



Citation: *SM v Minister of Employment and Social Development*, 2024 SST 151

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: S. M.

Respondent: Minister of Employment and Social Development
Representative: Ian McRobbie

Decision under appeal: General Division decision dated March 12, 2023
(GP-21-2036)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference

Hearing date: January 29, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: February 18, 2024

File number: AD-23-638

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant spent many years as a customer service representative for a series of auto dealers. He has had back pain for more than 20 years, and he claims that it progressed to the point where he could no longer do his job. He earned some money as a part-time food delivery driver, but he had to give that occupation up too. He is now 49 years old and hasn't worked since February 2021.

[3] The Appellant applied for a CPP disability pension in March 2021.¹ In his application, he said that he could no longer work because of sciatic low back pain caused by spinal stenosis and obesity. He also said that he experienced periodic bouts of depression.

[4] The Minister of Employment and Social Development refused the application after finding that the Appellant did not have a severe and prolonged disability as of December 31, 2020, the last time he had CPP disability coverage.

[5] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found that, although the Appellant had some physical impairments during his coverage period, he still had the capacity to regularly perform substantially gainful employment.

[6] The Appellant then applied for permission to appeal to the Appeal Division. In June 2023, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Last month, I held a hearing to discuss his disability claim in full.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show he is disabled under the CPP. The evidence shows that the

¹ See the Appellant's application for a CPP disability pension dated March 8, 2021, GD2-68.

Appellant, while subject to some functional limitations, did not have a severe disability at the end of 2020.

Issue

[8] For the Appellant to succeed, he had to prove that, more likely than not, he had a severe and prolonged disability during his coverage period. The parties agreed that the Appellant's CPP disability coverage ended on December 31, 2020.²

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.³ A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.
- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.⁴ The disability must be expected to keep the claimant out of the workforce for a long time.

[9] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before December 31, 2020.

Analysis

[10] I have applied the law to the available evidence and concluded that the Appellant did not have a severe and prolonged disability as of December 31, 2020. I am satisfied that the Appellant's medical conditions did not prevent him from regularly pursuing substantially gainful employment at the time.

The Appellant does not have severe disability

[11] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.⁵ I have reviewed the record, and I have concluded that

² Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Appellant's CPP contributions are listed on her updated record of earnings at GD2-91.

³ See section 42(2)(a)(i) of the *Canada Pension Plan*.

⁴ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

⁵ See *Canada Pension Plan*, section 44(1).

the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant may have suffered from impairments during his coverage period, I couldn't find enough evidence to suggest that they rendered him incapable of work.

[12] The Appellant testified that he has had lower back pain since the early 2000s. He said that it got worse in 2017–18, limiting his ability to sit, walk, bend, or use stairs for extended periods. He said that, although he always has background pain, it sometimes flares up to an excruciating level, which then takes five to seven days to subside. He estimated that he experienced these flare-ups maybe four times per year, although the frequency varied.

[13] The Appellant's last full-time job was at a X dealership. He was laid off in October 2018 for reasons that were never made clear to him. However, he strongly suspects that he was let go because he was taking too much time off work. He testified that, on some days, his back pain was so bad, he couldn't get out of bed. His doctor advised him to stop working on account of his back pain and weight.

[14] By that time, he had already started driving for X. He saw food delivery as an alternative job that would allow him to set his own hours according to how he was feeling. However, he never made much money at it, and it turned out to be much harder on his back than he expected, requiring him to constantly get in and out of his car. He eventually gave it up, because X kept reducing driver rates, and it no longer became worthwhile to continue.

[15] Although the Appellant may feel that he is disabled, I must base my decision on more than just his subjective view of his capacity.⁶ In this case, the evidence, looked at as a whole, does not suggest he had a severe impairment that prevented him from performing suitable work before December 31, 2020.

⁶ A CPP disability claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*.

[16] I base this conclusion on the following factors:

– **The Appellant’s medical reports don’t suggest a severe disability**

[17] The Appellant had to provide medical evidence of functional limitations that affected her ability to work by December 31, 2020.⁷ However, the reports on file don’t point to a severe disability.

