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

Citation: *AB v Minister of Employment and Social Development*, 2020 SST 1063

Tribunal File Number: GP-20-266

BETWEEN:

A. B.

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:	Chantelle Yang
Minister represented by:	Jessica Spafford
Teleconference hearing on:	May 27, 2020
Date of decision:	May 31, 2020

DECISION

[1] The Claimant is not entitled to Canada Pension Plan (CPP) disability benefits.

OVERVIEW

[2] The Claimant is a 49-year-old woman who came to Canada in 1997. In June 2009, she began operating her own licensed daycare from her home. She stopped working in May 2018.

[3] The Claimant applied for disability benefits in November 2017, a few months before she stopped working. In her application, she reported that she is disabled by depression, stress, anxiety and panic attacks. She explained that she has fatigue, lack of energy, motivation and focus, and a fear of the future. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

[4] A Tribunal member heard the Claimant's appeal in August 2019. That member decided that the Claimant was not entitled to disability benefits because her disability was not severe at the time of her Minimum Qualifying Period (MQP).

[5] The Claimant appealed the decision to the SST Appeal Division. In January 2020, the Appeal Division allowed the appeal, finding that the General Division had failed to provide a fair process because the Minister had referred to evidence that was not shared with the Claimant. The Appeal Division referred the matter back to the General Division for reconsideration by a different General Division member. The Appeal Division also held that the parties could make submissions to the General Division about what form the reconsideration hearing should take, and whether the prior General Division decision and/or recording of that hearing should remain part of the Tribunal's record.

[6] In April 2020, the Minister provided the Tribunal with additional evidence, including the reports the Minister had previously referred to and which were not included in the record at the time of the first Tribunal hearing in August 2019[1].

[1] Pages IS1-4 to IS1-87

PRELIMINARY MATTERS

[7] On March 20, 2020, I wrote to the parties and I invited each party to make submissions on what form the reconsideration hearing should take and whether the General Division decision of 2019 and/or recording of that hearing should remain part of the Tribunal's record. I set the deadline for reply as April 20, 2020.

[8] In submissions dated April 15, 2020, the Minister asked for an oral hearing because the Minister considered the case to be complex[2]. On April 27, 2020, I issued a Notice of Hearing setting an oral hearing (teleconference) for May 27, 2020 and I explained that one of the reasons I was scheduling an oral hearing was because there are gaps in the information in the file and/or a need for clarification.

[9] On May 21, 2020 (shortly before the hearing), the Claimant's representative filed a request asking me to render a decision based on the existing record (without an oral hearing). She submitted that the record (including the recording from the hearing of August 2019) is sufficient to decide the appeal, and that requiring the Claimant to re-testify would significantly exacerbate the Claimant's mental health. The Claimant's representative further submitted that if I determined that an oral hearing was needed, then the scope of the examination should be limited in that the Claimant should not have to testify about certain areas such as her background, work history, certain medical reports and symptoms. As for the lateness of the request, the Claimant's representative explained that her request was originally drafted on March 30, 2020 but was inadvertently not sent to the Tribunal until May 21, 2020.

[10] I responded to the Claimant's request on May 26, 2020. I explained that I had reviewed the file in its entirety and I had determined that an oral hearing was warranted. I pointed out that new evidence was filed after the hearing of August 2019 and that some of that evidence raised questions that are not sufficiently addressed in the record. I also pointed out that the Minister had asked for an oral hearing and that I agreed with the Minister that the case is complex. As for the scope of the questioning, I said that I was sensitive to the Claimant's mental health conditions and the stress that may be associated with having to re-visit issues she previously testified about.

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[2] Page IS1-3

However, I said I was reluctant to exclude outright any areas from questioning, as there may be areas where clarification is needed.

[11] At the outset of the hearing, the Claimant's representative confirmed she had received a copy of my decision letter. She said she had nothing further to say about it. The Minister's representative said she had not yet received my decision letter, but she also said she did not feel disadvantaged in any way by not having it and she confirmed she was comfortable proceeding with the hearing.

[12] The oral hearing proceeded as scheduled.

ISSUE(S)

[13] 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 MQP. The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP is December 31, 2017.

[14] Disability is defined as a physical or mental disability that is severe and prolonged. 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 that if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

[15] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2017.

ANALYSIS

Severe disability

The Claimant has a significant health condition that resulted in functional limitations by her MQP

[16] The evidence shows that the Claimant has a significant health condition that resulted in functional limitations by her MQP.

