



Citation: *Minister of Employment and Social Development v LP*, 2024 SST 72

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Érelégna Bernard

Respondent: L. P.
Representative: Chanel Scheepers

Decision under appeal: General Division decision dated March 15, 2023
(GP-21-1532)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference

Hearing date: January 15, 2024

Hearing participants: Appellant's representative
Respondent
Respondent's representative

Decision date: January 24, 2024

File number: AD-23-596

Decision

[1] I am allowing this appeal. The Respondent is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Respondent is a 57-year-old former construction worker and safety supervisor. She stopped working in July 2017 after experiencing shortness of breath. Although she has undergone rehabilitation, she hasn't worked since.

[3] The Respondent applied for a CPP disability pension in January 2020.¹ She said that she could no longer work because of emphysema and chronic obstructive pulmonary disease (COPD). She also said that she was disabled by glaucoma and a broken tailbone.

[4] The Minister of Employment and Social Development (Minister) refused the application after finding that the Respondent did not have a severe and prolonged disability as of December 31, 2020, the last time she had CPP disability coverage.²

[5] The Respondent appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and allowed the appeal. It found that the Respondent had been regularly incapable of substantially gainful employment since her coverage period.

[6] The Minister disagreed with that decision and applied for permission to appeal to the Appeal Division. Last year, one of my colleagues on the Appeal Division granted the Minister permission to appeal. Earlier this month, I held a hearing to discuss its case in full.

¹ See the Respondent's application for CPP disability benefits dated January 14, 2020, GD2-12.

² See the Minister's reconsideration refusal letter dated May 10, 2021, GD2-54.

[7] Now that I have considered submissions from both parties, I have concluded that the Respondent failed to show that she is eligible for a CPP disability pension. The evidence shows that the Respondent, while subject to some functional limitations, did not have a severe disability at the end of 2020 and thereafter.

Issue

[8] For the Respondent 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 Respondent's coverage ended on December 31, 2020.³

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.⁴ 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.⁵ The disability must be expected to keep the claimant out of the workforce for a long time.

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

Analysis

[10] I have applied the law to the available evidence and concluded that the Respondent did not have a severe and prolonged disability during her coverage period. I am satisfied that the Respondent's medical conditions at the time did not prevent her from regularly pursuing substantially gainful employment.

³ Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Respondent's CPP contributions are listed on her record of earnings at GD2-6.

⁴ See *Canada Pension Plan*, section 42(2)(a)(i).

⁵ See *Canada Pension Plan*, section 42(2)(a)(ii).

The Respondent does not have severe disability

[11] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.⁶ I have reviewed the record, and I have concluded that the Respondent did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Respondent might have suffered from impairments during her coverage period, I couldn't find enough evidence to suggest that they rendered her incapable of all forms of work.

[12] In her application for benefits, the Respondent described her main disabling conditions as emphysema and COPD. She said that her right lung had a 7.5-cm bulla (air-filled space) and that her left lung had several smaller bullae that left her breathless after 10 to 15 minutes of activity.⁷

[13] The Respondent also said that glaucoma had left her with a 20-percent loss of her peripheral vision. She said that she cracked her coccyx in 2019, leaving her unable to sit for extended periods.

[14] She rated her ability to carry out many daily activities as fair to poor.

[15] The Respondent testified that she worked as a construction safety officer for many years. She said that it was a well-paying, highly physical job that required her to climb scaffolds and ladders and work at high elevations with a harness. In 2016, she started to lose her breath and her energy. Her co-workers did their best to help her but, after a few months, she felt unable to carry on. In July 2017, she went on short-term leave.

[16] Since then, the Respondent has quit smoking and participated in at least two rehabilitation programs. Although she saw some improvement in her physical endurance, she has never felt capable of returning to her old job.

⁶ See *Canada Pension Plan*, section 44(1).

⁷ See the Respondent's application for CPP disability benefits dated January 14, 2020, GD2-16.

[17] Although the Respondent may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity.⁸ 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.

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

The Respondent's medical reports don't suggest a severe disability

[19] The Respondent had to provide medical evidence of functional limitations that affected her ability to work by December 31, 2020.⁹ However, the reports on file don't indicate a severe disability.

