Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. C. v. Minister of Employment and Social Development*, 2018 SST 855

Tribunal File Number: GP-16-2173

BETWEEN:

G. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Jane Galbraith
Claimant represented by:	Stuart Ghan
In person hearing on:	June 21, 2018
Date of decision:	July 3, 2018

DECISION

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

OVERVIEW

[2] The Minister received the Claimant's application for the disability pension on August 12, 2015. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Claimant was injured in a car accident in February 2010. She sustained injuries in the accident and returned to work after the accident. She had increasing pain in her shoulder over the next few years resulting in having an arthroscopy done on her shoulder in December 2014. This procedure did not improve her symptoms. She has developed chronic right shoulder, back pain, right knee and leg pain as well as depression. She reports on the CPP questionnaire that she could no longer work due to these conditions as of December 2014.

[4] 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, 2016.

PRELIMINARY MATTERS

[5] As the Claimant's representative only brought a couple of documents from the hearing file with him to the hearing I confirmed with him that he had received the large amount of documentation related to this file. This included all the medical documents that he had sent to the Tribunal on behalf of the Claimant as well as the Minister's submissions and addendums to their submissions.

ISSUE(S)

[6] Did the Claimant's conditions of chronic pain and depression result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2016.

[7] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2016.

ANALYSIS

[8] Disability is defined as a physical or mental disability that is severe and prolonged[1]. 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 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

[9] I reviewed the exceptionally large hearing file with many duplicate documents. I am aware that it is recognized that not all the reports in the hearing file need to be referred to in the decision.[2] As the Claimant was involved in a car accident many of the reports are not reflecting any ongoing treatment. They are assessments conducted for either the insurance company or at the request of the Claimant's representative. They have not been prepared specifically for the disability application. The Claimant relied most heavily on the report of Dr. West done in January 2016 and the testimony of Dr. Khanna heard at the hearing.

[10] I have considered all of the documentary evidence and have not dismissed any document due to who commissioned the report.

[11] The Claimant indicated that she required the services of an interpreter at the hearing, which she used frequently. Several reports indicate an interpreter was not used for their

[1] Paragraph 42(2)(a) *Canada Pension Plan*
[2] *Simpson v Canada (Attorney General)*, 2012 FCA 82

evaluations. The Claimant's representative pointed out that I should consider her difficulty with English when evaluating the answers provided by the Claimant. He indicated that the Claimant is not fluent in English as this is not her first language.

The Claimant's physical condition and effect on employment

[12] The documents and consultations notes show the Claimant had issues with pain and headaches for many years before the accident. The Minister submits that I should focus on reports that reflect the Claimant's condition closer to the MQP. I agree with this but also find value in understanding her condition spanning many years, which have been provided in the medical records.

[13] Dr. Tuillo saw the Claimant in 2006 and again in 2007 for complaints of musculoskeletal pain. He described in May 2007 that she had pain in her neck, shoulder and right arm and she advised that it was difficult for her to work. He characterized her condition chronic pain.[3] He thought she may have fibromyalgia, as the investigations that were done did not show any pathology. In April 2007 she reported neck and right shoulder pain in to Dr. Angel. In 2008 the Claimant complained to her family physician, Dr. Choudry about back pain but with no radiation down her leg.[4] The Claimant also complained to her doctor of back pain in February, August, September and November in 2008.[5]

[14] The Claimant went to her family physician the day after her car accident in February 2010, complaining of pain in her right shoulder, right knee, neck and lower back. The Claimant had several insurance assessments in 2010 to determine the amount of services she required due to her injuries.

