



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *RK v Minister of Employment and Social Development*, 2020 SST 813

Tribunal File Number: GP-19-1052

BETWEEN:

**R. K.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Shannon Russell

Claimant represented by: Judy Hemming

Teleconference hearing on: July 28, 2020

Date of decision: August 17, 2020

## **DECISION**

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

## **OVERVIEW**

[2] The Claimant is a 53-year-old woman who used to work in customer service at X Airport. She helped transport passengers who required wheelchair assistance. She stopped working at the airport in May 2015 because her employer lost the contract. However, at that time, she was already having difficulties with her health.

[3] The Claimant applied for disability benefits in July 2018, and in her application she reported that she is unable to work because of anxiety, panic attacks, fibromyalgia, a herniated disc and sciatica. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

## **PRELIMINARY MATTERS**

[4] At the outset of the hearing, the Claimant's representative told me that she just emailed some additional evidence to the Tribunal – namely, a prescription medication record and an accessible parking permit.

[5] I told the Claimant's representative that the documents had not yet been uploaded to the Claimant's file. I also explained that, to accept late-filed documents, I would need to hear submissions on why the documents could not have been submitted earlier and why the documents are relevant to the issue on appeal.

[6] The Claimant's representative acknowledged that she could have obtained the documents earlier if she had made efforts to do so. She also said that she was comfortable proceeding with the hearing without the documents being accepted into evidence. I confirmed that I would not be accepting the late-filed documents into the record. However, I told the Claimant's representative that she was welcome to speak to the contents of the documents during the hearing.

## **ELIGIBILITY REQUIREMENTS**

[7] 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, 2017.

[8] Disability is defined as a physical or mental disability that is severe and prolonged<sup>1</sup>. 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)**

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

## **ANALYSIS**

### **Severe disability**

#### **The Claimant had functional limitations that affected work capacity by December 31, 2017**

[10] The Claimant testified that in December 2017 she had several health conditions that resulted in limitations. She said, for example, that she had pain from a back condition, fibromyalgia, arthritis, and varicose veins.

[11] The Claimant explained that her back pain was significant in that in December 2017 it was an 8 out of 10 almost every day, where 0 represents no pain and 10 represents excruciating pain requiring a hospital visit. The pain included shooting, stabbing pain through her shoulders

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<sup>1</sup> Paragraph 42(2)(a) of the *Canada Pension Plan*

and down her legs, which limited her ability to bend, lift, walk and sit. The fibromyalgia pain could be sharp and throbbing and was felt through her fingers and toes. She had panic attacks at least 4 times a week. Sometimes the attacks lasted 4-5 hours, while other times they lasted an entire day. The panic attacks were triggered by crowds, and left her feeling weak with a racing heart, chest pain and trouble concentrating. The pain and anxiety affected her ability to sleep. She was (and still is) lucky to get 3 hours of sleep a night. She had side effects from medications including a lot of drowsiness, weakness, constipation, diarrhea, nausea, an inability to concentrate, difficulty with memory, and dizziness. Because of the side effects from medications (especially the drowsiness and dizziness), her family physician prescribed a cane to assist her with walking.

[12] I acknowledge that the Claimant had limitations at the time of her MQP. However, I have difficulty accepting that her limitations were as extensive as she described. I say this for two reasons.

[13] First, there are inconsistencies between what the Claimant told me about her limitations and what her doctors have reported. For example, the Claimant told me that at the time of her MQP, she was having panic attacks at least 4 times a week and that sometimes an attack lasted 4-5 hours and other times it lasted an entire day. This is inconsistent with what the Claimant's psychiatrist reported. In July 2018 (about 7 months after the MQP), the Claimant's psychiatrist (Dr. Nazneen Shakeel) noted that the Claimant said her panic attacks and anxiety were worsening in that she was having 2-3 panic attacks a week and they were lasting between 10-15 minutes<sup>2</sup>. As another example of an inconsistency, the Claimant said that at the time of her MQP (and continuing after) she was limited by the side effects of her medications, particularly the inability to concentrate. However, in July 2018 Dr. Shakeel reported that the Claimant denied problems with her concentration and had no side effects from medications, though she acknowledged her medication made her feel drowsy in the morning<sup>3</sup>. In November 2018 (almost one year after the MQP), Dr. Shakeel again reported that the Claimant did not have side effects from her medications<sup>4</sup>.

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<sup>2</sup> Page GD4-5

<sup>3</sup> Page GD4-8

<sup>4</sup> Page GD4-12

[14] Second, the Claimant showed a tendency during her evidence to provide unreliable information. For example, the Claimant initially testified that she worked at a shoe store for two months during the summer of 2016. Later in the hearing, I asked her if she was sure about the year she worked at the shoe store and she said she was sure. When I pointed to other evidence that might suggest she worked after 2016, the Claimant acknowledged that she must have worked at the shoe store in either 2017 or 2018 (she was not sure when). As another example, the Claimant told me that, a few years ago, she saw a specialist for her back and he recommended back surgery. When I asked her if she was referring to Dr. Marmor, she said she was. I have one report from Dr. Marmor and it is dated August 29, 2016. Dr. Marmor did not recommend surgery. He said the Claimant has predominant mechanical-type lower back pain, with vague and intermittent radicular type symptoms. He said that neither the imaging nor exam suggested any significant radiculopathy and that there was no indication for any surgical intervention<sup>5</sup>. I asked the Claimant if she saw Dr. Marmor again after August 2016, and she said she might have, but she was not certain.

