



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. G. v Minister of Employment and Social Development*, 2019 SST 1560

Tribunal File Number: GP-18-1791

BETWEEN:

T. G.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: September 17, 2019

Date of decision: September 20, 2019

DECISION

[1] T. G. is the Claimant. I have decided that she is not entitled to a Canada Pension Plan (CPP) disability pension. Following are the reasons why I made this decision.

OVERVIEW

[2] The Claimant was 49 years old when she stopped working as a part-time sales associate in September 2016 because of a herniated disc. She had surgery in March 2017. Since the surgery, she has nerve damage. She applied for a CPP Disability Benefit in March 2017. The Minister denied the application. The Claimant appealed the reconsideration decision to the Social Security Tribunal. I am the Tribunal member who heard her appeal.

ISSUE IN THIS APPEAL

[3] A person who applies for a disability pension has to meet the requirements that are set out in the law that deals with CPP disability benefits. First, you have to meet the contribution requirements. The legal term for this is the “minimum qualifying period”¹. That is not a problem in this appeal. The Claimant’s minimum qualifying period is December 31, 2018.

[4] Second, you have to have a disability that is “severe and prolonged”². You have to have that disability on or before the date of the minimum qualifying period.

[5] The issue that I have to decide is whether the Claimant’s disability is severe and prolonged³. 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. It is up to the Claimant to prove⁴ they meet both parts of the test. This means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

¹ It is found at Section 44(1)(b) of the *Canada Pension Plan* (CPP).

² This requirement is found at Section 42(2)(a) of the CPP.

³ Paragraph 42(2)(a) *Canada Pension Plan*

⁴ The legal test for proof in this case is that the Claimant has to show it is more likely than not that her disability is severe and prolonged

[6] The Minister says that the medical evidence does not show that the Claimant's condition would prevent her from any and all work activity. This is why her application was refused.

[7] The Claimant disagrees. This is why she appealed. I must now decide if the Claimant's disability is severe and prolonged.

[8] The Tribunal's file indicates that the Claimant has radiculopathy/left leg pain, numbness and weakness. She also has low back pain/herniated disc. I have to consider how the Claimant feels about the impact this condition has on her capacity to work. This is what we call subjective evidence. I also have to consider what her doctors and other medical professionals say about her condition, including such things as the results of medical tests. This is objective evidence. I also look at her background. Her background includes things like her age, level of education and past work and life experience. This is so I can get a realistic or "real world" picture of whether her disability is severe⁵. If the Claimant is able to regularly do some kind of work that is substantially gainful, then she is not entitled to a disability pension⁶.

Is the disability severe?

[9] The Claimant explained how she sees her medical condition and the impact of her health on her activities of daily living. She stated that:

- She has pain in her leg and lower back.
- She has physiotherapy twice a week. She is still doing the same exercises that she did one year ago because she has not improved enough to change or increase the exercises.
- On a daily basis, she cannot stand to even wash a sink full of dishes or prepare a meal, without taking a rest break.
- Her balance is affected occasionally. She will lose her balance because her left foot has a constant tingle. Before her surgery, she needed a walker, now

⁵ In a decision called *Villani*, the Federal Court of Appeal explains how to understand the concept of a "severe" disability

⁶ This is explained in a Federal Court of Appeal decision called *Klabouch v. Canada (A.G.)*, 2008 FCA 33

she does not use a walker or cane. She walks slowly and will climb stairs two feet per step.

- She now has permanent nerve damage.
- She could not do a sedentary job because she can only sit for about 30 minutes before she needs to stand up or elevate her feet.
- After standing or walking for 30 minutes, she needs to lie in her recliner chair.

[10] I believe that the Claimant was telling the truth when she gave her evidence. Her answers to questions at the hearing were mostly consistent with what she was telling her doctors on different occasions in the past. When a person's story is consistent over a period, this can indicate that they are being truthful. She did not hesitate in answering questions and seemed to be making an honest effort to answer accurately. I conclude that she is credible.

[11] However, I do not just look at how she feels that her disability has an impact on her ability to work. She also needs to support her case with objective evidence. I have to consider what she says, along with what the doctors and other medical professionals say. I have to look at how consistent her evidence is with what is in the medical reports.

The medical evidence does not support that the Claimant is disabled

[12] Dr. Schneider (neurosurgeon) saw the Claimant in March 2017.⁷ The Claimant told Dr. Schneider that she started having leg pain and tightness in May 2016. She explained that she had pain that radiated from her buttock to her knee and would occasionally go down to her heel. Dr. Schneider noted that the MRI of December 2016⁸ showed a fairly significant L5/S1 disc herniation. A discectomy was recommended and was performed on March 29, 2017.⁹

⁷ Dr. Schneider's report is at GD 2-57

⁸ MRI is at GD 2-80

⁹ Operative report begins at GD 2-62

[13] The Claimant saw Dr. Schneider for a post-surgery follow-up visit in May 2017¹⁰. She noted that the Claimant was making slow but steady progress. Her leg pain had improved. The Claimant continued to have complaints of muscle discomfort in her calf. However, Dr. Schneider noted that the Claimant was able to walk without difficulty. She was also able to get up on her left toes without too much trouble. It was Dr. Schneider's opinion that the Claimant was doing well and her condition had improved significantly. She expected that the Claimant's recovery would be a slow process. This was also the opinion of the Claimant's physiotherapist in 2017.¹¹ This has proven to be the case.

