



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. J. v Minister of Employment and Social Development*, 2020 SST 333

Tribunal File Number: GP-19-1481

BETWEEN:

K. J.

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: February 6, 2020

Date of decision: February 7, 2020

DECISION

[1] K. J. is the Claimant. I have decided that she is entitled to a Canada Pension Plan (CPP) disability pension. Payments start June 2017. Following are the reasons why I made this decision.

OVERVIEW

[2] The Claimant was 40 years old in September 2014 when she was involved in a car accident. She had long-term injuries including lower back pain. She stopped working as a supervisor of housekeeping because of the accident. She says she is unable to return to that job or any other because of her fatigue and low back pain. She applied for a CPP disability pension in May 2018. The Minister denied her application. She appealed to the Social Security Tribunal (referred to as the 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. These 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, 2016.

[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] For most people “severe” means something that is “really bad” or “really significant”. Similarly, most people think of prolonged as something that takes a long time. But, the words “severe” and “prolonged” have special meanings in this area of law. This can be confusing. I will explain what the terms severe and prolonged mean when it comes to CPP Disability Pension decisions.

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.

What Does Severe Mean?

[6] The law says that if a person is unable regularly to pursue any substantially gainful occupation because of their disability then they are severely³ disabled.

[7] Severely disabled is not about the nature of a disability. Severely disabled is about whether the disability impacts a person's capacity to work. Severely disabled is not about the nature of a disability. Severely disabled is about whether the disability impacts a person's capacity to work. If a disability is so severe that it prevents a person regularly from working at a job, then they are severely disabled. It is important to note that this does not mean a former job or a job with a comparable wage. This means any job that is substantially gainful, even if the pay is lower than previous jobs.

What Does Prolonged Mean?

[8] Prolonged means that a disability is "long continued" and is "of indefinite duration" or "is likely to result in death"⁴. For a disability to be "prolonged" the disability must be almost permanent in nature. So if a person has a reasonable chance to regain the ability to work at some time in the near future then their disability is not prolonged.

[9] The Minister acknowledges the Claimant's symptoms. The Minister believes the evidence does not show these conditions are severe. This means that the Claimant would have capacity to work. That is why her application was refused.

[10] The Tribunal's file indicates that the Claimant presently has numerous conditions. To decide if her disability is severe, I have to consider how the Claimant feels about the impact these conditions have on her capacity to work. 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. If the Claimant is able to regularly do some kind of work that is substantially gainful⁵, then she is not entitled to a disability pension.

³ The legal definition of "severe" is found at s 42(2)(a)(i) of the *Canada Pension Plan*

⁴ The legal definition of "prolonged" is found at s 42(2)(a)(ii) of the *Canada Pension Plan*.

⁵ This is explained in a Federal Court of Appeal decision called *Klabouch v Canada (MSD)*, 2008 FCA 33

The Claimant has an honest belief that she is severely disabled

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

- Since seeing her specialist, her symptoms have worsened.
- She does not sleep well and is in pain every day, which makes it difficult for her to sit or stand for periods of time.
- After her car accident in 2014, she tried to return to work in 2015. She had to stop because of pain and swelling. She then tried physiotherapy and injections in her lower back as well as medication. But, she had side effects from the medication or only had short term relief.
- She lives on her own but her mom, neighbor, daughter and best friend help every day. She needs help with daily activities of living including housekeeping, laundry and grocery shopping. Her neighbor mows her lawn.
- To manage her pain, uses Voltaren on her hip and lower back. She also uses a TENS unit. She alternates between heat and cold packs. She also uses Tylenol 1. She tries to get up and do things, but then she is sore after a few minutes and needs to rest. She said her day is mainly spent looking for pain relief.
- She can sit between 10 minutes on an average day before having to get up and move around. She explained that she has to change positions and move around throughout the entire day.

[12] 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.