[15] Dr. Swain, a chiropractor, completed an in home assessment with the Claimant's husband present on March 2, 2010. She reported to him that she had an unremarkable medical history and she was taking Tylenol, Tylenol #3 and a sleeping pill to manage her symptoms. She stated that she was unable to perform any of her pre-accident household, personal care or caregiving tasks.[6]

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[3] GD11-472
[4] GD11-180
[5] GD11-179
[6] GD11-32

She indicated that her pain levels (with 10 being the most severe) were between 8/10 for her neck, right knee and ankle pain to 9/10 for her low back pain. Dr. Swain stated found no objective findings to substantiate her reported restrictions. He believed that the Claimant was pain focused and this was preventing her from focusing on a return to activities. The Claimant reported to Dr. Swain that she had returned to work the week before and worked 18 hours.[7]

[16] An In-Home Rebuttal Assessment Report by Dr. Charles, a Chiropractor, was done in May 2010 when attendant care services were denied. The Claimant reported that she required help with personal care and household tasks. She described her neck and back pain as intermittent, dull and achy with her pain registering 8/10 in severity. She identified many actions that aggravated different areas of pain. She indicated she had daily bouts of headaches requiring medication to get relief. He noted the Claimant was pleasant and answered all questions. He did not indicate if an interpreter was present or that the Claimant was working at the time of the assessment. Dr. Charles determined the Claimant required housekeeping and caregiving assistance.[8]

[17] Dr. Williamson did a Functional Abilities Evaluation in July 2010. The Claimant denied any history of back, neck, shoulder or knee pain. She advised him that she had returned to work on February 20, 2010 performing modified duties and then in June 2010 she returned to full hours and regular duties. She repeated to Dr. Williamson that she was currently unable to perform any household or childcare task to any degree and her mother was doing them. She was independent with personal care at that time. No pain-focused behaviours were noted. His conclusions were that a treatment plan suggested for the Claimant was unnecessary as she had not made good progress to date with similar services.[9]

[18] In the past Dr. Tuillo had seen the Claimant for neck pain and headaches in 2006 and 2007. In February 2011 she advised him that her headaches had improved with conservative management and she took Tylenol #3 for the pain occasionally.[10]

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[7] GD11-31
[8] GD11-12
[9] GD11-93
[10] GD3-2

[19] She was referred to an orthopaedic specialist, Dr. Weisleder in July 2014, who eventually carried out an arthroscopic decompression and acromioplasty of her right shoulder. [11] The Claimant has reported that she has not seen any improvement after this surgery and her pain has worsened.

[20] Diagnostic tests that were performed on her lumbar spine, cervical spine, right knee, and head from 2014 to 2016 did not show severe conditions. Mild sprain and mild degenerative changes were noted.[12] Several assessment reports comment on the lack of severe findings in the diagnostic evaluations.

[21] The Claimant told Dr. West in a consultation in January 2016, that she has had constant back pain, right knee pain and neck pain since the accident. She rates the severity of her pain from 7-9/10 has continued. Her shoulder pain did not improve after the surgery. She reports requiring sedatives to sleep, frequent and severe headaches as well as feelings of stress, anxiety and depression. Many different movements aggravate her pain.[13]

[22] Dr. West reviewed the diagnostic imaging that had been completed over the years. An MRI of the lumbar spine in January 2012 showed some disc changes but not herniation or compromise of the nerve roots. The cervical x-ray in 2007 show small disc herniations and the MRI in September 2010 indicate reduced lordosis, which could reflect spasm but no remarkable bone or joint findings.[14] The Claimant had indicated that she had no prior problems with her right shoulder, her knees, neck or lower back prior to the accident.[15]

[23] Dr. West recommended numerous treatments after examining the Claimant and reviewing the diagnostic tests. He determined the Claimant suffered from chronic pain, multiple sites of myofascial strain, contusion of her right knee and right shoulder tendonitis with painful arc syndrome.[16] It was his opinion that she has chronic pain, as her symptoms have persisted for 6 years, and the Claimant's prognosis for a complete and full recovery is guarded.

