Citation: *GC v Minister of Employment and Social Development*, 2024 SST 88

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. C.
Representative:	Nicole Jule-Thimm
Respondent:	Minister of Employment and Social Development
Representative:	Joshua Toews

Decision under appeal:	General Division decision dated June 16, 2023 (GP-22-458)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	January 17, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 29, 2024
File number:	AD-23-828

Decision

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

Overview

[2] The Appellant is a 58-year-old former cook and daycare worker. In April 2016, she left her job because of osteoarthritic pain in her left knee. She had knee replacement surgery six months later, but her recovery was slow, and she strained tendons on at least two occasions.

[3] In meantime, her right knee was increasingly subjected to stress. In October 2020, it too was replaced.

[4] The Appellant applied for a CPP disability pension in May 2020. In her application, she claimed that she could no longer manage the physical demands of her job.[1]

[5] The Minister of Employment and Social Development refused the Appellant's application after determining that she did not have a severe and prolonged disability as of December 31, 2018, the last time she had CPP disability coverage.[2]

[6] 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, although the Appellant had a physical impairment, she still had the capacity to perform regular, substantially gainful employment.

[7] The Appellant then applied for permission to appeal to the Appeal Division. Last year, 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.

[8] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she was disabled under the CPP. The evidence shows

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[1] See the Appellant's application for CPP disability benefits dated May 8, 2020, GD2-24.
[2] See Minister's reconsideration decision letter dated November 23, 2021, GD2-4.

that the Appellant, while subject to some functional limitations, was not disabled from all forms of regular employment during her coverage period.

Issue

[9] For the Appellant to succeed, she must prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agreed that the Appellant's coverage ended on December 31, 2018.[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.

[10] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2018.

Analysis

[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 Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant has had two knee replacements, I couldn't find enough evidence that they prevented her from regularly pursuing substantially gainful employment at the end of 2018.

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[3] 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 earnings and contributions are listed on her updated record of earnings at GD2-48.
[4] See section 42(2)(a)(i) of the *Canada Pension Plan*.
[5] See *Canada Pension Plan*, section 42(2)(a)(ii).
[6] See *Canada Pension Plan*, section 44(1).

[12] In her May 2020 application for benefits, the Appellant said that she could no longer work because of bilateral knee osteoarthritis and injuries to her medial collateral ligament (MCL). She reported pain and stiffness in both knees, as well as locking and snapping on her left. She had received a total knee replacement on her left side and was awaiting the same procedure on her right. She rated most of her physical capabilities as fair to poor but reported no psychological or cognitive problems.

[13] At the hearing, the Appellant testified that she worked at a day care for nearly 20 years, cooking meals and cleaning the premises. She said that it was a physically demanding job that required her to be on her feet all the time. She had to regularly kneel, bend over, and climb stairs.

[14] She started feeling pain her left knee in early 2016. The pain quickly got worse and, within a year, she was diagnosed with osteoarthritis and an MCL injury and given an artificial knee. She soon started feeling pain in her right knee, she thinks because it bore most of her weight during her rehab and recovery. Her left knee had never really healed properly, but it suffered a major setback when she sustained a second MCL injury sometime in 2018. The Appellant couldn't point to a specific incident that led to the injury, but she knows that something happened. Her right knee was replaced in November 2000, but it too remains painful.

[15] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity.[7] In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented the Appellant from performing suitable work during her coverage period. From what I can see, the Appellant was subject to some limitations at the time, but she was not incapacitated from all forms of work.

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

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[7] A 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.* In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

A diagnosis does not equate to disability

[17] The Appellant's medical file contains ample evidence that she suffered from osteoarthritic knee pain before December 31, 2018, but that doesn't necessarily mean she was disabled at the time. I can't focus on the Appellant's diagnoses.[8] Instead, I have to look at whether she had functional limitations that got in the way of her earning a living.

The medical evidence doesn't point to disability before December 31, 2018

[18] The Appellant's left knee was replaced during her coverage period, but there is nothing in her medical file to suggest that her surgery and recovery was unsuccessful.