[13] 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 support that the Claimant is disabled

i) medical conditions prior to 2014

[14] Dr. Black provided a history of the Claimant's medical conditions. He said she had:

- recurrent urinary tract infections dating back to the mid 1980's.
- tendonitis of her left wrist starting in 1993
- hyperacidity syndrome first diagnosed in 1994
- irritable bowel syndrome diagnosed first in 1994
- intertrigo off and on since 1996
- tendonitis of her right elbow diagnosed in 1998 and
- reactive airway disease diagnosed in 2009

[15] 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.⁶ However, the Claimant worked for many years after the diagnosis of these conditions. There is no evidence that either individually or collectively, they prevented the Claimant from working. Also, the Claimant said that the reason she could not work was because of injuries resulting from a car accident in 2014.

ii) medical conditions after September 2014

[16] The Minister has submitted that the medical evidence does not support a conclusion that the Claimant's health conditions would have made her incapable of working on or before December 31, 2016. I disagree.

[17] Dr. Black said the Claimant's main disabling conditions were facet joint arthritis, chronic low back pain, fibromyalgia of her spine and sacroiliitis. He noted that her chronic facet joint arthritis and sacroiliitis both started after a motor vehicle accident in September 2014. Since that time, she had complained of chronic back pain. She had numerous treatments without significant improvement. The treatments included:

⁶ *Bungay v Canada (AG)*, 2011 FCA 47

- followed by physical medicine,
- physiotherapy,
- nerve root blocks,
- trigger point injections,
- SI joint and facet joint injections, and
- numerous oral medications

[18] It was Dr. Black's opinion that the Claimant was unable to continue active, gainful employment and was totally disabled and unable to work.⁷

[19] The Claimant also saw Dr. Koshi in February 2016.⁸ She told him that driving, sitting, bending, standing and walking all worsen her pain. She said that she could sit for 1-2 hours, drive for 2 hours and walk for 30 minutes before the pain forced her to stop. The Claimant explained that this is not consecutive and consistent and not without rests and changes in positions. To manage her pain she uses heat, rests and lays down.

[20] The Claimant testified that she can sit between 10 minutes on an average day before having to get up and move around. She explained that she has to change positions and move around throughout the entire day. The functional abilities and limitations described to me by the Claimant are essentially the same as they were in 2016, in May 2018 and at the hearing in February 2020. Despite years of various treatments, the medical evidence does not show that there has been improvement in the Claimant's function ability.

[21] The Claimant previously had three injections in the SI joint area, which relieved her pain by 80% but only provided temporary relief of a few days. Dr. Koshi confirmed that the Claimant had facet joint pain. He said this type of pain did not respond to physiotherapy and he recommended that the Claimant stop her physiotherapy treatment. The Claimant said it was not helping anyway. Dr. Koshi noted that the Claimant had tried numerous medications, which had not provided any relief. In February 2016, she was using Cymbalta, which was not helping and had side effects. It was Dr. Koshi's opinion that Cymbalta was not helpful for pain but used for depression. He noted that the Claimant was not depressed at that time and he recommended that

⁷ This information from Dr. Black is at GD 2-41 and GD 3-2

⁸ Dr. Koshi's report is at GD 2-103

she stop using Cymbalta. He recommended diagnostic facet joint injections, as this was the only scientific proven way to make a diagnosis of facet joint pain.

[22] He said if the diagnosis of facet joint pain was confirmed, the Claimant could benefit from radiofrequency denervation of facet joints. Dr. Koshi said that 90% pain relief for at least 1 year could be possible. It was his opinion that this was the only treatment that was effective with facet joint pain. No other treatment came even close to giving such long and significant pain relief. The Claimant had the diagnostic facet joint injections on March 30, 2016.⁹ The first part of the diagnostic facet joint injections support that she had symptoms of facet joint pain.¹⁰ Therefore, she had the radiofrequency denervation done on April 27, 2016.¹¹ On May 17, 2016, the Claimant told Dr. Koshi that she had achieved at least 75% pain relief. She was very happy with the results. Dr. Koshi said that it was likely the effectiveness of the injection would last 1 ½ years.¹² The Claimant testified that this pain relief was short lived. She had returned to Dr. Koshi in January 2017 and explained that she had felt well for 2-3 months.¹³ However, by October 2016, she was “back to square one”. In February 2017, Dr. Koshi performed a second radiofrequency denervation.¹⁴ On March 21, 2017, the Claimant told Dr. Koshi that she did not have any relief at all from the procedure this time.¹⁵ Dr. Koshi recommended no further injections be done.

