



Citation: *MK v Minister of Employment and Social Development*, 2024 SST 183

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: M. K.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated May 17, 2023 (issued by Service Canada)

Tribunal member: Connie Dyck

Type of hearing: Teleconference

Hearing date: February 26, 2024

Hearing participant: Appellant

Decision date: February 27, 2024

File number: GP-23-1090

Decision

[1] The appeal is allowed.

[2] The Appellant, M. K., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of November 2022. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 51 years old. He stopped working as a landscaper and general labourer in July 2022 because of pain in his back, feet and hands.

[4] The Appellant applied for a CPP disability pension in August 2022.¹ 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 his back is in constant pain. He can't hold anything for more than two minutes because of the pain in his hands. He also has stress and anxiety because of his pain and injuries. He has difficulty concentrating and focusing. After ten minutes of doing any household chore, he must stop and rest.

[6] The Minister believes the Appellant can still work at suitable employment as noted by his family doctor in June 2023. They also say that after the Appellant's heart attack and implanting stents, tests showed normal findings. The medical evidence also doesn't show a severe back condition or peripheral neuropathy.

¹ GD2-57 to 61.

What the Appellant must prove

[7] For 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 February 26, 2024.²

[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 must look at all the Appellant’s medical conditions together to see what effect they have on his ability to work. I also must 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.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 must prove he has a severe and prolonged disability. He must prove this on a balance of probabilities. This means he must show it is more likely than not that he is disabled.

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. In this case, the Appellant’s coverage period ends after the hearing date, (December 31, 2024) so I have to decide whether he was disabled by the hearing date.

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.

Matters I have to consider first

I accepted late documents

[14] The Appellant and Minister submitted documents after the deadline. They are identified in the file as GD4, 5, 6, 7, 8 and 9. I accepted the late documents because they were relevant and giving permission would not be unfair to either party or cause delays.⁵

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of July 2022. He 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?

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

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

[17] The Appellant has peripheral neuropathy, coronary artery disease, chronic low back pain and carpal tunnel syndrome.

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether he has functional limitations that got in the way of him 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 his ability to work.⁸

⁵ Section 42(2) of the *Social Security Tribunal Rules of Procedure* (Rules) sets out what factors I must consider when deciding whether to accept late evidence. Under section 8(5) of the Rules, I can apply these factors to late submissions (arguments) as well, even though these aren't considered evidence. Section 5 of the Rules defines "evidence."

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.

[19] I find that the Appellant has functional limitations that affect his ability to work.

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

[20] The Appellant says that his medical conditions have resulted in functional limitations that affect his ability to work. He says:

- His back bothers him everyday;
- He can only do something for 10-20 minutes before he has to stop because of pain;
- He had carpal tunnel surgery in 2006, but it failed and his right wrist and hand are worse today;
- In 2018, he had a massive heart attack and had stents inserted;
- He is anxious every day and doesn't sleep well;
- He has neuropathy damage in both feet;

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

[21] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work no later than the hearing date.⁹

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

[23] The Appellant has several medical conditions, but I don't find that they all contribute to his being disabled. However, I disagree with the Minister and believe the medical evidence shows that carpal tunnel syndrome (CTS), peripheral neuropathy, and lower back pain collectively affect the Appellant's ability to work.

– **Carpal tunnel syndrome (CTS)**

[24] The medical evidence shows that since 2009, the Appellant's CTS has steadily worsened. In 2009, he had mild dysfunction of the median nerves in both wrists.¹⁰

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ GD2-22.

[25] In 2020, his CTS had worsened from mild to moderate/severe CTS.¹¹

[26] In June 2022, a nerve study showed moderate to severe dysfunction of the right wrist and moderate dysfunction of the left wrist.¹² It was noted these findings would be significant if the Appellant had symptoms or signs of CTS, which he does.

[27] The medical evidence supports the Appellant's testimony that since his CTS surgery, his functional limitations with using his wrists and hands has decreased. He said he can only use his hands for about two minutes or turn a screwdriver about seven times, before he has to stop because of pain and numbness.

– **Peripheral neuropathy**

[28] In the last two years, the Appellant started experiencing numbness and pain in his feet. Dr. Desai said nerve conduction tests done in August 2022 showed significant peripheral neuropathy.¹³

[29] Dr. Lopez (orthopedic specialist) believed a lot of the Appellant's pain in his feet was due to neuropathy.¹⁴

[30] The medical evidence supports the Appellant's testimony that he has constant pain in his feet. It impacts his ability to stand more than a few minutes. It also impacts his ability to sit. He explained during a 30-minute television program, he needs to get up three to four times to rub his feet to try and relieve the burning feeling.

– **Lower back pain**

[31] A bone scan taken in May 1995 showed findings consistent with sacroiliitis.¹⁵

[32] In January 2023, Dr. Alsmoudi (family doctor) noted the Appellant had chronic low back pain.¹⁶ Although he had full range of motion, he had tenderness. He was

¹¹ GD2-93.