[14] Since May 2017, the Claimant had stopped all pain medications except for Tylenol and Aleve. The neurosurgeon recommended physiotherapy and the possible use of Lyrica. The Claimant told me that she only relies on Aleve when the pain is "really bugging" her. She takes about "a handful" of Aleve tablets over a month period. This supports the medical evidence of the physiotherapist and the surgeon that there has been significant improvement in the Claimant's condition. Her condition is managed with minimal over the counter pain medications.

[15] Dr. Schneider did prescribe Pregabalin (Lyrica), to help manage pain, but the Claimant does not use it. She does not want to rely on medication. I considered whether the Claimant's refusal to use the prescribed pain medication was reasonable and what impact that refusal might have on her disability status¹². I considered that pain is one of the Claimant's biggest complaints and what causes her limited function ability¹³. Her reason to refuse to this recommended treatment option is not reasonable. This is a treatment option that was prescribed to address her chief complaint of pain. The impact of refusing to at least try this treatment, is that her function will continue to be limited by pain as the pain is not being treated.

[16] In addition to pain medication, other further treatment options are available. Dr. Schneider recommended epidural steroid injections. If this did not provide pain relief, nerve blocks were suggested. The Claimant is waiting for appointments to be made, so both of these recommendations have not yet been tried. Again, both of these treatments would address the

¹⁰ Dr. Schneider's report is at GD 2-65

¹¹ The physiotherapist's report is at GD 2-69

¹² This is explained in a Federal Court of Appeal decision called *Lalonde v. Canada (MHRD)*, 2002 FCA211

¹³ Testimony of the Claimant at the hearing and the family doctor's notes at GD 3-12

Claimant's primary complaint of pain. There is a realistic expectation that these treatments will improve the Claimant's condition. They were recommended by two specialists (the pain specialist and the neurosurgeon).

[17] I also considered the Claimant's testimony that her balance is affected occasionally. She will lose her balance because her left foot has a constant tingle. However, she uses no aids. She testified that prior to her surgery, she had used a walker. Now she does not use a walker or cane, but walks cautiously. She will go to the mall or a large store and walk for about 30 minutes. She said that after this she needs to go home and sit in her recliner chair. Although the Claimant is limited in the time she can walk, she is doing this unaided and without the use of prescribed pain medications. She is essentially doing it without treatment to address her imbalance and pain. Further, while her limited time walking may affect her ability to return to work as a sales clerk, I was not persuaded that she was incapable regularly of pursuing any substantially gainful employment. It is not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work¹⁴.

[18] The Claimant was examined by the neurosurgeon again in April 2019.¹⁵ Physical examination revealed no acute distress. The Claimant was able to flex forward with fingertips to upper shin. Extension was well performed and relatively pain free. The neurological exam revealed normal bulk, power and tone in both lower extremities. The MRI of November 2018 showed a bit of enhancement consistent with postsurgical change. There was a small residual disk present at the left L5/S1 level, but it was not causing any neural compression. It was insignificant in its size. The MRI did not show a surgically correctible lesion. Dr. Schneider recommended ongoing physiotherapy focusing on additional exercises. No follow-up appointment was necessary.

[19] When I read Dr. Schneider's most recent report, the impression I have is that the doctor thinks the Claimant's symptoms and functional limitations are moderate. None of her reports say anything about the effect of her symptoms on the Claimant's capacity to work.

¹⁴ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹⁵ Dr. Schneider's report is at GD 7-4

[20] I understand that the Claimant feels that she is totally disabled. However, the medical evidence does not support a conclusion that she is unable to do any kind of work.

[21] The Claimant was 51 years old at the time of her MQP. She has a grade 12 education and 4 years of post secondary education. She has diplomas in secretarial and computer programming. She testified that she her computers skills are limited and she uses a computer primarily for social media. She last worked part-time from September 2012 to September 2016 in a retail store as a sales clerk. This job involved lifting and being on her feet the majority of the time. While the Claimant may be unable to return to this job, I find that she has transferable skills for more suitable work or retraining. Her education and post-secondary schooling shows that she has experience in an academic setting and in fact, was successful as she obtained two certificates.

[22] Keeping in mind the Claimant's personal circumstance, particularly her age, education and her ability to retrain, it would appear that her personal circumstances would not negatively impact her ability to seek and, if necessary, retrain for part-time employment.

[23] If a person has some capacity to work, then the law requires that they have to show some efforts to find work¹⁶. The Claimant in this case did not make efforts to find work.

[24] As I mention in paragraph 5 above, a person needs to have a disability that is severe and prolonged to get benefits. I conclude that the Claimant's disability is not severe. This is because she has some work capacity and because she did not make efforts to find work.

[25] There is no need for me to consider whether the disability is prolonged, because I have decided that the disability is not severe.

CONCLUSION

[26] The Claimant does not have a severe and prolonged disability. The result is that her appeal is dismissed.

Connie Dyck

¹⁶ The Federal Court of Appeal explains this at paragraph 3 in a case called *Inclima v. Canada (A.G.)*, 2003 FCA 117

Member, General Division - Income Security