



Citation: *DG v Minister of Employment and Social Development*, 2024 SST 383

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant: D. G.
Representative: Jaswinder Johal

Respondent: Minister of Employment and Social Development
Representative: Andrew Kirk

Decision under appeal: General Division decision dated October 23, 2023
(GP-22-1409)

Tribunal member: Neil Nawaz

Type of hearing: In Writing
Decision date: April 17, 2024
File number: AD-23-1021

Decision

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

Overview

[2] The Appellant is a 54-year-old former warehouse worker. She was born in India, where she earned a bachelor's degree. She immigrated to Canada in 1998 and has worked in this country for more than 20 years, most recently at X in Brampton. She left that job in January 2021 and hasn't worked since.

[3] The Appellant applied for a CPP disability pension in December 2021.¹ She said that she could no longer work because of various medical problems, including leg pain, depression, and diabetes.

[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, 2023, the last time she 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 insufficient evidence that the Appellant was regularly incapable of substantially gainful employment during her coverage period. Among other things, the General Division found that the Appellant hadn't exhausted all reasonable therapeutic options.

[6] The Appellant then applied for permission to appeal to the Appeal Division. Late last year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. At the Appellant's request, I conducted a hearing by way of written questions and answers.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that she is eligible for a CPP disability pension. The

¹ See Appellant's application for the CPP disability pension dated December 20, 2021, GD2-50.

evidence shows that the Appellant, while subject to some functional limitations, did not have a severe and prolonged disability at the end of 2023.

Issue

[8] For the Appellant to succeed, she had to prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agreed that the Appellant's coverage ended on December 31, 2023.²

- 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, 2023.

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, 2023. I am satisfied that the Appellant's medical conditions at the time did not prevent her from regularly pursuing substantially gainful employment.

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 record of earnings at GD2-77.

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 section 44(1) of the *Canada Pension Plan*.

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

[12] In her application for benefits, the Appellant described her main disabling condition chronic leg pain, depression, and diabetes. She also said that she could not stand or sit for prolonged periods.⁶ She rated most of her physical, emotional and mental capacities as fair to poor.

[13] Later, the Appellant's representative claimed that his client suffered from the following medical conditions:

- Major depression and anxiety
- Chronic pain syndrome
- Post-traumatic stress disorder
- Pain, numbness, and tingling in the left arm
- Pain and weakness in both feet
- Headaches
- Bladder infections
- Stomach pain
- Disturbed sleep
- Impaired memory
- Inability to concentrate
- Amputation of left-hand fingers⁷

⁶ See Appellant's application for CPP disability benefits dated December 29, 2021, GD2-50.

⁷ See notice of appeal to the General Division dated August 10, 2022, GD1-3. I was unable to find independent medical confirmation of any amputation in the medical record.

[14] At her General Division hearing, the Appellant testified that she was a floor worker at X for 17 years, eventually working her way up to team leader. Over time, she developed pain and swelling in her legs, which prevented her from standing for extended periods. In November 2020, she was placed on modified duties in the shipping and receiving department, making entries on a computer. Two months later, her employer told her that they had no more work for her and advised her to apply for long term disability benefits.

[15] The Appellant testified that she feels pain in her legs, arms, and neck. She can't stand or sit for over an hour. She can't walk longer than 10 minutes. She has to take frequent rests between tasks. She has low energy, and her memory and concentration are poor.

[16] The Appellant was required to provide medical evidence of functional limitations that affected her ability to work by December 31, 2023.⁸ Although she may feel disabled, I must base my decision on more than just her subjective view of her capacity at the relevant time.⁹ In my view, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work during the relevant period.

– The Appellant is not significantly restricted by foot, leg, or back pain

[17] In December 2021, the Appellant's family physician, Dr. Sabha Cheema, completed a questionnaire in support of her patient's CPP disability application. She listed the Appellant's main medical condition, which she had been treating since August 2020, as bilateral leg pain, aggravated by prolonged standing. Dr. Cheema explained that, while the Appellant liked her job, her employer had repeatedly rebuffed her attempts to go on worker's compensation and had refused to give her modified duties

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377 and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁹ 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*.

that would relieve the pain and swelling in her legs.¹⁰ This account contradicts what the Appellant later told the General Division, and it appears that Dr. Cheema was not aware that X had already given the Appellant a sitting job, albeit one that turned out to be temporary. In any event, the fact remains that the Appellant's primary treatment provider did not bar her from working and instead suggested that she was able to do modified work within her limitations.