The family doctor

[20] Dr. O'Grady has been the Respondent's family physician for 29 years. As such, he has been well-positioned to observe and document her medical problems and their impact on her life. His file indicates the following:

- In October 2017, the Respondent was investigated for shortness of breath, and a CT scan showed signs of emphysema in both lungs;¹⁰
- In December 2017, Dr. O'Grady wrote that the Respondent was capable of moderate physical activity, but limited by shortness of breath, marked by decreased air entry, prolonged expiratory phase, and scattered wheeze;¹¹
- At the same time, Dr. O'Grady said that, although she could not return to her duties on a part-time or modified basis, her fitness to return to work would be determined pending completion of her pulmonary rehabilitation program;¹²

⁸ 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*.

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377 and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See office note dated October 2, 2017 by Dr. Patrick O'Grady, family physician, GD2-149.

¹¹ See Dr. O'Grady's attending physician's statement for the Respondent's long-term disability claim dated December 14, 2017, GD2-197.

¹² See Dr. O'Grady's attending physician's statement dated December 14, 2017, GD2- 197.

- In June 2018, the Respondent completed a respiratory rehabilitation program and felt ready to go back to work, although she would be barred from dusty or smoky environments;¹³
- In October 2018, the Respondent reported that she was exercising and wanted to be retrained;¹⁴ and
- In January 2019, the Respondent's recovery had apparently plateaued, but she reported coccyx pain, and it didn't seem "like she could go back to work like she is."¹⁵

[21] These notes indicate that the Respondent's pulmonary symptoms improved with treatment. They also show that she was ready to try a new job when she sustained an injury to her tailbone. I will later consider the impact of that injury on her employability. However, it appears that shortness of breath was not preventing the Respondent from at least attempting alternative employment as of early 2019.

[22] Later, after the Respondent had applied for CPP disability benefits, Dr. O'Grady prepared reports that took a more pessimistic view of the Respondent's condition. In March 2022, Dr. O'Grady reported that the Respondent had been diagnosed with advanced COPD, which permitted her to walk for no more than ten minutes, slowly and with breaks on flat surfaces. Dr. O'Grady also noted that the Respondent could not get dressed without losing her breath.¹⁶ In October 2022, Dr. O'Grady noted a limited ability to walk, use stairs, and carry groceries. He declared the Respondent unable to work at any type of occupation.¹⁷

¹³ See Dr. O'Grady's office note dated June 25, 2018, GD2-132.

¹⁴ See Dr. O'Grady's office note dated October 31, 2018, GD2-134.

¹⁵ See Dr. O'Grady's office note dated January 19 2019, GD2-125.

¹⁶ See disability tax credit form completed by Dr. O'Grady on March 29, 2022, GD4-4.

¹⁷ See Dr. O'Grady's narrative report dated October 25, 2022, GD8-5.

[23] However, Dr. O’Grady’s recent reports contrast with his prior office notes, in which, as late as October 2018, he noted that the Respondent felt well enough to be retrained. But there is nothing in the medical file to indicate that the Respondent’s lung condition significantly deteriorated between 2018 and 2022.

[24] Dr. O’Grady’s recent reports also stand at odds with his later office notes. In March 2022, Dr. O’Grady noted that the Respondent had put on weight and that her breathing was worse with activity.¹⁸ However, after Dr. O’Grady increased the Respondent’s inhalant dosage, the Respondent reported some improvement.¹⁹ At around the same time, a chest x-ray showed no abnormalities, and a pulmonary function test (PFT) indicated minimal airflow limitation.²⁰ By May 2022, the Respondent was “feeling all better” after taking an antibiotic for a COPD exacerbation.²¹

[25] Dr. O’Grady’s treatment notes suggest that the Respondent’s emphysemic symptoms were real but manageable with medication. Even if the Respondent’s lung condition deteriorated between 2018 and 2022, the most compelling evidence shows that any such deterioration occurred in early 2022 — well after her coverage period ended.

