



Citation: *AR v Minister of Employment and Social Development*, 2024 SST 104

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. R.
Representative: Palma Pallante

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated June 23, 2023 (issued by
Service Canada)

Tribunal member: Wayne van der Meide

Type of hearing: Teleconference

Hearing date: January 30, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: February 2, 2024

File number: GP-23-1620

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. R., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant is 56 years old. She was born in Italy. When she was 11, she stopped school and started helping to take care of her siblings. She was diagnosed with scoliosis when she was 14. She came to Canada with her family when she was 17. She continued to take care of her family. She took English language courses but didn't get any more education in Canada.

[4] When the Appellant was about 20, she got married and started working outside of the home. She had different jobs like working in a grocery store and managing a restaurant for her brother and husband. She did things like answer the phones and work the register.

[5] Around 2010 or 2011, the Appellant hurt her back seriously. She made a claim to the Workers' Safety and Insurance Board (WSIB). She got WSIB payments for a couple months but didn't continue to claim benefits because it was too difficult for her to respond to the WSIB's constant demands for information.

[6] Since her injury, the Appellant has had pain which makes it hard for her to sit or stand. She has also been diagnosed with other conditions that I will talk about more later.

[7] Despite her limited financial means and the costs, the Appellant has tried to get better with treatments including physiotherapy, psychotherapy, cortisone injections, and chiropractic treatments.

[8] The Appellant also pushed herself to work for several years despite her limitations. She did that not only to earn money for her family, but also as a way to try and cope with her pain. As she put it at the hearing, she worked to try and get on with her life.

[9] Her last job was as a sales associate at a clothing store. She worked there from March 2019 to October 2021 when she quit. She hasn't worked or tried to look for work since then.

[10] The Appellant applied for a CPP disability pension on August 18, 2022. The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[11] In her application, the Appellant said she hasn't been able to work because of her medical conditions since October 2021.¹ This is when she last worked. However, she now says that she shouldn't be punished for "trying" to work for years before she actually stopped working for good.

[12] The Minister agrees that the Appellant has functional limitations. But the Minister says that she isn't eligible because she didn't have a severe and prolonged disability before October 2016. In other words, the Minister says that she wasn't incapable regularly of pursuing a substantially gainful job.

What the Appellant must prove

[13] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2015. In other words, no later than December

¹ See GD2-30.

31, 2015. This date is based on her CPP contributions.² She must also prove that she continues to be disabled.³

[14] The Appellant had CPP contributions in 2016 that were below the minimum amount the CPP accepts. These contributions let the Appellant qualify for a pension if she became disabled between January and October 2016, and she continues to be disabled.⁴

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

A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁵

[16] 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.

[17] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁶

[18] 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.

² 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 GD2-6.

³ 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.

⁴ This is based on sections 19 and 44(2.1) of the *Canada Pension Plan*.

⁵ 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.

⁶ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[19] 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 that she is disabled.

Reasons for my decision

[20] I find that the Appellant hasn't proven she has had a severe disability by either December 31, 2015, or between January and October 2016 **and continuously since then**. I reached this decision by considering the following issues:

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

The Appellant's disability wasn't severe before October 2016 and continuously since then

[21] The Appellant's disability wasn't severe before October 2016 and continuously since then. I will now explain why.

- **The Appellant has functional limitations that affected her ability to work before and continuously since October 2016**

[22] The Appellant has had a number of medical conditions. In her application she said she has:⁷

- fibromyalgia
- chronic pain syndrome
- degenerative disc disease
- bulging discs
- scoliosis
- inflammation
- arthritis
- plantar fasciitis in both feet
- a torn meniscus in her knee

⁷ See GD2-30.

- depression

[23] Medical evidence confirms most of what the Appellant says about her conditions.⁸ She has had scoliosis since childhood, degenerative disc disease since 2011, and right foot fibroma and fibromyalgia since 2016. Other conditions were diagnosed after October 2016. October 2016 is the month by which her disability had to become severe. Her plantar fasciitis was diagnosed in September 2019, right knee pain due to a torn meniscus in early 2020, and breast cancer in May 2022.⁹

[24] However, I can't focus on the Appellant's diagnoses.¹⁰ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.¹¹ 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.¹²

The Appellant worked until October 2021

[25] Despite her disability, the Appellant worked as a sales associate in a clothing store until October 2021.

[26] The Appellant's work activity is important because the definition of a severe disability is directly linked to a person's capacity to work. This is because the CPP disability program is designed to provide social insurance to those who experience a loss of earnings due to disability.¹³

[27] That said, the fact that the Appellant worked until October 2021 does not necessarily mean that her disability wasn't severe before October 2016. I must decide if the work she did showed that she was able regularly to make a substantially gainful living.

