Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. F. v Minister of Employment and Social Development*, 2019 SST 1676

Tribunal File Number: GP-19-406

BETWEEN:

G. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Claimant represented by: Rajiv Haté

Videoconference hearing on: September 5, 2019

Date of decision: October 6, 2019

Canada

DECISION

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

OVERVIEW

[2] The Claimant is a 46-year-old woman who last worked in 2012. At that time she was working as a call centre agent for X. She applied for disability benefits in April 2018 and in her application she reported that she is unable to work because of carpal tunnel syndrome (CTS), knee, back and shoulder pain, tennis elbow, urinary incontinence, plantar fasciitis, depression, anxiety, panic attacks, sleep difficulties and fatigue. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for CPP disability benefits, 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). Although the Claimant last contributed to the CPP in 2013, she meets the contributory requirements at the time of this hearing because she had a child in 2013 and is able to remove the years 2014 to 2019 from her contributory period.

PRELIMINARY MATTERS

[4] During the hearing, the Claimant's representative asked for permission to submit a report after the hearing. Specifically, he asked for permission to submit a report from Dr. Wan, rheumatologist. He explained that the Claimant was scheduled to see Dr. Wan on Saturday (September 7) and that they are hoping to obtain a report from that consultation. The Claimant's representative also said that he had made efforts to obtain a report from Dr. Wan before the hearing (as the Claimant has been seeing Dr. Wan for a couple of years) but he had been unsuccessful.

[5] I asked the Claimant and her representative if they were comfortable proceeding with the hearing despite not having a report from Dr. Wan, and they said they were comfortable proceeding. They explained that they simply wanted another opportunity to obtain a report from

that practitioner. They thought that once Dr. Wan learned that the hearing had been held, he might be more forthcoming with a report.

[6] I told the Claimant and her representative that I would allow them a period of 20 days after the hearing to submit a report from Dr. Wan.

[7] The Claimant did not submit a report from Dr. Wan within the 20 days. In the absence of a post-hearing document and in the absence of a request for an extension of the 20-day deadline, I proceeded to render my decision.

ISSUE(S)

[8] A Tribunal has previously considered the Claimant's eligibility for CPP disability benefits, and so I must decide whether the principle of *res judicata* applies to that Tribunal decision.

[9] If the principle of *res judicata* applies, I must decide whether the Claimant's disability became severe and prolonged between the date of her first Tribunal hearing and the date of this hearing.

ANALYSIS

Does Res Judicata Apply?

[10] The Claimant has applied for CPP disability benefits three times. She applied in February 2009[1], October 2010[2], and April 2018. The Claimant appealed the denials of her first two applications to the Office of the Commissioner of Review Tribunals (OCRT)[3]. However, only the Claimant's second appeal to the OCRT resulted in a hearing and that is because the Claimant withdrew her first appeal.

[1] Page GD2-674
[2] Page GD2-356
[3] In 2013, the OCRT was replaced by the Social Security Tribunal.

[11] The Claimant's Review Tribunal hearing was held on June 20, 2012 and, following that hearing, the Review Tribunal determined that the Claimant was not eligible for disability benefits because her disability was not severe[4].

[12] The 2012 decision of the Review Tribunal is relevant because of a legal principle known as *res judicata*.

[13] Generally speaking, *res judicata* means that, once a dispute has been finally decided, it cannot be litigated again. The doctrine is motivated in part by public policy concerns and is intended to advance the interests of justice. The Supreme Court of Canada has explained the public policy concerns this way[5]:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry…An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[14] The doctrine of *res judicata* can apply to administrative tribunals[6]. For it to apply, three preconditions must be met:

(i) The issue in the two proceedings must be the same;

(ii) The decision which is said to give rise to *res judicata* must be a final decision; and

(iii) The parties in the two proceedings must be the same.

[15] I find these three preconditions are met.

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[4] Pages GD2-265 to GD2-271
[5] *Danyluk* v. *Ainsworth Technologies Inc*., 2001 SCC 44
[6] *Danlyuk supra* and *Belo-Alves v. Canada (A.G.)*, 2014 FC 1100

[16] First, the issue decided by the Review Tribunal in June 2012 was whether the Claimant had a severe and prolonged disability. That is the same question that has been raised in this appeal.