[18] Other notes and letters from Dr. Cheema's office undermine the Appellant's claim that her legs contributed to a severe and pronged disability:

- In January 2021, Dr. Cheema noted that the Appellant's employer was not listening to the Appellant's requests for modified work; instead, they gave her a disability application. This suggests that the Appellant not only wanted to continue working, she felt that she had, at some level, the capacity to do so.¹¹
- In May 2021, Dr. Umair wrote that the Appellant wanted to work in a sitting job for four to six hour per day, but her employer wouldn't let her.¹²
- In July 2021, Dr. Cheema reported that the Appellant experienced pain and swelling in her legs after standing for "prolonged hours." She added that the Appellant had asked her employer on multiple occasions to give her modified work, to no avail.¹³
- In August 2021, the Appellant told Dr. Cheema that there were many modified jobs that she thought she could do in the company.¹⁴
- In December 2021, Dr. Cheema recommended that the Appellant do alternate sitting and standing, starting with fewer hours and gradually increasing.¹⁵

¹⁰ See CPP medical report dated December 13, 2021 by Dr. Sabha Cheema, general practitioner, GD2-98.

¹¹ See Dr. Cheema's office note dated January 25, 2021, GD5-25.

¹² See office note by Dr. Umair Iqbal dated May 4, 2022, GD5-44.

¹³ See Dr. Cheema's office note dated July 17, 2021, GD5-31.

¹⁴ See Dr. Cheema's office note dated August 17, 2021, GD5-32.

¹⁵ See Dr. Cheema's office note dated December 16, 2021, GD5-35.

- In February 2022, Dr. Cheema completed a questionnaire for the Appellant's employer, in which she declared the Appellant's prognosis "good." She recommended that X allow the Appellant back, starting with a desk position at four-hour shifts, five days per week.¹⁶

[19] On September 27, 2022, Dr. Cheema noted that the Appellant was "doing well" and had no new complaints.¹⁷

[20] There is nothing on file from Dr. Cheema for the next year. However, the Appellant saw her family doctor on September 20, 2023, one day after the General Division hearing, in which the presiding member noted the gap in the medical record. In a letter dated September 27, 2023, Dr. Cheema stated that the Appellant's leg swelling worsened with standing. She also said that she had written many notes urging the Appellant's employer to place her on modified duties.¹⁸

[21] The Appellant has seen an orthopedic specialist, but his report contained nothing to indicate a severe disability.¹⁹ In January 2021, Dr. Keith Louis wrote that, with prolonged standing, particularly at work, the Appellant would "gradually" develop some swelling along the dorsal aspect of her feet, "gradually" followed by pain, "gradually" radiating to both hips. She told Dr. Louis that, when walking on a treadmill, she would have to stop after 10 minutes and take a rest. She also said that she had had similar symptoms four or five years ago, but they resolved when she went to a partial sitting/standing type of job.

[22] The Appellant has also complained of low back pain, but the one report specifically about it suggested that it was mild and treatable.²⁰ Having decided that surgical consultation was not necessary, Dr. Cheema referred the Appellant to a

¹⁶ See Non-Occupational Functional Abilities Form completed by Dr. Cheema on February 9, 2022, GD5-12.

¹⁷ See Dr. Cheema's office note dated September 27, 2022, GD5-47.

¹⁸ See Dr. Cheema's office note dated September 20, 2023, GD7-22, and her letter dated September 27, 2023, GD7-3.

¹⁹ See consultation report dated January 20, 2021 by Dr. Keith Louis, orthopedic specialist, GD5-60.

²⁰ See consult note dated February 5, 2022 by Chirayu Desai, physiotherapist at Rapid Access Clinic, GD5-15.

physiotherapist, who recommended exercise, weight management, limited sitting time, and walks for up to 15 minutes per day. A follow-up appointment was not required.

[23] In March 2022, the Appellant saw a neurologist, who also described relatively mild symptoms. Dr. Crookshank wrote that she was seeing the Appellant for bilateral ankle pain that sometimes radiated up the sides of her legs to the hips when standing or walking for long periods of time.²¹ According to the Appellant, she could walk for up to 15 minutes but would then have to sit down with leg pain and numbness. She reported no difficulty climbing or descending stairs. Dr. Crookshank noted that the Appellant's neurological examination and electrophysiological studies were normal, although they did not rule out a purely sensory lumbosacral radiculopathy: "Because there is no weakness, bowel, and bladder dysfunction, gait impairment and no significant abnormal findings on examination and EMG studies, I do not think that surgical management is required."

[24] In short, neither Dr. Cheema nor any specialist has ever suggested that the Appellant was incapable of work because of a leg or associated back condition. Indeed, Dr. Cheema has consistently recommended that the Appellant return to work, albeit on a modified basis, starting with a desk job. It is true that her employer did not offer her a modified job for more than a few weeks, but that does not change the fact that the Appellant's primary caregiver thought she was fit for some type of job. Once X terminated her employment, it was the Appellant's responsibility to find alternative work that might have been better suited to her condition.

