Citation: *JB v Minister of Employment and Social Development*, 2023 SST 1112

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	J. B.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 22, 2022 (issued by Service Canada)

Tribunal member:	Anne S. Clark
Type of hearing:	Teleconference
Hearing date:	June 13, 2023
Hearing participant:	Appellant
Decision date:	July 4, 2023
File number:	GP-22-1924

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. 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 51 years old. She was 35 in December 2006. That was when she last met the contributory requirements for a CPP disability. She worked as a yoga instructor and exotic dancer. She studied human relations psychology in college. The Appellant has had seizures since approximately 1982. She said the seizures make her unable to work. She said she is also disabled by dozens of brain injuries that happen during seizures. She also has symptoms of depression.

[4] The Appellant applied for a CPP disability pension on June 22, 2020. 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 (GD).

[5] I held a hearing in April 2022. The Appellant presented evidence including oral testimony from her and two friends. The Minister participated in writing. The Appellant said there might more medical evidence she could present. In light of that I allowed her time to obtain and file the evidence after the hearing.

[6] The Appellant filed additional evidence. I decided the Appellant did not prove she had a severe and prolonged disability by December 31, 2006.[1]

[7] The Appellant appealed the decision to the Social Security Tribunal Appeal Division (AD). The AD granted permission (Leave) to appeal.

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[1] See the decision dated June 16, 2022.

[8] The parties (Appellant and Minister) agreed the AD should allow the appeal and return the matter to the GD to rehear the appeal. In particular, the parties agreed the GD failed to give the Appellant information about how to ask for an adjournment so she could find out if her former doctor would be able to give evidence.[2] The AD accepted the parties' agreement and allowed the appeal. The AD returned the matter to the GD with instructions to give the Appellant the opportunity to explore whether she can secure evidence from her former doctor.

[9] The Appellant says she was disabled by December 31, 2006. Seizures and multiple traumatic brain injuries make her unable to work. She said she refused medical treatment (prescription medication) because of side effects. She felt she could manage her conditions on her own.

[10] The Minister made submissions in the previous appeal before the GD and relied on those in the reconsideration. The Minister updated their submissions after the Appellant filed additional medical letters. The Minister said the evidence does not support a finding that the Appellant had a severe and prolonged disability by December 31, 2006.

What the Appellant must prove

[11] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2006. This date is based on her contributions to the CPP. [3]

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

[13] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[4]

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[2] See the AD decision at paragraph 6.
[3] A person's years of contributions to the CPP are used to calculate the "minimum qualifying period." It is usually called the MQP and is often described using the date the period ended. In this case it is December 31, 2006. See subsection 44(2) of the *Canada Pension Plan*. The Appellant's contributions are on page GD2-62. The Minister's update is at IS07. It shows the Appellant's MQP has not changed.
[4] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

[14] 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 able to regularly do some kind of work to earn a living, then she isn't entitled to a disability pension.

[15] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.[5]

[16] 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.

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

Matters I have to consider first

The evidence from the previous GD hearing is a part of the record for this appeal

[18] In the reconsideration (rehearing) the GD can consider testimony and evidence that was in the previous appeal.

[19] When the AD made its decision, it had the authority to refer a matter back to the GD for reconsideration in accordance with directions.[6] The AD directed the GD to reconsider the appeal after giving the Appellant an opportunity to explore whether she could secure her former doctor as a witness. The AD gave no other direction.

[20] The rules did not define how the GD should conduct a hearing when the AD referred a matter to the GD. Specifically, the legislation did not say the GD must rehear

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[5] Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.
[6] See section 59 *Department of Employment and Social Development Act* for the rules that were in place at the time of the AD decision.

all of the evidence from the parties or whether a decision can be based on the evidence already adduced at the first hearing.

[21] Sworn testimony a witness gave at the first hearing is an integral part of the record.[7] I am satisfied that the recording of the prior GD hearing formed part of the record in this appeal. The parties knew the hearing was recorded, the recording was made available to the AD, and neither party objected. The AD could have directed that any part of the previous record be removed from the record. The AD didn't. The AD allowed the appeal in this matter because the parties agreed the Appellant should have the opportunity to try to secure evidence from her former doctor. The AD gave direction regarding that issue and did not identify any issues with the record.

