



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *LG v Minister of Employment and Social Development*, 2020 SST 1236

Tribunal File Number: GP-20-239

BETWEEN:

**L. G.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Lianne Byrne

Claimant represented by: Allison Schmidt

Teleconference hearing on: November 12, 2020

Date of decision: December 29, 2020

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

## **OVERVIEW**

[2] The Claimant worked as a forklift driver until August 2012, when she was injured in a motor vehicle accident. She has had headaches and back, neck and right shoulder pain since then. The Minister received the Claimant's application for the disability pension on May 7, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2015.

## **ISSUE(S)**

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2015?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2015?

## **ANALYSIS**

[6] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **Severe disability**

[7] The Claimant worked full-time from 2002 until August 8, 2012 at Georgia-Pacific as a forklift driver. Her duties included carrying boxes, loading trailers, and wrapping skids with plastic. She was able to do this work without difficulty until she was involved in a motor vehicle accident in August 2012.

[8] Since then, she has pain in her neck, right shoulder and lower back. She also has headaches (approximately 10 per month). She has numbness and tingling in her right hand and decreased grip strength. She has difficulty sleeping (3-4 hours per night). She could sit for 15 minutes or walk for 10 minutes before her back began to hurt. She was unable to lift, carry, push or pull. She has not returned to work since the accident.

[9] After the MQP, in December 2016, she was admitted to the hospital for four days. She was initially told she had suffered a stroke. She was later diagnosed with migraines.

[10] T. R., the Claimant's wife, also testified at the hearing. Prior to the motor vehicle accident, she described the Claimant as hard-working and active. As of December 31, 2015, she had headaches and neck and back pain. She was not able to do many of the house chores she did prior to the accident.

[11] She stated that the Claimant is not well-educated. She struggles with reading and spelling. Her handwriting is illegible. She does not feel that the Claimant is qualified to do sedentary work.

[12] I considered all of the medical reports on file. In particular, I focused on the medical reports dated at or around the time of the MQP. There are multiple medical reports on file from Dr. J. Nixon, the Claimant's family physician. These reports indicate that, although the Claimant has had ongoing pain and limitations since the motor vehicle accident, she retained the capacity to do lighter work within her limitations.

[13] In the CPP Medical Report dated May 18, 2018, Dr. Nixon noted that she sustained cervical strain and lumbar strain in the motor vehicle accident. Her pain improved, but it continues to inhibit her ability to lift, do housework, and exercise. Dr. Nixon does not believe she will be able to work in a factory as she previously did.

[14] Dr. Nixon's medical reports also include the following:

- Dr. Nixon wrote on December 19, 2012 that she is slowly improving from her injury. She cannot return to work as a forklift driver as it requires bouncing. If she were to return to work, she would have to avoid bouncing, bending and lifting anything over 10 kg.
- On February 26, 2013, Dr. Nixon wrote that she is still having pain in her neck and back and cannot return to work.
- On January 27, 2014, Dr. Nixon wrote that it is very unlikely that she will be able to return to work as a forklift operator.
- Dr. Nixon wrote on April 7, 2014 that it is reasonable that she could carry out a job other than forklift driver. If there was a more sedentary job or a job that did not entail having to turn her neck all the time, then that may be an option for her. She should also avoid heavy lifting (more than 10 kg), and repetitive movement of her right arm.
- Dr. Nixon completed a CPP Medical Report on February 23, 2015. She was noted to have chronic neck and back pain, pain in the right shoulder and numbness into the right arm.

[15] Several months after the MQP, on May 15, 2016, Dr. Nixon reported that she has had chronic neck and back pain since the motor vehicle accident in August 2012. She was unable to return to her prior occupation as a forklift operator. She would have been unable to perform jobs that required general labour with lifting, pushing, pulling, prolonged sitting or prolonged standing. She cannot lift anything heavier than 5 kg or do any recurrent bending, prolonged sitting and standing. Dr. Nixon considered her to have a severe disability.

