



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JS v Minister of Employment and Social Development*, 2020 SST 1101

Tribunal File Number: GP-20-879

BETWEEN:

J. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: November 3, 2020

Date of decision: November 23, 2020

DECISION

[1] The Claimant is entitled to Canada Pension Plan (CPP) disability benefits to be paid as of August 2018. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant is a 47-year-old woman who worked for many years as a mortgage administration clerk at a bank. She stopped working at the bank in June 2017 because her position was declared redundant.

[3] The Claimant has had long-standing difficulties with her mental health as well as with diabetes. She applied for disability benefits in January 2019, and in her application she reported that she is unable to work because of severe depression and anxiety as well as type I diabetes (with neuropathy).

[4] The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[5] The Claimant has made enough contributions to the CPP to qualify for the disability benefit. Her Minimum Qualifying Period (MQP) is December 31, 2021.

[6] For the Claimant to succeed with this appeal, she must prove that she has a disability that is severe and prolonged.

[7] 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 death¹.

¹ The definitions of “severe” and “prolonged” are found at paragraph 42(2)(a) of the *Canada Pension Plan*.

ANALYSIS

Severe disability

The Claimant has functional limitations that affect work capacity

[8] There is no dispute between the parties that the Claimant has functional limitations that affect work capacity.

[9] In her application for disability benefits, the Claimant explained that on most days she has a poor ability to²:

- change her usual work approach when asked to do so;
- keep at difficult tasks until she gets them done;
- adjust easily to unexpected changes;
- figure out what to do when she is stressed;
- control emotions and impulses that others would probably consider inappropriate;
- manage her anxiety;
- concentrate and focus her attention for at least 30 minutes; and
- decide between two options.

[10] The Claimant explained that she cries periodically when she gets overwhelmed or confused. She has trouble getting out of bed and, because of this, there have been numerous occasions when she has dropped her son off at school late. She gets anxiety attacks when there is too much going on around her. She periodically cancels appointments when she is not up for leaving the house³.

² Pages GD2-31 to GD2-32

³ Page GD2-31

[11] The medical evidence supports the existence of functional limitations that affect work capacity. In September 2018, the Claimant's psychiatrist, Dr. Luis Cleto, reported that "as usual", the Claimant looks tired and sad. She feels sad and lacks energy and enjoyment in life⁴. In November 2018 and September 2019, Dr. Cleto explained that the Claimant's disability adversely affects her cognition⁵.

The Claimant's psychiatrist says the Claimant cannot work

[12] Dr. Cleto is supportive of the Claimant's application for disability benefits. Dr. Cleto completed the CPP medical report in January 2019, and in that report Dr. Cleto stated that the Claimant's major depression, generalized anxiety disorder and brittle diabetes prevent her from working. He explained that the Claimant's conditions interact with each other. Her anxiety affects her concentration which in turn impairs her work performance which leads to increased anxiety and stress and dysregulation of her blood sugars⁶.

[13] In May 2020, Dr. Cleto reported that he is convinced the Claimant's disability is severe⁷.

[14] Dr. Cleto attended the hearing, and he provided testimony. He explained that the Claimant has been under psychiatric care since 2010 and that the Claimant has been his patient since January 2012.

[15] Dr. Cleto testified that the Claimant has a combination of very severe anxiety, depressive symptoms and juvenile diabetes. The diabetes has been very difficult to treat despite the use of an insulin pump. Her conditions interact with each other in such a way that they prevent her from working. For example, the Claimant's anxiety impacts her blood sugars which can lead to hypoglycemia. The more anxious she gets, the worse she performs.

[16] Dr. Cleto explained that when he began treating the Claimant, he noticed a pattern with respect to her work activity. At that time, the Claimant was working for the bank. He noticed that she had numerous periods of short-term disability. What would typically happen is that when the

⁴ Page GD2-74

⁵ Pages GD2-75 and GD2-79

⁶ Page GD2-331

⁷ Page GD4-3

Claimant was off work on short-term disability, her stress levels decreased and her symptoms improved (though they never completely remitted). When she felt better, she would return to work. She would do okay for a short while, but then she would become depleted and the same cycle would start all over again. Initially he thought that the Claimant's difficulties were related to the stressful nature of her job at the bank. However, this proved not to be the case. After leaving the bank, the Claimant got a part-time, on-call job with some school boards and even though the work was less demanding and less stressful, she was not able to cope. He saw the same pattern unfold.

