



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. R. v Minister of Employment and Social Development*, 2020 SST 541

Tribunal File Number: GP-19-355

BETWEEN:

**D. R.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: George Tsakalis

Teleconference hearing on: May 19, 2020

Date of decision: May 21, 2020

## **DECISION**

[1] D. R. is the Claimant in this case. She applied for a Canada Pension Plan (CPP) disability pension in December 2017. The Minister of Employment and Social Development (the Minister) denied her application. The Claimant appealed the Minister's decision to the Social Security Tribunal (the Tribunal). I am allowing the Claimant's appeal. These reasons explain why.

## **OVERVIEW**

[2] The Claimant was born in 1975. She finished high school and obtained a music diploma. She worked as a piano instructor for three years. She worked at a pharmacy as a delivery driver, pharmacy assistant, and assistant bookkeeper from August 1998 to January 2017. The Claimant suffered from chronic back pain for many years. Her back pain worsened after injuring herself in a fall in August 2015, and a motor vehicle accident in 2015. She also suffered from depression and osteoarthritis in her knees. The Claimant alleges that she cannot work at any job because of her medical conditions.

[3] The Minister argued that the evidence did not show that the Claimant had a disability under the CPP.<sup>1</sup>

## **ISSUES**

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2018?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2018?

## **ANALYSIS**

[6] To qualify for a CPP disability pension, 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

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<sup>1</sup> See GD5-11-12

based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2018.

[7] Disability is defined as a physical or mental disability that is severe and prolonged<sup>2</sup>. A person is considered to have a severe disability if 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.

**The Claimant provide that she had a severe disability by December 31, 2018**

[8] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It is not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work<sup>3</sup>.

[9] I am satisfied that the evidence showed that the Claimant could not engage in any substantially gainful work at the time of her MQP.

[10] The Claimant testified that she suffered from chronic back pain for many years. She saw a chiropractor for many years. She would take holiday time rather than go on leave. Her back pain got worse in 2015. She had a slip and fall that August and a car accident that September. She tried to fight through the pain and work. Her employer gave her accommodation. She worked as a pharmacy assistant in 2015. Her boss did not require her to do any heavy lifting. Her boss reduced her hours after her accidents. She started working part-time in 2016. She tried physiotherapy. Her boss allowed her to work as an administrative assistant/bookkeeper to accommodate her. But she could not tolerate her administrative assistant duties. Prolonged sitting caused severe back pain. She was allowed to bring a yoga mat to work to perform stretches. She could change her position from sitting to standing. But she was still in too much pain. She made mistakes. She stopped working in January 2017 and has not worked since.

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<sup>2</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>3</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[11] The Claimant collects disability benefits from Great West Life (GWL). The Claimant testified that there is no pattern to her chronic pain. She does not know when she will have a good day or a bad day. She talked about working from home with GWL. But she does not believe that she would be a reliable employee. She does not believe that she could work regular hours on a full-time or part-time basis. She does not believe that she can work as a piano instructor or handle any type of job because of concentration difficulties.

[12] The Claimant also suffered from depression for many years. Her mental health worsened with time. She tried anti-depressants, pain medication, and medical marijuana. Her health did not improve with treatment. She also suffered from osteoarthritis in her knees that led her to using a cane.

[13] In 2018, she had more bad days than good days. On a bad day, she cannot undertake activities. She just manages her pain. Even on a good day her activities were limited. She can do housework for about 1 hour on a good day, but this makes her feel tired and sore. She tries to mow her lawn, but she can only do so for short periods. The Claimant testified that she had problems with sitting, standing, walking, lifting, memory, concentration and sleeping in 2018. She had a hard time putting on her shoes and socks. She and her husband bought a different bed to help her sleep. They also installed a taller toilet to make her life easier. However, regardless of what treatments she tried or any modifications to her home, she continued to suffer from chronic pain that stopped her from working.

***The medical evidence supports a finding that the Claimant had a severe disability by December 31, 2018.***

[14] I disagree with the Minister's argument that the evidence does not support a finding that the Claimant had a severe disability under the CPP.

[15] The medical evidence shows that the Claimant went to a physiotherapy clinic in 2016 because of back pain, low mood and sleep disturbance. She also suffered from right hip pain with right trochanteric bursitis.<sup>4</sup>

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<sup>4</sup> See GD2-69-70

[16] She saw a physician who specialized in chronic pain management in 2016. The specialist confirmed that the Claimant suffered from low back pain for 12 years.<sup>5</sup> The Claimant had problems with sleep and daytime fatigue. The specialist also mentioned her back injuries arising from her fall and car accident in 2015. The Claimant tried to return to work, but her symptoms progressed to the point where she only worked nine hours per week.<sup>6</sup> The specialist also referred to the Claimant's depression.<sup>7</sup> He started the Claimant on Hydromorphone.<sup>8</sup> But she did not tolerate this medication. Hydromorphone made her feel fuzzy and she felt uncomfortable taking it while working. The Claimant did not tolerate other pain medications in 2016. The Claimant increased her work hours to 18 per week by August 2016. The pain specialist noted that the Claimant tolerated those hours, but she had difficulty working a full shift on some days. He stated that the Claimant would receive facet joint injections in the near future.<sup>9</sup>

[17] The Claimant also went to a rehabilitation centre in 2016 where she saw a physiotherapist and had psychological counselling.<sup>10</sup>

[18] The Claimant's family doctor completed a medical report for the Minister in December 2017. The Claimant's family doctor said that the Claimant had chronic back pain, right knee pain secondary to osteoarthritis, and depression. The Claimant tried to work after her 2015 accidents, but her attempts to work ended in failure. The family said that the Claimant's condition did not improve with treatment that included facet joint injections. The Claimant needed to apply heat and do lots of stretching to control her condition and the family doctor felt that these activities were not consistent with working.<sup>11</sup>

[19] The Claimant saw an orthopaedic surgeon in 2018 for her back pain. The orthopaedic surgeon did not believe that surgery would help the Claimant.