– The Appellant's diabetes is manageable

[25] The Appellant cites diabetes as a contributing factor in her claimed disability. However, the evidence suggests that it is manageable.

[26] In her CPP disability questionnaire, Dr Cheema wrote that the Appellant was diagnosed with diabetes mellitus in December 2020 after exhibiting tiredness and

²¹ See report dated March 21, 2022 by Dr. Emily Crookshank, neurologist, GD5-8.

decreased stamina.²² She noted that Metformin had produced only a partial response, although the Appellant had responded well Jardiance and Semaglutide. In August 2022, Dr. Cheema saw the Appellant for a follow-up of her diabetes, noting no sign of peripheral neuropathy or retinopathy. He described the Appellant's condition as "well controlled."²³

[27] The following month, Dr. Cheema said the Appellant was "doing well" and noted that she was going away for five or six months.²⁴ As noted, the Appellant went a year without seeing her family doctor. One day after the General Division hearing, Dr. Cheema noted that the Appellant was complaining of numbness in her right hand and blurry vision. She now described the Appellant's diabetes as **not** controlled.²⁵

[28] However, it appears the Appellant herself was to blame for her diabetes not being under control at that point. Dr. Cheema's September 2023 note also says, "It has been a while since she checked blood sugar" and "She doesn't have benefits at home, so she is only taking one of her medications out of the four that have been prescribed." According to the Federal Court of Appeal, CPP disability claimants must take reasonable steps to follow treatment recommendations.²⁶ I find that, by leaving the country for an extended period without taking steps to ensure an adequate supply of medication, the Appellant allowed her diabetic condition to deteriorate.

[29] In any event, it's not clear whether the Appellant's symptoms were significant or diabetes-related. Even if they were, there's no reason to believe that they couldn't have been addressed by restoring her medication regime.

²² See Dr. Cheema's CPP medical report dated December 13, 2021, GD2-98.

²³ See Dr. Cheema's office note dated August 24, 2022, GD5-46.

²⁴ See Dr. Cheema's office note dated September 27, 2022, GD7-22.

²⁵ See Dr. Cheema's office note dated September 20, 2023, GD7-23.

²⁶ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

– **The Appellant's depression and anxiety are largely situational**

[30] The Appellant has been diagnosed with depression and anxiety, but the available evidence indicates that it has responded to treatment and, in any case, is largely a product of external circumstances.

[31] Dr. Cheema wrote that the Appellant had been dealing with depression and anxiety since December 2020, which happens to be the month she left, not just X, but employment altogether.²⁷ At the time, Dr. Cheema prescribed the Appellant with Venlafaxine. When that medication produced only a partial response, he referred her to a psychiatrist.

[32] The Appellant saw psychiatrist, Dr. Dhaliwal, who recommended decreasing the Appellant's Effexor dose and adding Abilify.²⁸ In his report, Dr. Dhaliwal did not comment on the Appellant's mental health and expressed regret that he could not take the Appellant on as a patient.

[33] As recommended, Dr. Cheema started the Appellant on Abilify and adjusted her Effexor. In March 2022, Dr. Cheema noted that the Appellant's mood had improved and that her anxiety was 60 to 70 percent better, although her sleep and energy were still not good.²⁹ Dr. Cheema reported a similar effect in May 2022 and noted that her major depressive disorder was improving.³⁰

[34] In September 2022, Dr. Cheema noted that the Appellant was doing and appeared well with no new complaints.³¹ When the Appellant informed her that she was going away for up to six months, Dr. Cheema advised her to walk regularly, reduce her weight, and take her medication as directed.

[35] One year passed. When Dr. Cheema saw the Appellant again on September 27, 2023, she documented her patient's condition in a detailed office note that focused on

²⁷ See Dr. Cheema's CPP medical report dated December 13, 2021, GD2-103.

²⁸ See undated letter by Dr. Jagtaran Dhaliwal, psychiatrist, GD5-14.

²⁹ See Dr. Cheema's note dated March 28, 2022, GD5-41.

³⁰ See Dr. Cheema's note dated March 28, 2022, GD5-44.

³¹ See Dr. Cheema's note dated September 27, 2022, GD5-47.

her diabetes mellitus and mentioned her mental health only in passing: “Last appointment with psychiatrist was one year ago. Still taking medication, just less as she does not have insurance. Still taking Abilify and Venlafaxine.”³²

[36] The same day, Dr. Cheema prepared, at the request of the Appellant’s legal representative, a considerably more detailed mental health assessment.³³ She wrote:

- The Appellant’s mental health condition significantly impaired daily functioning;
- A comprehensive mental health evaluation supported the diagnosis of depression and anxiety;
- These conditions were expected to persist and affect the Appellant’s ability to engage in gainful employment;
- Due to not being able to work, her depression was getting worse;
- She had been working in the same company for 19 years and felt betrayed by not being allowed to do modified work there; and
- She might benefit from exploring vocational rehabilitation programs to assist her in finding suitable employment considering her mental health condition.