[23] Since approximately 2017, the Claimant has had injections provided by her family doctor every three months. She said that these injections provide some pain relief for 3-5 days. Then her pain is back to its baseline.

[24] Dr. Boucher examined the Claimant in September 2017.¹⁶ He also agreed with Dr. Black that the Claimant had sustained numerous injuries from the car accident in 2014. Specifically,

- Lumbosacral myofascial strain.
- Cervical myofascial neck strain (WAD II Injury).

⁹ The report begins at GD 2-93

¹⁰ Dr. Koshi’s letter is at GD 2-92

¹¹ The report is at GD 2-89

¹² Dr. Koshi’s letter is at GD 2-84

¹³ Dr. Koshi’s report is at GD 2-82

¹⁴ This report begins at GD 2-79

¹⁵ Dr. Koshi’s report is at GD 2-75

¹⁶ Dr. Boucher’s report begins at GD 2-45 – GD 2-56

- Chronic daily headache-cervicogenic.
- Mixed anxiety and depressive disorder.
- Pain disorder associated with both psychological factors and a general medical condition
- insomnia.
- Left trochanter bursitis.

[25] Dr. Boucher explained that the Claimant's collision-related impairments left her with diminished functional tolerances in relation to activities that place strain throughout the neck and entire back. While she could complete most daily tasks, she did so with varying degrees of pain, which interfered with her ability to complete routine activities of daily living and social and recreational activities. This was the same in February 2016 as noted by Dr. Kochi. Dr. Boucher said that she the Claimant had difficulty with respect to the following types of activities:

- Repetitive or prolonged activities at or above shoulder height.
- Activities that place strain on the neck and entire back, including but not limited to lifting, bending,
- twisting, pushing and pulling, and actions that place the arms away from the body.
- Activities that include repetitive and sustained postures.

[26] It was Dr. Boucher's professional medical opinion, after reviewing the relevant documentation, performing a history and physical examination and reviewing the mechanism of the collision, that all of the Claimant's reported disabilities and functional limitations were entirely consistent with her diagnosis and were directly attributable to the subject motor vehicle collision.

[27] There is no suggestion from any physician or examiner that the Claimant is exaggerating her symptoms. Dr. Boucher said there was a high degree of concordance with respect to the functional outcome measures that the Claimant completed for the assessment. Her self-described reporting of physical pain on the Brief Pain Inventory was consistent with her global results on the Pain Disability Questionnaire. A psychological assessment was conducted utilizing the Beck Depression Inventory II and the Beck Anxiety Inventory. The outcome of these two focused psychological assessments was compatible with her results on the Pain Disability Questionnaire and her self-reports. The degree of concordance between these outcome measures, the

Claimant's self-reported complaints, and Dr. Boucher's examination and interview gave significant credence to her presentation.

[28] The measure of whether a disability is "severe" is not whether Claimant suffers from severe impairments, but whether the disability prevents her from earning a living. It is not a question of whether the Claimant is unable to perform her regular job, but rather the Claimant's inability to perform any substantially gainful work¹⁷.

[29] It was Dr. Boucher's medical opinion that her collision-related injuries had limited the Claimant's employment opportunities, and left her at a competitive disadvantage relative to her peers. He said that she would have to be selective as to the type of work that she performed and for how long she performed it. I do not believe that Dr. Boucher is saying the Claimant has work capacity. He explains that he would recommend a vocational assessment to see what sort of employment, **if any**, might be suitable for the Claimant going forward, given her education, training and experience, and the limitations imposed by her injuries being pain, as well as functional and psychological limitations. He further says that the nature of the Claimant's injuries, the longstanding duration of her problems, and her current presentation, which included physical and emotional factors, were all negative long-term prognostic indicators.

