



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. D. v Minister of Employment and Social Development*, 2019 SST 1582

Tribunal File Number: GP-18-848

BETWEEN:

S. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Claimant represented by: Sarj Gosal

Teleconference hearing on: August 20, 2019

Date of decision: September 9, 2019

DECISION

[1] The Claimant, S. D., applied for a *Canada Pension Plan* (CPP) disability pension in March 2017. The Minister denied the application and the Claimant appealed to this Tribunal. I have decided the Claimant is not eligible for the pension, so I am dismissing her appeal. These are my reasons.

OVERVIEW

[2] The Claimant is now 56 years old. She moved to Canada from India in 1989. She was a seamstress for about 13 years before leaving the paid workforce to look after her five children. In 2007 she started working as a cleaning technician for a flood and fire restoration company.

[3] The Claimant was in a car accident in August 2013. She had soft tissue injuries to her neck, right shoulder, and back. She was off work for over a year while she had treatment including physiotherapy, active rehabilitation, counselling, and medication. She tried a graduated return to work, but did not succeed.

[4] The Claimant said in her disability application that she has not been able to work since August 2013 because of pain in her upper back, right shoulder, neck, and left foot. She also had headaches, numbness in her right hand, anxiety, depression, and hypertension.¹ When she appealed to the Tribunal she reported more conditions including rheumatoid arthritis, chronic left ankle pain, and nasal pterygium.²

THE ISSUE IN THIS APPEAL

[5] The Claimant is entitled to a CPP disability pension if she meets these conditions:

- she must have contributed to the CPP within a time frame called the “minimum qualifying period” or MQP;
- she must have a disability that is severe and prolonged; and
- she must have become disabled on or before the end of her MQP.³

¹ The Claimant’s disability application and questionnaire are at pages GD2-32-36 and GD2-292-298.

² Notice of Appeal, April 10, 2018, GD1-6-8

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

[6] The Claimant's MQP ended on December 31, 2015.⁴ I have to decide if she has a severe and prolonged disability, and if she was disabled by that date. It is the Claimant's responsibility to prove this.⁵

ANALYSIS

The Claimant's disability was not severe at December 31, 2015

[7] The Claimant's disability is severe if she is incapable regularly of pursuing any substantially gainful occupation.⁶ That means her disability has to prevent her from earning a living at any type of job.⁷

[8] The Claimant told me her recovery was "off and on". She seemed to improve but then her pain would return. She has not been able to do heavy duties at home since the accident, and she started to have trouble with small tasks as well. Her existing pain got worse and she had pain and swelling in her arms, hands and feet.

[9] The Claimant tried to go back to her old job. She could not remember any of the details or dates. All she remembered was that she could not perform her duties because her right shoulder, left hand, and left foot were bothering her. She tried to return twice, and in September 2015 her doctor told her to stop. She has not worked anywhere since then. She loved her job, and would be doing that if she could. She has not applied for other jobs because she does not think she can do them.

[10] The Claimant told me she does not know what each day will be like. Sometimes she can go two or three days without pain, but then it comes back. On those days she cannot stand or walk for more than 15 minutes before her feet start hurting. She cannot sit for more than half an hour before her shoulders and back start hurting. Even without her pain she is tired all the time. She barely sleeps at night, so she has no energy and she has to lie down during the day.

⁴ The Claimant's CPP contributions are at page GD3-16.

⁵ The legal test is that the Claimant must prove she is disabled on a balance of probabilities; in other words, she must show it is more likely than not that she is disabled.

⁶ Paragraph 42(2)(a) *Canada Pension Plan*.

⁷ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

[11] The Claimant told me she feels very down, stressed, and confused. She cannot focus and she starts to panic. Sometimes she stays in bed all day. On other days she makes tea for herself; then she does light cleaning for five or ten minutes. She has an easy lunch of canned or takeout food. Her children help her with all the household chores and cook most of the meals. She takes one or two 15-minute walks each day so she can digest her food. Other than that, she only goes out if she has to.

[12] The Claimant's view of how her condition affects her ability to work is important. She feels she has been disabled for quite some time. But there has to be objective evidence showing she was disabled at December 31, 2015.⁸ That means I have to look at what doctors and other professionals said about her condition around that time.

