



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. F. v Minister of Employment and Social Development*, 2020 SST 718

Tribunal File Number: GP-19-1964

BETWEEN:

L. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: June 23, 2020

Date of decision: July 13, 2020

DECISION

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

OVERVIEW

[2] The Claimant is a 62-year-old woman who applied for CPP disability benefits in November 2018. In her application, she reported that she has been unable to work since 1992 because of tendinitis, carpal tunnel syndrome and arthritis. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

ELIGIBILITY REQUIREMENTS

[3] 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 minimum qualifying period (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, 2013.

[4] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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 if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

ISSUE(S)

[5] I must decide whether the Claimant has a disability that was severe and prolonged by December 31, 2013.

¹ Paragraph 42(2)(a) of the *Canada Pension Plan*

ANALYSIS

Severe disability

The nature of the Claimant's disability

[6] The Claimant testified that her carpal tunnel syndrome started in 1992, and was caused by repetitive work she had been doing for some time. She had two surgeries on her hands, and then began receiving compensation from the WSIB. She explained that she had an agreement with the WSIB in that the WSIB would pay her a benefit equivalent to 20 hours of work per week and the Claimant would work 20 hours a week.

[7] The Claimant acknowledged that she has worked cleaning houses since she began receiving WSIB benefits. However, she explained that she has not been able to work a full work week, and that she scheduled her cleaning jobs so that she had time to rest in between her cleaning jobs. She said that her injuries are such that she cannot work "like normal people do". She insists that no other person would work if they had the pain that she has.

[8] I asked the Claimant to describe the symptoms that affected her ability to work in December 2013. She described her symptoms as follows:

- She was unable to sleep due to numbness and tingling in her hands and fingers;
- She sometimes had numbness and tingling in the morning, and so she needed to start her day by taking Advil which helped for a couple of hours;
- She had pain down her right arm, starting from her neck down through her shoulder; and
- She could not grip items properly and she is right-handed.

The Claimant's disability was not severe by December 31, 2013

[9] I am unable to find that the Claimant's disability was severe by December 31, 2013. I say this for two main reasons. First, there is a significant gap in the medical evidence from 2008 to 2019. Second, the Claimant worked in and after 2013.

[10] I will now explain each of these reasons in detail.

(i) There is a significant gap in the medical evidence from 2008 to 2019

[11] There is a significant gap in the medical evidence from 2008 to 2019. I have a report dated October 1, 2008 from Dr. Pflug and then no other medical report until April 2019, when Dr. Liu completed the CPP medical report.

[12] The gap in the medical record is problematic because the Claimant's MQP is December 2013 and thus falls in the middle of the gap. I do not have any medical evidence that speaks to the Claimant's level of functionality in and around December 2013. Medical evidence is needed to support a finding that a disability is severe².

[13] I asked the Claimant why there is such a large gap in the medical evidence, and she said it is because she never returned to see Dr. Pflug because there was nothing he could do for her. She said she only saw her family physician.

[14] When I read the last report in 2008 and the first report in 2019, I am not left with the impression that the Claimant's disability was severe in December 2013.

[15] In October 2008, Dr. Pflug reported that the Claimant was under his care for bilateral carpal tunnel syndrome as well as complex regional pain syndrome that resulted from surgery. He said the Claimant was still symptomatic, but he explained that the findings of complex regional pain syndrome were much less evident. Dr. Pflug said the Claimant remained quite limited with respect to her ability to do heavy manual labour, but he did not say she was incapable of doing lighter work. In fact, he described the Claimant's disability as "partial" and he noted the Claimant was working part time as a cleaner about 20 hours a week, earning \$450 to \$500 a week³.

[16] In April 2019, Dr. Liu summarized the Claimant's history with respect to the Claimant's upper extremities, including the persistent bilateral carpal tunnel syndrome. Dr. Liu noted that the Claimant's last consult with a specialist (Dr. Sourkes) was in 2008 at which time she had

² This is explained in a decision called *Villani v. Canada (A.G.)*, 2001 FCA 248

³ Page GD2-84

EMG studies which did not show clear results. Dr. Liu then said that “the issue” (presumably the difficulties with the Claimant’s upper extremities) was not brought up again until 2019⁴. The lack of follow up from 2008 to 2019 is not supportive of a finding of a severe disability in 2013, particularly since the Claimant had been under Dr. Liu’s care since January 2015⁵. Moreover, Dr. Liu did not make a referral to a specialist (Dr. Marchie, physiatrist) until 2019 suggesting to me that the Claimant was managing her condition until 2019. Indeed, the Claimant told me more than once that her condition has gotten worse as she has aged.

(ii) The Claimant worked in and after 2013

[17] The Claimant acknowledged that she worked cleaning houses in and after 2013. I accept that there are circumstances in which a person with a severe disability might continue to work in and after the MQP. However, if the work is indicative of a capacity regularly to pursue a substantially gainful occupation, then there is no entitlement to disability benefits.

[18] I have had some difficulty assessing whether the Claimant’s work activity is indicative of a capacity regularly to pursue a substantially gainful occupation. There are two reasons for this.

