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

Citation: *KS v Minister of Employment and Social Development*, 2020 SST 1132

Tribunal File Number: GP-19-2017

BETWEEN:

K. S.

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:	Will Hachey
Minister represented by:	John Gebara
Teleconference hearing on:	March 4, 2020
Date of decision:	April 16, 2020

DECISION

[1] The Claimant is entitled to Canada Pension Plan (CPP) disability benefits to be paid as of March 2018.

OVERVIEW

[2] The Claimant is a 45-year-old woman who was involved in a motor vehicle accident (MVA) in January 2017. The MVA occurred at the entrance of a Tim Horton's, when a truck hit the Claimant's vehicle on the driver's side.

[3] At the time of the MVA, the Claimant was working as a personal support worker. She applied for CPP disability benefits in July 2017, and in her application she reported that she is unable to work because of the MVA injuries – namely, whiplash, headaches, pain in the low back, left hip, leg, and knee, tingling and numbness, loss of strength and loss of feeling in the left side (at times). Later, the Claimant reported that she suffers from three areas of disability – namely, chronic and acute pain with nerve damage; multiple stomach, digestive and elimination disorders; and mental health conditions (PTSD, anxiety and depression).

[4] The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST). A Tribunal Member heard the Claimant's appeal in June 2019. That member decided that the Claimant was not entitled to disability benefits because her disability was not severe. The Claimant appealed that decision to the SST Appeal Division. In November 2019, the Appeal Division allowed the appeal, finding that the General Division had failed to observe a principle of natural justice, made errors in law and based its decision on erroneous findings of fact. The Appeal Division referred the matter back to the General Division for reconsideration, and ordered that the appeal be heard by a different member of the General Division.

PRELIMINARY MATTERS

[5] During the hearing, the Claimant's representative asked if he could submit medical reports from two specialists after the hearing. He explained that he had not tried to submit the

reports before the hearing because he mistakenly believed that the government would have asked for the reports if they were needed.

[6] The Minister's representative did not object to the Claimant's request. With this in mind, and knowing that the specialist reports are likely relevant, I told the Claimant's representative he could submit post-hearing documents.

[7] The Claimant's representative submitted the reports on March 13, 2020[1]. The post-hearing documents were shared with the Minister on March 20, 2020, and the Minister was given an opportunity to comment on them. The Minister did not provide any written comments on the documents by the deadline to reply and the Minister did not ask for an extension of time to reply. I have thus proceeded to render my decision.

ISSUE(S)

[8] 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). The calculation of the MQP is based on the Claimant's contributions to the CPP. The Claimant's MQP is December 31, 2022. I used the child rearing provision to calculate the Claimant's MQP.

[9] Disability is defined as a physical or mental disability that is severe and prolonged[2]. A disability is severe if it renders a person incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

[10] I must decide whether the Claimant has a disability that is severe and prolonged.

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[1] Pages IS5-1 to IS5-6
[2] Paragraph 42(2)(a) of the *Canada Pension Plan*

ANALYSIS

Severe disability

[11] To recap, the Claimant submits that she has three conditions that render her disabled – namely, a mental health condition, a bowel condition, and a pain condition. With this in mind, I have assessed the evidence with a view to understanding the functional limitations that result from each of the Claimant's conditions.

It is difficult to assess the functional limitations resulting from the mental health conditions and bowel condition

[12] I believe that the Claimant's pain condition results in significant limitations, and I will address these limitations shortly. However, with respect to the Claimant's mental health and bowel condition (and associated stomach and digestive issues), I find the evidence to be problematic. In particular, I find the evidence is not reliable enough to allow me to properly identify and assess the resulting limitations.

[13] I will explain why I have concerns about the reliability of the evidence insofar as it relates to the Claimant's mental health and bowel condition.

[14] In May 2018, Dr. Smith (one of the Claimant's two family physicians) reported that the Claimant has been markedly restricted in performing the mental functions necessary for everyday life since the year 1991, and that the Claimant has been markedly restricted in eliminating (bowel functions) since the year 2000. Dr. Smith explained that the Claimant has severe PTSD resulting from a sexual assault that happened in 1991. He explained that the mental distress resulted in increasingly severe IBS (pain, nausea, unpredictable spasms and loss of bowel control), and that the Claimant often soiled herself. He also said that the mental distress (anxiety, depression, social avoidance, poor memory and concentration and dissociation) and the daily bowel distress caused the Claimant to be unable to work. He added that the Claimant could

only do part-time work and would either have to leave work often or not show up for work more than 90% of the time[3].

