



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. K. v Minister of Employment and Social Development*, 2018 SST 1038

Tribunal File Number: GP-18-360

BETWEEN:

N. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Freda Vanopoulos

Videoconference hearing on: September 17, 2018

Date of decision: September 23, 2018

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment starting December 2011.

OVERVIEW

[2] The Claimant was born in India and came to Canada in 1993. She was 51 years old when she applied for applied for CPP disability in November 2012. She last worked as a seamstress and stopped working in December 2008 when she was injured in a motor vehicle accident. She stated that she has not been able to work since then because of chronic pain disorder involving her neck, back, right hip, and right leg, and depression.

[3] The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal. On May 11, 2016 the General Division dismissed the appeal after an in person hearing. On January 31, 2018 the Appeal Division allowed the appeal and referred this matter back to the General Division for redetermination.

[4] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing. The Claimant gave additional evidence with the assistance of a Punjabi interpreter.

[5] The Claimant must prove on a balance of probabilities that she became disabled on or before the end of her Minimum Qualifying Period (MQP), which is calculated based on her contributions to the CPP. Her MQP ended on December 31, 2010.¹

ISSUES

1. Did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2010?
2. If so, is her disability long continued and of indefinite duration?

¹ Record of Contributions: IS2-5

ANALYSIS

Test for a Disability Pension

[6] Subsection 42(2) of the CPP provides that a qualifying disability must be severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

Severe Disability

[7] The Claimant testified in a consistent manner and her testimony was generally consistent with and supported by the extensive medical evidence. I found her testimony to be credible.

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

[8] I must assess the Claimant's condition as a whole and consider all the impairments that affect employability, not just her biggest impairments or the main impairment.² Although each of her medical problems taken separately might not result in a severe disability, the combined effect of her various health conditions may render her severely disabled.³

[9] The Claimant testified that she suffered from the multiple medical conditions as of the MQP and that these conditions have worsened since then. Her main conditions are:

- ***Neck pain and headaches:*** She has suffered from constant neck pain since the accident. The pain radiates up towards her head with any kind of activity including moving her neck from side to side. In addition, her neck pain triggers headaches. She had headaches 2-3 times a week, and they usually lasted for about four hours. Now her headaches sometimes last for an entire week. When she has headaches, she has to sit down and keep her neck and head still.
- ***Back pain:*** She has also suffered from constant back pain since the accident. Her back pain "never goes away" and is "part of her life." She has difficulty sitting,

² *Bungay* 2011 FCA 47

³ *Barata v MHRD* (January 17, 2001) CP 15058 (PAB). This decision is not binding on me but is persuasive.

standing, or walking and her back pain “stops her from doing any kind of activity at home.”

- ***Right hip and leg pain:*** Her right hip pain is constant and increases whenever she has to bend or stand. This is now her main problem: she has difficulty walking or going up stairs and now both of her lower legs are numb and swell up.
- ***Depression and anxiety:*** She is depressed and anxious because she isn't able to work, take care of the house, or care for her 2-year old twin daughters. She experiences frequent episodes of shortness of breath because of her anxiety. She feels shame because her husband has to do most the household chores and take care of the children. She also has to rely on and gets regular assistance from her mother, mother-in-law, sister, and sister-in-law for household and childcare tasks.⁴ The Claimant was treated by Dr. Sharma, a clinical psychologist, on a regular basis from May 2010 to September 2011, when the insurance funding ran out.

