



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. G. v. Minister of Employment and Social Development*, 2018 SST 865

Tribunal File Number: GP-18-406

BETWEEN:

**R. 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: Carol Wilton

Claimant represented by: Freda Vanopoulos

In person hearing on: July 12, 2018

Date of decision: July 18, 2018

## **DECISION**

[1] The Claimant is eligible for a *Canada Pension Plan (CPP)* disability pension to be paid as of June 2014.

## **OVERVIEW**

[2] The Claimant is 47 years old. She immigrated to Canada from India as an adult, and worked from 1994 to 2012 as a machine operator. She was in a car accident in April 2012, and states that she has been unable to work since then because of injuries to her head, left shoulder, neck, and back, as well as mental health issues.

[3] The Minister received the Claimant's application for the disability pension on May 25, 2015, and denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, she 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 her contributions to the CPP. I find her MQP to be December 31, 2014.<sup>1</sup>

## **PRELIMINARY MATTER**

[5] This appeal was initially dismissed by the General Division of this Tribunal in June 2017. The Claimant's appeal to the Appeal Division succeeded in February 2018 on the basis that the Member of the General Division had not considered the 2017 evidence of the Claimant's treating psychologist, or the effect that her mental health symptoms might have on her work capacity.

## **ISSUES**

[6] Did the Claimant's health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2014?

[7] If so, was her disability long continued and of indefinite duration by December 31, 2014?

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<sup>1</sup> GD2-4

## **ANALYSIS**

### **Test for a Disability Pension**

[8] Disability is defined as a physical or mental disability that is severe and prolonged.<sup>2</sup> A disability is severe if because of it a person is 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.

[9] The Claimant must prove on a balance of probabilities that her disability was severe and prolonged by December 31, 2014.

### **Severe disability**

[10] The Claimant appeared to testify to the best of her ability, but she had difficulty remembering many aspects of her health condition, including the medications she had taken, and when she stopped seeing her psychologist. Under such circumstances it is necessary to rely to a greater extent on the medical record.

### ***The Claimant's medical conditions were significantly disabling as of the MQP***

[11] I should assess the Claimant's condition as a whole and consider all of her possible impairments, not just her main impairment.<sup>3</sup> Although each of the Claimant's medical problems taken separately might not result in a severe disability, the collective effect of her various health conditions may render her severely disabled.<sup>4</sup>

### ***Physical conditions***

[12] In April 2012, the Claimant rolled her car on a major highway to avoid being hit by another car and landed in the ditch. She testified that in the accident she injured her neck, left shoulder, and back, and that she had suffered afterwards from headaches.

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

<sup>3</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

<sup>4</sup> *Barata v. MHRD* (January 17, 2001) CP 15058 (PAB)

[13] In August 2013, Dr. Seyed Hossein Hosseini, a physiatrist at the Acquired Brain Injury Program of a local hospital, reported that the Claimant had a headache on the left side of her head, which he described as a typical symptom of a head injury. The headache was at a level of 7/10, coming from the neck and radiating to the front of the left side of the head. The pain increased with any neck movement and could last up to a day.<sup>5</sup> In February 2014, the Claimant's headaches had improved, but she still had pain mostly at the back of her neck that sometimes radiated to the left shoulder and up to her head.<sup>6</sup> By August 2014, Dr. Hosseini reported that the Claimant's headaches were better, but she was still having them two or three times a week at a level of 6-7/10. The pain responded well to Advil.<sup>7</sup>

[14] In the period after the MQP, none of the specialists involved in the Catastrophic Determination Assessment Report of November 2015 considered the issue of her headaches.<sup>8</sup> However, the Claimant reported to a number of specialists that she continued to suffer from them: John Sullivan, psychological associate (March 2015), Dr. Neeru Sharma, psychologist (April and November 2015), and Dr. Raman Rai, rheumatologist (January 2016).<sup>9</sup> The Claimant testified at the hearing that she continued to experience headaches, for which she takes over-the-counter medications.

[15] The Claimant had a number of imaging reports relating to her spine and left shoulder. An MRI of the spine dated October 2, 2012, showed no fracture and no central canal or neural foraminal stenosis.<sup>10</sup> An ultrasound of the left shoulder in February 2013 showed mild tendinosis but no rotator cuff tears.<sup>11</sup> The Minister correctly submitted that these reports did not show a severe medical condition. An EMG of April 2014, however, showed severe carpal tunnel syndrome, especially on the right side.<sup>12</sup>

[16] The Claimant's major medical condition, however, was chronic pain, which does not typically show up on imaging reports. In January 2013, Dr. Dinesh Kumbhare, a physiatrist,

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<sup>5</sup> GD2-83

<sup>6</sup> GD2-64-65

<sup>7</sup> GD2-58

<sup>8</sup> GD10-35 ff.