[15] The difficulty I have with this evidence is that it is not consistent with other evidence on file.

[16] First, the Claimant filled out a CPP Questionnaire in June 2017 and in that Questionnaire she reported that her bowel and bladder habits are normal[4]. It could be that the Claimant's bowel condition worsened after she completed her CPP Questionnaire. However, Dr. Smith reported that the Claimant has been *markedly restricted* from this condition since the year 2000. I also find it significant that the Claimant did not start seeing Dr. Smith until March 2017[5], and so presumably his report about the Claimant's symptoms before 2017 was based on what the Claimant told him. This is concerning because it causes me to question the severity of the symptoms the Claimant described.

[17] Second, the Claimant did not mention a mental health condition or bowel condition in her CPP Questionnaire. This is despite the fact that one of the questions on the Questionnaire asked about other health-related conditions or impairments. The Claimant left that question blank[6].

[18] Third, Dr. MacMullin (the Claimant's other family physician) completed the CPP medical report in May 2017, and she made no mention of a mental health condition or a bowel condition[7]. The Claimant told me that she did not discuss her mental health conditions with Dr. MacMullin because Dr. MacMullin is also the family physician for the Claimant's former partner and his family. The Claimant explained that, because of this, she (on her own initiative) approached Dr. Smith (a family physician who reportedly specializes in PTSD) for assistance with her mental health conditions. This may explain why Dr. MacMullin did not mention a mental health condition in her CPP medical report, but it does not explain why Dr. MacMullin did not mention the bowel condition. Even then, I find it odd that the Claimant appears not to have told Dr. MacMullin that she needed someone to talk to about her mental health concerns or

[3] Pages GD4-1 to GD4-5
[4] Page GD2-52
[5] Page GD3-1
[6] Page GD2-51
[7] Pages GD2-57 to GD2-60

that she had approached another family physician. The Claimant did not even list Dr. Smith as one of her doctors in her CPP Questionnaire. This is despite the fact that the Claimant began seeing Dr. Smith in March 2017 (before the date that Dr. MacMullin completed the CPP medical report and before the date the Claimant completed the CPP Questionnaire).

[19] Fourth, the evidence includes a letter written by the Claimant's mother and in that letter the Claimant's mother attributed the Claimant's disability to the motor vehicle accident of January 2017. She suggested that the Claimant was functioning quite well before the accident and she made no mention whatsoever of a mental health condition or a bowel condition[8].

[20] I am not suggesting that the Claimant does not have a mental health condition or a bowel condition. She clearly does. My point is simply that the evidence about these conditions is not reliable enough for me to identify and assess the corresponding functional limitations.

The Claimant's pain condition results in significant functional limitations

[21] I turn now to the chronic pain and associated numbness, tingling and weakness. The evidence shows that this condition results in significant functional limitations.

[22] In November 2017, Dr. MacMullin reported that the Claimant's soft tissue injury is such that she is unable to sit, stand or walk for more than a few minutes at a time[9].

[23] In April 2018, Dr. MacMullin reported that the Claimant has severe back and left leg pain. She uses a cane to walk and falls quite often. She is also starting to have weakness and pain to her right side due to overuse[10].

[24] In May 2019, the Claimant underwent a two-day Functional Capacity Evaluation, at the request of her insurer. The evaluation was done by Lynn Moore, Senior Physiotherapist at CBI Health Centre. According to Ms. Moore, the Claimant's abilities or tolerances include the following[11]:

[8] Pages AD1B-18 to AD1B-19
[9] Page GD7-21
[10] Page GD4-7
[11] Pages GD9-5 to GD9-14

