



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

*Citation: N. B. v Minister of Employment and Social Development, 2019 SST 406*

Tribunal File Number: GP-17-2441

BETWEEN:

**N. B.**

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: Virginia Saunders

Claimant represented by: Jenna Etheridge

Teleconference hearing on: February 19, 2019

Date of decision: March 11, 2019

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant worked regularly as a supermarket cashier and stocker until December 2013. She applied for a CPP disability pension in August 2016<sup>1</sup>. She claimed she had been unable to work since January 1, 2014, because of widespread pain after being injured in a car accident. She stated she was unable to sit or stand for long because of her pain, and had difficulty walking and performing most activities<sup>2</sup>. The Minister denied the application initially and on reconsideration, and the Claimant appealed to the Social Security Tribunal.

[3] 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<sup>3</sup>. The Claimant's MQP ended on December 31, 2015. If the Claimant was not disabled by that date, she qualifies if she became disabled between January 1, 2016, and November 30, 2016, because her earnings and contributions in that year can be pro-rated<sup>4</sup>.

## **ISSUES**

[4] Does the Claimant have a severe disability, meaning she was incapable regularly of pursuing any substantially gainful occupation by November 30, 2016?

[5] Was the disability likely to be long continued and of indefinite duration by November 30, 2016?

## **ANALYSIS**

[6] A person is disabled under the CPP if she has a physical or mental disability that is severe and prolonged. A disability is severe if the person is incapable regularly of pursuing any

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<sup>1</sup> GD2-32-36

<sup>2</sup> GD2-128-134

<sup>3</sup> Paragraph 44(1)(b), subsections 44(2), 52(3) *Canada Pension Plan*

<sup>4</sup> Section 19, subsection 44(2.1) *Canada Pension Plan*; GD4-16

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<sup>5</sup>.

**The Claimant has not established she has a severe disability**

[7] I accept the Claimant's evidence that she has widespread pain, and that this limits her abilities and affects her sleep, leaving her tired and unfocussed throughout the day. However, I cannot find she was disabled as defined in the CPP on or before November 30, 2016. That is because she did not fully comply with reasonable treatment recommendations.

**i. The Claimant's condition**

[8] The Claimant was injured in a car accident in November 2013. Her immediate complaint was pain in her left leg. She was diagnosed with a torn meniscus in her left knee, and had arthroscopy to repair it. She had physiotherapy, but gradually developed chronic whole body pain, particularly in her left knee, buttocks, back, neck and both arms. She became weak and deconditioned<sup>6</sup>. An MRI showed she had mild cervical spondylosis<sup>7</sup>, knee x-rays showed mild degenerative changes<sup>8</sup>, and nerve testing showed no evidence of neuropathy<sup>9</sup>.

[9] The Claimant testified she tried to return to her job twice. The first time was immediately after the accident. She worked for one month at lighter duties and with shorter hours. The work was too painful, so she stopped. The second time was in October or November 2016, after her employer promised her a \$5000 bonus if she came back to work. She testified she worked in the receiving department, and all she did was check items received off a list. She could not do this job without taking pain killers, so she decided to stop. She has not worked since then.

[10] The Claimant testified she spends her days at the home she shares with her husband, two teenaged children, and mother-in-law. She sleeps badly because of her pain, and she usually gets up early with her husband and makes his lunch before he goes to work. Then she goes back to bed or sits on the sofa. She takes her daughter to school, watches television, and naps. Her

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<sup>5</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>6</sup> GD2-101-102, 116-119, 123-124

<sup>7</sup> GD2-126

<sup>8</sup> GD2-98

<sup>9</sup> GD2-92-93; 95-97

mother-in-law and her daughter help her with the housework and cooking. She goes grocery shopping for light items by herself, but otherwise waits for her children to help her. She has stopped driving because she hurts too much.

**ii. The Claimant has not tried all recommended treatments**

[11] In deciding if the Claimant's disability is severe, I must consider whether she has made reasonable efforts to follow medical advice<sup>10</sup>. She has been compliant in trying medications, going to physiotherapy, and seeing specialists. However, she has not been diligent in doing the home exercises that were recommended by orthopedic surgeon Dr. Brown in December 2014<sup>11</sup> and March 2016<sup>12</sup>, physiatrist Dr. Wang in October 2015<sup>13</sup>, and neurologist Dr. Ho in December 2016<sup>14</sup>. These were advised because of the marked atrophy in the Claimant's left leg, and her general deconditioning.

[12] In March 2016 Dr. Brown noted the Claimant was only exercising for a couple of minutes each day, when she ought to have been spending an hour or more. The Claimant's description of her typical day included no time spent exercising. She testified she tries to do the exercises recommended by Dr. Brown and by a physiotherapist, but they cause too much pain.

[13] I do not think the Claimant's effort has been reasonable. Her doctors knew she had chronic pain, but determined that despite this, she should work on strengthening and improving her physical condition, as this was the only way she was likely to feel better. They did not tell her to only do as much as she could manage. On the contrary, Dr. Brown "told her in the strongest terms" to stop being concerned about her knee hurting, and that "all she can do now is to work hard on her exercises and work her way back to regular activity"<sup>15</sup>.

[14] Clinic notes for by the Claimant's family physician, Dr. Sawhney, show the Claimant was told through 2016 to continue with exercises, and that she told Dr. Sawhney she was doing

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<sup>10</sup> *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Sharma v. Canada (Attorney General)*, 2018 FCA 48

<sup>11</sup> GD2-127

<sup>12</sup> GD2-101-102

<sup>13</sup> GD2-123-124

<sup>14</sup> GD2-95-97

<sup>15</sup> GD2-127

them<sup>16</sup>. These notes suggest Dr. Sawhney believed the Claimant was doing everything she could, when in fact she was doing very little. There is no indication from these notes that the Claimant told Dr. Sawhney she was having trouble doing the exercises. Had Dr. Sawhney known this, she might have referred the Claimant for more help with pain management.

[15] If the Claimant had exercised as recommended, her symptoms might have improved. Unfortunately, she did not. Dr. Sawhney stated, “the longer her symptoms continue, the less likely she is to make a full recovery and achieve her pre-accident status”<sup>17</sup>. The Claimant’s failure to follow this particular treatment recommendation over several years was likely one of the main reasons she still felt unable to work at November 2016. She has not persuaded me on a balance of probabilities that her actions were reasonable, or that following the recommendations would not have made a difference to her ability to work.

[16] I did not analyze whether the Claimant’s age, level of education, language proficiency, and past work and life experience affected her work capacity<sup>18</sup>. Her personal attributes did not keep her out of the workforce in the past, and her last employer wanted her to return to work in 2016. I believe she would have been able to perform some type of work, including her previous job, if she had followed all reasonable medical advice when it was given to her. Because she did not, I cannot find she was incapable regularly of pursuing any substantially gainful occupation by November 30, 2016.

## **CONCLUSION**

[17] Because I decided the Claimant’s disability was not severe, I did not consider whether it was prolonged.

[18] The appeal is dismissed.

Virginia Saunders  
Member, General Division - Income Security

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<sup>16</sup> GD2-57-63

<sup>17</sup> GD2-110

<sup>18</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248