Citation: *EH v Minister of Employment and Social Development*, 2024 SST 1282

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	E. H.
Representative on record:	Allison Schmidt
Representative at the hearing:	Chanel Scheepers
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 14, 2023 (issued by Service Canada)

Tribunal member:	James Beaton
Type of hearing:	Teleconference
Hearing date:	October 23, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	October 24, 2024
File number:	GP-24-141

Decision

[1] The appeal is allowed.

[2] The Appellant, E. H., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of November 2021. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 56 years old. She spent her entire career as a dental hygienist. She stopped working in January 2020 because of medical conditions that affected her ability to use her right hand. She is right-handed.

[4] The Appellant applied for a CPP disability pension on October 21, 2022. The Minister of Employment and Social Development refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Minister says there is no recent medical evidence. The Appellant hasn't followed up with her physiatrist or surgeon since June 2021. The Appellant's physiatrist said her medical conditions were related to her job as a dental hygienist, but the Appellant hasn't tried other jobs despite being well-educated.

[6] The Appellant says the medical evidence supports her limitations. She attended all follow-up medical appointments. She can't do another job. Although she is well-educated, she spent her entire career in one industry. Her medical conditions mean she can't use a computer, which eliminates many job possibilities.

[7] I agree with the Appellant.

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, 2022, and continuously since then. This date is based on her contributions to the CPP.[1]

[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.[2]

[11] This means I must look at all of the Appellant's medical conditions together to see what effect they have on her ability to work. I must also look at her background (including her age, level of education, language abilities, and 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.[3]

[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 must prove she has a severe and prolonged disability. She must prove this on a balance of probabilities. This means she must show it is more likely than not that she is disabled.

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[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 at GD2-6 and 7.
[2] 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 get from a disability pension.
[3] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Matters I have to consider first

I didn't allow the Appellant's witness to testify

[15] Section 41 of the *Social Security Tribunal Rules of Procedure* (Rules) says a party must file a notice with the Tribunal by their filing deadline if they want to have a witness testify.

[16] The Appellant's representative filed a notice with the Tribunal on October 16, 2024, a week before the hearing, advising that they wanted the Appellant's spouse to testify. The representative told the Tribunal on June 21, 2024, that they had nothing else to file. Although I believe that "filing deadline" in section 41 means the Appellant's initial filing deadline, it is worth noting that the representative didn't file anything during their reply period either. Their reply period ended on September 27, 2024.[4]

[17] On October 17, I invited the representative and the Minister to tell me why I should or should not allow the late witness.[5] The Minister didn't respond or attend the hearing. The Appellant's representative gave seven reasons why I should allow the late witness:

1) The witness would not be testifying in a professional capacity.

2) Allowing the late witness won't prejudice (unfairly disadvantage) the Minister.

3) It can be difficult to file a witness form on time because no one knows if the appeal will go ahead to a hearing or be settled.

4) It can be difficult to file a witness form on time because the witness may not be available.

5) The Tribunal hasn't previously taken an issue with late witness forms. Allowing late witnesses was "widely accepted before."

[4] See GD6, GD11, and the letter dated August 28, 2024.
[5] See GD12.

6) The Tribunal should give representatives time to “adapt to this directive.” (The implication here is that the “directive” to file witness forms on time is new.)

7) The witness’s testimony about their observations of the Appellant could help me make an informed decision.

[18] Here is why I don’t find these reasons convincing and why I decided not to allow the late witness:

1) Under section 41, the requirement to give notice applies equally to professional and non-professional witnesses.

2) Section 41 exists so that parties have a fair opportunity to prepare and present their case to the Tribunal. So the representative’s failure to follow section 41 suggests that the Minister could be prejudiced as a result. I am not prepared to conclude that there is **no** prejudice from the fact that the Minister didn’t expressly identify how it would be prejudiced. The Minister might simply have lacked the time to do so, because of the lateness of the witness form. There were only four full business days between the day the Tribunal received the witness form and the day of the hearing, and only three full business days from when I sent my letter inviting submissions.