[17] On October 23, 2017, the Claimant reported that nearly every day she has little interest or pleasure in doing things, feels down, depressed or hopeless, has trouble falling or staying asleep or sleeps too much, feels tired or has little energy, feels nervous, anxious or on edge, is not able to stop or control worrying, has trouble relaxing, and feels afraid. She also has days when she thinks she would be better off dead, or of hurting herself in some way[3].

[18] On November 16, 2017 (about 6 weeks before the MQP), the Claimant's family physician (Dr. Moghadam) wrote that the Claimant suffers from chronic under-treated depression and anxiety. She has had multiple ER visits for panic attacks, with her most recent visit being in February 2017. She suffers from almost daily panic attacks, and her social anxiety limits her from interacting with people outside of her home. She has a daycare, but finds it more and more difficult to care for children due to her depressed and anxious mood. Her medical condition limits her from working at this time, and she would benefit from a temporary disability until her medical condition is treated and she is able to safely work again[4].

[19] On April 4, 2018 (only about 3 months after the MQP), the Claimant saw Dr. Neelma Dhar for a psychiatric assessment. Dr. Dhar diagnosed major affective disorder (moderately severe without psychosis), panic disorder and generalized anxiety disorder, and anemia which aggravates her mood disorder. She explained that the Claimant had difficulties with sleep and

[3] Pages GD2-84 to GD2-85
[4] Pages GD2-74 to GD2-78

that in the last two years the Claimant had noticed a slow decrease in her energy, appetite, interest, motivation and felt like she was "dying inside"[5].

[20] On April 6, 2018, Dr. Moghadam wrote that the Claimant has chronic and severe depression, anxiety and panic attacks. She has had multiple visits to the ER for her panic attacks. She has daily symptoms that really limit her daily activities and her normal functioning. Her medical condition is severe and it limits her from working[6].

The Claimant has not been compliant with treatment recommendations

[21] 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[7]. Such efforts are generally known as a "duty to mitigate". Claimants are not entitled to CPP disability benefits unless they satisfy the duty to mitigate[8]. 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[9].

[22] The Minister submits that the Claimant has not been compliant with treatment recommendations[10].

[23] The Claimant's representative appears to acknowledge that the Claimant has not been compliant. However, she submits that the non-compliance is reasonable.

[24] The evidence shows that the Claimant has not been fully compliant with treatment recommendations. She has shown, what I believe to be, a general reluctance to pursue important treatment modalities that are likely to affect her disability status. Here are some examples:

Dr. Kheirani's recommendations

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[5] Pages GD2-60 to GD2-63
[6] Page GD2-58
[7] *Klabouch* v. *Minister of Social Development*, 2008 FCA 33
[8] *Sharma* v. *Canada (Attorney General)*, 2018 FCA 48
[9] *Lalonde* v. *Minister of Human Resources Development*, 2002 FCA 211
[10] Page GD3-6

[25] In November 2016, the Claimant was referred to Dr. Kamran Kheirani (psychiatrist) after she had gone to the ER with complaints of chest pain and shortness of breath. Dr. Kheirani made several recommendations. For example, Dr. Kheirani prescribed one week of medications (Cipralex 5 mg and Ativan) and told the Claimant to find a family doctor so that future medications could be prescribed. He also completed a form to cover the cost of the medications. Dr. Kheirani also recommended counselling, and to help with this, he gave the Claimant a list of counselling resources in the community[11].

[26] The Claimant did not have her medications re-filled and she did not seek counselling in the weeks following her consult with Dr. Kheirani. I know this because the Claimant saw a cardiologist (Dr. Blackwell) in December 2016, and at that consult the Claimant said her prescription had run out. She did not have a family doctor and could not get her medications renewed. She also told Dr. Blackwell that she did not seek help because her family thought she should not see anyone for counselling[12]. Also, Dr. Moghadam reported that when she first met the Claimant in October 2017, the Claimant said she was not taking the prescribed medications because she was told by a walk-in physician that they could be "addictive"[13].

Dr. Moghadam's Recommendations

[27] When Dr. Moghadam first met the Claimant and learned the Claimant had not been taking the medications prescribed by Dr. Kheirani, she emphasized the importance of following doctors' recommendations, including medications. At that time, the Claimant reportedly promised to follow any recommendations that Dr. Moghadam made. Dr. Moghadam then re-started the Claimant on Cipralex and Ativan and also prescribed Trazadone to help with sleep. At the follow-up visits, the Claimant told Dr. Moghadam she was taking her medications. However, the Claimant later admitted that she was not taking the Cipralex or the Trazadone consistently because she did not like the effect and because they made her numb. Dr. Moghadam offered to switch the Claimant to Wellbutrin, but the Claimant refused. She said she would try the Cipralex again to see if she could tolerate it better. It does not appear the Claimant was fully compliant because she saw another psychiatrist (Dr. Dhar) in April 2018 (after refusing to see Dr. Kheirani

[11] Pages GD2-87 to GD2-89
[12] Pages GD2-93 to GD2-94
[13] Page GD3-17

again) and Dr. Dhar reported that the Claimant was not taking her medications as prescribed. The Claimant appears to have told Dr. Dhar that she was not taking the medications as prescribed because they were not effective[14].

