



Citation: *KR v Minister of Employment and Social Development*, 2024 SST 536

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

Decision

Appellant: K. R.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 24, 2023 (issued
by Service Canada)

Tribunal member: Wayne van der Meide

Type of hearing: Videoconference

Hearing date: May 7, 2024

Hearing participant: Appellant

Decision date: May 13, 2024

File number: GP-23-448

Decision

[1] The appeal is allowed.

[2] The Appellant, K. R., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of April 2022. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 59 years old. She has a grade 12 high school diploma. She worked a few years in her 20's. Then she stopped working for several years. She did, however, work continuously since 1999 (when she was 35). For 13 years (between 2006 and 2019) she worked full-time at a gas station/convenience store. The owner changed and after a six-week medical leave of absence the new owners replaced her with their family. They said they didn't have a position for her.

[4] One month later, she got a part-time job at another gas station/convenience store that was part of the same chain. They could only offer her part-time hours. After a little less than a year at that location the owner changed, and they didn't hire her because they refused her wage demands.

[5] In November 2020 she went on unemployment insurance for about one year.

[6] In December 2021, her unemployment insurance expired, and she got a job at a general store. She only worked two 8-hour shifts and quit. She said that after the first shift she was in excruciating pain to the point where she went home and cried. After the second day she stopped working and hasn't worked or looked for work since.

[7] The Appellant has a number of medical conditions. I will talk more about this later. She says that these conditions cause her constant pain from her head down to her shoulders and that she also has weakness on her left side (she is left-handed).

[8] The Appellant applied for a CPP disability pension on December 6, 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.

[9] The Appellant says she cannot work. She says that because of her pain she cannot take care of herself and her home without great difficulty and significant limits.

[10] The Appellant says that she has seen many doctors and repeatedly described how much pain she is in. She says they don't take the time to listen to her, she has to wait many months and go long distances for appointments with doctors and for tests. She reminded me at the hearing that this was much worse during the Covid-19 pandemic. She understands that there isn't a lot of medical evidence about her pain and other limitations but says that that is not her fault.

[11] The Minister says that there isn't enough medical evidence to prove that the Appellant has a severe and prolonged disability. The Minister says that they agree she has medical conditions that cause limitations, but there isn't enough evidence of her treatment and prognosis.

What the Appellant must prove

[12] For the Appellant to succeed, she must prove she has 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.¹ She must also prove that she continues to be disabled.²

[13] The *Canada Pension Plan* defines "severe" and "prolonged."

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 GD7-7.

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.

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

[15] 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.

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

[17] 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.

[18] 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

– The opinion of the Appellant's former lawyer isn't persuasive

[19] The Appellant **was** represented by a publicly funded lawyer for limited purposes: "to obtain medical evidence" and "assess if there was sufficient evidence for us to continue representing [the Appellant at the] hearing." That lawyer asked me for an extension of the Appellant's filing deadline. When I refused the request, the lawyer wrote to the Appellant. The lawyer told the Appellant that she wouldn't represent her at the hearing because she didn't believe "there was sufficient medical evidence to provide

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.

to the Tribunal to be able to demonstrate that your disability was both severe and prolonged....”⁵

[20] The Minister said this about that letter: “[The Appellant’s legal representative provided a letter addressed to K. R. dated February 13th, 2024, documenting, “...we do not believe that there is sufficient medical evidence to provide to the Tribunal to be able to demonstrate that your disability was both severe and prolonged by your Minimum Qualifying Period of December 31, 2023.” The Minister doesn’t say why this letter is relevant.

[21] This letter is of very limited if any relevance. It is evidence only of a lawyer’s opinion. I have read the letter and it **doesn’t** talk about what has happened to the Appellant or what **she says** about her treatment and functional limitations. Something I have briefly mentioned and will talk more about later. Besides, it is not an analysis of whether the Appellant has a severe and prolonged disability. Rather, it is an analysis of whether a publicly funded organization wanted to continue to represent the Appellant after I denied her request for an extension.

Reasons for my decision

[22] I find that the Appellant had a severe and prolonged disability as of December 2021. 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?

Was the Appellant’s disability severe?

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

⁵ See GD11-245 to GD11-249.

