



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. K. v Minister of Employment and Social Development*, 2019 SST 114

Tribunal File Number: GP-17-2498

BETWEEN:

A. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: January 22, 2019

Date of decision: January 23, 2019

DECISION

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

OVERVIEW

[2] The Claimant was employed as a community health worker in the Vancouver area for over twenty years, when she injured her left shoulder in 2013. After rehabilitation she attempted a graduated return to work, but she could not perform her duties without help. She stopped working in November 2014. Over the next two years she developed a frozen right shoulder, anxiety, and depression. She applied for a CPP disability pension in December 2016¹. The Minister denied the application initially and on reconsideration; and the Claimant appealed to the Social Security Tribunal.

[3] The CPP defines disability as a physical or mental disability that is severe and prolonged. A person has a severe disability if she 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 death².

[4] 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 CPP³. The Claimant's MQP ended on December 31, 2017⁴.

ISSUES

[5] Does the Claimant have a severe disability, meaning she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[6] Was the disability likely to be long continued and of indefinite duration by December 31, 2017?

¹ GD2-28-32, 159-166

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

³ Paragraph 44(1)(b), subsections 44(2), 52(3) *Canada Pension Plan*

⁴ GD2-35

ANALYSIS

The Claimant has not established she has a severe disability

[7] I accept the Claimant's evidence that she has pain and limitations in her shoulders, knees and hands; as well as depression and anxiety. However, I cannot find she was disabled as defined in the CPP on or before December 31, 2017. There are two reasons for this. The first is that she has refused reasonable treatment that has been suggested and is available to her. The second is that she has not tried to find work that is suited to her limitations.

The Claimant's condition

[8] The Claimant's job as a community health worker involved visiting elderly and disabled clients in their homes to provide all aspects of household and personal care, including meal preparation, housework, bathing, dressing, and shopping. The Claimant described this as physical work that was challenging at times. She injured her left shoulder when a patient fell against her in November 2013. Her memory of what happened after that is vague. She recalled she stopped working immediately, went to see her family doctor, and had rehabilitation through Work Safe BC.

[9] The Claimant testified that after several months she returned to work on a buddy system. She performed tasks as she was able, and her partner did everything else. With this arrangement she helped prepare meals, gave medication, and did other light activities. After some time she started working by herself, and she found she was unable to do everything that was required of her. Her employer had no lighter work to give her, so she stopped working in November 2014.

[10] The Claimant's medical records show she had a left rotator cuff tear⁵. Because of her pain, her sleep was not restorative; and as time passed, she became anxious and depressed about her situation⁶. In 2016 she was diagnosed with osteoporosis, and she developed pain and stiffness

⁵ MRI GD2-145

⁶ Family physician notes GD2-112-119; Dr. Kinahan GD2-148-153; Dr. Kim GD2-121-122; Dr. West GD2-132-133

in her right shoulder⁷. The most recent medical reports are from 2017. They show the Claimant continued to have pain and stiffness in both shoulders, as well as anxiety and depression⁸.

[11] The Claimant testified she takes naproxen daily for her pain, and Extra-Strength Tylenol if she is going out. She has had physiotherapy and chiropractic treatment; and she goes to a gym every other day for cardiovascular exercise and light strength training. Her physical condition has not improved, except that she has a bit more movement in her right shoulder. She began to have knee pain sometime in 2017⁹. She also has arthritis in her hands which makes her fingers crooked and swollen. Using her hands - particularly the right hand - makes them sore. She is able to dress and shower without help, but she can do only light housework and cooking because of her pain. She has to take breaks, and she leaves most chores to her husband and adult children who live with her. Her pain wakes her up at night, and medication upsets her stomach.

[12] The Claimant testified she had mental health counselling through her family doctor, Dr. West, who also prescribed medication for anxiety and depression. She continues to take Cipralex and nortriptyline, as she has since 2015-2016¹⁰. She was referred to a psychiatrist, Dr. Sidhu, in June 2017¹¹. She testified she began seeing Dr. Sidhu shortly after that, and saw her every month until recently. Dr. Sidhu provided counselling and medication management, including starting the Claimant on bupropion last year. Dr. Sidhu stopped practicing in December 2018, and the Claimant is now waiting for a new referral. She testified her depression makes her sleepy and slow to react to anything; and her anxiety makes her feel uncomfortable outside her home.

