



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MB v Minister of Employment and Social Development*, 2020 SST 1112

Tribunal File Number: GP-20-120

BETWEEN:

M. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: Glenn Jones

Videoconference hearing on: August 5, 2020

Date of decision: August 31, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 41 years old when she applied for the CPP disability pension in June 2017. Her last job was as a unit aide in a hospital. She was involved in car accidents in May 1999 and June 2001. In the first accident, she sustained sprains of her neck and upper back. In the second, she had whiplash-related muscular strain and facet joint irritation in her back.¹ She was able, however, to work as a unit aide at a hospital, stocking and maintaining medical supplies and equipment, beginning in 2003. She stated that she had been unable to work since June 2015 because of bursitis, varicose veins, and pain in her lower back and right leg. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] Following a hearing in May 2019 (the 2019 hearing), the General Division dismissed the Claimant's appeal. The Claimant appealed to the Appeal Division. In January 2020, the Appeal Division allowed the appeal and referred this matter back to the General Division for reconsideration.

[4] The Minister submits that imaging reports showed no significant findings. Further, there is no indication that the Claimant has any difficulty sitting. In addition, she has not tried alternate, less strenuous work.

[5] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[6] 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). Her MQP – the date by which

¹ IS6-6

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

she has to prove she was disabled - is based on her contributions to the CPP.³ Although the Claimant stopped working in 2015, the Minister extended her MQP by applying the Child-Rearing Drop-Out Provision.⁴ This protects the contributory period of those who stay home to raise a young child.⁵ The Claimant's MQP is December 31, 2024. Because this date is in the future, the issue is whether the Claimant was disabled as of the date of the hearing.

[7] In order to avoid unnecessary duplication, I used the recording of the evidence from the General Division hearing in May 2019 as part of the evidence at the 2020 hearing. The Claimant provided further oral evidence at the hearing before me.

ISSUES

[8] Do the Claimant's health conditions result in her having a severe disability, so that she is incapable regularly of pursuing any substantially gainful occupation?

[9] If so, is her disability long continued and of indefinite duration?

SEVERE DISABILITY

[10] When I am deciding whether the Claimant's condition is severe, I have to look at every health issue that might affect her employability.⁶

[11] The case law is clear that medical evidence is required to support a claim that a disability is severe.⁷

The Claimant's disability interferes with her ability to work

The Claimant's account

[12] The Claimant's account was not reliable. It often differed from information in the medical record. In addition, in 2020, she gave two specialists different accounts of her pain medications.

³ CPP Record of Contributions: IS2-23-24

⁴ Subparagraph 44(2)(b)(iv) of the CPP. The CRP was not taken into account at the 2019 hearing. At that time, the MQP was determined to be the end of 2017 rather than the end of 2024. This is why Appeal Division returned the matter to the General Division.

⁵ The Claimant has two children, born in 2012 and 2015.

⁶ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁷ *Villani v. Canada (A.G.)* 2001 FCA 248; *Warren v. Canada (A.G.)*, 2008 FCA 377

Further, her testimony, and her sister's, about her functional limitations differed from the account she provided to Dr. Hanada just four months before the hearing.⁸ Moreover, she provided several different accounts of her education level. Under these circumstances, it is necessary for me to rely to a greater extent on the documentary evidence than on the oral record.

[13] In her June 2017 CPP questionnaire, the Claimant stated that she suffered from excruciating pain in her lower back, and veins protruding from her right leg. Her knee and ankle pain prevented her from standing and walking long distances. She was unable to bend her knees.⁹

[14] At the 2019 hearing, the Claimant testified that she had sharp pain in her left leg and back. She stated that she had suffered from significant back pain since 2005. At the 2020 hearing, she described shooting pains in her back and neck. Her knees and ankle are swollen, and her right leg is bigger than her left leg. She also gets headaches. She takes painkillers "all the time" – an anti-inflammatory (Naproxen), Ibuprofen, and Tylenol. Without medication, her pain level is greater than 10/10, where 10 is the greatest pain imaginable. She stated that she was "barely living" because of the pain. With medication, her pain is at a level of 8 ½/10, but the relief is short-lived. In addition, the medications make her nauseous, dizzy, and tired. She stated that she naps much of the day and sleeps poorly at night. She also stated that her pain is worse than in May 2019. She has worn a knee brace for the past 18 months.¹⁰ She has trouble getting out of the bathtub.