– **The Appellant’s functional limitations affected her ability to work**

[24] The Appellant has:

- degenerative disc disease with severe spinal canal stenosis at C4-C5 and C5-C6 resulting in increased cord signal/myelomalacia from C4 to C6 (she had surgery for this in April 2023) and sciatica⁶
- osteoarthritis in the lumbar part of the spine **and** hip⁷
- a benign brain tumour with blurred vision, headaches, and occasional double vision in the evenings⁸

[25] The Appellant has had a hysterectomy and a heart attack due to a defect in her heart that was treated surgically.

[26] However, I can’t focus on the Appellant’s diagnoses.⁹ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.¹⁰ 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.¹¹

[27] I find that the Appellant has functional limitations that affected her ability to work

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

[28] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. Put simply, the Appellant says she cannot work in any job that she could get in the real world.

(i) The Appellant is credible

⁶ See GD1-9 to GD1-12, GD1-17, GD1-18, GD11-65 to GD11-73, GD11-83, GD11-88 and GD11-89.

⁷ See GD1-9 and GD1-10.

⁸ See GD1-13 to GD1-18 and GD11-65 to GD11-67.

⁹ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹⁰ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹¹ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[29] I find that the Appellant's description of her limitations is credible. I will now explain why.

[30] The Appellant's description of her limitations and when they started, and got worse, is consistent with her employment history. And this history tells me that if she could work, she would.

[31] The Appellant worked for almost twenty years in relatively low paying jobs. When she lost her job in circumstances that seem unfair, she found another one. **After** she developed a number of serious medical conditions, had a heart attack and three surgeries, she pushed through, got another relatively low paying job, and tried to work.

[32] At the hearing the Appellant answered my questions without hesitation. In particular, she provided more details when I asked for them without hesitation.

[33] The Appellant's story hasn't changed. That story is also consistent with the medical evidence and the "big picture" story she described at the hearing.

[34] The details of her story makes sense. In other words, it is plausible.

(ii) What the Appellant says about her functional limitations

[35] The Appellant says she cannot do the type of job she has done most of her life. She cannot stand or walk for long because it causes her severe pain. At best her pain level is between a five to seven out of 10. At worst, it is as bad as she could imagine, and this is a lot of the time. She says she is **always** in pain from her head down to her shoulders and back.

[36] The Appellant also says that she can walk with a cane for short distances and a walker for longer distances. But, she also says she gets dizzy, and cannot stand at a counter for very long at all to wash dishes or cook. She has to sit down to vacuum and sweep and uses an extendable duster.

[37] She agrees that her ability to stand and walk are better after her spinal surgery (in April 2023). But, she also says that she still has weakness on her left side. She is

left-handed. Her hand is cramped, and she cannot hold a pen, type, or tie a shoelace properly (she has to knot it).

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

[38] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2023.¹²

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

(i) Medical evidence *in the real world*

[40] At the hearing I asked the Appellant several questions about the medical evidence. I asked her questions like why there isn’t more medical evidence about her functional limitations as she describes them. Although I didn’t cross examine her, I tested her claims.

[41] She said several things that are relevant to how I interpret the medical evidence in this case:

- She lives in a smaller city. Tests and access to specialists take a long time (6 to 12 months). She noted that during the pandemic this was even worse.
- She doesn’t think her family doctor is providing her with quality medical treatment. She has been told more than once that when she is given an appointment she can only discuss one issue. The appointments are only 15 minutes long. She lost her temper once and was reprimanded by clinic staff. She has thought about complaining about her family doctor but is worried she will be “blacklisted” in her small community.
- Her surgeon is focussed on whether she can stand and walk. Not on whether doing so causes her pain.

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

- She has told her family doctor repeatedly about her pain. Her impression is that her family doctor isn't interested in trying to diagnose it and help her, other than to refer her to specialists.
- She wants to see a pain specialist. She once asked her family doctor about getting a referral but doesn't know if her family doctor is doing anything about it.
- The Appellant's orthopedic surgeon and his team aren't interested in evaluating or even listening to what she says about her limitations (in particular, her pain). They performed an emergency surgery and evaluated whether the results were as expected.

(ii) The medical evidence supports what the Appellant says about her limitations

[42] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2023.¹³

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

[44] The medical report written by the Appellant's family doctor lists a number of limitations including dizziness, imbalance, disequilibrium, and staggering with walking, lower back pain with sciatica causing pain with walking or standing for long durations since 2020.¹⁴ The Appellant says these symptoms got worse after this report was written in April 2022. Efforts by the Minister and the Appellant's former lawyer to get an update from the Appellant's family doctor were not successful.

