



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *H. K. v Minister of Employment and Social Development*, 2020 SST 600

Tribunal File Number: GP-19-1634

BETWEEN:

H. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: John Eberhard

Teleconference hearing on: March 2, 2020

Date of decision: March 3, 2020

DECISION

[1] H. K. is the Claimant in this case. She applied for a Canada Pension Plan (CPP) disability pension.¹ The Minister of Employment and Social Development Canada (the Minister) denied the application. The Claimant appealed to the General Division of the Social Security Tribunal (SST).

[2] I have decided that the Claimant is not eligible for disability pension. This written decision explains why I am not allowing the appeal.

BACKGROUND

[3] The CPP law² says a Claimant is disabled only if she has a severe and prolonged mental or physical disability. The Claimant must meet both criteria to be entitled to a disability pension. The Claimant said during the hearing that she relies on physical impediments to satisfy the test for disability.

[4] The Minister received the Claimant's application for CPP disability benefits on October 10, 2018. She is 58 years old with a high school education and a nail technician certificate. H. K. described her main disabling conditions as depression, anxiety, body and wrist pain (previously broken wrists) and bad knees. She indicated she was owner of a nail and hair salon from 1985 to 2010. She stopped working due to an accident that injured her wrists. The Claimant indicated she felt she could no longer work as of August 2010. The family physician noted she fell and injured her wrists and was not able to continue doing esthetics as of that time. The physician diagnosed her with major depression (2018) with anxious features and wrist pain.

¹ The application was received on October 10, 2018

² Section 42(2) of the Plan

[5] The Claimant bears the onus of proving she suffers from a severe and prolonged disability prior to the expiration of her qualifying period. The Minister is not required to prove that a claimant is capable of working.

[6] The Minister takes the position that the evidence does not show any severe pathology or impairment that would have prevented her from performing suitable work within her limitations continuously since December 31, 2013.

[7] I conclude that the Claimant did not have a severe and prolonged disability as December 31, 2013. She is not entitled to a CPP disability pension.

ISSUES

[8] There are two issues in this appeal

- 1) Did the Claimant's major depression, anxiety, low mood and wrist pain result in her being incapable regularly of pursuing any substantially gainful occupation by December 31, 2013?
- 2) If so, was the Claimant's disability also long continued and of indefinite duration by that date?

ANALYSIS

What I must decide

[9] A person who applies for a disability pension has to meet the requirements set out in the law. First, you have to pay contributions into the CPP. You did this. The legal term for this is meeting the "minimum qualifying period (MQP)."³ Your MQP ended on December 31, 2013. The main question is whether you have proven that you suffered from a severe and prolonged disability by the expiry of your MQP, and continuously thereafter. If you have not done so, it is irrelevant that your condition deteriorated after your MQP. To prove a severe disability, there must be some medical evidence of

³ This term is found in s 44(1)(b) of the *Canada Pension Plan*.

incapacity. There are few medical documents from the period 2010 through 2013. I gave you the opportunity to seek additional evidence and send to the tribunal any documentation that might assist you in proving evidence of a disability between 2010 and 2013. You declined to have the matter put over to a future date to allow you to secure additional evidence.

[10] I have to look at your work capacity. It is not the diagnosis or the disease description that determines the severity of the disability under the *CPP*. The severity of the disability is not based on your inability to perform your regular job, but rather any substantially gainful occupation.

[11] The *CPP* defines disability as a physical or mental disability that is severe and prolonged.⁴ A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A prolonged disability is likely to be long continued and of indefinite duration.

[12] I have to decide if that is more likely than not that you qualify.⁵ This means, if you meet only one part of the test, you do not qualify for disability benefits. You have written that you have been sick since 2010.⁶ I am satisfied that you have had several medical issues as of that time:

- You attended a wedding in 2010. You slipped on a dance floor and fell. You suffered injuries to both wrists. The right wrist had a more significant injury than the left. You had fractures of both distal radii.⁷ You were treated with splints. The

⁴ Subparagraphs 42(2)(a)(i) and (ii)

⁵ This is a clear-language paraphrase of the legal requirement to decide “on a balance of probabilities.”

⁶ GD1- 6 and GD3- 20

⁷ The emergency department notes are found on page GD2-95 and 96

fractures were treated conservatively.⁸ Two casts were initially applied.⁹ You testified that you had an operation but there is no medical report on this.¹⁰

- In October 2013, you went to the emergency room following a right foot injury.¹¹ You complained of right foot swelling and pain after you fell down three steps and twisted your foot. X-rays showed a minimally displaced fracture at the base of your fifth metatarsal (base of the small toe), which was managed conservatively.¹²

[13] Neither of these two medical events suggest a serious and permanent disability. I do know from your current family doctor that she made a recommendation to see a psychiatrist in 2018.¹³ You have more recently (2019) been suffering from Cirrhosis secondary to alcohol and hepatitis C which has affected your liver. Your recent diagnosis of breast cancer is now giving rise to treatment¹⁴ quite different from the kind of care you needed in 2010 through 2013. Your medical condition is much more serious now. You also had a hernia in 2018 for which you were briefly hospitalized.

[14] The Minister asserts that no severe physical or psychological findings were identified as of your MQP. It is necessary for you to provide evidence that the medical condition was severely disabling. You also have to make reasonable efforts to cope with the condition when last qualified. The Minister maintains that you have not met this onus. I agree. You have not proven that you were without work capacity in 2013.

Was your disability both severe and prolonged?

The Facts

⁸ GD2-124

⁹ GD2-103

¹⁰ There are ambulatory Care – Fracture clinic notes in the file starting at page GD2-88 through GD2-92. Percocet is mentioned but the clinical notes themselves are difficult to read and there is no interpretation or functionality opinions expressed.

¹¹ GD2-97

¹² GD2-137

¹³ GD2-166

¹⁴ A cyst was removed from the breast in 2018.

[15] Dr. Darlene Lower is your Family Physician. She filed a report in September 2018. The physician listed your diagnoses as major depression with anxious features and wrist pain. The family physician noted you fell and injured your wrists in 2010. You received physiotherapy.

[16] In her report she wrote that you subsequently developed symptoms of depression including difficulty sleeping, low motivation and energy, poor concentration, organization and planning, as well as difficulties with performing activities of daily living (self-care tasks that require more complex thinking skills such as managing finances, shopping, meal preparation and home maintenance). Dr. Lower stated you briefly attended sessions with a social worker, but did not continue with this. There is an undated report in the evidence¹⁵ from a clinical social worker (Ms. Paula Lipkus) who provided 10 individual therapy sessions. She reported levels of depression and anxiety due to family conflict. There is no conclusion reached as to how this might affect your work capacity. Your physician recommended you see a psychiatrist in 2018. There is no report from any psychologist or psychiatrist that has been brought to my attention.

[17] The family physician went on to say you were unable to afford antidepressant medication. You testified that you did not take these because you were afraid of medications. She concluded you have had longstanding depression and were unwilling and/or unable to pursue meaningful treatment. The family physician added you had a difficult household and social situation with a confrontational adult son. She remarked you are not very functional at the time of her report and opined your prognosis was poor.

¹⁵ GD3-4

[18] If you are able to regularly do some kind of work that is substantially gainful, then you are not entitled to a disability pension.¹⁶ To decide on this, I have to look at the effect of your medical condition on your capacity to work.¹⁷

Physical Impediments and functionality Issues

[19] You underwent a functional ability assessment in 2018.¹⁸ There is no indication of any comparable tests done before or at your MQP. You did testify that you became depressed after you hurt your wrists. You then developed anxiety and depression. You self-described your impediments in 2018 generally as “poor” and activities of daily living as good to poor.¹⁹

[20] Your family Doctor, Darlene Lower sent a letter dated April 29, 2019²⁰ in which she stated you had 2 main issues that were addressed in your application:

1. Bilateral wrist pain that affects your ability to work. She noted you are pursuing orthopaedic consultation and treatment (no reports on these); and,
2. Depression/anxiety as well as family and psychosocial stressors at home; motivation, mood and poor concentration. It was at this time, you started to address your mental health issues. You declined psychiatric assessment even though the therapy could help you recover her confidence and motivation according to your doctor.

[21] It is important that I direct my attention to the time when you last qualified for disability benefits. This was in 2013. The physical impediments at that time are both unsubstantiated and inclusive.

Mental Health Issues

¹⁶ This is explained in a Federal Court of Appeal decision called [Klabouch](#).

¹⁷ The Federal Court of Appeal explains this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

¹⁸ This self assessment is dated October 4, 2018 and

¹⁹ GD2-35 and 38

²⁰ GD2-83

[22] No physician or specialist substantiated your mental issues of 2013. You responded in the functional test to questions related to your behavioural and emotional problems.²¹

[23] In a Social Work Initial Consultation report dated December 17, 2015, you had been referred for individual counselling for symptoms of dysthymia.²² The report referred to your falls in 2010 and in 2013. Both injuries were minor. You quit work after your wrist injuries. You later attempted to find work but were unsuccessful. You tried to find work outside of esthetics. These attempts were not successful. You had a good experience with the Jewish Vocation Services but continued to struggle with finding work and said you were not sure why. You reported that you are not suicidal and “I love life”.²³ In addition, you reported that you did not have any physical symptoms associated with stress. You said you have never been depressed, but do feel defeated by life circumstances.²⁴ A treatment recommendation was to get additional social work counselling to discuss your stressors. There are no formal mental health worker reports or severe mental status impairments identified. You did two counselling sessions with the Physician’s social worker.

[24] Danuta Southgate, your counsellor, addressed your symptoms of dysthymia (mild chronic depression). You described feeling overwhelmed by many stressors experienced. Your primary stressors were your children and your finances. In fact, you supplied evidence of accumulated bills and the need to regularize your current financial challenges. Ms. Southgate noted you admitted to regularly using alcohol; however, you denied feeling depressed. You did attend further sessions with a social worker in 2019.

²¹ GD2-35 and 36

²² GD2-175 to 179

²³ GD2-171

²⁴ You made these statements to your counsellor as noted at page GD2-172.

[25] The evidence on depression and anxiety are inconclusive at this time. There is no helpful evidence from 2013 that clarifies the issue. I do find it relevant that you feel embarrassed when considering the possibility of working at a low paying job. You noted that you are well known in your community as having been a business owner in the past and that it would be embarrassing for other to see your working at a grocery store or restaurant, "it would ruin me". Unfortunately, that is not a test for benefits under the CPP.

[26] The question for me is what condition prevented you regularly from seeking work in December 2013. In recent years (after her MQP), it seems that physical impairments have persisted. Your mental health issues that may have been present in 2013 (at the MQP) are situational and not debilitating. These symptoms continue but I am satisfied that they did not rise to the level of a severe disability as of your MQP.

Steps taken to manage your health condition

[27] You must show that you have taken reasonable steps to manage your medical conditions. If you refuse treatment unreasonably, you may not be entitled to the disability pension (and the impact of the refused treatment is relevant in that analysis). You say that you refused medications like Percocet after your wrist and foot accidents due to concerns about becoming addicted. To the extent that this could be a refusal of treatment, I am satisfied that it is a reasonable one based on a legitimate concern for your health and well-being.

[28] Your doctor says that you have not been able to afford medications (i.e. selective serotonin reuptake inhibitors). You testified that anti-depressant medications were offered in 2013. You did not take them because you did not want to "mask" the problems. You stated you did not want to be on meds for the rest of your life so you did not take them. Even as late as 2019, you testified that you did not feel medications or a

psychiatric assessment would be helpful. You did briefly attend sessions with Dr. Lower's social worker. Your doctor said you did not continue this. There is no explanation. Even though your doctor, six years after your MQP noted your prognosis was poor with longstanding depression, you have been unwilling to pursue meaningful treatments that could very well enhance your functionality.

[29] I recognize that you have a social situation with a confrontational adult son. This issue could be helped with a focus on counselling and outside help. There is no further monitoring from an orthopaedic specialist related to any wrist pain and there were no indicated current or future treatments regarding your medical conditions in 2013. This tells me that you have not taken advantage of conventional medical treatments and recommendations and I draw an adverse inference from this because some of them would have the potential of bringing you back to a condition that could lead to employment. I do not find your resistance to these strategies as reasonable.

Was the Claimant's disability Severe?

[30] I have to look at whether your disability prevents you from earning a living. The question is not whether you are able to perform your regular job. I need to decide whether you can do **any** substantially gainful work.²⁵ This is called, "capacity to work." I cannot just look at the diagnosis.²⁶ The key is how your health affects daily functioning and capacity to work.²⁷

[31] Your recorded medical history begins in 2010 at an urgent care clinic. Your self-reported symptoms are provided in reports from your family doctor and mental health observations by your social worker. There is little follow-up evidence on how your wrists

²⁵ The Federal Court of Appeal explains this in a case called *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁶ This is explained by the Federal court of Appeal in a case called *Klabouch v Canada (Social Development)*, 2008 FCA 33.

²⁷ The Federal Court of Appeal explains this in a case called *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

affected your general health and work capacity. There are no specialist reports, vocational studies or independent functional ability studies. You have not proven that you had no work capacity in 2013.

Personal Factors to be considered

[32] You have a “severe” disability within the meaning of the CPP when they are incapable regularly of pursuing any substantially gainful occupation.²⁸ I find that this is not the case. I have to ask if you had residual work capacity at your MQP. To answer that question, the relevant factors are the nature of the health conditions and the corresponding functional limitations; the recommended treatments and any unreasonable refusal to pursue those treatments; and, your personal circumstances.²⁹ There is sparse independent relevant medical evidence after you quit work in 2010 that assists me in answering these questions. There are no relevant reports around the time of your MQP in 2013.

[33] I look at your background including age, level of education and past work and life experience. This is so I can get a realistic or “real world” picture of whether your disability is severe³⁰. I have to decide if you have residual capacity to work anywhere. You are 58 years old. However, you had earnings in 2017 and 2018. You worked on weekends from December 2017 until January 2018. You presented an Employer questionnaire from X dated July 2019. The company stated you just stopped reporting for work. You provided no explanation. Your title was: cook. You prepared meals for staff on weekends (breakfast, lunch and dinner) at a salary of \$390 weekly. You did the work part time. You wrote that the reason for part time work was that it was all the work that was available. It was a seasonal job running from October 15 to April 7 of each

²⁸ Canada Pension Plan, s 42(2)(a). 2019 SST 526 (CanLII)

²⁹ S.G. v. Minister of Employment and Social Development, 2017 CanLII 141823.

³⁰ In a decision called Villani, the Federal Court of Appeal explains how to understand the concept of a “severe” disability. (Villani v Canada (Attorney General), 2001 FCA 248).

winter season. Your work was described as, satisfactory. You did not require help from co-workers and had the ability to handle the demands of the job. There is no other explanation available to me to indicate why you did not continue with this work. It is up to you to prove that you have no work capacity. There is no report or evidence that you could not do this work because of your medical condition. I would just be guessing to conclude that you stopped working because of a qualifying disability.

CONCLUSIONS

[34] You applied for Canada Pension Plan Disability benefits using the Late Applicant Provision and last qualified in December 2013. In the medical report completed by your family physician dated September 7, 2018, it was noted that you treated for wrist pain and depression with anxious features. The physician notes the applicant's only treatment has consisted of past counselling sessions with a social worker and you do not require pain medication for your wrist pain. While this physician notes limitations affecting your activities of daily living and ability to work, these are not to a severity as to preclude all forms of suitable work, including part time sedentary employment. In addition, there is no indication your symptoms were significant enough to warrant aggressive intervention or require ongoing monitoring from a specialist. Moreover, in the telephone conversation on February 13, 2019 you denied any further orthopedic treatment for her wrists since 2010. The evidence does not support a severe medical condition that has prevented you from all work as of December 2013. I do acknowledge that you are now (2018 and 2019) diagnosed with serious medical issues. There is no evidence that these arise from or are a continuation of your conditions at the time you quit your job in 2010.

[35] In addition, you reported that you do not have any physical symptoms that you associate with stress. You do feel "defeated by life circumstances". I sympathize with you for circumstances over which you have no control. With no severe physical or

mental status impairments identified, the evidence does not support a severe medical condition that would have prevented you from performing some type of work since you last qualified in December 2013. Given this finding, it is not necessary to make a finding on the prolonged aspect of the case.

[36] I dismiss the appeal.

John Eberhard
Member, General Division - Income Security