[15] The Claimant testified that she is unable to sit without pain for more than three minutes. She cannot walk for more than 20 minutes because of back and leg pain. She has trouble going up and down stairs. She cannot pick up her young daughter. She gets a great deal of help from a neighbor and family members with childcare, groceries and cleaning. In addition, she has trouble with her memory and difficulty with paperwork, like filling out applications. She stated that she has trouble focusing because of the pain.

⁸ IS6-7

⁹ GD2-53 ff.

¹⁰ In November 2017 her family doctor stated that the Claimant had a prescription for compression stockings but was not using them. Now she was complaining of knee pain and wanted a knee brace. Dr. Malik gave her a prescription for a knee brace: GD4-I-61.

[16] Her sister, A. B., testified that she goes to the Claimant's home about three days a week to help her. Since 2015, she stated, the Claimant has been unable to do much around the house or to be very involved with the care of her children. She also stated that the Claimant tries to do what she can, but her knees buckle and she starts to limp. She also stated that the Claimant can be forgetful. Her sister reminds her about appointments.

The medical evidence does not fully support the Claimant's testimony

[17] I have reviewed all the medical evidence in the appeal file. I have focused below on what I consider to be the most significant documents.

Family doctors' records

[18] The medical evidence fails to show that the Claimant's health conditions seriously interfered with her ability to work in 2015, when she last worked. There is no record of her visiting her family doctor in the three years after July 2012.¹¹ On July 13, 2015, the office notes of Dr. D. Varma, family doctor, stated that the Claimant wanted to go off work to look after her mother, who had suffered a stroke.¹² On July 22, 2015, Dr. Varma stated that the Claimant wanted to be off work for another six weeks because she couldn't leave her mother alone.¹³ Mr. Jones, the Claimant's representative, stated that these office notes were in error, since there were many other relatives available to look after the Claimant's mother. As there is no documentary evidence contradicting the information in Dr. Varma's office notes, I give little weight to this submission.

[19] In August 2015, the Claimant visited her family doctor for a right stiff leg.¹⁴ Her patient history shows her appointments after that were pregnancy-related until May and September 2016, when she saw her family doctor for emotional distress related to her mother's health condition.¹⁵

¹¹ GD4-III-101

¹² GD4-II-39

¹³ GD4-II-37, 38. The Claimant lived with her mother.

¹⁴ GD4-II-37

¹⁵ GD4-III-101-105; GD4-1-74, GD4-III-72

[20] The various reports of Dr. S. Malik, the Claimant's family doctor from February 2016, fail to reveal any serious impairment. From October 2016 to November 2017, Dr. Malik consistently reported that the Claimant walked normally, had a normal range of motion without pain, had no tenderness in her back, and had no swelling or deformity of her leg, knee, or ankle.¹⁶ In March 2017, imaging reports of the Claimant's right knee and lumbar spine showed normal findings.¹⁷

[21] Dr. Malik's June 2017 CPP medical report stated that the Claimant complained of back pain that had worsened over the past four years. However, the pain was not referred anywhere, there was no bowel or bladder disturbance, and the Claimant could walk normally. Dr. Malik reported that on examination there was no tenderness over the hip joints, and no tenderness in the back muscles. Further, the range of motion was normal, full, and painless. Dr. Malik also stated that the Claimant reported having suffered from constant leg pain for four or five years. Standing made it worse, and lying down made it better. Walking made the leg swell and she reported that "because of this I cannot go to work." On examination, there was no swelling, numbness or deformity of the leg, knee, or ankle. The range of motion in those areas was normal. There were small varicose veins on the upper thigh and lower leg. There was no tenderness anywhere in her right leg. The bones of the Claimant's hind foot were tender, but her pain was managed with an anti-inflammatory and injections.¹⁸

[22] In November 2017, Dr. Malik completed a medical form for social assistance. She provided no diagnosis, stated that the Claimant's health problem was mild, and listed no functional limitations.¹⁹

[23] In June 2018, Service Canada asked Dr. Malik about the Claimant's condition. In response, she stated that the Claimant reported that her pain was severe, continuous, and not helped by medication.²⁰ She had not received physiotherapy as there was no indication for this. The cause and character of her pain was unclear, so that any further pain medications would be

¹⁶ GD4-1-36, 60, 61, 62, 70, 71, 72; GD3-6

¹⁷ GD-4-III-4. In May 2018, an MRI of the lumbar spine was also normal: IS6-82.