[19] In August 2016, Dr. Cai Wadden, an orthopedic surgeon, completed an insurance questionnaire noting that the Appellant had osteoarthritic pain in her left knee for which a total replacement was planned. He said that improvement was expected in three to six months post-operatively with a return to work after the recovery period.[9]

[20] In January 2017, Dr. Wadden indicated that the Appellant was approximately three months post-operative from a left total knee replacement, that she was doing well with a knee brace, and that she had "no more [MCL] pain." Noting some residual stiffness, Dr. Wadden expected that the Appellant could return to work in three months.[10]

[21] In May 2017, Dr. Wadden examined the Appellant seven months after her surgery and found no restrictions other than stiffness. He hoped that she would be able to return to her old duties full-time, and he found that "she would certainly be able capable of alternative work."[11]

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[8] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[9] See Co-Operators long-term disability attending physician statement dated August 31, 2016 and completed by Dr. Cai Wadden, orthopedic surgeon, GD2-146.
[10] See Dr. Wadden's report dated January 28, 2017, GD2-87. It should be noted that this report is dated January 28, **2018**, but I am assuming the year is a typographical error; the report refers to "**three months** post-operative," and it is well documented elsewhere in the file that the Appellant's left knee replacement took place in October 2016.
[11] See Dr. Wadden's report dated May 26, 2017, GD2-173.

[22] Subsequent physiotherapy records documented post-operative improvements in the Appellant's condition:

- In May 2017, the Appellant rated her pain as zero on a scale of 10, and her score on the lower extremity functional scale indicated relatively low levels of activity limitation. She was recommended to a multidisciplinary program, after which she would "ease back to her regular work if her employer could accommodate her restriction regarding stairs."[12]

- In July 2017, having begun the multidisciplinary program, the Appellant reported an improvement in her ability to negotiate stairs and no difficulty with performing activities of daily living, although she did anticipate difficulty in carrying food on the stairs at work. According to her assessors, she demonstrated an improvement in range of motion of her left knee and functional tolerances. She was cleared to return to her old job on modified duties for the first three weeks.[13]

- In August 2017, the Appellant, having returned to modified duties four days per week, eight hours a day, reported that she was unable to safely descend two half-flights of stairs while carrying trays of food, because she could not use the hand railing for support. The Appellant's assessors determined that, since her functional status had plateaued, she would not benefit from further treatment.[14]

[23] Although the Appellant was unable to manage the duties of her old job, her treatment providers saw nothing to prevent her from trying another job. However, the Appellant says that she reinjured her left leg sometime 2018.

[24] The Appellant could not pinpoint a date for such an injury, nor could she say what might have caused it. The file contains no x-ray or other imaging report describing the injury's nature and extent. The first hint of the injury comes in August 2018, when Dr.

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[12] See CBI Health Centre report dated May 25, 2017 by Jacey Kelly, physiotherapist, and Chrissie McNevin, kinesiologist, GD2-163.
[13] See CBI Health Centre report dated July 10, 2017, GD2-166.
[14] See CBI Health Centre report dated August 16, 2017, GD2-170.

Wadden reported that the Appellant was now complaining of "ongoing pain."[15] After testing and imaging revealed no abnormalities, Dr. Wadden declared that he was "at a loss" to explain the Appellant's symptoms and referred her for a second opinion.

[25] By October 2018, Dr. Wadden was saying that the Appellant had sustained an MCL strain to her left knee. He noted a significant reduction in her range of motion, with 70 degrees of flexion and ongoing pain over her patella. Dr. Wadden concluded: "I don't think that she is yet able to return to work given the stiffness following this injury."[16]

[26] In November 2018, the Appellant was examined by another orthopedic surgeon. Dr. Scott Wotherspoon relayed the Appellant's complaint of persistent anterior pain and stiffness following her October 2016 left knee replacement. He noted that the ligament repair had healed well. He detected no tenderness around the knee and described it as "stable." He heard no crepitus (crackling in the joint), and he observed that the Appellant could walk fairly well, with a "very slight" antalgic gait. He said that the Appellant "denied any pain."[17]

[27] The reports before December 31, 2018 indicate that the Appellant made a good recovery after her left knee replacement — good enough that she was cleared to return to her old job. The Appellant's return to work was unsuccessful, but only because she could not manage stairs while her hands were full carrying trays of food. None of her treatment providers ever ruled out the possibility of alternative employment — in fact, they clearly stated that, even with her knee condition, she would be able to do other types of work.

