



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DN v Minister of Employment and Social Development*, 2019 SST 1699

Tribunal File Number: GP-18-2218

BETWEEN:

D. N.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Jackie Laidlaw

Claimant represented by: John Hammond

In person hearing on: August 6, 2019

Date of decision: August 27, 2019

DECISION

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

OVERVIEW

[2] The Claimant is a 50-year-old woman who had a car accident in January 2015. At the time of the accident she was in a new job where she was required to pass a test in order to be qualified for the job. She took the test twice and failed both times, at which point she was terminated. She had an undiagnosed concussion at the time. She attempted and failed at an on-call part-time customer service job shortly after that in 2015-2016, and in 2018 volunteered four hours a week at a yoga studio until just recently when she quit. She is claiming tenderness in her neck, shoulders, and back, along with issues in concentration and headaches which have made her unable to work. The Claimant initially applied for a disability benefit on August 9, 2016, which was denied upon reconsideration and she did not appeal the denial. The Minister received the Claimant's current application for the disability pension on December 15, 2017. 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. I find the Claimant's MQP to be December 31, 2017.

ISSUE(S)

[4] Did the Claimant's conditions of neck, shoulder and back pain along with issues with concentration and headaches result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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

The Claimant's shoulder and neck pain are well managed

[7] The Claimant did not attend at the hospital after the accident. The following day she had a sore shoulder, neck and back and immediately started with physiotherapy and chiropractic treatments. Dr. Maxwell Woods, her chiropractor noted that she had a WAD I injury and a left shoulder injury. A WAD I is a Whiplash Associated Disorder and a WAD I classification refers to a sprain or a strain and is considered mild. Dr. Woods noted she began treatment in January 2015 and was still attending in October 2015. Her prognosis was fair and further improvement was expected with treatment going forward. A massage report in October 2015 also noted improved pain and range of motion in her neck and regular exercise and weekly yoga were recommended. She had massage treatments until May 2015.

[8] In an Executive Summary in April 21, 2017, physiatrist Dr. Ryan Williams found she had left shoulder tendinopathy and mild bursitis with a full range of motion in her neck and shoulder with pain. He also found there was no evidence of any positive objective orthopaedic or neurological findings. In an Occupational Therapists Progress Report in December 2017, at the time of her MQP, Danielle Dilworth and Neha Gill noted she had resumed kayaking and indoor biking. She continues with both today.

[9] The Claimant testified she continues with home exercises, uses an indoor spin bike and cycles outdoors in the summer and goes to yoga. She stated she still has pain and takes and

¹ Paragraph 42(2)(a) *Canada Pension Plan*

Advil or Tylenol if needed. She is not seeing any specialists for her physical conditions. She has declined any pain medications preferring to use essential oils instead.

[10] The evidence shows that her shoulder and neck pain have improved and are managed well with occasional over-the-counter medications, essential oils and exercise.

[11] The Claimant relies upon Dr. Goldstein's neurological medico legal report of September 2017. He does note ongoing neck and shoulder pain for which she is not taking any specific treatment. This is the same information as noted by the other physicians. However, I cannot accept Dr. Goldstein's opinion that her physical difficulties prevent physical work. All the evidence, including his own is that the physical conditions require minimal management. There is no indication she would be unable to work due to neck and shoulder pain.

[12] There is no mention of back pain requiring any intervention.

Headaches and Cognitive Functioning are well managed

[13] After the accident the Claimant returned to work and was to take an exam for her new job position. She is claiming that it is because she could not remember the information that she failed the exam twice and was terminated in March 2015. At the time she did not realize she had a cognitive condition or possible concussion. She was repeating herself and struggling to find words and struggling to spell correctly. She was also getting headaches and migraines. Six months' post-accident she mentioned this to her family physician Dr. Loiskandl who suggested it was post-concussive syndrome.

[14] In September 2015 she began attending at the Brain Injury Services, and adult education service to provide coping strategies for memory issues. Since then she attends weekly for group education courses. No referral is necessary for the services at this point.

[15] She was referred to neurosurgeon Dr. Vachhrajani of the Head Injury Clinic in June 2016 who diagnosed post-concussive symptoms and recommended a speech pathologist and an occupational therapist for her cognitive problems. He noted her headaches were worse however she refused the propranolol medication he recommended.

