



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *I. B. v Minister of Employment and Social Development*, 2020 SST 548

Tribunal File Number: GP-19-1486

BETWEEN:

I. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: Steve Sacco

Teleconference hearing on: April 15, 2020

Date of decision: May 30, 2020

DECISION

[1] The Claimant is not eligible for a *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] The Claimant was 42 years old when she applied for the CPP disability pension in October 2018. Her last job was doing clerical work at a printing company. She stated that she had been unable to work since May 2014 because of fibromyalgia, migraines, hip pain, depression, and anxiety. At the hearing, she testified that her major health problems were fibromyalgia and depression. She tried returning to work for brief periods in December 2015, January 2016, and January 2017, but was unable to continue.¹ She has not worked since. The Minister denied the Claimant's application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Minister submitted that the Claimant was not compliant with treatment – she did not co-operate with a program provided through Odyssey Health Services in 2018.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[5] For the Claimant to succeed, she must prove that it is more likely than not that she became disabled by the end of her Minimum Qualifying Period (MQP). Her MQP – the date by which she has to prove she was disabled - is based on her contributions to the CPP.³ It ended on December 31, 2018.

¹ See also GD6-60, 62, 63, family doctor's office notes.

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

³ CPP Record of Contributions: GD2-4. The Minister extended the Claimant's MQP by applying the Child-Rearing Drop-Out provision, which protects the contributory period of those who stay home to raise a young child: subparagraph 44(2)(b)(iv) of the CPP.

ISSUES

[6] Did the Claimant's health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2018?

[7] If so, was her disability long continued and of indefinite duration by that date?

SEVERE DISABILITY

[8] When I am deciding whether the Claimant's condition is severe, I must look at every health issue that might affect her employability.⁴

The Claimant's disability interfered with her ability to work by December 31, 2018

Physical condition

[9] In April 2016, the Claimant began seeing a pain management specialist for symptoms of fibromyalgia that she had experienced for five years. In October 2016, Dr. P. Aazami, pain specialist, reported that the pain was mostly in the Claimant's neck, shoulders, and lower back. Its average level was 5/10, where 10 is the greatest pain imaginable. The range of motion in her neck and lumbar spine were close to normal, and her shoulder examination was normal. She had tried massage therapy and physiotherapy with minimal benefit. She was unable to tolerate the Butrans patch, but had recently started Gabapentin for pain.⁵ In October 2017, Dr. Aazami reported that the Claimant was unable to tolerate nerve blocks. She was taking Lyrica for pain. Her average pain level remained at 5/10.⁶

[10] In December 2017, Dr. Flora Yeracaris, psychologist, reported her findings after interviewing the Claimant, speaking with her family doctor, reviewing her medical records, interviewing her employer, and performing a number of psychological tests. The Claimant explained that she "really did not do very much because of her symptoms." She tried to engage in activities, but was limited in what she could do.⁷ She complained of fatigue. She got about 5

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁵ GD2-95

⁶ GD2-98

⁷ GD6-124

or 6 hours of sleep at night, and napped for an hour or two during the day.⁸ Dr. Yeracaris found that the Claimant was self-limiting, relying on her pain and fatigue to guide her activities. Daytime resting interfered with her ability to sleep well at night. Her pain-limiting activities perpetuated the cycle of lowered mood, less activity, and a more limited range of experiences.⁹

[11] In February 2018, the Claimant fractured her left wrist and was in a cast for six weeks.¹⁰ In April 2018, Mr. Lopez, physiotherapist, stated that the Claimant's ability to do strength training might be limited temporarily because of weakness.¹¹ In November 2018, Dr. J. Haverstock, orthopedic surgeon, reported that the range of movement in her wrist was much improved and that she was able to keyboard.¹²

[12] In July 2015, an MRI showed mild degenerative changes and possible bursitis in the Claimant's hips.¹³

[13] In 2018, the Claimant visited the hospital emergency department with severe abdominal pain on three occasions.¹⁴ At the hearing, she testified that she has attacks of stomach pain every 3 to 5 months. When this happens, she receives pain medication at the emergency department. The current working diagnosis is urinary tract infection.

[14] At the hearing, the Claimant reported experiencing weekly headaches for which she takes an over-the-counter medication. She also gets migraines for a few days every 2 or 3 months. In December 2017, she told Dr. Yeracaris that she had learned to live with the ordinary headaches and did not think the migraines were a major concern.¹⁵

Mental health condition

[15] In April 2013, the Claimant began suffering from depression. In September 2014, she saw Dr. Elizabeth Bishop, psychiatrist, who diagnosed her with major depressive disorder and

