



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. M. v Minister of Employment and Social Development*, 2020 SST 623

Tribunal File Number: GP-18-2807

BETWEEN:

M. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Thomas W. Zwiebel

Teleconference hearing on: June 17, 2020

Date of decision: June 22, 2020

DECISION

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

OVERVIEW

[2] The Claimant was born in Egypt and came to Canada in 2002. She was 51 years old when she applied for a CPP disability pension in February 2018. She last worked as a picker/packer. She stated that she had been unable to work since April 2013 because of a torn cartilage in her left knee, a blood clot in her lung, and shortness of breath.¹ The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal (Tribunal).

[3] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² The Claimant's disability is severe if it causes her to be incapable regularly of pursuing any substantially gainful occupation. Her disability is prolonged if it is likely to be long continued and of indefinite duration.

[4] 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) and continues to be disabled.³ Her MQP – the date by which she has to prove she was disabled – is December 31, 2016. This is the last date when she had valid contributions to the CPP in four out of the last six years.⁴

[5] The Claimant also had earnings of \$4,002 in 2017.⁵ This was below the minimum level of earnings to help her meet the contributory requirements; however, if she became disabled in 2017 before the end of August 2017, she will have an MQP of August 31, 2017.

¹ GD2R-184

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

³ Paragraph 44(1)(b) CPP

⁴ Record of Contributions: GD5-13. The Honourable Gordon Killeen, Q.C., and Andrew James, *2019 Annotated Canada Pension Plan and Old Age Security Act*, 18th edition, (Toronto, 2019), at page 296

⁵ GD2R-42 to 44

PRELIMINARY ISSUE

[6] This is the Claimant's second application for CPP disability. The Minister received her first application in May 2014.⁶ The Minister denied the application at the initial and reconsideration levels, and the Claimant appealed to the Tribunal. In May 2016, the General Division dismissed the appeal.⁷

[7] Mr. Zwiebel, the Claimant's representative, acknowledged that the principle of *res judicata* (the matter has been decided) applies to the May 2016 decision. *Res judicata* precludes the rehearing or litigation of matters that have previously been determined. The May 2016 decision decided that the Claimant was not suffering from a severe and prolonged disability by her then MQP date of December 31, 2013. Accordingly, for the purposes of this appeal she must be considered not to have been disabled within the CPP definition before the end of December 2013.

[8] In the current case, the Claimant's employment earnings of \$9,829 in 2016 extend her MQP to December 31, 2016. In addition, her earnings of \$4,002 in 2017 could potentially extend her MQP to August 31, 2017.⁸ Since the May 2016 decision is not determinative of whether the Claimant was severely disabled as of August 31, 2017, I must determine whether she became severely disabled during the window period between January 1, 2014 and August 31, 2017 (window period).

ISSUES

1. Was there a material change and deterioration in Claimant's condition during the window period such that she was severely disabled by the end of August 2017?
2. If so, is her disability long continued and of indefinite duration?

⁶ GD2R-242

⁷ GD2R-197 to 209

⁸ GD5-13

ANALYSIS

Severe Disability

[9] The Claimant suffered a workplace injury to her left knee in November 2012. She was off work for about one week, and then returned to work on modified duties. Her modified duties involved sorting at waist level and above, with no bending or kneeling.⁹ In March 2013, Dr. Manolopoulos, orthopaedic surgeon, stated that the Claimant was walking with an antalgic limp (a walking abnormality to avoid pain). A MRI revealed a medial meniscus tear and Dr. Manolopoulos recommended arthroscopic surgery.¹⁰

[10] The Claimant stopped working in April 2013 to undergo left knee arthroscopic surgery. The surgery was unsuccessful, and she has not returned to work since. Her earnings in 2016 and 2017 were from her helping her husband in his watch repair business when he was busy. She just sat and dealt with customers.

The Claimant's medical condition deteriorated during the window period

[11] I must focus on the Claimant's condition during the window period from January 1, 2014 to August 31, 2017.

[12] During the window period, the Claimant's chronic left knee pain progressed to chronic pain syndrome with pain in not only her left knee but also her right knee and lower back. She suffered from depression and anxiety. She suffered a pulmonary embolism, and was diagnosed with hypothyroidism.

⁹ GD2R-376

¹⁰ GD3-391

[13] In the February 2018 CPP medical report, Dr. Abdelmalek, family doctor, diagnosed left knee sprain, unstable heartbeat triggered by hypothyroidism, deep vein thrombosis that had progressed to a lung blood clot, and major depression.¹¹

Chronic pain syndrome

[14] In August 2016, Dr. Gupta, chronic pain specialist, performed a chronic pain assessment. The Claimant's chief complaint was left knee pain, but she also had lower back and right knee pain. Her left knee pain had worsened in the last few months. She had developed a severe limp and changed her gait, which caused pain in her overworked right knee and lower back. She reported bilateral sharp and shooting lower back pain that was aggravated by lifting, bending, walking, standing, and overhead reaching. She reported right knee pain that was aggravated by bending, walking, and standing. Dr. Gupta diagnosed chronic pain syndrome, sleep disturbance, mood disturbance with symptoms of anxiety and depression, chronic lower back pain with myofascial pain, and chronic knee pain with probable bilateral degenerative arthritis and a left knee meniscal tear.¹²

Pulmonary embolism & hypothyroidism

[15] In early September 2016, the Claimant was hospitalized for three days. Angiograms revealed that she had suffered a pulmonary embolism (lung blood clot). On September 29, 2016 Dr. Gottesman, endocrinologist, performed a thyroid assessment. Her thyroid gland was enlarged by about 35 gm. Dr. Gottesman's diagnoses included pulmonary embolism and hypothyroidism.¹³ In April 2017, Dr. Gottesman stated that the Claimant was feeling well. She was euthyroid (had a normally functioning thyroid), and had no compressive symptoms.¹⁴

[16] In October 2016, Dr. McGowan saw the Claimant for her recent unprovoked pulmonary embolism. The Claimant told Dr. McGowan that she was feeling well. She denied any dyspnea

¹¹ GD2R-131

¹² GD2R-367 to 388

¹³ GD2R-177 to 178

¹⁴ GD2R-170

(shortness of breath) or chest pain. Her left leg was “a bit” more swollen than the right, but she did not have any calf pain. Dr. McGowan explained to the Claimant that because this was her first unprovoked pulmonary embolism, her risk of recurrence was 10% for the first year, and 5% per year thereafter. She recommended that the Claimant take anticoagulation medication.¹⁵ In November 2016, the Claimant told Dr. McGowan that the cough and shortness of breath, for which she had first presented to the hospital in September, had resolved.¹⁶ In July 2017, the Claimant told Dr. McGowan that she had been feeling well, and there had been no recurrence of chest pain or dyspnea.¹⁷ In October 2017, Dr. McGowan stated that the Claimant continued to do well on anticoagulation. There were no signs or symptoms of a pulmonary embolism recurrence.¹⁸

Depression and anxiety

[17] The Claimant first saw a psychiatrist, Dr. Philips, on September 29, 2016. In his report to Dr. Abdelmalek, Dr. Philips stated that the Claimant suffered from many of the vegetative symptoms of depression. She struggled with negative and self-deprecating thoughts, she was irritable, she had isolated herself from others, she had little motivation, she had interrupted sleep, and she had poor energy. Dr. Philips diagnosed major depressive episode with anxiety features. He also diagnosed adjustment disorder with depressed and anxious mood. Although her symptoms warranted a trial of anti-depressants, Dr. Philips recommended holding off on this because the Claimant might be starting a blood thinner.¹⁹ In an April 2017 progress note, Dr. Philips stated that the Claimant continued to feel depressed and struggled with chronic pain.²⁰

My Findings

[18] I find that there was a deterioration in the Claimant’s medical condition during the window period. This was because of the worsening of her chronic left knee pain, her depression, and her new conditions including hypothyroidism and deep vein thrombosis.

¹⁵ GD2R-179 to 181

¹⁶ GD1-86

¹⁷ GD1-80

¹⁸ GD1-78

¹⁹ GD2R-79 to 81

²⁰ GD2R-82

[19] This, however, does not end the matter. The Claimant must still establish that her medical condition had become severe by the end of August 2017. For the reasons that follow, I have determined that she has failed to do so.

The Claimant has failed to establish that she was unable to pursue alternative work as of the end of August 2017

[20] I must assess the Claimant's condition as a whole and consider all the impairments that affected her employability, not just her biggest impairments or her main impairment.²¹ Although each of the Claimant's medical problems taken separately might not result in a severe disability, the collective effect of her various health conditions may render her severely disabled.²²

[21] Since the Minister does not dispute that the Claimant was unable to return to physically demanding work, the primary issue I must determine is whether she was capable of pursuing alternative work.

