



Citation: *ME v Minister of Employment and Social Development*, 2024 SST 100

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: M. E.
Representative: Steven Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated November 16, 2022 (issued
by Service Canada)

Tribunal member: Sharon Buchanan

Type of hearing: Teleconference

Hearing date: January 18, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: January 29, 2024

File number: GP-22-1878

Decision

[1] The appeal is allowed.

[2] The Appellant, M. E., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 64 years old. She was born and educated in the Philippines. She came to Canada in 2004 as a care giver. From 2008 to 2018 she worked as a personal support worker in retirement and nursing homes. In 2018 she stopped working because of joint and chest pain and shortness of breath. She has not worked since.

[4] The Appellant first applied for a CPP disability pension on September 3, 2019. The Minister of Employment and Social Development (Minister) refused her application on March 2, 2020. The Appellant did not ask for a reconsideration of this decision. The Appellant submitted a second disability application on November 24, 2021. The Minister refused this application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says the pain and stiffness in her joints, hands and hips prevents her from being able to work. She can't do the physical work that she has done all her life. She says she would be unable to manage sedentary work because her ability to sit is limited, and she lacks basic skills for retraining.

[6] The Minister says tests do not show severe findings, and she is treated conservatively. The Minister says the Appellant hasn't proven that she is unable to perform suitable work when she last qualified for disability benefits.

What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2020. In other words, no later than December

31, 2020. This date is based on her CPP contributions.¹ She must also prove that she continues to be disabled.²

[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.³

[10] 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 capable regularly of doing some kind of work that she could earn a living from, then she isn’t entitled to 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.⁴

[12] 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.

[13] The Appellant has to prove she has a severe and prolonged disability. She has to prove this on a balance of probabilities. This means she has to show it is more likely than not she is disabled.

¹ Service Canada uses an appellant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on page GD2-7 in the file.

² In *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that the appellant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2001 FCA 318.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability. Section 68.1 of the *Canada Pension Plan Regulations* says a job is “substantially gainful” if it pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Reasons for my decision

[14] I find the Appellant had a severe and prolonged disability as of March 2019. She continues to be disabled. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

[15] The Appellant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

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

[16] The Appellant has:

- Angina (chest pain), dizziness, choking, shortness of breath, and narrowing of a coronary artery.
- Fibromyalgia
- Frozen hips, osteoarthritis, a bulging disc in her lumbar spine, a pinched nerve in her lower back, and left leg weakness with tingling in her toes
- Tendonitis in her left shoulder and headaches
- Elevated alkaline phosphatase (ALP)
- Monoclonal gammopathy (MUGS).

[17] However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.⁶ 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.⁷

[18] I find the Appellant has functional limitations that affected her ability to work.

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

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

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[19] The Appellant says her medical conditions have resulted in functional limitations that affect her ability to work. She says:

- She is unable to sit or stand for long, uses back and knee supports and a padded chair.
- She walks for exercise in the hallway of her apartment building and sometimes in a local mall. She doesn't walk for long before she tires, her hips get tight and painful, and she needs to rest.
- She has trouble bending over and uses a grabber stick to help her reach for things.
- She can shower and get dressed without assistance but has difficulty pulling her pants up and on.
- She can't lift or carry much. The Appellant relies on her adult son who lives with her. For example, he carries the laundry to the machines in the basement of their building, helps prepare meals and cleans their apartment.
- She can use a broom and do light housecleaning when her pain is under control.

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

[20] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 2020.⁸

[21] The medical evidence supports what the Appellant says.

[22] There is no medical evidence of limitations from ALP or MUGS, nor did the Appellant identify any.

[23] The Appellant reported shortness of breath and chest pain in 2018. Investigation of the Appellant's progressive chest pain and shortness of breath ultimately led in 2021

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

to diagnosis of severe coronary artery disease (CAD) in one of the arteries in her heart. The 90% blockage was repaired with a stent in December 2021.⁹ The Appellant has been stable since that procedure. The medical evidence supports that she is stable and that she had reported she could walk for seven minutes on even ground before she had to stop.¹⁰

[24] Since 2018, the Appellant consistently described pain in her joints that affected her activities of daily living.

[25] The Appellant's family physician, Dr. Meglis, said in the CPP Medical Report in November 2019 the Appellant's mechanical joint pain caused stiff joints and sometimes created limitations with walking and standing. Although he said she should be able to return to work in six to 12 months, he cautioned her regular work might need to be modified if her joint pain increased.¹¹ This is consistent with a Functional Abilities form that he completed in October 2019. Dr. Meglis said her approximate return to regular duties was unknown and that pain could limit her safety.¹²

[26] The Appellant's Rheumatologist Dr. Dunne said in March 2019 the Appellant was experiencing ongoing joint pain, especially in her back and left shoulder. She indicated the Appellant was not able to work at that time.¹³

[27] The Appellant was participating in physiotherapy for her hip, back and shoulder pain. In October 2019 the Appellant's physiotherapist said she was unable to sit, stand or walk for more than 20 minutes and was unable to lift, carry, push, or pull anything over five pounds.¹⁴ In January 2020 the physiotherapist re-evaluated the Appellant and noted additional limitations.¹⁵

⁹ See GD2-34

¹⁰ See GD2-114

¹¹ See GD2-473

¹² See GD2-348

¹³ See GD2-477

¹⁴ See GD2-342

¹⁵ See GD2-296

[28] In July 2020 Dr. Meglis said the Appellant needed to remain off work due to ongoing back pain.¹⁶

[29] In August 2020 Dr. Dunne diagnosed the Appellant with severe Fibromyalgia.¹⁷