⁸ See GD1-22, GD2-129, GD5-13, GD5-17, and GD5-22 to GD5-39.

⁹ See GD1-25, GD2-111 to GD2-120, and GD5-19.

¹⁰ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹¹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹² See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

¹³ This is explained in *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at paragraph 9.

– **The Appellant’s work activity showed that she could regularly pursue a substantially gainful occupation**

[28] The Appellant’s work as a sales associate in a clothing store showed her capacity regularly to pursue a substantially gainful occupation. I will explain why.

i. The Appellant’s job was substantially gainful

[29] A substantially gainful occupation is one that pays the same or more than the maximum annual amount a person could receive as a disability pension.¹⁴ In 2019, the Appellant earned \$18,327. This is more than a person could receive from a disability pension in 2019, which was \$16,353.54.

ii. The Appellant’s job was substantially gainful

[30] I considered whether the Appellant was incapable **regularly** of pursuing any substantially gainful occupation. She was capable regularly.

[31] The Appellant worked for nearly two and a half years as a sales associate between March 2019 and October 2021.

[32] Although she worked part-time, she didn’t take any short- or long-term sick leaves. She only took sick days as well as time off to be with her brother, who sadly died in December 2020.

iii. The Appellant didn’t have a benevolent employer

[33] If an appellant had a benevolent employer, then it could mean she was not actually capable of pursuing a substantially gainful occupation, despite what her income shows. The Appellant didn’t say she had a benevolent employer. I considered the issue anyway. The evidence does not show that the Appellant’s employer was benevolent.

¹⁴ Subsection 68.1(1) of the *Canada Pension Plan Regulations*.

[34] At the hearing I asked the Appellant how she got the job. She said her daughter helped her apply and she started the day after her interview. She didn't get the job from a friend or family member.

[35] A benevolent employer is someone who will change the working conditions and lower the expectations of an employee who has limitations. A benevolent employer expects significantly less from the disabled employee than from other employees. A benevolent employer accepts that the employee can't work at a competitive level.¹⁵

[36] This doesn't describe the Appellant's job or what she did. She said she would have to take breaks and even sometimes work in her socks only. She also said that sometimes her manager commented on her slow sales. This tells me that her manager knew she had pain and was concerned about it. This doesn't mean her employer was benevolent.

[37] It was the Appellant who quit her job, not her employer who let her go.

The Appellant's disability got worse after October 2016

[38] The Appellant had medical conditions years before she stopped working completely in October 2021. To her credit, she continued to work to make money and push past her limitations to try and get better.

[39] And things got worse before she actually stopped working. She has had symptoms of fibromyalgia since 2016 and symptoms of major depressive disorder since 2019. She was also diagnosed with plantar fasciitis in September 2019. She started to have knee pain in early 2020.¹⁶

[40] But the functional limitations these conditions caused, even considered together, don't mean she was incapable regularly of substantially gainful work **before** October 2016. None of her treating medical professionals have said anything different.

¹⁵ This is explained in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

¹⁶ See GD1-25, GD2-81 to GD2-86, GD2-111 to GD2-120, and GD5-19.

[41] The Appellant says I shouldn't punish her for **trying** to work. But the Appellant didn't simply try to work, she did work. Therefore, after October 2016 she had the capacity regularly to work in a substantially gainful job.

The Appellant could work in the real world

[42] When I am deciding if a disability is severe, I can't just look at the Appellant's medical conditions and how they affect what she can do. 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 if the Appellant can work in the real world – in other words, whether it is realistic to say that she can work.

[43] Clearly, the Appellant could work in the real world because she did. I accept that the Appellant has disadvantages, including limited education, some limitations of her English, and work experience that was limited to non-office jobs. But she worked in a real job for more than two years after October 2016.

– The Appellant followed medical advice

[44] To receive a disability pension, an appellant must follow medical advice.¹⁷ At the hearing, the Appellant's representative made sure that I understood that she wanted to and did everything she could afford to do to get better. I agree.

[45] I think it is worth repeating that the Appellant even tried to get better by working and pushing through her pain, rather than withdrawing from society. But I cannot find her eligible based on these things.

Conclusion

[46] The Appellant isn't eligible for a CPP disability pension because her disability wasn't severe. Because I have found that her disability wasn't severe, I didn't have to consider whether it was prolonged.

¹⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[47] This means the appeal is dismissed.

Wayne van der Meide
Member, General Division – Income Security Section