



Citation: *CH v Minister of Employment and Social Development*, 2024 SST 1033

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: C. H.
Representative: Allison Schmidt

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 9, 2023 (issued by
Service Canada)

Tribunal member: Dawn Kershaw

Type of hearing: Teleconference

Hearing date: February 27, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: March 18, 2024

File number: GP-23-319

Decision

[1] The appeal is dismissed.

[2] The Appellant, C. H., 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 almost 49. She worked as a nurse until she hurt her back in 2018. She still has back and knee pain. Her knee swells

[4] The Appellant applied for a CPP disability pension on October 4, 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 she can't work because she has knee and back pain and can't sit, stand, or walk for long. When her knee swells, it causes her discomfort.

[6] The Minister says the Appellant has some functional limitations that would interfere with her ability to do a physically demanding job like nursing, but she could do less physically demanding work. She hasn't tried.

[7] The Minister says her personal characteristics mean she could retrain for, or adapt to, other work.

What the Appellant must prove

[8] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2021. In other words, no later than December

31, 2021. This date is based on her CPP contributions.¹ She must also prove that she continues to be disabled.²

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

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

[11] 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.

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

[13] 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.

[14] 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.

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 GD2-7.

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.

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.

Reasons for my decision

[15] I find that the Appellant hasn't proven she has had a severe and prolonged disability by December 31, 2021 and continuously since then. 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?

[16] The Appellant's disability wasn't continuously severe. I reached this finding by considering several factors. I explain these factors below.

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

[17] The Appellant has:

- chronic lower back pain
- ischiofemoral impingement [narrowing of the space between the pelvic bone and the upper leg bone]
- osteoarthritis of the knees

[18] However, I can't focus on the Appellant's diagnoses.⁵ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.⁶ 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.⁷

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

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

[21] She had trouble getting out of bed and standing. She said she could not stand for more than 10 to 20 minutes.

[22] She says from when she hurt her back in 2018 to her MQP her back pain interfered with her ability to walk. She said when she walked her back was quite uncomfortable. She quite often had a “nervy, tingly” feeling that would turn into pain. The further she walked, the worse it would get.

[23] She says at first sitting wasn’t as hard. But then she got the ischiofemoral impingement that causes left buttock pain.

[24] She says her leg swells up when she is on her feet. This causes back discomfort. She climbs back in bed to put her feet up.

[25] She says she can lift if she has the same amount of weight in each hand.

[26] She had to modify some household tasks. She said they raised the dryer up off the floor because bending over caused her pain. She had to take breaks when cooking because she could not stand for long enough.

[27] The Appellant’s husband said he has to help her with housework and groceries. He said she typically was only up for 10 to 20 minutes before she went back to bed.

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

[28] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2021.⁸

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

[29] The medical evidence supports what the Appellant says. The CPP medical report says the Appellant has:

- chronic lower back pain
- ischiofemoral impingement [narrowing of the space btwn the pelvic bone & the upper leg bone]
- osteoarthritis of the knees⁹

[30] It also says she has functional limitations, including:

- pain with prolonged walking
- pain with prolonged bending
- unable to lift more than 10 pounds
- increased pain with prolonged sitting
- no twisting¹⁰

[31] The Appellant had a left knee replacement in July 2021. By August 2021 the surgeon reported the Appellant was overall happy with her left knee. He noted her alignment looked excellent. He noted her pain had decreased and she was improving functionally.¹¹

[32] A left knee x-ray showed some mild persistent prepatellar soft tissue swelling in August 2021, but no evidence of complications.¹²

[33] After that, other than the CPP medical report, there weren't any medical reports that mentioned knee problems until July 2022.¹³

[34] Even though there weren't any reports about her knee between August 2021 and July 2022, the July 2022 report says that the Appellant had persistent symptoms since the knee replacement. And the September 2021 CPP medical report includes the

⁹ See CPP medical report signed by Dr. Kyle Winning on October 12, 2021, at GD2-180.

¹⁰ See CPP medical report signed by Dr. Kyle Winning on October 12, 2021, at GD2-180.

¹¹ See Dr. Claude Cullinan's July 19 and August 19, 2021, reports at GD2-196 and GD2-198.

¹² See x-ray report at GD2-197.

¹³ See Dr. Travis Marion's July 13, 2022, report at GD2-153.

Appellant's knees as one of the causes for her functional limitations. So, I find that the Appellant had functional limitations from her knees by her MQP.¹⁴

[35] The CPP medical report also includes the Appellant's chronic lower back pain and ischiofemoral impingement as a cause for her functional limitations.¹⁵ So, I find that the Appellant had functional limitations that prevented her from doing her usual physical job of nursing.

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

– **The Appellant followed medical advice**

[37] To receive a disability pension, an appellant must follow medical advice.¹⁶

[38] The Appellant followed medical advice.¹⁷

[39] The Minister didn't suggest that the Appellant had not followed medical advice.

[40] The Appellant has had lots of treatment, including physiotherapy, exercises, dry needling, cupping, massage, acupuncture, injections, and oral treatments like Celebrex and marijuana. One of her doctors told her they wished all their patients were as disciplined as she is.