Task	Demonstrated Ability or Tolerance[12]
Occasional Lifting (waist to shoulder)	10 pounds
Occasional Lifting (12" to waist)	10 pounds
Occasional Lifting (12" to shoulder)	10 pounds
Bilateral carrying (30 feet)	10 pounds
Dynamic whole body push/pull (30 feet)	20 pounds of force
Unilateral carrying (30 feet) left / right	7 pounds with each hand
Sitting	Frequent tolerance, based on cumulative durations. The longest sustained duration was observed to be between 15-30 minutes and the cumulative was between 1-3.5 hours. Frequent weight shifting was observed. Her sitting tolerance decreased as the evaluation progressed.
Standing	Occasional tolerance, based on cumulative durations. The longest sustained duration was observed to be between 10 – 20 minutes and the cumulative was between 1 – 1.5 hours. The standing tolerance decreased as the evaluation progressed.
Walking	Occasional tolerance, for short durations only. She was observed to walk a sustained period of 9 minutes as well as from task to task on both evaluation days.
Twisting / Spinal Rotation	Occasional tolerance.
Reaching (above shoulder)	Occasional tolerance for above shoulder reaching, for short sustained durations only. The Claimant was unable to complete this test.
Reaching	Near horizontal reaching: frequent tolerance Far horizontal reaching: occasional tolerance for short sustained durations only. Waist to Floor: occasional tolerance for short durations only.
Prolonged Neck Positioning	Neck flexion (looking down): frequent tolerance Neck extension: occasional tolerance for short sustained durations only.
Grasping (light)[13]	Left Hand: occasional tolerance Right Hand: tested to but not limited to occasional tolerance
Grasping (firm)	Left Hand: occasional tolerance

[12] The tolerances are defined as follows: Occasional – 0-33% of the workday; Frequent – 34-66% of the workday; Constant – 67-100% of the workday (page GD9-38)

[13] The Claimant is left hand dominant.

	Right Hand: tested to but not limited to occasional tolerance.
Computer usage (keyboard / mouse)	Occasional tolerance
Writing	Occasional tolerance

[25] Ms. Moore concluded that the Claimant demonstrated a tolerance for a 2-3 hour workday at the sedentary physical demands level. However, Ms. Moore went on to say that the Claimant showed a significant decrease in performance as the testing progressed and showed signs of physical limitations with regard to things like pain, fatigue and headache. Because of this, Ms. Moore did not think the Claimant could sustain the demonstrated physical abilities for 2-3 hours on a daily basis.

[26] Ms. Moore's conclusions are deserving of weight. Ms. Moore reported that, throughout the two days of evaluation, the Claimant demonstrated high levels of effort with all functional tasks, as shown by objective measures (such as heart rate monitoring, observed biomechanical changes, and the absence of clinical inconsistencies). She also said that the results of the evaluation are a true representation of the Claimant's current level of function. While she noted an inconsistency between the Claimant's self-reported abilities and limitations (weight handling and positional tolerances) and the Claimant's actual performance, she said that all other measures (objective evaluation of pain, pain scales, pain and activity questionnaires and repetitive movement screening, range of motion testing and walk test) supported a high reliability profile.

[27] The Minister's representative submits that I should question Ms. Moore's objectivity because Ms. Moore emailed the Claimant in July 2019 and encouraged the Claimant to "appeal that decision"[14] (presumably the June 2019 decision of the General Division). I acknowledge that Ms. Moore's advice is unsettling. However, I do not find it so troubling as to discount Ms. Moore's functional evaluation findings. I say this because Ms. Moore's advice seems to have been prompted by an email she received from the Claimant in July 2019 asking Ms. Moore to "write a letter regarding the assessment"[15]. Ms. Moore replied by saying her report was "crystal clear". She also asked what Tribunal the Claimant was referring to. Ms. Moore's response tells me that she was not prepared to advocate on behalf of the Claimant. It also tells me that Ms.

[14] Page IS3-4 and the Minister's representative's submissions at the hearing
[15] Pages AD1B-16 to AD1B-17

Moore was likely unaware of the Claimant's Tribunal proceedings at the time of the evaluation. Without more, I cannot find that Ms. Moore's evaluation lacked objectivity.

The Claimant has not pursued treatment recommendations for her mental health

[28] To be successful in obtaining disability benefits, claimants 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 they satisfy the duty to mitigate[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].

[29] Given the difficulty I have had in identifying the functional limitations that result from the Claimant's mental health conditions (PTSD, anxiety and depression), it is likely not necessary for me to assess whether the Claimant followed the recommended treatment for those conditions. However, to err on the side of caution I have considered this issue.

[30] I am unable to find that the Claimant has made sufficient efforts to manage her mental health conditions. In February 2018, Dr. MacMullin wrote a note (presumably to the Claimant's insurer) asking for the Claimant to be provided with psychological counselling[19]. The Claimant has not received professional counselling since Dr. MacMullin's recommendation of February 2018. The Claimant testified that she received counselling at the sexual assault centre but she said that was towards the end of 2016 and beginning of 2017.

[31] I know the Claimant has been seeing Dr. Smith. However, I do not believe that the consultations the Claimant has with Dr. Smith are what Dr. MacMullin contemplated when she recommended counselling with a psychologist. First, Dr. Smith is a family physician and not a

[16] *Klabouch* v. *Minister of Social Development*, 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 GD7-17

psychologist. Second, the Claimant has not been seeing Dr. Smith on a frequent basis. In June 2019 (more than one year after Dr. MacMullin's treatment recommendation), the Claimant testified that she was seeing Dr. Smith once every 6 or 12 months.

[32] As for an explanation as to why Dr. MacMullin's counselling recommendation was not followed, the Claimant explained in a letter of September 2019 that she has not received any counselling with a psychologist because she does not have the medical benefits or the financial means to cover it[20]. During the hearing, the Claimant testified that her annual income is $12,000 (or $1,000 a month). She gets this from her section B insurance benefits. I accept that a person earning only $12,000 a year would be unable to afford private counselling with a psychologist. However, the Claimant also wrote in her letter of September 2019 that her insurance company agreed to cover the counselling but it meant the Claimant had to pay upfront and then get reimbursed. She said she could not afford to pay the money upfront[21].

[33] The main difficulty I have with the Claimant's explanation is that, despite her limited income, she has found a way to pay significant sums of money for other treatment – namely the medical marihuana that Dr. Smith prescribes. This is so even though her insurance company does not reimburse her for the cost of the medical marihuana. The Claimant testified that she is prescribed 10 or 12 grams of marihuana a day, and that she has been consistently prescribed at least 10 grams a day for quite some time. When I asked the Claimant how much the medical marihuana costs her a month, she said the cost varies because she is licensed to grow her own. When I asked her if she is growing her own now, she said she is not and she said that when she is not growing her own it is costing her more than $1,000 a month. She explained that she gets help from her family to pay for this. I am unable to reconcile the Claimant's ability to pay more than $1,000 a month for medical marihuana (even with help from her family) with her inability to pay for counselling, particularly since the counselling is a cost she could recover from her insurer whereas the marihuana is not. For this reason, I am unable to find that the Claimant has provided a reasonable explanation for not pursuing counselling.

[20] Page AD1B-4
[21] Page AD1B-4

[34] Another mental health treatment that has not yet been pursued is Alpha-Theta training. In this regard, the evidence shows that the Claimant signed consent forms to participate in this training with Dr. Smith in June 2017[22] and May 2018[23]. I asked the Claimant if she has started this therapy and she said she has not. When I asked why that might be, she said she does not know what is going on with it. She does not know if she is on a wait list or if Dr. Smith thinks she is not quite ready for it. When I asked the Claimant if she has followed up on this with Dr. Smith, she said she has not, but mentioned she might do this at an upcoming appointment. Overall, the evidence about why this treatment has not yet begun is vague and speculative. It falls short of a reasonable explanation for why this treatment has not been followed.

[35] As for the impact these treatments have on the Claimant's disability status, I can only infer that the Claimant's family physicians would not have made the recommendations unless they thought the therapies would be helpful in improving the Claimant's disability.

The Claimant has pursued treatment recommendations for her chronic pain

[36] The evidence shows that the Claimant has pursued treatment recommendations for her pain condition.

[37] She participated in physiotherapy from January 2017 to August 23, 2017[24] and then again from February 28, 2018 to March 29, 2018[25]. She stopped the physiotherapy in August 2017 and in March 2018 because it was making her pain worse, as evidenced by Dr. MacMullin's notes[26]. It is also significant that the physiotherapy was not improving the Claimant's functionality. In May 2017, the Claimant's physiotherapist reported that there had been some improvement in performance of strengthening exercises but that it was not transpiring into functional change[27]. In August 2017, the physiotherapist reported that there had been little to no improvement in the Claimant's condition since physiotherapy began in January 2017. She still moved around the clinic very deliberately with poor disassociation of the limbs. Her active range of motion through

[22] Page IS5-2
[23] Page GD4-14
[24] Pages GD2-82 and GD7-64
[25] Pages GD7-65 to GD7-66
[26] Pages GD2-74 and GD7-17
[27] Page GD7-59

the spine was limited into all areas with pain produced throughout the spine on spinal movements, and she remained quite tender to touch, particularly to the left sacroiliac and gluteal region with pain radiating from these areas into the buttock and lower leg[28]. In March 2018, the physiotherapist reported that the Claimant had shown very little improvement and was unable to tolerate mild strain through the neck and back[29].