Dr. Dhar's Recommendations

[28] In April 2018, Dr. Dhar changed the Claimant's medications and said the Claimant was agreeable to the change. Dr. Dhar recommended mirtazapine 7.5 mg to be increased to 15 mg to help with her sleep and she recommended that the Claimant stay on the Cipralex (Escitalopram) 20 mg. Dr. Dhar also said she would fill out a form so that the Claimant could get subsidized medications[15]. In March 2019, Dr. Moghadam reported that she is not sure if the Claimant followed through with Dr. Dhar's recommendations[16].

Dr. Fagbuyi's Recommendations

[29] Dr. Dhar left her practice and so the Claimant began seeing Dr. Kay Fagbuyi (psychiatrist) in December 2018.

[30] Dr. Fagbuyi recommended that the Claimant increase the Mirtazapine to 30 mg and that she stop the Lorazepam and Cipralex[17]. The Claimant did not comply. In January 2019, the Claimant told Dr. Fagbuyi that she did not take the dosage he recommended because she met with Dr. Moghadam and together they decided that the increase in Mirtazapine should have been done at a slower pace and so the dose was only increased to 22.5 mg[18]. I question whether the Claimant was completely truthful with Dr. Fagbuyi because there is nothing in Dr. Moghadam's reports that suggest she agreed or suggested that Dr. Fagbuyi had prescribed too high a dose. In March 2019, Dr. Moghadam wrote that the Claimant came to see her after seeing Dr. Fagbuyi and the Claimant said she did not feel comfortable with Dr. Fagbuyi's recommendations and so she stopped taking the medication after two days. Dr. Moghadam said she had a long discussion

[14] Page GD2-63
[15] Page GD2-63
[16] Page GD3-17
[17] Page GD6-15
[18] Page GD4-22

with the Claimant, and the Claimant agreed to take it again, but Dr. Moghadam later learned the Claimant never did[19].

Beena Jaswal's Recommendations

[31] Beena Jaswal is a clinical therapist who began seeing the Claimant in or about March 2018[20]. Ms. Jaswal made a few recommendations to the Claimant, including group and individual therapies, but Dr. Moghadam reported that the Claimant was not following through with the homework and eventually she stopped going to the sessions and cancelled all of her follow up appointments with Ms. Jaswal. When asked about this, the Claimant told Dr. Moghadam that "Beena was not nice to me and she did not treat me like a sick person"[21].

[32] In June 2019, Ms. Jaswal wrote that the Claimant was being discharged, as she was not able to apply cognitive behavioural therapy (CBT) or attend CBT group and therapy was not working[22].

The Claimant's treatment modalities would have impacted her disability status

[33] If the Claimant had been compliant with treatment, it would have impacted her disability status. I say this because the Claimant was not expected to be out of the workforce for long. In November 2016, Dr. Kheirani said that he was giving the Claimant a note to be off work for two months (presumably while the Claimant pursued his treatment recommendations)[23]. Also, when Dr. Moghadam began seeing the Claimant, Dr. Moghadam was optimistic that with treatment the Claimant would be able to return to work. In November 2017, she wrote that without the right treatment, the Claimant will likely have hospital admissions and deteriorate even more. She added that the Claimant would likely benefit from "temporary" time off work until she is more medically and mentally fit to work again[24].

[19] Page GD3-18
[20] Page IS1-58
[21] Page GD3-18
[22] Page IS1-33
[23] Page GD2-87
[24] Page GD2-77

The Claimant's non-compliance has not been reasonably explained

[34] During her first hearing of August 2019, the Claimant was asked about the compliance issues. In her reply, the Claimant focused mainly on the side effects from the medications. She said, for example, that the medication (she did not specify which medication(s)) made her feel like a zombie and left her tired, with no energy or ability to focus. Because the side effects from the medication is what the Claimant focused on in her reply, I will consider it first.

[35] I do not believe that the Claimant's non-compliance with medication is reasonably explained by side effects.