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[11] GD1-12 (Dr. West consult note)
[12] GD2-122, GD2-146, GD4-8
[13] GD1-14
[14] GD1-19
[15] BD1-12
[16] GD1-20

[24] Dr. Khanna testified at the hearing that the Claimant has constant pain. He confirmed that he had read and agrees with Dr. West's report in January 2016. He declined to diagnose the Claimant with chronic pain and relied on the assessment of the pain clinic for a diagnosis. He believes that some of her symptoms have worsened. He has been her physician since 2014 and was not aware of her previous medical history. It is his understanding that the Claimant tried going back to work on a part-time basis but was unable to do the work.

[25] He notes that depression is also affecting the Claimant's condition and she has been seen by a psychiatrist but cannot afford any counselling. He reports her mood has been partially controlled by the antidepressant medication. He testified that many different actions aggravate her pain such as lifting, twisting, reaching and carrying. It is his perception that in 2016 her condition was intermittently worse.

[26] He referred her to a pain specialist and she now is on a narcotic patch to help with her pain. It took several months before she saw the specialist. He explains that the pain patch can affect her focus, memory and make her very fatigued. The Claimant confirmed that she uses a pain patch and still sees the pain specialist, Dr. Cuddlhy. Dr. Cuddlhy focused on pain control of her shoulder and stated in May 2017 that it was her shoulder preventing her from any gainful employment. [17]

[27] Dr. Khanna's clinical notes confirm his testimony that the Claimant receives B12 injections. A variety of reasons are noted in the clinical notes as the reason for the visits. These include complaints of pain in various locations as well as other reasons. I appreciate Dr. Khanna's testimony but recognize his experience with the Claimant has been for a shorter period of time and he does not have the benefit of the history of her complaints.

[28] Dr. West's findings also included the Claimant being positive for an overreaction of her pain and he indicated that this was a sign of a chronic pain syndrome.[18] He describes the Claimant having these persistent and unremitting symptoms for almost 6 years and expects they will persist forever. Dr. Cameron wrote a report in June 2013 after examining the Claimant and felt strongly that Dr. West has misinterpreted her symptom exaggeration as indicative of chronic

[17] GD11-549
[18] GD1-18

pain.[19] After reviewing additional medical information provided to him, his opinion did not change which was reported in his 2016 addendum.[20]

[29] Dr. Cameron's report also found similar objective findings on document review and examination of the Claimant as had other assessors, however with different conclusions. She had denied any past musculoskeletal problems or previous history of headaches. He noted in his report some differences and inconsistencies in his formal examination findings and casual observation.

[30] I do not see a lot of differences in the description of the Claimant's condition in Dr. West's report or in the other reports mentioned above that were done at least 5 years prior. One thing they all have in common is that the Claimant repeatedly told them there had been no history of back or neck pain. This is clearly not the case as noted in the clinical notes from 2007 and 2008. She has been consistent in advising every assessor that she had no previous conditions. There is objective documentation about these conditions prior to the car accident and it is clear to me that she did not disclose that information.

[31] She has been inconsistent when reporting to evaluators when she believed she had returned to work. In her testimony she said she returned to work with modified duties in 2-3 weeks after the accident. She stated that she worked always worked with modified duties since the accident. She worked 2 days a week, 8-10 hours a day, and sometimes would get 6 months off if work was slow.

[32] The Claimant told Dr. Williamson that she returned on February 20, 2010 and had returned to her previous duties by June 2010. Dr. West reported that she was off work until July 2010 until she could no longer do her job 2 days a week in February 2014. The Claimant clarified at the hearing that she stopped working when she was laid off with others due to lack of work and also because she wasn't performing her job as well as she should. She collected regular Employment Insurance benefits from May 2014 to January 2015 after she was laid off.

[19] GD11-170
[20] GD11-169

[33] I have to consider Dr. Khanna's testimony as well as all the assessments and take into account the consistencies and inconsistencies between the reports. There has been no significant or persuasive objective medical evidence to explain the Claimant's assertion of her continued and worsening pain. The Claimant testified that she has seen no improvement in her pain or her functional abilities. Her description of her level of pain has remained consistently about 7-10 in all areas, some higher than others. She does indicate that her pain has worsened.