[18] The Appellant submitted several imaging reports that show degenerative changes of varying degrees:

- In December 2017, an MRI of the lumbar spine indicated a mild disc bulge at L3-4 and L4-5 and mild broad-based posterior central disc herniation at L5-S1, with mild central spinal stenosis.⁸
- In July 2019, an MRI showed a slight improvement in the disc bulge L3-4, with overall stable appearances. The most significant level remained L4-5, where some disc protrusion and impingement were observed.⁹
- In January 2021, an MRI revealed left sided protrusion at L4-5 resulting in contact with the exiting left nerve root, unchanged in the interval. At L5-S1, there was a pronounced central and right paracentral disc protrusion L5-S1 contacting the right S1 nerve root.¹⁰

[19] Dr. Haider Al Dabbagh has been the Appellant’s family doctor since 2006. He provided his clinical records from January 2019 to November 2022. They indicated that the Appellant saw his family doctor on average once every two months, although no appointments were documented after September 2021.¹¹ In February 2020, Dr. Al Dabbagh wrote that the Appellant’s back condition waxed and waned with periods of stiffness.¹² In September 2020, Dr. Al Dabbagh noted that the Appellant had recently

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377 and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁸ See MRI of the lumbar spine dated December 29, 2017, GD2-126.

⁹ See MRI of the lumbar spine dated July 4, 2019, GD2-124.

¹⁰ See MRI of the lumbar spine dated January 7, 2021, GD2-122.

¹¹ The Appellant saw Dr. Al Dabbagh 18 times from January 2019 to September 2021 — see GD6-4 to GD6-43.

¹² See Dr. Al Dabbagh’s office note dated February 7, 2020, GD6-26.

experienced a severe episode of lower back pain with muscle spasm. But he also noted that the Appellant was addressing the pain with over-the-counter pain medications, and he recommended nothing more than conservative treatments such as heat, rest, and physiotherapy.¹³ Between July and September 2021, Dr. Al Dabbagh noted intermittent flare-ups of the Appellant's back pain, but his Gabapentin dosage remained unchanged, and he was advised to continue conservative treatment.

[20] Dr. Al Dabbagh referred the Appellant to a pain management clinic. In September 2019, Dr. Sina Sakian wrote that she was seeing the Appellant for a 15-year history of back pain, worse in last year. He reported no relief from Gabapentin, Tylenol, or Naproxen, and little benefit from physiotherapy, chiropractic, and acupuncture. On examination, his gait was normal, although he displayed hesitant lumbar range of motion due to pain. Dr. Sakian concluded that the Appellant's symptoms were in keeping with discogenic back pain with sciatica. She said that he was a good candidate for nerve blocks and otherwise recommended meditation, weight loss, and a trial of Lyrica.¹⁴

[21] In February 2021, Dr. Al Dabbagh completed a CPP medical report on the Appellant's behalf. He listed the Appellant's main conditions as chronic lower back pain that restricted bending twisting, lifting, or walking extended distances. He noted that, due to his obesity, the Appellant could not regularly exercise. Dr. Al Dabbagh did not expect the Appellant to return to any type of work in the future.¹⁵

[22] Based on these reports, I am not convinced that the Appellant's back pain left him without **any** capacity to work. The medical evidence indicates that the Appellant has a baseline level of back pain with occasional flare-ups. He has been specifically cautioned not to engage in physical activity, but there is nothing in his file to suggest he is incapable of extending sitting. So far, the Appellant has tried only conservative treatments. If the Appellant's pain is as severe as he says it is, but none of his medications have worked, then one would have expected him to more aggressively

¹³ See Dr. Al Dabbagh's office note dated September 25, 2020, GD6-28.

¹⁴ See report dated September 11, 2019 by Dr. Sina Sakian, general practitioner focusing on pain management, GD2-128.

¹⁵ See Dr. Al Dabbagh's CPP medical report dated February 21, 2021, GD2-113.

pursue other means of relief. Dr. Sakian recommended weight loss and nerve block injections, but the Appellant has taken only limited steps in these directions.

– **The Appellant has not pursued all reasonable treatment options**

[23] As we have seen, the medical evidence does not point to a severe disability during the coverage period. But there is another reason why the Appellant is not entitled to a CPP disability pension.

[24] Disability claimants must show that they tried to get better. The Federal Court of Appeal has made it clear that claimants are not entitled to a CPP disability pension unless they do everything reasonably possible to overcome their impairments.¹⁶ The court has also stated that the burden of proof rests entirely with the claimant.¹⁷ In other words, it is up to the claimant to provide evidence that they have sought treatment.

[25] In a recent case called *Brown*, the Federal Court of Appeal affirmed the obligation on claimants to “make efforts to treat their disability, where this is possible, and to seek employment that accommodates their limitations.”¹⁸ The Court found that this Tribunal was entitled to find the claimant in that case had no good excuse not to follow his doctors’ recommendations to exercise and lose weight.