[19] First, the Claimant’s work activity, including the number of hours she has worked, has not been consistently reported. This makes it difficult for me to clearly understand the Claimant’s work schedule in recent years. Here are three examples of inconsistent reporting:

- In her application, the Claimant did not provide the date she started working or the date she stopped working. She said that she had stopped working completely, but she also wrote that her “current” job involved cleaning homes when able and that she worked four hours a day, three days a week⁶.
- In June 2019, the Claimant spoke with one of the Minister’s adjudicators and she reportedly told the adjudicator that she stopped her cleaning job in October 2018 or November 2018 and that she was working 5-8 hours a day, 3 days a week⁷.

⁴ Page GD2-76

⁵ Page GD2-72

⁶ Page GD2-31

⁷ Page GD2-70

- At the hearing, the Claimant told me that from 2013 (her MQP) to November 2018 (when she applied for disability benefits) she worked three days a week cleaning homes. After she applied for disability benefits she took the winter off. She then started working again in or about July 2019 because she learned her application was denied. She worked until March 2020 when everything shut down due to Covid-19. From July 2019 to March 2020, she worked two days one week and three days the next week. During her two-day work week she worked Tuesday (6 hours) and Thursday (5 hours). During her three-day work week she worked Tuesday (6 hours), Wednesday (5 hours) and Thursday (5 hours).

[20] Second, the documentary evidence does not give me a clear picture of how much money the Claimant has earned. This makes it difficult for me to assess whether the Claimant's earnings have been "substantially gainful". For example, the Claimant told me that she worked from 2013 (and probably since before then) through to 2018. She also told me that she has declared all of her earnings and that she has always filed income tax returns. I am unable to reconcile this information with the fact that the Claimant's Record of Earnings does not show anything for the years 2013, 2014, 2016 and 2017⁸. I am therefore left to question whether the Claimant always filed an income tax return and/or always declared all of her earnings. If she did, I am left without documentary evidence showing how much she earned in and after 2013, including the amounts (if any) she was able to deduct for expenses.

[21] The Claimant's Record of Earnings shows that she did not earn enough money to make valid contributions to the CPP in the years 2015 and 2018⁹. This means her reported earnings were below \$5300 in 2015 and \$5500 in 2018. However, again I do not know if or how much the Claimant declared as expenses in each of those years. I also do not know how much income she reported in the other years not shown on her Record of Earnings (i.e. 2013, 2014, 2016 and 2017).

[22] I asked the Claimant how much she earned from her cleaning jobs and she told me that at the time she stopped working in March 2020 she earned \$180 for a 6-hour cleaning job and \$150.00 for a 5-hour cleaning job. This works out to about \$30.00 an hour. I asked the Claimant

⁸ Page GD4-12

⁹ Pages GD2-4, GD2-60, GD2-62 and GD4-12.

if she would have been earning the same amount per house in 2013 and she said she earned a little less, but not much less.

[23] Without more, I cannot find that the Claimant did not have the capacity to earn substantially gainful income in and after 2013. If, for example, she was working 3 days a week in 2014 (the year after her MQP) and earning \$150.00 a day, then her annual earnings would be about \$21,600. This is above the substantially gainful threshold set out in the legislation.

[24] The legislation says that “substantially gainful”, in respect of an occupation, means an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension¹⁰. The maximum annual amount a person could receive as a disability pension in 2014 was \$14,836.20.

[25] In finding that the Claimant’s work was indicative of a capacity regularly to pursue a substantially gainful occupation, I have found it significant that the work the Claimant was doing was heavy work and yet she appears to have been able to sustain it over a long period of time. The Claimant told me that her house cleaning duties included washing floors, vacuuming, cleaning bathrooms and dusting.

[26] The Claimant told me that she was only able to continue doing the work she did because she took time between her cleanings days to rest. I acknowledge that the Claimant may not have been able to clean homes 5 days a week in and after 2013. However, she nonetheless appears to have had the capacity *regularly* to work. She had set days of work, and there is no indication in the evidence that she was not reliable.

[27] In assessing the Claimant’s capacity for work, I have considered her age, level of education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in a real world context¹¹.

[28] I acknowledge that the Claimant’s personal attributes would limit the types of jobs she was realistically capable of doing in 2013. In December 2013, the Claimant was 56 years of age with a limited education. The Claimant told me that she has only a grade 9 education that she

¹⁰ Subsection 68.1(1) of the *Canada Pension Plan Regulations*

¹¹ *Villani v. Canada (Attorney General)*, 2001 FCA 248

completed in Jamaica. She said she tried to upgrade her education in Canada but stopped in 1991 because of the carpal tunnel syndrome. The Claimant's work history is largely comprised of physical jobs, including babysitting, factory work (making computer disks) and cleaning. Despite the limits on the Claimant's employability, I cannot find that she was not realistically employable. She was in fact employed and remained employed for several years after her MQP.

Prolonged disability

[29] Given my finding that the Claimant's disability was not severe by December 31, 2013, it is not necessary for me to assess whether it was prolonged.

CONCLUSION

[30] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security