



Citation: *RO v Minister of Employment and Social Development*, 2024 SST 94

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: R. O.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated May 4, 2023 (issued by
Service Canada)

Tribunal member: Virginia Saunders
Type of hearing: Teleconference
Hearing date: January 11, 2024
Hearing participants: Appellant
Decision date: January 30, 2024
File number: GP-23-1830

Decision

[1] The appeal is dismissed.

[2] The Appellant, R. O., isn't eligible to have his Canada Pension Plan (CPP) disability pension start before August 2022. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant worked as a driver and labourer for a city in Ontario from 1984 to 2018. He gradually developed back pain. The pain got worse after he had a fall in 2016. He started to have neck pain as well. He continued in his job for over a year, but he often missed work because of his pain. He quit his job in May 2018, because he had used up all his sick leave, his employer didn't have lighter duties for him, and his doctor told him he should retire.

[4] For the next four winters, the Appellant worked for private companies as a snow plow driver. He found this difficult, but he didn't have to drive very often. He was mostly on-call. However, after the winter of 2021-2022, he decided he wouldn't return the next year. He was in too much pain after a day of work, and he needed several more days to recuperate.

[5] The Appellant applied for a CPP disability pension in April 2022. The Minister of Employment and Social Development (Minister) approved the application, with payments to start in August 2022. This was based on the Minister's deciding the Appellant became disabled in April 2022.¹

[6] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division. He says that he became disabled before April 2022.

¹ After a person becomes disabled, there is a four-month waiting period before payments start. See section 69 of the *Canada Pension Plan*

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he has a disability that was severe and prolonged before April 2022. There is no dispute that he was disabled by April 2022, and that he continues to be disabled.

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

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

[10] 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 was severe before April 2022. If the Appellant was capable regularly of doing some kind of work that he could earn a living from, then he isn’t entitled to receive a disability pension.

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

[12] This means the Appellant’s disability can’t have an expected recovery date. The disability must have been expected to keep him out of the workforce for a long time.

[13] The Appellant has to prove he had a severe and prolonged disability before April 2022. He has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he was disabled.

Reasons for my decision

[14] I find that the Appellant hasn’t proven he had a severe and prolonged disability before April 2022.

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.

The Appellant's disability wasn't severe before April 2022

[15] The Appellant's disability wasn't severe before April 2022. I reached this finding by considering several factors, which I explain below.

– The Appellant's condition affected his ability to work before April 2022

[16] The Appellant has chronic back and neck pain, type 2 diabetes, and congestive heart failure. However, I can't focus on his diagnoses.⁴ Instead, I must focus on whether he has functional limitations that got in the way of him earning a living before April 2022.⁵ When I do this, I have to look at all of his medical conditions (not just the main one) and think about how they affected his ability to work.⁶

[17] The Appellant's diabetes and congestive heart failure are well-controlled. They didn't affect his ability to work.⁷ However, his chronic back and neck pain did affect his ability to work.

[18] In his disability application, the Appellant described difficulties with standing, walking, bending, kneeling, and squatting. He had trouble picking up two bags of groceries. He couldn't sit for long periods. He could drive, but he had to get out and walk around on long trips.⁸

[19] The medical evidence supports what the Appellant said.

[20] The Appellant's nurse practitioner said the Appellant's back pain started in 1986. It got worse, with added neck pain, in 2016. His pain caused the following functional limitations:

- He couldn't walk more than a block without having to take a rest break.
- He was uncomfortable sitting for more than two hours.
- He couldn't stand for more than 30 minutes without a rest break.

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

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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

⁷ See GD2-106-107.

⁸ See GD2-54.

- He had pain when lifting items such as a load of laundry.⁹

[21] The Appellant's disability application and the nurse practitioner's medical report were both written in April 2022. However, I accept that they describe the Appellant's condition before then as well. The nurse practitioner said she started treating the Appellant in 2019. I believe what the Appellant told me about how he struggled when he worked for the city and when driving a snow plow. I accept his evidence that he started seeing his family doctor about his pain in 2016. The nurse practitioner is at the same clinic and has taken over his care.

[22] The medical evidence supports that the Appellant's back and neck pain has affected his ability to work since 2016. By 2018, it prevented him from working in a full-time job that was physically demanding. It also prevented him from doing sedentary work unless he could get up and move around periodically.

– **The Appellant could work in the real world before April 2022**

[23] 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.¹⁰ So, I have to decide if he could regularly do other work before April 2022.

