



Citation: *SM v Minister of Employment and Social Development*, 2024 SST 1035

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: S. M.
Representative: Paul Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 8, 2023 (issued by
Service Canada)

Tribunal member: Dawn Kershaw

Type of hearing: Teleconference

Hearing date: March 4, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: March 22, 2024

File number: GP-23-1401

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is almost 50. She was a manager at X until October 31, 2021, when she began to get leg pains, electric shock sensations, and fatigue. This progressed to include lower back pain.

[4] The Appellant applied for a CPP disability pension on September 23, 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 has unpredictable flare ups. Then she has an extremely hard time even doing her daily activities. Someone has to help her.

[6] She says she can't work even part-time because when she has a flare up, she can't do much.

[7] The Minister says the Appellant has fibromyalgia, and it isn't a disabling or progressive condition. They say that only the family doctor said she can't work, and the specialists didn't say that.

[8] The Minister says the Appellant hasn't tried some kind of alternate work even though she should be capable of it.

What the Appellant must prove

[9] 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

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

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

[12] 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.

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

[14] 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.

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 GD2-62.

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.

[15] 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

I accepted late documents

[16] Because the Appellant submitted documents after the deadline and I accepted them, I gave the Minister time to file any response they wished to.

[17] The Minister filed submissions even faster than I asked them to, so it didn't cause any delay. I accepted their submissions because it was fair to do so given the Appellant's late documents.⁵

Reasons for my decision

[18] I find that the Appellant had a severe and prolonged disability as of November 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?

[19] The Appellant's disability was 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

[20] The Appellant has what the doctors now think is fibromyalgia and general anxiety disorder.

⁵ Section 42(2) of the *Social Security Tribunal Rules of Procedure* (Rules) sets out what factors I must consider when deciding whether to accept late evidence. Under section 8(5) of the Rules, I can apply these factors to late submissions (arguments) as well, even though these aren't considered evidence. Section 5 of the Rules defines "evidence."

[21] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living.⁷ 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.⁸

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

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

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

[24] I believe what the Appellant told me. She was upfront about what caused her problems and what didn't. For example, I asked her about depression that she mentioned in her application. She told me it wasn't an issue for her.

[25] She also didn't exaggerate. For example, when I asked if her arms were still a problem since she had surgery, she said she still has some problems with them, but she expects they will improve with time.

[26] She says her problems started with pain in both legs. This interferes with her ability to stand, walk, and do activity.

[27] In a typical day, she tries to do what she can around the house. She can't lift much because she has pain. She used to be able to shop but now has to order online. She can go get the order, but she can't bring it in from the car.

[28] She says that the biggest problem for her is that she has flare ups. She can't predict them. When she has a flare up, her limbs feel heavy, her back is sore, and she is very fatigued.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[29] Sometimes she can't really do anything. She has a hard time moving her limbs. Her spouse has to help her dress. She has to sleep during the day.

[30] She says that she takes Duloxetine and that helps, but she still gets fatigue and heavy limbs during a flare up.

[31] I asked her about what the Minister said that one recommendation for fibromyalgia is to increase the person's activity level. The Appellant said there was no way she could do that. I asked how she knew that. She told me she tried, and it sent her into a flare up.

[32] She said her flare ups are further apart than they were, but last longer - from 5 to 10 days. She said that during flares, she can't understand things. She said her speech and thinking are slower. She spends a lot of time sleeping.

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

[33] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work no later than December 31, 2023.⁹

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

[35] The Appellant's family doctor has seen her the most. She said she sees the Appellant every six to eight weeks.¹⁰

[36] The medical evidence is consistent with what the Appellant said at the hearing. She struggles overall. She has days when she has fewer symptoms, but on other days she feels completely debilitated and paralyzed with pain, even though the medications decreased the tingling and numbness.¹¹

⁹ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See Attending Physician's Statement – Long Term Disability Claim form, signed by Dr. J. Ingram-Crooks on March 3, 2022, at GD2-127.

¹¹ See medical report, dated August 8, 2022, at GD4-4.

[37] When her flares start, she is very fatigued. Her arms and legs feel heavier. Her pain is worse. She sometimes can't get out of bed. In May 2023, she had a flare up that lasted for about nine days. The medication hasn't helped how she feels during a flare up.¹²

[38] The Appellant saw a neurologist in June 2023 who said the Appellant had heaviness in both legs that can be very painful and muscle pain from her back to her foot, worse on the left. She also had numbness and weakness in her left leg.¹³

[39] The Appellant continued to have debilitating flares through the end of 2023 and struggled with chronic pain. She had low energy. She continued to have daily pain and numbness. She was pacing herself to be able to get her daily activities done.¹⁴

[40] She had moderate¹⁵ problems with:

- household tasks
- yardwork
- errands
- sitting
- standing
- walking
- bending/crouching
- lifting/carrying¹⁶

[41] Her family doctor also noted that she had some mild problems with concentration, planning, and decision-making.¹⁷

¹² See medical report dated January 9, 2023, at GD4-3. See also, medical report dated May 3, 2023, at GD6-4.

¹³ See Dr. C.E. Pringle's June 28, 2023, report at GD2-106.

¹⁴ See Dr. Ingram-Crook's November 27 and Dec 3, 2023, reports at GD6-24 and GD6-20.

¹⁵ "moderate" in this report means: able to complete but less frequently or avoids task, may require assistance or prompting from another person etc.

