



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. O. v Minister of Employment and Social Development*, 2019 SST 697

Tribunal File Number: GP-18-1090

BETWEEN:

**J. O.**

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: Raymond Raphael

Teleconference hearing on: July 3, 2019

Date of decision: July 24, 2019

## **DECISION**

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of September 2017.

## **OVERVIEW**

[2] The Claimant was 56 years old when she applied for a CPP disability pension in March 2017. She worked as a housekeeper for a X. In 2006, she injured her right arm and hand because of her repetitive work duties. She was off work from June 2006 to October 2006. In October 2006, she returned to work on modified housekeeping duties. However, in May and June 2007, she reinjured her right hand while lifting a heavy garbage bag. She was then off work until June 2008, when she returned to work as a hostess. She states that she was able to work as a hostess for only about three months because of her pain. She reported upper back and leg pain to the WSIB, which she claimed related to her work.<sup>1</sup> She has not worked for the X since 2008.

[3] From 2009 to 2011, she participated in two Labour Market Re-entry (LMR) programs through the Workers Safety & Insurance Board (WSIB). From 2013 to 2017, she worked at several jobs. In February 2015, she suffered further injuries to her neck and back when she was rear-ended in a car accident. She last worked as a home care aide in May 2017 preparing meals in a nursing home. The Claimant states that she has been unable work since because of chronic neck, back, and right arm pain as well as depression.

[4] The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal. The Minister takes the position that the evidence does not support the presence of a continuously severe medical condition as of December 2011, when the Claimant last qualified for CPP disability. Her work activity between 2013 and 2017 supports that she had work capacity after December 2011. No triggering event occurred in 2017 that would extend her last qualifying date for CPP disability to November 2017.

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<sup>1</sup> GD2-196. Although the WSIB accepted her claim for her right arm and wrist, it did not accept her claim for her upper back and neck pain.

## ISSUES

[5] Did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2011?

[6] If not, did her medical conditions result in her being incapable regularly of pursuing any substantially gainful employment starting in 2017 and before the end of November 2017?

[7] If the answer to either of the above is yes, is her disability long continued and of indefinite duration?

## ANALYSIS

### Test for a Disability Pension

[8] A qualifying disability must be severe and prolonged.<sup>2</sup> 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.

[9] The Claimant must prove that it is more likely than not 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, 2011.<sup>3</sup>

[10] The Claimant had enough earnings after December 2011 to make valid contributions to the CPP in 2014 and 2016. She also had earnings of \$5,263 in 2017. Her earnings in 2017 were below the minimum level of earnings to help her meet the contributory requirements; however, if she became disabled in 2017 before the end of November, she will qualify for CPP disability.<sup>4</sup>

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<sup>2</sup> Subsection 42(2) of the CPP

<sup>3</sup> Record of Contributions: GD6-7. Because of a DUPE in June 2017, the Claimant had 25 years of pensionable earnings. As a result, her MQP is based on the last three of six years valid pensionable earnings.

<sup>4</sup> GD6-3 to 5

### **Severe disability**

[11] I must initially focus on the Claimant's condition as of December 31, 2011. If I determine that she was not severely disabled as of that date, I must then focus on her condition from January 1, 2017 to November 30, 2017.

### **The Claimant has not established a severe disability as at December 31, 2011**

[12] The medical evidence establishes that the Claimant had significant limitations as of December 31, 2011. She could not do housekeeping or work involving repetitive computer use. However, she was able to complete the LMR courses and attend job placements. More significantly, she was able to pursue extensive and varied employment from 2013 to 2017.

