



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. K. v. Minister of Employment and Social Development*, 2018 SST 463

Tribunal File Number: GP-17-678

BETWEEN:

G. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Zane Roth

Videoconference hearing on: May 10, 2018

Date of decision: May 24, 2018

REASONS AND DECISION

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of September 2015.

OVERVIEW

[2] The Claimant was born in XXXX in Iraq, where she obtained a Grade 12 education and worked on a farm. She came to Canada in or around 1997. She worked as a general labourer in various factories from 1997 to May 1, 2015, when she was injured in a motor vehicle accident. The Claimant alleges that she cannot work because of injuries that she sustained in the motor vehicle accident. The Minister received the Claimant's application for the disability pension on April 26, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant must prove on a balance of probabilities that she became disabled on or before the Minimum Qualifying Period (MQP), which is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2017.

ISSUES

[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, 2017?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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

¹ Paragraph 42(2)(a) *Canada Pension Plan*

of indefinite duration or is likely to result in death. A person must prove on a balance of 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.

The Claimant's disability was severe as of December 31, 2017

[7] 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's 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 work².

[8] I am satisfied that the evidence shows that the Claimant was unable to perform any substantially gainful work at the time of her MQP because of her medical condition.

[9] The Claimant stated in her Questionnaire for Disability Benefits that she could no longer work as of May 1, 2015 because of right shoulder pain. She stated that she could not raise her right arm. She reported not being able to lift anything and reaching was difficult for her. She also stated that she could not walk or stand because of foot and ankle pain.³

[10] The Claimant, her husband, and her daughter provided evidence about her medical condition. They all asserted that the Claimant had serious medical problems since her May 2015 car accident and that her ability to perform housekeeping tasks had been impaired. The Claimant testified that she could not sit or stand for long periods of time. She stated that she suffered from hand numbness and had difficulty grabbing objects. The impairments that the Claimant and her family referred to at the hearing are supported by the medical evidence.

[11] The medical evidence showed the following:

- The Claimant went to the emergency room on May 1, 2015, after being involved in a motor vehicle accident.⁴

² *Klabouch v. Canada (Social Development)*, 2008 FCA 33

³ GD2-84

⁴ GD4-33

- Her family physician, Dr. K.A. Wudom, stated in a May 4, 2015 clinical note that the Claimant suffered from upper back, chest, bilateral shoulder and knee pain since the motor vehicle accident.
- The Claimant sustained a right foot fracture sometime in May 2015 after a fall.⁵
- Dr. Wudom in a 2016 Medical Report to Service Canada noted that the Claimant had constant pain in her right shoulder and foot. She could not walk more than one block.⁶
- A July 9, 2016 MRI showed a supraspinatus tear in the Claimant's right shoulder.⁷
- The Claimant underwent psychological treatment with P.M. Akbari. Ms. Akbari in a September 2, 2016 report noted that the Claimant had a decline in cognitive functioning since the motor vehicle accident. She also noted that the Claimant had reduced housekeeping capacity because of her medical condition.⁸ Ms. Akbari diagnosed the Claimant with an adjustment disorder, with mixed anxiety and depressed mood; a somatic symptom disorder; and a specific phobia related to travelling in a motor vehicle.⁹
- The Claimant underwent right shoulder surgery on January 9, 2017 with Dr. Carlos Lopez, Orthopaedic Surgeon.¹⁰
- Dr. Wudom in a report to the Claimant's private disability insurance company dated March 18, 2017, noted that the Claimant could not work because of her right shoulder tear and neck strain. He stated that the Claimant could not use her right arm or hand for lifting or bathing.¹¹

⁵ Dr. Wudom, Clinical Notes, GD4-78-80

⁶ GD2-64-67

⁷ GD2-6

⁸ GD4-436

⁹ GD4-440

¹⁰ GD4-216-217

¹¹ GD4-223-224

- Lital Crombie, Kinesiologist conducted a Functional Capacity Evaluation on April 24, 2017. She found that the Claimant could not lift anything. The Claimant was only able to walk, and sit and stand on an occasional basis with constant shifting and changing of positions. Ms. Crombie found that the Claimant was unable to engage in most of her activities of daily living and her vocational tasks due to her functional limitations.¹²
- An Electromyography (EMG) Report dated May 30, 2017 noted that the Claimant suffered from right hand numbness. EMG testing showed mid right median neuropathy and radiculopathy.¹³
- The Claimant saw Dr. M. Farahani, Neurologist for neck pain. She noted in a September 1, 2017 consultation report that a cervical spine MRI showed disc herniation, foraminal stenosis, and nerve root compression.¹⁴
- A right knee MRI taken on September 15, 2017, showed a meniscal tear.¹⁵
- A left shoulder MRI taken on December 6, 2017, showed a possible tear.¹⁶

I prefer the evidence of the Claimant's treating physicians to those of the medical experts retained by the automobile insurer.

