



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. D. v Minister of Employment and Social Development*, 2020 SST 334

Tribunal File Number: GP-19-501

BETWEEN:

N. D.

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 25, 2020

Date of decision: February 26, 2020

DECISION

[1] N. D. is the Claimant. I have decided that she is entitled to a Canada Pension Plan (CPP) disability pension. Payments start April 2016. Following are the reasons why I made this decision.

OVERVIEW

[2] The Claimant was 32 years old when she stopped working in June 2015 as a light rail transit, track maintenance safety personnel. She says she is no longer able to work because of anxiety, panic attacks and her physical pain including leg swelling. The Claimant applied for a CPP disability pension in March 2017. The Minister denied her application. She appealed the decision to the Social Security Tribunal (called 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, 2017.

[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.

What Does Severe Mean?

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.

[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 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.

The Claimant has an honest belief that she is severely disabled

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

[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:

- She experiences frequent panic attacks.
- She suffers debilitating anxiety and fear. It greatly increases when she is away from home or around people.
- She has trouble with concentration and making decisions. She becomes overwhelmed.
- She struggles with self-harm and cutting.
- She experiences frequent thoughts and feelings of suicide and homicide or hurting people.
- She suffers with severe pain in her back, legs and both feet. She also has abdominal pain due to irregular digestive functions. These symptoms are continuous and every 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 not support that the Claimant is disabled because of her physical conditions

Physical condition

[14] Dr. Alfaki (family doctor) said that he had been treating the Claimant since July 2015.⁶ He listed the Claimant's diagnoses to include degenerative disc disease, plantar fasciitis and small intestinal bacterial overgrowth. She also suffered from legs and feet swelling with pain.

- I) **plantar fasciitis affecting both feet** - Dr. Alfaki said that this condition was chronic and caused heel pain that was aggravated mainly by walking and standing for long hours. It also caused limitation in her movement range. She tried different treatments for this condition. However, all of them were unsuccessful.
- II) **small intestinal bacterial overgrowth (SIBO)** - Dr. Alfaki said the Claimant was suffering from recurrent abdominal pain, which associated with abnormal bowel movement. He explained this was a bacterial infection that affected the intestine and caused abdominal pain. She had multiple treatments for this condition; however, there was not much improvement in her symptoms. Dr. Alfaki explained that the Claimant's abdominal pain occurred on daily basis, affecting her mobility and limiting her function. He expected this condition to be chronic.
- III) **legs and feet swelling with pain** – Dr. Alfaki said that the Claimant was still under investigation for this condition by different specialists. A diagnosis is still unknown. He explained that the Claimant had recurrent back pain, legs pain and feet pain. It was associated with massive swelling in her feet, which extended up to her legs and knees. Her condition affects her daily movement and function. She was not able to walk, stand, bend or sit for long hours because of her lower limbs pain and swelling. Her appointments with specialists were still pending.

In was Dr. Alfaki's opinion that the Claimant was not medically or physically fit to perform any kind of work at the time he wrote his report, which was February 2019. He felt that her return to work would likely result in exacerbation of her current medical conditions.

[15] While Dr. Alfaki is supportive of the Claimant's CPP disability application, the information provided by him in February 2019 does not support that the Claimant's conditions, individually or collectively, are severe and prolonged. I must consider the Claimant's capacity to work and not just the diagnosis of her disease to determine whether her disability meets the

⁶ Dr. Alfaki's report is at GD 1-3

definition of severe.⁷ It is the functional effect of the Claimant's health condition on her ability to work that is key, not the nature of name of the health condition.⁸

[16] Dr. Alfaki described the Claimant's functional abilities. He said:

- a. not able to walk, stand, bend or sit for long hours because of her lower limbs pain and swelling;
- b. and abdominal pain occurred on daily basis, affecting her mobility and limiting her function;
- c. heel pain that was aggravated mainly by walking and standing for long hours. It also caused limitation in her movement range

[17] The limitations outlined by Dr. Alfaki would not prevent the Claimant from suitable sedentary work. This means they do not meet the criteria of 'severe' as explained above. Also, it was Dr. Alfaki's opinion that the Claimant was unable to work "at this time" (February 2019). This is more than one year after the Claimant's MQP (December 2017). This does not support that she was unable to work by December 31, 2017. Dr. Alfaki noted that the treatments and investigations were ongoing and her return to work "at this time" would likely result in exacerbation of her current medical condition. However, this evidence does not support that her condition is prolonged.