<sup>9</sup> GD4-I-115. 124, 145; GD10-209.

<sup>10</sup> GD2-71

<sup>11</sup> GD2-77

<sup>12</sup> GD2-63

diagnosed possible facet irritation in the mid cervical spine on the left, as well as lesser occipital neuralgia and left rotator cuff tendinopathy. He further noted that she had some arthritis in her shoulder joint, and suggested that she had secondary myofascial pain.<sup>13</sup> In August 2013 and February 2014, Dr. Hosseini reported that the Claimant suffered from neck and left shoulder pain, with severe tenderness of the left shoulder muscles and lesser occipital nerve area on the left side. He diagnosed myofascial pain syndrome/chronic pain.<sup>14</sup> The following month, Dr. Hiten Lad completed a neuropsychological evaluation for the insurer, stating that the Claimant had ongoing problems with chronic pain that had a significant negative effect on her level of functioning and quality of life.<sup>15</sup> In October 2013 and February 2014, occupational therapist Jennifer Holmes-Beamer also noted chronic pain.<sup>16</sup>

[17] After the MQP, the specialists involved in the Catastrophic Determination Assessment Report of November 2015 did not fully consider the issue of chronic pain, although the medical evidence before them showed that other health professionals had diagnosed this condition.<sup>17</sup> Dr. Lawrence Tuff, a neuropsychologist, referred in passing to the Claimant's scores on tests for various psychological conditions "relative to the normative sample of chronic patients," which suggest that the Claimant fell into this category as well, but Dr. Tuff did not explore this issue.<sup>18</sup> Although the specialists involved in preparing the Catastrophic Determination Assessment Report largely ignored the issue of chronic pain, in December 2016 Dr. Rai diagnosed soft tissue pain in the Claimant's shoulder and mechanical left shoulder pain and muscle spasm,<sup>19</sup> and in March 2017, Dr. Sharma reported that the Claimant had ongoing difficulties with chronic pain that were likely to worsen rather than improve.<sup>20</sup>

[18] Chronic pain is a recognized medical condition with a strong subjective component. The lack of objective findings to support the Claimant's complaints does not mean that she does not have a disability. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is

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<sup>13</sup> GD2-76

<sup>14</sup> GD2-65, 84, 85

<sup>15</sup> GD4-II-49

<sup>16</sup> GD3-30; GD4-I-79

<sup>17</sup> GD10-50-54

<sup>18</sup> GD10-86

<sup>19</sup> IS3-95

<sup>20</sup> AD1-39

disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.<sup>21</sup>

[19] I prefer the evidence of the Claimant's treating specialists over that of health professionals who performed a one-time assessment, and find that the Claimant suffered from chronic pain.

[20] In February 2017, Dr. Bashir Khambalia, family doctor, wrote that he had explained to the Claimant that she was not totally disabled.<sup>22</sup> The Claimant testified that she had no recollection of this conversation. However, it occurred in the context of her complaints of muscle spasm in her neck and shoulder areas, and Dr. Khambalia noted that there were no neurological deficits. I am not satisfied that his remark was intended as a general statement of her health condition, including her psychological state, much less a comment on her employability.

[21] In 2018, Dr. Zain Chagla, a liver specialist, diagnosed the Claimant with hepatitis C in the context of fatty liver disease and a small liver mass.<sup>23</sup> As these conditions evidently arose after the expiry of the MQP, I have not considered them in arriving at my decision.

### ***Mental health conditions***

[22] Following the accident, the Claimant received a diagnosis of mild post-traumatic brain injury and was treated at the Acquired Brain Injury Program from August 2013 to August 2014.<sup>24</sup> In August 2013, Dr. Hosseini reported that she had difficulty sleeping, and memory problems related to chronic pain and deconditioning.<sup>25</sup> In February 2014, he stated that she complained of "anger behavior" arising from memory and attention problems. She also had some aggressive behavior, mostly towards her family members, and was unable to control this. He stated that the Claimant definitely had some short-term and delayed memory problems, as

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<sup>21</sup> *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54

<sup>22</sup> IS3-II-94

<sup>23</sup> IS3-II-79

<sup>24</sup> GD2-58 ff., 65 ff., 82 ff.