[36] The Claimant has had compliance issues with medications since her first consultation with Dr. Kheirani, and she has not always cited side effects as the reason for her non-compliance. For example, when Dr. Fagbuyi prescribed Mirtazapine 30 mg, the Claimant stopped after only two days, and simply told her family physician that she did not feel comfortable with Dr. Fagbuyi's recommendations. This leaves me to question whether the side effects are a genuine explanation. My concern is supported by some of the Claimant's responses to her doctors' suggestions. For example, when Dr. Moghadam learned that the Claimant was not taking the Cipralex or the Trazadone consistently because they made the Claimant feel "numb", Dr. Moghadam offered to switch the Claimant to Wellbutrin. The Claimant refused to try the Wellbutrin and instead opted to re-start the Cipralex[25]. Had the Claimant been experiencing side effects to such an extent that they were causing a compliance issue, then I would have expected her to try a different medication before opting to re-start one of the medications that reportedly caused side effects.

[37] During the hearing of August 2019, the Claimant also spoke of how she did not like the way Dr. Fagbuyi spoke to her. She said, for example, that when she tried to talk to Dr. Fagbuyi about all the symptoms she experiences after taking the medications, he said something like "I'm the doctor. You don't know better than me. Take the medication or you don't come to me".

[25] Page GD3-17

[38] It would not surprise me if Dr. Fagbuyi expressed some frustration with the Claimant's non-compliance, but I question whether he spoke to the Claimant in the way she described and whether his comments were in response to concerns the Claimant raised about side effects from medications. There are references throughout the file to the Claimant describing several practitioners as being unkind or insensitive towards her and I have a difficult time believing they all acted as she claims. For example, the Claimant told Dr. Moghadam that Dr. Kheirani was not nice to her and so she refused to follow up with him[26]. She also said that a mental health counsellor (a woman she saw before Ms. Jaswal) did not seem to care about her[27]. As for Ms. Jaswal, the Claimant said she was not nice to her and did not treat her like a sick person[28]. All of this makes me wonder if the Claimant's descriptions of her encounters are exaggerated or otherwise skewed by an inaccurate perception. If it is the latter, I am left to question whether this is something that counselling may have helped with.

[39] I know that when Dr. Fagbuyi last saw the Claimant in June 2019 he said that marriage difficulties are the primary issue and that a solution-focused approach should be the way to go, as he was not sure that any medication would alter the way the Claimant feels[29]. The difficulty for me is that I do not know that the marriage difficulties were the primary issue affecting the Claimant's mental health in December 2017 (her MQP) and so I am reluctant to infer that medications would not have been helpful had she been compliant closer in time to her MQP. I am not saying there were no marriage difficulties by the MQP. I am simply saying that I do know they were a significant contributor to the Claimant's disability at that time. Indeed, the medical evidence shows that the Claimant's mental health conditions got progressively worse after October 2017 (when the Claimant first met with Dr. Moghadam)[30]. I also note that in November 2016, the Claimant told Dr. Kheirani that she generally has a good relationship with her husband[31]. In April 2018, the Claimant told Dr. Dhar that she had a good husband, though she said he made negative comments to her[32].

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[26] Page GD3-17
[27] Page GD3-18
[28] Page GD3-18
[29] Page IS1-31
[30] Page GD3-17
[31] Page GD2-88
[32] Page GD2-62

[40] The Claimant's representative provided a list of other considerations that she submits reasonably explain the Claimant's non-compliance. These include financial barriers, the Claimant's fear of addiction, cultural issues including shame surrounding mental illness, the inability of the Claimant to leave her home due to social anxiety and agoraphobia, the Claimant's distrust of doctors, language barriers, logistical issues with continuity of care (doctors moving and closing files) and the Claimant's long-standing PTSD and how that might lead her to make irrational decisions.

[41] I do not have evidence indicating that the non-compliance is due to financial barriers. The medical evidence indicates that at least two doctors (Dr. Kheirani and Dr. Dhar) completed forms (Plan G) so that the Claimant could have her medications subsidized. There is also no indication in the file that the Claimant had to pay for the therapy sessions she was offered.

[42] As for the fear of addiction, I note that when the Claimant first met Dr. Moghadam in 2017 she told her that she had not been taking the medications that Dr. Kheirani prescribed because a doctor at a walk-in clinic had told her the medications were addictive. I do not have evidence from the walk-in clinic indicating that the Claimant was discouraged to take the medications she had been prescribed. If things did happen as the Claimant says, I find it curious that the Claimant would prefer the advice of a walk-in physician (who presumably did not know the Claimant) to that of the psychiatrist who had completed a full assessment. In any event, Dr. Moghadam said that she emphasized the importance of following doctors' recommendations including medications and that the Claimant promised to adhere to any recommendations made. It does not appear as though the Claimant expressed further concerns to her practitioners about addiction.