[16] She had 15 sessions of speech therapy from Michelle Monk between September 2016 and December 2017. Dr. Loiskandl's clinical note of February 2017 indicates her speech is much more fluent and she sounds back to normal. By November 2017 the speech clinic noted that she could sustain attention and focus in conversation without distraction and was completing all tasks with 100% accuracy.

[17] The evidence shows her problems with her speech has been successfully treated.

[18] She began seeing psychologist Dr. Davidson for mindfulness therapy for anxiety upon the recommendation of Dr. Vachhrajani. By October 2016 Dr. Davidson reported difficulties with the death of her mother and moving issues, and that weekly sessions are no longer required based on her independent application of strategies and her improvement in coping. She continues to see him once a month for an hour to discuss meditation and she stated it is helpful. She also had three sessions of cognitive behavioural therapy and three sessions of mindfulness therapy in 2017. Each session was weekly for eight weeks. She stated the treatment was "great" and she would do it again.

[19] Psychiatrist, Dr. Chantal Vaidyanath, saw the Claimant in August 2016 for a medico legal Psychiatry report and found she had no limitations with thought process, speech or movement. At that time, she felt the Claimant's improvement would depend on further treatment of pain and psychological distress. Her prognosis at the time for a full recovery was guarded but for further improvement was fair. She considered her injuries and impairments permanent.

[20] It was in March 2017 that Dr. Vaidyanath took over the Claimants care from Dr. Vachhrajani, whom the Claimant stated she had only seen twice. Dr. Vaidyanath checked for migraines and headaches and suggested she keep physical and use her mindfulness and meditation training. The doctor noted in March 2017 that the headaches happened two to three times a week but that she did not wish any drugs for pain managed and that the physiotherapy, massage, osteopathy and psychological treatments were of considerable benefit and had improved in her cognition and pain. She had sustained a concussion and mild brain injury, cervical strain, left shoulder strain and thoracic strain but there were no neuromotor defects and her affect was euthymic. Dr. Vaidyanath did not require any follow up.

[21] The medical report of November 2017 accompanying this application was from her current family physician Dr. Olisa whom she started seeing in July 2017, four months prior to the report. Dr. Olisa states that symptoms now are primarily related to the concussion and cognitive residual issues with poor concentration, headaches, anxiety and psychological effects. She noted she will likely improve over time with appropriate treatments.

[22] An executive summary² was performed in April 2017, and it is not clear if Dr. Olisa had the benefit at the time of reviewing it's findings. The Claimant was assessed by Dr. Bradbury, a psychologist and neuropsychologist who found she had a concussion and mild brain injury which had resolved. She did have a mild neurocognitive disorder and recommended ongoing psychological support and mindfulness stress reduction. From a neuropsychological perspective she did not sustain a complete inability (a test for insurance on car accidents to determine if the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience. The test is somewhat similar the CPP disability benefit test but is not the definitive test for a CPP disability benefit).

[23] She also was assessed by Dr. Ryan Williams, physiatrist, who found the post-traumatic headaches were WAD II and there was no evidence of any positive objective orthopaedic or neurological findings. His physiatric perspective was also that she did not suffer a complete inability to work.

[24] In the same report she was assessed by Stephanie Semple, for a vocational assessment who also found from a vocational perspective she had not sustained a complete inability.

[25] Dr. Olisa noted she will improve over time, and Dr. Bradbury recommended ongoing mindfulness stress reduction. Dr. Vaidyanath did not require further follow up. The Claimant has continued with her mindfulness training with Dr. Davidson and at the head injury clinic. She is not taking any pain relief drugs other than Advil or Tylenol as needed, along with essential oils. It is noted by Dr. Olisa that the Claimant takes Serc as needed for migraines, however the Claimant did not list that and has not been noted in the evidence as not wanting to take drugs.

² GD 2 392 Executive summary April 21,2 017

[26] In November 2017 Keri Ireland, her rehabilitation counsellor at the Brain Injury Services noted she attended educational workshops monthly from May 2016 to May 2017 and also noted the life changes of selling her home, the loss of her mother and loss of income all of which were overwhelming. She reported she was doing well with educational groups and the weekly drop in peer support group.