¹² GD2-19-20.

¹³ GD2-32 and 2-91.

¹⁴ GD6-2.

¹⁵ GD2-38.

¹⁶ GD2-89.

unable to tolerate full extension and flexion due to pain. He also had sharp shooting pain when extending his knees.

[33] In June 2023, Dr. Alsmoudi noted the Appellant had chronic back pain with radicular symptoms affecting both lower extremities and peripheral neuropathy. This restricted his ability to stand more than 30 minutes.¹⁷

[34] The medical evidence does support that the Appellant's functional limitations from CTS, neuropathy and lower back pain collectively affected his ability to work by the hearing date.

– **The Appellant followed medical advice**

[35] 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

[36] The Appellant has tried many medications to manage his pain, including opioids. He told me that his doctor stopped prescribing opioids because they weren't effective in reducing his pain. He now uses Gabapentin, but it doesn't take away his pain. It only makes him tired.

[37] He also does stretches, exercises and tries to walk to help his low back pain. However, the only thing that helps is to lie flat in bed.

[38] Dr. Desai (neurologist) recommended conservative treatment for the Appellant's CTS including wearing braces. He did note that surgery might be an option.²¹ There was no further follow-up from Dr. Desai regarding this treatment option. However, the Appellant told me that he would not consent to having CTS surgery. He explained that he had CTS surgery in 2006 on his right wrist and since then, his right wrist is worse

¹⁷ GD1-2

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.

²¹ GD6-2.

than his left. He has pain and numbness and can only use his right hand for a two-minute task before he needs to stop and rest. I accept his reason for not having CTS surgery when he said he is fearful that the surgery might make things worse again.

[39] 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.²²

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

[40] 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
- past work and life experience

[41] 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.²³

[42] I find that the Appellant can't work in the real world. He hasn't been able to work since July 2022.

[43] The Appellant is only 51 years old. He is fluent in English and has a Grade 12 education. He achieved a college diploma, but this was almost three decades ago and was in rigging/pipe fitting, which is a hands on/practical and physical course.

[44] He has limited work experience. His work history is in physically demanding jobs. He has worked in the construction trade and in lawn maintenance. These provide him with no transferable skills because of his physical limitations.

²² See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[45] I considered whether the Appellant could retrain for sedentary type work. I don't believe he could. He has no computer skills and has only ever worked in physically demanding jobs. Further, he can't sit more than a few minutes, can't stand more than 20 minutes, can only use his hands for about two minutes and uses medication that makes him tired and drowsy. This impacts his ability to focus and concentrate.

[46] The Minister says Dr. Alsmoudi's letter of June 2023 supports the Appellant could work part-time hours.²⁴ I asked the Appellant about this, and he provided some context. He said he asked Dr. Alsmoudi to write this letter in case he was able to do some work in the future. It was his hope that he might be able to work a few hours periodically over the year. However, to date, this hasn't been possible because of his functional limitations.

[47] I didn't give much weight to Dr. Alsmoudi's letter based on the information from the Appellant. I also note that in her letter, she notes the Appellant has lower back pain that impacts his ability to work. She said the Appellant can't stand more than 30 minutes and his peripheral neuropathy severely restricts his ability to work. He also struggles with CTS which hinders his ability to work. Based on these functional limitations, I don't believe the Appellant would be able to work in the real world, with a real-world employer who has expectations for work performance.

[48] I find that the Appellant's disability was severe as of July 2022, when his functional limitations prevented him from doing any type of work.

Was the Appellant's disability prolonged?

[49] The Appellant's disability was prolonged.

[50] The Appellant's lower back pain began about four decades ago. His CTS started about three decades years ago. The neuropathy in his feet started about two years ago.

²⁴ GD1-2.

These conditions have continued and gotten worse over the years.²⁵ By July 2022, his functional limitations prevented him from doing any type of work.

[51] In January 2024, Dr. Alsmoudi said the Appellant was unable to return to work because of peripheral neuropathy, coronary artery disease, chronic low back pain and carpal tunnel syndrome.²⁶

[52] There are no treatments planned for his neuropathy.

[53] He had CTS surgery more than 20 years ago, and his CTS symptoms have worsened since then.

[54] There is no expectation that the Appellant's conditions will improve. It is more than likely that they will continue indefinitely.

[55] I find that the Appellant's disability was prolonged as of July 2022.

When payments start

[56] The Appellant's disability became severe and prolonged in July 2022.

[57] There is a four-month waiting period before payments start.²⁷ This means that payments start as of November 2022.

Conclusion

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

[59] This means the appeal is allowed.

Connie Dyck

Member, General Division – Income Security Section

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 GD5-2

²⁷ Section 69 of the *Canada Pension Plan* sets out this rule.