



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *NH v Minister of Employment and Social Development*, 2021 SST 48

Tribunal File Number: GP-19-246

BETWEEN:

N. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: D. Joel Dick

Minister represented by: John Gebara

Videoconference hearing on: January 20, 2021

Date of decision: January 25, 2021

DECISION

[1] The Claimant, N. H., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start April 2017. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant was born in Armenia in 1963. She came to Canada when she was four years old. She obtained a general business diploma. She has extensive work experience that included owning a franchise sandwich shop. She worked as a pharmacy clerk. She worked as a receptionist for a security company. She worked as a warehouse manager. She last worked in the accounts receivable department at a security company. But her life changed on August 21, 2016. Her son sustained catastrophic injuries in an ATV accident that left him unable to communicate or move his limbs. The Claimant developed chronic major depression. She has not worked at any job since September 2016. She alleges that she cannot work at any type of job because of her medical condition.

[3] The Claimant applied for a CPP disability pension on March 8, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because it took the position that the medical evidence did not show that the Claimant had a disability under the CPP.¹ The Minister acknowledges the Claimant's difficult circumstances. But the Minister argues that the Claimant has work capacity because she provides caregiving support to her son.² 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 has a disability that was severe and prolonged by December 31, 2019. The *CPP* calls this date the "Minimum Qualifying Period." This date is based on her CPP contributions.³

¹ See GD2-7

² See GD6-3-4

³ See s. 44(2).

[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.⁴

THE REASONS FOR MY DECISION

[6] I find that the Claimant had a severe and prolonged disability as of August 2016. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

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 diagnosis. It is based on whether she has functional limitations that prevent her from working.⁵ I have to look at her overall medical condition and think about how the Claimant's health issues might affect her ability to work.⁶

[8] The Claimant has to provide objective medical evidence of her disability as of December 31, 2019. If the Claimant fails to prove that she suffered from a severe disability prior to this date, medical evidence dated after is irrelevant.⁷

[9] The Claimant argues that her mental health condition results in severe functional limitations. She cannot focus and concentrate. She sleeps poorly. She avoids driving. She struggles performing her personal care needs. She is not interested in completing housekeeping tasks.⁸

[10] The Claimant testified that her life revolves around caring for her son. She wakes up in the morning and removes his catheter. She has to hook up his feeding tube. Personal support workers (PSWs) attend at her residence for about one hour on three different occasions during

⁴ 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. They must show it is more likely than not that they are disabled.

⁵ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁶ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁷ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377

⁸ See GD2-63-66

the day. She cleans her son before the PSWs arrive. But she does few daily activities. She has been preoccupied with worrying about her son since August 2016. She tries to pass her time reading books to her son and reading the Bible. She prepares dinner for her daughter, who lives with the Claimant and her son. The Claimant does laundry at night. But she struggles with all of her tasks because of her mental health. She cannot focus and she cries a lot. It takes her 45 minutes to clean her son in the morning, when it should only take her 15 minutes. It takes her much longer than it should to prepare dinner for her daughter because she cannot multi-task.

[11] The Claimant testified that she sleeps poorly because she constantly worries about her son. She suffers from anxiety. She is irritable. She had difficulty dealing with contractors who completed home modifications to help her son. Even simple tasks like banking and paying bills causes anxiety. She had significant experience working with computers. But she has difficulty using a mobile banking application because of problems with concentration.

[12] The Claimant's condition has not changed since her son's August 2016 accident. She cannot accept what happened to her son. She tried working for two weeks after the accident. She worked part-time, but could not perform her duties. She cried constantly. She could not concentrate. She could not make phone calls as fast as she did before. She had difficulty keyboarding. She constantly worried about her son. Her employer sympathized with her plight, but they could not keep her because of her lack of productivity. The Claimant testified that she does not believe that she can work at any job because she cannot concentrate. She has not worked at any job since September 2016. She has no real source of income, other than some rental income. She has not discussed a return to work with her treating physicians.

[13] The medical evidence from the Claimant's treating physicians supports her testimony that she has a severe disability under the CPP.

[14] The medical evidence shows that the Claimant suffered from post-traumatic stress disorder (PTSD), anxiety, irritability, and depression after her son's accident. The Claimant had problems with her memory and sleeping.⁹

⁹ See GD2-44-52

[15] The Claimant saw a psychologist in 2017 and 2018. The psychologist noted that the Claimant could not return to work in 2018 because of anxiety and depression. She continued to worry about her son. She avoided social interactions because she feared talking about her son's health.¹⁰ The Claimant had anger management issues in 2018 and had difficulty reacting to people on the telephone.¹¹ The Claimant also informed the psychologist that she was struggling with technology and her computer.¹²

[16] The Claimant's family doctor provided a medical report to the Minister on March 2, 2018. The doctor described the Claimant as being very depressed. The Claimant could not stop crying and could not concentrate.¹³

[17] The family doctor's clinical notes and records from 2018 showed mood swings. The Claimant also experienced side effects from anti-depressant medication.¹⁴

[18] The Claimant saw a psychiatrist in 2019. The psychiatrist wrote a report on February 16, 2019 to the Claimant's legal representative. The psychiatrist stated that the Claimant continued to suffer from major depression. She lacked motivation. She had poor energy, memory, and concentration. The Claimant did not want to take medication because she needed to hear her son at night. The psychiatrist believed that the Claimant could not work because of physical and emotional exhaustion, an inability to focus, and poor memory.¹⁵

[19] The Claimant's psychiatrist also completed a report on December 6, 2019. She diagnosed the Claimant with chronic major depression complicated by anxiety and PTSD. The Claimant had not reacted well to another anti-depressant medication. The psychiatrist did not believe that the Claimant was capable of working, even if she had further treatment. The psychiatrist stated she did not think that the Claimant could deal with co-workers or with stress. She did not believe that the Claimant could obtain and maintain gainful employment. I place significant weight on

¹⁰ See GD1-42

¹¹ See GD5-46

¹² See GD5-52

¹³ See GD2-59-62

¹⁴ See GD1-62

¹⁵ See GD5-9-10

this report because it was written shortly before the Claimant's Minimum Qualifying Period (MQP) date.