<sup>25</sup> GD2-85

well as attention and concentration difficulties.<sup>26</sup> In August 2014, Dr. Hosseini stated that her memory was severely impaired, and that this might be related to her anxiety and depression. She also had trouble sleeping, and had 2 to 3 naps a day for up to an hour and a half each.<sup>27</sup>

[23] In September 2013, Dr. Lad diagnosed pain disorder associated with psychological conditions in a general medical condition – chronic, and adjustment disorder with mixed anxiety and depressed mood and query cognitive disorder not otherwise specified.<sup>28</sup> In February 2014, Jennifer Holmes-Beamer, an occupational therapist, reported that the Claimant had shown significant reductions in her scores on psychosocial risk factor measures.<sup>29</sup> However, four months later, Dr. Isabell Cote, a psychiatrist, performed an insurer’s examination and diagnosed adjustment disorder with mixed anxiety and depressed mood, and somatic symptom disorder, with predominant pain, moderate.<sup>30</sup> In November 2014, shortly before the MQP, Dr. Sharma, who had been treating the Claimant since June 2014, wrote that she continued to suffer from depression, anxiety, trouble coping with pain, sleep difficulties, stress, and feelings of hopelessness and irritability.<sup>31</sup>

[24] The medical evidence shows that the Claimant’s mental health issues continued after December 2014. In March 2015, Mr. Sullivan’s neuropsychological assessment report diagnosed post-concussional syndrome. He attributed the Claimant’s failure to recover within six months largely to “the exacerbating effects of pain and mood symptoms.” She showed a degree of inattentiveness sufficient to cause memory problems in everyday living, and a reduction in processing speed, which he said was a typical adaptation of chronic pain.<sup>32</sup>

[25] The Minister submitted that the independent insurer’s examination performed by Dr. Tuff in October 2015 found no neurocognitive impairment.<sup>33</sup> Dr. Tuff, however, recognized that the

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<sup>26</sup> GD2-65

<sup>27</sup> GD2-59-60

<sup>28</sup> GD4-II-44 ff.

<sup>29</sup> GD4-I-79

<sup>30</sup> GD10-51. This report was not before me; it was quoted in Dr. Stephanie’s Wiesenthal’s independent psychiatric assessment that was part of the Catastrophic Determination Assessment Report.

<sup>31</sup> GD4-I-88

<sup>32</sup> GD3-37

<sup>33</sup> IS1-3

Claimant had cognitive symptoms and complaints, but considered that they were “better explained on the basis of factors unrelated to central nervous system dysfunction.”<sup>34</sup>

[26] In October 2015, Dr. Wiesenthal’s psychiatric examination for the insurer reported that the diagnoses were as follows: adjustment disorder with mixed depressed and anxious features, mild, chronic; and somatic symptom disorder, persistent, predominant with pain.<sup>35</sup> In November 2015 and March 2017, Dr. Sharma stated that the Claimant was having difficulty consolidating therapeutic gains, and continued to need intensive psychotherapeutic support. She had made some progress, but it was slow, and she was likely to continue to experience emotional difficulties.<sup>36</sup>

[27] At the hearing, the Claimant testified that she continues to have trouble sleeping, and still suffers from memory and anger management issues. She does not want to be around people, and worries about things. Her daughter, S. G., testified that her mother repeats things again and again, and is “down” all the time. Sometimes she can’t concentrate on a conversation. The Claimant gets very angry and is easily frustrated.

***The Claimant has followed reasonable treatment recommendations***

[28] A claimant is required to abide by and submit to reasonable treatment recommendations, or provide a persuasive explanation for their failure to do so.<sup>37</sup>

[29] The Claimant has received extensive treatment. Early in 2013, she twice saw Dr. Kumbhare, and then received treatment from Dr. Hosseini at the Brain Injury Program until August 2014. In February 2014, she completed a 10-week Progressive Goal Attainment Program under the supervision of an occupational therapist following treatment that began in April 2013.<sup>38</sup> She received treatment from a rehabilitation specialist, Katie George, for a year beginning in April 2014.<sup>39</sup> Since at least January 2016, she has been receiving injections in her

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<sup>34</sup> GD10-56

<sup>35</sup> GD10-63

<sup>36</sup> GD3-26; AD1-38-40

<sup>37</sup> *Warren v. Canada (A.G.)*, 2008 FCA 377; *Lalonde v. Canada (MHRD)*, 2002 FCA 211

<sup>38</sup> GD4-I-79 ff.

