Citation: *BY v Minister of Employment and Social Development*, 2023 SST 1668

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	B. Y.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 6, 2021 (issued by Service Canada)

Tribunal member:	Selena Bateman
Type of hearing:	In writing
Decision date:	November 3, 2023
File number:	GP-22-797

Decision

[1] The appeal is dismissed.

[2] The Appellant, B. Y., 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 64 old. She worked as a stock buyer in an industrial warehouse. She says that in 2013 she became disabled because of mental health conditions when her daughter became ill. She last worked in April 2013.

[4] The Appellant first applied for a CPP disability pension on July 7, 2014. 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 General Division held a hearing on August 10, 2016. The General Division found that the Appellant didn't have a severe disability.[1] She asked for leave to appeal and was refused by the Appeal Division.[2]

[6] The Appellant applied for CPP disability a second time, on May 17, 2021.[3] The Minister denied her application initially and on reconsideration.[4] The Appellant appealed the decision to the Social Security Tribunal.

[7] The Appellant says that her health hasn't changed since April 2013. She says she is disabled from anxiety, depression, and stress. She says that her local community doesn't have psychiatric services for her to access.[5]

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[1] See GD2-68 to 84.
[2] See GD2-57-65.
[3] See GD2-30 to 49.
[4] See GD2-5 to 7.
[5] See GD1-7.

[8] The Minister says that the Appellant doesn't meet the criteria for disability during the time in question because her medical condition wasn't severe. The Minister also says that the evidence doesn't show that she has been continuously disabled.[6]

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged between August 11, 2016, to December 31, 2016 (the previous hearing date).

[10] The *Canada Pension Plan* defines "severe" and "prolonged."

[11] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[7]

[12] 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.

[13] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.[8]

[14] 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.

[15] 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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[6] See GD5.
[7] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[8] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Matters I have to consider first

The Appellant asked to reschedule the hearing

[16] The Appellant requested an adjournment to her hearing date in August 2023. She made the request because she wouldn't have telephone or internet access in August. I decided to grant the adjournment out of fairness so that the Appellant could have a full opportunity to present her case.[9]

[17] The Appellant's hearing was rescheduled to September 21, 2023.

The Appellant then asked for the hearing to be held in writing

[18] On September 20, 2023, the Appellant left a voice message with the Tribunal saying that she would not be attending an oral hearing. She requested that the hearing take place in writing.

[19] I wrote a letter to the Appellant confirming her choice of hearing form. Out of fairness to the Appellant, I needed to ask three questions before deciding the outcome of the appeal.[10] She didn't respond. I held the hearing in writing.[11] This means that I based my decision on the evidence and submissions in the Tribunal file.

The 2016 General Division decision

[20] I am bound by the decision that was made in 2016. The decision was final. This means I cannot decide that the Appellant was disabled at any time on or before August 10, 2016, because the Tribunal has already decided that she was not.

[21] The 2016 General Division found that the Appellant's main disabling condition was depression. It decided that it wasn't reasonable for the Appellant to refuse

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[9] See GD6.
[10] See GD7. I asked the Appellant about her treatment, barriers to treatment, and work efforts between August 11, 2016, to December 31, 2016.
[11] See section 2(1) of the *Social Security Tribunal Regulations.*

recommended treatment for depression that could likely impact her disability status. Because of this, it decided that her condition wasn't severe.[12]

– The previous decision stands

[22] There is a legal rule called *res judicata.*[13] The rule seeks an end to litigation.[14] The rule means that once a Tribunal decision has been made on an appellant's disability that issue cannot be re-litigated.

[23] There is an exception to this. Even if the rule applies, the Tribunal can hear an appeal if it would be unjust not to. I asked the Appellant if it is not fair to apply the rule of *res judicata.*[15] She didn't respond.

[24] I decided that *res judicata* applies to the Appellant's appeal. The rule applies because the three requirements for *res judicata* are met.

