



[TRANSLATION]

Citation: *KH v Minister of Employment and Social Development*, 2024 SST 220

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: K. H.

Respondent: Minister of Employment and Social Development
Representative: Yanick Bélanger

Decision under appeal: General Division decision dated
May 23, 2023(GP-21-2445)

Tribunal member: Jude Samson

Type of hearing: Videoconference
Hearing date: January 31, 2024
Hearing participants: Appellant
Respondent's representative

Decision date: March 5, 2024
File number: AD-23-794

Decision

[1] I am dismissing the appeal of the Applicant, K. H. She isn't eligible for a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Applicant applied for a CPP disability pension. She says that she is unable to work because of fibromyalgia, fatigue, and depression. She also has anxiety attacks and migraines. In addition, she has suicidal ideation, agoraphobia, arthritis, osteoarthritis, and Raynaud's disease.

[3] The Minister of Employment and Social Development (Minister) denied the Applicant's application. It found that she didn't have a severe and prolonged disability under the *Canada Pension Plan* by September 30, 2013.

[4] The Applicant appealed the Minister's decision to the Social Security Tribunal's General Division. It dismissed the appeal.

[5] The Applicant then appealed the General Division decision to the Appeal Division. I gave the Applicant permission to appeal and took a fresh look at the case.¹ But I find that the Applicant isn't eligible for a disability pension.

Issue

[6] Did the Applicant have a severe and prolonged disability by September 30, 2013?

Analysis

[7] To be eligible for a CPP disability pension, a person has to prove they had a severe and prolonged disability by the end of their minimum qualifying period (MQP).

¹ See section 58.3 of the *Department of Employment and Social Development Act*.

The Applicant's MQP ended in December 2012 with the option to extend it to September 30, 2013.²

[8] A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. The severity test must be analyzed in a real world context.³ This means that when deciding whether a person's disability is severe, I must consider their overall condition and factors like age, education level, language proficiency, and past work and life experience.⁴

[9] I also note the following important information from the Federal Court of Appeal:

- The severity of the disability isn't based on the applicant's incapacity to perform their regular job, but rather any substantially gainful occupation.⁵
- The severity of the disability under the *Canada Pension Plan*⁶ is determined by the capacity to work, not by the diagnosis or description of the illness.
- In cases where there is evidence of work capacity, the applicant must show that they have made efforts to obtain and maintain a job but have been unsuccessful because of that health condition.⁷

The Applicant wasn't severely disabled by September 30, 2013

[10] It is clear that the Applicant had health issues for much of her life. It is also clear that these issues affected her ability to earn a living. I have great sympathy for the Applicant and the difficulties she has faced in contributing to her family's finances.

² See minimum qualifying period (MQP) worksheet at GD2-96.

³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁴ See *Bungay v Canada (Attorney General)*, 2011 FCA 47 at para 8.

⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248; and *Patterson v Canada (Attorney General)*, 2009 FCA 178.

⁶ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁷ See *Inclima v Canada (Attorney General)*, 2003 FCA 117 at para 3.

[11] Even though the Applicant's condition has worsened over time, the Applicant said at the hearing that she already had severe functional limitations in September 2013 that prevented her from working. In that regard, the Applicant highlighted her health issues that existed before September 30, 2013—depression, chronic pain, atrial fibrillation (irregular and often very rapid heartbeat), sleep apnea, and high blood pressure.

[12] I recognize that the Applicant had functional limitations in 2013. But I cannot find that she had a severe disability at that time.

[13] The presence of certain conditions doesn't mean that a person is unable to work. On the contrary, the Applicant worked in 2014 and 2016. Also, the evidence shows that her health worsened more rapidly in 2016. That is when the Applicant's disability could have gotten severe.

– **The Applicant had a substantially gainful occupation in 2014**

[14] The Applicant's substantially gainful occupation in 2014 is inconsistent with a severe disability in September 2013.⁸

[15] The Applicant worked for the provincial government from November 2013 until December 2014. She says that this work was intermittent. She says that she was able to do this work because it was very light, there were many accommodations in place, and she had time to recover between shifts.

[16] The record of hours worked during this period supports that the Applicant's work was intermittent.⁹ But it also shows that she often worked more than 40 hours per week.¹⁰ So, while a supervisor confirms that she had significant work accommodations in 2016, there is no similar evidence for when she worked in 2013 and 2014.¹¹

⁸ See *Miller v Canada (Attorney General)*, 2007 FCA 237.

⁹ See GD2-42 to GD2-47.

¹⁰ In May 2014, the Claimant worked the most hours in a week, 66 hours.

¹¹ See GD2-39 to GD2-41, and AD8-2.

[17] To assess whether the Applicant had a severe disability, I have to consider her ability to perform modified duties at her usual workplace, as well as part-time, sedentary, and seasonal work.¹² So, the Applicant's work in 2014 and 2016 is very important, since those are the years where she had some of the highest earnings of her life.¹³

– **The medical evidence doesn't show a severe disability in September 2013**

[18] It is clear that the Applicant had several health issues in 2013 and 2014. But it is also clear that she was able to cope with these issues to some extent for many years and was even able to work from time to time.

[19] The clinical notes show that the Applicant saw her family doctor a few times in 2013 and 2014. She mostly reported symptoms like fatigue, hot flashes, irregular heartbeat, occasional sciatica pain, and muscle pain.¹⁴ But they don't show functional limitations that would prevent the Applicant from doing substantially gainful work.

[20] By contrast, the medical evidence shows the Applicant's condition worsened significantly in 2016. For example, the Applicant underwent a psychiatric assessment in 2018, during which she reported that she had been going through difficult times since the winter of 2016.¹⁵

[21] Also, the Applicant reported an increase in pain to her nurse practitioner in November 2018.¹⁶ She then saw a rheumatologist in 2019, when she was diagnosed with fibromyalgia.¹⁷

[22] The Applicant's evidence is consistent with the medical evidence. She hasn't worked since 2016. On her application form, she said that she had been disabled since

¹² See *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158; *Wright v Canada (Attorney General)*, 2007 FC 1185; and *Bagri v Canada (Attorney General)*, 2006 FCA 134.

¹³ See GD2-90 and GD2-91.

¹⁴ See GD4-99 to GD4-134, GD4-181 to GD4-197, and AD5-7 and AD5-8.

¹⁵ See GD4-9 to GD4-13.

¹⁶ See GD2-219.

¹⁷ See GD2-232 to GD2-235.

August 2016.¹⁸ Then, at the hearing, the Applicant confirmed that her condition had worsened significantly since 2016.

[23] The Applicant's age, education level, language proficiency, and past work and life experience didn't affect her ability to work in September 2013.

[24] In short, I find that the Applicant didn't have a severe disability in September 2013, and that she isn't eligible for a CPP disability pension either.

[25] Based on this finding, I don't have to consider whether the Applicant had a prolonged disability.

[26] I sympathize with the Applicant's situation. She clearly needs help. But I have no choice but to apply the very restrictive definition of severe disability from the *Canada Pension Plan*. Unfortunately, this definition doesn't cover all individuals who have severe and prolonged impairments.¹⁹

[27] Before closing, I will just mention that Parliament passed a new law creating the Canada Disability Benefit. This benefit can't come soon enough for people like the Applicant (if she is eligible).

Conclusion

[28] I am dismissing the Applicant's appeal. She isn't eligible for a CPP disability pension.

Jude Samson
Member, Appeal Division

¹⁸ See GD2-71.

¹⁹ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 3.