



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MW v Minister of Employment and Social Development*, 2020 SST 914

Tribunal File Number: GP-19-625

BETWEEN:

M. W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: April 16, 2020

Date of decision: April 30, 2020

DECISION

[1] The Claimant, M.W, applied for a *Canada Pension Plan* (CPP) disability pension in August 2017.¹ The Minister denied the application, and the Claimant appealed to the Social Security Tribunal.

[2] I am dismissing the appeal. The Claimant is not entitled to a CPP disability pension. These are my reasons.

OVERVIEW

[3] The Claimant is 37 years old. She worked as a labourer with a district municipality in the Vancouver area for about eight years. In January 2012, she injured her back on the job. She was off work for two years while she went through rehabilitation with WorkSafe BC. She returned to a different job with lighter duties, but that position ended in early 2015.

[4] The Claimant has not worked since then. She says she cannot work at any job because of constant pain and numbness in her back and left leg, which prevents her from doing any activity for very long.

[5] The Claimant is entitled to a CPP disability pension if she meets these conditions:

- she must have contributed to the CPP within a time frame called the minimum qualifying period or MQP;
- she must have a disability that is severe and prolonged, and
- she must have become disabled on or before the end of her MQP.²

[6] The Claimant's MQP will end on December 31, 2023.³ Because this is in the future, she must be disabled as of April 16, 2020, the date I heard her appeal. It is the Claimant's responsibility to prove this on a balance of probabilities. In other words, she must show it is more likely than not that she is disabled.

¹ The Claimant's CPP application and disability questionnaire are at pages GD2R-63-67 and GD2R-124-130.

² Paragraph 44(1)(b), subsection 44(2) *Canada Pension Plan*

³ The Claimant's CPP contributions are at GD4-20. She has contributions from 2011 through 2015 because of a CPP credit split with her former common-law partner. Her MQP is extended because she is the primary caregiver of a child born in 2016.

THE ISSUE IN THIS APPEAL

[7] I have to decide if the Claimant has a severe and prolonged disability, and if she became disabled by April 16, 2020.

ANALYSIS

[8] A person is disabled under the CPP if she has a physical or mental disability that is severe and prolonged. A disability is severe if the person is 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.⁴ The person has to meet both parts of the test to be disabled under the CPP.

The Claimant does not have a severe disability

[9] At the hearing, the Claimant struck me as honest and straightforward. I recognize she has back, leg and foot pain that affects her daily activities and her ability to work. However, I am not persuaded on a balance of probabilities that her disability is severe, as that word is defined in the CPP.

i. What the Claimant said about her condition

[10] The Claimant started her job with the district municipality in 2003 or 2004. She was hired to do seasonal work like landscaping and trail maintenance. Later, she started working on a paving crew. Her job included tasks like shovelling asphalt, pouring concrete, and jackhammering. She drove dump trucks and snow plows. She was classified as full-time temporary, meaning she worked full-time hours but was laid off for about a week each year so she would not achieve full-time employee status.

[11] The Claimant was well until January 2012. That day she was working with a partner, replacing the cover of a catch basin on the side of a road they were plowing. Her partner let go

⁴ Paragraph 42(2)(a) *Canada Pension Plan*

and the Claimant fell while holding onto about 100 pounds. She immediately had low back pain. A few weeks later, she started to have pain down her left leg as well.

[12] The Claimant did not know why she said in her disability questionnaire that she stopped work in February 2012 and could no longer work as of then. She was certain she did go back to work at all for two years after her injury. WorkSafe BC directed her medical care and rehabilitation. She took narcotics for pain, and had physiotherapy, massage and injections. She also went to group counselling at a pain management program. Nothing helped. Eventually WorkSafe BC sent her to a specialist, who recommended she have back surgery.

[13] The Claimant had a discectomy in March 2013. She told me she felt better for a time, but then her symptoms got worse. A follow-up MRI showed she had scar tissue around the S1 nerve root. She was told this was the reason for her increased symptoms. She was also told it would not be a good idea to try to remove the scar tissue surgically. WorkSafe BC gave her a small pension and stopped paying for physiotherapy and massage. She stopped having injections because they did not help. She cannot remember when she last saw a back specialist. Her treatment consists of medication prescribed by her family doctor, Dr. Walton-Knight. She takes Cymbalta for her nerve pain and 10 mg of oxycodone two times a day. She told me the Cymbalta gives her “brain zaps” that run through her body, but otherwise she has no side effects from either of these medications. She did not describe the “brain zaps” as debilitating.

[14] The Claimant told me she has not improved at all. She has constant nerve pain that flares up to the point where she has to go to Emergency unless she is very careful about what she does. Because of her pain, she has trouble sitting, standing or walking at more than a slow pace. She and her four-year-old daughter live in a guest house on her parents’ farm. She can walk a bit, drive, go grocery shopping, and do light housework. Her mother and grandmother help her. Her daughter recently started day care three days a week so the Claimant has a break from having to care for her. The provincial government pays for the day care because of the Claimant’s back problems.

ii. The medical evidence

[15] The Claimant's medical documents are a bit hard to follow. I suspect much of her WorkSafe BC record is not there, and many of the reports only have the first page. This is not the Claimant's fault. There is no rule saying she has to provide her entire medical file.⁵ In any case, the Tribunal file contains letters, a medical report, and office notes from the Claimant's family doctor. These provide a good overall picture of the Claimant's condition. They are consistent with the rest of the medical documents, such as they are. They also confirm what the Claimant told me about her injury and treatment. I asked the Claimant if she wanted time to submit more documents and she said she did not, as her condition has not changed.