[25] The issues in both appeals are the same. The earlier appeal was about whether the Appellant had a severe and prolonged disability by the first hearing date. The parties are the same. They are still the Appellant and the Minister. The Tribunal's General Division and Appeal Division decisions were final.[16]

[26] I also decided that it isn't unjust to apply *res judicata.*[17] The Appellant attended the 2016 hearing. She had the opportunity to present her case. She didn't raise an issue of fairness.

[27] This means that I cannot decide if the Appellant was disabled at any time up to August 10, 2016. The General Division already decided that she was not.

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[12] See GD2-68 to 84.
[13] This rule applies when the issue in the current appeal is the same issue in an earlier appeal, the parties are the same in both appeals, and the decision on the earlier appeal was final.
[14] See *Danyluk v Ainsworth Technologies Inc,* 2001 SCC 44.
[15] See GD7.
[16] See GD-15-1279 and AD-16-1264. Leave to appeal was refused.
[17] See *Danyluk v Ainsworth Technologies Inc,* 2001 SCC 44. The Supreme Court of Canada set out a list of relevant factors to consider when determining whether a strict application of *res judicata* results in an injustice.

Issues I consider in the current appeal

[28] In the current appeal, I have to decide whether the Appellant has a disability that became severe and prolonged between August 11, 2016, and December 31, 2016, the end of her minimum qualifying period. This is known as the window period.

[29] If so, I must decide if her disability is long continued and of indefinite duration.

Reasons for my decision

[30] I find that the Appellant hasn't proven she had a disability that became severe and prolonged between August 11, 2016, and December 31, 2016. The Appellant didn't have any new health conditions arise. The evidence doesn't support that she became disabled during the time in question.

Was the Appellant's disability severe?

[31] The Appellant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– **The Appellant's functional limitations affected her ability to work**

[32] The Appellant had depression and anxiety. She also had osteoarthritis in the subtalar joint of her left foot.

[33] However, I can't focus on the Appellant's diagnoses.[18] Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.[19] 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 her ability to work.[20]

[34] I find that the Appellant had functional limitations that affected her ability to work during the window period.

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[18] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[19] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[20] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[35] The Appellant says that her health hasn't changed since 2013. She says she live with daily stress, anxiety, and depression. She cries easily.[21]

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

[36] The medical evidence contains a medical report completed in August 2021. Her family doctor wrote that she had moderate depression since 2013. She had difficulty concentrating and making decisions. She had low motivation, low mood, poor memory, and fatigue.[22]

[37] The medical evidence also includes charting records. Charting from June 2016 to February 2023 were included in the appeal file.[23] I preferred the contemporaneous records because they addressed the Appellant's health concerns at the time when she made them.

The Appellant's health condition didn't become severe

[38] The evidence doesn't support that the Appellant's health condition became severe between August 11, 2016, to December 31, 2016.

[39] The Appellant saw Dr. Fawell (family doctor) during the window period. These records don't show that she was actively struggling with depression, anxiety, or any other serious condition during the window period.

[40] The charting between August 11, 2016, to December 31, shows that she didn't discuss her mental health with Dr. Fawell.

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[21] See GD1-7.
[22] See GD1-19.
[23] See GD5-18 to 19.

[41] The Appellant saw Dr. Fawell three times:

- September 12, 2016, she had a cough and discussed her diet and a FAST[24] clinic appointment in Vancouver.
- September 27, 2016, her blood test results were "reassuring." Her cholesterol and blood sugars were improving. A CT of her chest was planned.
- October 17, 2016, there is a note of a foot clinic appointment at St. Paul's, discussion on rhinitis and a cough.

[42] I also considered Dr. Fawell's charting from the next appointment into 2017. This entry didn't detail subjective or objective mental health observations or notes.[25]

[43] The medical evidence doesn't show that the Appellant was being treated by a mental health specialist at this time. There are no referrals to psychiatry, psychology, or counseling made after August 10, 2016. This supports that the Appellant's condition didn't worsen during the window period.

No evidence of other disabling conditions

[44] There is no evidence to suggest that any new conditions came into existence during the time in question.

[45] I asked the Appellant if she changed the dosage of any medication or began any other treatment after August 11, 2016.[26] She didn't respond.

