



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *K. K. v Minister of Employment and Social Development*, 2018 SST 1202

Tribunal File Number: GP-17-1224

BETWEEN:

**K. K.**

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: Jackie Laidlaw

Videoconference hearing on: September 4, 2018

Date of decision: September 14, 2018

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant is a 34 year old woman. She has fibromyalgia, chronic low back pain, migraines and irritable bowel syndrome (IBS). She worked as an early childhood educator and has been unable to work as of October 2012. The Minister received the Claimant's application for the disability pension on March 8, 2016. 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 and the child rearing provision. I find the Claimant's MQP to be December 31, 2020. As the MQP is in the future the Claimant must be found disabled as of the date of the hearing.

## **ISSUE(S)**

[4] Did the Claimant's conditions of fibromyalgia, chronic low back pain, migraines and IBS result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the date of the hearing?

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

## 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 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] 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>2</sup>. In this case I will assess the total condition of the Claimant rather than the individual conditions separately as the conditions and the treatments interact with each other.

[8] In February 2010, Dr. Naoum, a general surgeon, conducted an endoscopic evaluation and diagnosed severe IBS<sup>3</sup>. This was confirmed by the gastroscopy and colonoscopy of March 2010<sup>4</sup>. The Claimant stated she has had IBS since high school, which is brought on by anxiety and continues to flare-up intermittently and irregularly on a weekly basis. The condition is not as bad during pregnancy, though she still has to watch what she eats.

[9] Because of the IBS she is unable to tolerate NSAIDS or other medications for the chronic pain of her lower back and fibromyalgia, as noted by Dr. Marie Clements-Baker, her rheumatologist.<sup>5</sup>

[10] Dr. Ducas, her family physician since 1992 stated her symptoms of severe back pain developed after her last pregnancy in 2013.<sup>6</sup> The Claimant stated in a phone call in June 2016

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

<sup>2</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

<sup>3</sup> GD 2 75

<sup>4</sup> GD 2 77

<sup>5</sup> GD 5 57

<sup>6</sup> GD 2 70

that since after the birth of her second child that she has been unable to lay flat<sup>7</sup>. She has attempted chiropractic treatments and massage which did not work. She tried cortisone in 2016 for her hip and back <sup>8</sup>which did not help. She has attempted yoga and mindful thinking and noted in her questionnaire she is unable to lie down through a full yoga session.<sup>9</sup>

[11] Dr. Ducas stated she was diagnosed with fibromyalgia October 6, 2015<sup>10</sup> and Dr. Clements-Baker noted in August 2016 that the diffuse pain throughout her body had been present for five years.<sup>11</sup> This would indicate the pain was present while she was working.

[12] The Claimant has a history migraines according to Dr. Ducas<sup>12</sup> who has treated her since 1992. She states that she was diagnosed with TMJ and wears a mouth guard. It is reasonable that the TMJ, which is grinding of her teeth, would cause headaches. However, the Claimant states she suffers from migraines which occur one or two times a week and can last up to three days. She stated that she has been told migraines happen with fibromyalgia and her condition of spondylolithis.

[13] Dr. Clements-Baker attempted monthly TFN injections (Simponi) for relief which started in August 2017.<sup>13</sup> By December 2017 Dr. Clements-Baker noted significant side effects due to the biologic medication Simponi, symptoms which included migraines, nausea and an upper respiratory tract infection requiring three rounds of antibiotics.<sup>14</sup>

[14] In 2016 Dr. Ducas stated that her symptoms are chronic and difficult to treat and to date had failed most conventional medication.<sup>15</sup> Nonetheless, as noted above, the Claimant continued to try treatments until the end of 2017 unsuccessfully, and which exacerbated existing conditions such as migraines and caused other conditions such as the respiratory tract infection.