[27] From Ms. Ireland's report it indicates the therapy was mainly to help with the overwhelming situational life events which are temporary, such as the sale of her house. Dr. Bradbury had found her mild brain injury and concussion had resolved.

[28] As previously mentioned, the Claimant relies upon the neurological medico legal report of September 2017 by Dr. Goldstein. He makes an opinion that her overall prognosis is poor but hopeful as there are many medications and treatment that have not been tried that could improve her situation.

[29] I cannot put much weight on this report as Dr. Goldstein did not treat the Claimant. His opinion is counter to that of her treating specialists, such as Ms. Ireland who found she was doing well; the speech therapist who found at the same time that she was completing all tasks with 100% accuracy; and, Dr. Vaidyanath who found her treatments both physical and psychological were of considerable benefit and she had improvement in cognition and pain. The Claimant has been completely compliant with all treatments recommended. She has decided not to treat with pain medication and prefers more natural substances, and still her pain has improved. Therefore, I do not accept there are many untried treatments that could improve her situation. The evidence shows she has tried them, and they have improved her situation.

[30] As Dr. Vaidyanath stated in 2016 her impairments are permanent, but at that time the prognosis for further improvement was fair. She did continue to improve and by the time of her MQP she was managing her symptoms well with no prescription medications, monthly visits to Dr. Davidson and peer support drop-in group.

[31] She continues with her mindfulness sessions and educational groups at the Brain Injury Services which indicates she most likely will continue to have some residual post-concussive symptoms such as having to use notes to remind herself of appointments and an inability to be in

a boat due to the motion of the waves, even though she has resumed kayaking. The symptoms have improved from 2015 and they are well managed with minimal intervention.

The evidence does not support an inability to work at any occupation

[32] The Claimant has two college degrees, one for aesthetics and a second which she took in 2010 for medical office administration. She has worked in factories in her early years. After aesthetics school she worked for five or six years and returned to college for her second degree. After the medical office administration degree, she worked for three years casting orthotics and administrating client files. She stated she was let go as she was not good at sales.

[33] It was then that she worked for X in auto insurance making changes to client files. After one year she changed positions and companies to X handling personal accounts, taking calls and learning a new computer system. She stated that the home and auto insurance was a learning curve and the computer system was completely different. As well, as X was a broker she had to deal with many insurance companies. She started in mid-November 2014.

[34] The requirement of the job was that she had to take the REBO examination (an examination on home and auto insurance) to maintain her position as a registered insurance broker representative. The exam was scheduled for when she was comfortable. It was a three or four-week course, self-studied with mock exams. She worked full time and studied at night. She stated that even if she passed the REBO exam the training process was quite extensive for learning the computer system and dealing with the clients.

[35] After the car accident in January 2015 she forgot how to turn her computer on, and her trainer at X had to turn it on for her. She was having difficulties remembering what she had learned the night before. She took the exam twice. After only getting 50% the second time she was let go from X in March 2015.

[36] It is clear in the evidence that at that time she had a concussion which had not yet been diagnosed. I accept that her cognitive abilities at the time were responsible for her inability to pass the requirements of her job.

[37] However, after X she re-applied at X, where she had just left a few months earlier and had only worked for one year. She stated she did not tell them of her condition or that she had had an automobile accident. She stated she was not allowed in the door for an interview.

[38] As X was not aware of her physical or mental condition, the reason she was not interviewed would be for reasons other than her health.

[39] She was successful in getting a job by just walking into a store and applying. The position was a short customer service job, 10 hours a week and found she could not count the change. Again, as this was shortly following the accident and she was still not yet aware of her concussion I accept that she was unable to do the job.

[40] However, she went on to get multiple treatments both physical and psychological and the evidence shows that by her MQP she was managing her conditions well, though she still experienced some pain and required continuing mindfulness therapy, mainly for life events.

[41] After not working for almost 3 years, she started 4 hours a week working at a yoga studio greeting clients and maintaining the float tanks. She stopped a week before the hearing due to anxiety, though she feels she can do a job on-call.