<sup>39</sup> GD4-II-57 ff.



shoulder and upper arm from Dr. Rai.<sup>40</sup> For her mental health conditions, Dr. Sharma followed her regularly from at least June 2014 to July 2016.<sup>41</sup> In addition, the Claimant received treatment from a chiropractor from 2012 to 2014.<sup>42</sup>

[30] The Claimant tried numerous medications, including Lyrica, Nortriptyline, Naproxen, a topical cream, and over-the-counter medications for pain and insomnia.<sup>43</sup> For depression, she began taking Cymbalta, 60 mg. on the advice of Dr. Kumbhare early in 2013,<sup>44</sup> and was still taking it in March 2017.<sup>45</sup> The Minister stated that she would not have continued to take it if it weren't effective, but Dr. Hosseini reported in August 2014 that in spite of Cymbalta she was still suffering from depression and anxiety.<sup>46</sup> Further, it is clear from Dr. Sharma's reports that the Claimant continued to suffer from mental health issues in spite of her medication. At the time of the hearing, the Claimant testified that she was not taking any prescription medication on the advice of her liver specialist. She stated that as a result her pain and her mood were worse. In addition, her insomnia is more troublesome, and she gets only about 5 hours' sleep a day, including a nap for up to an hour and a half.

[31] The Minister submitted that the Claimant was not referred to a pain management clinic. However, as the Claimant submitted, she had the functional equivalent of a multidisciplinary pain management program by way of treatments by specialists for her physical and mental health conditions, as well as extensive occupational and rehabilitation therapy.

[32] The Claimant began wearing wrist splints for her carpal tunnel syndrome in 2014, with beneficial effect.<sup>47</sup> She testified that she continues to wear them most of the time. She also stated that she has a grab bar and a stool in the shower.

[33] I find that the Claimant has generally followed reasonable treatment recommendations.

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<sup>40</sup> GD4-I-145

<sup>41</sup> The Claimant testified that she could not remember when she had stopped seeing Dr. Sharma.

<sup>42</sup> GD8

<sup>43</sup> GD2-57; GD4-I-173, 178

<sup>44</sup> GD2-50, 57

<sup>45</sup> IS3-II-112

<sup>46</sup> GD2-60

<sup>47</sup> GD2-58-61

[34] At her MQP, the Claimant was suffering from a number of physical and mental health conditions, including headaches, chronic pain in her neck and shoulder, carpal tunnel syndrome, anxiety, depression, pain disorder, and somatic symptom disorder. Taking all of these into account, as well as the failure of treatment to provide lasting relief, I find that her disability was seriously disabling as of December 31, 2014.

***The Claimant lacked a regular capacity for substantially gainful employment by December 31, 2014***

[35] It is not the diagnosis of the disease, but the Claimant's capacity to work, that "determines the severity of the disability under the CPP."<sup>48</sup>

[36] An examination of a claimant's functional limitations provides some insight into their work capacity. The Minister submitted that the Claimant's functional abilities improved in the period 2012-2015, suggesting that she had retained work capacity. For example, the Minister submitted that an occupational therapy report of February 2014 stated that the Claimant felt she was better able to maintain her routine and complete daily tasks.<sup>49</sup> Moreover, the therapist suggested that the Claimant discuss return-to-work options with her family doctor.<sup>50</sup> I note, however, that the month after this report, her family doctor wrote that the Claimant suffered a complete inability to engage in any employment for which she was reasonably suited.<sup>51</sup>

[37] Similarly, the Minister submitted that the rehabilitation specialist, Katie George, stated in May 2015 that the Claimant had an increased ability to work towards her goals.<sup>52</sup> However, Ms. George also noted that the Claimant was unable to follow a consistent physical activity routine. Further, she had discontinued ESL classes because they were too much for her.<sup>53</sup> Ms. George anticipated that the Claimant would undergo further treatment,<sup>54</sup> but this did not occur.