⁸ GD6-123

⁹ GD2-128

¹⁰ GD2-102, 113

¹¹ GD2-101

¹² GD6-3

¹³ GD2-105

¹⁴ GD6-7

¹⁵ GD6-123

recommended a medication change.¹⁶ In April 2015, she saw Neil Tarswell, social worker, who reported that the Claimant had completed a mental health day program and was seeing a counsellor.¹⁷ In March 2016, she saw Dr. Brian Butler, psychiatrist, who changed her medication. In May 2016, he reported that her sleep was stable and she continued to feel better. She continued with out-patient counselling. Dr. Butler referred her back to her family doctor.¹⁸ In January 2017, Dr. O. Adegboyega-Conde, psychiatrist, diagnosed major depressive disorder, recurrent, and obsessive compulsive disorder.¹⁹ In August 2017, Dr. Adegboyega-Conde reported that the Claimant had made significant improvements in the past few months.²⁰

[16] In December 2017, Dr. Yeracaris stated that the Claimant reported fluctuating levels of motivation, focus, and concentration. However, Dr. Yeracaris found no evidence of compromised cognitive functioning.²¹

[17] At the hearing, the Claimant testified that she had not been in a mental health day program since 2016. She had not seen a psychiatrist since early 2018. She was seeing a social worker only every 3-4 months. She was still on the antidepressants her family doctor itemized in October 2018. At that time, Dr. Gvozdic reported that medication had improved the Claimant's sleep and chronic pain.²² At the hearing, the Claimant agreed that treatment had somewhat improved her mental health condition.

Functional limitations

[18] At the hearing, the Claimant stated that in December 2018 she was able to do the family cooking and grocery shopping, as well as some house cleaning. Her main ongoing problem is her pain. Its level varies from day to day, which makes it impossible for her to commit to a schedule.

[19] In October 2018, Dr. Gvozdic stated that the Claimant suffered from depression, with poor attention and concentration. She also had severe fatigue due to chronic pain and poor sleep. She

¹⁶ GD2-90

¹⁷ GD2-92

¹⁸ GD2-118

¹⁹ GD6-127, report of Dr. Yeracaris, December 2017

²⁰ GD2-114

²¹ GD6-124

²² GD2-60

had difficulties with interpersonal communication. Dr. Gvozdic further stated that because of fibromyalgia, the Claimant had difficulties with prolonged walking, sitting, and standing.

[20] I find that it is more likely than not that the Claimant's health conditions interfered with her ability to work by the end of December 2018.

The Claimant failed to follow reasonable treatment recommendations

[21] A claimant is required to follow reasonable treatment recommendations. If they fail to do so, I must consider what impact this might have had on their disability status.²³ A claimant who fails to follow reasonable treatment recommendations that would likely have significantly improved their disability status will not establish a severe disability.²⁴

[22] As reported above, the Claimant tried a variety of medication for pain and depression. She also took physiotherapy and massage therapy. For her mental health conditions, she saw psychiatrists and counsellors and participated in outpatient mental health groups. However, in one very significant respect, she failed to follow reasonable treatment recommendations.

[23] Beginning in March 2018, the Claimant had 18 weeks of intensive individual behavioural treatment through Odyssey Health Services (Odyssey).²⁵ Before she began the program, her family doctor and her pain specialist agreed that there was no medical reason why she could not follow the proposed treatments. Her physiotherapist concurred.²⁶ The program's purpose was to address her chronic pain, fatigue, and depressed mood by progressively increasing her activity levels. In addition, a program of study and psychological counselling promoted an alternate approach to coping with pain.²⁷ By the end of June 2018, Odyssey health professionals had conducted 30 field visits with the Claimant (72 contact hours) and 5 psychological/clinical interviews (4.5 hours).²⁸

²³ *Warren v. Canada (A.G.)*, 2008 FCA 377; *Kambo v. Canada (HRD)*, 2005 FCA 353; *Lalonde v. Canada (MHRD)*, 2002 FCA 11; *B.F. v. MESD*, 2019 SST 491, a decision that is not binding on me but that is persuasive.

²⁴ *Sharma v. Canada (A.G.)*, 2018 FCA 48

²⁵ GD6-94

²⁶ GD6-101, 119-20, 122

²⁷ GD6-94

²⁸ GD6-94

[24] During the Odyssey program, staff sought to convince the Claimant that she could become consistently more functional and engaged in her life if she followed their treatment recommendations.²⁹ Dr. Yercaris' ongoing reports, however, do not support a finding that the Claimant made best efforts to do so. For example, the program discouraged daytime resting because it interfered with physical reconditioning. In early April 2018, the Claimant was successful only 26% of the time in avoiding daytime resting.³⁰

[25] The Claimant resisted following the program in other ways as well:

- She initially refused Dr. Yercaris permission to contact her physiotherapist about any restrictions arising from her broken wrist;³¹
- She did not want to schedule appointments when her school-age children were home.³² There is no evidence that she tried to make alternate childcare arrangements;
- She cancelled a number of field visits;³³
- She was unwilling to perform a job search, stating that the activity was meaningless to her;³⁴ and
- She refused to do any of the required reading. She claimed that it was repetitive, although in the team's view she had failed to act on its approach.³⁵ When asked about this at the hearing, the Claimant stated that she did not find the required reading interesting and just wanted to read what she wanted to read.

