had a significant hearing impairment — one that would disadvantage any worker, particularly a worker with the Appellant's profile.

– **The Appellant's cancer treatments were successful, but they left her with another significant impairment**

[20] In addition to impaired hearing, the Appellant claims to have suffered from variety of other ailments and limitations during her coverage period and after. In my view, one of them was significant; the others were not.

[21] The Appellant says that she's depressed. I find this plausible given the fact that she survived cancer but, in the process, lost her right ear and half her hearing. There is a report on file from a clinical psychologist who found that the Appellant was facing

¹¹ See Dr. Enepekides's operative report dated March 21, 2019 (GD2-87) and hospital discharge report dated March 26, 2019 by Neil Brayford Arnstead, otolaryngology resident (GD2-92).

¹² See report dated October 20, 2022 by David C. Hacker, otolaryngologist, AD5-24.

adjustment challenges, manifested by symptoms such as sleeplessness, anhedonia, and inability to concentrate.¹³ The psychologist said that the Appellant would eventually return to “formerly enjoyed activities,” but that is not the same thing as returning to work. Although the report is dated after the coverage period, it is close enough that one can reasonably infer that the Appellant’s mental health was, if not the main cause of her disability, then certainly a contributing factor to it.

[22] As for the Appellant’s other complaints, I don’t see much support for them in the available reports. In annual follow-ups, her ENT surgeon described her facial nerve function as “remarkably good,” aside from marginal mandibular weakness.¹⁴

[23] In September 2020, the Appellant’s radiation oncologist noted that she had intermittent headaches but said they “did not interfere significantly with her quality of life.”¹⁵ Dr. Hussain also said that the Appellant experienced positional vertigo when standing up, but I doubt this was a significant problem; in a subsequent patient intake form, the Appellant declared that she did not experience “fainting and dizziness.”¹⁶

[24] In sum, the Appellant’s surgery led to a number of longstanding after-effects, but I don’t think most of them are significant contributors to her disability. The exception is her depression, which, combined with her deafness, has seriously compromised her functionality.

– **The Appellant lacked capacity when viewed as a whole person**

[25] 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.¹⁷ Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.” Those circumstances fall into two categories:

¹³ See report dated February 23, 2022 by Jane Young-On, AD5-24.

¹⁴ See Dr. Enepekides’ reports dated February 15, 2022 (GD5-40) and September 20, 2022 (GD5-37).

¹⁵ See report dated September 9, 2020 by Dr. Zain Hussain, radiation oncologist, AD5-115.

¹⁶ See Mimosa Rehab patient intake form dated September 30, 2020, GD3-48.

¹⁷ See *Villani v Canada (Attorney General)* 2001 FCA 248.

- A claimant's background — matters such as “age, education level, language proficiency and past work and life experience” are relevant;
- A claimant's medical condition — this is a broad inquiry, requiring that the claimant's condition be assessed in its totality.

[26] In this case, I don't think that the Appellant had anything left to offer a real-world employer by the end of 2020. It is true that she was only 46 years old at the time, but her combined physical and psychological conditions made her incapable of reliable performance.

[27] The Appellant was born in India and came to Canada as an adult. At the hearing, she testified with the assistance of a Punjabi interpreter. She said that she has only a few words of English, and I saw no reason to disbelieve her. She said that, in the past, she had always managed to find jobs where she was surrounded by co-workers who spoke her first language. However, her already constrained ability to communicate in a workplace is now further compromised by her hearing impairment.

[28] In addition, the Appellant has a limited education — she attended only two years of the equivalent of high school in her country of origin. She has a fairly lengthy work history in this country, but it consisted entirely of low-skilled, manual labour jobs.

[29] With her background and her medical conditions, the Appellant is effectively unemployable. I have a difficult time seeing how, at the end of her coverage period, she could have succeeded in any job, nor do I think she would have been a suitable candidate for retraining.

– **The Appellant did not have sufficient capacity to pursue alternative employment**

[30] A case called *Inclima* requires disability claimants with residual capacity to show that they have made reasonable efforts to obtain and secure employment and that those efforts have been unsuccessful because of their health condition.¹⁸ In this case,

¹⁸ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

the Appellant lacked the residual capacity to make such efforts. For that reason, I will not draw a negative inference from the lack of any evidence that he launched a job search or investigated retraining programs. The Appellant had a genuine belief that she could no longer do any kind of work, and the medical evidence bears that out.

– The Appellant’s testimony was credible and persuasive

[31] The Appellant was a sympathetic and forthright witness. She explained how her hearing impairment prevented her from working her during her coverage period. She said that she didn’t notice the hearing in her left ear was impaired until after her right ear was removed. She said that it had deteriorated since then. Asked why she can’t work, the Appellant replied that she would worry about not understanding her co-workers, especially if there were an emergency. She also cited dizzy spells, which she said she has three or four times a day. Then there is pain and stiffness from the skin graft on the right side of her head, which she says prevents her from moving freely.

[32] I believed the Appellant. Her testimony, combined with the available medical evidence, painted a picture of an individual with significant physical and psychological impairments — impairments that prevented her from dependably fulfilling work duties in the period before December 31, 2020. Her credibility was enhanced by her work history, which includes 20 years of substantially gainful earnings in a variety of low-skilled job. One can reasonably assume that someone with this kind of demonstrated work ethic would not have applied for disability benefits unless she had significant underlying medical issues.¹⁹

The Appellant has a prolonged disability

[33] The Appellant’s testimony, corroborated by the medical reports, indicates that she has suffered from significant hearing loss, coupled with anxiety and depression, since she was treated for a malignant tumour in her right ear. She has not worked since then, and it is difficult to see how she will ever regain functionality, even with alternative

¹⁹ See Appellant’s record of earnings, GD2-5.

therapies or new medications. In my view, these factors suggest that the Appellant's disability is prolonged.

Conclusion

[34] I find the Appellant disabled as of May 2019, the last month she held a job. Since the Minister received her application for benefits in ~~September~~August 2020, the Appellant is deemed disabled as of ~~June~~May 2019.²⁰ That means the effective start date of the Appellant's CPP disability pension is ~~October~~September 2019.²¹

[35] The appeal is allowed.



Member, Appeal Division

²⁰ Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension.

²¹ According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability.