



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KL v Minister of Employment and Social Development*, 2020 SST 935

Tribunal File Number: GP-19-1126

BETWEEN:

K. L.

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: Kimberley Munro

Videoconference hearing on: September 16, 2020

Date of decision: September 21, 2020

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment beginning as of June 2017.

OVERVIEW

[2] The Claimant was 33 years old when she applied for the CPP disability pension in May 2018. Her last job was as an emergency room nurse and team leader. In May 2016, another driver hit her stopped vehicle at 80 kilometres an hour. She stated that she was unable to work after that because of a severe concussion, a traumatic brain injury, and a whiplash-associated disorder with muscle pain. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Minister submitted that the Claimant had retained work capacity because she was able to volunteer for four hours a week and complete her domestic responsibilities. Yet she had not tried to return to work.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.¹ 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.

[5] 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 she has to prove she was disabled - is based on her contributions to the CPP.² The Minister extended the Claimant's MQP by applying the Child-Rearing Drop-Out provision, which protects the contributory period of those who stay home to raise a young child.³ The Claimant's MQP ends on December 31, 2025. Because this date is in the future, I must decide whether the Claimant was disabled by the date of the hearing.

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

² CPP Record of Contributions: GD9-12

³ Subparagraph 44(2)(b)(iv) of the CPP

ISSUES

[6] 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?

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

SEVERE DISABILITY

[8] When I am deciding whether the Claimant's condition is severe, I have to look at every health issue that might affect her employability.⁴

The Claimant's disability interferes with her ability to work

[9] Shortly after the May 2016 car accident, Dr. Agnes Kluz, family and emergency room doctor, reported that the Claimant had soft tissue injuries and a concussion.⁵ In August 2016, an MRI and a SPECT (imaging devices) of the Claimant's brain suggested that she had suffered a traumatic brain injury.⁶

[10] The Claimant's most significant ongoing health conditions are post-concussive conditions, including cognitive difficulties, insomnia, headaches, and sensitivity to sound and light. She also suffers from depression and anxiety, as well as neck and back pain. All of these are well-documented in the medical evidence.

Cognitive difficulties

[11] The Minister submits that a neuropsychologist, Dr. Susan Pigott, stated in June 2017 and June 2018 that the Claimant's overall level of intellectual functioning was within the average range. This overlooks the fact that Dr. Pigott also reported that the Claimant had difficulty with a number of functions that would affect her ability to work: memory, focus, ability to perform

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

⁵ GD2-I-103

⁶ GD2-45

written and oral math, and recall of short stories. She had trouble planning and pacing herself. She had difficulty managing her symptoms in busy environments.⁷

[12] Several other health professionals reported that the Claimant had cognitive difficulties. In October 2016, Dr. Kluz stated that the Claimant had trouble with visual processing. She also had an impaired ability to solve problems, concentrate, and retain new learning.⁸ In May 2018, Lisa Jadd, speech language pathologist, reported that the Claimant had trouble with multi-tasking, memory, planning, reading, and listening.⁹

[13] For her cognitive problems, the Claimant has worked extensively with Ms. Jadd and an occupational therapist.¹⁰

[14] At the hearing, the Claimant testified that among her most troublesome cognitive difficulties were fatigue and irritability. She also has trouble operating in an unfamiliar environment. She has to re-read written material repeatedly. She finds it hard to switch from one task to another. She needs a lot of cues to remember things.

[15] The Claimant's mother, B. D., testified that the Claimant often forgets things that they had recently talked about. She has trouble retaining simple directions and doing math.

Other Problems related to her brain injury

[16] The Claimant has experienced headaches since shortly after the accident.¹¹ There has been some variation in their severity. In December 2017, the Claimant reported some improvement with the use of Nortriptyline.¹² However, she was still taking over-the-counter medication three times a week for headaches and eye strain.¹³ In June 2018, she reported a one-week flare-up in her headaches.¹⁴ In February 2020, she told Dr. Heather MacKenzie, physiatrist, that her headaches occurred three to four days a week and could last for days. They were associated with

⁷ GD2-I-65 ff.

⁸ GD2-I-197; GD2-II-1

⁹ GD2-I-78, 79

¹⁰ GD2-I-183, 185; GD3-7, 16

¹¹ GD2-GD2-I-163

¹² GD2-I-182

¹³ GD2-I-185, report of Kelly Smale, occupational therapist

¹⁴ GD2-I-82

sensitivity to light and sound, as well as nausea.¹⁵ She has tried Rizatriptan for migraines, with limited benefit.¹⁶ She testified that if she takes it at the right moment, she can stop a headache. However, if she misses that moment, the headache can last for days. The pain level from the headaches sometimes reaches a level of 8/10. Her neck pain intensifies her headaches.

