



Citation: *TA v Minister of Employment and Social Development*, 2024 SST 292

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

# Decision

**Appellant:** T. A.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development reconsideration decision dated May 30, 2023 (issued by Service Canada)

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**Tribunal member:** Jackie Laidlaw

**Type of hearing:** Videoconference

**Hearing date:** February 1, 2024

**Hearing participants:** Appellant

**Decision date:** February 9, 2024

**File number:** GP-23-1249

## Decision

[1] The appeal is allowed.

[2] The Appellant, T. A., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of February 2024.

## Overview

[3] The Appellant is a 58-year-old woman who last worked March 12, 2023 as a cashier at Walmart. She initially applied for a CPP disability benefit indicating an inability to work because of uterine bleeding and high blood pressure. She had a uterine ablation which has stopped the bleeding, and her blood pressure is controlled with medications. At the hearing, she noted it was pain in her back and shoulders from arthritis which have caused her to stop working.

[4] The Appellant applied for a CPP disability pension on May 16, 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.

[5] The Appellant says she cannot work because of pain.

[6] The Minister says the medical evidence shows only mild back problems which are normally dealt with anti-inflammatories and physiotherapy.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by the hearing date. In other words, no later than February 1, 2024.<sup>1</sup>

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<sup>1</sup> 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 GD 2-6. In this case,

[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.<sup>2</sup>

[10] 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.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.<sup>3</sup>

[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 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.

## Reasons for my decision

[14] I find that the Appellant had a severe and prolonged disability as of October 12, 2023. This is the date her doctor stated she is permanently disabled. She 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?

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the Appellant’s coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

<sup>2</sup> 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.

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

## **Was the Appellant's disability severe?**

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

### **– The Appellant's functional limitations affect her ability to work**

[16] The Appellant has:

- generalized osteoarthritis.
- high blood pressure.

[17] However, I can't focus on the Appellant's diagnoses.<sup>4</sup> Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.<sup>5</sup> 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 affect her ability to work.<sup>6</sup>

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

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

[19] The Appellant says that her medical condition has resulted in functional limitations that affect her ability to work.

[20] The Appellant stated she is still able to cook and clean a bit and go for walks. When she sits too long her back hurts, and she must move around. When she stands for more than 10 to 15 minutes she needs to sit. After she takes her morning medications she must lay down for an hour because she is drowsy.

[21] The Appellant stated she is now forgetting things which is not normal for her.

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<sup>4</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>5</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>6</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[22] The Appellant explained that she returned to work in July 2021 after her uterine ablation because she needed to support herself. She pushed herself to work and she feels she damaged her body.

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

[23] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than the hearing date.<sup>7</sup>

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

[25] I agree with the Minister that the diagnostic evidence shows only mild arthritis of the lumbar spine.<sup>8</sup> The diagnostic images of the CT spine in 2021 showed a mild bulge but no significant spinal stenosis. X-rays of the left knee in February 2023 showed minimal narrowing and no significant changes, while the right knee showed osteoarthritis with damage to the cartilage.<sup>9</sup>

[26] However, chronic pain is a condition and would not show in diagnostic images.

[27] In September 2021 the Appellant was seen in the emergency department for right-sided sciatica. At the time, it was noted, she had been reassigned from work where previously she could walk around to working as a cashier requiring constant rotating and flexing. This caused her pain to worsen. The emergency room doctor requested her employer put her back to a work area where she could be accommodated. He prescribed Toradol 10mg then Celebrex.<sup>10</sup>

[28] The Appellant stated she was put on the “self check out”, which required her to stand constantly. She stated this still hurt her back.

[29] The emergency room note of November 28, 2022 showed the Appellant had a three-to-four-year history of pain after an accident. She was seen at the time for a one-

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

<sup>8</sup> See GD 2 107 and Xray of the lumbar spine on May 13, 2023.

<sup>9</sup> See GD 2 151 left knee Xray February 8, 2023, and GD 2 111 right knee Xray February 8, 2023.