[26] Odyssey staff were flexible in applying their program to the Claimant's circumstances.

- They modified her physical conditioning program when she injured her wrist;
- They tried a variety of pain management strategies, although they found that the Claimant did not give them a fair trial;³⁶ and

²⁹ GD6-94-95

³⁰ GD6-103. By the end of May, this had improved to a compliance rate of 57%. Odyssey aimed at a compliance rate of 80%.

³¹ GD6-100

³² GD6-95

³³ GD6-104, 94

³⁴ GD6-101

³⁵ GD6-97-98

³⁶ GD6-98-9 101, 102

- When the Claimant complained that she was frustrated with her psychotherapist, they provided a different psychotherapist. The Claimant, however, did not engage with the second psychotherapist either.³⁷

[27] By July 1, 2018, the insurer terminated the Odyssey program before the scheduled completion date. Dr. Yeracaris reported that the Claimant was poorly engaged with treatment, failed to increase her activity level, and resisted rethinking her relationship to her pain.³⁸ Dr. Yeracaris concluded that the Claimant's failure to comply with treatment showed that she was not as motivated to return to work as she claimed.³⁹ The Claimant did not indicate that she wished to continue treatment. The insurer emphasized that was no medical evidence that she could not participate in the program. The company found that the Claimant had not been compliant with treatment.⁴⁰

[28] In July 2018, Dr. Yeracaris reported that staff had reviewed with the Claimant multiple times, in different ways and with different behavioural therapists, that their program was the most effective, evidence-based treatment paradigm.⁴¹ She acknowledged that the Claimant suffered from fatigue and pain, but "the whole thrust of our treatment plan has been to provide [her] with different responses to these symptoms."⁴² Nevertheless, the Claimant maintained that her fatigue and pain were preventing her from increasing her level of participation. At the hearing, the Claimant stated that the staff didn't spend enough time with her. I pointed out that by the end of June 2018, they had spent more than 70 hours with her over four months. She said that they only saw her for an hour or two at a time, so they couldn't understand what her whole day was like. This criticism of Odyssey is odd in view of Dr. Yeracaris' April 2018 report that the Claimant herself had actually shortened the time of the field visits.⁴³

[29] Mr. Sacco, the Claimant's representative, submitted that the Claimant's left wrist injury was a major problem in her compliance with the Odyssey program. In February 2018, Dr.

³⁷ GD6-97-98, 105

³⁸ GD6-94

³⁹ GD6-98

⁴⁰ GD6-96

⁴¹ GD6-94

⁴² GD6-97

⁴³ GD6-105

Gvozdic asked that the rigours of the program be relaxed somewhat because the Claimant would be wearing a cast for 6 weeks.⁴⁴ However, in April 2018 her physiotherapist reported that her left wrist had healed.⁴⁵ In June 2018, Dr. Yeracaris reported that stretching and strength training had been suspended because of the Claimant's wrist condition, but her cardiovascular exercise was continuing.⁴⁶ The Claimant herself testified that her wrist condition was only a minor setback in the context of the Odyssey program.

[30] In considering the Claimant's failure to comply with the Odyssey program, I have taken into account her argument that her pain and fatigue prevented her from compliance. I have also considered that pain levels are subjective. I nevertheless find that the Claimant failed to comply with reasonable treatment recommendations. Her family doctor, pain doctor, and physiotherapist all reported that there was no medical reason why she could not follow the Odyssey program. That program was closely supervised by qualified health professionals headed by a psychologist. Moreover, even in areas where pain levels would have little or no bearing on compliance, such as doing required reading and performing job searches, the Claimant did not follow the Odyssey program.

[31] Having found that the Claimant did not comply with reasonable treatment recommendations, I must consider what effect noncompliance had on her disability status. Dr. Yeracaris reported that Dr. Gvozdic had told the Claimant that the Odyssey program would be her "best opportunity to return to employment."⁴⁷ In December 2017, Dr. Yeracaris stated that if the Claimant followed the Odyssey program with "appropriate engagement," there was a 75% chance that she could resume gainful employment "on a reliable and consistent basis."⁴⁸ The Claimant did not appropriately engage with the Odyssey program. If she had done so, I find it more likely than not that she would have been able to return to gainful employment.

⁴⁴ GD6-113

⁴⁵ GD6-101

⁴⁶ GD6-98

⁴⁷ GD6-95

⁴⁸ GD6-122-123

[32] Since I have found that the Claimant did not comply with reasonable treatment recommendations that would likely have significantly improved her disability status, it is unnecessary for me to apply the “real world” analysis.⁴⁹

[33] I find that the Claimant failed to prove it is more likely than not that she had a severe disability by December 31, 2018.

PROLONGED DISABILITY

[34] As I found the disability was not severe, it is not necessary for me to make a finding on the prolonged criterion.

CONCLUSION

[35] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security

⁴⁹ *Sharma v. Canada (A.G.)*, 2018 FCA 48