



Citation: *DB v Minister of Employment and Social Development*, 2024 SST 184

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: D. B.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated October 5, 2022 (issued by Service Canada)

Tribunal member: Virginia Saunders

Type of hearing: Teleconference

Hearing date: February 14, 2024

Hearing participants: Appellant

Decision date: February 26, 2024

File number: GP-22-1996

Decision

[1] The appeal is allowed.

[2] The Appellant, D. B., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of March 2021. This decision explains why I am allowing the appeal.

Overview

[3] For many years, the Appellant worked in service and labouring jobs such as housekeeping, restaurant server, dishwasher, and nanny. In 2017, she was managing a beer store. A customer (Ms. G) offered her a job as a home support worker. The pay was good, so the Appellant accepted, although she had no training in that field.

[4] The Appellant worked for Ms. G full time for about two years. She looked after her home and personal care, including bathing, dressing, shopping, meal preparation, and housework.

[5] Ms. G was very demanding, and the Appellant found the job to be draining, both mentally and physically. She had chronic back and shoulder pain from previous injuries, and these gradually worsened in her new job. She re-injured her shoulder while helping Ms. G out of the tub. By June 2019, she was having difficulty doing her work tasks. She also felt she was in a hostile work environment. She quit her job. She hasn't worked regularly at any job since then. She is now 51 years old.

[6] The Appellant applied for a CPP disability pension in February 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.

[7] The Appellant says her chronic pain prevents her from doing any job.

[8] The Minister says the Appellant could have done work that was suited to her limitations.

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2021. This date is based on her CPP contributions.¹ She must also prove that she continues to be disabled.²

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

[11] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.³

[12] 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.

[13] A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.⁴

[14] 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.

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 on GD2-62.

² 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.

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.

[15] 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.

Matters I have to consider first

I accepted late documents

[16] In August 2023, the Appellant told the Tribunal that she had no more documents to file. The Minister filed its written arguments the following month.⁵ The Tribunal told the Appellant that she had until October 28, 2023, to respond.⁶ The Tribunal calls this the “reply period.”

[17] The Tribunal intends the reply period to be for written arguments, not more evidence. However, the Tribunal didn’t explain this to the Appellant. It was reasonable for her to think that she could file more evidence to reinforce her position. So, I decided not to limit what the Appellant could file in the reply period. She filed a letter from her doctor (GD6) on October 11, 2023. Although the letter is evidence, rather than an argument, it was filed in time.

[18] The Minister then filed an argument (GD7) that discussed the Appellant’s new evidence. Normally, the Appellant gets the last word. The Minister isn’t supposed to file arguments in response to the Appellant’s reply. However, I accepted GD7 because:⁷

- It was new and was relevant to the issue of whether the Appellant is disabled.
- It could not have been filed earlier, because it addressed new evidence.
- It would be unfair not to give the Minister a chance to address the new evidence.
- Accepting GD7 didn’t delay anything. The argument was three pages long and was filed four months before the hearing took place.

⁵ See GD5.

⁶ See Tribunal letter of September 28, 2023.

⁷ 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.”

Reasons for my decision

[19] I find that the Appellant had a severe and prolonged disability as of June 2020. She continues to be disabled. Here are my reasons.

The Appellant's disability was severe

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

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

[21] The Appellant has pain in her neck, back, and shoulders. She has also had depression and anxiety for many years.

[22] However, I can't focus on her diagnoses.⁸ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.⁹ When I do this, I have to look at **all** of her medical conditions (not just the main one) and think about how they affected her ability to work by December 31, 2021, and since then.¹⁰

[23] I find that the Appellant has functional limitations that have affected her ability to work since June 2020.

– What the Appellant says about her functional limitations

[24] The Appellant says that, because of her medical conditions, she has difficulty with sitting, standing, walking, and almost any activity of daily living. She is right-handed, but it is very hard to use her right arm and hand to do anything, including writing and typing. She can't pick up her grandson. She had to give up gardening and playing musical instruments. On bad days, she needs help with dressing and hygiene. She is also depressed and anxious about her condition, so she has problems sleeping and concentrating.¹¹

⁸ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹⁰ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

¹¹ See GD2-21-24. The Appellant told me some of this at the hearing as well.

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

[25] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2021.¹²

[26] The medical evidence supports most of what the Appellant says.

[27] In October 2023, the Appellant’s family doctor, Dr. Rossouw, said she had been a patient of his clinic for 22 years. She had a longstanding depression/anxiety disorder, as well as chronic right shoulder pain secondary to rotator cuff pathology that limited her ability to do physical work.¹³

[28] Other medical evidence shows the Appellant has had these conditions for many years. For example, in 2009, Dr. Rossouw noted her depression and her significant lower back discomfort caused by lumbar spondylosis.¹⁴ Dr. Rossouw ordered imaging to investigate her shoulder pain in October 2016 and June 2020.¹⁵ In February 2022, Dr. Rossouw said she had chronic pain syndrome causing neck, back, and shoulder pain; and right shoulder tendinopathy. These conditions made it difficult for her to do anything physical, or to sit or stand for prolonged periods.¹⁶

[29] The medical evidence doesn’t identify any functional limitations caused by the Appellant’s depression and anxiety. There is nothing to show how they affect her ability to work. However, the evidence does support that her chronic back, neck, and shoulder pain affect her ability to do physical work, particularly work where she has to use her right arm.

¹² See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹³ See GD6-1.