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<sup>48</sup> *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

<sup>49</sup> GD6-7

<sup>50</sup> GD4-I-83-84, report of J. Holmes-Beamer

<sup>51</sup> IS3-I-66

<sup>52</sup> GD6-8

<sup>53</sup> GD4-II-58

<sup>54</sup> GD4-II-60

[38] The Minister highlighted the fact that in 2016 the Claimant planned to care for her mother-in-law at home rather than placing her in a nursing home.<sup>55</sup> At the hearing, the Claimant and her daughter testified that the mother-in-law was largely able to care for herself, with assistance from her granddaughters. I find that this set of facts does not support a finding that the Claimant has the capacity to work.

[39] The most significant evidence in favour of the Claimant having some retained work capacity is the report of Luigi Grimaldi, a kinesiologist, in September 2015, as part of the insurer's examination. On the basis of an 85-minute evaluation, Mr. Grimaldi concluded that the Claimant could "perform activities" at the sedentary to light level of work capacity. He found that she would be able to handle sitting, stooping, crouching, kneeling and handling on a constant basis; standing, walking and moving the neck on a frequent basis; and lifting, pushing and pulling on an occasional basis.<sup>56</sup> I am not satisfied that this report accurately reflects the Claimant's functional limitations. First, it was based on her activities during an extremely limited time period, so that it did not test her ability to function over the course of a working day. Second, it did not take into account the Claimant's psychological conditions. Third, it offered no recommendations of jobs for which the Claimant might be suitable. Therefore, I find that the Grimaldi report did not provide a persuasive account of the full extent of the Claimant's functional limitations.

[40] There are several reports in the appeal file stating that the Claimant was unable to work, in addition to Dr. Khambalia's February 2014 report cited above. In October 2013, Ms. Holmes-Beamer wrote that she was unable to manage the demands of competitive employment due to ongoing chronic pain and fatigue.<sup>57</sup> In July 2014, the insurer wrote to the Claimant, stating that based on insurer's medical examinations of June-July 2014, she suffered a complete inability to engage in any employment for which she was reasonably suited by education, training or experience.<sup>58</sup>

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<sup>55</sup> IS5-2

<sup>56</sup> GD10-103, 108

<sup>57</sup> GD3-20

<sup>58</sup> AD1-10

[41] After the MQP, Dr. Sharma considered the Claimant's work capacity in March 2017, based on at least two years' experience as her treating psychologist in 2014-2016. She reported that the Claimant's emotional state meant that since her accident she had suffered a complete inability to perform the essential tasks of her pre-accident employment, or any suitable occupation. Further, "given her significant emotional difficulties, pain, inability to focus and concentrate [,] she is not able to participate in any vocational training."<sup>59</sup>

[42] Taking account of the Claimant's functional limitations, and the opinions of health professionals as to her ability to work, I find no evidence of work capacity after the Claimant's accident in April 2012.

[43] In deciding if the Claimant's condition was severe, I must take a "real world" approach and consider factors such as her age, level of education, language proficiency, and past work and life experience.<sup>60</sup> The Claimant was only 43 years old at her MQP. She completed high school, but in India, so she does not have a Canadian high school diploma. Although she worked in Canada for many years, she testified that many of her co-workers spoke Punjabi, and that this was the language she typically spoke in the workplace. In addition, she required an interpreter at the hearing. All her work experience has been in a physically demanding job, which she is now unable to do. It was Dr. Sharma's opinion that she was unsuitable for retraining, and the Claimant testified that she was unable to persist with ESL training because of attention problems. Moreover, she continues to suffer from insomnia, and requires long naps during the day. In addition, her anger management issues would be an impediment to gainful employment. Given her multiple physical and psychological impairments, I am satisfied that she would be unable to find a job in the competitive marketplace.

[44] Accordingly I find, on a balance of probabilities, that the Claimant's disability was severe on or before December 31, 2014.

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<sup>59</sup> AD1-39

<sup>60</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

### **Prolonged disability**

[45] The Claimant has suffered from physical and mental health conditions since her accident in 2012. There is no indication that her condition will improve.

[46] The Claimant's disability is both long continued and of indefinite duration. I therefore find that it is prolonged.

### **CONCLUSION**

[47] The Claimant had a disability that was severe and likely to be prolonged in April 2012, when her car accident occurred. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.<sup>61</sup> The application was received in May 2015, so the deemed date of disability is February 2014. Payments start four months after the deemed date of disability, as of June 2014.<sup>62</sup>

[48] The appeal is allowed.

Carol Wilton  
Member, General Division - Income Security

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<sup>61</sup> Paragraph 42(2)(b) *Canada Pension Plan*

<sup>62</sup> Section 69 *Canada Pension Plan*