[17] Second, the decision of the Review Tribunal in June 2012 is final. The finality of that decision is confirmed by section 84 of the CPP (as it read in 2012)[7].

[18] Third, the parties in the two proceedings are the same. I note that the Respondent's name has changed since 2012, but the change in name is inconsequential because, in substance, the Respondent is the same.

[19] The law says that even when the three preconditions for *res judicata* are met, I must consider whether the application of the doctrine results in an injustice. In this regard, the Supreme Court of Canada has set out a non-exhaustive list of relevant factors that can be considered when determining whether the circumstances are appropriate for the strict application of *res judicata*. These factors are:

- The wording of the statute pursuant to which the first decision was made;
- The purpose of the legislation;
- The availability of an appeal;
- The safeguards of the administrative decision-maker;
- The circumstances giving rise to the prior administrative proceeding; and
- Potential injustice.

[20] The Claimant and her representative submitted that it would be an injustice to apply *res judicata* because the Claimant was not represented at her hearing in June 2012. The Claimant told me that she was aware that she could have a representative, but she was unable to afford

[7] In 2012, subsection 84(1) of the CPP stated that "…the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the Federal Courts Act, as the case may be, is final and binding for all purposes of this Act."

one. She also said that she had a lot going on in her life and so she was unable to look into what representation services might have been available to her. She said she was unprepared for the hearing in June 2012 and that she did not understand a lot of the terminology that was used.

[21] Viewing the circumstances as a whole, I do not agree that applying *res judicata* in this particular case results in an injustice.

[22] First, the Claimant had plenty of notice about her June 2012 hearing date. In January 2012, she spoke with a Scheduling Agent with the Tribunal Office and she confirmed her availability for a hearing on June 20, 2012[8].

[23] Second, I do not believe that the Claimant did not understand a lot of what was said or explained to her during the June 2012 hearing. I say this based upon a combination of factors, including:

- The Claimant is well educated and has a university education[9].

- The Review Tribunal did not make any mention in its decision of the Claimant appearing confused or being unable to understand what was required of her.

- From January 2012 (when the Claimant confirmed her availability for a hearing in June 2012) through to May 2012 (the month before her hearing), the Claimant continued to submit evidence in support of her appeal[10], thus demonstrating some understanding of what was expected of her.

- At the time of the Claimant's first appeal to the OCRT in 2010, the Claimant was represented by a lawyer. It is reasonable for me to infer from that representation that the lawyer likely explained, at least in a general way, the nature of the appeals process and the case to meet.

[8] Page GD2-277

[9] The Claimant told me she has a university degree in equity and cultural studies. Her appeal file also shows that she has a university diploma in computer programs (page GD2-247).

[10] Pages GD2-400 to GD2-428

[24] Third, if at the time of the June 2012 hearing, the Claimant felt that she was not ready to proceed, either because she was unrepresented or had insufficient time to prepare (or both), then it was open to her to ask the Review Tribunal for an adjournment or, at the very least, bring her concerns to the attention of the Review Tribunal. There is no indication she did either. I asked the Claimant if she raised her concerns with the Review Tribunal, and she said she cannot remember. The Review Tribunal's decision makes no mention of the Claimant raising any such concerns.

[25] Fourth, at the time the Claimant received the Review Tribunal's decision, there was an appeal that was available to her. In other words, if the Claimant was not satisfied with the Review Tribunal's decision (or the process leading up to the making of that decision) then she could have applied for leave (permission) to appeal that decision to the Pension Appeals Board. There is no indication she did this.

[26] Because I have found that the doctrine of *res judicata* applies to the decision of June 2012, I must decide whether the Claimant's disability became severe and prolonged at any point after June 20, 2012.

Severe Disability

[27] Disability is defined as a physical or mental disability that is severe and prolonged[11]. A disability is severe if it renders a person incapable regularly of pursuing any substantially gainful occupation.

Why the Claimant Stopped Work

[28] The Claimant testified that in 2012 she worked as a customer service representative in a call centre for X. She said she stopped work in 2012 because she was in a lot of pain, including pain from the CTS. She said she had been diagnosed with CTS before 2012 but it got worse while she was working at X because her job required a lot of typing.