3) The fact that an appeal might be settled before a hearing should not impact a representative’s ability to evaluate an appellant’s appeal and decide whether a witness could help their appellant’s case. This can and should be done at the same time the representative files their submissions—in other words, by the filing deadline.

4) It is possible to notify the Tribunal of a potential witness and later decide not to have the witness testify, or ask to reschedule if the witness is unavailable.

5) I disagree that the Tribunal has a practice of accepting late witness forms. The Tribunal’s practice is reflected in section 41 of the Rules. It is up to each Tribunal member to apply section 41 to the appeals that come before them.

Representatives should be prepared for the possibility that different Tribunal members might come to different conclusions about procedural issues. The same Tribunal member might also come to different conclusions in different appeals because the circumstances of those appeals are different.

6) There is no new directive here for representatives to adapt to. Section 41 is the "new" directive and it is no longer new. It came into force on December 5, 2022. Representatives are responsible for knowing and following the Rules.[6]

7) Section 8(4) of the Rules allows me to dispense with a rule if it is in the interest of justice. In this appeal, it isn't in the interest of justice to allow the late witness. While his testimony might be relevant, there is already considerable information about the Appellant's functional limitations in the file. The Appellant herself was able to testify about her limitations. The Minister didn't raise an issue with the Appellant's credibility. The hearing would still be fair without the testimony of the Appellant's spouse.

Reasons for my decision

[19] I find that the Appellant had a severe and prolonged disability as of January 2020 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?

[20] The Appellant's disability was severe by January 2020. I reached this finding by considering several factors. I explain these factors below.

[6] See sections 12(c), 13(2), and 14(2) of the Rules.

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

[21] The Appellant developed carpal tunnel syndrome and de Quervain's tenosynovitis in her right hand and wrist around January 2020.

[22] However, I can't focus on the Appellant's diagnoses.[7] Instead, I must focus on whether she has functional limitations that got in the way of her earning a living by December 31, 2022.[8] When I do this, I must look at **all** of her medical conditions (not just the main one) and think about how they affected her ability to work.[9]

[23] I find that the Appellant had functional limitations by January 2020.

– What the Appellant says about her functional limitations

[24] The Appellant says her medical conditions have resulted in functional limitations that affected her ability to work by January 2020. In June 2021, she had carpal tunnel release surgery. This improved her pain but didn't restore her functional ability to use her right hand. She still experiences pain with certain movements. She has no grip or pinch strength. She can barely hold a pen to write. It is hard to use a computer. She lacks fine motor skills and sensation in her right hand. This impacts her housekeeping.[10]

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

[25] The Appellant must provide some medical evidence to support that her functional limitations affected her ability to work by December 31, 2022.[11]

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

[27] In January 2020, the Appellant saw her family doctor, Dr. Edwards. She told Dr. Edwards that she was having difficulty holding her tools at work. She had already started seeing a physiotherapist and was using Advil and Voltaren to manage the pain.

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[7] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[8] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[9] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[10] See the Appellant's application at GD2-26 to 45. See also GD2-102 to 105 and the hearing recording.
[11] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

Dr. Edwards diagnosed her with de Quervain's tenosynovitis and made several treatment recommendations. Dr. Edwards also excused her from work.[12]

[28] In March 2020, Dr. Edwards completed an insurance form. She wrote that the Appellant had pain and weakness and was capable of only minimal sedentary activity. Later that month, Dr. Edwards noted that the Appellant could not hold a pen. She lacked coordination and dexterity.[13]

[29] Between February 2020 and June 2021, the Appellant saw specialists for her conditions. They reported similar symptoms.[14]

[30] In June 2021, the Appellant had carpal tunnel release surgery.[15] According to Dr. Edwards, surgery resolved most of the Appellant's pain but didn't restore her function. She still could not grip or pinch with her right hand. She lacked strength and stamina.[16]

[31] In December 2022, Dr. Edwards completed a report to support the Appellant's disability pension application. Dr. Edwards endorsed the same symptoms as before, including pain with more than 20 minutes of hand use.[17]

[32] The most recent medical evidence is a note from Dr. Edwards dated April 27, 2023, in which Dr. Edwards said the Appellant's wrist was about the same and wasn't expected to improve any further.[18]

[33] I don't share the Minister's concern with the lack of recent medical evidence. The impact of the Appellant's medical conditions is well-documented leading up to December 31, 2022. The medical evidence after that tells me that nothing was expected to change.