The respirologist

[26] For the most part, the Respondent’s pulmonary condition has been treated by her family doctor. The one time she saw a treatment specialist was November 2017, when she was referred to Dr. Brake, a respirologist.²² In his report, Dr. Brake referred to a previous PFT, which showed mild to moderate airflow obstruction with a significant bronchodilator effect. He noted that she had a cough that produced clear and bubbly sputum and complained of pain during flare-ups. On examination, the Respondent exhibited shortness of breath after walking five minutes on a treadmill and climbing ten stairs. Dr. Brake assigned the Respondent a 3/5 on the Medical Research Council

¹⁸ See Dr. O’Grady’s office note dated March 8, 2022, GD8-42.

¹⁹ See Dr. O’Grady’s office note dated March 30, 2022, GD8-40.

²⁰ See pulmonary function test results dated April 8, 2022, GD8-82.

²¹ See Dr. O’Grady’s office note dated May 31, 2022, GD8-72.

²² See reported dated November 17, 2017 by Dr. David Brake, respirologist, GD2-142.

dyspnea scale, indicating that she walked slower than most people — that is, she would be expected to have to stop after walking a mile or so at her own pace.

[27] Dr Brake's findings clearly show functional limitations, but they do not suggest that the Respondent would be precluded from performing, or attempting to perform, all forms of work. Dr. Brake did not note any significant physical restrictions at the time of his examination, and he offered hope that further treatment would improve the Respondent's condition. He noted that her flare-ups had already responded well to prednisone, and he recommended that she enroll in a pulmonary rehabilitation program.

The physiotherapists

[28] The Respondent has by now participated in two pulmonary rehabilitation programs, with positive results. Starting in October 2018, the Respondent attended CBI Health Group for a 12-week program of exercise and education.²³ In the initial assessment, the goal was to increase the Respondent's endurance to the point where she could gradually return to her previous job. After several weeks, the Respondent demonstrated improvements in her treadmill tolerances, walking for six minutes without a break and tolerating a pace of 2.4 mph for 20 minutes.²⁴ On discharge, the Respondent demonstrated a slight decrease in walking speed and endurance and did not meet the lifting requirements for her previous job. However, she was found to have no limitation for sitting or standing.²⁵

[29] The Respondent completed another 12 weeks of rehabilitation in early 2020. On discharge, her physiotherapist noted that she was able to exercise for 45 to 60 minutes and walk three or four times per week at home for 60 minutes. He said that she had done well overall.²⁶

²³ See initial assessment report dated October 30, 2018 by Matthew McKay, physiotherapist at CBI Health Group, GD2-230

²⁴ See Matthew McKay's progress report dated November 19, 2018, GD2-233.

²⁵ See Matthew McKay's discharge report dated January 14, 2019, GD2-236.

²⁶ See discharge summary dated February 20, 2020 by S. Butts, R.N., and John Boudreau, physiotherapist, both with Cape Breton Heart and Lung Wellness Centre, GD8-15.

[30] At the hearing, the Respondent insisted that this last rehabilitation report misrepresented her true capacities. She maintained that it left out the fact that she had to rest every ten minutes during her exercises and was exhausted by the end of it all. However, I find it unlikely that a trained professional would leave out such important details, especially in a report prepared in the context of treatment.

[31] The Respondent might have had breathing problems at the end of her coverage period, but the available medical evidence suggests that her respiratory condition was less than severe. In my view, the Respondent has some physical limitations as of December 31, 2020, but not enough to prevent her from attempting to work at an alternative job.

The Respondent's other medical conditions do not contribute to disability

[32] In addition to emphysema-induced breathlessness, the Respondent cited a vision impairment and a cracked tailbone as contributors to her disability. After her application, the Respondent claimed that she was also prevented from working by rheumatoid arthritis.

[33] Having reviewed the Respondent's medical records, I don't see how these conditions contributed to a disability, either by themselves or in combination with others.