[29] The evidence is inconsistent as to the dates the Claimant worked in 2012. However, despite the inconsistencies, it appears the Claimant was working in and around the time of her

[11] Paragraph 42(2)(a) of the *Canada Pension Plan*

Review Tribunal hearing in June 2012. In 2016, the Claimant told an orthopedic surgeon (Dr. Brian Alpert) that she stopped working in approximately June 2012[12]. In her CPP Questionnaire of April 2018, the Claimant reported that she worked from February 13, 2012 to April 1, 2012[13]. At this hearing, the Claimant said she worked at X in early 2012 for "maybe 3-4 months".

[30] At her Review Tribunal hearing in June 2012, the Claimant was asked if she had worked since September 2010 (being the date identified in her 2010 CPP Questionnaire as her last day of work), and the Claimant told the Review Tribunal she had not worked since then. The Review Tribunal appears not to have believed her, and stated that they did not consider the Claimant to be a reliable witness.

The Carpal Tunnel Syndrome (CTS)

[31] The Claimant's family physician (Dr. Clive Snape) completed a CPP medical report in September 2017 and in that report he listed just one diagnosis, namely carpal tunnel syndrome[14]. It makes sense then, for me to begin my analysis with the CTS.

[32] The CTS is a condition that was considered by the Review Tribunal in 2012. In its decision, the Review Tribunal wrote that the Claimant had reported in her CPP Questionnaire that she stopped working in September 2010 because of a lay-off, and that she had been unable to work since that date because the CTS made it difficult for her to type.

[33] Although the CTS was considered by the Review Tribunal and was found not to result in a severe disability, the CTS is nonetheless a relevant consideration in this appeal. This is because the CTS worsened after June 2012. In March 2013, Dr. Michael Angel (neurologist) reported that testing showed the CTS had worsened significantly since previous testing of August 2012[15].

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[12] Pages GD2-91 and GD2-102 to GD2-103
[13] Page GD2-247
[14] In the section of the medical report asking about physical findings and functional limitations, Dr. Snape mentioned cervical spine, lumbar spine and right knee disability. However, under the Diagnosis section of the report, he only mentioned the carpal tunnel syndrome (pages GD2-82 to GD2-85).
[15] Pages GD2-213 to GD2-214

[34] Despite the worsening of the CTS, I am unable to find that the CTS results in a severe disability. This is because there is a recommended treatment modality (surgery) that has not been followed.

[35] To be successful in obtaining disability benefits, a claimant must not only provide evidence concerning the nature of their disability, but must also provide evidence of their efforts to manage their medical condition[16]. Such efforts are generally known as a “duty to mitigate”. The Federal Court of Appeal has made it clear that claimants are not entitled to CPP disability benefits unless the duty to mitigate has been satisfied[17]. When claimants refuse to undergo a recommended treatment that is likely to affect their disability status, claimants must then establish that their refusal was reasonable[18].

[36] In April 2013, Dr. Krajden (surgeon) reported that the Claimant’s CTS was severe in both hands and that she needs surgery. He noted that the Claimant was pregnant (24 weeks) and so he told her to contact his office in the next few months so that the surgery could be scheduled once the Claimant had been able to arrange for child care[19].

[37] During the hearing, the Claimant told me that she has not had the surgery done. She provided a number of reasons for this. She said that the surgeon told her that the surgery is optional (as opposed to recommended) and that if she has the surgery it is possible that she might lose all of the functions in her hands. She also said that a physiotherapist told her that she would require extensive physiotherapy after the surgery and this is a barrier because she cannot afford the physiotherapy nor the time to attend the physiotherapy sessions as she has 7 children to care for.

[38] I do not accept the Claimant’s explanations as reasonable. First, my reading of the medical reports is that surgery has indeed been recommended. In April 2013, Dr. Krajden said

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[16] *Klabouch* v. *MSD*, 2008 FCA 33
[17] *Sharma* v. *Canada (Attorney General)*, 2018 FCA 48
[18] *Lalonde* v. *Minister of Human Resources Development*, 2002 FCA 211
[19] Page GD2-207

“This patient does require surgical intervention as her symptoms are severe and progressive”[20]. In May 2014, Dr. Snape said he “strongly urged” the Claimant to get the surgery done[21].

[39] Second, I see nothing in the evidence to indicate that the risks of surgery are high or disproportionate to the benefits of having surgery. In fact, there appears to be a significant risk in not having the surgery. For example, Dr. Snape told the Claimant that if the pressure on the nerves is not alleviated then she could lose function[22].

