



Citation: *AJ v Minister of Employment and Social Development*, 2024 SST 305

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

## Decision

**Appellant:** A. J.  
**Representative:** S. S.

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

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated January 25, 2023 (issued  
by Service Canada)

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**Tribunal member:** Sharon Buchanan

**Type of hearing:** Teleconference

**Hearing date:** March 13, 2024

**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** March 22, 2024

**File number:** GP-23-220

## Decision

[1] The appeal is dismissed.

[2] The Appellant, A. J., 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 52 years old. She has a university degree in math and computer science. She worked in full time permanent positions and as an independent contractor in Information Technology (IT) in senior positions. In August 2018 she stopped working because of symptoms from severe migraines. She attempted to return to work in October 2018, working fewer hours, from home. She was unable to manage. She stopped working in November 2018. She hasn't worked since.

[4] The Appellant applied for a CPP disability pension on October 26, 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 the symptoms from her chronic and severe migraine pain, complicated by fibromyalgia pain, dizziness, brain fog and fatigue mean that she can't work. She says can't she manage a routine in her own home without help.

[6] The Minister says the evidence shows the Appellant experienced significant symptoms and limitations at the time she stopped working in 2018, and for a period after that. However, the Minister says the evidence doesn't support a severe and prolonged disability by December 2023 – the time when the Appellant last qualified for disability benefits. There is a lack of medical evidence from 2022 and 2023.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2023. In other words, no later than December

31, 2023. This date is based on her CPP contributions.<sup>1</sup> She must also prove that she continues to be disabled.<sup>2</sup>

[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>3</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>4</sup>

[12] 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.

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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 page number GD2-6 in the file.

<sup>2</sup> 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.

<sup>3</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>4</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## **Matters I have to consider first**

### **I didn't grant the Appellant's request for additional time following the hearing to submit documents**

[13] At the conclusion of the hearing the Appellant's representative asked for time to submit the Appellant's 2022 and 2023 medical records. He said he would contact the Appellant's long-term disability provider for their records. I denied the request.

[14] The evidence would be relevant. However, I am not persuaded that in the circumstances further time is required for a fair hearing.

[15] November 15, 2022, the Minister wrote to the Appellant's family physician requesting the dates and reasons for office visits, and consultation reports since January 2022.<sup>5</sup> The Appellant and her representative were advised additional information was required and had been requested from the Appellant's physician.<sup>6</sup> When the physician didn't respond the Minister sent final reminder notices to the physician, the Appellant and the representative.<sup>7</sup> The Minister's written submissions are clear about the significance of this medical evidence.<sup>8</sup>

[16] I am not satisfied that there is a reasonable explanation for why the Appellant was unable to provide this information prior to the hearing.

[17] The Appellant's representative said he was ready to proceed in October 2023. The Appellant's representative confirmed he received the Minister's submissions.

[18] At the hearing the Appellant's representative asked the Appellant about a development call from the Minister in November 2022 asking for 2022 and 2023 medical evidence. The representative asked the Appellant where the evidence was. She said she assumed someone was coordinating it, that all her physicians take many notes and complete many forms on her behalf, however she didn't have access to these notes.

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<sup>5</sup> See GD2-28

<sup>6</sup> See GD2-26, GD2-24

<sup>7</sup> See GD2-18, GD2-17, GD2-16

<sup>8</sup> See GD8-2, 3, 7, 8.

[19] The evidence is not new. I am not persuaded it couldn't have been obtained earlier. The issue, or need for this evidence, is not new. I am satisfied the Appellant had notice of the need for some medical evidence for the period 2022 and 2023.

[20] The Appellant has had a reasonable opportunity to prepare for the hearing. I find in the circumstances the Appellant has not taken reasonable steps to avoid having to ask for this additional time, at the conclusion of the proceedings. Giving permission would cause an unreasonable delay.

## **Reasons for my decision**

[21] I find that the Appellant hasn't proven she had a severe and prolonged disability by December 31, 2023.

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

[22] The Appellant has chronic migraines, post traumatic stress disorder (PTSD), anxiety and macular degeneration.

[23] However, I can't focus on the Appellant's diagnoses.<sup>9</sup> Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.<sup>10</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 affected her ability to work.<sup>11</sup>

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

[24] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work.

[25] The Appellant said when she tried to return to work in the fall of 2018 she couldn't focus because of her pain. Her job was demanding, the pain and inability to focus meant she lacked the necessary critical thinking skills to meet the demands of

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<sup>9</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

<sup>10</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

<sup>11</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

over 100 stakeholders across the country. The Appellant said this hasn't changed. Many days she is stuck in bed with pain.