[17] The Claimant has also suffered from sleep difficulties since the accident.¹⁷ Sleep deprivation aggravates her cognitive issues.¹⁸ She tried a sleep medication for two weeks in 2017. It helped her sleep, but made her emotional symptoms worse. Her sleep disorder contributes to daily fatigue and irritability. With the birth of her second child in late 2017, her sleep and her mood deteriorated.¹⁹ In May 2018, Dr. MacKenzie relayed that the Claimant got at best four to six hours of non-restful sleep a night.²⁰ The Claimant continues to see Dr. MacKenzie every six months.

[18] At the hearing, the Claimant testified that she still has sleep problems. Her brain races all night. She wakes up several times a night, and is exhausted in the morning.

[19] The Claimant has experienced a number of visual symptoms since May 2016. These include severe light sensitivity, blurred vision, and increased eye strain.²¹

[20] In September 2019, Dr. Albert Cheng, psychiatrist, performed an independent examination for the Claimant's lawyer. He stated that in spite of extensive treatment, the Claimant continued to suffer from persistent post-concussive symptoms, including headaches, fatigue, mood dysfunction, and cognitive deficits.²² In February 2020, Dr. MacKenzie stated that the Claimant had tried a number of sleep medications, but was unable to tolerate them.²³

Mental health conditions

¹⁵ GD6-3; see also GD5-93, report of Dr. Kluz, February 2020,

¹⁶ GD7-7-8

¹⁷ GD 2-I-183, report of Ms. Smale, December 2017;

¹⁸ GD2-182, report of Dr. Pigott, June 2017;

¹⁹ GD2-I-73-75

²⁰ GD2-I-130

²¹ GD3-19

²² GD3-16

²³ GD6-3

[21] In July 2016, Ms. Susan Hrovat, social worker, reported that the Claimant had moderate levels of depression and severe levels of anxiety.²⁴ She has been seeing a psychologist, Dr. Rosanne Field, since October 2017.²⁵ In March 2018, Dr. Field reported that the Claimant had emotional issues adapting to the changes in her life since the 2016 accident. She was suffering from adjustment disorder with depression.²⁶

[22] The Claimant has tried antidepressants, including Nortriptyline and Cymbalta.²⁷

[23] In February 2020, Dr. Zohar Waisman, psychiatrist, found on assessment that the Claimant suffered from major depressive disorder and somatic symptom disorder with predominant pain. Sleep deprivation affected her overall functioning. Her symptoms caused clinically significant impairments in social, occupational, or other areas of functioning.²⁸

Physical conditions

[24] In September 2017, the Claimant reported daily neck pain that radiated to her shoulder and upper back. It was sometimes associated with nausea. It became worse after she sat or stood for about half an hour. At its worst, it was at a level of 5/10, where 10 is the greatest pain imaginable. The Claimant also had pain in her eyes that radiated to behind her ears. At its worst, this pain was at a level of 8/10. She reported difficulties with driving, running, and co-ordination, as well as intermittent interference with her range of motion. She had trouble bending and twisting.²⁹

[25] In September 2019, Dr. Cheng found on physical examination that the Claimant had a mildly reduced range of motion with any movement of her neck, as well as tenderness and tautness in her upper back. There was also tenderness over the upper-to-mid neck joints.³⁰ In

²⁴ GD2-I-69

²⁵ GD2-I-185

²⁶ GD2-I-77

²⁷ GD2-I-131

²⁸ GD5-70, 71. See also GD6-3, Dr. MacKenzie, February 2020

²⁹ GD2-I-96, report of Gail Ann Delaney, physiatrist.

³⁰ GD3-14-15, 20

February 2020, Dr. Waisman stated that during his interview with the Claimant it was clear that she “was in some significant physical pain.”³¹

[26] The Claimant has received treatment from a chiropractor, a massage therapist, and a physiotherapist.³² She testified, however, that she still has constant pain from her left ear down the sides of her neck at a constant level of 4/10.

Functional limitations

[27] The Claimant testified that she needs a lot of help from family members. Her mother drives her to appointments and to the grocery store. She also helps with meal planning and preparation. Her mother and husband do a lot of the childcare for her two young children. B. D. stated that the Claimant’s husband was amazing. He would get home from work, take off his boots, and go straight to the stove to make supper. He also looks after the garden and does most of the work involving the 20 goats on their hobby farm. In addition, the Claimant has someone come in to do the heavy cleaning. Even with all this help, the Claimant tearfully admitted that there was a lot that did not get done around the house. She stated that she can barely get through the day.

My findings

[28] The Claimant’s cognitive problems include difficulty reading, listening and planning. The Claimant also struggles with multi-tasking and retaining new information. She has sleep difficulties and is always fatigued. Her mental health conditions and pain in her head, neck, and shoulders impair her ability to function. Taken together, I find that the Claimant’s disability interferes with her ability to work.