The medical evidence does support that the Claimant is disabled because of her mental health conditions

Mental Health Condition

[18] Dr. Astorga (psychiatrist) has been treating the Claimant since 2015 for psychotherapy. The Claimant has a diagnosis of Borderline Personality Disorder, Generalized Anxiety Disorder,

⁷ *Klabouch v Canada (MSD)*, 2008 FCA 33

⁸ *Ferreira v Canada (AG)*, 2013 FCA 81

Panic Disorder and Opioid Dependence, on maintenance therapy.⁹ The Claimant was being followed by Dr. Aulakh for maintenance therapy for her Opioid Dependence and by her family doctor, Dr. F. Alfaki for pharmacotherapy of her psychiatric disorder. Dr. Astorga followed the Claimant individually and in skills group in a Dialectical Behavioral Therapy (DBT) Program. Dr. Astorga explained that DBT is the treatment with the most evidence for the treatment of Borderline Personality Disorder.

[19] The Claimant participated in the following psychotherapy groups:

1. Mental Health Day Program - November 2015 to January 2016
2. Advance Skills Group - April 2016 to September 2016
3. Dialectical Behavioral Therapy - February 2017 to the present (April 2018)

Dr. Astorga explained that patients are usually in the DBT program for 1 year. However, the Claimant's participation in the DBT Program was extended because she continued to experience severe symptoms of anxiety and Borderline Personality Disorder including panic attacks, excessive worrying, mood instability and recurrent self-harm behaviors. She worked hard in the group and has experienced some improvement. However, her recovery was impeded by the fact that her psychotropic medications were at sub-therapeutic levels. The reason for the sub-therapeutic levels was because of the significant side effects the Claimant experienced. These included significant sedation, gastrointestinal bloating and discomfort and weight gain leading to chronic leg pain.¹⁰ Dr. Astorga said that despite being extremely drowsy, the Claimant persevered and continued to attend therapy sessions. She noted that the Claimant had tried Paroxetine, Escitalopram, Lorazepam and Clonazepam. At the time of the letter (April 2018), she was using Venlafaxine (Effexor). However, because of the above noted side effects, she was at a

⁹ Dr. Astorga's report of April 2018 is at GD 6-7

¹⁰ Specific side effects to specific medication is listed in the clinic notes of the family doctor in 2017 at GD 6-28 – GD 6-40

lower dose so she continued to experience severe anxiety in the form of panic attacks whenever she leaves the house.

[20] In November 2018, the Claimant's condition remained essentially the same.¹¹ She continued to experience severe anxiety symptoms that made it extremely difficult for her to get out of the house mentally and physically. This limited her ability to access the care that she required. Dr. Astorga said that the benefit the Claimant obtained from Dialectical Behavioral Therapy was limited by her uncontrolled anxiety symptoms. At this point, the Claimant had been in psychotherapy for three years with limited benefit. Her anxiety continued to remain uncontrolled and she was still unable to leave her home because of anxiety symptoms. The limited benefit she did receive during three years of psychotherapy would still not provide her with capacity to work. It remained Dr. Astorga's opinion in November 2018, that the Claimant's return to work would likely result in exacerbation of her current symptoms.¹²

[21] The Claimant explained what she stopped working in June 2015 because of symptoms of anxiety and panic attacks. She said that she was suicidal. She told me that she continues to struggle with the same things she did in 2015. These were anxiety, panic and suicidal thoughts. She said that her condition had worsened since she made her CPP disability application in March 2017. She is no longer able to live on her own. She lives with her grandmother who provides her with emotional support, help with her activities of daily living and helps her deal with her suicidal tendencies. She explained that since 2016, she has lived with her grandmother. She said that she is never alone. She is either in the physically in the presence of her grandmother or she is on the phone speaking with her sister, friend or grandmother, if she has to leave the house. Essentially, she is always accompanied by someone.

[22] She explained that she only leaves the house for appointments. She has no social life. Her home (grandmother's residence) is her "safe place". Despite this, her panic and anxiety will still flare up when she is at home.

[23] Both the medical evidence and the Claimant's testimony consistently show that the Claimant's anxiety and panic attacks have not improved since she stopped working because of

¹¹ Dr. Astorga's report of November 2018 is at GD 1-5

¹² Dr. Astorga's report is at GD 1-5

them in June 2015. The Claimant began therapy in 2015 and this has continued to the present day because her symptoms continued with only minimal improvement.

