



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *KM v Minister of Employment and Social Development*, 2020 SST 983

Tribunal File Number: GP-20-805

BETWEEN:

**K. M.**

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: Jackie Laidlaw

Claimant represented by: Paul Sacco

Teleconference hearing on: October 7, 2020

Date of decision: October 23, 2020

## **DECISION**

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of May 2018.

## **OVERVIEW**

[2] The Claimant is a 63-year-old woman who worked as a special educational assistant until April 2018. She stopped working due to left knee pain, which will require a knee replacement in the near future. She was also depressed, with anxiety and post-traumatic stress disorder (PTSD). She applied for a CPP retirement pension in October 2018 and then applied for a CPP disability benefit in December 2018. Her retirement pension began in January 2019. The Minister denied the application for the disability benefit initially and on reconsideration. The Minister also addressed the issue of entitlement to the Post-Retirement Disability Benefit (PRDB), which came into effect on January 2019. The Minister also denied the PRDB initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, 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.

[4] I find the Claimant's MQP for the disability benefit to be December 2018, one-month prior to the date of receipt of the retirement pension as per the legislation.<sup>1</sup>

[5] I find the Claimant's MQP for the PRDB is December 31, 2021. As the MQP is in the future, the Claimant must be found disabled as of the date of the hearing.

## **ISSUE(S)**

[6] Is the Claimant eligible for a CPP disability benefit on or before December 31, 2018?

[7] If not, is the Claimant eligible for a CPP PRDB as of the date of the hearing?

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<sup>1</sup> Section 66.1(1.1) of the *CPP*

## **CPP DISABILITY BENEFIT**

### **ANALYSIS**

[8] Disability is defined as a physical or mental disability that is severe and prolonged<sup>2</sup>. A person is considered to have a severe disability if they are 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.

### **Severe disability**

#### **The Claimant requires a knee replacement**

[9] I accept that the Claimant requires a left knee replacement. Orthopaedic surgeon, Dr. Jacqueline Auguste, diagnosed advanced tri-compartmental osteoarthritis of the left knee in 2018<sup>3</sup>. She was fitted for a knee brace that she continues to use today. In 2018, Dr. Auguste wanted to wait until the condition was “bone-on-bone” in order to have the surgery. The Claimant testified that an X-ray of February 2020, which was not provided into evidence, showed the condition was now bone-on-bone and she was scheduled for knee replacement surgery in June 2020 with a new orthopaedic surgeon, Dr. Korkola. While I do not have the benefit of the 2020 opinion of Dr. Korkola, or the X-ray of February 2020, I have reviewed the MRI of November 2017<sup>4</sup> that showed MCL and LCL strain injuries; a small tear; and, a complex/septated Baker’s cyst. It is not unreasonable that the advanced osteoarthritis would have progressed in two years to become a bone-on-bone condition.

[10] Due to COVID-19, the scheduled knee replacement for June 2020 was cancelled. The Claimant testified that it has been rescheduled to November 6, 2020 in X, Ontario. At the time of this writing, the X Area has returned to Stage 2 of the pandemic, meaning people are back

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

<sup>3</sup> GD 2 84 letter of Dr. August July 3, 2018

<sup>4</sup> GD 2 82 November 7, 2017 MRI of left knee

into the isolation phase and some businesses have closed. While elective surgery is still going ahead, the situation with COVID-19 may cancel surgeries again.

[11] As it stands, she is scheduled to have surgery in November 2020. After that, as is usual with knee replacements, there will be a period of recovery. As well, the Claimant has noted that because she has favoured her right leg, the right knee is also wearing down. Again, I do not have the benefit of seeing the X-ray of the right knee from February 2020; however, I find it reasonable that her right knee would deteriorate as well.

### **The pain and functional limitations have caused depression and stress**

[12] The Claimant's knee condition worsened in 2017, according to her testimony and Dr. Auguste's letter of July 2018. As the pain worsened, the Claimant became depressed and stressed. Her stress was exacerbated by personal situations from 2013 onward. She began seeing a psychologist, Dr. Mermigis, in April 2018<sup>5</sup>. Dr. Mermigis noted at the time that she was disabled as an educational assistant due to depression, anxiety and PTSD.

[13] In November 2018, at the time of her MQP, Dr. Mermigis<sup>6</sup> diagnosed dysthymia; anxiety disorder; depression; PTSD; and, she had a GAF (global assessment of functioning scale) of 50, which are serious symptoms. He noted her work became unbearable when her pain increased. He saw her every two weeks with a slow but positive response. Dr. Mermigis felt her prognosis was poor until the knee replacement. In June 2020, Dr. Mermigis<sup>7</sup> diagnosed the same conditions of dysthymia, anxiety and difficulty coping with physical limitations. She continues to see him, now on a monthly basis.

[14] She used to take Xanax that was replaced by Sertraline daily in August 2020. She also takes Naproxen for the inflammation of her knees. The Minister has submitted that she is only taking one medication when needed which does not indicate a severe condition. Her medication has now increased to daily from "as needed", indicating that her psychological condition has worsened.

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<sup>5</sup> GD 2 86 letter of Dr. Mermigis, May 23, 2018

<sup>6</sup> GD 270 Great West Life physician statement November 12, 2018 Dr. Mermigis, psychologist

<sup>7</sup> GD 3 3 Dr. Mermigis, June 17, 2020

### **The Claimant is unable to work**

[15] The evidence above has noted that her physical and psychological conditions worsened in 2017 to the point where she stopped working in April 2018. She has not attempted to return to work, as her conditions have not been resolved. She stated that she would not be able to return to her previous job after the knee surgery because of her emotional condition.

