



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CB v Minister of Employment and Social Development*, 2020 SST 900

Tribunal File Number: GP-19-949

BETWEEN:

C. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Claimant represented by: Allison Schmidt

Teleconference hearing on: April 21, 2020

Date of decision: May 11, 2020

DECISION

[1] The Claimant, C. B. , applied for a *Canada Pension Plan* (CPP) disability pension in May 2018. 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 stopped working as an electronics technician in December 1998. In her disability application, she said she has been unable to work since then because of chronic pain in the joints on the right side of her neck and back. The pain is constant and restricts the amount of time she can sit or stand. She has trouble lifting and bending. She has to change positions often, and needs to rest throughout the day.¹

[4] To be eligible for CPP disability benefits, the Claimant must have contributed to the CPP within a time period called the minimum qualifying period or MQP. She has to prove she was disabled by the end of her MQP.²

[5] To be disabled under the CPP, the Claimant's disability must be severe and prolonged. Her disability is severe if she is incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.³

ISSUE

[6] The Claimant's MQP ended on December 31, 2000.⁴ I must decide if she had a severe and prolonged disability by that date.

¹ The application and accompanying questionnaire are at pages GD2-22-25 and GD2-73-79.

² Paragraph 44(1)(b), subsection 44(2) *Canada Pension Plan*. The legal test is that the Claimant must prove she is disabled on a balance of probabilities; in other words, she must show it is more likely than not that she is disabled.

³ Paragraph 42(2)(a) of the *Canada Pension Plan*.

⁴ The Claimant's contributions are shown at page GD7-29.

ANALYSIS

[7] The Claimant appeared honest and straightforward when she gave her evidence at the hearing. Her medical records show she complained of back pain repeatedly and had treatment over many years, with only brief periods of improvement.⁵ I accept that she has had back pain for a long time, and that she was unable to continue working as an electronics technician because of it. However, I cannot find that she had a severe disability at December 31, 2000.

The Claimant's medical condition affected her ability to work

[8] The Claimant's job was repairing consumer electronics like microwave ovens and televisions. She told me her back started hurting around 1996. She had been off work for about a year because she was undergoing investigations for possible seizures. When she returned to her job, she noticed she had back pain. She does not know what caused it, but suspects it was a combination of repetitive work activities. She had to lift and carry items to her work table. She spent most of the workday sitting and reading schematics, with a lot of reaching and bending forward to carry out the repairs.

[9] The Claimant told me she continued working despite her back pain because she did not want to let her boss down. She did not work full time. She went to physiotherapy and tried different medications. But she did not get better, and it became harder to do her job. Eventually, she and her employer agreed she should stop, which she did on December 31, 1998. Other than some part-time bookkeeping, which I discuss below, she has not worked since then.

[10] Besides back pain, the Claimant has had seizures and several knee surgeries, but she did not claim these affected her ability to work for significant lengths of time.

[11] Dr. Bartie and Dr. Reynolds were the Claimant's family doctors from 1997 to 2014. After reviewing the Claimant's chart for that period, Dr. Bartie said the Claimant had no major or

⁵ Dr. Bartie, October 1999 to May 2015, GD2-128-150, summarized by Dr. Bartie in a letter of November 16, 2018, GD2-127; Dr. Reynolds, July 5, 2001, GD2-167-168

continual medical concerns other than back pain. He said the Claimant's back pain began gradually in 1997. It was aggravated by sitting and activity, and caused her to stop working.⁶

[12] I accept that the Claimant's pain is legitimate and that she had to quit her job because of it. A CT scan of her lumbar spine in October 2000 showed disc bulging.⁷ She was diagnosed with "mechanical-type lower backache". By that time, her pain had persisted for several years. It was chronic.⁸ Chronic pain is recognized as a potentially disabling medical condition.⁹

The Claimant had work capacity at December 31, 2000

[13] However, it is not enough that the Claimant's disability kept her from doing her usual work. To be severe it had to prevent her from earning a living at any type of job.¹⁰ I am not persuaded on a balance of probabilities that by December 2000 the Claimant's limitations prevented her from doing work that was less physical than her previous job.

[14] The Claimant told me her condition has not changed much since December 1998. She did not apply for CPP disability benefits before 2018 because she did not know about them. At the hearing she said she had the following problems in 1998, and still has them:

- severe and chronic lower back pain with intermittent radiation into right leg
- pain is significantly aggravated by prolonged sitting, standing, walking, lifting
- frequent flare-ups of pain
- poor sleep; wakes frequently due to pain
- chronic fatigue
- must lie down for one or two hours following most activity
- difficulty going up and down stairs
- inability to lift or carry more than five or ten lbs maximum
- increased pain when reaching with right arm
- difficulty getting out of bed in the morning
- unable to bend and twist at waist
- difficulty completing activities of daily living and household chores; must pace herself extensively and take frequent rest breaks
- unable to drive for extended periods of time.¹¹

⁶ Dr. Bartie, November 16, 2018, GD2-127

⁷ GD2-205

⁸ Dr. Wash, October 31, 2000, GD2-202-204

⁹ *Nova Scotia (Worker's Compensation Board) v Martin*, [2003] SCC 54

¹⁰ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

¹¹ These are listed in the Claimant's submission at GD3-3.