[42] The Occupational Therapist report of December 2017³ noted that she was volunteering for 4 hours a week at the yoga studio and did not want to be employed in the same capacity as her pre-accident job. The Claimant did not rule out administrative work and wanted something less stressful. The occupational therapists helped her with her resume and job search. In the report it is noted that the Claimant was not working and wanted time to self-reflect to determine her work and life goals.

[43] I do not accept the job at the yoga studio as a valid attempt to work. It was noted as a volunteer job in the occupational report and is not regular or substantially gainful. It was a volunteer position for the Claimant to do while she took time to reflect on her “long-term goal for identifying and obtaining a full-time career”⁴.

³ GD 2 899 December 1, 2017 Occupational Therapy progress report Danielle Dilworth and Neha Gill

⁴ GD 2 905 Occupational Therapy Report December 12, 2017

[44] The Claimant testified that she had had a number of job interviews in 2018 and 2019 for jobs she found on Indeed and other job banks. She stated she does not do as well in interviews as previously and that she has not heard back from any of the employers. While she may not interview well, there is no evidence that she was unsuccessful in obtaining the positions by reason of her health.

[45] In the medico legal report of Dr. Vaidyanath in August 2016 Dr. Vaidyanath opined she is unable to return to her usual employment due to her difficulties counting change in her last job, and the difficulties with the position at X she is not competitive in a job requiring recall of detailed information, efficient responses or highly technical office operations. In 2017 Dr. Vaidyanath found “considerable”⁵ improvement in her cognition and pain.

[46] As part of the Executive Summary there was a Vocational Evaluation⁶ which speaks directly to her capacity to work. Stephanie Semple found occupational options. She found the Claimant had many transferable skills. She tested above average in her learning capacity, which means she would be able to retrain for any suitable employment.

[47] Dr. Goldstein noted in September 2017 that she was unable to do her regular job. He noted her ongoing symptoms and difficulties with cognition would lower her chances for employability. I have already indicated my reasons for not accepting his opinion that she may be unemployable due to her physical difficulties (paragraph 11), and his opinion of her cognitive symptoms hindering any retraining is refuted by the Vocational Assessment where she tested above average in her learning capacity.

[48] I accept that she may not be able to return to her previous employment as an insurance broker representative. However, the evidence does not support that she is prevented from working at any suitable occupation.

⁵ GD 2 284 consultation with Dr. Chantal Vaidyanath March 21, 2017

⁶ GD 2 412 Stephanie Semple, Vocational Evaluation dated April 21, 2017 conducted January 20, 2017

[49] I must assess the severe part of the test in a real world context⁷. 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.

[50] The Claimant was a young woman of 48 years-old at the time of her MQP. She had over 15 years remaining before retirement. She was found above average in her learning capacity and therefore would be capable of retraining in a suitable position. She was also found to have many transferable skills due to the various jobs she has done over her lifetime. She is well educated and fluent in the English language. She has been able to get job interviews, and there is no indication she has been unsuccessful by reason of her physical or cognitive conditions. In a real world sense, she would not be prevented from finding suitable employment by reason of her age, education, language skills and past work and life experiences despite her limitations.

[51] The evidence shows the Claimant has made great strides in her rehabilitations where her shoulder pain and headaches are managed with occasional Tylenol and Advil and she has been able to resume kayaking and bike riding. She successfully completed Speech Therapy which noted she could sustain attention and focus in conversations without distraction and completed all her tasks with 100% accuracy in November 2017. She continues to make use of the educational sessions and drop in peer-support group at the Brain Injury Clinic, reportedly doing well with the services and attends mindfulness sessions with her psychotherapist, Dr. Davidson. By her MQP Dr. Bradbury found that she had a mild neurocognitive disorder secondary to a resolved concussion/mild traumatic brain injury. She still has some cognitive and physical limitations, which have not been found to prevent her from working at any occupation as of her MQP.

[52] I find the Claimant has failed to prove a severe disability that renders her incapable regularly of pursuing any substantially gainful occupation.

⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

CONCLUSION

[53] The appeal is dismissed.

Jackie Laidlaw
Member, General Division - Income Security