[38] The Claimant has also participated in massage therapy since 2017. There are several reports on file from the therapists the Claimant has seen, and those reports do not show any significant improvement with massage therapy. For example, in June 2018 the massage therapist wrote that since the Claimant's file was transferred to her (from another massage therapist), the Claimant had shown little sign of progress, with relief lasting 24 to 48 hours (but after an initial aggravation of symptoms). The therapist also explained that the Claimant was reporting constant pain of 7 to 9 out of 10. Her nerve pain and weakness were affecting her activities of daily living, including her sleep, her ability to turn her head, and her tolerances for standing and walking. The Claimant limped when she walked and she had vascular changes in her lower back including inflammation, swelling and colour changes[30].

[39] The Claimant has also tried several medications (including Flexeril, Arthrotec, prescription strength Advil, CBD Oil (ingestible), and medical marihuana). The Claimant testified that she started Naproxen and amitriptyline about 2-3 weeks ago, but has not yet noticed any improvement in her symptoms (including sleep). She says the Naproxen worsens her stomach symptoms and so she has been taking a lot more of the Tecta and Tums.

[40] The Claimant acknowledged that there have been times when she has been unable to fill her prescription for Flexeril because she was unable to afford to pay for the medication upfront. Again, I find this troubling given the Claimant's ability to find a way to pay for the medical marihuana. However, I do not see how this affects the Claimant's overall disability status, because even when the Claimant has taken the Flexeril it appears not to have improved her functionality in any significant way.

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[28] Page GD2-82
[29] Page GD7-65
[30] Page GD7-69

[41] In July 2018, Dr. Martin (gastroenterologist) recommended a "judicious reduction" in marihuana[31]. There is no indication that the Claimant has complied with this recommendation. However, I do not consider this detrimental to the Claimant's appeal. Dr. Martin appears to have made the recommendation because he was concerned that the cannabinoid use was causing the Claimant's nausea. For reasons I explained previously, I have not factored the Claimant's nausea (or other IBS symptoms) into my assessment of the Claimant's disability.

[42] Shortly after seeing Dr. Martin, the Claimant saw another specialist (Dr. Attabib, neurosurgeon). Dr. Attabib reviewed the Claimant's MRI results, noting a very small disc bulge at L5-S1 and moderate multi-level degenerative disc disease of the cervical spine. He concluded that there was no reason for surgery, and he recommended a referral to a physiatrist[32]. The Claimant testified that the referral has been made, but she has not yet received an appointment date. She also said that she is on a waiting list to see Dr. Worley, a neurologist.

[43] As for other specialist consultations, the Claimant's insurer asked the Claimant to undergo an independent medical evaluation with a specialist (the Claimant was not sure as to the doctor's specialty but thought it may have been an orthopedic surgeon or a physiatrist). In any event, the Claimant did not attend that evaluation (which I understand was planned for sometime around March or May 2018). The Claimant explained that she could not participate in that evaluation because the doctor was in Halifax (which is about a 5-hour drive from her home). She said she could not tolerate a 5-hour drive in her car and, even if she could, she would have needed to stay overnight and this posed a child care issue for her because she is the primary caregiver to her youngest daughter. I accept the Claimant's explanation as reasonable, and I do so knowing that Dr. MacMullin was supportive of the Claimant's inability to drive for such a long distance[33].

There is no recent evidence of work capacity

[31] Page IS5-6
[32] Pages IS5-3 to IS5-4
[33] Page GD7-17

[44] There is some suggestion in the evidence that the Claimant had the capacity for some form of work in the first few months after her MVA, though probably not to the extent that she would have been able to return to her physically demanding job in special care homes.

[45] For example, in May 2017 Dr. MacMullin wrote that the Claimant had a soft tissue injury only. She noted that the Claimant was tender all over, but she did not say (or otherwise suggest) that the Claimant was limited in what she could do[34]. That same month (May 2017), the Claimant's physiotherapist wrote that the Claimant was not currently able to return to a physical job, but might be able to do sedentary duties[35].

[46] Instead of improving, the Claimant's disability continued to worsen. For example, in August and September 2017 the Claimant's massage therapist reported that the Claimant's symptoms had been getting worse in recent weeks[36].

[47] Ms. Moore's functional capacity evaluation is quite telling about the Claimant's functionality and how it would affect the Claimant's ability to work. As I mentioned previously, Ms. Moore concluded that the Claimant had the tolerance for a 2-3 hour workday at the sedentary physical demands level. She also pointed out that the Claimant showed a significant decrease in performance as the testing progressed and showed signs of physical limitations with regard to things like pain, fatigue and headache. Because of this, Ms. Moore did not think the Claimant could sustain the demonstrated physical abilities for 2-3 hours on a daily basis.

