



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SM v Minister of Employment and Social Development*, 2020 SST 829

Tribunal File Number: GP-20-105

BETWEEN:

S. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Teleconference hearing on: May 21, 2020

Date of decision: June 5, 2020

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (“CPP”) disability pension.

OVERVIEW

[2] The Claimant is currently 39 years old. She has worked occasionally since 2000, and her latest work attempt ended in 2018.¹ However, she claims that she has been unable to work because of her medical condition since February 2013. She says her main medical conditions are herniated discs in her neck and major depressive disorder (“MDD”).² The Minister received the Claimant’s application for the disability pension on March 1, 2019. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. More specifically, she must be found disabled (as defined in the CPP) on or before the end of the minimum qualifying period (“MQP”). The MQP calculation is based on her contributions to the CPP. I find the Claimant’s MQP to be December 31, 2016.

ISSUES

[4] Did the Claimant have a severe disability by December 31, 2016?

[5] If so, was her disability also prolonged by December 31, 2016?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged.³ A person has a severe disability if she 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. A person must prove, on a balance of probabilities, that her disability meets both parts of the test. If the Claimant meets only one part, she does not qualify for disability benefits.

¹ GD2-47 and GD2-62.

² GD2-39

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

Did the Claimant have a severe disability by December 31, 2016?

[7] For the reasons that follow, I find that the Claimant did not have a severe disability by December 31, 2016, that continued through the hearing date.

[8] I must assess the Claimant's condition in its totality, which means I must consider all possible impairments, not just the biggest or main impairment.⁴ This is important, because the Claimant has identified both physical and mental health concerns.

[9] I must also assess the severe part of the test in a real-world context.⁵ 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. In this case, the Claimant was only 35 years old at her MQP date. She speaks English fluently. She attended Grade 12, but quit right before graduation for personal and family health reasons. She has since taken a few courses for work purposes. She was the primary caregiver for her children, who were born in 2001 and 2006.⁶ She has worked as a waitress, in a "boot camp" for people recovering from addiction, and an instructor for X. She has also worked as a residential support worker on two occasions: once for the elderly, and once in a women's recovery centre. Although she did not mention it herself, the medical documents refer to giving classes at a gym.⁷ Without considering her medical conditions, I find she would be suited to a broad range of work in the health or service sectors that did not require advanced academic qualification or extensive training. She could also do relatively physical work, including physical training. I will now look more closely at the Claimant's conditions and symptoms.

The Claimant's current conditions and symptoms

[10] I accept that the Claimant is currently unable to work. In February 2019, she said she had suffered from a sore neck since 2013. She developed MDD as a result. She said she had trouble standing or sitting for even 10 minutes because of her neck pain. Her anxiety had also worsened.⁸

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

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁶ GD2-37

⁷ GD12-112 (continued from GD12-119)

⁸ GD2-42

[11] In 2019 at least, objective evidence supports the Claimant's statements. In December 2019, Dr. Obadan (Family Physician) said the Claimant had MDD, generalized anxiety disorder, and degenerative disc disease that caused radicular symptoms. Dr. Obadan had treated the Claimant for more than two years. Due to debilitating neck and back pain, and several hospital admissions (primarily for psychiatric reasons), Dr. Obadan said the Claimant could not perform any work.⁹ Many medical documents from 2019 support this statement. The Claimant was admitted to hospital in January 2019 for suicidal ideation. She was in hospital again many times that year.¹⁰ It is difficult to see how the Claimant could have worked at any job during this time.

[12] However, even if the Claimant has a severe disability now, this does not necessarily mean she has had one since at least December 31, 2016. I accept that the medical evidence points to a history of neck and mental health concerns. She had neck surgery in 2013, and was in hospital for mental health concerns in 1998. However, the measure of whether a disability is "severe" is not whether she suffers from severe impairments, but whether the disability prevents her from earning a living.¹¹ The impairment's impact is more important than its mere existence. Medical conditions may also resolve for extended periods and prevent a finding of severity.

[13] Four issues are apparent upon reviewing the evidence. The first is the almost complete lack of pertinent medical documents from April 2013 to the start of 2019. The second is the apparent very recent onset of the Claimant's disabling conditions. The third is the lack of post-surgical follow up and care for her neck problem. The fourth is her training and work activity after April 2013. After looking at each of these issues, I will determine when her severe disability might have begun.

