Citation: *CK v Minister of Employment and Social Development*, 2024 SST 158

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

# Decision

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| **Appellant:** | C. K. |
| **Representative:** | Debbie Caswell |
| **Respondent:** | Minister of Employment and Social Development |
| **Decision under appeal:** | Minister of Employment and Social Development reconsideration decision dated September 14, 2022 (issued by Service Canada) |
| **Tribunal member:** | Selena Bateman |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | January 30, 2024 |
| **Hearing participants:** | Appellant<br>Appellant's representative |
| **Decision date:** | February 5, 2024 |
| **File number:** | GP-22-2007 |

## Decision

[1] The appeal is dismissed.

[2] The Appellant, C. K., 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 60 years old. She worked as a custodian. She says that in November 2020 she fell ill with COVID. She has fatigue, brain fog, and is short of breath. She also has back pain from degenerative disc disease.

[4] The Appellant applied for a CPP disability pension on October 19, 2021. 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.

[5] The Appellant says that she got sick in November 2020 and never got better. She doesn't have a family doctor, so she struggled with getting medical care. She says that she needs to sleep up to 19 hours a day and she can't do much physical labour.[1]

[6] The Minister acknowledges the Appellant's lack of access to care. However, the Minister says that the Appellant hasn't proven that she suffers from a severe and prolonged disability.[2]

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by the hearing date. In other words, no later than the hearing date.[3]

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[1] See GD2-35 to 36 and GD4.
[2] See GD5.
[3] 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

[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.[4]

[10] I must 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.[5] 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.

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

## Reasons for my decision

[13] I find that the Appellant hasn’t proven she 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?

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section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are on GD2-6. In this case, the Appellant’s coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

[4] 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.

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

## Was the Appellant’s disability severe?

[14] 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 her ability to work**

[15] The Appellant has:

- Chronic fatigue syndrome
- Degenerative disc disease

[16] However, I can’t focus on the Appellant’s diagnoses.[6] Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.[7] 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.[8]

[17] I find that the Appellant has functional limitations that affect her ability to work.

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

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

- She needs to sleep up to 19 hours a day. She must rest constantly through the day, or she will get sick.
- She has no stamina and poor physical strength. She can do physical labour for 10 to 20 minutes before needing a break.
- She has an autoimmune disorder. Because of this, she has brain fog and poor memory. She is easily overwhelmed.
- She has pain throughout her body. Her stomach and back are in constant pain.

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[6] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[7] See *Klabouch v Canada (Social Development)*, 2008 FCA 33.
[8] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- She has respiratory problems that cause her to feel like she has "no breath in her body". Sometimes she needs to pause walking up stairs.
- She has longstanding back problems. It was severe when doing janitorial work. She can't lift or carry. She founds ways to cope when she was working.

[19] The Appellant says that she has had COVID twice. She believes she has a long-COVID. At the hearing, she said that she had symptoms and self-isolated, as instructed by public health guidelines at the time.

– **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 the hearing date.[9]

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

– **The medical evidence doesn't support some conditions**

[22] The medical evidence doesn't support that the Appellant has an **autoimmune disease**. In fact, it shows the opposite. In May 2021, the Appellant was examined for such a condition. The doctor that assessed her concluded that she had no signs of autoimmune issues.[10] I don't have a reason to doubt the doctor's examination and history taking. Because of this, I find that the Appellant doesn't have limitations from an autoimmune condition.

[23] At the hearing, the Appellant spoke about having **respiratory problems** that limit her ability to climb stairs and do physical tasks. However, the medical evidence doesn't support this. Records from November 2020, January 2021, and May 2021 note that she wasn't in respiratory distress and didn't have shortness of breath. There are no breathing limitations listed in her medical report.[11]

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[9] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[10] See GD2-123, and 129 to 130.
[11] See GD2-94, 130, 158, and 182.

[24] The medical evidence doesn’t support that the Appellant has been diagnosed with **long-COVID**. The emergency doctor (Dr. Eickmeier) who completed the medical report queried whether she had long-COVID. This tells me that Dr. Eickmeier wasn’t certain enough to make this diagnosis. From the available records, no such formal diagnosis was made. The Appellant had three negative COVID test result at the hospital.[12]

[25] This doesn’t mean that the Appellant didn’t have COVID or even long-COVID. I don’t make a finding on this. The focus isn’t on her diagnosis, but rather the affect of her functional limitations on her ability to work.

– **The medical evidence supports some conditions**

[26] The medical evidence supports that the Appellant was diagnosed with **chronic fatigue** in November 2020. She had an upper respiratory tract infection in November 2020 and went to the hospital. In December 2020, she was diagnosed with a sinus infection. She reported feeling fatigue after two to three hours of work. In September 2021, she continued to have fatigue, poor ability to concentrate, and difficulty learning new tasks. I accept the functional limitations in the medical report.[13]

[27] The medical evidence supports that the Appellant has **degenerative disc disease**. In December 2022, the Appellant had imaging of her lumbar spine. It showed that she has severe degenerative disc disease between L4 and L5. I accept that the Appellant has back pain that limits her physical ability to lift and carry.[14]

[28] The medical evidence supports that the Appellant’s fatigue and back pain prevented her from doing her usual job.