[22] The Tribunal is required to make sure the appeal process is as simple and quick as fairness allows.[8] The simple and quick process was to include the evidence previously adduced and not require all witnesses attend and repeat all evidence.

[23] The Tribunal sent the record from the previous appeal to the parties and confirmed they had copies of all written material. I wrote to the parties to explain they could submit additional evidence and submissions but were not required to resubmit evidence or argument they already filed. Unless there is a reason to do otherwise, the Tribunal should not require the Appellant and other witnesses to testify again to the same facts. Doing that would lengthen the reconsideration hearing and offer no benefit to the parties or the process. Neither party questioned the fact that evidence from the previous hearing would be a part of the current record.

The process for the reconsideration at the GD

[24] The process I used to conduct the reconsideration is important. With the exception of the hearing, I had to communicate with the Appellant in writing. I set dates and gave information about the rules in letters because the Appellant said she was not comfortable talking to me about the appeal. The process was as follows.

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[7] *In Re X*, 2005 Carswell Nat 6321
[8] See section 8 *Social Security Tribunal Rules of Procedure.*

Case Conference (CC)

[25] I invited the parties to attend a case conference (CC) to discuss the process for the reconsideration. I asked them to be prepared to discuss the following:

- Any issues that might be settled by agreement
- Whether the Appellant's former doctor (Dr. Nunes) attend the hearing or submit evidence in writing
- When the parties can be prepared to file additional evidence
- When the parties will be able to attend the hearing
- Whether there are other matters the parties want to discuss

[26] The Minister wrote to say they would not attend the CC. The Minister said there were no issues they intended to resolve by agreement.

[27] The Appellant attended but was not able to discuss the process or her preferences for the hearing. She became combative. At times she was incoherent. She ended the call before we had the chance to identify her issues or talk about the options.

The process

[28] I wrote to the parties and outlined the methods of proceeding Appellant could consider. I explained the various methods and the process each would follow. I asked the Appellant to tell us her preference. I also asked her to decide how much time she needed to prepare and when she could go ahead with the hearing.

[29] The Appellant said she preferred an oral hearing. She said she needed two months to contact Dr. Nunes. The Tribunal officer contacted the Appellant at the agreed time. The Appellant said she arranged for Dr. Nunes to attend the hearing and gave dates when Dr. Nunes would be available. The Appellant told the officer she preferred a hearing by teleconference. We selected a date for the teleconference to accommodate Dr. Nunes' schedule.

[30] The Appellant attended the hearing but said Dr. Nunes wouldn't attend the hearing after all. I asked the Appellant if she wanted to delay the hearing to allow Dr. Nunes to attend.

[31] The Appellant said the doctor hadn't gotten back to her and probably wouldn't. She said that was likely because Dr. Nunes prescribed the medication that made the Appellant suicidal. She said she talked to a clerk at the doctor's office but did not talk to Dr. Nunes. The Appellant said she thinks Dr. Nunes will not support her appeal. She said Dr. Nunes did not monitor her mental health in 2005. The Appellant feels Dr. Nunes would not have any evidence that would support of her appeal because she did not go back to see Dr. Nunes after her attempted overdose in 2005.

[32] The Appellant said there is no other evidence she can get. There were no other matters she wanted to raise before proceeding with the appeal. She said she knows the issues that apply to her. She said, "you people" (the Tribunal) were "dragging it out". She said she wanted to go ahead with the hearing as scheduled.

Reasons for my decision

[33] I find that the Appellant didn't prove she had a severe and prolonged disability by December 31, 2006.

Was the Appellant's disability severe?

[34] The Appellant didn't show she had a disability that was severe. I reached this finding by considering several factors. I explain these factors below.

The Appellant's functional limitations didn't affect her ability to work

[35] The Appellant submitted she has:

- Seizure disorder
- Traumatic brain injuries
- Depression

[36] However, I can't focus on the Appellant's diagnoses.[9] Instead, I must focus on whether she had 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]

[37] I find that the evidence doesn't prove the Appellant had functional limitations that affected her ability to work.

What the Appellant says about her functional limitations

[38] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She gave affirmed testimony in both hearings. I will summarize it below.

Testimony from the first hearing (April 2022).