[10] On June 28, 2010 Dr. Sharma related that the Claimant had experienced constant pain in her low back radiating to her right hip, leg, and neck “every day” since the December 2008 accident; that she finds that all of her activities are limited; and that her mother and husband do all of the household chores. Dr. Sharma's diagnoses included depression, nonorganic sleep disorder, post-traumatic stress disorder, chronic pain, headaches, and cognitive difficulties.⁵

[11] On February 12, 2013 Dr. Sharma reported to the Claimant's lawyer that in addition to treating the Claimant from May 2010 to September 2011 she had also conducted psychological interviews and testing in December 2012 and January 2013. The Claimant's current physical problems included chronic lower back pain, neck pain, and headaches. Her current psychological problems included disturbed mood, sleep difficulties, obsessive behaviours, flashbacks to the accident, appetite and weight change, and motor vehicle riding anxiety. The Claimant also had cognitive difficulties including memory and concentration problems. The diagnoses included chronic pain disorder associated with both psychological factors and general medical condition; severe major depressive disorder; cognitive disorder; dyssomnia; and post-traumatic stress

⁴ This is confirmed by the affidavits of S. B., the Claimant's mother, and J. S., the Claimant's husband: IS3-14 to 20
⁵ IS3-135 to 144

disorder. Dr. Sharma stated that complete remission of the Claimant's pain was improbable and that it would worsen with age. She also stated that the Claimant had not been able to return to work; that she was emotionally labile, functional limited, and socially restricted; and that her psychological impairments were permanent.⁶

[12] In 2010 the Claimant saw two specialists for unpredictable shortness of breath. On May 20, 2010 Dr. Whitehead, a respirologist, stated that there was a definite component of panic or anxiety to her attacks.⁷ On July 10, 2010 Dr. Gibson, an internist, stated that appropriate investigations were underway by Dr. Whitehead and that he suspected that her problem was "a reflection of stress and psychological issues with hyperventilation."⁸ On July 14, 2010 Dr. Whitehead stated that the Claimant had features of obsessive compulsive disorder and anxiety.⁹

[13] In her CPP medical report dated October 5, 2012 Dr. Gogia, the Claimant's family doctor, diagnosed chronic myofascial neck and back pain. She stated that the Claimant lived with chronic pain that was complicated by anxiety disorder; that she had assumed a sick role; that her hyperventilation episodes were controlled with anti-depressants; and that she was still limited in doing activities.¹⁰

[14] The Claimant testified that activities like cooking and cleaning increase her pain. She has difficulty washing her hair because of her neck pain; she has difficulty changing clothes because of her back pain; she loses her balance and becomes dizzy when she takes a shower; she cannot drive or even sit in a car for long; she can't go to a mall because she can only walk for a short distance; and she can't go to the community centre because she can only sit for a short period of time. She can drive for a short distance but isn't able to go for a long drive even if she is the passenger.

[15] The Claimant's testimony is consistent with her disability questionnaire signed in October 2012, in which she stated that sitting for an extended period results in pain radiating from her lower back to her right hip and leg; that she can only stand for a few minutes because of

⁶ IS3-43 to 60

⁷ IS3-372 to 373

⁸ IS3-358 to 359

⁹ IS3-357

¹⁰ GD1-131 to 134

pain; that she can only walk for one block; that she has to pace herself and constantly stop; that she has difficulty washing her hair and reaching up because of neck pain; that she has difficulty putting on shoes; that she has constant issues with memory and poor concentration; that she has difficulty sleeping because of pain; and that she can only drive for ten minutes.¹¹

[16] Considering the cumulative effect of the Claimant's physical and psychological conditions, and their effects on her functional abilities, I find that her conditions were significantly disabling as of the MQP.

The Claimant has made reasonable efforts to manage her condition

[17] There must be evidence of efforts by the Claimant to manage her medical condition.¹² If she refused to follow reasonable treatment recommendations, I should consider whether her refusal was unreasonable and, if so, what impact the refusal might have on her disability status.¹³

[18] The Minister argued that the Claimant failed to pursue reasonable treatment recommendations because she declined cortisone injections; she did not regularly take prescribed anti-depressant medications; she did not pursue treatment at a chronic pain management clinic; and she did not follow up for treatment at the St. Joseph's Hospital anxiety and treatment centre in October 2010.¹⁴