[16] Although I accept that the Claimant could not return to work as forklift operator, Dr. Nixon's reports indicate that the Claimant maintained the capacity to attempt lighter work within her limitations. This is also evident from the remaining medical reports on file.

[17] Cameron Burns, physiotherapist, reported on August 9, 2012 that a return to work is not probable given her high levels of reported pain and disability. Mr. Burns wrote on November 18, 2013 that there has been no significant change in her level of function.

[18] On June 12, 2013, Dr. Margaret Dziedzic, physical medicine and rehabilitation, wrote that she has myofascial, cervical and lumbar spine pain. She also has evidence of right shoulder AC joint arthritis and pain. Her low back pain improved by about 50-60%.

[19] Dr. Gregory Murphy, orthopedics, reported on April 28, 2014 that she has cervical facet syndrome, cervical myofascial pain, and primary shoulder pathology likely rotator cuff tendonitis.

[20] In a Functional Ability Evaluation Report dated October 9, 2014, Lesley Spada, occupational therapist, noted that the Claimant falls within the sedentary strength level, which includes handling 10 lbs on an occasional basis and negligible weight on a frequent basis. She exhibits limitations with respect to her ability to tolerate repetitive lifting from waist to floor, waist to crown, bilateral carrying, sustained elevated work, and sustained forward bending and low level positioning.

[21] Dr. Dana F. Wilson, orthopedic surgeon, reported on October 30, 2015 that she has symptoms of neck and back pain. She can manage her sedentary activities and personal care, but cannot do anything of a physical nature. Her career involved physical jobs only and she is not currently capable of returning to this. The only occupation she may be capable of in the future would be sedentary in nature and most likely on a part-time basis only.

[22] There are also multiple reports on file that indicate the Claimant's health worsened after the MQP. These include reports related to her hospitalization in December 2016, reports related to sleep apnea, and reports related to left knee pain noted to have begun after the MQP. I agree with the Minister that the evidence does not support that these conditions were an issue for her prior to the MQP.

[23] I accept that the Claimant suffers from ongoing pain and functional limitations and cannot return to physically-demanding work. However, I considered that the measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It is not a question of whether a person is unable to perform their regular job, but rather the person’s inability to perform any substantially gainful work<sup>2</sup>.

[24] Dr. Nixon, Dr. Wilson and Ms. Spada’s reports indicate that the Claimant had the capacity to attempt lighter work within her limitations. I therefore find that there is evidence of work capacity.

[25] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person’s health condition<sup>3</sup>. In this case, the Claimant testified that she did not return to any type of work after the accident. There were no lighter duties available with her employer. She did not look for any other lighter or sedentary work or attempt to retrain for such work.

[26] I must assess the severe part of the test in a real world context<sup>4</sup>. This means that when deciding whether a person’s disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in finding that the Claimant’s disability is not severe, I considered that she was 46 years old as of the MQP with a grade 8 education. She is unable to use a computer. She is able to speak and understand English. She has worked mainly in factory jobs and as a forklift operator. She has also worked as a babysitter and cashier at KFC.

[27] I note her low level of education and inability to use a computer. However, her age and functional limitations would not preclude her from attempting lighter work, training for lighter work or upgrading her education. In considering her personal characteristics, I do not find that she was unemployable in a real world context as of the MQP. While I acknowledge that she would be unable to perform heavy physical work, she would not be precluded from attempting

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<sup>2</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

<sup>3</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

<sup>4</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

lighter or sedentary work within her restrictions, or retraining for such work. She has not made any attempt at finding such work. Therefore, she has not shown that her efforts at obtaining and maintaining employment have been unsuccessful because of her health condition.

[28] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment<sup>5</sup>. Having considered the totality of the evidence and the cumulative effect of the Claimant's medical conditions, I am not satisfied on the balance of probabilities that she suffers from a severe disability.

## **CONCLUSION**

[29] The appeal is dismissed.

Lianne Byrne  
Member, General Division - Income Security

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<sup>5</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47