- The Respondent has been diagnosed with glaucoma, but a diagnosis by itself cannot be equated with a disability. I saw little evidence that any vision impairment would have significantly affected the Respondent's ability to perform all forms of work by the end of her coverage period. In September 2020, after a routine eye exam, an optometrist advised the Respondent to see an ophthalmologist immediately.²⁷ She did not see one until January 2022, when Dr. Kettle confirmed her diagnosis and adjusted her medications.²⁸ He subsequently performed a series of laser surgeries

²⁷ See report and referral note dated September 8, 2020 by Dr. Thomas Pottle, optometrist, GD8-37. At that time, Dr. Pottle noted that the Respondent's "IOPs [inter-ocular pressures] appear to be WNL [within normal limits]."

²⁸ See report dated January 31 2022 by Dr. Hiron Kettledas, ophthalmologist, GD8-50.

designed to relieve the Respondent's inter-ocular pressure.²⁹ These procedures apparently went well,³⁰ but the Respondent says that she was still left with a 20 percent reduction in her peripheral vision. There is no mention of such a reduction in the available medical reports but, even if true, it would not have affected the Respondent's capacity to at least attempt alternative sedentary employment.

- The Respondent says that she cracked her tailbone in early 2019, but the file contains no objective medical evidence to confirm such an injury. Dr. O'Grady's office notes contain a single reference to the Respondent's complaint of "ongoing pain" in her coccyx,³¹ but there is no x-ray or other imaging report to support that claim. In any event, even if the Respondent did fracture her tailbone, she offered no evidence, beyond her own testimony, that it had failed to heal properly.
- The Respondent maintains that she has rheumatoid arthritis, but she did not mention this condition in her application for benefits, raising questions about its severity.³² In testimony, she has described widespread pain and increasing limitations in her feet, hips, coccyx, wrists, and hands. She says that she cannot even make a fist, but her family physician has never mentioned arthritis in his notes and reports, nor has he referred her to a specialist who might be better positioned to devise a treatment plan. It is true that Dr. O'Grady prescribed the Respondent with Meloxicam, an anti-inflammatory painkiller, but this by itself is not compelling evidence that she has a serious arthritic condition. The Respondent suggested that Cape Breton Island is an underserved area, but I think it is reasonable to assume that if her condition

²⁹ Dr. Kettledas' reports document a bilateral YAG-PI, MLT, and SLT. See reports dated August 16, 2022, (AD4-15), September 20, 2022 (AD4-14), and January 9, 2023 (AD4-10).

³⁰ See report dated December 12, 2022 (AD4-11), in which Dr. Kettledas noted "no new changes or concerns."

³¹ See Dr. O'Grady's office note dated January 21, 2019, GD2-125.

³² The Respondent later claimed to have been diagnosed with arthritis in her request for reconsideration. See submission dated October 21, 2020, GD2-5.

were sufficiently serious, Dr. O'Grady, or any competent general practitioner, would have sought additional help.

[34] In the end, there simply wasn't enough objective medical evidence to support what the Respondent says about the debilitating effects of her glaucoma, tailbone pain, or arthritic pain. I don't doubt that the Respondent experiences some loss of vision and joint pain, but I don't see how these symptoms, even in combination with her breathlessness, prevent her from attempting alternative employment.

Independent medical examinations suggest that the Respondent had capacity

[35] The Respondent has been treated by physicians, specialists, and rehabilitation consultants, but she has also undergone two so-called independent medical examinations (IMEs) pursuant to her long-term disability claim. It is true that, because these IMEs were commissioned by the Respondent's workplace insurance provider, they may be less than objective. However, they do have the virtue, unlike reports by her treatment providers, of assessing the Respondent as a whole person while focusing on, not just on her medical conditions, but also on her functional capabilities:

- An August 2018 functional ability evaluation found the Respondent to be capable of an eight-hour workday at a light level, with minor limitations with walking, occasional limitations with crawling and bilateral firm grasp, as well as frequent limitations with balance and above shoulder reaching. The report concluded that any work pursued would need to take into consideration medical restrictions outlined by her treating physicians.³³
- A March 2019 transferrable skills analysis found that, although the Respondent could not return to her previous job, she was capable of full-time sedentary work in occupations such as an administrative officer, administrative assistant, or general office support worker, given her functional profile and transferable skills. The analysis also found that the Respondent

³³ See functional ability evaluation report dated August 23, 2018 by Heather Boudreau, occupational therapist, GD2-221.

had been on two courses short of completing an occupational health and safety diploma program online.³⁴

[36] Both reports say that, even with her various impairments, the Respondent retained considerable functionality after she left her last job. Their findings suggest that she remained capable of a range of physically undemanding jobs in late 2018 and early 2019. In the absence of any compelling evidence that her condition deteriorated in the following two years, it appears that the Respondent had residual capacity as of December 31, 2020.