The Claimant does not have work capacity

[20] 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.¹⁶

[21] I find the Claimant has no capacity to work in the real world. The Claimant was 56 years old at the time of her MQP. But she completed some post-secondary education. She has good knowledge of English. She owned a business. She has management experience. She also testified that she obtained extensive experience working with computers. The Claimant's education, language proficiency, and past work and life experience suggest that she has can perform many jobs. But I am still satisfied that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2019.

[22] The Minister argued that the Claimant had work capacity by December 31, 2019 because of the amount of care that she provided for her son.¹⁷ The Claimant's family doctor in a June 9, 2019 report stated that the Claimant could not do any kind of work aside from caring for her son.¹⁸

[23] The family doctor's comment suggests that the care the Claimant provides her son is equal to engaging in substantially gainful employment. I disagree.

[24] I agree with the arguments of the Claimant's legal representative argument that the Claimant had no work capacity since her son's August 2016 accident. It takes the Claimant far longer than normal to clean her son, hook up his feeding tube, do laundry, and prepare dinner. The Claimant cares for her son, but she also has to rely on significant assistance from PSWs. I do

¹⁶ 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 See GD6-3

¹⁸ See GD5-16

not believe that cleaning her son in the morning, hooking up his feeding tube, reading to him, and taking him to medical appointments constitutes substantially gainful employment.

[25] I also place significant weight on the Claimant's testimony. I found the Claimant to be a credible witness. She had a good work ethic. She earned income in each year from 1981 to 2016.¹⁹ I have no reason to believe that she exaggerated her symptoms. I am convinced that she suffers from a severe medical condition that prevents her from working.

[26] The Minister also argued that the Claimant needed to be with her son, but this did not mean that she could not work.²⁰ The Claimant's son lives with her. She does not want to place him into a long-term care facility. However, I do not believe that the Claimant could engage in substantially gainful employment even if she placed her son in a long-term care facility. I accept her evidence and that of her psychiatrist that her mental health condition stopped her working at any type of job by December 31, 2019.

[27] I do not believe that the Claimant could have performed any type of physical work by December 31, 2019 because of the physical and emotional exhaustion caused by her depression. I also believe that the Claimant could not have worked at any type of sedentary job by December 31, 2019 because of her mental health. I do not believe that the Claimant could have worked with the public because of her inability to handle stress and concentrate. I do not believe that she could have worked from home on a computer because of her inability to concentrate. I do not believe that she could have handled a driving job because of anxiety. I accept that her ability to perform her activities of daily living was impaired at the time of her MQP, and that it took her longer to complete her housekeeping tasks.

[28] I find that the Claimant has been incapable regularly of pursuing any substantially gainful occupation since her son's accident in August 2016. She worked for two weeks in September 2016, but I do not believe that this work constituted substantially gainful work because the Claimant worked unproductively on a part-time basis. I disagree with the Minister's argument that the Claimant retained work capacity and did not pursue alternative employment. The evidence did not support a finding that the Claimant retained work capacity after August 2016.

¹⁹ See GD2-4

²⁰ See GD6-3-4

The psychologist mentioned in an August 26, 2018 report that work was not contemplated that that year, but I do not take this to mean that the Claimant had potential work capacity. Her psychiatrist drafted reports in 2019 that she could not obtain and maintain gainful employment.

The Claimant has made reasonable efforts to follow recommended treatment

[29] The Claimant has made reasonable efforts to follow medical advice.²¹ The Claimant has followed up with her family doctor. She received counselling from a psychologist and psychiatrist. A medical record suggested reluctance to try medications because the Claimant needed to hear her son at night. But I do not place much significance on this because the Claimant tried medication to treat her depression and anxiety. However, medication and counselling have not improved the Claimant's functionality to the point where she could regularly return to substantially gainful employment.

WAS THE CLAIMANT'S DISABILITY PROLONGED?

[30] The Claimant's disability was prolonged.

[31] The Claimant's condition began in August 2016 and continues today. The Claimant continues to suffer from chronic major depression, anxiety, and PTSD, despite receiving treatment.

[32] The Claimant's psychiatrist provided her with a poor prognosis because of the complexity of her illness and chronic symptoms.²² I do not believe that the medical evidence shows that the Claimant's physicians are contemplating a return to substantially gainful employment.

CONCLUSION

[33] The Claimant had a severe and prolonged disability in August 2016, following her son's accident. 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. The Minister received the Claimant's application in March 2018. That

²¹ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

²² GD5-12-13

means she is deemed to have become disabled in December 2016. Payment of her pension starts as of April 2017.

George Tsakalis
Member, General Division - Income Security