



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PA v Minister of Employment and Social Development*, 2020 SST 1086

Tribunal File Number: GP-20-969

BETWEEN:

P. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: November 17, 2020

Date of decision: November 20, 2020

DECISION

[1] The Claimant, P. A., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start August 2018. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant is 58 years old. She was last employed as an Education Assistant (EA) in February 2017. She stopped working as an EA due to symptoms she was experiencing because of a concussion. She said she had cognitive challenges, poor memory, fatigue, sensitivity to light and sound and headaches. The Claimant continues to have part-time, seasonal work at a winery. She applied for a CPP disability pension in July 2019. The Minister of Employment and Social Development Canada (the Minister) refused her application because the Claimant's medical and employment evidence support that she maintains capacity for suitable work. The Claimant appealed to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[3] For the Claimant to succeed, she must prove that she has a disability that is severe and prolonged by December 31, 2021. This date is based on her contributions to the CPP.¹ Because this date is in the future, I must decide if she is disabled on or before the date of the hearing (November 17, 2020).

[4] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.²

¹ The *CPP* calls this date the "Minimum Qualifying Period." See s. 44(2).

² The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove they are disabled on a balance of probabilities. In other words, they must show it is more likely than not that they are disabled.

THE CLAIMANT'S DISABILITY IS SEVERE

[5] I find that the Claimant has a severe and prolonged disability as of February 2017. I reached this decision by considering the following issues.

The Claimant has functional limitations that affect her capacity to work

[6] The Claimant had three concussions. However, my decision about whether the Claimant's disability is severe is not based on her diagnosis. It is based on whether she has functional limitations that prevent her from working.³ I have to look at her overall medical condition and think about how the Claimant's health issues might affect her ability to work.⁴

[7] The Claimant argues that she cannot work because of concussion symptoms. She says she has significant and multiple cognitive challenges, poor memory, noise sensitivity headaches, tinnitus and exhaustion.

[8] The Claimant had her first concussion in February 2014 when she slipped on ice. She made a full recovery and returned to work as an Educational Assistant (EA).⁵

[9] In October 2015, she had a second concussion when she fell while breaking up a fight between two students. She had symptoms of hypersensitivity to noise and light, some dizziness and concentration issues.⁶ Again, she was able to return to work but this time, she continued to have ongoing symptoms. Dr. Surkan, in a report of January 2016, stated that the Claimant was continuing with her work, but was experiencing symptoms of difficulty with concentration, problems with memory, and challenges managing a student's behavior. In February 2016, the Claimant told Dr. Surkan that she

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

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

⁵ Dr. Beckman (neurologist) reported the full recovery in his report at GD 2-210.

⁶ This information is also at GD 2-210.

was experiencing symptoms including headache, decreased energy, dizziness, sensitivity to noise, poor concentration, and poor memory.⁷

[10] The Claimant had a third concussion in February 2017 when she was hit by a football. She was experiencing symptoms including headache, decreased energy, dizziness, sensitivity to noise, poor concentration, and poor memory. Although it was hoped that the Claimant would make a full recovery, this has not been the case.⁸ These conditions continued in May 2017. Dr. Surkan, in a clinic note of May 2017, stated the patient was struggling at work, and was reporting symptoms of noise sensitivity, and poor focus.⁹ It was Dr. Surkan's opinion that the Claimant could not return to work given her condition. He supported the Claimant exploring long-term disability benefits.¹⁰ In August 2017, Dr. Surkan noted the Claimant's condition had "essentially no change, still quite symptomatic".

[11] Dr. Surkan noted in October 2017, stated the Claimant was experiencing "post-concussion symptoms", and that she was unable to return to work as an education assistant.¹¹ Dr. P. Hinds, (medical advisor for WorkSafe BC), noted the Claimant was two years post-injury, and was experiencing ongoing symptoms. Dr. Hinds commented, "Recovery complicated by further concussion in February 2017".¹²

[12] The medical evidence shows that the Claimant had functional limitations that affected her ability to work by February 2017 as an EA. However, the test before is not whether the Claimant can return to her employment as an EA. I must consider whether she has capacity for any type of suitable work. I find that the evidence supports that since her last concussion in February 2017, the Claimant has ongoing symptoms and functional limitations that prevent her from working not only as an EA, but in any

⁷ Dr. Surkan's clinic notes are at GD 2-206.

⁸ Dr. Beckman (neurologist) report of May 30, 2017 at GD 211.

⁹ Dr. Surkan's note is at GD 2-206.

¹⁰ Dr. Surkan's clinic notes are at GD 2-202.

¹¹ The clinic notes are at GD 2-198.

¹² This information is at GD 2-66.

substantially gainful occupation. I believe this finding is also supported by the Claimant's work at the winery, which is not evidence of work capacity in a 'real world'.

The Claimant's work efforts are not evidence of work capacity

[13] The Minister has submitted that the Claimant's part-time work at a winery during summer months is evidence of work capacity.