[28] The Appellant says that she again injured her left knee in late 2018, but it remains unclear how much it affected her functionality. The Appellant insists that she has since experienced continuous intense pain, but none of the available medical evidence indicates an organic basis for such a symptom. Moreover, Dr. Wotherspoon, who examined her less than two months before the end of her coverage period, found

[15] See Dr. Wadden's report dated August 23, 2018, GD6-35.
[16] See Dr. Wadden's latter dated October 1, 2018, GD2-187.
[17] See report dated November 6, 2018 by Dr. Scott Wotherspoon, orthopedic surgeon, GD2-128.

that she could walk fairly well, without pain, without crackling, and with only a "very slight" limp.

[29] I am inclined to place a great deal of weight on Dr. Wotherspoon's report. The Appellant may have significant left knee pain now, but the balance of the evidence suggests that it wasn't significant at the end of December 2018.

The Appellant's right knee didn't become a problem until after December 31, 2018

[30] The Appellant says that she began feeling pain in her right knee before December 31, 2018. That may be so, but there is no mention of it in the available reports from that period. The Appellant eventually had the knee replaced, but that did not happen until November 2020 — well after the end of her coverage period.

[31] It is notable that Dr. Wotherspoon didn't say anything about right knee pain in his otherwise thorough examination of the Appellant in November 2018. The first reference to right knee pain can be seen in February 2019, when Dr. Wadden noted that the Appellant's right knee was "sore." With the Appellant's consent, he administered an injection of local anaesthetics and scheduled a follow up for three months later.[18]

[32] In May 2019, the Appellant was still complaining of "some" pain in her right knee. On examination, Dr. Wadden found near complete extension to flexion of the calf almost touching the thigh.[19] In November 2019, Dr. Wadden noted that the Appellant's right knee pain was getting worse. Even so, he described her as having only "moderate" osteoarthritis in the medial compartment and "mild" changes in the patellofemoral compartment. She had full extension.[20]

[33] Dr. Wadden later proceeded with a total replacement of the Appellant's right knee but not until nearly two years after the end of her coverage period. Again, while the Appellant's might have significant right knee pain now, there is no evidence that it was disabling as of December 31, 2018.

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[18] See Dr. Wadden's report dated February 21, 2019, GD6-37.
[19] See Dr. Wadden's report dated May 5, 2019, GD2-117.
[20] See Dr. Wadden's report dated November 26, 2019, GD2-191.

The Appellant's condition didn't prevent her from real world work

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

[35] To qualify for the CPP disability pension, an applicant has to have a severe disability. A case called *Villani* explains what it means for a disability to be severe. *Villani* requires the Tribunal, when assessing disability, to consider a disability claimant as a "whole person" in a real-world context. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances."[21]

[36] When deciding whether the Appellant 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 Appellant could work in the real world when she had coverage.

[37] The Appellant was 53 years old when she last had CPP disability coverage. She was no longer young at the end of 2018, but she was still a decade from the typical age of retirement. The Appellant has only a high school education, but that is balanced by a lengthy work record — one that would mark her as a reliable employee to a prospective employer.

[38] At the hearing, the Appellant maintained that she had never used a computer and never so much as sent an email; she denied having a smart phone. Asked whether it was true, as mentioned in a transferrable skills analysis, that she had used a computer to print out menus at her last job, she replied that it was false; she insisted that the analysis had got that particular detail wrong.