[37] This assessment appears to be at odds with Dr. Cheema’s relatively positive reports from the previous year. The assessment does not say what caused the Appellant’s psychological condition deteriorate during that period. However, it confirms my impression that much of the Appellant’s depression and anxiety were situational — caused by the specific stressor of having an impairment that led to the loss of her job. More significantly, it suggests that Dr. Cheema thought the Appellant was capable of returning to some kind of work despite her mental health.

³² See Dr. Cheema’s note dated September 27, 2023, GD7-22.

³³ See Dr. Cheema’s letter dated September 27, 2023, GD7-3.

– **The Appellant’s condition, looked at as a whole, did not prevent her from working in the real world**

[38] I find that the Appellant’s physical and psychological conditions, considered as a whole, have left her with at least some ability to work. I am reinforced in this belief when I look at her overall employability.

[39] The leading case on the interpretation of “severe” is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability claimant as a “whole person” in a real-world context.³⁴ Employability is not to be assessed in the abstract, but rather in light of all circumstances. Those circumstances fall into two categories:

- The claimant’s medical condition — this is a broad inquiry, requiring that the claimant’s condition be assessed in its totality;³⁵ and
- The claimant’s background — matters such as age, education level, language proficiency and past work and life experience are relevant.

[40] In this case, the Appellant claims that she is disabled, mainly by leg and back pain, anxiety and depression, and diabetes. However, close examination of the available medical evidence leads me to doubt that the Appellant is completely incapable of pursuing suitable employment. As we have seen, the Appellant’s problems were, for the most part, manageable, situational, or not as serious as claimed during the relevant period. I don’t believe that their combined effect rendered the Appellant unemployable.

[41] The Appellant’s background and personal characteristics are not barriers to her continued participation in the workforce either. The Appellant is now in her fifties, and she is lacking in physical and mental endurance, but she also has several assets that would help her in a job search. She has a university degree and, even it was earned in India and thus may not have much currency in Canada, it still demonstrates to prospective employers that she is intelligent and teachable. The Appellant also has more than 20 years of experience working in a variety of jobs, including her last job,

³⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³⁵ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

which required her to use a computer. English is not the Appellant's first language, but she has demonstrated enough fluency in it to function in many work environments. She has also said that she is comfortable reading and writing English.³⁶

[42] In all, I am satisfied that, even with her background and her medical conditions, the Appellant was equipped to at least attempt a return to the labour market during her coverage period. She is not young, and her written English skills are likely weak, but her work record is sufficiently strong to merit consideration for a position in customer service or low-impact manual labour.

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

[43] In the end, I was unable to properly assess the severity of the Appellant's disability as of December 31, 2023. That's because she didn't make a serious effort to look for another job.

[44] 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.³⁷

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

³⁶ Refer to recording of General Division hearing at 20:00.

³⁷ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[46] On top of that, disability claimants must make **meaningful** attempts to return to work.³⁸ 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.³⁹ Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[47] The Appellant had at least some work capacity — enough to trigger the obligation to pursue alternative employment. However, the Appellant never attempted to work, or look for work, after leaving her job at X, even though there was little on the record to suggest that her functional limitations prevented her from performing lighter work.

[48] During her career, the Appellant has mostly done physically demanding work. Before going on modified duties, the Appellant's last job required her to be on her feet all the time and to lift heavy objects. After she developed leg and back pain, X placed on her modified duties, in which, among other things, she sat at a desk and use a computer. But the Appellant, by her own account, was let go from that job, not because she couldn't do it, but because the company didn't need her in that role.

[49] As we have seen, the Appellant wanted to keep working at X and insisted that she was capable carrying on with modified duties over the long term. Her family physician agreed with her. After her dismissal, the Appellant could have looked for another job, one comparable to the one she had just been doing at X. She never did. For that reason, I find that the Appellant did not make a meaningful attempt to mitigate her impairment by looking for alternative employment.

³⁸ 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.

³⁹ See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

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

[50] A disability must be severe **and** prolonged.⁴⁰ Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it might also be prolonged.

Conclusion

[51] The Appellant has various medical conditions, but the available evidence suggests that they do not prevent her from regularly pursuing a substantially gainful occupation. What's more, the Appellant has never made a real effort to seek employment that might have been better suited to her limitations. For these reasons, I am not convinced that the Appellant had a severe disability as of December 31, 2023.

[52] The appeal is dismissed.



Member, Appeal Division

⁴⁰ See *Canada Pension Plan*, section 42(2)(a).