¹⁴ See GD2-127.

¹⁵ See GD2-94 and GD2-116.

¹⁶ See GD2-89-92.

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

[30] To be severe, the Appellant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.¹⁷

[31] When I am deciding whether the Appellant can work, I can't just look at her 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 whether the Appellant can work in the real world—in other words, whether it is realistic to say that she can work.¹⁸

[32] It isn't realistic to say that the Appellant can work. In December 2021, she was only 49 years old. She has a high school education. She took a book-keeping course years ago. She has some experience as a store manager. These positive factors suggest that she might be able to retrain for a different job.

[33] However, the Appellant's limitations outweigh the positive factors. She is right-handed, but she can't use her right arm. She can't sit or stand for long periods. She wouldn't be able to work productively at any type of job.

[34] The Appellant tried to work in 2021. Her experience confirms that she can't work in the real world. She was hired by her old boss at the beer store to work on a casual basis. She was supposed to work the cash, clean, and stock shelves. She didn't have to do anything that was too difficult. But she found that everything was difficult. She couldn't do any of her tasks, including standing or sitting at the cash. She estimated that she worked for about 10 days off and on. Then her boss hired someone else.

[35] The Minister acknowledged that the Appellant has some limitations that prevent her from doing physically demanding jobs. But the Minister argued that her condition

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

¹⁸ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

wasn't so bad as to rule out "suitable work within her limitations."¹⁹ The Minister noted the following:²⁰

- The Appellant was able to work for many years despite having pain and depression.
- Shoulder imaging in 2016 and 2020 didn't show anything of significance. The shoulder MRI that showed adhesive capsulitis took place in February 2023, which is **after** the Appellant's qualifying period ended in December 2021.
- There were no x-ray, CT scan or MRI reports to show the Appellant had significant spine issues.
- The Appellant's pain medications have not changed significantly since 2009.
- The Appellant did not see specialists and was referred to an orthopedic surgeon only recently.
- The Appellant felt better after receiving prolotherapy injections in her right shoulder, beginning in October 2020. Since then, she has regularly told Dr. Rossouw that she is "feeling better" and "doing well" as a result of the prolotherapy. She said the same thing to Service Canada in April 2022.

[36] I am not persuaded by the Minister's arguments.

[37] First, whether the Appellant could work in the past doesn't matter. She said that her condition got worse in her last job, which is why she quit in June 2019. She isn't claiming that she was disabled before then.

[38] The absence of any significant objective findings to explain the Appellant's pain doesn't mean her pain isn't real. Chronic pain doesn't always show up on tests and imaging. It can still affect a person's ability to work.²¹ Dr. Rossouw believed what the Appellant said about her pain. The Minister did not provide a medical opinion to show that he was wrong to do so.

¹⁹ See GD5-3.

²⁰ See GD5 and GD8.

²¹ See *Nova Scotia (Worker's Compensation Board) v Martin*, [2003] SCC 54.

[39] The Appellant relied on Dr. Rossouw to recommend appropriate investigations and treatment. I don't know why Dr. Rossouw didn't try other medications or refer the Appellant to specialists, but I can't conclude that it was because he didn't think there was much wrong with her. He told her to stop working in 2020. In 2022, he said that he didn't think there was any work she could safely do. The Minister did not provide a medical opinion to show that Dr. Rossouw would have followed a different treatment plan if he truly believed the Appellant was unable to work.

[40] Finally, I accept the Appellant's evidence that she told Dr. Rossouw she was doing better because the prolotherapy did reduce her pain. But it didn't help her back issues, nor did it make her right arm more functional.

[41] I find that the Appellant can't work in the real world. Her disability was severe as of June 2020. I chose this date because Dr. Rossouw said he told her to stop working in 2020. There is no information that tells me **when** in 2020. However, in June he noted her right shoulder was very painful. It is likely that is when he told her not to work (although by that time, she hadn't been working for a year.)

The Appellant's disability was prolonged

[42] The Appellant's disability was prolonged.

[43] The Appellant has had her conditions for many years. She hasn't been able to work for almost four years. She has followed all medical advice and continues to have treatment. Treatment has reduced some of her shoulder pain, but not enough to improve her function.

[44] The Appellant's conditions will more than likely continue indefinitely. In 2022, Dr. Rossouw said her chronic pain would likely deteriorate and last for more than one year, and her shoulder tendinopathy would likely last for more than one year.²² More recently, he said that, although the Appellant will be seeing an orthopedic surgeon, it is unlikely she would be able to do any physical work.²³ Since the orthopedic surgeon is only

²² See GD2-89-90.

²³ GD6-1.

looking at the Appellant's shoulder, it isn't likely that her back will improve. She will continue to have difficulty sitting, which means she won't be able to do sedentary work either.

[45] I find that the Appellant's disability was prolonged as of June 2020, when Dr. Rossouw said she couldn't work any more.

When payments start

[46] The Appellant had a severe and prolonged disability in June 2020.

[47] However, the *Canada Pension Plan* says a person can't be considered disabled more than 15 months before the Minister receives their disability pension application.²⁴ After that, there is a 4-month waiting period before payments start.²⁵

[48] The Minister received the Appellant's application in February 2022. That means she is considered to have become disabled in November 2020.

[49] Her pension payments start as of March 2021.

Conclusion

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

[51] This means the appeal is allowed.

Virginia Saunders
Member, General Division – Income Security Section

²⁴ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

²⁵ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.