



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. A. v Minister of Employment and Social Development*, 2019 SST 1225

Tribunal File Number: GP-19-829

BETWEEN:

M. A.

Applicant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: K. C.

Teleconference hearing on: September 17, 2019

Date of decision: September 23, 2019

DECISION

[1] The Claimant has established new material facts. However, she is not eligible for a *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] The Claimant was 53 years old when she applied for a CPP disability pension in July 2016. She was born in India. In 1984, she came to Canada. She last worked as a X in a factory. In March 2012, she broke her left ankle in a workplace accident. She continued working on modified duties until she was laid off in July 2012. She has not worked since. In October 2012, she injured her back, shoulders, and neck in a motor vehicle accident. In 2013, she underwent surgery to remove her uterus. In June 2015, she was injured in another motor vehicle accident.

[3] In her disability application, the Claimant stated that she had been unable to work since July 2012 because of chronic neck, back, and shoulder pain.¹ The Minister denied the application initially and upon reconsideration. The General Division dismissed the Claimant's appeal to the Social Security Tribunal (Tribunal) on January 17, 2019.

[4] In May 2019, the Claimant filed this application to amend or rescind the January 17, 2019 decision. She submits that her family doctor's missing clinical notes of February 13, 2015 and March 9, 2015 are new material facts. He accidentally failed to forward copies of them to Service Canada, so they were not included in the appeal file.

ISSUES

1. Are the family doctor's missing clinical notes new material facts?
2. If so, did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by February 28, 2015?
3. If so, is her disability long continued and of indefinite duration?

¹ GD2-126

ANALYSIS

Test for New Facts

[5] I may amend or rescind a decision made by the General Division if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.²

[6] Under this provision, a decision may be reopened if an applicant submits new information that was not readily accessible at the time of hearing. The new information must also be material – that is, it could reasonably be expected to have affected the outcome of the hearing if the Tribunal had known about it at the time.

[7] Such an application is not an appeal, nor is it an opportunity to reargue the merits of a Claimant's appeal. Instead, it is a tool designed to allow the Tribunal to reopen one of its decisions if new and relevant evidence comes to light that existed but, for whatever reason, was previously undiscoverable by the exercise of reasonable diligence.³

[8] I am satisfied that the family doctor's February 13, 2015 and March 9, 2015 clinical notes are new material facts. They were in existence at the time of the initial hearing and were not readily accessible. They could reasonably be expected to have affected the outcome of that hearing.

[9] In early 2017, Dr. Khan provided his office notes from 2012 to Service Canada at the request of the Minister. He accidentally failed to include copies of his notes from February 23 and March 9, 2015. The Claimant's lawyers did not realize that these notes were not in the appeal file until they reviewed the reasons for decision. They noticed that there was no mention of the February 23 and March 9, 2015 office visits in the summary of Dr. Khan's clinical notes in the decision. After reviewing a copy of the Dr. Khan's clinical notes that had been sent to them for the Claimant's personal injury litigation, they realized that they were not in the appeal file.

² Section 66(1)(b) of the Department of Employment and Social Development Act

³ *R.B. v Minister of Employment and Social Development and V.H.*, 2019 SST 29

[10] I am satisfied that it was reasonable for the Claimant's lawyers to have assumed that Dr. Khan had forwarded copies of all of his clinical notes to Service Canada for the period from 2012 to 2017. The standard is "reasonableness" not "perfection." Since the notes were not in the appeal file, they were not readily accessible for the hearing.

[11] The February 23, 2015 clinical note indicates that the Claimant was prescribed Voltaren for lower mechanical backache. The March 9, 2015 clinical note indicates chronic lower backache, and only temporary relief with Voltaren.⁴ This was within two weeks of the February 28, 2015 MQP and three months before the June 2015 motor vehicle accident.

[12] In his decision, the Tribunal Member summarized Dr. Khan's clinical notes. His findings included the following:

- The Claimant's chronic back pain was a result of her June 2015 motor vehicle accident, which was after her potential February 28, 2015 MQP date.⁵
- Much of the Claimant's chronic pain resulted from the June 2015 motor vehicle accident.⁶

[13] I am satisfied that the notes could reasonably be expected to have affected the results of the initial hearing. The missing clinical notes confirm that the Claimant was suffering from chronic back pain as of February 28, 2015, which was several months before the June 2015 accident. The existence and extent of the Claimant's back pain before that accident was a significant issue before the Tribunal. The missing office notes are relevant to that issue.