[15] Despite my reluctance to accept the Claimant's description of her limitations as of December 2017, I accept that at the time of her MQP she had functional limitations that affected work capacity. This is largely because there is corroborating medical evidence.

[16] In October 2017, the Claimant's family physician (Dr. Sulaiman) reported that the Claimant has a prolapsed disc at L4-L5, which causes chronic back pain, decreased range of movement, and difficulty with walking, sitting and bending. Dr. Sulaiman also said the Claimant has swelling in both legs and pain and intermittent swelling in both feet, due to varicose veins and plantar fasciitis<sup>6</sup>.

[17] In November 2017, Dr. Sulaiman reported that the Claimant had chronic pain, depression and anxiety, with resulting limitations in lifting, walking, sitting, standing, bending, concentrating, energy / stamina, and operating machinery<sup>7</sup>.

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<sup>5</sup> Page GD6-9

<sup>6</sup> Page GD4-16

<sup>7</sup> Page GD4-17

[18] In February 2018 (shortly after the MQP), Dr. Shakeel reported that the Claimant had poor energy and concentration, had lost interest in enjoyable activities and was having at least 3-5 panic attacks a week<sup>8</sup>.

[19] In April 2018 (just 4 months after the MQP), Dr. Joanna Ueng, rheumatologist, reported that the Claimant had constant arthralgias and myalgias, swelling in the feet and hands in the morning that resolve once she starts moving, swelling in the feet with prolonged standing, and blue fingertips when exposed to cold<sup>9</sup>.

**The Claimant's disability was not severe by December 31, 2017**

[20] Although I accept that the Claimant had functional limitations that affected work capacity by December 31, 2017, I am unable to find that her disability was severe by her MQP. I say this for five reasons – namely, there is insufficient evidence about the effectiveness of certain therapies; there is still a treatment modality to try; the Claimant stopped going to counselling; the Claimant has been applying for jobs; and the Claimant's employability factors are favourable. I will now explain each of these reasons in detail.

**a. There is insufficient evidence about the effectiveness of certain therapies**

[21] In December 2017, the Claimant began counselling sessions with Nirmala Sharma.

[22] The Minister submits that there is no information on file about the effectiveness of the counselling sessions the Claimant received. I agree. There is only one letter on file from Ms. Sharma and it simply states the Claimant attended 9 sessions from December 28, 2017 to July 2018<sup>10</sup>.

[23] Along with having no substantive reports from Ms. Sharma, I also do not have any reports from Dr. Shakeel that are more recent than November 2018. This is despite the fact that the Claimant testified that she continues to see her psychiatrist once a month.

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<sup>8</sup> Pages GD4-2 to GD4-4

<sup>9</sup> Page GD6-18

<sup>10</sup> Page GD4-14

[24] In the absence of a substantive report from Ms. Sharma or an updated report from Dr. Shakeel, I am unable to assess, in any meaningful way, the effectiveness of the treatment the Claimant has received for her mental health conditions.

[25] I have a similar difficulty with respect to the Claimant's physiotherapy. The Claimant told me that she attended physiotherapy from August 2019 to October 2019. She said she was to attend again in early 2020 but everything shut down due to COVID-19.

[26] The physiotherapy appears to be an important treatment modality because it has been recommended for some time. In fact, it was recommended before the MQP. Dr. Marmor recommended physiotherapy in August 2016<sup>11</sup> and Dr. Sulaiman recommended physiotherapy in October 2017<sup>12</sup>. The Claimant explained that she did not attend physiotherapy before August 2019 because she could not afford it. Things changed when she began receiving ODSF.

[27] Without medical reports that speak to the physiotherapy treatment the Claimant received, I cannot assess the effectiveness of that therapy.

[28] I acknowledge that in January 2020 Dr. Sulaiman reported that the Claimant's disability is permanent<sup>13</sup>. However, I cannot infer from this that the treatments the Claimant tried were not effective. Dr. Sulaiman provided a list of the Claimant's medications, but she did not otherwise discuss treatment.

**b. There is still a treatment modality to try**

[29] There are still treatment modalities for the Claimant to try. In August 2018, the Claimant was assessed at the Pain Care Clinics by Dr. Ravdeep Kukreja. Dr. Kukreja told the Claimant that she could try nerve blocks<sup>14</sup>. During the hearing, the Claimant told me that she has not yet tried the nerve blocks. She said she has been afraid to try them because she read that there could be a lot of side effects. However, she also said that if the nerve blocks will help her pain, then she will try them. This tells me that there is still a treatment for the Claimant's pain that she is willing to try.