[41] 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.¹⁸

¹⁴ See Dr. Travis Marion's July 13, 2022, report at GD2-153. See also, CPP medical report signed by Dr. Kyle Winning on October 12, 2021, at GD2-180.

¹⁵ See CPP medical report signed by Dr. Kyle Winning on October 12, 2021, at GD2-180.

¹⁶ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁸ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

– **The Appellant can work in the real world**

[42] 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

[43] 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.¹⁹

[44] I find that the Appellant can work in the real world. I find it more likely than not that she had work capacity at December 31, 2021. She also has improved since.

[45] The Appellant is almost 49. She stopped working in 2018 when she was 43. Her age might be somewhat of a negative factor in retraining or adjusting to other work. However, she still has 16 years until the normal retirement age.

[46] She has two college diplomas, one in practical nursing and the other in tourism management. There was no evidence that the Appellant had any difficulties with learning. I find her education is a positive factor in her ability to retrain or adjust to other work.

[47] Her first language is English. There was no evidence that she has any problems with the English language. She did her schooling in English.

[48] The Appellant's work history includes being a practical nurse and an assistant to an event planner. When she first graduated, she worked as a health coach. Growing up she worked in her parents' laundromat and in a bait shop. She agreed with the Minister

¹⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

that she has skilled work experience that would help her find alternate work. So, her work experience is a positive factor.

Work Capacity

[49] The Appellant has work capacity. She has pain in her back, knee and buttock. So, she can't do her usual physical job.

[50] But she has some work capacity. Her former family doctor said in September 2019 that she may need to look at alternate work options requiring less work on her feet and more desk related.²⁰

[51] In March 2020, the surgeon said it was unlikely she would return to nursing. He said she will have to look at a more managerial/desk job. In the same month, her family doctor repeated that she could do a sedentary job.²¹

[52] In July 2020, another doctor discussed with the Appellant the possibility of retraining for employment. This was despite the same report mentioning both her knee and buttock issues.²²

[53] I agree with the Minister that the report after her knee surgery says her function improved. So, since her family doctor and the surgeon said she could do sedentary work even before the surgery, I find she retained the capacity to do it after the surgery.²³

[54] It is also worth noting that even though she said at the hearing that it was only since the injections that she could stand for two hours, she reported in September 2021 before her knee surgery that she could sit and stand for up to two hours.²⁴

²⁰ See Dr. Rhonda Diamond's clinical note at GD2-225.

²¹ See Dr. Claude Cullinan's report at GD2-259. Also, see Dr. Rhonda Diamond's letter at GD2-324.

²² See doctor's clinic note at GD2-338. I believe this is a family doctor's report, but it is not identified.

²³ See Minister's submissions at GD6.

²⁴ See Questionnaire for CPP Disability Benefits at GD2-207 and 208.

[55] She also said at the hearing that since the knee surgery, she doesn't have the same amount of pain. I acknowledge she still has some pain because her leg swells, but despite this her pain has improved.

[56] The Appellant also said she is making progress with the back injections. She said it's the swollen leg she wants to get figured out. She has to elevate her leg to alleviate the swelling.

[57] The Appellant also said at the hearing that her right hip causes her a lot of grief when she walks now. But she said this didn't start until 2023, so it started after her MQP.

[58] Overall, the Appellant improved since her doctors said she could do sedentary work. So, I find considering the medical reports that she retained some capacity to do sedentary work or retrain.

[59] She hasn't tried to work since she stopped working in 2018. I will talk about that next.

– **The Appellant didn't sufficiently try to find and keep a suitable job**

[60] If the Appellant can work in the real world, she must show that she tried to find and keep a suitable job. She must also show her efforts weren't successful because of her medical conditions.²⁵ Finding and keeping a suitable job includes retraining or looking for a job she can do with her functional limitations.²⁶

[61] The Appellant didn't try to work. She also tried only two nights of online learning back in March 2020. She hasn't tried any retraining since.

[62] She said that back in 2020 when she tried to do the online course, she could not be on screen for the required three hours. The instructor said she didn't have to be. So,

²⁵ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁶ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

she tried the course for two nights. She said she was in so much discomfort that she could not concentrate.

[63] Since then, however, she has improved with injections. And even before that, in 2021, she reported being able to sit and stand for two hours. And her doctors said she should retrain for suitable work.

[64] I asked her about retraining now and she said because she has so much swelling in her leg and how uncomfortable she is, she isn't sure how it would go. She also mentioned the pain in her right hip, though this didn't start until after her MQP.

[65] I find that trying a course for two nights almost four years ago and not trying anything since isn't sufficient to satisfy the test of whether she tried to find and keep a suitable job, especially since her doctors said she should find or retrain for suitable work.

[66] She doesn't have to be pain-free to be able to do some kind of work or retraining. She can also elevate her leg to alleviate the swelling.

[67] Since she hasn't tried to work and has not tried any retraining except two nights four years ago, she doesn't know if she can do it. So, I also don't know if she can do it. She may well be able to do a sitting job even if just on a part-time basis. She may also be able to retrain.

[68] Since she hasn't really tried, I can't find she had a severe disability by December 31, 2021.

Conclusion

[69] 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.

[70] This means the appeal is dismissed.

Dawn Kershaw
Member, General Division – Income Security Section