[14] I find that this is not evidence of work capacity. I say this because this is a job that is heavily accommodated. The Claimant has worked part-time for the winery since 2012. Her job title is a "wine educator". Her duties include offering wine tasting and sales. The Claimant testified she works 2-3 days a week for several hours each shift. The Claimant said she cannot work several days in a row and her employer confirmed they make sure to not "over-schedule" her. Her employer accommodates her by spacing her shifts and shortening the hours per shift. She testified she is not working more hours, not because there are no more hours available, but because this is all she can manage. Her employer confirmed that the Claimant was not capable of performing more than she was.¹³ In addition to day and hour accommodations, the employer also allows the Claimant to work in a quiet environment. She is also allowed to have a co-worker take over for her when she gets overwhelmed. The employer said that the Claimant does not have the ability to handle the demands of the job. She forgets things easily and cannot do new tasks. The employer said the Claimant is given tasks that allow her to use long-term memory. The Claimant explained that the owner is a family friend and they allow her many accommodations that are not allowed for other workers. She said that she can recall information that is long term. She provided an example. She told me that she has worked for the winery for 8 years. The information she repeats to customers is the same today as it was then. There is nothing new to learn. This is why, along with the accommodations, she is able to continue doing this job. She said that

¹³ The Employer Questionnaire is at GD 2-142.

with the start of Covid-19, her employment changed. There were new protocols that she could not grasp, understand or remember. So again, her employer moved to her other tasks to accommodate her. Reservations were now required to view the winery. The Claimant said she could not take and track reservations. It was confusing and overwhelming for her. She said her tasks now are cleaning boards and serving wine to 1-2 people. She explained that her employer has created tasks for her that are suitable for her condition and limitations.

[15] I find that the only way the Claimant is able to manage this work is because of a benevolent employer. A benevolent employer is one who will change the conditions of a job and adjust their expectations of an employee in keeping with the person's limitations. A benevolent employer will expect far less performance, output, or product from this person compared to that expected from other employees. Also, accommodations offered by a benevolent employer will go further than what is asked of an employer in the competitive marketplace.¹⁴ Work for an employer who will provide an employee with accommodations and lower expectations than other employees may not be evidence of true work capacity. In this case, this job was created for the Claimant. There are no expectations for her like there are other employees.

[16] I also considered whether the Claimant's earnings would be "gainful".

[17] In respect of an occupation, "substantially gainful" is described as an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.¹⁵ A contribution of earnings record shows that the Claimant had earnings of \$4801 in 2019 and \$5771 in 2019.¹⁶ These would not be what is considered substantially gainful.

[18] The definition of severe addresses the capacity of a Claimant to work in a meaningful and competitive work environment. An employer should not have to put up with occasional absences from work and make accommodations by creating a flexible

¹⁴ The concept of a benevolent employer is explained by the Federal Court of Appeal in a decision called *Atkinson v Canada (Attorney General)*, 2014 FCA 187

¹⁵ Section 68.1 of the *CPP Regulations*

¹⁶ The contribution of earnings record is at GD 4-15.

work environment to enable the individual to have a job that he or she would not otherwise be able to perform in a normal competitive work environment.¹⁷ Given the restrictions on her hours of work, her work performance and the accommodations, the Claimant's winery employer would likely fall within the definition of "benevolent". For these reasons, I do not find that the Claimant's work efforts would be considered evidence of work capacity.

The Claimant does not have work capacity

[19] When I am deciding if the Claimant is able to work, I must consider more than just the Claimant's medical conditions and their effect on functionality. I must also consider her age, level of education, language proficiency, and past work and life experience. These factors help me decide if the Claimant can work in the real world.¹⁸

[20] The Claimant is 58 years old. Her age would be a deterrent to retraining. She does have more than 15 years of work experience as an EA. While on the surface it would seem her employment would provide transferable skills, because of her medical condition, she no longer has these transferable skills.

[21] A Neuropsychology Assessment Report¹⁹ completed in October 2018 revealed a number of areas of higher cognitive function to be within normal limits. However, there were isolated deficits for complex auditory attention/working memory, and variable memory for detailed and specific information. There was also indication of ongoing complaints of pain and headache, as well as tinnitus. The Claimant attended a vocation rehabilitation program, but was unable to complete it due to significant symptoms including headaches.

[22] When I considered the Claimant's age which is near retirement, lack of transferable skills, inability to learn new tasks as evidenced by her work at the winery and her difficulty with memory and concentration, I find she would not be a candidate to

¹⁷ *L.F. v. MHRSD* (October 5, 2010), CP 26809 (PAB) (not binding but persuasive)

¹⁸ The Federal Court of Appeal held that the severe part of the test for disability must be assessed in the real world context (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

¹⁹ The report is at GD 2-62.

retrain. Her work at the winery is not evidence of work capacity in the 'real world' as she is only able to continue with many accommodations that are designed exclusively for her.

The Claimant has made reasonable efforts to follow recommended treatments

[23] The Claimant has made reasonable efforts.²⁰ She has lost weight, had physiotherapy treatment, and attended all recommendations of WorkSafe BC. These treatments have not improved the Claimant's functionality.

THE CLAIMANT'S DISABILITY IS PROLONGED

[24] The Claimant's disability is prolonged.

[25] The Claimant's condition began in February 2017 and continues today. While there was an expectation that the Claimant would make a full recovery, this has not happened. To be prolonged, a disability does not need to be permanent.²¹ I do not find any evidence that would reasonably lead me to assume that the Claimant's condition will be resolving in the near future. Dr. Surkan did not expect the Claimant's condition to improve.²²

[26] The Claimant has satisfied me on a balance of probabilities that it is more likely than not that she has a severe and prolonged disability.

CONCLUSION

[27] The Claimant had a severe and prolonged disability in February 2017. However, the CPP says she cannot be deemed disabled more than fifteen months before the Minister received her disability application. After that, there is a four-month waiting period before payment begins.²³ The Minister received the Claimant's application in July

²⁰ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

²¹ *Litke v. Minister of Human Resources and Social Development Canada*, 2008 FCA 366

²² Dr. Surkan's prognosis is at GD 2-160.

²³ This is set out in s. 69 of the *Canada Pension Plan*

2019. That means she is deemed to have become disabled in April 2018. Payment of her pension starts as of August 2018.

[28] The appeal is allowed.

Connie Dyck
Member, General Division - Income Security