



Citation: *MN v Minister of Employment and Social Development*, 2024 SST 144

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: M. N.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated September 18, 2023
(issued by Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Teleconference

Hearing date: January 30, 2024

Hearing participant: Appellant

Decision date: February 15, 2024

File number: GP-23-1807

Decision

[1] The appeal is dismissed.

[2] The Appellant, M. N., 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 53 years old. He has pulmonary hypertension. He worked as a tower crane operator. He was struggling at work because of shortness of breath. In November 2021, he went off work to have surgery. He tried working one more day in January 2022, but he couldn't do it. He continued to be short of breath when he exerted himself. His condition hasn't improved since.

[4] The Appellant applied for a CPP disability pension on April 12, 2023. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says he has a severe and prolonged disability. He can't breathe properly. It isn't getting any better. He can't be productive and successful while managing his condition. No one has offered him any training, which makes it impossible to find gainful employment.

[6] The Minister says the evidence shows that the Appellant's limitations from his medical conditions wouldn't prevent him from performing some type of work. It is recognized that the Appellant has a serious medical condition. But the key question is not the nature of the medical condition, but its functional effect on the Appellant's ability to work. There is no evidence that he attempted a trial of work suitable to his limitations.

What the Appellant must prove

[7] the Appellant to succeed, he must prove he has a disability that was severe and prolonged by the hearing date. In other words, no later than January 30, 2024.¹

[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 is severe. If the Appellant is capable regularly of doing some kind of work that he could earn a living from, then he 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.³

[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 he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means he has to show it is more likely than not that he 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 at GD4-10 to 16. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether he was disabled by the hearing date.

² 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.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Reasons for my decision

[14] I find that the Appellant hasn't proven he had a severe and prolonged disability by the hearing date. 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 wasn't severe. I reached this finding by considering several factors. I explain these factors below.

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

[16] The Appellant has pulmonary hypertension (increased blood pressure in the arteries of the lungs) with a history of deep vein thrombosis (DVT) (blood clot in a deep vein), pulmonary embolism (blood clot in the lungs), and previous splenectomy (removal of the spleen).

[17] However, I can't focus on the Appellant's diagnoses.⁴ Instead, I must focus on whether he has functional limitations that got in the way of him earning a living.⁵ 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 his ability to work.⁶

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

– What the Appellant says about his functional limitations

[19] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. He stopped working in November 2021 when he had major surgery for his condition. He tried working one day in January 2022, but

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

⁵ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

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

realized he couldn't operate a crane safely anymore. He continues to deal with shortness of breath and other symptoms that limit what he can do for work.

[20] The Appellant has had heart problems for a while. He had a heart attack in 2004. He's had two stents placed in his arteries. In November 2020, he was diagnosed with bilateral DVT and pulmonary embolism. He had been feeling short of breath on exertion for about four to five weeks, which progressively worsened.⁷ He started to feel chest tightness too, so he went to the hospital. He was admitted for several days and prescribed medication to treat his condition (blood thinners).

[21] Doctors recommended that the Appellant have surgery to remove blood clots in his pulmonary arteries. He continued to work but was feeling short of breath. He cut down his hours from 60 hours a week to 32 hours. He travelled out of province to have the surgery in November 2021. He was in hospital recovering for three weeks. Other than one day in January 2022, he hasn't worked since.

[22] To do the job of a tower crane operator required that he climb a ladder approximately 180 feet tall to reach the operator cabin. It was taking him 30 minutes to climb the crane. It was a struggle. It would take him 5 to 10 minutes to catch his breath once he reached the cabin. He felt like he wasn't physically capable to do the job safely.

[23] He saw his doctor, Dr. Kim, who recommended that he not return to crane operating. Dr. Kim also suggested that he stay away from sitting because he sat for his job as a crane operator for so long. Dr. Kim said that it isn't healthy for anyone to sit for long periods of time. Dr. Kim told him to find something a little more active, like "in between" – not sitting, but not heavy lifting either.

[24] The Appellant has applied for other jobs since he stopped working. He can't do anything too physical, including heavy lifting. He started applying for the following jobs around the summer of 2022:

⁷ See hospital consultation report, dated November 9, 2020, at GD2-118.

