



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KF v Minister of Employment and Social Development*, 2020 SST 1147

Tribunal File Number: GP-20-202

BETWEEN:

K. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Claimant represented by: Paul Sacco

Teleconference hearing on: November 26, 2020

Date of decision: December 8, 2020

DECISION

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

OVERVIEW

[2] The Claimant last worked as a part-time registered nurse doing telephone triage from September 2015 to July 2018. She indicated that she could no longer work as of that time because of fibromyalgia, chronic fatigue syndrome, and anxiety.

[3] The Claimant applied for a CPP disability pension on March 18, 2019. The Minister of Employment and Social Development Canada (the Minister) refused her application because the medical evidence from her rheumatologist and family doctor did not support severe findings that would have prevented her from performing some type of suitable work. The Claimant appealed to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[4] For the Claimant to succeed, she must prove that she was disabled on or before the date that I heard her appeal.¹

[5] 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

THE REASONS FOR MY DECISION

[6] I find that the Claimant had a severe and prolonged disability as of July 2018. I reached this decision by considering the following issues.

IS THE CLAIMANT'S DISABILITY SEVERE?

¹ This is because the 'Minimum Qualifying Period' in s. 44(2) of the *CPP* is after the hearing date.

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

The Claimant has functional limitations that affect her capacity to work

[7] My decision about whether the Claimant's disability is severe is not based on her diagnoses. 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 her health issues might affect her ability to work.⁴

[8] I found the Claimant to be credible. Her testimony was straightforward and candid. For that reason, I have given equal weight to the medical evidence contained in the Hearing File and the Claimant's testimony.

[9] The Claimant argues that fibromyalgia, chronic fatigue syndrome, and anxiety has resulted in the need for her to nap for a few hours each day. Her condition causes burning in her legs when climbing stairs, back/hip pain when walking, the need to sit when doing tasks around the house like cooking or folding laundry, and the inability to sit for more than 5 minutes before having to get up and move around.

[10] The Claimant also argues that her memory is poor, she cannot follow instructions, she has word finding difficulties, and she has poor verbal comprehension because of brain fog and constant fatigue. She is not able to sustain any activity for more than 10 minutes, she has to rely on her husband to keep their house in order, he does all of the home maintenance, and he looks after their finances. The Claimant cannot even shower without having to lay down afterwards.

[11] The medical evidence from Dr. Ruban and Dr. Pinto supports the Claimant's argument. In 2018, Dr. Ruban reported that the Claimant had a history of muscle and joint pain since 2011. Her symptoms resolved for a time but then flared again in July 2018. She required increased pain medication and referral to a cannabis clinic. In July 2019, Dr. Pinto reported that the Claimant continued to have widespread joint/muscle pain as well as other symptoms caused by computer work and repetitive movements. By April 2020, Dr. Pinto reported that the Claimant's pain and mood were stable but not improved. In September 2020, Dr. Pinto's clinical notes

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

show that the Claimant could not maintain any type of regular schedule because of her condition. Her prognosis was listed as poor.

[12] The medical evidence shows that the Claimant had functional limitations that affected her ability to work by the time of the hearing.

The Claimant does not have work capacity

[13] When I am deciding if the Claimant is able to work, I must consider more than just her 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 to decide if she can work in the real world.⁵

[14] The Claimant is 41 years old and fluent in English. She completed high school and a university degree in nursing. She has only worked as a registered nurse. Based on her education and work experience, she does have transferable skills.

[15] There is no denying that the Claimant is relatively young, educated, and possesses transferable skills. However, she also has many psychological and functional limitations. I find that those limitations outweigh her education and transferable skills, and preclude her from being a candidate for re-training or for alternate work.

[16] The Claimant made an effort to do modified lighter work before she stopped working completely in 2018. She was working from home, her hours were regular, she only worked 3 days per week, and there were no physical demands. She had to stand up a lot because of pain sitting at the computer and she tried different phone headsets, which did not help. She was having daily headaches, anxiety, an inability to concentrate/focus on calls, and fatigue to the point that she was falling asleep while on break. She then reduced her work hours even more, to one, 4-hour shift per week. She was still making mistakes, forgetting, and constantly needed to move around. It took her days to recover from each shift. That is when Dr. Pinto advised her to stop working to see if that would help her symptoms. Unfortunately, it did not.

⁵ 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).

[17] The Claimant has not looked for any other work since July 2018. Her condition simply has not improved to the point that would allow her to be able to do so. I accept that she would work if she could.

[18] The Claimant was not able to continue doing even one, 4-hour shift of work at home each week. She is not able to sustain any posture or activity, she cannot focus or concentrate, and she cannot follow instructions. She has to nap during the day and even basic tasks like showering exhausts her. I cannot think of any employer in a competitive job market that would realistically accommodate the Claimant's limitations on an indefinite basis.

The Claimant has made reasonable efforts to follow recommended treatment

[19] The Claimant has followed medical advice to the best of her ability.⁶ She has tried taking Cymbalta, Lyrica, Gabapentin, Naproxen, Tylenol #3, Contrive, Quetiapine, and Sertraline medications. She has used CBD oil, participated in physiotherapy, occupation therapy, and massage therapy. She sees a psychotherapist monthly for cognitive behavioural therapy, does guided medication, and she does yoga. She has consulted with medical specialists.

[20] The Claimant is currently taking Sertraline, Tylenol, Advil, and CBD oil. She stopped physiotherapy and massage therapy because it was not helping. While the CBD oil helps a bit with her anxiety, there has been no improvement in her pain or fatigue. If anything, things have gotten worse despite being off work and having treatment.

[21] The Claimant is currently waiting for a referral to a pain clinic. Dr. Pinto, however, has advised her that he does not know what else they could do to help her that she has not already tried. I accept this. Unfortunately, the Claimant's treatment has not improved her functionality.

WAS THE CLAIMANT'S DISABILITY PROLONGED?

[22] The Claimant's disability is prolonged. Her condition began in 2011, it was present when she left work in July 2018, and it continues today. Despite trying many medications and participating in recommended therapies, the Claimant's condition has not improved. The

⁶ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

Claimant's family doctor, Dr. Pinto, does not anticipate improvement or that the Claimant will be able to return to the workplace.

CONCLUSION

[23] I am allowing this appeal. The Claimant's disability was severe and prolonged in July 2018. There is a four-month waiting period before the disability pension is paid.⁷ This means that payments start as of November 2018.

Tyler Moore
Member, General Division - Income Security

⁷ This is set out in s. 69 of the *Canada Pension Plan*