



Citation: *AB v Minister of Employment and Social Development*, 2022 SST 1298

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

Decision

Appellant: A. B.
Representative: Paul Sacco

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated December 7, 2021 (issued
by Service Canada)

Tribunal member: Selena Bateman

Type of hearing: Teleconference

Hearing date: October 17, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: December 13, 2022

File number: GP-21-2540

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. B., 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 63 years old. He last worked as a coach bus driver. He has had a series of injuries to his right shoulder, most recently in December 2019. He says that he is in constant neck and shoulder pain, can't sleep, and can't use his right arm very much. He last worked his regular job in January 2020. He tried a return to work in 2021.

[4] The Appellant applied for a CPP disability pension on October 4, 2021. The Minister of Employment and Social Development (Minister) refused his application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant attempted a gradual return to modified work around November 2021. He says he was only able to work on modified cleaning duties for two weeks before he felt the pain growing and stopped working. He says that his attempt shows he tried to work but can't because of his medical condition.

[6] The Minister says that multiple reports suggest that he should be capable of trying modified work. The Minister also says that there is no evidence of the Appellant taking any regular medication or evidence of chronic pain specialist involvement to support the severity of his medical condition.¹

¹ See GD5-6.

What the Appellant must prove

[7] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by December 31, 2021. This date is based on his contributions to the CPP.²

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

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

[10] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on his ability to work. I also have to look at his background (including his age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether his disability is severe. If the Appellant is able to regularly do some kind of work that he could earn a living from, then he isn’t entitled to a disability pension.

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

[12] 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.

[13] The Appellant has to prove he has a severe and prolonged disability. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not he is disabled.

² 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 GD6-2.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

Matters I have to consider first

I accepted the documents sent in after the hearing

[14] At the hearing, the Appellant referred to documents that were not in the appeal file. After the hearing, the Appellant submitted late documents. I decided to accept the late documents because they are relevant to the issues under appeal. No response was received from the Minister.⁵

Reasons for my decision

[15] I find that the Appellant hasn't proven he had a severe and prolonged disability by December 31, 2021.

Was the Appellant's disability severe?

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

– The Appellant's functional limitations affect his ability to work

[17] The Appellant has:

- Right shoulder rotator cuff tear
- Supraspinatus tendinopathy
- Subacromial subdeltoid bursitis
- Glenohumeral and acromioclavicular osteoarthritis

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether he had functional limitations that got in the way of him earning a living.⁷ When I

⁵ The documents relate to his November 2021 work attempt as well as the most recent upper extremity specialty program reports. See GD8.

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

⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

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 his ability to work.⁸

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

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

[20] The Appellant says that his medical conditions resulted in functional limitations that affect his ability to work. He says:

- It is impossible to use his right shoulder and arm. He uses his left arm for tasks instead. He has had no improvement to his range of motion.
- Some personal care tasks are more difficult or require assistance. He can't do housekeeping, meal preparation, or shopping.
- He is in constant neck and shoulder pain. Because of this, he has poor sleep and is tired. He also has poor concentration.
- He has poor driving abilities.
- He can bicycle for 15 minutes before he experiences pain.
- He can no longer shovel snow or rake.
- He has a fair ability to type but can't stare at a computer screen because of his neck.⁹

[21] The Appellant testified that he has stopped hobbies and activities. Because of his medical conditions, he stopped playing golf in July 2021. He can't lift a kayak and had to stop this activity as well. He stopped his model trains hobby as well because it is too "finicky work".

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

⁹ See GD2-30 and 33.

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

[22] The Appellant must provide some medical evidence that supports that his functional limitations affected his ability to work by December 31, 2021.¹⁰

[23] The medical evidence supports **most of** what the Appellant says.

[24] The medical evidence doesn’t support that the Appellant has concentration problems because of his medical condition.