[39] The Appellant had two witnesses attend the first hearing. They did not know the Appellant until many years after December 31, 2006. Therefore, they had no information about how her health condition affected her by December 31, 2006. The Appellant said her intention was that they would testify about the Appellant's limitations in the preceding decade.

[40] The Appellant testified that she had a seizure disorder before 2006. She took medication for about 20 years. She said she was gainfully employed because she took medication. That was the only reason she could work. When she stopped taking medication in 2005, she could not work any more.

[41] The Appellant testified that she has a very poor memory from "dozens and dozens of bumps on the head". She can't remember when or how she was treated for this. That is because a symptom of brain injury is poor memory. She thinks the treatment was somewhere in St. Catherine's. She said she had weekly sessions but couldn't say when or what they were.

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[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.

[42] The Appellant said the effect the medication had on her was horrible. As soon as she refused to take medication the doctors abandoned her. When she called them to try to get evidence for the first hearing, they told her they did not keep records about her treatment.

[43] The Appellant's friend Chantal Julian wrote about the Appellant's condition.[12] Ms. Julian said she witnessed the Appellant's first seizure around 1982. She was present and saw five more in 2006 when the Appellant was pregnant.

Testimony from the second hearing (June 2023)

[44] The Appellant attended the second teleconference. She added to the testimony from the first hearing. Her testimony included the following statements:

- She is disabled by the effects of seizure disorder, traumatic brain injuries and mental health.
- Medication prescribed for convulsions made take an overdose in 2005. There is no medical evidence because she took care of herself. In fact, when she woke up the next morning she had to go to work. She did not seek any medical care or consult a health professional about her belief that the medication made her suicidal.
- She decided to stop seeing her doctor because she blamed the doctor for the overdose. Dr. Nunes prescribed the medication and did not monitor its effect on the Appellant's mental health.
- There is no medical evidence after 2005 and 2006 because she stopped interacting with the medical community in 2005. She decided she could take care of her mental health herself.

[12] See the letter at GD6.

- She has a deep mistrust for neurologists. Every time she saw a neurologist, she had a major mental health breakdown. (2018 and 2019).
- She has never had professional treatment for her mental health or for brain injuries. She said those conditions are obvious and she doesn't need a doctor to tell her she has them.
- She takes care of all of her health conditions herself. She uses plant-based medication (cannabis and CBD oil), nutrition (ketogenic), yoga, meditation, and pranayama that includes other breathing practices.
- When she is not having a seizure, she is still disabled by the effects on her mental health from anxiety and head trauma.

[45] The Appellant does not qualify for a CPP disability pension for two reasons. Either of these reasons make her ineligible. The first is that the medical evidence does not show she had a severe disability by December 31, 2006. The second is that she refused to take prescribed medication that was shown to previously made her able to work.

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

[46] The Appellant must provide some medical evidence that supports that her functional limitations affected her ability to work by December 31, 2006.[13]

[47] The medical evidence doesn't support what the Appellant says.

[48] Dr. Nunes wrote on January 26, 2023, to say she last saw the Appellant in May 2009.[14] The letter says the Appellant had a seizure disorder beginning was she was 12 years old. She was treated with Dilantin. Dr. Nunes included a page from a 2004 report. It noted the Appellant was last seen in 1997. She had a history of intermittent drug use and said she prefers a more natural lifestyle. There is no information about the type of drug use. Given the other limited information this may refer to the Appellant's choice to decline medication. I can't draw any conclusions from this information.

[13] See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.
[14] Dr. Nunes' letter and attachment are at IS02.

[49] The Appellant said she could not get supportive evidence from her former doctor (Dr. Nunes) or other health professionals. She believes Dr. Nunes is not supportive because she prescribed medication and didn't monitor the effects it had on the Appellant. The Appellant also said she did not seek medical attention for any conditions after 2005 because she has a deep mistrust of doctors and counsellors. Therefore, there is no evidence about her health in 2006 or after. Unfortunately, that does not relieve the Appellant of the requirement for her to provide medical evidence to show she had a disability by December 2006 and continuously since.