The Claimant lacks a regular capacity for substantially gainful employment

[29] Employability is the key measure of a severe disability under the CPP.³³

³¹ GD5-70

³² GD2-I-130, report of Dr. Mackenzie, May 2018

³³ *Canada (A.G.) v. Dean*, 2020 FC 206

[30] In January 2017, the Claimant tried to take a nursing-related course. It should have taken her 20 to 25 hours to complete. It took her over 100 hours.³⁴

[31] In May 2018, Tina Feoli, vocational assessor, found that the Claimant's academic and vocational functioning was competitive from a labour market perspective. However, the Claimant was at a significant vocational disadvantage because of fatigue, cognitive limitations, and psychological symptoms.³⁵

[32] In September 2018, Dr. Keith Sequeira, physiatrist, stated that the Claimant could not return to her pre-accident level of work. She would need to find alternate work. She could move in this direction by trying volunteer work. However, she was not yet at a point where she was capable of competitive, consistent and reliable paid work.³⁶

[33] In October 2018, the Claimant began volunteering at a hospice with only four beds.³⁷ She started at four hours a week. The plan was for her to increase her hours and duties gradually. The Claimant testified that the work involved organizing patient charts on a computer. She found this very difficult. She tried working four hours twice a week, but was unable to sustain this. Her ability to do even that much work declined, so that by December 2019 she was only volunteering for four hours every other week. Since the shutdowns arising from COVID-19, she has stopped her volunteer work altogether.

[34] The Claimant stated that she found volunteering exhausting. It worsened her headaches and made it more difficult for her to complete her other activities. B. D. agreed that the volunteer work had worsened the Claimant's pain and headaches. Moreover, the Claimant could never predict when she would have a sleepless night, with reduced ability to function the next day.

[35] In June 2019, after the Claimant had tried volunteer work, Dr. Sequeira stated that there was almost no chance that she would return to the competitive workforce. Her problems had lasted more than three years, and he did not expect them to improve.³⁸

³⁴ GD2-I-79

³⁵ GD2-I-80-181

³⁶ GD2-I-134

³⁷ GD2-I-133

³⁸ GD1-137

[36] In September 2019, Dr. Cheng reported that the Claimant's physical disability, including her brain injury, prevented her from doing any type of work and would continue to do so.³⁹ In February 2020, Dr. MacKenzie reached the same conclusion, as did Dr. Kluz.⁴⁰

[37] The medical evidence shows that by the date of the hearing, the Claimant lacked retained work capacity. I am satisfied that she is unable to find or maintain employment because of her disability.⁴¹

[38] In May 2017, Tina Feoli stated that "it was very apparent that [the Claimant] had a very strong work ethic." It was essential for her self-identity and psychological well-being that she be able to work.⁴² In June 2018, Dr. Pigott stated that the Claimant "really wishes to return to her previous career in nursing."⁴³ At the hearing, the Claimant and her mother both explained how hard it was for the Claimant to give up her hope of returning to work. The Claimant could not talk about this without tears. I am satisfied that the Claimant would be working if she were able to.

[39] 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.⁴⁴ The Claimant is only 35 years old, decades before retirement age. She has a nursing degree and ten years of experience as a nurse. She is English-speaking. None of these personal characteristics would limit her job prospects. However, her many health conditions prevent her from returning to paid employment, as several doctors have recently stated.

[40] I am satisfied that the Claimant lacks the regular capacity to pursue any substantially gainful occupation.

[41] Accordingly, I find that it is more likely than not that her disability is severe.

³⁹ GD3-22

⁴⁰ GD6-3; GD5-93

⁴¹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁴² GD2-I-80

⁴³ GD2-I-89

⁴⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

PROLONGED DISABILITY

[42] Since May 2016, the Claimant has suffered from cognitive impairment and other symptoms of post-concussive syndrome. She has also experienced mental health issues, as well as neck and shoulder pain. Her disability is therefore long continued.

[43] In September 2017, Dr. Gail Delaney, physiatrist, stated that the Claimant had reached maximum medical recovery. According to the Claimant's testimony, her condition has deteriorated since then. Her disability is of indefinite duration.

[44] I therefore find that her disability is prolonged.

CONCLUSION

[45] The Claimant had a disability that was severe and likely to be prolonged in May 2016, when her accident occurred. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension. The Minister received the application in May 2018, so the deemed date of disability is February 2017. Payments start four months after the deemed date of disability, as of June 2017.⁴⁵

[46] The appeal is allowed.

Carol Wilton
Member, General Division - Income Security

⁴⁵ Section 69 *Canada Pension Plan*