The medical evidence does not support the Claimant

[15] The Claimant's view of how her condition affected her ability to work is important. But there must also be some objective medical evidence of a disabling condition at the time of the MQP to support her claim.¹² That means I have to look at what doctors and other health care providers said. That evidence tells me that despite her back pain the Claimant had some work capacity at December 31, 2000, and for some time after. Objective reports of what the Claimant said about her limitations in 2000 and 2001 do not support what she now remembers. Objective assessments of her limitations in 2001 concluded that she had the capacity to do less demanding work.

[16] The Claimant said she saw an orthopedic surgeon in 1999, who diagnosed degenerative disc disease and discussed treatment options with her. He prescribed a back brace. She had a cortisone injection that did not help. Between October 1999 and December 2000, she had chronic lower back pain all the time, and had several visits with Dr. Reynolds. She tried more pain medication, physiotherapy, and a TENS machine. In April 2000, Dr. Reynolds referred her to a specialist, Dr. Goebel. Dr. Goebel put her on the waiting list for a multidisciplinary rehabilitation program.¹³

[17] In October 2000, Dr. Wash assessed the Claimant for entry to the program. The Claimant told him she had intermittent lower backache since 1998, which had become more persistent. There was occasional radiation of pain to her right buttock and at times her whole right leg ached, especially when going for walks. The pain was aggravated by lifting, sitting for extended periods, or travelling in a car.¹⁴

[18] An interdisciplinary team made up of a physical therapist, an exercise physiologist and an occupational therapist assessed the Claimant in January 2001. She reported sitting and standing tolerance of two hours maximum, and walking tolerance of one block. Her goal was to improve

¹² *Warren v Canada (Attorney General)*, 2008 FCA 377; *Canada (Attorney General) v. Dean*, 2020 FC 206

¹³ Claimant's list of medical treatments GD2-111

¹⁴ Dr. Wash, October 31, 2000, GD2-202-204

these, to increase her fitness level, and to increase her socialization activities as these had declined because of her difficulty sitting.¹⁵

[19] According to the reports from these two assessments, the Claimant did not say she had some of the limitations she described much later in her CPP disability application and her written submissions.¹⁶ In particular she did not report difficulty sleeping, difficulty getting out of bed, difficulty with concentration, or having to lie down for one or two hours following most activity. Nor did she mention these problems to her family doctor at the time.¹⁷ I recognize the Claimant's pain might have interfered with her sleep, and caused fatigue that affected her function. But she did not describe anything to suggest she could not predictably and regularly do a job as long as her duties did not cause back pain. That is confirmed by the fact that the proposed treatment focussed on her fitness, posture, and body mechanics. There was no discussion of (or apparent need for) counselling, cognitive rehabilitation, or help with sleep problems.¹⁸

[20] The Claimant attended the program from January to March 2001. By March, she reported some benefit, but she still had episodic exacerbation of her pain symptoms, which interfered with her physical activities.¹⁹ When she was discharged, she had significantly decreased right leg pain, but no change to her sitting, standing and walking tolerance.

[21] The interdisciplinary team concluded the Claimant could not meet the demands of her previous job, which required sitting for up to four hours, constant reaching, frequent stooping, and occasional bending, as well as handling weights up to 50 lbs occasionally and 25 lbs frequently. However, they also concluded the Claimant had a sedentary-light level of function. I note they reached this conclusion after taking into account the Claimant's difficulty with sitting, standing or walking for long periods. They advised her to pursue occupations at this level.²⁰

[22] The Claimant went to the program for six hours a day, five days a week, over nine weeks (she took one week off to go to medical appointments). Despite this, she said she did not think

¹⁵ A. Fricke RN, January 9, 2001, GD2-191-196

¹⁶ GD2-8, 111, 288; GD3-14

¹⁷ Office notes October 1999 to February 2001, GD2-128-131

¹⁸ GD2-193-196

¹⁹ Dr. Sidhu, March 12, 2001, GD2-173-175

²⁰ A. Fricke RN, March 16, 2001, GD2-178-181, 172, 182

she would be able to work four hours, five days a week.²¹ I don't see how she could have reached that conclusion. It is contrary to what she demonstrated over more than two months, with no deterioration in her condition. She also said she was worn out after each session and had to take Tylenol and lie down.²² That is something many people have to do after work. It does not help persuade me the Claimant did not have work capacity.