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<sup>5</sup> There is an x-ray from 2006 at GD2-72 that showed degenerative changes in her lumbar spine.

<sup>6</sup> See GD2-65

<sup>7</sup> See GD2-62-64

<sup>8</sup> See GD2-57

<sup>9</sup> See GD2-50-52

<sup>10</sup> See GD2-53-55 and 58-60

<sup>11</sup> See GD2-45-48

[20] The Claimant also saw another doctor at an orthopaedic and sports medicine centre in 2018 for her knee pain. The Claimant used Naproxen and medical marijuana. She also used a cane.<sup>12</sup>

[21] I agree with the Minister that the x-rays in this case did not contain significant findings.<sup>13</sup> The Claimant did not require surgery. There are comments in some medical records that the Claimant was doing well.<sup>14</sup>

[22] The Claimant suffers from chronic pain and depression. These illnesses are difficult to prove because the extent of a person's pain and mental distress is hard to measure. The Supreme Court of Canada recognized that those who suffer from chronic pain are subject to persistent suspicions of malingering because their condition cannot be supported by objective findings.<sup>15</sup> Many of these cases come down to a claimant's credibility.

[23] I found the Claimant to be a credible witness. She had a good work ethic. Her Record of Earnings showed that she earned income every year from 1995 to 2016.<sup>16</sup> She worked with the same employer for more than 18 years. She experienced serious pain since her accidents in 2015. But she tried working until January 2017. However, her return to work efforts ended in failure even though her employer offered her significant accommodations. There are medical reports that suggested that the Claimant seemed to be improving at certain points. However, I do not place much weight on those comments. I accept that the Claimant's condition waxed and waned with time. But her condition never improved to the point where she could return to substantially gainful employment after she last worked in January 2017. I have no reason to disbelieve the Claimant's hearing evidence that she could not work after January 2017.

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<sup>12</sup> See GD1-6-7

<sup>13</sup> See GD5-12

<sup>14</sup> See GD1-7

<sup>15</sup> See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54

<sup>16</sup> See GD2-26

***The Claimant could not work in the real world by December 31, 2018.***

[24] I must assess the severe part of the test in a real world context<sup>17</sup>. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[25] I accept that the Claimant could not work in a real world context prior to her MQP. The Claimant was only 43 years old at the time of her MQP. She has post-secondary education. She has experience working on computers. She understands English. Her age, language, education, and work experience suggest that the Claimant has many work options. But I find that the Claimant was incapable regularly of pursuing any substantially gainful occupation at the time of her MQP because of her medical condition.

[26] I do not believe that the Claimant could handle any type of physical work at the time of her MQP because of her problems with lifting, standing, and walking. I do not believe that the Claimant could retrain for other work because of her difficulty concentrating because of chronic pain. I do not believe that she could have handled a driving job. I have concerns about her ability to handle such a job safely with some of the medications she took. Many people who cannot sit or stand for long periods can successfully work if they can rotate between sitting and standing. The Claimant's employer offered her the chance to rotate between sitting and standing, along with the ability to stretch on a yoga mat as needed. But she still could not work at a sedentary job as an administrative assistant with these accommodations. I accept that the Claimant's ability to perform her housekeeping tasks was impaired at the time of her MQP. I also accept her evidence that she could not sustain activities for a long enough period to be employed in the real world. I also accept that her pain levels were unpredictable to the point where she could not have able to work on a regular, reliable or predictable basis at any job at the time of her MQP.

[27] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition<sup>18</sup>. I am satisfied that the Claimant's failure to continue working at the pharmacy was because of her

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<sup>17</sup> See *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>18</sup> See *Inclima v. Canada (A.G.)*, 2003 FCA 117

health condition. I am satisfied that the Claimant has not had work capacity since she last worked in January 2017.

***The Claimant followed reasonable treatment options***

[28] I am satisfied that the Claimant followed recommended treatment options. She followed up with her family doctor. She saw pain specialists. She saw an orthopaedic surgeon. She tried physiotherapy, massage therapy, acupuncture, chiropractic treatments, and injections.<sup>19</sup> She tried psychological counselling. She unsuccessfully tried numerous medications to control her pain and depression.

**Prolonged disability**

[29] The Claimant proved that she had a disability that is likely to be long continued and of indefinite duration.

[30] Her family doctor provided an opinion that the Claimant's condition is not likely to improve.<sup>20</sup>

[31] I am satisfied that the Claimant's doctors are managing her medical problems, as opposed to trying to cure them.

**CONCLUSION**

[32] The Claimant had a severe and prolonged disability in January 2017, when she last worked. Payments start four months after the date of disability, as of May 2017<sup>21</sup>.

[33] The appeal is allowed.

George Tsakalis  
Member, General Division - Income Security

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<sup>19</sup> See GD2-47

<sup>20</sup> See GD2-48

<sup>21</sup> Section 69 *Canada Pension Plan*