[30] In October 2017, the Claimant participated in a two day Functional Capacity Evaluation (FCE).¹⁸ Based on FCE test results, the Occupational therapist recommended that the Claimant had a workday tolerance of 8 hours per day, 5 days per week, at the sedentary level with the accommodation of changing positions periodically from sitting to standing throughout the workday. The Claimant testified that after the FCE, she was unable to do any activity. She lay in bed and cried because the pain was so intense. She said it took 3 days for her pain to return to his baseline level.

[31] I was not persuaded that the FCE was evidence of work capacity in a real world. As well, there were several contradictions in the FCE. The occupational therapist said that the Claimant gave maximal effort during both days of testing. She also said that functional limitations noted were consistent with physical impairments and diagnoses. For example, decreased elevated work

¹⁷ *Klabouch v Canada (AG)*, 2008 FCA 33

¹⁸ The FCE begins at GD 2-57

tolerance was consistent with limited active range of motion and strength of the right shoulder as well as the diagnosis of partial rotator cuff tears (bilaterally).

[32] She said that subjective reports of function were relatively consistent with functional abilities observed during FCE testing. The Claimant has previously said that she is unable to do light housekeeping tasks, needs to take breaks, and is in constant pain. On a typical day, she estimated her tolerance for sitting, standing, and walking to be 30 to 40, 45, and 20 minutes (respectively). If the function ability as described by the Claimant was consistent with the function abilities observed by the examiner, it does not seem logical that the Claimant had capacity to work 8 hours, 5 days a week as said by the examiner. Further, the Occupational therapist says that these reports of function are consistent with her functional abilities shown during the FCE. Yet, the examiner concludes that the Claimant has no limitations with sitting or standing and has the capacity to work full-time, 5 days a week, 8 hours a day. This does not seem logical. In addition, the occupational therapist said that on the visual analog scale ranging from 0 to 10 whereby 0 means no pain and 10 means pain as bad as it can be, the Claimant rated her average level of pain on a day-to-day basis to be 6/10. She rated her pain level at the beginning of Day 1 to be 6/10, increasing to 8/10 by the end of the FCE testing. She reported similar pain levels both at the beginning and end of Day 2 testing, as compared to Day 1.

[33] The Occupational therapist also said that the Claimant experienced increased pain from her left hip after 2 minutes of walking. It again seems unlikely based on the increased level of her pain each day, that she would have capacity to work 8 hours a day, 5 days a week at a sedentary level. For the above reasons, I did not give much weight to the FCE.

The Claimant is incapable regularly of pursuing any gainful employment

[34] I considered whether the Claimant was incapable regularly of pursuing gainful employment. Predictability is the essence of regularity within the CPP definition of disability.¹⁹ I considered that the Claimant is in constant pain. Despite this, her pain has flare-ups. She cannot predict from day to day what level her pain will be and what task, if any, she can do on a day.

¹⁹ Explained in the Federal Court of Appeal decision called *Atkinson v. Canada (A.G.)*, 2014 FCA 187

She does not plan things in advance and testified that she cannot commit to things because of the uncertainty of her pain levels.

[35] The unpredictability of her pain and its incapacitating effect on the Claimant has prevented her from returning to any type of work. It remains the opinion of the family doctor that the Claimant is unable to do any work.

[36] Given the medical evidence and the testimony of the Claimant, I find that she would not be a reliable employee in the context of the real world of work and is incapable regularly of working at any occupation.