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<sup>11</sup> Page GD6-9

<sup>12</sup> Page GD4-16

<sup>13</sup> Page GD6-2

<sup>14</sup> Page GD6-33

**c. The Claimant stopped going to counselling**

[30] The Claimant has also not optimized her treatment for her mental health conditions. She told me that she stopped her counselling sessions with Ms. Sharma on her own initiative. She also said she did not speak with Ms. Sharma about her decision to stop the counselling.

[31] The Claimant's decision to stop the counselling is concerning because it was a treatment that was recommended by Dr. Shakeel<sup>15</sup>.

[32] To be successful in obtaining disability benefits, claimants must not only provide evidence about the nature of their disability, but must also provide evidence about their efforts to manage their medical conditions<sup>16</sup>. 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<sup>17</sup>. When claimants do not follow a recommended treatment that is likely to affect their disability status, claimants must then establish that the non-compliance was reasonable<sup>18</sup>.

[33] The Claimant's decision to stop the counselling sessions on her own initiative is evidence of non-compliance with a treatment recommendation. As for the reason for stopping the counselling, the Claimant said it was because of her weakness and difficulty taking the bus. The main difficulty I have with the Claimant's explanation is that she has been consistently looking for work since May 2015. It does not make sense to me that the Claimant would, on the one hand, feel capable of applying for jobs, while, on the other hand, be unable to attend counselling sessions once or twice a month. For this reason, the Claimant has not established that her non-compliance was reasonable.

[34] As for the impact the treatment would have had on the Claimant's disability status, I can only infer from Dr. Shakeel's recommendation that she would not have suggested counselling unless she thought it would improve the Claimant's mental health. I also note that Dr. Ueng had pointed out that cognitive behavioural therapy was recommended for the Claimant's

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<sup>15</sup> Page GD4-4

<sup>16</sup> *Klabouch v. Minister of Social Development*, 2007 FCA 33

<sup>17</sup> *Sharma v. Canada (Attorney General)*, 2018 FCA 48

<sup>18</sup> *Lalonde v. Minister of Human Resources Development*, 2002 FCA 211



fibromyalgia<sup>19</sup>. This suggests to me that counselling might have been beneficial for the Claimant's physical health as well.

**d. The Claimant has been applying for jobs**

[35] The Claimant told me that she has been applying for jobs since May 2015. She has applied for jobs at the airport, as well as at other places such as Costco, Walmart, Shoppers Drug Mart, Tim Horton's, and FreshCo. This tells me that the Claimant believes she has had some capacity for work since before her MQP.

[36] The Claimant's representative submitted that the Claimant seems to lack insight into her ability to work. This may be so, but it is speculative. The Claimant did not say she cannot work. She said she would give a job her best shot. She also said that having a job might help her to forget about her pain, and she acknowledged that distraction helps with the pain. She said that she would even be satisfied working 3 hours a day, as it would keep her out of her misery. She explained that she wants to see people and socialize with people.

[37] I know the Claimant said that she tried working at a shoe store in either 2017 or 2018, but was let go after two months because she could not handle the job. However, I have difficulty reconciling this evidence with the Claimant's testimony of continuing to apply for jobs. Also, the work the Claimant did for the shoe store appears to have been in 2017, as her Record of Earnings shows some contributions in that year, though not enough to trigger a valid contribution to the CPP. Most of the Claimant's treatments started shortly after that, suggesting she realized some improvement. Indeed, Dr. Shakeel reported in July 2018 that the Claimant took Cipralext for almost a month from February 2018 to March 2018 and it was working "very well" for her<sup>20</sup>. In August 2018, Dr. Kukreja reported that the Claimant's recent and remote memory, insight and judgement, affect and mood all appeared within normal limits<sup>21</sup>. In September 2018, Dr. Shakeel reported that the Claimant had started Cymbalta and she reported improvement in her pain as well as her mood<sup>22</sup>.

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<sup>19</sup> Page GD6-23

<sup>20</sup> Page GD4-5

<sup>21</sup> Page GD6-32

<sup>22</sup> Page GD4-8

**e. The Claimant's employability factors are favourable**

[38] 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 a real world context<sup>23</sup>.

[39] The Claimant's personal characteristics are such that she was realistically employable at the time of her MQP. In December 2017, the Claimant was only 50 years of age and thus had several years ahead of her before the standard age of retirement. She has a reasonable level of education (grade 12) and is proficient in at least one of Canada's two official languages. She has work experience in customer service and has done quite a bit of volunteer work for a social committee in her apartment building.

**Prolonged disability**

[40] Given that I am unable to find that the Claimant's disability was severe by December 31, 2017, it is not necessary for me to assess whether the Claimant's disability was prolonged.

**CONCLUSION**

[41] The appeal is dismissed.

Shannon Russell  
Member, General Division - Income Security

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<sup>23</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

**ANNEX**

The following documents are excluded from the appeal file:

- GD8 (the Appellant's late-filed documents)
- GD9 (the Minister's post-hearing submissions)