[43] As for the remaining considerations, my impression is that they are a grouping of *possible* explanations that *might* contribute to a claimant's non-compliance. The evidence is thin that any of these were the real reasons why the Claimant was non-compliant. As I mentioned earlier, when the Claimant was asked about the compliance issue during the hearing of August 2019, she focused on the side effects from the medications. I find it significant that the Claimant's practitioners (Dr. Moghadam, Dr. Fagbuyi, and Ms. Jaswal) held a joint meeting with the Claimant in March 2019 to discuss the Claimant's goals and expectations as well as the

importance of pharmacological and non-pharmacological treatment compliance. The summary of that meeting does not suggest that the practitioners concluded that compliance with treatment was an unrealistic expectation for the Claimant, given her circumstances. In fact, Dr. Moghadam wrote that the Claimant agreed to continue seeing Ms. Jaswal and to follow up with Dr. Fagbuyi and herself (Dr. Moghadam) with regards to her medications.

[44] Finally, the Claimant's representative submits that I should apply the *Bulger* decision[33]. She submits that it stands for the proposition that compliance must be viewed in the context of the Claimant's circumstances, and that people suffering mental health conditions cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury.

[45] The *Bulger* decision was rendered by the Pension Appeals Board, and so strictly speaking it is not binding on me. I have, however, considered it carefully. I see two main reasons for why I should distinguish *Bulger*. First, the *Bulger* decision was rendered in the context of a woman who suffered from fibromyalgia. It was in the context of fibromyalgia that the Board relaxed the compliance requirement. The Board said that "Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression" cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury. The Claimant, in the case at hand, does not have fibromyalgia, nor was she diagnosed with any other chronic pain condition at the time of her MQP. Second, the claimant in *Bulger* was able to show that she abandoned treatment programs only after they appeared to provide no improvement or in some cases when actual aggravation occurred. In the case at hand, I have insufficient evidence to show that the Claimant complied with any treatment recommendation long enough to show that it provided no improvement or made her symptoms worse.

[33] *Bulgar* v. *Minister of Human Resources Development* (March 30, 2000), CP 09164 (PAB)

There is insufficient medical evidence indicating that the anemia would have prevented the Claimant from working by her MQP

[46] In May 2018, the Claimant wrote that the anemia puts her in a constant state of exhaustion, such that she would be unable to keep up with the requirements of a physical job[34]. The difficulty for me is that the anemia was not a new condition and the Claimant had demonstrated the ability to work with this condition at physical jobs in the past (well before her MQP). This is despite the fact that the Claimant went many years without taking her iron supplements. In April 2018, Dr. Moghadam wrote that the Claimant has long-standing iron deficiency anemia, but she had not been taking the iron supplements for many years because she could not afford them[35].

[47] There is some suggestion in the evidence that the cost of the iron supplements may have eventually been subsidized because in April 2018 Dr. Dhar linked the anemia to the Claimant's mood, and she said she would be completing the Plan G form. Indeed, in December 2018 it was noted that the Claimant was due to have injections as the oral treatment had not been successful[36]. This tells me that the Claimant likely started taking the oral medications after April 2018, but also that there was another treatment modality (injections) that may have been explored had the cost of the medications remained prohibitive.

The Claimant's employability is limited

[48] 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[37].

[49] I acknowledge that the Claimant's employability in the real world is limited. Although she was relatively young (46 years of age) at the time of her MQP, she has limited education (grade 3 or grade 6)[38], is not able to read or write in English (though she can speak English,

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[34] Pages GD2-9 to GD2-10
[35] Page GD2-58
[36] Page GD6-13
[37] *Villani* v. *Canada (A.G.)*, 2001 FCA 248
[38] The evidence about the Claimant's education is inconsistent. She testified in August 2019 that she only completed grade 3. However, she told Dr. Dhar that she completed grade 6 (page GD2-62).

French and Arabic)[39], and has only done physical type work such as cleaning homes, babysitting and daycare provider). However, despite these characteristics I am still unable to find that the Claimant's disability was severe by December 31, 2017. When the Claimant's family physician first met the Claimant she indicated that the treatment would likely benefit the Claimant so that the Claimant could work again. As I explained previously, the Claimant was not compliant with treatment recommendations.

Prolonged disability

[50] Given my finding that the Claimant's disability was not severe by December 31, 2017, it is not necessary for me to assess whether it was prolonged.

CONCLUSION

[51] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security

[39] Page IS1-58