[34] When the Claimant was being assessed after the accident she consistently described being unable to do any household or caregiving tasks at all. She reported the same functional difficulties to me at the hearing. I do not accept that there is a communication issue about her functional limitations as she consistently gave the same response when asked about her functional abilities.

[35] It is difficult for me to determine when there was a change or a substantial deterioration in her condition preventing her from working before her MQP. The Claimant has continued to describe her pain as severe the most significant issue for me is that there is essentially no difference in her description of her functional limitations described at the hearing to what she has told the other assessors for many years.

[36] The Claimant's functional abilities are very important when determining work capacity. The consistency of the similarity of all the descriptions of the assessors is a significant factor for me. I cannot ignore or discount the evidence that during the time of the assessments she had returned to work despite these significant functional limitations and reported levels of pain. She continued to work for four years after the first assessments.

[37] I acknowledge that the Claimant experiences pain in various areas of her body. Pain is not by itself indicative of a severe impairment as addressed by *Braun*. Although I am not bound by this case, I find it applicable and persuasive.[21] I can also appreciate that it is challenging for the Claimant to clearly remember events and her condition many years before. It is for this reason I have relied heavily when considering the medical documents in the file.

[21] *Braun v MHRD*, (October 5, 1999), CP 09172(PAB)

[38] I have not been persuaded the Claimant had a severe medical physical condition at the time of her MQP. The Claimant's representative indicates she met the definition of severe when she had the accident in February 2010. I do not find that her medical condition and pain was so severe from that time to make her incapable regularly of pursuing any substantially gainful occupation. She had substantially gainful earnings in 2013 and more earnings after 2010 than in 2009.

The Claimant's psychological condition effect on employment

[39] Dr. Khanna in July 2015 when completing the CPP medical form indicated the Claimant's depression had a partial improvement.[22] The Claimant reported that she was prescribed Effexor 150 mg per day on the questionnaire. In an updated letter of the Claimant's condition in May 2017, Dr. Khanna listed major depression with anxiety first. At the hearing he clarified that he did think it was a significant issue for her. He also added that her chronic knee pain precluded her from standing and walking short distances and she was unable to use her right shoulder. [23]

[40] Dr. Khanna did refer the Claimant to a psychiatrist, Dr. Farooqi, in 2016. He saw her for consultation about the appropriate medications. Dr. Khanna reported at the hearing the Claimant's mood was partially controlled and her sleep was slightly improved.

[41] The Halton Addiction and Mental Health program reported in July 2016 that she did not report improvement of her symptoms but experienced no side effects. She did report that she had taken 4 Clonazepam in the last 4 weeks but it made her sleepy. Advice was given to take ½ a tablet. The Claimant was seen there in the fall of 2016 and stated to them she was having difficulty controlling her symptoms. She described a big reason for her depression was because of the pain she had in her knee and shoulder preventing her from working.

[42] In August 2016 Dr. Farooqi, psychiatrist, saw the Claimant and noted she had been struggling with issues of anxiety and depression for the last 7 years. He diagnosed her with

[22] GD2-158
[23] GD11-8

Major Depression, shoulder pain and injuries as well as moderate stressors. He recommended counselling and the need to properly titrate the Effexor as well as prescribing Trazadone.[24]

[43] The Claimant has not received any counselling for her depression since 2016. The Claimant was given some contacts after therapy and their availability in the community was discussed.[25] She reported to the agency that she was not successful in connecting with them. She testified that she did reach the contacts she was given but there was a fee associated with the treatment and she couldn't afford to pay for the service.

[44] The treatment prescribed seems to be making some difference in the Claimant's mood. There is a pattern seen in the documents about how well her depression and anxiety has been controlled for many years. Her mood has been documented as fluctuating over the years.

[45] I am not satisfied by the oral and written evidence that the Claimants' psychological state prevents her from being incapable regularly of pursuing any substantially gainful occupation by her MQP.

Personal Characteristics

[46] I must assess the severe part of the test in a real world context[26]. 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.