¹⁸ GD2-48 ff.

¹⁹ GD4-I-47

²⁰ Dr. Malik referred to a statement that the Claimant prepared. This may be the note the Claimant submitted at GD4-I-34.

inappropriate.²¹ Dr. Malik provided no findings from physical examinations and did not endorse the Claimant's description of her physical conditions and response to treatment.

[24] In February 2020, Dr. Malik reported to Service Canada that she had not seen the Claimant since May 2018.²² The Claimant testified that Dr. Malik had told her that she could be of no further assistance to her. The Claimant has been going to walk-in clinics since then.²³

Specialists' reports

[25] The Claimant saw two specialists in 2018. Briefly put, in January 2018, Dr. Gerald MacKean, vascular surgeon, thought the problem must be with the Claimant's back. He stated that she was "disabled from her lumbar spine and L5 nerve irritation...which is causing her a lot of discomfort." There is no indication that he examined her back, and as a vascular surgeon it is doubtful that he was qualified to provide an opinion about this.²⁴ In May 2018, an MRI of the lumbar spine showed normal results.²⁵

[26] In March 2018, Dr. William Oxner, orthopedic surgeon, stated that the Claimant had normal reflexes and a normal hip and vascular examination. She walked slowly and was unable to heel or toe walk on the right side. She had some limitation on straight leg raising. However, her X-rays were normal.²⁶ He later stated that he could offer no diagnosis.²⁷

[27] In January 2020, Dr. A. Kelland, anesthetist and pain specialist, saw the Claimant on referral from Dr. MacKean for assessment and treatment of chronic pain in her right low back, right knee, and right ankle. She stated that the Claimant had been involved in a serious car accident in 1999. Afterwards, she reported persistent and worsening symptoms of pain in her neck, low back, and right knee. She told Dr. Kelland that her pain level was 10/10 on average.

²¹ GD8-33

²² IS2-25

²³ No reports from these walk-in clinics were before me.

²⁴ AD2-2, January 2018.

²⁵ IS6-82

²⁶ IS6-82, 88

²⁷ AD2-5, letter to the Claimant's lawyer, February 2019.

She was taking four Tylenol 4 (opioid painkillers) a day, as well as Naprosyn (anti-inflammatory), “which was not listed on her pharmacy printout.”²⁸

[28] On examination, Dr. Kelland reported that the Claimant sat with a normal affect. She had no trouble getting onto the examination table. She had a slight limp. The physical examination revealed the following:

- Limitations in the range of motion in her back because of discomfort, and very minimal tenderness in her right low back;
- “possibly” 10% of normal extension (bending backwards) of the back. The Claimant was reluctant to do that because of increased pain in the back;
- Some weakness in the flexion of her right foot;
- Diffuse tenderness around the right knee, but no swelling or heat;
- Slight swelling of the right ankle but good mobility there;
- Normal reflexes; and
- Painful varicose veins.

[29] Dr. Kelland concluded that the Claimant was “disabled” by pain in her right knee, ankle, and low back. Notably, Dr. Kelland’s findings about the Claimant’s right ankle and knee appear to fall significantly short of a disabling condition, although her back pain was more serious. Moreover, Dr. Kelland did not use the word “disabled” in the context of the CPP definition of disability. Nor did she provide an account of any functional limitations or restrictions the Claimant might have. She recommended a pain self-management group and compression stockings. Dr. Kelland also gave the Claimant a prescription for a sleep aid. The Claimant testified that she saw Dr. Kelland again shortly before the hearing. Dr. Kelland renewed the sleep aid prescription and referred her back to Dr. MacKean.