The Claimant has not tried all recommended treatments

[13] In deciding if the Claimant's disability is severe, I must consider whether she has undergone reasonable treatments that are available to her¹². Her medical records show she has generally followed medical advice and has tried to get better. However, she refused to have a steroid injection to her left biceps, which was recommended by orthopedic surgeon Dr. Kim in

⁷ Family physician notes GD2-61, 62, 64, 66; Dr. West GD2-84-87

⁸ Family physician notes GD2-51-54, 58-60, 75-76

⁹ GD1-2

¹⁰ GD2-77

¹¹ GD2-75-76

¹² *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Sharma v. Canada (Attorney General)*, 2018 FCA 48

January 2016¹³. She testified this was because she had been told by many people that the injection might spread through her body and make her osteoporosis worse, and because Dr. Kim would not guarantee that it would help her pain. She was also concerned because she had three injections for back pain many years ago, and she was worried that her bones would weaken.

[14] Dr. Kim's subsequent report and Dr. West's office notes show neither physician shared the Claimant's concerns¹⁴. Dr. West tried to reassure her, and Dr. Kim explained the only risks were a small chance of infection and the possibility of incomplete pain relief. In deciding to refuse this treatment, the Claimant rejected two medical opinions in favour of her own uninformed suspicions and speculative advice from "lots of people". I find her objection was unreasonable. This was a minimally invasive procedure with a diagnostic purpose that might also offer pain relief. It was offered to the Claimant in early 2016, when her main issue was her left shoulder. It is possible that some pain relief at that time might have allowed the Claimant to return to work. She might have regained mobility in her left shoulder and thereby lessened her reliance on her right arm, which might have prevented her from developing pain on that side. Increased function might have prevented or lessened her anxiety and depression. I recognize it is possible the Claimant would have seen no improvement with the suggested injection. However, it is equally possible that she would have. She has not persuaded me on a balance of probabilities that her refusal of this treatment was reasonable, or that it would not have made a difference.

The Claimant has work capacity

[15] The measure of whether the Claimant's disability is "severe" is not whether she has a particular diagnosis or suffers from severe impairments, but whether the disability prevents her from earning a living. She must be incapable regularly of pursuing any substantially gainful occupation, not just incapable of performing her former job¹⁵.

¹³ GD2-121-122

¹⁴ GD2-70; 82-83

¹⁵ *Klabouch v Canada (A.G.)*, 2008 FCA 33

[16] The Claimant testified she has not worked since November 2014¹⁶. She did not return to work because there were no light duties available to her, and she did not think she would be hired anywhere else because of her limitations.

[17] I recognize the Claimant could not perform her previous job, because of the limitations caused by the pain and stiffness in her shoulder. However, these were the only substantial restrictions she had at December 31, 2017. There is no evidence she reported or sought treatment for significant knee or hand pain at that time. Although her anxiety and depression were diagnosed, she was receiving treatment, and there is no evidence to support a conclusion that her mental health was debilitating. I find the Claimant's health condition prevented her from performing more physical jobs, but she retained the physical and mental capacity to do less demanding work.

[18] In deciding if the Claimant has work capacity, I must keep in mind factors such as her age, level of education, language proficiency, and past work and life experience¹⁷. She was 55 years old when she stopped working. She is originally from India, but moved to Canada as a teenager. She acknowledged that she has a fairly good command of English. She did not attend school after Grade 11 for family reasons, and before she started her career as a community health worker in 1990 she held short-term unskilled positions and as a longer-term job as a X in a X.

[19] The Claimant's age and physical condition limit her employability, but she is literate, has good English skills, and years of experience in health care. She continues to drive, and is able to spend time reading on her tablet and doing gentle exercise at the gym. These indicate to me that at December 31, 2017, she had the capacity to perform some type of light, sedentary, or part-time work.

[20] Because I find there is evidence of work capacity, the Claimant must show she tried to obtain or maintain employment, and was unsuccessful because of her health condition¹⁸. Except for trying to return to her previous, physically demanding employment, the Claimant has not attempted any work. If she had, it is possible she would have failed. It is equally possible she

¹⁶ She believed earnings attributed to her after that (GD2-35) were likely for unused vacation.

¹⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁸ *Inclima v. Canada (A.G.)*, 2003 FCA 117

would have succeeded. Again, the onus is on the Claimant to prove her case on a balance of probabilities, and she has not done so.

CONCLUSION

[21] Because she did not follow all reasonable treatment recommendations, and did not try less-demanding work, the Claimant has not persuaded me she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2017.

[22] The Claimant must prove on a balance of probabilities that her disability is both severe and prolonged. Because I decided her disability was not severe at her MQP, I did not consider whether it was prolonged.

[23] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security