[40] Third, I do not have any medical evidence supporting the Claimant’s testimony that the post-surgery physiotherapy would be extensive or that she would have to bear the cost of most of that therapy. If the physiotherapy was a legitimate reason for not pursuing the surgery then I would have expected to see this mentioned in the medical reports. It is not. Instead, most of the medical reports suggest that the Claimant’s main concern was her need to look after her children[23]. I acknowledge that the Claimant has seven children, but I do not believe this is a credible reason for not having the surgery. Dr. Snape told the Claimant in May 2014 that she could have one hand done at a time so that she could still look after her children[24]. I also note that the Claimant’s need to care for her children did not prevent her from having another surgical procedure done in October 2013[25]. Finally, I note that the Claimant appears to have significant help. Her eldest son (Anthony) testified at the hearing, and he said that, since 2012, he and one of his sisters have done most of the household chores and caregiving responsibilities. There may also be a common-law partner (or former common-law partner) in the picture. I know the Claimant has repeatedly represented herself to be a single parent, but there is *some* evidence to suggest that this may not always have been the case since 2012. For example, the Claimant appears to have told Dr. Alpert in 2016 that she was living with her spouse[26]. When I asked the

[20] Page GD2-207
[21] Page GD2-146
[22] Page GD2-146
[23] See, for example, pages GD2-93, GD2-118 and GD2-146
[24] Page GD2-146
[25] Page GD2-184
[26] Page GD2-96

Claimant about this at the hearing, she said they are "on again off again" because she needs help with the kids.

[41] The Claimant also testified that she has been told that because her CTS is chronic, the surgery may not be successful. I acknowledge that, at the request of her representative, the Claimant saw an orthopedic surgeon in 2016 (Dr. Alpert) and that Dr. Alpert said that, because of the chronicity and severity of the worsening CTS condition, the surgery would likely result in only very limited musculoskeletal pain improvement and/or very limited improved physical function.[27] However, I do not find this argument helpful to the Claimant's case because the reason her CTS has become chronic is because the Claimant did not have the surgery when it was recommended.

[42] Having found that the Claimant's refusal to have the surgery was not reasonable, I must now consider the impact her refusal has on her disability status. In my view, the impact is significant. The CTS is a main component of the Claimant's disability status. As I mentioned previously, the CTS is the only diagnosis listed in Dr. Snape's CPP medical report of 2017. I can only surmise from the medical evidence that the Claimant's hand surgeon would not have recommended the surgery unless he thought it would improve the Claimant's pain and functionality. In April 2013, he said he discussed the long-term functional results with the Claimant[28].

The Claimant's Other Pain Conditions

[43] The second condition the Claimant spoke of during the hearing is the pain condition (i.e. pain in various parts of her body that does not also include the pain from the CTS). The Claimant said that she has lower and upper back pain with sciatica, neck pain, shoulder pain, right knee pain, and head-to-toe joint pain.

[44] The medical evidence shows that the Claimant's pain-related diagnoses include moderate right knee strain with evidence of medial compartment osteoarthritis and articular cartilage

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[27] Page GD2-108
[28] Page GD2-207

damage; moderate-to-severe chronic muscle-ligament strain and zygapophyseal joint pain in the cervical spine, trapezii and lumbar spine; and fibromyalgia[29].

[45] I accept that the Claimant has pain. However, I am unable to find that the pain condition results in a severe disability. I say this for several reasons (that I have considered in combination):

a. The Claimant's pain condition was known to the Review Tribunal of June 2012 and that Tribunal found that the Claimant's disability was not severe. Moreover, the pain levels that were in evidence before the Review Tribunal in 2012 were not that much different from the pain levels the Claimant described to Dr. Alpert in 2016. For example, a Functional Capacity Evaluation of 2008 (which was in evidence at the time of the June 2012 hearing) noted that the Claimant reported her pain levels as: neck pain (5/10), left shoulder pain (4/10), right shoulder pain (8/10), upper back pain (4/10), and lower back pain (7/10)[30]. In 2016, the Claimant described pain in the wrists/hands, right knee and neck and upper and lower back. She rated the neck and back pain as 5-6/10[31]. As for her right shoulder, the Claimant told Dr. Pilowsky in January 2016 that her right shoulder pain was severe[32]. However, when the Claimant saw Dr. Alpert, just a few months later, she made little to no mention of the right shoulder pain[33].