[30] In April 2020, Dr. Edwin Hanada, physiatrist, completed an assessment on the Claimant’s behalf for the purpose of litigation. He found that the Claimant had a normal range of motion through the hips, knee joints, and ankles. She walked normally. The range of motion in her back

²⁸ IS6-60-61

was limited by pain.²⁹ Dr. Hanada diagnosed myofascial pain in the right lower back and varicose veins in the right leg.³⁰ The Claimant had not necessarily reached maximum medical recovery. However, because of the length of time her pain had continued, it was likely that she would have long-term difficulties.³¹

[31] The Claimant told Dr. Hanada that she was taking only an anti-inflammatory for pain. She was able to do meal preparation and function around the house. However, she needed help from a cousin with yard work, as well as assistance getting groceries. There is no mention of all the help she and her sister testified that she received from a neighbour and her relatives, or of the almost total inability to perform household chores.³²

[32] With regard to her functional limitations, Dr. Hanada stated that the Claimant had difficulty with repetitive or prolonged activities that required flexion of her back or right leg. She also had trouble with activities that placed strain on her back and right leg. Such activities included lifting, bending, pushing and pulling, and especially actions that placed the arms away from her body. He recommended physiotherapy and a compression stocking for her right leg.³³

[33] In view of the functional limitations listed by Dr. Hanada, I find that the Claimant's health conditions interfere with her ability to work.

The Claimant failed to prove that she lacks a regular capacity for substantially gainful employment

[34] Employability is the key measure of a severe disability under the CPP.³⁴ It is not the diagnosis of the disease, but the Claimant's capacity to work, that "determines the severity of the disability under the CPP."³⁵ In addition, where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of their health condition.³⁶

²⁹ IS6-6, 10. The month before, Dr. Kelland stated that the Claimant's knee pain was such that she was unable to test the range of motion in her hips: IS6-60 ff.

³⁰ IS6-7

³¹ IS6-12

³² IS6-7

³³ IS6-10-11

³⁴ *Canada (A.G.) v. Dean*, 2020 FC 206

³⁵ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

³⁶ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[35] Dr. Malik provided information to various authorities stating that the Claimant was unable to work.³⁷ I attach little weight to these statements. It is apparent from Dr. Malik's office notes that in spite of a lack of medical evidence, the Claimant was pressuring her doctor to state that she was unable to work. In December 2016, Dr. Malik reported that the Claimant's main issue, even though everything was normal, was that she said she couldn't go back to work.³⁸ In April 2017, Dr. Malik's office notes stated: "her complaints are sometimes backache and other times right leg pain – examination of both normal – her issues are she cannot go back to her work because of these issues."³⁹

[36] The Claimant also coached Dr. Malik on what to say. In her report to Service Canada dated July 2018, Dr. Malik enclosed a handwritten note from the Claimant. She stated that, according to the Claimant's note, her pain was severe and present all the time. However, Dr. Malik urged the Minister to read her office notes, "as it may better guide you to understand the situation." Dr. Malik also stated that if the Claimant could not tolerate a job involving significant physical activity, she could possibly apply for a desk job or a job as a ward clerk, which was less demanding than desk work.⁴⁰ After two years of this tension between the physical examination findings and the Claimant's demands, it is not surprising that in 2018 Dr. Malik dropped the Claimant as a patient. The doctor's reports fail to support a finding that the Claimant lacked the regular capacity for substantially gainful employment.

[37] In March 2018, Dr. Oxner stated that the Claimant had been off work for two years because of low back dysfunction and leg pain.⁴¹ This was Dr. Oxner's first appointment with the Claimant, and there is no evidence that he read her medical records other than her X-rays, which were normal. I therefore do not consider Dr. Oxner's statement reliable on the question of the Claimant's work capacity. In February 2019, Dr. Oxner stated that he did not think the Claimant would be hired by a reasonable employer in the state she was in when he saw her in May 2018

³⁷ AD2-9: March 2017, "To Whom it May Concern;" GD4-I-36: July 2017, attending physician's statement to the Health Association of Nova Scotia; GD4-I-46: November 2017, medical assessment for income assistance; GD3-1, May 2018, "To Whom it May Concern;" and GD8-31-34: July 2018 correspondence to Service Canada.

³⁸ GD4-I-71

³⁹ GD4-I-70

⁴⁰ GD8-33-34

⁴¹ IS6-87

for a review of her MRI. He did not elaborate, and it is not clear that such a determination is within his area of expertise. The force of his observation, moreover, is undercut by his statement that he could not comment on whether her account of her health conditions was credible.⁴²

[38] In April 2020, Dr. Hanada stated that since June 2015, the Claimant had been unable to perform the regular duties of a unit aide because of back and leg pain. The job of unit aide involved a number of physical demands that he believed were “outside her overall capacity *at this time* [italics mine].”⁴³ Dr. Hanada also stated that since December 2017, the Claimant’s disability had prevented her from engaging in any paying job for which she was qualified by education, training, or experience. Her pain symptoms limited her employment opportunities and left her at a competitive disadvantage compared to her peers who did not have leg and back pain.