[17] Dr. Cleto explained that when the Claimant is not working, her symptoms improve to the point where they are manageable. However, the symptoms do not go away. When the Claimant is working, her symptoms are not manageable.

[18] In my view, Dr. Cleto's opinion is deserving of weight. First, he has been treating the Claimant since 2012 and is thus well positioned to comment on her functionality and the impact that has on her work capacity. Second, Dr. Cleto is a specialist in the field of medicine to which the Claimant's primary disabling conditions relate. Third, Dr. Cleto's opinion that the Claimant's disability is severe is not contradicted by the opinion of any other practitioner on record.

The Claimant's current work activity is not indicative of a capacity regularly to pursue a substantially gainful occupation

[19] The Claimant is employed. Since about May 2017, she has been selling Pampered Chef products⁸. In January 2018, she began a casual job as a supply secretary for two school boards – namely, the Avon Maitland District School Board (AMDSB) and the Huron Perth Catholic District School Board (HPCDSB).

[20] Although the Claimant is still employed by the school boards, she has not worked for either board since March 2020 when the schools closed due to Covid-19. She was unable to return to work when the schools re-opened because she cannot tolerate the masks that must be worn.

⁸ Page GD2-58

[21] The Minister submits that the Claimant's work activity shows that her disability is not severe. I disagree.

[22] Although the Claimant continues to be employed, I do not consider her employment to be detrimental to her appeal. Her work activity is not indicative of a capacity *regularly* to pursue a *substantially gainful* occupation.

[23] First, the evidence shows that the Claimant does not have the capacity *regularly* to work. Since starting her jobs with the school boards, she has declined work opportunities for reasons related to her disability. On February 21, 2018, Dr. Cleto reported that on the days when the Claimant is sadder, she stays home to replenish herself. He noted that this is quite appropriate as the Claimant is quite vulnerable and her job allows her this latitude⁹. In November 2018, Dr. Cleto reported that the Claimant struggles even with the few shifts she gets at the school board. He noted that it would be difficult for the Claimant to do the work more regularly and that she would be unable to sustain full-time work¹⁰. In January 2019, Dr. Cleto reported that the Claimant is "at her limit" with respect to work. He said that some weeks she does not go in to work at all, while other weeks she might work three days. If anything stressful happens, she struggles to think. This very much resembles what happened at the bank and is indicative of the interaction between her diabetes and her anxiety¹¹. In May 2019, Dr. Cleto reported that the Claimant was working about six days per month for the school board and that is as much as can do given her psychological issues and her diabetes¹². In September 2019, Dr. Cleto wrote that the Claimant is "clearly unable to work" because of the double effects of her anxiety / depression and her diabetes. He said the Claimant hoped the work with the school boards would be easier than her previous job with the bank, but she struggled even working part time. She made some mistakes at work, and now they hardly call her in to work¹³.

[24] As for the work the Claimant does for Pampered Chef, the Claimant explained that the work is very flexible. She picks her own hours. When she feels able, she posts sales on a social media site. On average, she works about 10-12 hours a month and this is fairly consistent. In

⁹ Page GD2-66

¹⁰ Page GD2-75

¹¹ Page GD2-76

¹² Page GD2-77

¹³ Page GD2-79

other words, it is not often that she works more than that. She has days when she does not do any work for Pampered Chef at all and that is because she does not feel able to do it.

[25] Second, the work the Claimant has been doing has not generated *substantially gainful* earnings. The CPP Regulations define “substantially gainful” 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 pension¹⁴. The chart below shows what the Claimant earned from 2017 to 2019 and what the associated substantially gainful threshold is.