[45] In January 2023, an MRI of the Appellant's spine said she had left-sided weakness and decreased sensation.¹⁵ She was diagnosed with multilevel degenerative changes of the cervical spine with severe spinal canal stenosis at C4-C5 and C5-C6 resulting in increased cord signal/myelomalacia from C4 to C6. There was also severe

¹³ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁴ See GD2-97 to GD20-103.

¹⁵ See GD1-17 and GD1-18.

bilateral neural foraminal canal stenosis at C4-C5 and C5-C6 compressing on the exiting nerve roots. And urgent neurosurgery consultation was recommended.

[46] The Appellant had surgery in May 2023. After surgery her orthopedic surgeon and his team wrote two post-operative notes, one in May and the other in October 2023¹⁶. In the second note they said:¹⁷

Overall she is doing well. She notes improvement in her walking with no more falls, balance and some improvement in her hand function. She still has some discomfort in left side of the neck and shoulder...she ambulates well. Incisions healed well. All powers 5/5 in both upper and lower limbs except left T1 almost +4/5...My impression is that she is progressing well with great improvement and balance and fine movement.

[47] This isn't an assessment of all of the Appellant's functional limitations. It doesn't say whether the doctor thinks she can work. All it tells me is that the surgery went well and as a result **some** of her limitations have improved. It certainly doesn't tell me about the Appellant pain other than what I find is a passing comment about "discomfort".

[48] The law doesn't require proof of a specific diagnosis in support of chronic pain.¹⁸ And there is other medical evidence that the Appellant had limitations affecting her ability to work before December 31, 2023¹⁹:

- she was diagnosed with degenerative disc disease and facet osteoarthritis in the lumbar spine in March 2021²⁰
- she reported a one-to-two-year history of imbalance, disequilibrium, inability to move quickly, headaches, and double vision in February 2022²¹

[49] I have also considered the Appellant's evidence about her experience with doctors and the health system. That evidence explains to me why there isn't **more** medical evidence.

¹⁶ See GD11-83, GD11-88, and GD11-89.

¹⁷ See GD11-89.

¹⁸ See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54.

¹⁹ See *Canada (Attorney General) v Dean*, 2020 FC 206.

²⁰ See GD1-9 and GD1-10.

²¹ See GD2-108.

[50] I find that the medical evidence supports that the Appellant's claim that she has had chronic pain which prevented her from working in any job since December 2021. This is when she tried to go back to work but quit after two days because her pain was, she said, too severe.

[51] Next, I will look at whether the Appellant followed medical advice.

The Appellant followed medical advice

[52] To receive a disability pension, an appellant must follow medical advice.²² There is no evidence that the Appellant hasn't followed medical advice. In fact, the evidence is very clear that she is trying hard to get treatment. The Appellant followed medical advice.²³

[53] 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.²⁴

The Appellant can't work in the real world

[54] 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
- past work and life experience

[55] 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.²⁵

²² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁴ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[56] I find that the Appellant can't work in the real world. She hasn't been able to work since December 2021.

[57] The Appellant admits that she can usually sit for a while without severe pain. So, I asked her why she couldn't work in a sedentary job — that is, a job she could mostly do sitting down.

[58] The Appellant said she has no experience with this kind of job. She said she is nearly 60. She only has a grade 12 education and would need to go back to college for at least a year and then try to get a job, for which she had no experience, and with physical limitations. She doesn't think any employer would hire her. I think she is right.

[59] The Appellant did in fact try to work in December 2021 in a job that she could get. She wasn't physically able to do that job.

[60] I find that the Appellant's disability was severe as of December 2021. This is when she tried to work but couldn't because of the severe pain it triggered. She quit after two days.

Was the Appellant's disability prolonged?

[61] The Appellant's disability was prolonged.

[62] The medical evidence shows that the Appellant started to experience dizziness and lower back pain in 2020.²⁶ With surgery her mobility has improved but there has been no lessening of her pain. On the contrary, the Appellant said it is getting worse.

[63] The Appellant's limitations will more than likely continue indefinitely.

[64] I find that the Appellant's disability was prolonged as of December 31, 2021.

When payments start

[65] The Appellant's disability became severe and prolonged in December 2021.

²⁶ See GD2-95 to GD2-103.

[66] There is a four-month waiting period before payments start.²⁷ This means that payments start as of April 2022.

Conclusion

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

[68] This means the appeal is allowed.

Wayne van der Meide
Member, General Division – Income Security Section

²⁷ Section 69 of the *Canada Pension Plan* sets out this rule.