The Respondent's background and personal characteristics didn't affect her employability

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

[38] The leading case on the interpretation of "severe" is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Respondent as a "whole person" in a real-world context.³⁵ Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances."

[39] When deciding whether the Respondent 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 Respondent could work in the real world.

[40] The Respondent was 54 years old when she last had CPP disability coverage. She was no longer young at the end of 2020, but she was still a decade from the typical age of retirement. The Respondent has only a high school education, but that is balanced by a lengthy work record — one that culminated in a position of considerable

³⁴ See transferrable skills analysis report dated March 13, 2019 by François Paradis, vocational rehabilitation specialist, GD2-82.

³⁵ See *Villani v Canada (Attorney General)* 2001 FCA 248.

responsibility. At her transferable skills assessment, her last job as a construction safety supervisor was described as follows:

Her duties included making sure that equipment, materials and production processes were safe for employees and the public. She developed, implemented and evaluated health and safety programs and strategies. She participated in safety audits and programs and advised on emergency response when required.³⁶

[41] At the hearing, the Respondent insisted that she had no experience with computers, but she seems to have said something different during the transferable skills assessment:

Computer Skills: [The Respondent] reported being self taught. She used an in-house computer software in her last place of employment. She is currently using her computer to complete online studies (OHS diploma program) but otherwise does not have any MS Office skills or typing skills.³⁷

[42] The Respondent's last job was dangerous and physically demanding, but it also required people and administrative skills that would be assets in the labour market. I am satisfied that, even with her shortness of breath and other medical issues, she had residual capacity to at least attempt another career.

The Respondent has not attempted alternative employment

[43] The Respondent left her last job because of diminished physical endurance, but after receiving treatment, she did not seek a job that might have required less exertion. As a result, I was unable to properly assess the severity of the Respondent's disability. That's because she failed to make a serious effort to pursue alternative employment.

³⁶ See transferrable skills analysis report dated March 13, 2019, GD2-86.

³⁷ See transferrable skills analysis report dated March 13, 2019, GD2-85.

[44] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find work that might be better suited to their impairments:

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 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 [emphasis added].³⁸

[45] 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. On top of that, disability claimants must make **meaningful** attempts to return to work.³⁹ 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.⁴⁰

[46] The Respondent testified that she loved her job and wanted to return to work. Asked why she had never attempted an office or retail job, she replied that, because of her medical conditions, she woke up tired and took too long to get ready. She insisted that she would not have been able to offer predictable job performance.

[47] I am satisfied that the Respondent had at least some work capacity — enough to trigger the obligation to pursue alternative employment. As we have seen, the Respondent was found to be able to walk for up to 60 minutes at a time. She was found to be capable of a variety of sedentary jobs. She has never been found to have limitations for extended sitting.

[48] Even though there was little on the record to suggest that her functional limitations prevented her from performing lighter work, the Respondent never attempted

³⁸ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³⁹ 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.

⁴⁰ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

to work, look for work, or retrain after leaving her job as a construction safety supervisor.

I don't have to consider whether the Respondent has a prolonged disability

[49] A disability must be severe **and** prolonged.⁴¹ Since the Respondent has not proved that her disability is severe, there is no need for me to assess whether it might also be prolonged.

Conclusion

[50] The Respondent has emphysema, COPD, and other medical conditions, but the available evidence suggests that they did not prevent her from regularly pursuing a substantially gainful occupation during her coverage period. What's more, the Respondent 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 Respondent had a severe disability as of December 31, 2020.

[51] The appeal is allowed.



Member, Appeal Division

⁴¹ See *Canada Pension Plan*, section 42(2)(a).