[22] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.²³ The Claimant's capacity to work, not the diagnosis of her disease, determines the severity of her disability under the CPP.²⁴

[23] The Claimant testified that she could not walk, sit, or stand, for more than an hour. She starts to feel a "sharp pain" in her left knee after walking for more than an hour, and has to rest. This is consistent with her January 2018 disability questionnaire, in which she stated that she had difficulty sitting or standing for more than hour, and difficulty walking for more than ½ hour. Significantly, she did not indicate any difficulties with seeing, hearing, speaking, remembering or concentrating.²⁵ She has to take medication "for life" for her hypothyroidism and blood clot, and because of these conditions her heart beat increases and she experiences a shortness of

²¹ *Bungay* 2011 FCA 47

²² *Barata v MHRD* (January 17, 2001) CP 15058 (PAB)

²³ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²⁴ *Klabouch*, 2008 FCA 140

²⁵ GD2R-185

breath, if she walks too far or lifts heavy things. She saw Dr. Philips on only two occasions for depression, and wasn't able to take an anti-depressant because of the blood clot. She acknowledged that she has not pursued any counselling or therapy for depression. She stated that she feels "emotionally down" because she hasn't been able to find a job.

[24] Although the limitations described by the Claimant prevent her from returning to her previous physically demanding work, they should not prevent her from pursuing alternative sedentary work. The medical evidence supports this conclusion.

[25] In May 2015, Dr. Abdelmalek, stated that the Claimant was unable to do any physical job because of her knee injury.²⁶ In March 2016, he stated that she was totally disabled from doing any type of physical work.²⁷ In August 2018, Dr. Zalzal, orthopaedic surgeon, stated that the Claimant was capable of sedentary work.²⁸ In April 2019, Dr. Abdelmalek stated that the Claimant could only walk or stand for a short period of time because of her left knee pain. Because of this, she was unable to do any physical or labour work. Dr. Abdelmalek also stated that the Claimant could do a sitting job that did not require good English language skills but so far, this type of job was not available.²⁹

[26] I accept that that there has been a progression in the Claimant's chronic knee pain since January 1, 2014. I also recognize that the Claimant feels she is unable to work because of her pain. However, it is not sufficient for chronic pain to exist; the pain must be such as to prevent her from regularly pursuing a substantially gainful occupation.³⁰

[27] I find that the Claimant retained the capacity to pursue sedentary work as of the end of August 2017.

The Claimant has failed to establish a severe disability

[28] A disability is severe if it renders a claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a "real

²⁶ GD2R-399

²⁷ GD2-378

²⁸ GD2R-92

²⁹ GD4-2

³⁰ *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). This decision is not binding but I find it persuasive.

world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining her "employability".³¹

[29] Where a claimant has some capacity to work, she is obligated to show that she has made efforts to obtain and maintain employment that were unsuccessful because of her medical condition.³²

[30] The Claimant acknowledged at the hearing that, other than her work for her husband, she has not made any efforts to pursue sedentary work since her unsuccessful knee surgery in April 2013. I have already determined that she had the capacity to pursue sedentary work.

[31] Because the Claimant has not looked for alternate work, she has not demonstrated that she was unable to obtain or maintain employment because of her health condition. The onus is on the Claimant to show that it is more likely than not that she lacked the regular capacity to pursue substantially gainful employment. I find that she has failed to discharge this onus.

[32] The Claimant was only 51 years old in August 2017. She had close to 14 years left until the usual retirement age. She obtained a Bachelor of Commerce degree in Egypt as well as an accounting and payroll diploma in Canada. She worked in accounting in Egypt for about 10 years before coming to Canada. Her employment in Canada has included working as a lunchroom supervisor, daycare assistant, and picker/packer. Although English is not her first language, she developed sufficient English language skills to complete successfully an accounting and payroll course in Canada. This required her to take courses, study, and write examinations in English. She stated that she did not require any special accommodations to complete this course. There is no suggestion that she suffers from any learning disability. Her personal characteristics, education, and work history do not create substantial barriers to her “employability.”

[33] The Claimant has failed to establish that it is more likely than not that she suffers from a severe disability in accordance with the CPP requirements.

³¹ *Villani* 2001 FCA 248

³² *Yantzi v Attorney General Canada* 2014 FCA 193, para 5: *J.W. v Minister of Human Resources and Skills Development* 2014 SSTAD 12, para 41. This decision is not binding but I find it persuasive.

[34] Since the Claimant has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[35] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security