[50] It is not enough for the Appellant to show she had a condition by December 31, 2006. The test is whether she had a condition that made her incapable of working by then and continuously since. Her testimony and the information from her doctors show that she had a seizure disorder beginning at age 12. There is no medical evidence about how that disorder likely affected her ability to work by December 31, 2006. In fact, she worked for many years after the first seizure.

[51] There is no medical evidence about the Appellant's mental health or brain traumas. She said she did not want to seek help from a mental health professional because she could not afford to consult a good practitioner. She decided it was better to take care of herself. Her explanation does not relieve her of the requirement to submit medical evidence to support her claims.

[52] The medical evidence doesn't show that the Appellant had functional limitations that affected her ability to work by December 31, 2006. As a result, she hasn't proven she had a severe disability.

[53] Even if there was some evidence to show the Appellant's condition affected her ability to work by December 31, 2006, she would not be eligible because. That is because she refused to follow medical advice that had controlled her symptoms in the past and allowed her to work.

The Appellant hasn't followed medical advice

[54] To receive a disability pension, an appellant must follow medical advice.[15] 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.[16]

[55] The Appellant hasn't followed medical advice. She didn't give a reasonable explanation for not following the advice.

[56] The Appellant was treated with medication to control seizures. Her testimony was that the medication controlled the seizures, and she was able to work for twenty years. She said she decided she preferred to use more natural remedies. In 2005 she stopped taking medication and stopped seeing doctors. She became pregnant in 2006 and did not go back to any medication after her son's birth. After that she said she felt she could manage her symptoms better on her own. Unfortunately, the medical evidence confirms the seizures returned and were not controlled by the Appellant's treatment choices.

[57] The specialist, Dr. Stolz repeatedly said that it was not reasonable for the Appellant to refuse to take medication.[17] In 2014 and 2019 Dr. Stolz said the Appellant needed to take medication. Without medication to control the seizures there is a risk of sudden death. Dr. Stolz said the only potential side effect from the recommended medication would be a rash that can be controlled. The Appellant said she would consider it. However, she confirmed in her testimony that she has not taken medication for seizures since 2005.

[58] The Appellant saw Dr. Stolz after 2005 (2008 and 2014). Dr. Stolz strongly recommended the Appellant take medication. She said cannabis in not prescribed for seizures. She said the Appellant needs medication and stubbornly refuses it. The Appellant continued to have seizures showing that her choice of treatment was clearly

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[15] See *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[16] See *Lalonde v Canada (Minister of Human Resources Development*), 2002 FCA 211.
[17] Dr. Katherine Stolz' notes and letters are dated November 21, 1008 (GD2-104), March 28, 2014 (GD2-102), November 1, 2017 (GD2-98), November 12, 2018 (GD2-97), and January 9, 2019 (GD2-96).

not enough. In her 2019 letter Dr. Stolz said the Appellant needed a referral to a psychiatrist.

[59] The Appellant's former doctor, Dr. Nunes did not comment about the Appellant's decision to refuse to take medication

[60] Dr. Marco wrote that he saw the Appellant three times in 2020.[18] He said they did not discuss her ability to work. It is unknown whether the Appellant can return to work. The Appellant told him she chose not to take medication because there are harsh side effects. Dr. Marco did not offer any opinion on whether the Appellant's decision was reasonable.

[61] I must now consider whether following this medical advice might have affected the Appellant's disability. I find that following the medical advice might have made a difference to the Appellant's disability. The Appellant testified that she was able to work when she took medication. She stopped taking the medication because she believed it made her take an overdose in 2005. After she stopped taking the medication the seizures began again. There is no evidence that she made this decision in consultation with a health professional. In fact, she said she refused to consult a doctor or counsellor because of her deep mistrust.

[62] The specialist repeatedly urged the Appellant to resume taking medication. Dr. Stolz said the steps the Appellant took were clearly not enough to manage the seizures.

[63] The Appellant hasn't followed medical advice that might have affected her disability. This means that her disability wasn't severe.

[64] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics.

[65] This allows me to realistically assess an appellant's ability to work.[19]

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[18] The report begins at page GD2-142.
[19] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[66] I don't have to do that here because the Appellant hasn't proven that her disability was severe by December 31, 2006.[20]

Conclusion

[67] 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.

[68] This means the appeal is dismissed.

Anne S. Clark
Member, General Division – Income Security Section

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