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<sup>7</sup> GD 2 65

<sup>8</sup> GD 2 10

<sup>9</sup> GD 2 83

<sup>10</sup> GD 2 70

<sup>11</sup> GD 2 10

<sup>12</sup> GD 2 70

<sup>13</sup> GD 5 58

<sup>14</sup> GD 6 21.

<sup>15</sup> GD 2 70

[15] The Claimant stated Dr. Clements-Baker is responsible for her total care which is evident by the numerous letters from Dr. Clements-Baker since 2016<sup>16</sup> indicating that she is actively seeking proper treatment for the multiple conditions and supports the Claimant's disability appeal. Dr. Clements-Baker's last correspondence is January 2018<sup>17</sup> in which she indicates limitations of movement through the hips and lower spine and a new development of co-existent pain syndrome which further decreases her functional ability. She states that treatment will now be quite challenging given her reactions to medications and limited ability to take medications due to her other conditions.

[16] The Claimant explained at the hearing that she was put on medical marijuana, cannimed oil, in November 2017<sup>18</sup> which interfered with her birth control and she is now pregnant for a third time and due in September 2018.

[17] Both Dr. Clements-Baker<sup>19</sup> and Dr. Ducas<sup>20</sup> have diagnosed chronic pain, and more specifically co-existent pain syndrome. The IBS has been determined to be severe since 2010<sup>21</sup>, and the pain medication required cannot be tolerated due to the IBS. The Claimant has failed all treatments, and has attempted multiple different treatments and continues to suffer from all her conditions a challenging course of treatment as noted by Dr. Clements-Baker in January 2018.<sup>22</sup>

[18] I also acknowledge that the Claimant was granted a handicap parking permit on December 18, 2017 valid until December 5, 2022.<sup>23</sup>

### ***Capacity to work***

[19] 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

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<sup>16</sup> GD 2 10 GD 5 57 GD 6 21 GD 6 23

<sup>17</sup> GD 6 23

<sup>18</sup> GD 6 4

<sup>19</sup> GD 6 23

<sup>20</sup> GD 2 70

<sup>21</sup> GD 2 75

<sup>22</sup> GD 6 23

<sup>23</sup> GD 6 22

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>24</sup>.

[20] There is discrepancy as to the date the Claimant worked. She worked at a variety of daycare centre for six or seven years after college until they moved to X and she got a full time job for three years at only one day care. Her duties were to lift the children, help with feeding, naptime and toilet duties. The job is physical.

[21] In March 2011 the Claimant had her first daughter and went on maternity leave for the full duration. At that point she stated she physically could not sleep on her back right after the birth as she had a spinal injection for the caesarian section. She was told her back would get better after six months but she found it got worse.

[22] The Claimant stated she went back to work in the fall of 2011 at X daycare. The job was supposed to be a full time job however she had issues with her IBS and required frequent breaks from the classroom every 30 minutes. She remained there one or two months full time. Then she went to "supply and relief" at a variety of daycare centres. The Claimant explained that after school programs are under the school board and she was sent to different sites, such as X on part-time split shifts. In total she worked for a year with X and stopped working altogether around October 2012. By that point she was incapable physically of sitting on the floor with the children, which is a requirement of the job.

[23] As well as working at the daycare the Claimant also worked as a bookkeeper. Towards the end of 2011 into early 2012 she worked for her cousin, out of the cousin's home office filing and bookkeeping during the tax season. After the tax season ended they parted ways as she was not able to bend over to do the filing.

[24] In 2012 the Claimant stated she looked at returning to school to become trained in a different occupation that she would physically be capable of performing. She spoke with her doctor about what she would be capable of doing. She considered a desk job but sitting for periods of time was not feasible.

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<sup>24</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[25] After she left work in October 2012 she did not go on Employment Income benefits. She had a second child in June 2013, again by caesarian section and has had trouble walking with chronic back pain and suffers from migraines ever since. She stated that she looked online for jobs at X and X and assessed the job descriptions but felt she could not perform the lifting requirements. She did apply for a job at an adult day care, where she would not be required to do any lifting only required to take the adults on day trips. The employer asked if she had any limitations and she did tell them her legs would go numb. She did not get the to the formal interview process after that.