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[12] See GD2-175.
[13] See GD2-162 to 165 and 180.
[14] See GD2-80, 81, 119 to 122, 143, 144, 178, 179, 191, and 192.
[15] See GD2-201 and 202.
[16] See GD2-82 and 202.
[17] See GD2-166 to 174.
[18] See GD2-94.

[34] The medical evidence supports that the Appellant's right hand and wrist symptoms kept her from doing her job as a dental hygienist by December 31, 2022. She could not safely handle the tools she had to use at work.[19]

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

– **The Appellant followed medical advice**

[36] To receive a disability pension, an appellant must follow medical advice and pursue treatment to improve their medical conditions.[20]

[37] The Appellant followed medical advice. She got carpal tunnel release surgery. She did physiotherapy to recover from surgery. She wears a splint.

[38] The Minister suggests that the Appellant hasn't pursued treatment because she hasn't followed up with Dr. Elsherif (a physical medicine and rehabilitation specialist) or Dr. Azad (the surgeon).

[39] I disagree with the Minister. The Appellant saw Dr. Elsherif multiple times and there is no indication that she was supposed to see him again after her last appointment.[21] There is no follow-up report from Dr. Azad in the file, but I accept the Appellant's testimony that she did see him once in the weeks after surgery. There is no indication that she was supposed to see him again either.

[40] 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]

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[19] See GD2-119 and 120.
[20] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[21] See GD2-80, 81, 121, 122, 143, 144, 191, and 192.
[22] See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

– The Appellant can't work in the real world

[41] 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
- work and life experience

[42] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say she can work.[23]

[43] I find that the Appellant can't work in the real world. She was unable to work as of January 2020. She is fluent in English. But her education (a dental hygiene diploma) and work experience (as a dental hygienist) are industry-specific.[24] They aren't readily transferrable to another industry. She would have to retrain. Being in her 50s would put her at a disadvantage for re-entering the workforce. In addition, it isn't clear what she could retrain for. The use of her dominant right hand is severely limited. As a result, she can't use her right hand for long. She would not be able to do a physical job. She would not be able to do a sedentary job that requires using a computer or writing by hand.

[44] The Minister says Dr. Elsherif linked the Appellant's symptoms to her job as a dental hygienist. In June 2020, he wrote that her "symptoms are secondary to wrist tendonitis and de Quervain's tenosynovitis related to her job and repetitive hand work activities using vibrating tools. She will need to be off work until resolution of her symptoms."[25] However, the evidence shows that the Appellant has remained off work since January 2020, without resolution of her symptoms. Her job might have caused her symptoms, but stopping her job didn't make the symptoms go away.

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[23] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[24] See GD2-37 and 38.
[25] See GD2-191 and 192.

[45] I find that the Appellant's disability was severe as of January 2020, when she stopped working due to her symptoms.

Was the Appellant's disability prolonged?

[46] The Appellant's disability was prolonged by January 2020.

[47] The Appellant's conditions began in January 2020 or earlier. They have continued since then.[26] They will more than likely continue indefinitely. Dr. Edwards doesn't expect any further improvement. There are no treatments left to try. Dr. Edwards doesn't know if the Appellant will be able to return to any type of work.[27]

When payments start

[48] The Appellant had a severe and prolonged disability in January 2020.

[49] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.[28] After that, there is a four-month waiting period before payments start.[29]

[50] The Minister received the Appellant's application in October 2022. That means she is considered to have become disabled in July 2021.

[51] Payments of her pension start as of November 2021.

Conclusion

[52] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged by January 2020.

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[26] In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant must show a severe and prolonged disability by the end of their MQP and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.
[27] See GD2-94 and 166 to 174.
[28] Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.
[29] Section 69 of the *Canada Pension Plan* sets out this rule. This means payments can't start more than 11 months before the application date.

[53] This means the appeal is allowed.

James Beaton

Member, General Division – Income Security Section