[37] Further, any employer would have to make unreasonable accommodations. She can only sit for a few minutes and then needs to move about. She can only do a small task for a few minutes and then needs to rest. This was the case in February 2016 and continues today. She would need to have the flexibility to miss work without giving any advance notice and leave work when her pain flared. The definition of severe addresses the capacity of a claimant to work in a meaningful and competitive work environment. An employer should not have to put up with occasional absences from work and make accommodations by creating a flexible work environment to enable the individual to have a job that he or she would not otherwise be able to perform in a normal competitive work environment.²⁰

The Claimant's personal circumstances would not prevent her from working

[38] I must assess the severe part of the test in a real world context²¹. This means that I consider the Claimant's personal circumstances such as age, level of education, language proficiency, and past work and life experience in combination with the health condition and resulting limitations.²²

[39] The Claimant was 42 years old at the time of her MQP. She has a grade 8 education and upgrading to a grade 12 education. She has some very basic computer skills, but does not use a computer for daily use. The Claimant has essentially no transferable skills. She has worked in

²⁰ *L.F. v. MHRSD* (October 5, 2010), CP 26809 (PAB)

²¹ *Villani v Canada (AG)*, 2001 FCA 248

²² *Bungay v Canada (AG)*, 2011 FCA 47

physically demanding occupations throughout her life. These included working as a clam digger, a landscaper and in housekeeping. These are physically demanding and she no longer has the physical capacity for this type of work. The Claimant is young with many potential years of employment. I considered whether she would be able to retrain and return to more suitable employment. I considered that she is in constant pain and this pain prevents her from a restorative sleep. She is always fatigued. Further, she is unable to sit or stand or walk for more than a few minutes. She is not able to perform many of her daily activities and relies on the assistance of others.

[40] Based on her functional limitations, abilities and the restrictions as well as the accommodations, which would be required from an employer, I was not persuaded that the Claimant would have work capacity or the capacity to retrain.

[41] As I mention above, a person needs to have a disability that is severe and prolonged to get benefits. I conclude that the Claimant's disability is severe. This is because she does not have work capacity.

The Claimant's disability is prolonged

[42] I do not find any evidence that would reasonably lead me to assume that the Claimant's condition will be resolving in the foreseeable future. The Claimant continues to experience chronic pain and her function ability has not increased. In fact, based on her testimony, it has decreased. There are no further treatment plans for the Claimant's condition.

[43] Dr. Boucher said that even three years after the car accident, the Claimant presented with pain, as well as functional and psychological limitations. The nature of her injuries, the longstanding duration of her problems, and her current presentation, which includes physical and emotional factors, are all negative long-term prognostic indicators. While most soft tissue injuries generally resolve within a matter of months, there is a subset of individuals who take significantly longer to recover, with a certain percentage that never fully recover.

[44] After reviewing the relevant documentation, performing a history and physical examination and reviewing the mechanism of the collision, it was Dr. Boucher's professional opinion that the Claimant's overall prognosis for complete recovery from her collision-related

injuries was guarded. He said that while his treatment recommendations were likely to provide some benefit, it was his opinion that the Claimant would have an incomplete resolution of her symptomatology. He did not expect a curative response. He said that the treatment recommendations were important to support her and more importantly, to help avoid further deterioration in her condition. Dr. Boucher said that there were likely no interventions that would lead to complete control or resolution of her symptoms, including her pain.²³

[45] At the time of the hearing, the Claimant had been unable to work for more than 5 years and her condition has not improved. Her condition is already long-continued, and it is likely to be of indefinite duration.

CONCLUSION

[46] The Claimant had a severe and prolonged disability in September 2014. However, to calculate the pension payment date, the Claimant cannot be deemed disabled more than fifteen months before the Minister received the disability pension application²⁴. The Minister received the application in May 2018 so the deemed date of disability is February 2017. Payments start June 2017, four months after the deemed date of disability²⁵.

[47] The Claimant does have a severe and prolonged disability. The result is that her appeal is allowed.

Connie Dyck
Member, General Division - Income Security

²³ Dr. Boucher's report is at GD 2-54

²⁴ Section 42(2)(b) of the *Canada Pension Plan*

²⁵ Section 69 of the *Canada Pension Plan*