[26] In this case, the Appellant has lost weight, although he remains heavy. He testified that he went on a diet in late 2022 and managed to lose 45 pounds, although he plateaued at around 250 pounds on a 5-foot, 10-inch frame. Despite the reduction, he said that he has not noticed any improvement in his back pain.

[27] The Appellant’s effort to lose weight is admirable, but there is still evidence that he could have done more to address his pain.

[28] Dr. Al Dabbagh first discussed referring the Appellant to a bariatric clinic in January 2019.¹⁹ Over the next two years, the family physician raised this option several

¹⁶ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211 and *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁷ See *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

¹⁸ See *Brown v Canada (Attorney General)*, 2022 FCA 104.

¹⁹ See Dr. Al Dabbagh’s clinical note dated January 22, 2019, GD6-4.

times, but it never happened because the Appellant was reluctant to consider surgery: “Afraid and hesitant of doing gastric sleeve or bypass.”²⁰ In September 2020, Dr. Al Dabbagh wrote that the Appellant had refused a bariatric referral for obesity.²¹

[29] The Appellant testified that he had conducted his own research and decided that bariatric surgery wasn’t for him. I can understand why anyone would be hesitant to submit an invasive procedure, but I don’t find the Appellant’s position reasonable. As noted by the Minister’s medical witness, Dr. Al Dabbagh was only suggesting a **referral** to a bariatric clinic, where surgery **might** be among several options to put forward to lose weight.²² The Appellant did his own research, but that’s a poor substitute for personally discussing the pros and cons of bariatric surgery with a medical professional who is immersed in the field.

[30] The Appellant has also failed to follow through on a medical recommendation that offered some hope of relieving his pain, even if only temporarily. As noted, Dr. Sakian viewed the Appellant as good candidate for nerve block injections in 2019. However, he decided against them because he wanted to minimize his medication intake. That, of course, was his right, but it leaves me wondering why, if his pain was so severe, he didn’t at least try a treatment option that might have improved on the relatively conservative measures that he had already tried with little success.²³

[31] CPP disability claimants are not required to perfectly follow every one of their treatment providers’ recommendations, but they are required to offer a reasonable explanation when asked why they didn’t do so. From what I can see, there was a fair chance that bariatric surgery and/or nerve block injections would have led to an improvement in the Appellant’s condition. Because the Appellant declined to go through with them, I must find that he did not meet his obligation to pursue reasonable treatment options.

²⁰ See Dr. Al Dabbagh’s clinical note dated May 28, 2019, GD6-9.

²¹ See Dr. Al Dabbagh’s clinical note dated September 25, 2019, GD6-28.

²² At the hearing, Dr. Isabelle-Sophie Jolin gave expert testimony on the Minister’s behalf.

²³ At the hearing, the Appellant testified that he was reconsidering his decision not to try nerve blocks. However, even if the Appellant does change his mind, it will be more than four years since the treatment was first recommended to him.

– **The Appellant’s other medical conditions do not contribute to disability**

[32] In addition to back pain, the Appellant claims that other medical conditions impaired his ability to work. However, I don’t see how these conditions contributed to a disability, either individually or in combination:

- The Appellant has been diagnosed with sleep apnea, but the condition was successfully resolved through use of a CPAP machine.²⁴
- He has low testosterone levels, but they are related to his weight and have been described as “asymptomatic.”²⁵
- He has complained of anxiety and depression, but his family doctor has never prescribed him medications for these conditions, nor has he ever referred him to a mental health specialist for assessment or counselling.²⁶

[33] In short, I am satisfied that the above conditions were not significant factors in any impairment from which the Appellant may suffer.

– **The Appellant’s background and personal characteristics didn’t affect his employability**

[34] Based on the medical evidence, I find that the Appellant had work capacity. I am reinforced in this belief when I look at his overall employability.

[35] The leading case on the interpretation of “severe” is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Appellant as a “whole person” in a real-world context.²⁷ Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.”

[36] When deciding whether the Appellant can work, I can’t just look at his medical conditions. I must also consider factors such as his age, level of education, language

²⁴ See Dr. Al Dabbagh’s clinical note dated February 7, 2020, GD6-26 and report dated May 14, 2020 by Dr. Ahmed Al Sabbagh, sleep specialist, GD6-27.

²⁵ See report by Dr. Langlois, endocrinologist, January 31, 2019, GD6-7

²⁶ See Dr. Al Dabbagh’s clinical note dated July 17, 2019 (GD6-11), September 6, 2019 (GD6-12), November 25, 2022 (GD6-17).