[14] I find that the Claimant has satisfied the new facts test.

Eligibility for CPP disability pension

[15] My finding that the notes could reasonably be expected to have affected the results of the decision does not mean that they would necessarily have done so. Since I have found that the Applicant has established new facts, I must determine if her disability was severe and prolonged on or before February 28, 2015.

⁴ RA1-18

⁵ Page 5 of decision.

⁶ Paragraph 12 of decision

[16] A qualifying disability must be severe and prolonged.⁷ The Claimant's disability is severe if it causes her to be incapable regularly of pursuing any substantially gainful occupation. Her disability is prolonged if it is likely to be long continued and of indefinite duration.

[17] However, the Claimant is required to prove that it was more likely than not that she became disabled by the end of her Minimum Qualifying Period (MQP), which is calculated based on her contributions to the CPP. Her MQP ended on December 31, 2014.⁸

[18] The Claimant had earnings of \$931 in 2015.⁹ This is below the minimum amount required to make valid contributions to the CPP. In this situation, the law allows for proration of the below minimum level of earnings to help the Claimant meet contributory requirements. If the Claimant was not disabled by December 31, 2014, she could use proration and qualify for the disability benefit if she became disabled between January 1 and February 28, 2015.

The Claimant's conditions

[19] In order to avoid unnecessary duplication I used the Claimant's oral evidence at the initial hearing as part of the evidence for this hearing. I gave the Claimant the opportunity to give additional oral evidence. She was content to rely on her initial evidence.

[20] At the initial hearing, the Claimant testified that she injured her left ankle and left elbow in the March 2012 workplace accident. She continued working on light duties for about two months, but her employer laid her off because light duties were no longer available. She was not able to go back to work after she injured her shoulders, back, and neck in the October 2012 motor vehicle accident. Dr. Khan prescribed medications and sent her for physiotherapy. In April 2013, Dr. Khan referred her to Dr. Kubba, a chronic pain specialist. Dr. Kubba gave her injections but her pain did not improve.

[21] She testified that she could not go back to her previous work as a X. She cannot bend, lift, or carry things. She cannot stand for more than 30 minutes. She cannot sit for more than an

⁷ Subsection 42(2) of the CPP

⁸ Record of Contributions: GD3-16

⁹ GD2-29

hour because of back pain. She has not looked for alternative work. When asked why not, she stated that the main reason she cannot work is her shoulder, back, and neck pain.

[22] The case law is clear that medical evidence is required to support a claim that a disability is severe.¹⁰

[23] The medical evidence confirms that the Claimant suffers from longstanding chronic pain and that she cannot return to her previous physically demanding work as a X. However, it does not establish that she lacked the capacity to pursue less physically demanding work at February 28, 2015.

[24] In April 2013, Dr. Kubba stated that the Claimant's whiplash injuries from the October 2012 motor vehicle accident were getting better with Lyrica and physiotherapy.¹¹ In his June 2016 initial CPP medical report, Dr. Khan diagnosed mechanical back pain, cervical pain, and bilateral shoulder pain. He also stated that she could not do heavy physical work because of her restricted range of back, neck, and shoulder motion. However, he did not state that she could not do less physically demanding work.¹²

[25] I must focus on the Claimant's condition as of February 28, 2015. The CPP is an insurance regime based on contributions. Under the CPP, the Claimant is only covered for conditions that became severe on or before her MQP. She is not covered for conditions that became severe afterwards

[26] Although she suffered from chronic pain as of February 28, 2015, the medical evidence establishes that her pain significantly increased after the June 2015 accident. In his June 2016 report, Dr. Khan stated that her pain had been worse since that accident. In June 2017, Dr. Kubba stated that her primary complaint was chronic back pain and the onset of that pain was the June 2015 accident.¹³ In October 2017, the Claimant told Dr. Vasdev, psychiatrist, that her shoulder and neck pain became worse after the June 2015 accident.¹⁴ In October 2017, Dr. Papaneja,

¹⁰ *Villani* 2001 FCA 248; *Warren*, 2008 FCA 377

¹¹ GD2-123

¹² GD2-111 to 114

¹³ GD2-87

¹⁴ GD5-4

rheumatologist, stated that the Claimant had been having mid-to-lower back pain after the motor vehicle accident in June 2015 and that her neck/shoulder pain from the October 2012 accident had improved.¹⁵

[27] There are no clinical office notes from Dr. Khan relating to back, neck, or shoulder pain between November 2012 and March 2014. The next clinical office note relating to this is not until February 23, 2015, when Dr. Khan prescribed Voltaren. The clinical notes indicate only mild symptoms that were treated conservatively, with significantly increased pain following the June 2015 motor vehicle accident.