[46] The medical evidence doesn't support that any medications were added or changed between August 11, 2016, to December 31, 2016.[27]

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[24] I understand "FAST" to mean "Foot and Ankle Screening and Triage" located in Vancouver.
[25] See GD5-18 to 19.
[26] See GD7.
[27] See GD1-19.

The Appellant argues she couldn't access mental health care

[47] The Appellant and Dr. Fawell explain the lack of mental health involvement. This is an important consideration when looking at whether a disability became severe. For example, if there is medical evidence of specialist care being needed, this could support a disability claim.

[48] The Appellant says she had no psychiatric service in Prince Rupert.[28] I take this to mean that she couldn't access necessary mental health care.

[49] In 2021, Dr. Fawell wrote that the community wasn't supported by psychiatric or psychological services at the time. Dr. Fawell further wrote that they couldn't refer the Appellant to Vancouver, Terrace, or Prince George.[29]

[50] I wrote to the Appellant and asked her to explain this contradiction.[30] She didn't respond.

[51] I prefer the explanation that the Appellant didn't require specialist mental health care during the window period. I think this for the following reasons:

[52] First, the Appellant had prior mental health care. She had mental health assessments and treatment with a variety of care providers between 2013 to 2015.[31]

[53] I don't accept that the Appellant couldn't access **any** psychiatric services if she needed this treatment. Dr. Fawell didn't say why they were not able to refer her to other regions for services. Because of this gap, I didn't rely on Dr. Fawell's explanation of why there were no mental health referrals or mental health services during the window period.

[54] Second, the medical evidence supports that the Appellant used electronic means to meet with a psychologist at least six times in 2014. She found the videoconference

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[28] See GD1-7.
[29] See GD1-22.
[30] See GD7.
[31] See GD2-336 to 338, 451, 468 to 470, and 471 to 491.

sessions helpful.[32] I didn't see any reason why she could not continue to use electronic means to access services with other service providers, if needed.

[55] Third, the Appellant was referred out of her local community for physical medical needs. For example, she had an upcoming foot appointment in Vancouver in the fall of 2016.[33]

[56] Fourth, Dr. Fawell noted that the Appellant had an excellent response to her depression medication since August 2015.[34] This supports that the Appellant had effective mental health treatment.

[57] 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 her from earning a living at any type of work, not just her usual job.[35]

– **The Appellant could work in the real world**

[58] The 2016 General Division didn't consider the Appellant's personal characteristics in the real world. This is because the disability analysis ended with a finding that the Appellant didn't follow medical advice. Because of this, I must conduct a real-world analysis in this decision.

[59] 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

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[32] See GD2-469.
[33] See GD5-19.
[34] See GD1-19.
[35] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

[60] These factors help me decide whether the Appellant could work in the real world—in other words, whether it is realistic to say that she can work.[36]

[61] I find that the Appellant could work in the real world.

[62] The Appellant's good personal characteristics support employability. She had just less than ten years before the standard age of retirement. Her age is the largest barrier. Retraining wouldn't likely allow her enough time to re-enter the workforce. There is no evidence of a language barrier. She has high school and college education. She spent her career working in an industrial warehouse. She is likely suited to direct entry work outside of her field.

[63] When I factor in the Appellant's functional limitations, she had difficulty with her concentration and focus, motivation, emotional and mood regulation, and fatigue. This tells me that she had cognitive and emotional struggles. It doesn't persuade me that she didn't have any residual work capacity during the window period.

[64] The Appellant had left foot pain, which caused difficulty with prolonged walking and standing. Heavy physical labour work wouldn't have been suitable.

– **The Appellant didn't try to find and keep a suitable job**

[65] If the Appellant could work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical conditions.[37]

[66] The evidence doesn't support that Appellant made any efforts to work or retrain.

[67] I find that the Appellant hasn't shown that she was regularly incapable of any substantially gainful work during the window period. Therefore, I can't find she had a disability that became severe between August 11, 2016, and December 31, 2016.

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[36] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[37] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

Conclusion

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

[69] This means the appeal is dismissed.

Selena Bateman
Member, General Division – Income Security Section