²⁷ See *Villani v Canada (Attorney General)* 2001 FCA 248.

abilities, and past work and life experience. These factors help me decide whether the Appellant could work in the real world when he had coverage.

[37] The Appellant was 46 years old when he last had CPP disability coverage — almost two decades from the typical age of retirement. He received training at a community college and has a lengthy work history. Although he has spent nearly all of his career in positions for which he no longer has physical capacity, his vocational background would likely be seen as an asset by potential employers.

[38] In all, I am satisfied that the Appellant was equipped to return to the labour market during his coverage period. He was relatively young, relatively educated, and relatively experienced. Even with his back condition, the Appellant would have been capable of at least attempting to retrain for a sedentary job behind a desk or counter.

– **The Appellant has not attempted alternative employment**

[39] In the end, I was unable to assess the severity of the Appellant's disability as of December 31, 2020. That's because he didn't make a serious effort to pursue an alternative career.

[40] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by **reason of that health condition** [emphasis added].²⁸

[41] This passage suggests that, if a claimant retains at least **some** work capacity, the General Division must conduct an analysis to determine (i) whether they attempted to

²⁸ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

[42] On top of that, disability claimants must make **meaningful** attempts to return to work.²⁹ They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.³⁰ Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[43] The Appellant had at least some work capacity — enough to trigger the obligation to pursue alternative employment. After leaving his regular job, the Appellant earned some money as an X driver, but he never attempted a job that might be better suited to his limitations.

[44] The Appellant testified that, years ago, after he started to experience back pain, he looked into changing careers. He said that he was accepted into a two-year network administrator training program at X. However, he said that he was rejected for student aid twice, because there wasn't enough work in his chosen field. He said that he would have gladly retrained had he received funding for his education.

[45] The Appellant continued to work as a customer service rep until he could no longer do the job. He wanted to keep working, so he looked for something that offered flexible hours and promised to be easy on his back.

[46] He was asked why he chose to work, not for X, but for X, which required him to constantly get in and out of his vehicle to make deliveries. He replied that X, unlike X, did not require a new car, which he could not afford at the time. He added that, a few years earlier, when his car was newer, he had briefly driven for X, but didn't like it. He said that sitting in a car for extended periods hurt his back, just as much, if not more,

²⁹ See *Tracey v Canada (Attorney General)*, 2015 FC 1300, in which the Federal Court stated that the onus is on claimants to show that they made "sincere" efforts to meet the employment efforts test.

³⁰ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

than having to repeatedly get in and out of it. Moreover, he didn't like dealing with loud, and sometimes rude, strangers in his car.

[47] The Appellant testified that he hasn't driven for X for some time. However, he said that he gave it up, not because of his back condition, but because X was squeezing driver rates, and it wasn't financially viable anymore. He said that he has recently been looking into taking an insurance appraisal course at Centennial College. He thinks he is up to it, because it would be mostly done online. Asked whether he could see himself successfully doing a desk or counter job, the Appellant replied that, having never tried such a job, he didn't know.

[48] In the end, I concluded that the Appellant had not fulfilled his duty to try suitable work. According to his income tax returns, he never earned any significant amounts from food delivery after expenses.³¹ Because they fell far short of substantially gainful, I am thus not inclined to hold those earnings against him. Ultimately, he stopped driving for X, but he did so for financial reasons, not by reason of his health condition.

[49] The Appellant is now contemplating a return to school, and he is to be commended for that. However, it suggests that, at some level, he believes himself capable of work. It also highlights the fact that he has yet to pursue a truly sedentary job.

I don't have to consider whether the Appellant has a prolonged disability

[50] A disability must be severe **and** prolonged.³² Since the Appellant has not proved that his disability is severe, there is no need for me to assess whether it might also be prolonged.

³¹ See Appellant's T1 income tax returns for 2019 and 2020, GD2-19. After the hearing, the Appellant submitted various X statements showing what appear to be marginal gross earnings from 2021-24 — see AD10.

³² See *Canada Pension Plan*, section 42(2)(a).

Conclusion

[51] The Appellant has a back condition, but the available evidence suggests that it did not prevent him from regularly pursuing a substantially gainful occupation during his coverage period. What's more, the Appellant has never made a real effort to seek employment that might have been better suited to his limitations. For these reasons, I am not convinced that the Appellant had a severe disability as of December 31, 2020.

[52] The appeal is dismissed.



Member, Appeal Division