[13] The measure of whether a disability is "severe" is not whether the Claimant suffers from severe impairments, but whether her disability prevented her from earning a living.<sup>5</sup> It is the Claimant's capacity to work and not the diagnosis of her disease that determines the severity of her disability under the CPP.<sup>6</sup>

[14] Dr. Armstrong's office notes confirm that the Claimant was able to pursue extensive and varied employment from 2013 to 2017. The most significant excerpts are set out below:

- July 12, 2013: new job, working at someone's home, doing increased physical labour.<sup>7</sup>
- August 8, 2013: new job again, now working at X, neck pain not as bad at this job so far.<sup>8</sup>
- October 9, 2013: new job again, doing job through temporary agency, assignment at X.<sup>9</sup>
- March 17, 2014: working on line at X.<sup>10</sup>

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<sup>5</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

<sup>6</sup> *Klabouch*, 2008 FCA 33

<sup>7</sup> GD2-1445

<sup>8</sup> GD2-1452

<sup>9</sup> GD2-1457

<sup>10</sup> GD2-1528

- June 10, 2014: still on temporary job, finding difficult.<sup>11</sup>
- September 10, 2014: working at X, finding a little difficult because of constant use of arm.<sup>12</sup>
- November 13, 2014: now has permanent job at old age home, happy with this.<sup>13</sup>
- February 7, 2015: car accident, insurance disability certificate, working at old age home at time of accident, able to return to work on modified hours and duties.<sup>14</sup>
- July 8, 2015: opened new store, selling vintage goods.<sup>15</sup>
- August 6, 2015: new store not doing well, thinking of moving store to Peterborough.<sup>16</sup>
- September 16, 2015: unable to work consistently, closed store August 30.<sup>17</sup>
- October 4, 2016: X, capable of returning to work with restrictions.<sup>18</sup>
- October 20, 2016: transferring to X in X as of next week.<sup>19</sup>
- February 22, 2017: unable to continue working at X, pain issues, disheartened that had to quit.<sup>20</sup>
- May 2, 2017: was working at X as of March 2017, worse with every repetitive task, cannot function.<sup>21</sup>
- May 2, 2017: letter, unable to work.<sup>22</sup>

[15] The Claimant suffered from chronic neck and arm pain at December 2011. This caused significant limitations especially in the use of her right arm and hand. She could not return to her previous employment as a X housekeeper, and was limited in using her right hand for repetitive tasks such as keyboarding and writing. She was, however able to continue working for a lengthy

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<sup>11</sup> GD2-1538

<sup>12</sup> GD2-1548 to 1549

<sup>13</sup> GD2-1557

<sup>14</sup> GD2-1579 to 1581

<sup>15</sup> GD2-1598

<sup>16</sup> GD2-1602

<sup>17</sup> GD2-1607

<sup>18</sup> GD2-1619

<sup>19</sup> GD2-1686

<sup>20</sup> GD2-1692

<sup>21</sup> GD2-1699

<sup>22</sup> GD2-1700

period after December 2011. Although her condition became worse after a February 2015 motor vehicle accident, she opened a business and was able to continue working until 2017.

[16] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work. The Claimant was able to continue working until long after December 2011. Her extensive work after 2011 establishes that she retained the regular capacity to pursue substantially gainful employment.

[17] I find that the Claimant has failed to establish a severe disability in accordance with the CPP requirements by December 31, 2011.

**The Claimant has established a severe disability before November 2017 that started in 2017**

[18] I must now focus on the Claimant's condition from January 1, 2017 to November 30, 2017.

[19] The Claimant's disability is severe if it renders her incapable of pursuing with consistent frequency any truly remunerative occupation. I must 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".<sup>23</sup>

[20] The Claimant testified that her main disabling condition is constant pain on the right side of her body. The pain runs from her neck, down the right side of her body to her fingers. She can only sit, stand, or walk for 20 minutes. She has become depressed because she cannot work. She would rather be working, and not being able to work "really upsets her."

[21] She has not made efforts to return to work since May 2017 because of her pain and limitations. She "can't do it anymore." She sees her family doctor every three months. She takes four Percocet a day, as well as anti-inflammatories. She wears braces on both wrists, and does exercises for her fingers and wrists. She has not seen any specialists since 2016, because her family doctor had told her that nothing more could be done. She spends most of her day at home.