- He applied for a job with the city he lives in, hoping to do light maintenance, landscaping or something like that. He applied at least 10 times for that job in the last year and a half, but hasn't heard anything back. His friend works for a different municipality and told him he has to be persistent to get that kind of job.
- He applied three or four times for a job with an association that works on film sets. He understands that it pays "half decent money", and he's always had an interest in doing that kind of work. He never heard back.
- He recently applied for a job with an airline doing light maintenance and cleaning. He saw the posting and applied by email. He never heard back.

[25] The Appellant would take a retraining course if he had the money. He made a worker's compensation claim and suggested they fund a training course in welding, but his claim was denied. He isn't aware of any other government assistance for retraining. He can't afford to pay for it himself.

[26] The Appellant has the following limitations because of his medical conditions:

- **Shortness of breath and chest discomfort** – The Appellant becomes short of breath on light exertion. It hasn't improved since the surgery in 2021. In some ways its worse. Everything seems to take more effort than before. He also gets discomfort in his chest – he has a thick scar from surgery and it seems tight in that area.
- **Walk** – He can walk on flat surfaces, just not long distances. He struggles with inclines and stairs. He walks his dogs for 45 minutes to one hour in the morning. He also goes for a walk in the evening for 30 to 45 minutes. It is a gradual walk, but he does it without taking long breaks.
- **Other daily activity** – He goes to the gym to swim every other day for an hour. He takes it easy – he doesn't swim laps or exert himself. He walks the 20 minutes to the gym. He cleans and cooks for himself. His sister helps him with carrying grocery shopping bags.
- **Lift / Carry** – He feels overexerted if he lifts anything more than 10 lbs.
- **Stand** – He says he can stand continuously for 4 hours.

- **Sit** – He says he can sit continuously for 2 hours. He would then need a 5-to-15-minute break to stand and stretch before sitting again.
- **Sleep** – His sleep is variable. Sometimes he only gets a couple of hours. He feels discomfort in his chest and it can keep him up.
- **Energy** – He struggles to breathe properly and has low energy. He doesn't feel motivated. He thinks that he may have a mental health issue.⁸

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

[27] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work no later than the hearing date.

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

[29] Dr. Kim, the Appellant's family doctor, diagnosed the following conditions with related limitations in his medical report dated April 15, 2023:⁹

- pulmonary hypertension and pulmonary endarterectomy (surgery to remove plaque from the arteries) – decreased stamina and energy
- superficial DVT in calf (February 2020) – occasional leg pain, decreased stamina and physical exertion
- pulmonary embolism – increased shortness of breath on exertion, decreased energy, and low stamina

[30] Dr. Kim's letter dated August 3, 2023, explained that the Appellant's shortness of breath is from the "large burden of unresolved chronic pulmonary embolism."¹⁰ He was being followed by respirologist, Dr. Chan. Dr. Kim also explained how the chest pain is from his multiple pulmonary embolism and poor fitness. Dr. Kim's prognosis was guarded.

⁸ There was no medical evidence submitted to support a mental health condition. Therefore, I can't consider a potential mental health condition as a cause of ongoing functional limitations.

⁹ See medical report, dated April 15, 2023, at GD2-280 to 282.

¹⁰ See Dr. Kim's letter, dated August 3, 2023, at GD2-67.

[31] Dr. Kim recommended that the Appellant stop working in November 2021.¹¹ It was unknown if the Appellant would return to any type of work in the future, but it would likely be another type of work that would require training. In his opinion, the Appellant wasn't able to work as a crane operator permanently.

[32] A hospital report dated May 22, 2020, confirmed that the Appellant had premature coronary artery disease and had interventions (surgery) to his coronary artery on two occasions.¹²

[33] Hospital records show an admission on November 7, 2020, with a diagnosis of "submassive pulmonary embolism and bilateral DVTs."¹³ He was discharged on November 11, 2020.¹⁴ Dr. Chan confirmed the diagnosis in a report dated January 14, 2021.¹⁵ A lung exam performed in April 2021 showed a "large burden of unresolved/chronic pulmonary embolism."¹⁶

[34] Dr. Brunner, the Appellant's cardiologist, recommended surgery in July 2021.¹⁷ He had the surgery on November 27, 2021, and was discharged from the hospital on December 14, 2021.¹⁸

[35] Dr. Brunner assessed the Appellant in August 2022 and February 2023. The following was noted:¹⁹

- He can walk indefinitely on level ground, but still gets short of breath when climbing inclines and stairs.
- No angina (chest discomfort) or light-headedness on exertion.