[13] There is no doubt the Claimant's medical condition affected her ability to go back to her old job. Her medical record shows she had headaches and persistent neck, back and shoulder pain since the accident. In early 2014 she started having pain in her right hand and wrist. Foot pain started in 2015. She was diagnosed with anxiety and depression in January 2014. All these were still present at December 2015.⁹ The problem is that the medical information tells me the Claimant likely had the capacity to perform some type of work at that time, even if she could not do her usual job.

Report of Alice Tong, occupational therapist

[14] The Claimant's graduated return to work effort is discussed in a December 2015 progress report by Alice Tong, an occupational therapist who saw the Claimant around that time. Ms. Tong had access to the Claimant's insurance file, so her report is a useful and accurate summary of the Claimant's situation.¹⁰

[15] The report said the Claimant completed an active rehabilitation program in October 2014. She was discharged as able to meet the demands of her job. She started a graduated return to

⁸ *Warren v Canada (Attorney General)*, 2008 FCA 377

⁹ Family physicians' visit notes, August 2013 to December 2015, GD4-4-18, 20-21, 277-278; Dr. Khan, January 20, 2014, GD4-39-41; counsellor's visit notes, November 2014 to October 2015, GD4-58-68

¹⁰ A. Tong, December 18, 2015, GD4-257-264

work program in September 2014 and was to be working full-time within 10 weeks. However, she could not do this because she had shoulder pain. The same thing happened with a similar plan that started in March 2015. A revised plan started in July 2015. The Claimant's duties were broken down by task and her hours gradually increased. She was expected to return to full-time hours in 13 weeks.¹¹

[16] The Claimant did not return to full-time hours. She had been seeing a chiropractor for Achilles tendonitis in her left foot, and in September 2015 he recommended she stay off work until this was completed. She saw a different chiropractor in October 2015 for treatment of right trapezius pain. He recommended she stay off work and avoid heavy lifting and strenuous household chores.¹² The Claimant's family doctor recommended she stay off work until she had been seen by a rheumatologist, which was scheduled for January 2016.¹³

[17] The Claimant told Ms. Tong she had the following ongoing concerns about her recovery:

- She had pain in the right side of her neck and right shoulder
- She had pain in her left leg from her thigh down to her foot, and swelling in her left foot
- Because her left leg pain made her limp, she had pain in her left hip.

[18] She told Ms. Tong she spent most of the day sitting at home. She could only do light housework, and only a few things at a time. She limited the amount of time she spent driving. She also had symptoms of depression and anxiety. These included feeling hopeless and helpless about her physical condition. She lacked interest and motivation. She had no appetite. She was irritable. She had difficulty sleeping, and she had no energy.

[19] Ms. Tong said the Claimant's anxiety and focus on her pain limited her recovery and affected her ability to complete activities of daily living. Pain was a major barrier that kept her from most daily activity. She anticipated the Claimant would return to pre-injury function after

¹¹ A. Tong, December 18, 2015, GD4-262

¹² A. Tong, December 18, 2015, GD4-261

¹³ A. Tong, December 18, 2015, GD4-262

these issues were addressed, and if her symptoms decreased with treatment by a rheumatologist. She thought the Claimant's employer might accommodate a part-time position if her condition plateaued. She encouraged the Claimant to increase her physical activity without weight bearing.

Reports of Dr. Khan, psychiatrist

[20] Dr. Khan started treating the Claimant in January 2014. He diagnosed her with an anxiety and depressive disorder in January 2014.¹⁴ In the spring of 2014 she began taking trazodone and bupropion (Wellbutrin)¹⁵. She started group therapy.¹⁶ By September she told Dr. Khan she was feeling much better.¹⁷ When she tried to return to work the next month she became fatigued and stressed, and she could not concentrate.¹⁸ However, in November she started seeing a counsellor Ms. Combow for individual therapy.¹⁹ She told Dr. Khan she was "doing really well". She had been taking Ritalin, which helped her fatigue. She did not feel depressed and her sleep was good. She did not want to go back to work because she had swelling in her left leg.²⁰

[21] In March she told Dr. Khan her anxiety and depression were under control. She felt better physically. She wanted to go back to work but she was worried about the stress. She wondered if she should try going part-time. Dr. Khan encouraged her to go back to work full time and "give it her best shot".²¹ In August the Claimant was concerned about her pain and worried about her future. She was on a gradual return to work program. Dr. Khan again encouraged her to first try working full time.²²