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<sup>23</sup> *Villani* 2001 FCA 248

She rests and tries to do a little cleaning. She isn't able to read because she cannot sit for long, and reading makes her neck pain worse. She always drops things.

[22] C. S. has been friends with the Claimant for 20 years. C. S. testified that she has watched the Claimant go from being a happy, healthy person, to a person who is depressed and does not leave her house. She noticed a big difference after the Claimant closed her store. Her hands swelled up and she became depressed. C. S. now helps the Claimant with her housework. She goes over three to four times a week, and does all the dusting, changes the beds etc. The Claimant cannot use her hands.

[23] Dr. Armstrong's office notes confirm that the Claimant was able to continue working until May 2017. She has not been able to work since.

[24] In the February 2017 CPP medical report, Dr. Armstrong diagnosed chronic neck, right shoulder, forearm, and hand pain. The Claimant had seen many specialists for chronic pain, remained on medications, and limited her activity to avoid exacerbation of her pain. She had to avoid repetitive tasks and heavy lifting or pushing.<sup>24</sup>

[25] In a May 2017 disability tax credit certificate, Dr. Armstrong stated that the Claimant had chronic pain in her neck, right shoulder, right arm, and right hand. She had to leave multiple jobs because she is right handed and was unable to fully use her right arm and shoulder.<sup>25</sup>

[26] The Claimant has a grade 10 education, and completed a hairdressing course. She has no other formal education. Before working for the X, she worked at a X, at a day care centre, and as a X at a X. She has dyslexia, but had no help for this when she was in school. She taught herself how to manage this condition. Her reading is "pretty good", but she cannot spell or do math. She feels that she is intelligent, but has difficulty putting her ideas on paper. She has learned to cope. She googles words she cannot spell and when she needs help with math. She cannot use a computer, because her fingers swell up. She does not use emails, and uses Alexa to do searches. She learned Word and Excel in the WSIB computer course, but she is not good at them.

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<sup>24</sup> GD2-79 t0 82

<sup>25</sup> GD2-39

[27] Dr. Fournier's July 2008 psychovocational report confirms that the Claimant's intellectual aptitude is below average. She experienced significant learning disabilities when attending school. The testing revealed that the Claimant's overall intellectual abilities and corresponding learning potential in a formal retraining program fall within the extremely low to borderline range.<sup>26</sup>

[28] The Claimant has made valiant efforts to continue working despite her chronic pain and limitations. She was 56 years old at November 2017. She has limited use of her dominant right arm and hand, and has significant limitations in sitting, standing. In view of her learning challenges, her ability to retrain is limited. Although her condition deteriorated after the February 2015 accident, she continued working as best she could until May 2017. She has demonstrated a strong work ethic and I am satisfied that she would have continued to work if she were able to do so.

[29] I find that the Claimant's disability became severe as of May 2017. Since her disability became severe in 2017 and before November 2017, she has established that it is more likely than not that she has a severe disability in accordance with the CPP requirements.

***Prolonged Disability***

[30] The Claimant's disabling conditions have persisted for many years. Despite extensive treatment, they have been deteriorating.

[31] The Claimant sees her family doctor on a regular basis, takes significant pain medication, has gone for physiotherapy, has undergone cortisone injections, and has seen many specialists.

[32] In the February 2017 CPP medical report, Dr. Armstrong, the Claimant's longstanding family doctor, stated that she did not expect any improvement.<sup>27</sup>

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

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<sup>26</sup> GD2-898 to 899

<sup>27</sup> GD2-82



## **CONCLUSION**

[34] I find that the Claimant had a severe and prolonged disability in May 2017, when she last worked. Payments start four months after the deemed date of disability.<sup>28</sup> Payments start as of September 2017.

[35] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>28</sup> Section 69 of the CPP