– **The parties’ arguments on access to medical care and the medical evidence**

[29] The Appellant says that she doesn’t have adequate access to medical care because she doesn’t have a family doctor. She says that she is a victim of a lack of

[12] See GD2-90 to 98.
[13] See GD2-179, 182, and 190.
[14] See GD4-6.

medical treatment, which is a systemic issue. She says she doesn't have a doctor to complete or follow up on referrals.

[30] The Minister argues that the onus is on the Appellant to prove her disability claim. The Minister says that there are no investigations or clinical assessments that support a disabling condition.[15] I agree with the Minister.

[31] At the hearing, I asked the Appellant if she had seen a doctor or gone to the emergency room for care in either 2023 or so far into 2024. She hadn't. She says that she has "given up" and feels that emergency doctors can't do anything to help her.

[32] The medical evidence doesn't support the Appellant's claim that the emergency doctors wouldn't treat her or take her concerns seriously. For instance, she was prescribed medication to treat a sinus infection. She had bloodwork done in January 2021. She received a referral and a requisition in May 2021. Her HbA1c was tested to rule out diabetes. Emergency room doctors filled out medical forms for her.[16]

[33] The emergency doctors were managing the Appellant's care in hospital because she didn't have a family doctor. It wasn't the preferrable method of care, but care was offered on an ongoing basis. For instance, the Appellant was asked to return to the hospital after an echocardiogram was done to review the results.[17]

– **The Appellant didn't follow some medical advice**

[34] To receive a disability pension, an appellant must follow medical advice.[18] If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.[19] If they don't have a reasonable explanation, then I must also consider what effect, if any, the medical advice might have had on the appellant's disability.[20]

[15] See GD5-4.
[16] See GD2-129 to 130 and 179.
[17] See GD2-90 to 98 and 130.
[18] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[19] See *Brown v Canada (Attorney General)*, 2022 FCA 104.
[20] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.

[35] The Appellant sees a chiropractor to manage her back pain.[21] She works on core strengthening and does yoga. She uses a neti pot to manage sinusitis. She doesn't have any prescription medication.

– **The Appellant unreasonably refused investigations**

[36] There isn't a requirement to exhaust all treatments or to follow an ideal treatment plan. However, the Appellant failed to take reasonable steps to manage her medical conditions.[22] Her lack of participation in her health care wasn't reasonable. In this case, I find that it is enough to amount to a refusal of treatment.

[37] In May 2021, the Appellant was referred for a sleep study. She was also given a requisition for an echocardiogram to investigate the cause of her fatigue. An emergency room doctor wanted to go through possible contributing factors, such as heart problems or sleep apnea.[23]

[38] The Appellant says that she never got a call to book an echocardiogram. She didn't make efforts to follow up and hasn't got one done.

[39] The completed echocardiogram requisition is available in the appeal file. It is clear from the form that it was her task to set an appointment.[24]

[40] The Appellant didn't participate in undergoing this investigation. There is no evidence to support that the Appellant has literacy, comprehension, or cognitive issues that would have caused her to be unable to read and follow written instructions.

[41] On its own, this possible misunderstanding or lack of follow through wouldn't surmount the threshold for an unreasonable treatment refusal. However, when combined with the sleep study refusal and lack of pursing ongoing medical care, it does.

[21] See GD4-7.
[22] See *CR v Minister of Employment and Social Development*, 2019 SST 1285.
[23] See GD2-126 and 129 to 130.
[24] See GD2-125.

[42] The Appellant booked a sleep study appointment. She cancelled the appointment and hasn't rebooked. She had three reasons why:

- the sleep study was far away,
- she can't sleep in strange places, and
- she was afraid that the early morning waking would cause her to be sick. She believes that getting up early causes her to be sick for weeks.

[43] I find the Appellant's decision to be unreasonable when factoring in her personal circumstances.

[44] It is reasonable to conclude that the Appellant understood that the sleep study could provide information about the source of her fatigue. Her refusals aren't linked to her functional limitations. There isn't evidence of mental health or cognitive concerns which could have possibly impacted her decision-making ability.[25]

[45] Attending a sleep study would be disruptive to her sleep schedule for the night. It required travel. But she didn't claim to have a barrier traveling to the appointment. While the Appellant believes that waking early causes her to be sick for weeks, there isn't supportive evidence for this belief.

– **Following medical advice might have made a difference**

[46] I find that following the medical advice might have made a difference to the Appellant's disability.

[47] These investigations were necessary to help the doctors rule in or out potential causes of the Appellant's fatigue. Also, the Appellant hasn't sought medical care aside from chiropractic over the last year. It is reasonable to conclude that seeking medical care might have made a difference to her ongoing limitations from fatigue.

[25] See *CC v Minister of Employment and Social Development*, 2023 SST 67.

[48] The Appellant didn't follow medical advice that might have affected her disability. This means that her disability wasn't severe.

[49] When I am deciding whether a disability was severe, I usually must consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work.[26] I don't have to do that here because the Appellant didn't follow medical advice and didn't give a reasonable explanation for not following the advice. This means she hasn't proven that her disability was severe by the hearing date.[27]

## Conclusion

[50] I find that 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.

[51] This means the appeal is dismissed.

Selena Bateman
Member, General Division – Income Security Section

[26] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[27] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.