[47] In making this assessment, however, it is important to keep in mind that *Villani* also states that the definition of disability under the CPP does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension and that medical evidence will still be needed as will evidence of employment efforts and possibilities.

[48] The Claimant was only 42 years old on the MQP. She completed university, albeit in India. She is not fluent in English, which she submits is a significant limitation. I do not agree. Although this is possibly a handicap, I do not find it is not a total barrier to employment. I am not

[24] GD4-15
[25] GD4-16
[26] *Villani v. Canada* (A.G.), 2001 FCA 248

persuaded that someone of her obvious intelligence could not undertake efforts to improve those skills, with a view to improving her prospects in the labour market. I have seen nothing that demonstrates to me that she is unable to upgrade her language skills and to retrain for a different role. I find that this is not unreasonable as Dr. West found in 2016 that she spoke English without any difficulty and there was no need for an interpreter.[27]

[49] Her work in Canada has been exclusively in physical labour and she argues that she can no longer do this type of work. I agree and am satisfied that she isn't able to return to her previous physical demanding work. I am not aware of any objective evidence of cognitive deficits that would lead me to believe retraining couldn't succeed. I find there is no evidence to support that she regularly lacks the capacity to pursue alternative suitable sedentary employment within her limitations or to retrain for such a job. She has lived and worked in a Punjabi community and obtained several other jobs through friends.

[50] I find that her personal characteristics do not mean on the balance of probabilities that she lacked the capacity regularly to pursue any substantially gainful occupation.

Work Capacity

[51] 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[28].

[52] She testified that when she returned to work she worked part-time with lighter duties. She stated that she could only do these lighter duties with the assistance of others and she did not get paid if she had to call in sick. She reports that she did this frequently and often would only work one 8-10 hour day a week instead of two.

[53] This evidence is contradicted by the Record of Contributions, which in 2013 showed an income of $27,311. At the $13 per hour rate the Claimant stated she was paid this represents much more than part-time work. Her earnings in 2014 were similar but she was laid off in March 2014. I am not convinced that the Claimant was only capable of inconsistent part-time work based on the evidence.

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[27] GD1-10
[28] *Inclima v. Canada (A.G.)*, 2003 FCA 117

[54] I find the evaluation completed in March and July 2010 contradictory to the Claimant's work capacity at that time as she reported to the assessors that she was unable to do any household task but yet was able to work.[29] In addition there has been no significant stated change to the high pain levels reported in 2010. With similar reported physical limitations in combination with similar pain levels I have reasonably concluded that she had work capacity by her MQP.

[55] Dr. West recommended treatments in 2016, which included a psychological assessment, physiotherapy, membership to a local gym, analgesic and anti-inflammatory medication, a chronic pain management program and a vocational assessment to assist her to be able to resume gainful employment.[30] He reported that she would be unable to complete the essential tasks involved in her pre-accident employment.[31] This does not preclude all employment. His recommendation about a vocational assessment is significant to me. I find it illogical that he would determine she should have a vocational assessment when he stated that she suffers from an impairment that resulted in a significant overall diminution of her quality of life.[32]

[56] The Claimant has not looked for any alternate work that would be suitable to her condition. She has also not investigated any retraining opportunities. There is no factual basis for me to determine that such efforts would have been unsuccessful by reason of the Claimant's health condition. In the absence of any effort on the part of the Claimant to attempt alternate employment, or attempting retraining, I must find that the Claimant has failed to meet her burden.[33]

[57] The burden of proof lies upon the Claimant to establish on the balance of probabilities that as of her MQP, she was disabled in accordance with the CPP requirements. I have considered all the written and oral evidence and I am not satisfied that it has been demonstrated on a balance of probabilities that the Claimant had a severe disability on or before December 31, 2016.

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[29] GD11-32
[30] GD1-25
[31] GD1-23
[32] GD1-23
[33] *Inclima v. Canada (A.G.)*, 2003 FCA 117

CONCLUSION

[58] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security