¹¹ See medical report, dated April 15, 2023, at GD2-280 to 283.

¹² See hospital cardiology report, dated May 22, 2020, at GD2-115 to 117.

¹³ See Dr. Abdulla's report, dated November 9, 2020, at GD2-118 to 122.

¹⁴ See discharge record, at GD2-126.

¹⁵ See Dr. Chan's report, dated January 14, 2021, at GD2-135 to 137.

¹⁶ See lung V/Q exam, dated April 8, 2021, at GD2-158.

¹⁷ See Dr. Brunner's report, dated July 26, 2021, at GD2-174 to 177. See also Dr. Brunner's report, dated May 18, 2021, at GD2-163 to 168.

¹⁸ See Notice of Appeal, at GD1-4.

¹⁹ See Dr. Brunner's reports, dated August 23, 2022, at GD2-223 to 226; and February 27, 2023, at GD2-238 to 242.

- In February 2023, he was able to walk 390 metres in 6 minutes, which was slightly less than in the summer, but Dr. Brunner suspected that it was related to weight gain and deconditioning.

[36] Dr. Chan also assessed the Appellant in August 2022. The following was noted in her report:²⁰

- He remained clinically well in the last 6 months.
- He still had some degree of shortness of breath which was minimally improved after surgery.
- He had a recent V/Q (lung) scan which showed improvement compared to the previous year.
- The walking test at the pulmonary hypertension clinic (Dr. Brunner) was reassuring.
- He wasn't scheduled for any formal follow-up at that time.

[37] The medical evidence supports that the Appellant's functional limitations affected his ability to work.

[38] 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 him from earning a living at any type of work, not just his usual job.²¹

– The Appellant can work in the real world

[39] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language abilities

²⁰ Dr. Chan's report, dated August 25, 2022, at GD2-227 to 229.

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

- past work and life experience

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

[41] I find that the Appellant can work in the real world. He was still able to work as of the hearing date. He is 53 years old. He worked for 35 years in construction, with close to 25 years as a crane operator. He has a Grade 10 education. These factors may affect his ability to retrain and perform alternate work. However, he still has the physical capacity to perform light-duty work from which he could earn a living. In other words, he has the capacity for substantially gainful employment.

[42] In my view, the Appellant has the capacity for low-skill work that doesn't require physical exertion. His limitations are shortness of breath when he exerts himself and decreased energy/stamina. There is no question that this prevents him from doing physically demanding work, like his regular job as a heavy equipment operator. But the Appellant can still sit and stand for long periods and walk on flat ground. He is active daily. He can cook and clean for himself. This supports the capacity for substantially gainful work.

– **The Appellant's medical conditions haven't got in the way of his efforts to find a suitable job**

[43] If the Appellant can work in the real world, he 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.²³ Finding and keeping a suitable job includes retraining or looking for a job he can do with his functional limitations.²⁴

[44] The Appellant has tried to find work. But his efforts don't show that his disability gets in the way of earning a living.

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

²³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁴ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

[45] The Appellant has applied for only three different jobs since he stopped working as a tower crane operator. He's applied several times for two of those jobs. He hasn't got a call back from any of them. But there is no evidence to suggest that the reason he hasn't got a call back has something to do with his medical conditions.

[46] The Appellant has been selective about the jobs he's applied for. When I asked him whether he could do the work of a cashier, he said he would like to be doing something "a little more productive." He is free to make that choice. However, the test is whether he can do any substantially gainful job, which would mean a job that pays a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension, which for 2024 is \$19,339.74.²⁵

[47] In my view, the Appellant has the capacity for substantially gainful work that doesn't require training. The Appellant says that it's impossible to find gainful employment without training, which he can't afford. Training courses would help his job search, but there are low-skill, light-duty jobs that don't require training courses to qualify. He already applied for three of those kinds of jobs.

[48] The Appellant hasn't proven that he can't do any substantially gainful work because of his medical conditions. Therefore, I can't find that the Appellant had a severe disability by the hearing date.

Conclusion

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

[50] This means the appeal is dismissed.

Michael Medeiros
Member, General Division – Income Security Section

²⁵ Section 68.1 of the *Canada Pension Plan Regulations* sets out this definition of "substantially gainful."