[39] I am willing to accept that the Appellant has almost no experience with computers. However, that doesn't mean she couldn't have been trained to use them, even at her relatively advanced age. The Appellant's transferrable skills analysis identified seven suitable employment alternatives based on the Appellant's education,

[21] See *Villani v Canada (Attorney General)* 2001 FCA 248.

training, and work experience, as well as her physical limitations.[22] The analysis noted that the Appellant had very poor knowledge of computers and office software and that jobs such as data entry clerk, call centre agent, and telemarketer would require significant training and upgrading. However, it concluded that, once the Appellant was able to use basic software and applications, these occupations would provide on-the-job training up to her learning potential.

[40] In all, I am satisfied that, despite her age and education level, the Appellant had residual capacity to pursue another career as of December 31, 2018. Although she was not young at the time, she was a native English-speaker and had a lengthy work record. Even with an artificial left knee, the Appellant would have been capable of at least attempting to retrain for selected sedentary jobs.

The Appellant didn't attempt suitable alternative employment

[41] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is 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, as here, 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.[23]

[42] 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.

[43] On top of that, disability claimants must make **meaningful** attempts to return to work.[24] They cannot limit their job search to the type of work that they were doing before

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[22] See transferrable skills analysis report dated May 18, 2018 by Melanie Mayer, occupational therapist, GD7-2.
[23] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[24] 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.

they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.[25] Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[44] In this case, the Appellant had at least some work capacity — enough to trigger the obligation to pursue employment that might have been better suited to her limitations. The Appellant attempted to return to her old job, but she could no longer manage its physically demands — particularly the requirement to descend stairs carrying trays. But that did not mean the Appellant was incapable of less taxing jobs.

[45] As noted, the Appellant's treatment providers did not rule out all types of alternative employment in 2017–18. Even after her second MCL injury, the Appellant told Dr. Wotherspoon that she was not in pain, and she walked with only a slight limp. I see nothing that would have prevented the Appellant from at least attempting to retrain for a more sedentary job — one behind a desk or a counter.

[46] At the hearing, the Appellant said that she had no idea how she would be able to attend classes or complete courses. She said that her knees were always throbbing and that she would be able to stay seated for no more than 10 minutes. On top of that, she said, she would always need help getting up because her knees are so unsteady.

[47] That may be so now, but the reports from the Appellant's coverage period tell a slightly different story. In July 2017, the Appellant's physiotherapist found her to have a sitting tolerance of up to 30 minutes.[26] In May 2018, her transferrable skills analysis said that the Appellant would likely be capable, despite her left knee condition, of seven alternative occupations — all of which were largely sedentary.[27] In November 2018, Dr. Wotherspoon specifically described the Appellant's knees as "steady." He said nothing about extended sitting — he only relayed the Appellant's report that getting up from a seated position caused her problems. As well, he described only minor symptoms in her left knee and was completely silent about any pain in her right knee.

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[25] See *Canada (Attorney General) v Ryall*, 2008 FCA 164.
[26] See CBI health centre report dated July 10, 2017, GD2-168.
[27] See Melanie Mayer's transferrable skills analysis report dated May 18, 2018, GD7-13.

[48] In view of this evidence, I am not convinced that the Appellant fulfilled her obligation to seek alternative work. After her first knee replacement, the Appellant made an admirable, but unsuccessful, attempt to return to her former job as a daycare cook and cleaner. However, the CPP requires claimants to show that they are incapable of **any** substantially gainful occupation, not just the one they did previously.

[49] The problem for the Appellant is that she never made an attempt to pursue a job that might have been better suited to her functional limitations. If she had tried and failed at such a job, then I would be better able to assess the severity of her disability as of December 31, 2018. However, she didn't. For that reason, I find that she failed to fulfill her obligation under the *Inclima* case.

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

[50] A disability must be severe **and** prolonged.[28] Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it is also prolonged.

Conclusion

[51] The evidence shows that the Appellant had physical problems during her coverage period, but I am not convinced that they amounted to a severe disability. She had residual capacity but never tried a job that might have been less physically demanding than her previous job as a daycare worker.

[52] The appeal is dismissed.

Member, Appeal Division

[28] See *Canada Pension Plan*, section 42(2)(a).