[26] The Appellant testified that she lacks the capacity to do much. She showers once a week. The Appellant's husband works from home and cares for her, their young daughter, and the household. She is not able to function more than one active day at a time, and then must recover.

[27] The Appellant never knows when her condition will flare or be severe. Some headaches respond to mild medication. Severe migraines require stronger medication that knocks her out. Severe migraines may continue for several days without a break in between. She said her physicians know she may have to cancel appointments at a moments notice.

[28] The Appellant said she doesn't have daily headaches but said 20 migraines in a month would be a good month. Her condition is aggravated because migraine pain is a trigger for her fibromyalgia. That means she doesn't just suffer with head pain, but has pain all over her body, is dizzy, and feels restless.

[29] The Appellant said currently her medication helps to the extent that she can get out of bed and eat. It helps with her nausea.

[30] The Appellant said that she receives injections every two and half months for her macular degeneration. Her eyes aren't 100 percent anymore, they can get dry, and she uses sunglasses because of glare. However, she said right now, the condition is under control.

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

[31] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2023.<sup>12</sup>

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

[32] There isn't medical evidence to support what the Appellant says.

[33] The most recent medical report I have is from February 2021, which is more than two years before the Appellant's minimum qualifying period (MQP).

[34] The medical evidence supports the Appellant had functional limitations at that time. For example, the February 2021 report from the Appellant's neurologist documents ongoing headaches with a few pain-free days per month. The neurologist says on pain free days the Appellant could still experience vertigo and tinnitus. The neurologist writes the Appellant reported six to seven migraine attacks per month.<sup>13</sup>

[35] According to this February 2021 medical report the Appellant had started Botox treatment for her migraines. A third injection had been scheduled. There is a note the Appellant could request a nerve block. However, there is no medical evidence beyond this.

[36] I understand that there may not always be medical evidence at the time of the MQP and that I can draw conclusions from the available relevant evidence in some cases. But in this case, I can't draw a conclusion that she continued to have functional limitations.

[37] According to the Appellant she is receiving ongoing and changing treatment, and her physicians continue to explore treatment options. She said the Botox injections weren't helpful. They were replaced with monthly injections of Ajovy.

[38] The Appellant said the dosage of this medication was increased this past fall to try a different approach to pain relief. She now receives a significant amount of the medication, injected once every three months. According to her neurologist it could take up to a year to see the benefits of this change. The Appellant said her neurologist says there is another medication that has recently been approved and it is being hailed as the "next holy grail" for migraine treatment. The Appellant said they may try this as well.

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<sup>13</sup> See GD2-242

[39] The Appellant says she was diagnosed with fibromyalgia and is taking medication for it. This condition is being managed by her family physician and psychologist, and she is also seeing a rheumatologist. The Appellant's rheumatologist has asked for a referral to a physiatrist to assist with assessing treatment options. The Appellant sees her psychiatrist every two weeks.

[40] The Appellant says her migraines are a trigger for her fibromyalgia pain. She said the interaction of these two conditions is significant. A migraine now means pain all over her body, not just the usual pain that would come with a migraine.

[41] I have no medical evidence about these developments, these treatments, or their impact on the Appellant's functional limitations. Without the medical evidence, I can't draw a conclusion on the nature of the Appellant's functional limitations.

[42] I didn't make this decision because I don't believe the Appellant. The problem is that there isn't any medical evidence to support the Appellant's functional limitations affected her ability to work by December 2023 and continuously since then.

**– Why I didn't consider the Appellant's personal characteristics**

[43] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics. Factors like age, level of education, language abilities, and past work and life experience, may affect whether an appellant can work in the real world.<sup>14</sup>

[44] But I didn't consider the Appellant's personal characteristics. This is because an appellant can't qualify for a disability pension based on their personal characteristics alone. There must still be medical evidence to support a finding of a disability.<sup>15</sup>

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<sup>14</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>15</sup> Section 42(2)(a) of the *Canada Pension Plan* says that a person is disabled only if they have a severe and prolonged **mental or physical disability**. See also *Villani v Canada (Attorney General)*, 2001 FCA 248 at paragraph 50, where the Court said that "[m]edical evidence will still be needed..."



[45] Since there is no relevant medical evidence, there is no reason to consider her personal characteristics.

## **Conclusion**

[46] 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.

[47] This means the appeal is dismissed.

Sharon Buchanan  
Member, General Division – Income Security Section