[12] The Claimant's family physician, Dr. Wudom, repeatedly drafted notes asserting that the Claimant was incapable of working. The first note that Dr. Wudom drafted asserting that the Claimant was incapable of working was dated May 7, 2015.¹⁷ His last note asserting that the Claimant was incapable of working was authored on December 28, 2017.¹⁸ Dr. Wudom endorsed that the Claimant had restrictions with heavy lifting and prolonged standing.¹⁹ The Claimant has

¹² GD4-528

¹³ GD4-228-230

¹⁴ GD4-239-240

¹⁵ GD4-731

¹⁶ GD7-22

¹⁷ GD4-99

¹⁸ GD4-246

¹⁹ GD4-99

also had extensive psychological treatment with Ms. Akbari. Dr. Silverman endorsed continued psychological treatment in her report.²⁰

[13] The Minister referred to medical experts who were retained by the Claimant's automobile insurer to support its position that the Claimant could work.²¹

[14] These reports stated the following:

- Dr. K. Spivak, Psychologist in a report dated November 3, 2015, stated that the Claimant did not, from a psychological perspective, suffer a substantial inability to perform the essential tasks of her pre-accident employment because of the motor vehicle accident.²²
- Dr. M. Devlin, Psychiatrist in a report dated November 4, 2015 stated that the Claimant did not have a substantial inability to perform the essential tasks of her pre-accident employment because of the motor vehicle accident.²³
- Deborah Westbrook, Physiotherapist completed a Hypothetical Jobsite Analysis Report on May 23, 2017. She classified the Claimant's pre-accident job as being in the light level of physical demands.²⁴
- Jennifer Chladny, Vocational Evaluator identified alternative occupations that were classified as light in a May 23, 2017. These occupations included working as a machine operator, poultry preparer, and a fish plant machine operator.²⁵
- Dr. S. Halman, Orthopaedic Surgeon in a report dated May 23, 2017, stated that the Claimant did not have a complete inability to engage in any employment for which she was reasonably suited by way of education, training or experience because of the motor vehicle accident. He reviewed the reports of Ms. Westbrook

²⁰ GD4-687-688

²¹ GD6-12-13

²² GD4-603

²³ GD4-591

²⁴ GD4-625

²⁵ GD4-702

and Ms. Chladny and concluded that the Claimant's accident related injuries did not lead to a complete inability to engage in the occupations identified by Ms. Chladny.

- Dr. R. Silverman, Psychologist in a report dated May 23, 2017, stated that the Claimant did not, from a psychological perspective, suffer from a complete inability to engage in any employment for which she was reasonably suited by way of education, training or experience because of the motor vehicle accident.²⁶

[15] I reject the conclusion of the experts retained by the Claimant's automobile insurer that she was capable of working for several reasons. The eligibility test for the receipt of automobile insurance benefits in Ontario differs from that for a CPP disability pension. Unlike the Claimant's automobile insurer, I do not have to consider whether the Claimant's disability is related to the motor vehicle accident. Causation was clearly an issue in the Claimant's dispute with her automobile insurer. Dr. Devlin, for example, did not relate the Claimant's foot fracture to the motor vehicle accident, and Dr. Halman seemed to question whether her right shoulder problem was related to the motor vehicle accident.

[16] The medical experts retained by the automobile insurance company were also assessing the Claimant based on her medical condition at the time of their assessments. I must assess whether the Claimant had a severe disability at the time of her MQP. Dr. Devlin completed his report prior to radiographic evidence which showed tears in both shoulders and her right knee. Dr. Spivak denied that the Claimant suffered from a mood, anxiety or adjustment disorder and that she met the diagnostic criteria for a somatic symptom disorder. However, Ms. Akbari made a positive psychological diagnosis in 2016, and Dr. Silverman diagnosed the Claimant with a somatic symptom disorder and an adjustment disorder with mixed anxiety and depressed mood in 2017.²⁷

[17] In addition, the medical experts retained by the Claimant's automobile insurer basing their opinions within the confines of their medical disciplines. Dr. Halman was assessing the

²⁶ GD4-687

²⁷ GD4-687

Claimant based on her physical injuries arising from the motor vehicle accident. While Dr. Silverman and Dr. Spivak assessed the Claimant based on any psychological injuries arising from the motor vehicle accident. Unlike the experts retained by the Claimant's automobile insurer, 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 impairment²⁸.