[16] The medical evidence confirms the Claimant suffered a back injury in 2012. She had lumbar spondylosis, loss of disc height, disc desiccation, a disc bulge, and nerve root irritation.⁶ After a discectomy, she developed perineural fibrosis (scar tissue).⁷ She has ongoing low back pain with sciatica down her left leg and neuralgia in her left foot. Her left leg is weak. She has acute flare ups of pain with certain activities. She takes Cymbalta and low doses of opioids for pain management.⁸

iii. The Claimant has work capacity

[17] The test of whether a disability is "severe" is not whether a person has a particular diagnosis or suffers from severe impairments, but whether the disability prevents her from earning a living.⁹ She must be incapable regularly of pursuing any substantially gainful occupation, not just incapable of performing her usual job.

[18] In deciding if the Claimant has any work capacity, I must consider evidence of her medical condition, as well as things like her age, level of education, language proficiency, and past work and life experience.¹⁰

⁵ The *Canada Pension Plan Regulations* say an applicant has to provide a medical report containing certain information, which the Claimant did at GD2R-112-115.

⁶ MRI lumbar spine, February 23, 2012, GD1-6; partial report September 27, 2012, GD1-5; partial report November 23, 2012, GD1-7.

⁷ Dr. Martin, December 12, 2014, GD2R-92

⁸ Dr. Walton-Knight, July 15, 2017, GD2R-112-115; December 28, 2018, GD2R-83. In the July 2017 report, Dr. Walton-Knight said the Claimant had surgery two years ago (which would have been in 2015). The Claimant told me this was not correct. The surgery was in 2013, as Dr. Walton-Knight stated immediately below.

⁹ *Klabouch v Canada (A.G.)*, 2008 FCA 33

¹⁰ *Villani v. Canada (A.G.)*, 2001 FCA 248

[19] The Claimant's personal characteristics are mostly positive. English is her native language. She left high school after Grade 11 because she wanted to start working, not because she was failing or struggling with schoolwork. She went on to get a hairdressing certificate, and worked as a hairdresser for a time. While she has spent most of her time in the workforce doing manual labour, she is only 37 years old. Nothing in her file suggests she has cognitive or learning deficits that would prevent her from learning new skills or upgrading her education. I do not think her personal factors negatively affect her work capacity. Therefore, my decision about that capacity depends on the evidence of her medical condition.

[20] The Claimant feels she cannot work at any job because of her pain and limitations. She tried working at a clerical job with her old employer for close to a year in 2014 and 2015. She was eventually laid off so she would not qualify as a full-time employee, and because she was filling in for someone on leave who was ready to return. There was no other position for her. She told me she could barely do the job anyway. She was allowed to sit, stand, and take breaks as needed. Despite this, she was often absent or had to leave early because the work aggravated her back and leg pain. She missed three straight months at the end of 2014.

[21] The medical evidence suggests the Claimant has some work capacity:

- On examination in 2017, Dr. Walton-Knight did not note any physical findings or functional limitations related to sitting. She said the Claimant needed to retrain for a job where she could avoid heavy lifting and have frequent changes of position to work around her chronic pain.¹¹
- One year later, Dr. Walton-Knight said the Claimant had pain after sitting for just a few minutes, could not stand for long periods, and that driving aggravated her back pain. She did not think she could do even light work.¹²
- However, by December 2018, which is the last medical document in the file, Dr. Walton-Knight's opinion had changed. She said the Claimant could not train for

¹¹ Dr. Walton-Knight, July 15, 2017, GD2R-112-115

¹² Dr. Walton-Knight, June 12, 2018, GD2R-107

any work that required heavy lifting or prolonged standing. On bad days she limped, could not safely pick up her daughter, and had difficulty climbing stairs.¹³

[22] There is also non-medical evidence of work capacity:

- The Claimant lost her clerical job in 2015 for reasons unrelated to her health or her work performance.
- The Claimant told me that WorkSafe BC has continued to take the position that she is capable of office work, and is prepared to pay for her to take online courses to upgrade her skills. I cannot adopt WorkSafe BC's decision about the Claimant's ability to work, but it is one piece of evidence I can consider.
- The Claimant's description of her daily activities includes doing light housework, doing crafts with her daughter, brushing the horses on the farm, and reading.
- The Claimant took the National Construction Safety Officer course online. I recognize she has not written the exams, and has not found work in this field. She thought she might be able to work a couple of hours at a time, walking around job sites. She feels even this might be overly optimistic.

[23] I accept that the Claimant cannot work at anything like her previous job. But the above evidence tells me she mainly has difficulty with standing, walking, and lifting. She has issues with sitting at times, but the problem has not been constant or regular. That means she may have the capacity to perform sedentary work.

[24] Because there is evidence of work capacity, the Claimant has to show she tried to work but could not because of her health condition.¹⁴ I acknowledge that in 2014 and 2015 she had difficulty doing sedentary work in an accommodating workplace. However, that was over five years ago. The evidence of work capacity dates from after scar tissue was identified as a problem

¹³ Dr. Walton-Knight, December 28, 2018, GD2R-83

¹⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

in December 2014, and after the Claimant was let go from her job. The Claimant has not tried to perform sedentary or other suitable work to counter this evidence.

[25] It is possible the Claimant would have failed if she had tried suitable work after early 2015. But it is equally possible she would have succeeded. She has to prove her case on a balance of probabilities. Because she has not tried suitable work in the last five years, despite evidence of work capacity during that period, she has not persuaded me that she is incapable regularly of pursuing any substantially gainful occupation.

CONCLUSION

[26] Because I decided the Claimant's condition was not severe, I did not consider whether it was prolonged.

[27] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security