b. When the Claimant saw Dr. Alpert in 2016, she told Dr. Alpert that she was taking several medications for the pain, including Naproxen (3 times a day), Extra Strength Tylenol (up to 3 tablets a day), and Extra Strength Advil when needed. However, at the hearing the Claimant testified that she does not take much medication. She said she takes Meloxicam every 7 or 8 days or maybe once every 1.5 weeks and she takes Cymbalta maybe once a week and she takes Tylenol "sometimes" and sometimes she switches between Tylenol and Advil. She also said she has a cream for her knee. (She could not

[29] Page GD2-109
[30] Page GD2-455
[31] Page GD2-94
[32] Page GD2-119
[33] Pages GD2-94 and GD2-95

remember the name of the cream but she said it is very expensive ($200.00)). This evidence leaves me to question whether the Claimant might not experience improved pain levels and functionality with more regular use of medication. I know the Claimant testified that she does not take the Cymbalta more often because it affects her stomach, but I do not have any evidence indicating that the Claimant has raised this concern with her physicians in an effort to see if perhaps a dosage change or alternate medication might resolve this issue. The Claimant also testified that she is unable to afford the fibromyalgia medications. However, when I asked her if she has looked into any programs that might help with the cost (such as the Trillium Drug Program) she said she has not.

c. I have very little medical evidence about the fibromyalgia. Dr. Wan wrote a short prescription note in December 2018 indicating that he was referring the Claimant to physiotherapy for fibromyalgia[34], but other than that I have little information as to the severity of the condition, Dr. Wan's full treatment recommendations or Dr. Wan's thoughts on whether this condition might improve with treatment.

d. The Claimant told Dr. Alpert in 2016 that she stopped working around June 2012 because of the CTS but also because of increasing musculoskeletal pain in her neck, shoulder blades and lower back[35]. However, the notes from the Claimant's family physician make very little mention of the Claimant being affected by pain (other than the CTS) while working. In October 2012 (shortly after the Claimant stopped work), Dr. Snape completed a medical form for the Claimant's insurer and in that form he listed just one diagnosis (carpal tunnel) and the only functional limitations he noted were hand-related (affecting her ability to hold objects, grip, type and write). He did not, for example, identify any restrictions with respect to the Claimant's ability to sit, stand, walk, bend, or reach[36]. Dr. Snape mentioned back pain in a clinic note of May 2013 but he attributed the pain to the Claimant's then pregnancy[37]. In 2017, Dr. Snape completed the CPP medical report and although he only identified one diagnosis (the CTS) in the

[34] Page GD2-11
[35] Page GD2-88
[36] Pages GD2-235 to GD2-237
[37] Page GD2-151

diagnosis section of the report, he did mention (in the section of the report that asks about relevant physical findings and functional limitations) that the Claimant has a cervical spine, lumbar spine and right knee disability. However, he did not elaborate on what he meant by "disability" and did not identify any functional limitations.

e. I have credibility concerns. As I mentioned previously, the Claimant told the Review Tribunal in 2012 that she had not worked since September 2010. This was clearly not true as she was either working at the time of that hearing or had just recently stopped. I asked the Claimant about this, but she was not able to provide an explanation. She simply said she does not know why she would have told the Review Tribunal that she had not been working. While this is troubling, my credibility concerns extend further. For example, there are inconsistencies between the Claimant's evidence and the evidence I heard from her son. For example, in her 2009 and 2010 applications, the Claimant reported pain-related limitations with respect to her ability to sit, stand and walk. In 2010, for example, she said she could only sit or stand for one hour and could walk for only half an hour[38]. (During the hearing, the Claimant told me that her knee troubles really started after she stopped work in 2012[39] and so I infer from this that the Claimant's reported limitations in her previous applications with sitting, standing and walking related to pain that was not from her knee). At the hearing, the Claimant's son testified that things changed for his mother (disability-wise) in 2012. He said that before 2012 (when the Claimant last worked), the Claimant was "good". He said she was not 100%, but she could get things done and he was only helping with about 20 to 30% of the work. When I asked the Claimant's son how it is that he is able to remember the year 2012 so clearly, he said he remembers it well because he was just finishing college. As another example of an inconsistency, the medical evidence indicates that one of the main reasons the Claimant did not want to have the CTS surgery is because of her need to care for her children. However, at the hearing, when I asked the Claimant's son about his mother's ability to care for her newborn baby in 2013, he said that he and his sister did most of the work. I