[39] Dr. Hanada stated that the Claimant’s chronic pain was moderately severe.⁴⁴ However, a claimant with chronic pain is required to establish that the pain prevented her from pursuing regularly any substantially gainful occupation.⁴⁵

[40] Dr. Hanada stated that the Claimant’s disability was severe and prolonged, and that she was unable regularly to pursue any substantially gainful occupation.⁴⁶ With respect, the task of determining whether a disability is severe and prolonged is a matter for the Tribunal, not a doctor, to decide.⁴⁷

[41] Dr. Hanada based his conclusion about the Claimant’s employability on three considerations: physical limitations that dated back to 2014; her inability to continue working as a unit aide because of those limitations as of 2015; and her difficulty with her activities of daily living. The first two points relate to the prolonged rather than the severe criterion.⁴⁸ With regard to her activities of daily living, the Claimant told Dr. Hanada that she was able to function

⁴² AD2-5

⁴³ IS6-12

⁴⁴ IS6-13

⁴⁵ *Klabouch v. Canada (Social Development)*, 2008 FCA 22

⁴⁶ IS6-13

⁴⁷ *Lalonde v. Canada (MHRD)*, 2002 FCA 211

⁴⁸ The medical evidence does not support a finding that the Claimant’s physical limitations dated back to 2014. On this point, Mr. Jones was unable to direct me to any medical evidence that Dr. Hanada had access to and I did not.

around the house with the help of anti-inflammatories, but needed assistance with yard work and getting groceries. The Claimant testified that she has no car, so getting help with groceries is not necessarily an indication of disabling physical limitations. Further, the fact that she gets help with yard work does not support a finding that she lacks a regular capacity for work.

[42] I accept Dr. Hanada's determination that by April 2020, the Claimant was unable to work as a unit aide. He based his conclusion on a current physical examination and on a review of the heavy physical requirements of such work. I also accept his finding that the Claimant's pain symptoms put her at a competitive disadvantage compared to her peers. Neither of these conclusions supports a finding that the Claimant is unable regularly to pursue any substantially gainful occupation. I note that Dr. Hanada did not provide any restrictions on sitting, or state that the Claimant's pain would prevent her from undergoing retraining.

[43] In deciding whether the Claimant's condition was severe, I must take a "real world" approach and consider factors such as her age, level of education, language proficiency, and past work and life experience.⁴⁹ The Claimant is only 44 years old, some two decades before retirement age. Although her previous work has almost always involved heavy physical labour, her age would not be a barrier to retraining or to becoming computer literate. She is English-speaking. The Claimant and her sister both testified that she had a stellar record as an employee. None of these personal characteristics would limit her employment opportunities.

[44] During the course of the lengthy proceedings before this Tribunal, the Claimant endorsed decreasing levels of education. Her claimed secondary school level declined from Grade 12 in her CPP questionnaire, to Grade 10 in the 2019 hearing, to Grade 9 in the 2020 hearing. Her claimed post-secondary training declined from a diploma as a "PCW" (personal care worker) to quickly failing out of the program. By the time of the 2020 hearing, she stated she needed special education classes in school, and even required extensive help filling in her CPP questionnaire. The only evidence before me about her education level shows that she finished Grade 9 (middle school), with grades ranging from 47% to 64%.⁵⁰ She provided no documentary evidence as to her further education. Given the unreliability of her accounts on this subject,

⁴⁹ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁵⁰ AD3-2

however, I find that she has failed to show that she has only a Grade 9 education or that, as she testified, she was unable to complete any further years of high school. The evidence before me fails to show that the Claimant is an unsuitable candidate for retraining or alternate work in a less physically demanding role than that of unit aide.

[45] The Claimant has not looked for alternate work since 2015. The evidence suggests that she has residual work capacity. She has failed to show that efforts at finding and keeping employment have been unsuccessful because of her health condition.⁵¹ I therefore find that it is more likely than not that her disability is not severe.

PROLONGED DISABILITY

[46] As I found the disability was not severe, it is not necessary for me to make a finding on the prolonged criterion.

CONCLUSION

[47] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security

⁵¹ *Inclima v. Canada (A.G.)*, 2003 FCA 117