[25] The Appellant has sleeping problems because of his shoulder pain and also right neck pain. He was recommended to seek treatment for ongoing neck pain in October 2021.¹¹

[26] The Appellant submitted two medical reports, one by Dr. Thomas (September 2021) and one by Dr. Creech (November 2021). The Appellant had surgery in July 2020 to repair a right shoulder rotator cuff tear. He has decreased strength and endurance with lifting and overhead activity. He has pain and weakness. No medications were listed. He had a good response to physiotherapy, although didn’t have a complete resolution of his symptoms.

Upper extremity specialist program

[27] The Appellant began an upper extremity specialty program in June 2021. I placed significant weight on the program reports. I did so for the following reasons: This program was designed to treat his main condition. He was assessed multiple times during the treatment. The program was led by an upper extremity specialist doctor, Dr. Creech. Dr. Creech is an orthopedic surgeon who had knowledge of the Appellant’s condition since December 2019, and was the Appellant’s surgeon for the shoulder surgery in July 2020.

¹⁰ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹¹ See GD4-16, GD2-87 to 89, and GD4-25.

[28] A partial functional recovery was expected. A gradual return to work plan was outlined to return to modified work at a light to medium capacity. The most recent functional abilities assessment on file was done in October 2021.

[29] In October 2021, the Appellant had full abilities for walking, standing, and sitting. He had medium ability for lifting from floor to waist, lifting from waist to shoulder and lifting above the shoulder. He was able to drive a personal vehicle but not a commercial vehicle, because this places a larger degree of strain on his shoulder. He had restrictions to bending, and gripping with his right hand on an occasional basis only.¹²

[30] The medical evidence supports that the Appellant's right shoulder and arm conditions prevented him from working his usual job as a coach bus driver by December 31, 2021.

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

– **The Appellant followed medical advice**

[32] To receive a disability pension, an appellant must follow medical advice.¹³ If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on the appellant's disability.¹⁴

[33] The Appellant has followed medical advice.¹⁵

[34] The Appellant completed the upper extremity program.

[35] At the hearing, the Appellant reported that he didn't have any treatment or medications for sleep issues. He had tried relaxation exercises, but they didn't help.

¹² See GD4-29 to 45 for the initial assessment. The following reports are found in GD4-29 to 66, GD4-69 to 86, GD8-29 to 39, and GD8-5 to 26.

¹³ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

¹⁴ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁵ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[36] The Minister notes that the Appellant wasn't taking any regular medications.¹⁶ At the hearing, Appellant said that he treated his conditions with Tylenol to relieve pain leading up to the end of December 31, 2021, except for other medication following his surgery. No medication is listed in the June 2021 or October 2021 upper extremity specialty program report. Only Tylenol use is recorded in the report from November 2021.¹⁷

[37] There is evidence in the records that the Appellant filled prescriptions for other medications in September 2021 for pain, after seeing Dr. Thomas for right sided neck pain.

[38] The October 2021 report recommended that the Appellant seek further treatment for ongoing neck pain. The Appellant testified that he tried acupuncture for his neck pain, but it didn't help.¹⁸

[39] 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 him from earning a living at any type of work, not just his usual job.¹⁹

– The Appellant could work in the real world by December 31, 2021

[40] When I am deciding whether the Appellant could work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language abilities
- past work and life experience

¹⁶ See GD5-4.

¹⁷ See GD2-26. The prescriptions were for naproxen, diclofenac, baclofen.

¹⁸ See GD8-38.

¹⁹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

[41] These factors help me decide whether the Appellant could work in the real world—in other words, whether it is realistic to say that he could work.²⁰

[42] I find that the Appellant could work in the real world by December 31, 2021. The Appellant's medical conditions impact his ability to work physical jobs. But I am not persuaded that the Appellant has no residual work capacity. I find he retains work capacity for sedentary jobs.

[43] At the time of the hearing, the Appellant was 63 years old. He has university education in business economics from the Netherlands. He has significant experience working in this sector abroad. He speaks English and multiple other languages with varying fluency. The Appellant says that his education from Europe is not recognized in Canada. Because of this, he found other types of jobs after arriving in Canada around 2000.