[26] Dr. Ducas noted in April 2016 that the Claimant had stopped working due to the severity of diffuse muscular pain in addition to her severe low back pain. At the time he noted that her symptoms were chronic and difficult to treat.<sup>25</sup> It has been established that the Claimant continues to suffer from chronic pain, and IBS to this day. Dr. Clements-Baker noted in July 2017 that there was no way she would be able to return to work in her condition.<sup>26</sup> After that point, she attempted further biologic medication which failed to help the Claimant and by January 2018 Dr. Clements-Baker stated she is not fit for work.<sup>27</sup>

[27] The initial opinion of Dr. Clements-Baker could possibly be viewed as meaning she was not able to return to her usual job as an early childhood educator. However, I find Dr. Clements-Baker's last opinion in 2018 indicates she is not fit to work at all. I accept the opinion of Dr. Clements-Baker as she has been determined to be a constant specialist since 2015 who is intent on treating all of the Claimant's conditions and not just the fibromyalgia.

[28] The record of earnings<sup>28</sup> shows that the best earning year the Claimant had was 2008 making \$22,296. In 2011 and 2012 she did not even make enough money to meet the yearly minimum pensionable earnings. The Claimant's earning potential decreased consistently from 2008 and then drastically from 2010. It is also noted that she had not had any maternity leave during this period.

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<sup>25</sup> GD 2 70.

<sup>26</sup> GD 5 57

<sup>27</sup> GD 6 23

<sup>28</sup> GD 2 4

[29] I must assess the severe part of the test in a real world context<sup>29</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.

[30] The Claimant is a very young woman with many years left before retirement. She has a two year college diploma in Early Childhood Education and a one year college certificate in autism and behavioural sciences. She is in a very good position to be retrained and find gainful employment by reason of her age, education and language skills. She has transferable skills with her history of working in bookkeeping, as a cashier in retail stores and as a childcare worker.

[31] All the real world factors are positive for gainful employment. Despite this, when I assess her limitations of bending, sitting, chronic pain, irregular flare-ups of IBS requiring unscheduled breaks and her limitations of movement, and factor the opinion of both her doctors, I find she would be incapable of retraining or finding suitable employment due to her health conditions.

[32] I find the Claimant has attempted all treatments recommended without success. She has demonstrated she is incapable of working at her usual occupation as an early childhood educator and has been determined to be incapable of performing any work by her specialist, Dr. Clements-Baker.

[33] I find the Claimant has proved to have a severe disability that renders her incapable regularly of pursuing any substantially gainful occupation.

### **Prolonged disability**

[34] The Claimant was diagnosed with IBS in 2010 and fibromyalgia in 2015, a condition which is permanent. She continues to have both conditions active to this day.

[35] Dr. Ducas had determined the Claimant's conditions were chronic in 2016<sup>30</sup> and Dr. Clements-Baker determined she had developed co-existent pain syndrome by 2018.<sup>31</sup> Despite treatments over many years the pain has developed to co-existent conditions.

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<sup>29</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248



[36] I find the Claimant has a prolonged disability that is likely to be long continued and of indefinite duration.

## **CONCLUSION**

[37] The Claimant had a severe and prolonged disability in October 2012 when she stopped working. 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>32</sup>. The application was received in March 2016 so the deemed date of disability is December 2014. Payments start four months after the deemed date of disability, as of April 2015<sup>33</sup>.

[38] The appeal is allowed.

Jackie Laidlaw  
Member, General Division - Income Security

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<sup>30</sup> GD 2 70

<sup>31</sup> GD 6 23

<sup>32</sup> Paragraph 42(2)(b) *Canada Pension Plan*

<sup>33</sup> Section 69 *Canada Pension Plan*