[19] Ms. Vanopoulos argued that the Claimant has unsuccessfully pursued extensive physical and psychological treatment including pain and anti-depressant medications; physiotherapy, chiropractic care, and massage therapy; occupational therapy; extensive counselling with Dr. Sharma; and numerous specialist consultations. She stated that cortisone injections would have provided only temporary relief and that the Claimant was pursuing counselling with Dr. Sharma in October 2010 when she didn't attend at the St. Joseph's Hospital anxiety and treatment centre. She also argued that after the insurer refused to continue to fund Dr. Sharma in September 2011, the Claimant has regularly followed up with Dr. Gogia who provides counselling and prescribes anti-depressant medications.

¹¹ GD2-352

¹² *Klabouch* 2008 FCA 33; *Angheloni* 2003 FCA 140

¹³ *Warren*, 2008 FCA 377; *Lalonde*, 2002 FCA 211

¹⁴ GD1-46

[20] There is considerable support for Ms. Vanapoulos' submissions in the medical evidence. In December 2010 Dr. Sharma stated that the Claimant had attended 18 sessions of individual therapy and that her participation had been good.¹⁵ On October 28, 2011 Dr. Sharma reported that although the Claimant's participation in treatment continued to be good she continued to struggle with pain, depression, and anxiety.¹⁶ In October 2012 Dr. Gogia stated that the Claimant did not have a positive response to ongoing therapy and that she was taking medications for pain and anxiety. Dr. Gogia's prognosis was "very guarded" given the chronicity of the Claimant's illness and her poor response to treatment.¹⁷

[21] It was reasonable for the Claimant to decline cortisone injections because of her fear of needles and the likelihood that would likely provide only short term relief. It was also reasonable for her to decline the appointment with the St. Joseph's Hospital anxiety and treatment centre in October 2010 because she was pursuing regular counselling with Dr. Sharma at that time. I accept the Claimant's evidence that she has regularly taken painkillers and anti-depressant medications and that she continues regularly to follow up with Dr. Gogia for treatment of her chronic pain and depression.

[22] I find that the Claimant has been reasonably compliant with treatment recommendations and that she has made, and continues to make, her best efforts to manage her multiple conditions.

The Claimant has established a severe disability

[23] A disability should be considered severe if it renders a Claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I should assess the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining her "employability".¹⁸

[24] The Claimant was only 39 years old at her MQP, has a reasonable although limited proficiency in English, and has computer training. The Minister argues that although she may not

¹⁵ IS3-147

¹⁶ IS3-168 to 170

¹⁷ GD1-131 to 134

¹⁸ *Villani* 2001 FCA 248

be able to return to her previous employment as a seamstress, she has the capacity to pursue alternative less physically demanding employment.

[25] I disagree.

[26] Despite these positive attributes the Claimant suffers from multiple physical and psychological limitations. She has difficulty with her own personal care and is unable to regularly perform household tasks or care for her children. She requires extensive assistance from her husband and other relatives. I cannot envision how she could be a regular and reliable employee. Since she lacks regular work capacity, she is not obligated to pursue alternative employment.

[27] I find that the Claimant has established, on the balance of probabilities, a severe disability in accordance with the CPP requirements.

Prolonged Disability

[28] The Claimant's widespread chronic pain, depression, and anxiety have persisted since the motor vehicle accident and despite extensive and ongoing treatment there has been little improvement. If anything, it would appear that her condition has been deteriorating.

[29] I find that the Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[30] I find that the Claimant had a severe and prolonged disability in December 2008, when she was injured in a motor vehicle accident. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Minister received the application for a disability pension.¹⁹ The application was received in November 2012; therefore, the Claimant is deemed

¹⁹ Paragraph 42(2)(b) of the CPP

disabled in August 2011. Payments start four months after the deemed date of disability.²⁰
Payments will start as of December 2011.

[31] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

²⁰ Section 69 of the CPP