¹⁶ See Dr. J. Ingram-Crook's medical report signed on December 3, 2023, at GD6-20.

¹⁷ See Dr. J. Ingram-Crook's medical report signed on December 3, 2023, at GD6-20. Note that in this report "mild" means: a person is able to complete the task but may be slower than normal or time limited and may need short breaks.

[42] The medical evidence also supports that the Appellant gets worse when she does more activity. She was noted to have walked three blocks and immediately got significant pain and fatigue in her arms and legs. After, she was exhausted and in significant pain for up to five days.¹⁸

[43] The medical evidence supports that the Appellant's fatigue and pain prevented her from doing her daily activities normally and prevented her from doing her usual job. She also had some functional limitations with respect to her concentration.

[44] Other than a mention of anxiety disorder by the Appellant in her application and a brief mention by her family doctor, there weren't any other mentions or medical reports about it or depression. The Appellant also didn't say it was something that prevented her from working. So, I find there isn't enough evidence that the Appellant had functional limitations from depression or anxiety disorder that interfered with her ability to work.

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

– **The Appellant followed medical advice**

[46] To receive a disability pension, an appellant must follow medical advice.¹⁹

[47] The Appellant followed medical advice.²⁰

[48] The Minister said there was no evidence that the Appellant tried the treatment recommendations that include physiotherapy, exercise programs, and increasing a person's activity level.²¹

[49] The Appellant had many investigations to try and find a cause for her symptoms. She tried physiotherapy and still does the exercises. She tried to increase her activity,

¹⁸ See August 8, 2022, medical report at GD4-4.

¹⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²¹ See Minister's submissions at GD5.

but it worsened her pain. She hasn't tried cognitive behavioural therapy, but it hasn't been recommended to her.

[50] I find that the Appellant has tried all the treatment that has been recommended to her.

[51] 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.²²

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

[52] 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

[53] 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.²³

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

[55] The Appellant is almost 50. Her age may be a negative factor in trying to find alternate work or retrain.

[56] She has a college diploma in accounting and bookkeeping, but she finished that education almost 26 years ago. She doesn't have any computer skills. She said she also isn't the best typist/keyboardist. Her education is a neutral factor in her ability to

²² See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

retrain or find alternate, less physical work, because it isn't recent. She also never used her college education for employment.

[57] The Appellant's ability to retrain or find alternate, less physical work won't be entirely negatively affected by her work history. Even though she worked on a line in a factory for three years, she also worked as a supervisor, assistant manager, and store manager at X for 14 years.²⁴

[58] I agree with the Minister that her work experience as a manager could be a positive factor in her trying to retrain or find alternate work.

[59] Overall, though, I find that the Appellant isn't able to work or retrain. She has times when she is so fatigued, she can't get out of bed. At those times, she has pain and difficulty moving her limbs.

[60] She can't predict when these flares will happen. So, she would have a very difficult time trying to retrain or find alternate work that would allow her to take time off whenever she had a flare. It would not matter whether this was physical or non-physical work.

[61] Her family doctor who knows her best and has seen her most says that she can't return to work. She said the Appellant was still very symptomatic. She said the Appellant has a difficult time sitting, standing, or walking, as well as doing daily tasks.²⁵

[62] Even though it was noted that she can do her household tasks, she has to pace herself and take breaks.²⁶

[63] Even if she could retrain or find alternate, less physical work, her inability to predict her flares which leave her exhausted and in pain would make her an unreliable employee. She would not be able to work during them. In addition, she would not be

²⁵ See Dr. J. Ingram-Crook's December 3, 2023, report at GD6-20.

²⁶ See Dr. Ingram-Crook's November 27 and Dec 3, 2023, reports at GD6-24 and GD6-20.

able to meet an expected pace at a job because she can only do things if she takes breaks and paces herself.

[64] I agree with the Minister that it was only the Appellant's family doctor who said she can't work.²⁷ But I don't think it's because the specialists thought she could work. I think it's because they don't seem to have talked to her about the issue.

[65] I find that the Appellant's disability was severe as of November 2021.

Was the Appellant's disability prolonged?

[66] The Appellant's disability was prolonged.

[67] The Appellant's condition began in November 2021. This condition has continued since then.²⁸

[68] The Appellant began to experience symptoms in October 2021 and had to stop working on October 31, 2021. She has not been able to work since.

[69] Even though more than three years have passed, she has not improved. Her family doctor says her prognosis for a return to work is poor.²⁹

[70] The Appellant's condition will more than likely continue indefinitely. Even though the Minister says the Appellant hasn't exhausted all treatment recommendations, she has done all that have been recommended to her, and even if she tried others, there is no guarantee they will help, nor is there any kind of timeline for how soon they might help her.

[71] I find that the Appellant's disability was prolonged as of November 2021.

²⁷ See Minister's submissions at GD5.

²⁸ 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.

²⁹ See Dr. J. Ingram-Crook's December 3, 2023, report at GD6-20.

When payments start

[72] The Appellant's disability became severe and prolonged in November 2021.

[73] There is a four-month waiting period before payments start.³⁰ This means that payments start as of March 2022.

Conclusion

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

[75] This means the appeal is allowed.

Dawn Kershaw
Member, General Division – Income Security Section

³⁰ Section 69 of the *Canada Pension Plan* sets out this rule.