[23] When she left the program the Claimant told the program's medical consultant, Dr. Sidhu, that she planned to take additional courses to explore different vocational options. Dr. Sidhu did not express doubt or concern about this plan. On the contrary, he was impressed by the Claimant's strong motivation and positive attitude despite facing medical impairments.²³

[24] The Claimant did not report any deterioration in her condition in follow-up appointments with Dr. Sidhu in April and May 2001.²⁴ In July 2001, her family doctor said she had "more or less a constant back pain with little change over the last couple years but with less exacerbation of her pain. Pain would limit her from occupations other than sedentary type work" with good ergonomics and frequent posture changes.²⁵ I do not think these latter two requirements suggest the Claimant needed to find a benevolent employer or an accommodating workplace. They are common features of many light or sedentary positions.

[25] The Claimant submitted that this report from Dr. Reynolds only said the Claimant could perform sedentary work at July 1999, and noted this was 18 months before her MQP ended.²⁶ I don't read the report that way. It says the last consultation was June 2001, one month before Dr. Reynolds wrote it. The last paragraph makes it clear that his conclusion about the type of work the Claimant was capable of was based on her medical history up to that point. He was not just repeating what someone observed in 1999.

[26] The weight of the evidence tells me that despite her limitations the Claimant had some work capacity when her MQP ended, and for some time after that.

²¹ GD3-14

²² GD3-14

²³ Dr. Sidhu, March 12, 2001, GD2-173-175

²⁴ Dr. Sidhu, April 9, 2001, GD2-170-171; May 14, 2001, GD2-169

²⁵ Dr. Reynolds, July 5, 2001, GD2-167-168

²⁶ Claimant's submission GD3-8

The Claimant`s personal characteristics did not affect her work capacity

[27] The Claimant`s medical condition at December 31, 2000, was chronic mechanical back pain. Medically, she was only fit for light or sedentary work. However, when I decide if her disability was severe at that time, I must also look at factors such as her age, level of education, language proficiency, and past work and life experience.²⁷

[28] These did not negatively affect the Claimant`s work capacity at December 31, 2000. English is her native language. There is no evidence she is not proficient in it. She had a variety of work experience in security, retail, dispatching, and casual hospital work. She had a high school education, and had also completed a one year college program. She was only 42 years old. None of these would have undermined her ability to find different work and to learn new job skills suited to her physical capacity.

The Claimant`s efforts do not show she did not have work capacity

[29] There is evidence the Claimant had some work capacity at December 31, 2000. A Federal Court of Appeal decision called *Inclima* says that means she must show that she tried to work but could not because of her health condition.²⁸ She has not done so.

[30] The Claimant struck me as motivated and hard working. I believe she wanted to work. But she did not try suitable work in a way that satisfies the requirement of *Inclima*. First, she did not make any concerted effort before her MQP ended. She did some bookkeeping for her husband`s home-based consulting business in 1999, but it only took three or four hours a month. Her husband was semi-retired and the work gradually slowed down and stopped after about a year. Because the Claimant worked minimal hours and stopped for reasons unrelated to her health, this job was not a real test of her capacity to perform substantially gainful work. It is not evidence that she could not perform light or sedentary work. If anything, it suggests the opposite.

[31] Second, the Claimant`s remaining efforts took place several years after her MQP ended. They are not evidence of her condition at her MQP. In any case, she did not actually try to perform the type of job recommended at the rehabilitation program. She told me that in 2003 and

²⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

²⁸ *Inclima v. Canada (A.G.)*, 2003 FCA 117

later she went to career centres for help with vocational planning and job searches. She was looking for a job that would accommodate her limitations, but could not find one. All the jobs required lifting or being on her feet all day.

[32] As I noted above, the only accommodations the Claimant required around her MQP and in the following year were good ergonomics and posture changes. These exist in competitive work environments in the real world. If the Claimant could not find a position where they were available, that was due to labour market conditions. It does not mean her medical condition combined with her personal circumstances prevented her from finding work. The availability of work is not relevant to a decision about whether a person is disabled.²⁹

[33] The Claimant also told me that her job search was affected by frequent medication changes, which made her tired and affected her concentration. But as I discussed above, there is no evidence these were significant limitations in 2000 and 2001.

[34] The Claimant has tried hard to get better. But she did not try to earn a living at a sedentary or light job. If she had, there might have been evidence that she was not capable of even this type of work. Because she did not, I cannot find she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2000. She has not established that her condition was severe at that time.

CONCLUSION

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

[36] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

²⁹ *Canada (MHRD) v. Rice*, 2002 FCA 47