Year	Claimant’s Earnings¹⁵	Maximum Annual CPP Disability Benefit
2017	28,370	\$15,763.92
2018	\$17,779	\$16,029.96
2019	\$3,873	\$16,347.60
2020	Not Available	\$16,651.92

[26] Clearly, the Claimant’s earnings for 2019 are well below the “substantially gainful” threshold. The earnings in 2018 are slightly above the “substantially gainful” threshold, but I do not believe all of the earnings in 2018 are from work performed. I say this for a couple of reasons.

[27] First, it appears that some of the Claimant’s earnings in 2018 came from her severance package from the bank. In June 2017, Dr. Cleto reported that the Claimant had learned she would receive a biweekly salary for 51 weeks¹⁶. In April 2018, Dr. Cleto reported that the Claimant was continuing to receive her severance from the bank¹⁷. On August 20, 2018, Dr. Cleto reported that the Claimant received her last cheque from the bank on June 21¹⁸.

¹⁴ Subsection 68.1(1) of the CPP Regulations

¹⁵ Pages GD5-5 to GD5-6

¹⁶ Page GD2-60

¹⁷ Page GD2-68

¹⁸ Page GD2-71

[28] Second, the Claimant's employment information from the school boards does not show she earned a significant amount of money in 2018. The Claimant's job with the AMDSB pays her \$18.88 per hour. In the year 2018, she worked a total of 24 days and a total of 106.75 hours¹⁹. This means that in 2018, the Claimant earned about \$2,015 from the AMDSB.

[29] The Claimant's job with the HPCDSB pays her \$19.68 per hour²⁰. In the year 2018, the Claimant worked a total of 19 days and a total of 109 hours²¹. This means that in 2018, the Claimant earned about \$2,145.12 from the HPCDSB.

[30] Added together, her earnings for the school boards would be about \$4,160 for 2018. This is well below the "substantially gainful" threshold.

[31] As for the work the Claimant does for Pampered Chef, I do not have corroborating evidence of her earnings. However, the Claimant testified that she earns between \$40 and \$100 per month. She said that in the last year, the most she has earned in any given month is \$350.00. The \$350.00 was earned last November (right before Christmas). I accept the Claimant's evidence as truthful. She gave me no reason to question her credibility.

[32] Even if the Claimant earned \$100 per month in 2018 from her work with Pampered Chef she would still be well below the "substantially gainful" threshold for 2018.

The Claimant has made efforts to improve her health conditions

[33] Dr. Cleto testified that the Claimant has participated in several types of treatment interventions, including many types of medications and cognitive behavioural therapy with Dr. Birtch. Dr. Cleto said that he has a copy of Dr. Birtch's discharge report of January 2018 and he told me that he was the Claimant's psychiatrist at that time. His review of the discharge report (which is not in evidence) and his observations of the Claimant led him to conclude that the cognitive behavioural therapy helped improve some of the Claimant's thinking patterns but, overall, it did not improve her disability in any significant way. Dr. Cleto also explained that although he is a psychiatrist, his primary interest is in psychotherapy and so he has been doing

¹⁹ Pages GD2-197 and GD2-200

²⁰ Page GD2-279

²¹ Page GD2-279 and GD2-281 to GD2-284

more than just prescribing medications to the Claimant. Despite this, the Claimant has had a limited response to treatment.

[34] The Minister submits that the Claimant has not been compliant with the treatment recommendations of Dr. MacNaughton, Internal Medicine. In this regard, the Minister points out that Dr. MacNaughton has stressed that improved glycemic control is the recommended treatment for the Claimant's symptoms. Despite this, Dr. MacNaughton's reports show that the Claimant's overall glycemic control has been poor due to several factors such as inconsistent timing and content of her meals, inconsistent glycemic testing and treatment for high sugar readings, obesity, and lack of exercise.

[35] I asked the Claimant to respond to the Minister's argument. The Claimant told me that she tries to manage her diabetes. She checks her blood sugars at least 4 times a day. She also does the best she can to diet and exercise. The Claimant explained that managing her diabetes is not just about diet and exercise. She said that stress affects her sugar levels in a big way.

[36] I acknowledge that there is medical evidence saying that the Claimant's diabetes is not well controlled. For example, in February 2017, Dr. MacNaughton reported that the Claimant's overall glycemic control remains very poor and that the Claimant is not getting any exercise and makes a lot of poor food choices²².