[24] When I am deciding whether the Appellant could work, I can't just look at his medical conditions and how they affected what he could do. I must also consider factors such as his age, level of education, language abilities, and past work and life experience. These personal factors help me decide whether the Appellant could work in the real world—in other words, whether it is realistic to say that he could work.¹¹

[25] I find that the Appellant could work in the real world before April 2022. I based this finding on his personal factors, and on the fact that he worked regularly for approximately four months each winter from November 2018 to April 2022.

⁹ See GD2-104-105.

¹⁰ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

– **The Appellant’s personal factors support that he could work before April 2022**

[26] The Appellant’s personal factors support that he could do some types of work.

[27] The Appellant was 56 years old when he had to quit his long-term job in 2018. His age would have affected his employability because he was within 5 or 10 years of when people normally retire in Canada. He spent his whole working life doing physical jobs. He had on-the-job training in areas such as propane handling and workplace safety, but he has no transferable skills that would help him do clerical or administrative work.

[28] However, the Appellant has a high school diploma from Ontario. He has no issues with reading, writing, or understanding English. This would have made him a more attractive candidate for sedentary or part-time work, including work that required short-term training.

[29] Finally, the Appellant’s seasonal work as a snow plow driver shows that his personal factors didn’t affect his ability to find and perform work that was suited to his limitations.

– **The Appellant was regularly able to do suitable work before April 2022**

[30] The Appellant’s work as a snow plow driver shows that he could work in the real world before April 2022.

[31] After leaving his job with the city, the Appellant worked full-time for snow removal contractors as follows:

- December 3, 2018, to March 20, 2019
- December 1, 2019, to March 31, 2020
- December 7, 2020, to March 31, 2021
- November 15, 2021, to April 15, 2022¹²

¹² See GD2-10 and GD2-12.

[32] I accept the Appellant's evidence that he spent a significant amount of time being on-call rather than actually driving a snow plow. He argued that he was mostly paid to do nothing but wait for a phone call. He said this was the only reason that he could do the job.

[33] That may be the case, but it doesn't mean the Appellant's employment wasn't a real occupation. There are other jobs where an employee is paid to be available or present, with little or no activity required for long periods. The Appellant was paid to be ready to work when he was called in. He said that occasionally he wouldn't answer his phone, so that he wouldn't have to go into work. However, there's no evidence that this happened often enough for anyone to notice.

[34] The Appellant didn't have a benevolent employer. A benevolent employer is one that accommodates an employee beyond what is required in the competitive marketplace.¹³

[35] The Appellant's employer gave him a lumbar support. He was allowed to get out of the plow to stretch, and he could take his time doing his route. But these are typical accommodations. There is no evidence that they caused hardship for the employer. The Appellant was available often enough and did his job well enough that he was hired for four seasons. The only reason his job ended was because the contract ended each spring.¹⁴

[36] The Appellant's snow removal job wasn't substantially gainful. A substantially gainful occupation pays at least the maximum amount a person could get for a CPP disability pension.¹⁵ The Appellant would have had to earn approximately \$16,000.00 to \$17,000.00 in each season for the snow removal job to be substantially gainful. He earned the following:

- \$3,003.64 in December 2018

¹³ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

¹⁴ See GD2-11 and GD2-13.

¹⁵ See section 68.1 of the *Canada Pension Plan Regulations*.

- \$8,824.80 for January to March 2019, and December 2019
- \$8,532.00 in 2020
- \$12,736.00 in 2021
- \$11,594.00 in 2022¹⁶

[37] However, the fact that the Appellant was regularly able to do this job for four months each year—meaning, he was able to be on-call full-time and to drive the snow plow as needed—is evidence that he was capable of doing suitable work at other times of the year or at a different job that lasted more than four months. If he had worked more than four months, he could have earned more than the substantially gainful amount in each year.

[38] The Appellant argued that he could not have done similar work for more than four months. But if there is evidence of work capacity, the Appellant must show that he tried to find and keep a suitable job. He must also show his efforts weren't successful because of his medical conditions.¹⁷ Finding and keeping a suitable job includes looking for a job he could do with his functional limitations.¹⁸

[39] The Appellant had work capacity. He didn't look for other work. Therefore, I can't find he had a severe disability before April 2022.

Conclusion

[40] I find that the Appellant isn't eligible to receive his CPP disability pension before August 2022 because his disability wasn't severe before April 2022.

[41] Because I have found that his disability wasn't severe, I didn't have to consider whether it was prolonged.

¹⁶ See GD2-6, GD2-10, and GD2-12.

¹⁷ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

¹⁸ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[42] This means the appeal is dismissed.

Virginia Saunders
Member, General Division – Income Security Section