[24] I disagree with the Minister's argument that the Claimant's condition was not severe at her MQP. This submission was based on the family practice progress notes of April through July 2018 of the family doctor. Dr. Alfaki said that the Claimant looked well and her condition was stable. However, a "stable" condition does not mean "recovery" or "improved". Dr. Alfaki also said in February 2019 that the Claimant was following up continuously with Dr. Astorga for her mental health condition. For this reason, I placed more weight on the evidence of Dr. Astorga, whom she saw on a regular basis for at least 3 years. Dr. Astorga specializes in mental health and provided in depth long-term treatment, which the family physician did not.

[25] In March 2017,¹³ Dr. Astorga said that the Claimant's symptoms of anxiety and panic impaired her concentration and limited her ability to socialize. More importantly, the panic attacks disabled her. At the time of the report, the Claimant had just started DBT psychotherapy. For this reason, Dr. Astorga was "guardedly optimistic" about the Claimant's condition. However, in subsequent reports, after the Claimant had participated in DBT, his opinion was that the Claimant did not have capacity to work. He also expected that patients are usually in the DBT program for 1 year. However, the Claimant's participation in the DBT Program was extended because she continued to experience severe symptoms of anxiety and Borderline Personality Disorder including panic attacks, excessive worrying, mood instability and recurrent self-harm behaviors. So, while Dr. Astorga was guardedly optimistic in March 2017, the DBT was not as successful as he had hoped.

Treatments have not provided the Claimant's function ability to allow her to return to any type of employment

[26] The Claimant began psychotherapy treatments with Dr. Astorga (psychiatrist) in November 2015. She had consistent follow-up and treatment with her until September 2019. She also participated in numerous therapy groups including a Mental Health Day Program from November 2015 to January 2016; an advance Skills Group from April 2016 to September 2016;

¹³ The medical report of March 2017 of Dr. Astorga is at GD 2-51

and Dialectical Behavioral Therapy from February 2017 to about November 2018. Dr. Astorga moved in September 2019, and while the Claimant was waiting for the Alberta Hospital counselling program, she was being treated by the Primary Care Network Mental Health. Despite more than 4 years of individual and group therapy, the Claimant's symptoms and limitations have remained essentially the same and it remains the opinion of her caregivers that she is unable to work in any capacity.

[27] Treatment with numerous medications has also been tried. Unfortunately, the Claimant has numerous side effects from medication and therefore, the dosage levels are sub-therapeutic. Despite having side effects, the Claimant has been compliant with all treatment and medication recommendations from her physicians.

The Claimant's personal circumstances

[28] I must assess the severe part of the test in a real world context¹⁴. 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.¹⁵

[29] The Claimant was only 34 at her MQP. She has a grade 12 education, and some training in work related courses pertaining to safety. She is English-speaking. She has some experience as a safety and track maintainer and safety advisor and equipment operator. None of these factors would be a barrier to employment. However, her daily panic attacks and anxiety would make her an unreliable employee. Her inability to concentrate or be unaccompanied would make it difficult to participate in the workforce or to learn new skills.

[30] The evidence supports that she continues to have debilitating symptoms of panic and anxiety. This is why she stopped work in 2015 and these limitations continue today. In 2015, she was reprimanded for her absences from work. Her panic and anxiety forced her to call in sick on numerous occasions. She is incapable regularly of working since 2015. Because of her mental

¹⁴ *Villani v Canada (AG)*, 2001 FCA 248

¹⁵ *Bungay v Canada (AG)*, 2011 FCA 47

health condition, I am satisfied that the Claimant did not have the regular capacity to pursue any substantially gainful occupation before her MQP of December 31, 2017.

[31] I find that despite her personal attributes, the Claimant is unable to work in any capacity. Therefore, I find that in the “real world” it is unlikely that the Claimant is capable of maintaining employment.

The Claimant’s mental health condition is prolonged

[32] The Claimant has suffered from very serious mental health issues since at least 2015. In March 2017, her psychiatrist stated that her prognosis was guarded. The evidence of Dr. Astorga and the Claimant’s communications with the Tribunal after that date suggest that her condition did not improve. The opinion of her physicians remains that she is unable to return to any type of work. The Claimant’s disability is both long continued and of indefinite duration. I therefore find that it is prolonged.

CONCLUSION

[33] The Claimant had a severe and prolonged disability in June 2015 when she was no longer able to work. However, to calculate the pension payment date, the Claimant cannot be deemed disabled more than fifteen months before the Minister received the disability pension application¹⁶. The Minister received the application in March 2017 so the deemed date of disability is December 2015. Payments start April 2016, four months after the deemed date of disability¹⁷.

[34] The appeal is allowed.

Connie Dyck
Member, General Division - Income Security

¹⁶ Section 42(2)(b) of the *Canada Pension Plan*

¹⁷ Section 69 of the *Canada Pension Plan*