[38] Page GD2-537
[39] This is generally consistent with a report on file from September 2013 which indicates that the Claimant had been having right knee pain for the last few years but it was intermittent (page GD2-192).

am not saying that I preferred the Claimant's son's evidence over that of the Claimant. I am saying that the inconsistencies make it difficult for me to know what to believe.

f. The Claimant had surgery on her right knee in October 2013[40]. However, although the Claimant saw a specialist after that surgery (she said she saw a specialist last year), I do not have a report from that consultation and so I am unable to assess, from a medical perspective, how helpful the surgery was or whether the specialist identified any residual functional limitations.

The Urinary Incontinence

[46] The third condition the Claimant spoke of during the hearing is urinary incontinence. She said this problem started after the birth of her 5th or 6th child and results in urgency and leakage. She explained that, as between the urgency and the leakage, the urgency is the most significant concern. It causes her to lose sleep at night because she needs to use the washroom frequently. It also affects her socially because people notice that she uses the bathroom often.

[47] The medical evidence shows that the Claimant saw a couple of specialists in 2013 and 2014. In July 2014, Dr. Mohseni (urologist) reported that a cystoscopy was within normal limits, but that the Claimant had a large fibroid pushing against her bladder. He described the stress urinary incontinence as "mild" and recommended medication. The Claimant testified that she tried the medication but it did not really help. When I asked the Claimant if she has returned to see a specialist since 2014, she said she has not and she acknowledged that this is something she should do. She said she also has not spoken to Dr. Snape about this condition in recent years, but she has spoken to a doctor at a walk-in clinic. That doctor apparently told her to continue taking the medication. When I asked the Claimant when she last took a prescribed medication for the incontinence she said she could not remember. All of this evidence (the "mild" nature of the condition as diagnosed by Dr. Mohseni, the absence of recent discussions about this condition with Dr. Snape, and the lack of follow up with the specialist) is not supportive of this condition

[40] Pages GD2-184 to GD2-185

preventing the Claimant from work, particularly since Dr. Mohseni said he would see the Claimant again if needed.

The Mental Health Conditions

[48] The Claimant testified that she is depressed and has emotional stress. She explained that she has three children with disabilities and she finds everything to be very difficult.

[49] In 2016, the Claimant underwent a Psycho-Vocational Assessment at the request of her representative. The assessment was carried out by Dr. Judith Pilowsky (psychologist) and Tania Risbridger (vocational assessor). Dr. Pilowsky diagnosed somatic symptom disorder with predominant pain (persistent, severe); chronic clinical symptoms of anxiety and panic attacks; and chronic depressive disorder (moderate to severe).

[50] I accept that there is a mental health component to the Claimant's disability, but I have difficulty finding that the mental health conditions, either alone or in combination with the Claimant's other health conditions, result in a severe disability.

[51] First, I do not know the extent to which the mental health diagnoses are connected to the CTS and so I am left to wonder if the Claimant's mental health conditions would be of the same severity if she had followed through with the surgery for the CTS.

[52] Second, although Dr. Pilowsky did not offer much hope for improvement or recovery, she did nonetheless recommend treatment, including long-term psychotherapeutic and psychiatric treatment as well as a possible psychopharmacological regimen. To date, it does not appear that all treatment recommendations have been optimized. I asked the Claimant if she has seen a psychiatrist and she said she has not. She also said she has not had any discussions about this with Dr. Snape, despite the fact that she is pretty sure Dr. Snape was provided with a copy of Dr. Pilowsky's report. With respect to medication, the Claimant says she takes an antidepressant (Cymbalta) but not regularly. As for counselling, the evidence shows that the Claimant began to see a counsellor in June 2017 (about 1.5 years after Dr. Pilowsky's assessment) and that she sees the counsellor about every 6-8 weeks. The counsellor is Ms. Reid-Scaletta, a family support worker with a program that focuses on providing counselling to individuals who support a family member or friend with a mental health issue. Ms. Reid-Scaletta reported in May 2019 that the

Claimant has made gains in the program and she recommended that the Claimant continue to increase self care and coping strategies to assist with the effective management of the stresses in her life[41]. There is nothing in Ms. Reid-Scaletta's report to indicate that the Claimant's own mental health conditions result in a severe disability.