[30] The Minister argued that Fibromyalgia doesn't cause damage to the body, is not a progressive condition, and that general activity, including work, is encouraged. The Appellant was encouraged to be more active and physical activity was prescribed in the form of physiotherapy and other physical treatment, however her physicians continued to believe she could not return to work. In January 2021 Dr. Meglis said the Appellant continued to be unable to work due to several active medical conditions that were under the care of separate specialists.¹⁸

[31] The medical evidence supports the Appellant's back, hip and shoulder pain prevented her from doing physical work. Her job as a personal support worker working with elderly patients required her to manage a variety of different patient transfers in and out of bed, toilet, shower, and vehicles. She supported patients on medical and family appointments. She pushed wheelchairs, often managing oxygen or medication poles as well.¹⁹ Her pain, inability to lift, push or pull more than five pounds and her limitations in walking, standing, and sitting prevented her from doing these activities.

[32] Next, I will look at whether the Appellant followed medical advice.

– **The Appellant followed medical advice**

[33] To receive a disability pension, an appellant must follow medical advice.²⁰

[34] The Minister argued the Appellant's condition wasn't severe because her treatment has been conservative. But that isn't the test for whether a condition is severe. The Appellant's symptoms have been thoroughly investigated. Treatments were recommended. The Appellant was prescribed medication, physiotherapy, chiropractic,

¹⁶ See GD2-335

¹⁷ See GD2-154

¹⁸ See GD2-166

¹⁹ She said this in the hearing

²⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

acupuncture, and steroid nerve block injections. The Appellant has complied with all these recommendations. She continues to have weekly physiotherapy and attends a pain clinic to continue with nerve block injections for her hips and back.

[35] 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.²¹

– **The Appellant can't work in the real world**

[36] 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.

[37] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that she can work.²²

[38] The Minister submits that when the above factors are considered the only characteristic that would weigh against the Appellant's ability to adjust to other work is her age. The Minister said the Appellant possesses transferable skills and an increased ability to train based on her education, work experience and English-speaking skills.

[39] I have considered the Minister's position. However, I find the Appellant can't work in the real world. It is unlikely that prospective employers would think the Appellant had transferable skills.

[40] The Appellant's first language is Tagalog. Her English-speaking skills are quite strong. However, I am not persuaded that they are sufficient to overcome her other characteristics.

[41] The Appellant's age is a significant factor. She is 64.

²¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[42] While the Appellant does have a two-year college education, it will not be a positive factor in assisting her to do other work or retrain. Her nursing degree was obtained in the Philippines in 1979.

[43] The Appellant has never used the nursing degree or worked as a nurse. She said her husband did not want her working outside of the home. Her work experience is as a live in care giver in Hong Kong and Canada, and a personal support worker in retirement and long-term care settings. She said she didn't write reports, assess patients, or dispense medications or do anything other than the physical work of supporting elderly patients in their daily living activities.

[44] The Appellant said at one point her family physician said she should talk to her employer about trying modified work. She went to the employer, and they gave her a form for her family doctor to fill out identifying any work limitations that she had. Updated medical reports were sent to her employer. She said the employer said they didn't have any work she could do.²³

[45] The Appellant has only very basic computer skills. I am not persuaded the Appellant's work experience would be helpful in assisting her to do administrative or other sedentary work, and she would likely struggle to find such a job.

[46] I find that the Appellant's disability was severe as of March 2019 when Dr. Dunne reported the Appellant was unable to work due to limited success with pain relief.²⁴

Was the Appellant's disability prolonged?

[47] The Appellant's disability was prolonged.

[48] In finding the Appellant's disability is severe I have considered that in December 2021 she had a procedure that repaired the arterial blockage. The Appellant continues to see her cardiologist and said that her shortness of breath is much better. The

²³ She said this in the hearing.

²⁴ See GD2-249

Appellant's heart condition is treated with medication. I am not persuaded the Appellant has proven this condition is prolonged.

[49] I am persuaded the limitations from the Appellant's pain are severe and prolonged.

[50] The Appellant began experiencing joint pain and stiffness in 2018 and it has continued since then.²⁵

[51] In November 2019 Dr. Meglis said in relation to the Appellant's joint pain the expected prognosis was unknown, and the expected duration was more than one year. He hoped she would return to work in six to 12 months but indicated that she might require modified work if her pain increased.

[52] Two years later in February 2021, Dr. Meglis said the Appellant continued to experience functional limitations of difficulty with prolonged walking, standing, sitting, and stamina. He says she was being treated for these symptoms with physiotherapy and pain medications, but her symptoms appeared to have gotten worse, not better over the past one to two years.²⁶

[53] It is now over five years since the Appellant began treatment for her joint pain. Given the Appellant's age, and the lack of progress after several years of treatment, I am persuaded, on balance, that the Appellant's disability is prolonged, and will more than likely continue indefinitely. The Appellant said that there are no proposed changes in her treatment, and therefore I am not persuaded that her circumstances are likely to change.

[54] I find that the Appellant's disability was prolonged as of March 2019.

²⁵ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant has to show a severe and prolonged disability no later than the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

²⁶ See GD2-152

When payments start

[55] The Appellant had a severe and prolonged disability in March 2019.

[56] However, the *Canada Pension Plan* says a person can't be considered disabled more than 15 months before the Minister receives their disability pension application.²⁷

After that, there is a 4-month waiting period before payments start.²⁸

[57] The Minister received the Appellant's application in November 2021. That means she is considered to have become disabled in August 2020.

[58] Her pension payments start as of December 2020.

Conclusion

[59] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged.

[60] This means the appeal is allowed.

Sharon Buchanan

Member, General Division – Income Security Section

²⁷ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁸ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.