[18] The Minister is relying upon a report authored by Dr. N. Dehghan, Orthopaedic Surgeon dated September 14, 2016. She saw the Claimant at the request of her family physician. She stated that the Claimant could return to work, but she advised that the Claimant should avoid repetitive work. However, the Claimant based on her age, education, and work experience was only capable of performing repetitive work with her hands.

[19] I find that the opinions expressed by the experts retained by the Claimant's automobile insurer that she can return to her pre-accident employment or work in any type of physical work is not a realistic option. The Claimant has significant physical impairments because injuries to her shoulders and knees have led to significant impairments in standing, grasping objects, lifting, and reaching, which makes a return to physical labour unrealistic.

[20] The Minister also suggested that Dr. Lopez stated in various consultation reports that the Claimant's condition had improved significantly.²⁹ However, the last consultation report on file from Dr. Lopez indicates that he provided injections to the Claimant's knees on December 20, 2017.³⁰

The Claimant pursued and complied with reasonable treatment options

[21] I am satisfied that the Claimant did all that she could to seek and to follow all reasonably recommended treatment options. She saw her family doctor. She has tried psychological treatment with Dr. Akbari. She has undergone right shoulder surgery. She has seen orthopaedic surgeons and a neurologist. She tried physiotherapy. She also had injections to treat her knee and shoulder problems with Dr. Lopez.

²⁸ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

²⁹ GD6-10

³⁰ GD7-20

The Claimant has a severe disability as of May 2015 when I consider the totality of her condition and her personal circumstances

[22] I find that the Claimant suffered from bilateral shoulder and knee pain, bilateral hand numbness, neck pain, and right foot pain at time of her MQP. She also had psychological problems including an adjustment disorder, and a somatic symptom disorder. The Claimant physical and psychological problems led to significant impairments in the areas of sitting, standing, walking, lifting, grasping objects, memory, and driving. She had no residual work capacity at the time of her MQP.

[23] I found the Claimant to be a credible witness at her hearing. She was physically uncomfortable giving evidence. She had to frequently switch from a seated to standing position. She also appeared to be sad giving evidence. She became very emotional when her family testified. I have no reason to disbelieve her assertion that she is not capable of working in any type of occupation.

[24] The Claimant stated in her Questionnaire for Disability Benefits that she planned on returning to work with her former employer in July 2016.³¹ I place little weight on this statement as evidence of work capacity. Her husband testified that he completed the form. He stated that the plan was for the Claimant to get better and return to work, but this never happened. I find that this statement was not based on concrete evidence that the Claimant had work capacity. I agree with the statement contained in the Questionnaire for Disability Benefits that the Claimant was unable to work as of May 1, 2015.³² I find that the Claimant has not had residual work capacity since her May 1, 2015 motor vehicle accident.

[25] I must also assess the severe part of the test in a real world context³³. 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. The Claimant was 48 years old at the time of her MQP. She gave her evidence through an Arabic interpreter, but she admitted at her hearing that she has some knowledge of English. However, her knowledge of English is limited. She did not complete the application forms for CPP disability. She relied on

³¹ GD2-83

³² GD2-84

³³ *Villani v. Canada (A.G.)*, 2001 FCA 248

family members to complete the forms. She worked on farms in Iraq and her work experience in Canada has been limited factory jobs. I find that physical type work that involves standing in a factory setting is the only realistic employment alternative for the Claimant, and her impairments prevent her from performing such work. I also find that the Claimant's difficulty with memory and concentration would make the employment setting difficult. I also find that the Claimant was not a suitable candidate for retraining. Even Ms. Chladny in her report did not assert that the Claimant should be retrained to pursue sedentary work.

Prolonged

[26] I find that the Claimant has proven on a balance of probabilities that she has a prolonged disability that is long continued and of indefinite duration.

[27] The Claimant continues to be followed by her family physician. She is still in physiotherapy and she continues to receive psychological treatment. However, the Claimant's medical conditions that existed prior to the MQP have continued despite receiving extensive treatment. Dr. Wudom provided the Claimant with a guarded prognosis in his 2016 Medical Report for Service Canada. Dr. Wudom in a December 28, 2017 note stated that the Claimant's pain persisted and she was incapable of working.³⁴

CONCLUSION

[28] The appeal is allowed.

[29] The Claimant had a severe and prolonged disability in May 2015, when she was injured in a motor vehicle accident. Payments start four months after the date of disability, as of September 2015³⁵.

George Tsakalis

Member, General Division – Income Security Section

³⁴ GD4-246

³⁵ Section 69 *Canada Pension Plan*