(1) Lack of pertinent medical documents from April 2013 to January 2019

[14] The Claimant had invasive surgery on April 26, 2013. Dr. Malik (Neurosurgery) excised a protruding disc at C5-C6, and did a fusion and internal fixation. The Claimant was discharged on April 29, 2013. Dr. Malik wanted to see her in six weeks (or earlier, if she had problems).¹²

⁹ GD1-6

¹⁰ See GD12 generally.

¹¹ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹² GD2-143 to GD2-149

[15] However, there are no further medical documents until December 16, 2016, when the Claimant attended the Emergency department with a cough complaint. She was diagnosed with a viral infection. She was told to take Tylenol and stay hydrated. She was triaged, seen, and discharged within an hour of arrival. While she also mentioned lower back and anterior chest pain, the hospital did not treat or refer her for those conditions.¹³

[16] After that attendance, there are few medical documents until the beginning of 2019. The only documents pertaining to “current” care were for eight Emergency department visits between June 26 and August 3, 2018. These visits were for anxiety, general weakness, dental/gum problems, chest tightness, dizziness/weakness, nausea, and leg pain and cramps. Four of these visits took place on August 2 and August 3. On one occasion, she went to hospital by ambulance.¹⁴ A November 2017 letter from Dr. Clarke (Neurosurgery) at the QE II Health Sciences Centre did not relate to current care. The letter only confirmed that the Centre would not be acting on an old referral made by Dr. St. Peters (Family Physician). As Dr. St. Peters does not appear to have treated the Claimant since the end of 2010, Dr. Clarke’s letter was likely in response to a referral made by Dr. St. Peters in May 2010.¹⁵

[17] The Claimant attributed the lack of documents to her previous family doctor’s disappearance, an extended period without a family doctor, her reluctance to attend the Emergency department because of extensive waits (to be discussed in more detail later), and her reliance on a nurse acquaintance.

[18] When the Claimant applied for CPP disability benefits, she said her previous family doctor (Dr. Zemerli) only treated her from 2012 to 2013.¹⁶ However, she later said that Dr. Zemerli left in 2016.¹⁷ Dr. Zemerli’s former clinic affirmed this.¹⁸ At the hearing, the Claimant was unsure about when Dr. Zemerli treated her, but eventually said that she stopped seeing Dr. Zemerli in April or May of 2016. She said no documents from Dr. Zemerli were available.

¹³ GD2-115 to GD2-117.

¹⁴ GD11-5 to GD11-15.

¹⁵ GD1-70 and GD1-71

¹⁶ GD2-46

¹⁷ GD1-38, GD2-107, GD2-113, and GD2-22 and GD2-4 (through her MP’s office).

¹⁸ GD2-106

[19] The Claimant said she relied on personal advice in the summer of 2016 from an acquaintance named H. L. H. L. is apparently a nurse practitioner who provided coping advice, pain management strategies, and guidance on where to obtain health care.¹⁹ This seems to have consisted mainly of referring the Claimant to crisis lines. There are no documents from H. L. in the file.

[20] The Claimant said she started seeing her new family doctor (Dr. Obadan) in September 2017.²⁰ However, the earliest document from Dr. Obadan is her CPP medical report from March 2019.²¹ When asked why there were no earlier documents from Dr. Obadan, the Claimant did not know if Dr. Obadan had them.

(2) Recent onset of the Claimant's disabling conditions

[21] While the Claimant says she has been disabled since February 2013, recent medical evidence suggests that she only experienced severe symptoms shortly before she applied for CPP disability benefits in early 2019.

[22] The Claimant was in the hospital on January 18, 2019: she had been suicidal. However, her risk profile only mentioned mental illness. The “checkbox” for chronic medical illness/pain was unmarked.²² On January 26, 2019, she told Dr. Milligan (Psychiatry) she still had suicidal ideation: she “was doing well until late summer when she began to be depressed”. As for the 2013 cervical fusion by Dr. Malik, she was “doing better that way” but had some sensory difficulties in her hands. Dr. Milligan concluded that the Claimant had worsening depression and anxiety since the summer. Dr. Milligan did not comment on any current pain complaints.²³

[23] Another Emergency Department report on February 2, 2019, said nothing about neck pain. On March 2, 2019, the Claimant attended the Emergency Department because of neck pain that had emerged again about 3 weeks before.²⁴

¹⁹ GD1-38

²⁰ GD2-46

²¹ This starts at GD2-119. The date is on page GD2-127.