[22] In December 2015 the Claimant told Dr. Khan her depression and her sleep were better. She was complaining of soft tissue pain, but Dr. Khan told her that rather than consuming herself with these complaints she should do some exercise, yoga, and meditation. He said "if she wants to consider another job if she was physically capable".²³

¹⁴ Dr. Khan, January 20, 2014, GD4-39-41

¹⁵ Medication history, GD4-33-34

¹⁶ Dr. Khan, March 19, 2014, GD4-44-45; MHSU group note, June 2, 2014, GD4-46

¹⁷ Dr. Khan, September 16, 2014, GD4-53

¹⁸ Dr. Khan, October 21, 2014, GD4-57

¹⁹ K. Combow, November 7, 2014, GD4-58

²⁰ Dr. Khan, November 17, 2014, GD4-56

²¹ Dr. Khan, March 11, 2015, GD4-89

²² Dr. Khan, August 11, 2015, GD4-19

²³ Dr. Khan, December 10, 2015, GD4-268

[23] The Minister said this meant Dr. Khan thought the Claimant was capable of some type of work.²⁴ I don't read the sentence that way. I think Dr. Khan meant there were no psychological barriers preventing the Claimant from working. He left open the possibility the Claimant was not physically capable of doing any job. He didn't think he was qualified to make that judgment. However, the other evidence shows the Claimant was capable of some type of work.

The Claimant had work capacity

[24] The Claimant's representative urged me to place more weight on the reports by the Claimant's family doctors, as these gave a more comprehensive picture of the Claimant's condition at December 2015. I don't think they do. I recognize the Claimant saw her family doctors more frequently than she saw Dr. Khan. She also saw a counsellor, Kimi Combow, once or twice a month. As I said above, their reports show the Claimant had multiple, ongoing concerns. But Dr. Khan and Ms. Tong were aware of and took note of all these complaints. They considered the Claimant's overall medical condition in reaching their conclusions.

[25] The medical evidence tells me the Claimant had some work capacity at December 2015. Her anxiety and depression were not debilitating, because her psychiatrist was encouraging her to work. Her physical barriers were pain that prevented her from standing, walking, overhead lifting and heavy lifting. She had reported hand symptoms off and on, but there is no evidence they were a significant problem at that time. There is no evidence she had problems with sitting.

[26] The Claimant's last job was a very physical one. She had to clean up items and pack them for storage. It involved a lot of heavy lifting and carrying. It is obvious from her failed work attempt that she could not do this job in December 2015. But she likely could have done a seated job that did not involve heavy use of her shoulder.

[27] In deciding if the Claimant had work capacity I have to look at things like her age, level of education, language proficiency, and past work and life experience.²⁵ In December 2015 the Claimant was 52 years old. She has a high school education from India. She told me she has little

²⁴ Minister's submission GD3-10

²⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

to no ability to read or write in English. She does not speak or understand it very well. She has only worked in jobs requiring manual labour.

[28] These factors suggest the Claimant has few employment options. However, I don't think they mean she has no work capacity. She lives in the Vancouver area where there is a large Punjabi-speaking community and workforce. Her English is good enough that she could function at her previous jobs. Although she has no clerical or computer skills, she has 13 years of experience as a seamstress. She told me she did not think she could do this job, she did not provide any evidence to explain why she could not do it or something similar at December 2015.

[29] I recognize the Claimant was still attached to her previous employer at December 2015. They were trying to get her back to her previous job. Although she was supposed to be doing light duties, she told me she was not because none were available. She did not have the chance to try something less demanding. If she had tried lighter, sedentary work and failed, that might have persuaded me her condition was severe despite what the medical evidence showed. As it is, I have to weigh the medical evidence against her own recollection of how she was feeling at that time. I think the medical evidence is more reliable than the Claimant's memory, particularly since it shows what she was telling her doctors and what they observed leading up to December 31, 2015. That evidence tells me the Claimant did not have a severe disability at that time.

CONCLUSION

[30] I have a great deal of sympathy for the Claimant. However, she has to prove her case on a balance of probabilities, and she has not done so. I cannot find she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2015. Because I found her condition was not severe, I did not consider whether it was prolonged.

[31] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security