[48] The Minister's representative submits that Ms. Moore's functional capacity evaluation shows that the Claimant has improved over time because the Claimant was able to complete Ms. Moore's two-day evaluation in May 2019 whereas the Claimant had been unable to complete a one-day functional evaluation in September 2017. I am not convinced that the two evaluations can be compared so easily. The Claimant explained that the September 2017 evaluation was done in X and the travel to the evaluation site caused increased pain for her so that when she started that evaluation she was already experiencing increased pain levels. She also knew that she had to reserve some energy so she could make the trip back home. The Claimant also

[34] Pages GD2-57 to GD2-60
[35] Page GD7-59
[36] Pages GD2-80 and GD2-81

explained that she did not complete all of the tasks asked of her during the May 2019 evaluation and that there were some tasks that had to be modified so that she could complete them. Even if there was some level of improvement between the two evaluations, I would have a difficult time, given Ms. Moore's conclusions, attributing any significance to the improvement insofar as work capacity is concerned.

[49] The Minister's representative submits that Ms. Moore did not conclude that the Claimant cannot work. He points out that Ms. Moore's comment about work capacity was that the Claimant cannot sustain work activity on a "daily" basis and he submits that the Claimant's tolerance might increase if she was given time off between work days. He submits that part-time employment, even if irregular, can be considered to be substantially gainful.

[50] I agree with the Minister's representative that Ms. Moore did not conclude that the Claimant cannot work. However, I do not read Ms. Moore's report to say that working is realistic for the Claimant, or that the Claimant's tolerance might increase if she was given time off between work days, such that she is capable of pursuing a substantially gainful occupation.

[51] First, the suggestion that the Claimant's tolerances might increase with time off between work days is speculative. I do not have the medical evidence to support this.

[52] Second, even if a work schedule of non-consecutive days resulted in increased tolerance, I do not see how such a work schedule would be obtainable in the real world. What employer is going to hire a person who can only work 2-3 hours a day (but not consecutive days)? Moreover, even if such a job could be found, I do not see how it would be substantially gainful, as that term is defined in the legislation[37].

[53] In assessing work capacity, I have considered the Claimant's age, level of education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context[38].

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[37] Section 68.1 of the Canada Pension Plan Regulations states that "substantially gainful" means an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. To put this into perspective, the most a person could receive as a disability pension in 2019 is $16,347.60 a year.

[38] *Villani* v. *Canada (Attorney General)*, 2001 FCA 248

[54] I acknowledge that the Claimant's personal characteristics would not impede her ability to find a job. She is only 45 years old, and thus has several years ahead of her before the standard age of retirement. She has a reasonable level of education (grade 12 plus 2 years of a licensed practical nurse program). She is proficient in English, and she has varied work experience (including medical office work, convenience store work, and patient care work). However, even with these attributes, I cannot find she has work capacity.

[55] Considering the evidence as a whole, I find that it is more likely than not that the Claimant's disability is severe.

Prolonged disability

[56] A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[57] When Dr. MacMullin completed the initial CPP medical report in May 2017, she reported the Claimant's prognosis as fair[39]. In the months that followed, the Claimant's prognosis got worse. In November 2017, Dr. MacMullin reported that the Claimant had made no progress whatsoever with physiotherapy and massage therapy, and further improvement was not expected[40]. In March 2018, Dr. MacMullin described the Claimant's pain as chronic and she explained it was impacting the Claimant's daily life tremendously, 24 hours a day[41].

[58] There are no medical opinions on record after November 2017 that suggest recovery is anticipated or expected in the foreseeable future. As such, I find that the Claimant's disability is likely prolonged.

CONCLUSION

[59] The Claimant has a severe and prolonged disability. Her disability became severe and prolonged in November 2017, when Dr. MacMullin reported that the Claimant is unable to

[39] Page GD2-60
[40] Page GD7-21
[41] Page GD4-6

perform any duties of work (including answering telephones) and that no further improvement is expected[42].

[60] Payments start four months after the date of disability[43]. Four months after November 2017 is March 2018.

[61] The appeal is allowed.

Shannon Russell
Member, General Division - Income Security

[42] Page GD7-21
[43] Section 69 of the *Canada Pension Plan*