[53] Third, Dr. Pilowsky was clearly sympathetic to the Claimant's description of her disability. She wrote, for example[42]:

> This is a woman who coped for many years with a great deal of responsibility and hardship, but after the birth of her fifth child, appears to have deteriorated physically and emotionally, to the point of a virtual emotional collapse. Ms. G. F. feels alone in her turmoil, and has not been offered the psychotherapeutic support that she desperately requires.
>
> …I find it remarkable that she was able to suppress an emotional collapse and remain working until 2012, as it is clear that her circumstances were overwhelming, she lacked adequate support, and her functionality was dwindling for some time.

[54] I do not believe that the Claimant's circumstances in 2012 were as dire as what was described to Dr. Pilowsky. The medical evidence shows that in and around the time the Claimant stopped working in 2012, she was expanding her family. She learned she was pregnant in April 2012[43]. Although that pregnancy appears to have resulted in miscarriage, she became pregnant again shortly thereafter and had her son in May 2013.

[55] Fourth, it is difficult for me to reconcile Dr. Pilowsky's report with the fact that the Claimant's long-time family physician did not identify any mental health diagnoses in his CPP medical report of June 2017 (a report that was completed about 1.5 years after Dr. Pilowsky's assessment and around the same time that the Claimant started seeing Ms. Reid-Scaletta). I do not know, for example, whether the mental health conditions are not mentioned because the Claimant's mental health improved after January 2016 or whether the Claimant did not discuss these difficulties with Dr. Snape or whether the Claimant was resistant to treatment (or a combination of all of this).

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[41] Page GD4-3
[42] Page GD2-128
[43] Page GD2-243

The Totality of the Claimant's Conditions Do Not Result in a Severe Disability

[56] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment[44].

[57] When I consider all of the Claimant's conditions in their totality, I am unable to find that the Claimant's disability became severe after June 20, 2012. I acknowledge that Dr. Alpert concluded that the Claimant has been disabled from performing any type of gainful employment on a continual basis since about June 2012. However, as I mentioned previously, a Review Tribunal has already concluded that the Claimant was not disabled as of June 20, 2012. Moreover, in saying that the Claimant's musculoskeletal impairments are severe, Dr. Alpert included the Claimant's CTS. I know this condition worsened after June 2012 but the Claimant did not pursue the recommended surgery and so I assign little weight to this condition.

[58] I have considered the Claimant's sleep disturbances and resultant fatigue. The Claimant testified that the reason she has difficulty sleeping is because of the urinary incontinence, the stiffness and numbness in her hands, and general pain (particularly in her right shoulder). Two of the reasons for the sleep disturbances relate to medical conditions for which treatment has not been optimized (urinary incontinence and CTS), and one reason relates to a pain condition for which the Claimant takes very little medication. I, therefore, do not consider the Claimant's sleep difficulties and fatigue to be a significant component of her disability.

[59] The mental health conditions have either improved (as evidenced by the absence of any mention of these conditions in Dr. Snape's 2017 medical report) or have treatment options that have not yet been optimized. The remaining conditions, including the knee pain, the plantar fasciitis[45] and tennis elbow, are conditions for which medical reports (about the seriousness of the condition including any functional limitations) are lacking.

[60] In reaching my conclusion, I have also considered the Claimant's age, education, language proficiency and past work and life experience. These are relevant considerations

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[44] *Bungay v. Canada (A.G.)*, 2011 FCA 47
[45] Page GD3-20

because a Claimant's disability must be assessed in a real world context[46]. The Claimant's personal characteristics are not such that employment would be unrealistic for her. She is relatively young (almost 47 years of age), is proficient in at least one of Canada's two official languages, is well educated (with a Master's degree in sociology[47] and a diploma in computers[48]), and has years of work experience in sedentary office settings.

Prolonged Disability

[61] Given my finding that the Claimant's disability is not severe, it is not necessary for me to assess whether it is prolonged.

CONCLUSION

[62] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security

[46] *Villani* v. *Canada (A.G.)*, 2001 FCA 248
[47] Page GD2-116
[48] Page GD2-247