<sup>10</sup> See GD 2 117 a September 29, 2021 emergency room note.

week acute exacerbation of the lower back with radiation. The emergency room doctor diagnosed sciatica and recommended Lyrica. The doctor also noted that the Appellant was able to walk.<sup>11</sup>

[30] There is a history of back pain. I agree again with the Minister that this pain could be treated with physiotherapy and medication. The Appellant stated she has gone to physiotherapy since her 2016 car accident. She has not seen an orthopaedic surgeon. She has not gone to a pain clinic.

[31] Despite all this, it is her family physician Dr. Anne-Marie Lemieux who has consistently noted she is unable to work. In 2023 Dr. Lemieux diagnosed a generalized osteoarthritis onset in 2021, with pain and decreased range of motion in her left shoulder, left knee and lumbar spine. Dr. Lemieux noted that Cymbalta and Lyrica did not work. Dr. Lemieux recommended the Appellant stop working on March 1, 2023.<sup>12</sup>

[32] At the same time, Dr. Lemieux filled out a group benefit attending physician statement, stating the same. She noted severe low back pain, left shoulder pain and oddly, pain in the right knee. Dr. Lemieux indicated functional limitations of standing more than 10 minutes, sitting five minutes, lifting, reaching, pulling, limited walking, pushing, grabbing, bending, and kneeling.<sup>13</sup>

[33] A form filled out by Dr. Lemieux dated October 12, 2023 indicates the Appellant was seen in her office that day and was unable to work for medical reasons as of that date. Dr. Lemieux wrote the Appellant is permanently disabled and cannot go back to work.<sup>14</sup>

[34] I agree with the Minister that Dr. Lemieux did not specify the condition which rendered the Appellant permanently disabled. However, it is reasonable to assume she means the back, knee, and shoulder pain she had described in her reports of May 2023.

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<sup>11</sup> See GD 2-137.

<sup>12</sup> See GD 2 129 the medical report of May 30, 20203.

<sup>13</sup> See GD 2 104 May 10, 2023.

<sup>14</sup> See GD 4-2.

[35] The medical evidence supports that the Appellant's arthritic pain prevented her from working by October 2023.

[36] 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 her from earning a living at any type of work, not just her usual job.<sup>15</sup>

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

[37] When I am deciding whether the Appellant can work, I can't just look at her medical condition and how it affects what she can do. I must also consider factors such as her:

- age
- level of education
- language abilities
- past work and life experience

[38] 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.<sup>16</sup>

[39] The Appellant is 58 years old. Her age would be a barrier to finding alternative work. She does not have any problems with the English language. Her high school education may also be a barrier in finding alternative work.

[40] In the past the Appellant has worked mostly in factories, fast food restaurants and recently as a cashier at Walmart. It is unlikely the Appellant would be able to return to any labour-intensive job at a factory. A cashier would be considered a sedentary, or low-impact job and she has been deemed by her doctor unable to perform the duties. I find it likely, given her age and her past work history with limited transferable skills that she would be able to retrain or find gainful employment.

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<sup>15</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>16</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[41] I find that the Appellant can't work in the real world. She hasn't been able to work since October 2023.

[42] I find that the Appellant's disability was severe as of October 2023 when her family doctor said she had a permanent disability and was unable to work.

### **Was the Appellant's disability prolonged?**

[43] The Appellant's disability was prolonged.

[44] The Appellant's arthritic pain began around 2021 and has continued since then.<sup>17</sup>

[45] Dr. Lemieux wrote that the disability is permanent.<sup>18</sup>

[46] The Appellant's condition will more than likely continue indefinitely.

[47] I find that the Appellant's disability was prolonged as of October 2023.

### **When payments start**

[48] The Appellant's disability became severe and prolonged in October 2023.

[49] There is a four-month waiting period before payments start.<sup>19</sup> This means that payments start as of February 2024.

### **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.

Jackie Laidlaw

Member, General Division – Income Security Section

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<sup>17</sup> 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.

<sup>18</sup> See GD 4-2.

<sup>19</sup> Section 69 of the *Canada Pension Plan* sets out this rule.