[44] The Appellant has work experience in both sedentary and physical roles. I have no doubt that he is a hard worker. The Appellant's Canadian work experience includes various types of construction work. He was also licenced to drive a school bus and coach bus. He has training other fields, including carpentry and accounting.

[45] The Appellant has business work experience. Although dated and Europe, he has skills from his education and work experience, and fluency in three languages. These are strong positive characteristics. He has no limitations to sitting, standing or walking and no identified cognitive limitations.

[46] The medical evidence from October and November 2021 supports that he could likely perform desk work, despite his limitations:

- Dr. Thomas thought that the Appellant would be able to do modified work with accommodations in the future.²¹

²⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²¹ See GD2-76 to 83.

- Dr. Creech thought the Appellant would be capable to perform sedentary work.²²
- The walk-in-clinic note of November 4, 2021 suggests that the Appellant was capable of performing light duty work, such as desk work.²³

[47] There is no medical evidence that contradicted the medical opinions above. The medical evidence didn't suggest that doctors thought that the Appellant was no longer capable of doing any form of work.

– **The Appellant tried a gradual return to modified work**

[48] If the Appellant could work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren't successful because of his medical conditions.²⁴ Finding and keeping a job includes retraining or looking for a job he can do with his functional limitations.²⁵

[49] I understand that the Appellant is frustrated with his limitations and that he experiences pain when using his right arm. But the evidence persuaded me that the Appellant's return to work attempt efforts were limited.

[50] The Appellant worked from October 29, 2021 until about November 16, 2021. He worked non-consecutive shifts for two hours at a time. The modified job duties included two main tasks:

- Cleaning the bus station lobby, cleaning buses, and assisting customers with directions and baggage tags.
- Computer work that involved reading and writing policies.²⁶

[51] He reported frustration over the type of modified work offered to him. He felt it was repetitive and aggravated his right shoulder symptoms. He also felt that he

²² See GD4-2 to 10.

²³ See GD8-27.

²⁴ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁵ See *Janzen v Canada (Attorney General)*, 2008 FCA 150.

²⁶ See GD8-3 and 11.

overused his left arm. The Appellant said that writing policies on the computer irritated his right arm because the chair didn't have arm rests.

[52] The Appellant reported two injuries during his 2021 return to work. He pulled on a locked door with his right arm and felt that he hurt his right shoulder. He also fell on stairs while at home. He said a walk-in clinic doctor put him off work for 3 days. The Appellant had imaging of his right shoulder and neck afterwards, which didn't show any significant tear or injury.²⁷

[53] The Appellant stopped the return to work around mid November 2021. He told the physiotherapy program workers that he wouldn't go back to this work. The same report says "he plans to refuse any further work offer for this occupation but hopes to find work elsewhere". The Appellant also told the Workplace Safety and Insurance Board (WSIB) return to work specialist that he couldn't perform the modified duties of the COVID cleaner any longer, so wouldn't be attending work.²⁸

[54] A refusal to return to an accommodating employer was a factor that I weight against the Appellant's favor. The refusal to return to any work that the employer offered also meant a refusal to continue sedentary duties. I appreciate that the Appellant expressed discomfort with his work chair. The evidence doesn't suggest that the Appellant made efforts to mitigate right arm discomfort while performing sedentary duties.

[55] The Appellant made no other work attempts with any other employer. At the hearing, the Appellant testified that he didn't look for work, retrain, or volunteer.

[56] Therefore, I can't find that the Appellant had a severe disability by December 31, 2021.

²⁷ See GD8-16 and 27. The walk-in-clinic doctor's signature is not legible.

²⁸ See GD8-4 to 10.

Conclusion

[57] I find that the Appellant isn't eligible for a CPP disability pension because his disability wasn't severe. Because I have found that his disability wasn't severe, I didn't have to consider whether it was prolonged.

[58] This means the appeal is dismissed.

Selena Bateman
Member, General Division – Income Security Section