²² GD12-16

²³ GD12-17 to GD12-19

²⁴ GD12-35 and GD12-47

[24] On March 13, 2019, Dr. Malik saw the Claimant on an urgent basis, on referral from Dr. Obadan. The Claimant told Dr. Malik that, following treatment in April 2013, she “had been well in the years that followed, until a few months ago.” She also said she “was in her usual state of health until about a month ago” when she awoke with severe pain in her neck. Dr. Malik noted that the April 2013 surgery relieved her symptoms. Dr. Malik also restated that she had been “pain-free until a month ago.”²⁵

[25] On March 22, 2019, Dr. Obadan said the onset of the Claimant’s neck condition was in both 2013 and July 2018. Dr. Obadan also placed the onset of the Claimant’s depression in July 2018.²⁶ As noted, Dr. Obadan had been seeing the Claimant since September 2017.

[26] On May 24, 2019, the Claimant went to the Emergency Department because of suicidal thoughts. The hospital notes traced her current problems to medication she started taking in July 2018. She had decreased energy for about a year, after she stopped going to the gym.²⁷

(3) The Claimant’s lack of post-surgical follow up and care for her neck problem

[27] The Claimant said she continued to suffer “brutal, brutal” pain after her 2013 surgery. She said she did her best to go to the Emergency Department, attend physiotherapy, and take medication, but did not get any relief. However, she filed no Emergency department records from this period, although she filed one from 2016 and many from 2018 and 2019. After Dr. Zemerli left, the Claimant did not go to the Emergency Department or other clinics. She said she could not sit waiting for 10 hours²⁸: she could only stay in the same position for five minutes. However, she often talked with H. L., and said she “could not count” how many times she called a crisis line about her pain.

[28] The Claimant confirmed that she did not see Dr. Malik (or any specialists) at all after the 2013 surgery, despite his request for a follow-up within six weeks.²⁹ She said he was 86 years old and was very rude: he was “from a different culture” and would make her cry. She said she was afraid to see him. She also thought she would be fine after the surgery. She never received a

²⁵ GD2-153 and GD2-154

²⁶ GD2-123 to GD2-124

²⁷ GD12-119, continued on GD12-112

²⁸ She also reported this to her MP (see GD2-4) and mentioned this in her appeal materials (see GD1-1).

²⁹ GD2-147

call or an appointment from Dr. Malik. She thinks she might have called his office in 2016, but was told that she needed a referral. As noted, she is seeing Dr. Malik again now.

[29] When asked about what Dr. Zemerli did for her until 2016, the Claimant said Dr. Zemerli took care of minor things such as coughs and colds. The Claimant said she felt good during this time, other than her neck. She said she had no doctor to prescribe her pain medication by 2016, but she still had some left over from 2013. She also took Tylenol and Advil.

[30] At the hearing, the Claimant said her anxiety and depression had emerged by the time she started seeing Dr. Obadan in September 2017. Dr. Obadan apparently insisted on treating her anxiety and depression first. The Claimant said she didn't talk about her neck because she needed to treat her mental health and she was also afraid to get pain medication.

[31] At the hearing, Ms. A. W. (the Claimant's mother-in-law) said the Claimant did not mention her neck pain around 2016 because there was "no point". The Claimant had apparently been told that "nothing could be done". Although Ms. A. W. said the Claimant called ambulances "every 2nd day", no hospital records around 2016 support this.

(4) The Claimant's work activity since April 2013

[32] The Claimant took a five-day instructor's course from X in 2015. She said the course went well: it was in a classroom, but she had no anxiety because the class size was small. She went on to work as an instructor for X until either 2016 (according to her earnings summary³⁰) or 2017 (according to her application materials³¹). She worked on and off as needed. It could be anywhere from zero to three days per week, but averaged one day per week. She would teach for eight hours a day: the CPR course was one day, while the First Aid course included a second day.

[33] The Claimant said she loved teaching, but had to quit because she was no longer able to carry the necessary equipment. Carrying heavy equipment would make her use ice and pain medication for days afterward. She said she had some anxiety, but worked anyway because she "knew I had to make some money".