[16] The Claimant is an educational assistant for special education children. She helps with children with autism and development disorders. She has done this job for almost 20 years. The job is in the classroom where she is required to manage behaviours by restraint. She works with both elementary and high school children. She is required to stand for long periods and lift the children. The children have hit her many times. Now, she states she is afraid of the children and it would be impossible to return to that work. Dr. Memirgis diagnosed PTSD due to the traumatization of the abuse from the children. When the children would attack, she was unable to physically remove herself due to her mobility issue, and that caused the PTSD. In 2018, Dr. Mermigis found that she had severe psychological symptoms. He noted that she was disabled as an educational assistant due to depression.<sup>8</sup>

[17] When she left work April 17, 2018, she went on short-term disability then long-term disability (LTD) in December 2018. She is currently still on LTD with Great West Life (GWL). Before she went on LTD, she did not know if she would be eligible, and that is why she applied for her early retirement benefit.

[18] The Minister has submitted that she would be able to do lighter work. There was no evidence pointing to an ability to do lighter work. GWL tried to get her computer training; however, they would not place her anywhere due to her age. She did not get the computer training. She does not have updated computer training and is not qualified for office work.

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<sup>8</sup> GD 2 86 May 23, 2018 Dr. Mermigis

[19] I must assess the severe part of the test in a real world context<sup>9</sup>. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[20] The Minister submits that she is educated and has transferable skills and therefore in a real world context, she is not disabled. I disagree.

[21] The Claimant has one year left before retirement age. She will be age 64 one week after her scheduled knee replacement. GWL would not place her in any other job due to her age. I accept that she is educated, having received a college degree in PSW (personal support worker) and DSW (doctor of social work). She used these degrees to work as a special educational assistant for 20 years. I acknowledge that between 1974 and 1993 she did office work, working for 10 years for her ex-husband's company doing bookkeeping and scheduling appointments. Office work has changed considerably since 1993 with the advancement of computers. She is not trained in the office work skills required today. I accept she does not have the transferable skills to return to office work.

[22] In a real world context, the Claimant would have barriers to employment because of her age and lack of transferable skills.

[23] In December 2018, the Claimant was in the early stages of psychotherapy. Two years later, she continues to receive the same therapy with the same practitioner and her medications have increased. Dr. Mermigis has opined she is disabled from working as an educational assistant. This has been her job for 20 years. In December 2018, she was given a knee brace and diagnosed with advanced tricompartmental osteoarthritis of the left knee with substantive degenerative changes. The condition continued to deteriorate and now she is awaiting a knee replacement, which will require time to recover. She does not have the skills for other work and is of an age where retraining would be problematic.

[24] I find the Claimant has proved to have a severe disability that renders her incapable regularly of pursuing any substantially gainful occupation as of her MQP of December 2018.

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<sup>9</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

### **Prolonged disability**

[25] The Claimant's knee pain worsened in 2017 and she is still awaiting a knee replacement. It is still up in the air if the knee replacement will go ahead in November 2020 or be rescheduled once again due to COVID-19. The condition is long continued.

[26] Her mental health prognosis was noted as poor until the knee replacement, according to Dr. Mermigis in 2018<sup>10</sup>. Two years later, in 2020, Dr. Mermigis diagnosed the same symptoms and a difficulty coping with physical limitations<sup>11</sup>. Medications have recently been increased and there is no indication her mental health has stabilized. Her mental health condition is also likely to be long continued.

[27] While it is not specifically mentioned in the medical evidence, there will be a recovery period. It is likely by the time the Claimant recovers from her knee surgery she will be age 65 or older.

[28] It is likely her mental health condition will continue to be a severe condition until age 65 and beyond as the prognosis is poor until the knee replacement.

[29] I accept that; "the purpose of the CPP is to provide a pension to those who are disabled from working on a long-term basis, not to tide claimants over a temporary period where a medical condition prevents them from working".<sup>12</sup> The purpose of the CPP disability benefit is an insurance for those that cannot work any longer. The disability benefit stops at age 65. The claimant generally will then start receiving a CPP retirement pension, unless they defer to a later date.

[30] Therefore, the only jurisdiction we have is to determine the prolonged period to be to age 65 as the benefit is not payable after that date. As such, we cannot determine the words, "indefinite duration" as meaning for the rest of the claimant's life. We can only make a determination to the date the benefit ceases to be available, specifically, age 65.

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<sup>10</sup> GD 2 70 Dr. Mermigis to GWL November 12, 2018

<sup>11</sup> GD 3 3 June 17, 2020 letter from Dr. Mermigis.

<sup>12</sup> *Canada (Minister of Human Resources Development) v. Henderson*, 2005 FCA 309

[31] Therefore, I find her conditions to be of indefinite duration.

[32] I find the Claimant has proven that she has a severe disability likely to be long continued, and present after age 65, therefore also of indefinite duration as of her MQP of December 31, 2018.

### **ANALYSIS: PRDB**

[33] As I have found the Claimant to have a severe and prolonged disability and therefore eligible for a CPP disability benefit, I do not have to determine eligibility for the PRDB.

### **CONCLUSION**

[34] The Claimant had a severe and prolonged disability in April 2018 when she stopped working. Payments start four months after the date of disability, as of August 2018<sup>13</sup>.

[35] The appeal is allowed.

Jackie Laidlaw  
Member, General Division - Income Security

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<sup>13</sup> Section 69 *Canada Pension Plan*