[28] The most significant excerpts relating to back, shoulder, and chronic pain from Dr. Khan's clinical notes from October 2012 to the end of July 2015 including those that were missing in the initial appeal file are set out below:¹⁶

- October 22, 2012: MVA rear ended, neck pain
- November 8, 2012: pain in shoulders, back of neck
- November 29, 2012: pain in all injured areas, still unable to work
- March 26, 2014: mild osteoarthritis changes, shoulder joint arthralgia, referred for physiotherapy
- February 23, 2015: Voltaren for lower mechanical backache
- March 9, 2015: chronic lower backache, good relief with Voltaren but only temporary
- March 12, 2015: x-rays of lumbar spine, nothing significant
- May 25, 2015: pain in left ankle, low back since five days, no history of injury, no known rheumatic condition
- May 28, 2015: chronic lower backache, now radiated to lower limbs
- June 2, 2015: motor vehicle accident yesterday, complaint of pain in shoulders, back of neck, neck pain, shoulder strain

¹⁵ GD5-61

¹⁶ GD2-50-70 & RA1-17

- June 11, 2015: pain neck, both shoulders, lower back
- July 20, 2015: doing physiotherapy for second week, pain worsens with activity and work at home
- November 5, 2015: chronic lower backache
- November 24, 2015: chronic lower backache since after the accident,
- November 26, 2015: known to have mid backache, cervical and bilateral shoulder pain, condition aggravated following the accident, not able to continue heavy physical work

[29] The Claimant states that she also suffers from depression and anxiety. There is, however, no medical evidence relating to this until she was referred to Dr. Vasdev in October 2017, which was more than two years after she last qualified for CPP disability. She did not follow up with Dr. Vasdev and she is not taking any medications for depression or anxiety.

[30] I am satisfied that because of her chronic pain, the Claimant cannot return to physically demanding work. Although her condition deteriorated because of the June 2015 accident, this is not relevant to whether her disability was severe at February 28, 2015. The Claimant has the burden of proof, and the medical evidence does not establish that she lacked the capacity to pursue less physically demanding work as of that date.

The Claimant has failed to establish that she lacked the regular capacity to pursue substantially gainful employment by February 28, 2015

[31] In addition to showing a serious health problem, where there is evidence of work capacity, the Claimant must establish she has made efforts to find and keep employment that were unsuccessful because of her health.¹⁷

[32] I recognize that the Claimant suffers from chronic pain and feels she is unable to work. However, it is not sufficient for chronic pain to exist; the pain must be such as to prevent her from regularly pursuing a substantially gainful occupation.¹⁸

¹⁷ *Inclima* 2003 FCA 117

¹⁸ *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). This decision is not binding but I find it persuasive.

[33] Since the Claimant had some capacity to work, she is obligated to show that she has made efforts to obtain and maintain employment that were unsuccessful because of her medical condition.¹⁹

[34] The Claimant acknowledged that she made no efforts to pursue alternative employment.

[35] I must assesses 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.²⁰

[36] The Claimant was only 52 years old at February 28, 2015. She was 49 years old when she last worked. Although English is not her first language and she usually communicates in Punjabi, she is able to speak, read, and write in English. Her level of English language proficiency does not pose a major barrier to her employability at many substantially gainful occupations. She has a university degree in India so she likely has the capacity to upgrade her education, her English language proficiency, and her transferable skills.

[37] I recognize that the Claimant’s employment in Canada has been limited to physical work, and that she experiences some barriers to obtaining employment in a real world context. However, I am not satisfied that her barriers are such, that she was not employable at light non-physically demanding work.²¹

[38] The Claimant has failed to establish that it is more likely than not that she suffers from a severe disability in accordance with the CPP requirements.

Prolonged

[39] Since the Claimant has failed to establish a severe disability, I do not need to make a determination on the severe criteria.

¹⁹ *Yantzi v Attorney General Canada* 2014 FCA 193, para 5; *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41.

²⁰ *Villani* 2001 FCA 248

²¹ *Z.D. v Minister of Employment and Social Development*, 2018 SST 953, paras 43 to 50. Although this decision is not binding, I find it persuasive.

CONCLUSION

[40] Although the Claimant has established new facts, she is not eligible for a CPP disability pension.

[41] The application is dismissed.

Raymond Raphael
Member, General Division - Income Security