³⁰ GD2-62

³¹ GD2-47

[34] In 2018, the Claimant took a two-week course for her upcoming job with X, where she was a residential support worker. She later had to quit the job after only two shifts because she would be crying after her shift. She said the clients triggered her mental health concerns, and she also had trouble with prolonged standing over her 12-hour shifts.³²

[35] A May 2019 form notes that the Claimant stopped putting on classes at the gym roughly one year before. She had been a trainer there, but stopped due to mental health symptoms.³³ The Claimant did not mention this work at the hearing, when asked if she had done any paid or volunteer work since 2013.

Resolving the issues and determining the onset date of a severe disability

[36] The lack of pertinent medical documents during this period is not necessarily fatal to the Claimant's appeal. However, this makes it more difficult for her to prove that she has had a severe disability since at least December 31, 2016. To complicate matters further, she admitted at the hearing that her memory was not good. I do not fault her for lacking a family doctor between roughly May 2016 and September 2017. Nonetheless, she did pursue care for at least one other issue (a viral infection in December 2016) during this time.

[37] The problem is that the evidence described above does not point to an ongoing severe condition after the Claimant's April 2013 neck surgery. She did not see any specialists, despite only lacking a family doctor between May 2016 and September 2017. Her only documented medical treatment over a period of more than five years was for cough and cold symptoms. Objective reports, from multiple health professionals, put the onset of her current neck and mental health concerns in either 2019 or (at the earliest) July 2018.

[38] The Claimant said her neck pain was so bad after April 2013 that she could not wait for ten hours in the Emergency department. However, she repeatedly attended Emergency in the summer of 2018 for multiple conditions other than neck pain. Her sole Emergency attendance in 2016 took far less than ten hours. She was triaged, seen, and discharged in less than an hour. In any case, she told doctors in 2019 that her neck pain had only recently emerged.

³² GD2-47 and GD2-62

³³ GD12-119, continued at GD12-112

[39] The Claimant also trained and worked for X for an extended period around 2016. While those were eight-hour days, she said she stopped because of the heavy equipment she had to carry to and from the courses. She also completed two weeks of full-time training in 2018 for a personal support worker role. Finally, she appears to have been leading gym classes until 2018, when she stopped because of emerging mental health concerns.

[40] The Claimant's explanations for the lack of treatment are difficult to accept. While Dr. Zemerli's sudden departure might explain the lack of records from her office, it does not appear that Dr. Zemerli was treating her neck anyway. The Claimant's suggestion that Dr. Obadan did not want to treat her neck because of the onset of mental health concerns (which only seemed to reappear in mid-2018) is troubling. Her failure to see Dr. Malik for any follow-up after the 2013 surgery is also troubling. While she expressed concern about his manner, her extended failure to seek help for her neck from any other health professional weakens this explanation. Disability benefit applicants have a personal responsibility to cooperate in their health care.³⁴

[41] I find it most likely that the Claimant experienced increased mental health symptoms by mid-2018. The bulk of the evidence suggests that her neck pain became a significant issue again in February 2019. This is consistent with what Dr. Malik told her in 2013: he could not guarantee the outcome, and she might need further surgery in 5–10 years. Given the lack of neck treatment after April 2013, the lack of mental health concerns until mid-2018, and her activity level until 2018, I conclude that the Claimant did not have a continuously severe disability before June 2018. As this is after her MQP date, her appeal cannot succeed.

[42] I am not suggesting that the Claimant could work now. She has recently had severe mental health concerns. Her serious neck pain also appears to have returned. However, eligibility for CPP disability benefits is based on CPP contributions. Unlike some other disability programs, CPP disability coverage only exists as long as qualifying contributions continue. In this sense, it is like an insurance policy. The evidence does not support a severe disability until some time after her "coverage" expired.

[43] More generally, I cannot ignore the CPP's provisions. The Tribunal was created by legislation. It only has the powers granted to it by its governing statute. As a Tribunal Member, I

³⁴ *Kambo v. Canada (Minister of Human Resources Development)*, 2005 FCA 353.

must interpret and apply the provisions as they appear in the CPP. I cannot waive or change them, even if they seem unfair. The CPP does not let the Tribunal make decisions on a compassionate basis. I cannot contradict Parliament's intent.³⁵

Did the Claimant have a prolonged disability by December 31, 2016?

[44] As I found that the Claimant did not have a severe disability by December 31, 2016, I do not need to answer this question.

CONCLUSION

[45] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

³⁵ See, for example, the Supreme Court of Canada's decision in *R. v. Conway*, 2010 SCC 22, at paragraph 101.