[37] However, there is also some evidence of the Claimant making efforts to improve. For example, in June 2017, Dr. MacNaughton reported that the Claimant was trying to implement some healthier eating at home and was also going to try to increase her activity. Dr. MacNaughton also said that the Claimant had stopped smoking and had not had any cigarettes since April 2017²³. In October 2017, the Claimant's family physician wrote that the Claimant wanted to discuss weight loss. The Claimant said she was trying to eat really well and exercise but she was still gaining weight²⁴. In November 2017, Dr. MacNaughton reported that the

²² Pages GD2-212 to GD2-213

²³ Page GD2-223

²⁴ Page GD2-236

Claimant had made some positive lifestyle changes in that she was using a treadmill and was eating healthier around supper time²⁵.

[38] In addition to the Claimant's documented efforts to improve her health, I also find it significant that Dr. MacNaughton has acknowledged the role that the Claimant's depression plays with respect to her sugar control. Dr. MacNaughton has said, for example, that the Claimant's struggles with depression make it difficult for her to stay motivated to self manage her diabetes²⁶. Dr. MacNaughton has also acknowledged the negative impact that stress plays on the Claimant's sugar levels²⁷.

[39] On these facts, where one medical condition clearly interferes with the ability to manage another medical condition, and where the medical evidence shows a clear link between the two conditions at issue (a mental health condition and diabetes), I cannot fault the Claimant for not managing her physical condition as effectively as one might hope.

The Claimant is incapable regularly of pursuing any substantially gainful occupation

[40] The Claimant has a disability that is severe. She may have days when she is able to work. However, she also has days when she is unable to work. She has shown an inability to commit to a work schedule with the predictability that an employer would require. The work that she is able to do is not substantially gainful. Her long-time psychiatrist has also explained that she cannot work and he is very supportive of her application for benefits.

[41] When assessing work capacity, I have considered the Claimant's age, education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context²⁸.

[42] I acknowledge that the Claimant's personal characteristics would not adversely affect her employability. Indeed, she is in fact employed. Even so, she is only 47 years of age, is proficient

²⁵ Page GD2-237

²⁶ Page GD2-212

²⁷ Page GD2-244

²⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

in English, has a reasonable level of education and many years of experience with desk-type work. Despite her favourable employability attributes, I am unable to find that she is capable *regularly* of pursuing any *substantially gainful* occupation.

Prolonged disability

[43] The Claimant's disability is likely to be long continued and of indefinite duration.

[44] The Claimant has been under psychiatric care since 2010. Her disabling conditions (anxiety, depression and type I diabetes) are all long-standing. There is no suggestion in the evidence that they are expected to improve within the foreseeable future. In fact, the evidence suggests that her disability will remain prolonged.

[45] In January 2019, Dr. Cleto reported that the Claimant's major depression and generalized anxiety disorder are likely to remain the same, and that the type I diabetes is likely to deteriorate²⁹.

[46] In May 2020, Dr. Cleto wrote that he is convinced the Claimant's disability is prolonged³⁰.

[47] At the hearing, Dr. Cleto testified that the Claimant's symptoms are chronic and that he does not anticipate remission of her symptoms in the foreseeable future.

CONCLUSION

[48] The Claimant has a disability that is severe and prolonged. It can sometimes be difficult to determine when a person's disability became severe and prolonged. In this case, I have determined that the disability became severe and prolonged in April 2018. I chose this date because it is about three months after the Claimant started working for the school boards and initially it was thought that she might be able to handle that job as it was less stressful than her previous position with the bank. After three months, a similar pattern of work absences appeared,

²⁹ Page GD2-331 to GD2-333

³⁰ Page GD4-3

as evidenced by the number of days she declined work opportunities³¹. Before April 2018 it was simply too soon to be able to assess how successful the Claimant's return to work efforts would be.

[49] Payments start four months after the date of disability³². Four months after April 2018 is August 2018.

[50] The appeal is allowed.

Shannon Russell
Member, General Division - Income Security

³¹ Page GD2-198 and GD2-280

³² Section 69 of the *Canada Pension Plan*