



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *ED v Minister of Employment and Social Development*, 2021 SST 50

Tribunal File Number: GP-20-278

BETWEEN:

E. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Videoconference hearing on: January 11, 2021

Date of decision: January 31, 2021

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment beginning as of September 2017.

OVERVIEW

[2] The Claimant was 40 years old when she applied for the CPP disability pension in August 2018. She had a career as a medical radiation technologist. She stated that she had been unable to work because of low back and leg pain since a car accident in April 2014. The Minister denied her application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Minister submitted that the Claimant is not entitled to a CPP disability pension because she has transferable skills and should be able to perform alternate work.

[4] For the Claimant to succeed, she must prove that it is more likely than not that she has a disability that was severe and prolonged by December 31, 2017. This date is based on her contributions to the CPP.¹

[5] The Claimant also had CPP contributions in 2018 that were below the minimum amount that the CPP accepts. These contributions will let the Claimant qualify for a pension, but only if she became disabled between January 1, 2018 and the end of November 2018.²

[6] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.³ It is prolonged if it is likely to be long continued and of indefinite duration.⁴

¹ Service Canada uses a person’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See subsection 44(2) of the *Canada Pension Plan*. The Claimant’s CPP contributions are at GD3-23

² This is based on section 19 and subsection 44(2.1) of the *Canada Pension Plan*.

³ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

ISSUES

[7] Do the Claimant's health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by the end of November 2018?

[8] If so, was her disability long continued and of indefinite duration?

SEVERE DISABILITY

The Claimant's disability interfered with her ability to work by the end of November 2018

[9] In April 2014, the Claimant was involved in a collision when another driver turned into her lane and hit her car.⁵ Afterwards, she experienced aching in her lower back and occasional tingling in her feet. Despite treatment, her back pain continued. In September 2014, she reported pain and intermittent numbness in her right thigh. The numbness sometimes radiated down to her her ankle.⁶

[10] Imaging reports of the Claimant's lower spine show that her back condition worsened over time. In October 2014, a CT showed small central disc herniations at several levels. In May 2015, an MRI scan showed small disc protrusions at two levels, and a diffuse disc/osteophyte complex at L5-S1. In October 2017, an MRI documented broad disc protrusions at three levels.⁷

[11] The Claimant made determined efforts to overcome her disability. From June to August 2014, she took a demanding rehabilitation program with daily treatments.⁸ In the years that followed, her treatments included massage, physiotherapy, chiropractic treatments, and epidural steroid injections for pain management. She did home exercises three times a week.⁹ She also tried several medications, including muscle

⁵ GD2-III-68

⁶ GD2-III-12, report of Dr. Mudassir Iqbal, neurologist, July 12, 2016

⁷ GD2-III-114; GD2-V-12, 13

⁸ GD2-V-34

⁹ Her physiotherapy records for May 2016 to March 2018 are at GD2-I- 91-124. Her chiropractic records for December 2015 to July 2017 are at GD2-II-20-32. Her injections before October 2016 were in October 2015, and January and September 2016: GD2-IV-121; GD2-III-6 and 23.

relaxants (Robaxacet, Flexeril), an antidepressant (Amitriptyline), an opioid medication (Tramadol), and medication for nerve pain (Gabapentin).¹⁰ She testified that for the first three months of 2016, she received treatment from Dr. Philip Balcaen, a naturopath. He gave her injections of vitamins and minerals. Unfortunately, they were extremely painful and provided no benefit. She was making slow progress until October 2016, when she had a 4-week flare-up of her symptoms.¹¹

[12] In January 2017, Dr. Darren Gray, physiatrist, reported that the Claimant had chronic right-sided low back pain. Her response had been minimal despite appropriate therapy. The epidural injections worked for only three or four weeks. Dr. Gray recommended that she try a different form of injection.¹² She tried injections in her sacroiliac joint.¹³ An injection in May 2017 brought a temporary improvement in her back pain.¹⁴

[13] In September 2017, when the Claimant was undergoing another work hardening program, she had several flare-ups of her symptoms. These included pain and numbness radiating into her right lower leg.¹⁵ In December 2017, Dr. M. Sudol, physiatrist, stated that the likely diagnosis was mechanical low back pain due to discogenic changes, possible facet pain, and sacroiliac joint irritation.¹⁶

[14] At the hearing, the Claimant testified that her condition has not changed much since 2017. In 2018, her physiotherapist gave her some helpful guidance on steps she could take to lessen her pain.¹⁷ However, following these instructions did not eliminate the pain.

¹⁰ GD2-III-69

¹¹ GD2-III-53

¹² GD2-III-40

¹³ GD2-I-85

¹⁴ GD2-I-79

¹⁵ GD2-II-87; GD2-I-79,85; GD2-IV-12

¹⁶ GD2-I-85

¹⁷ See GD2-V-91

Functional limitations

[15] In June 2014, an interdisciplinary assessment at the CBI Health Centre stated that the Claimant had several barriers to returning to work. These included pain, difficulty with sustained postures, and trouble pushing and pulling.¹⁸ In August 2014, the Claimant reported low back pain at a level of 5/10, where 10 is the greatest pain imaginable. Her pain was aggravated by sitting and prolonged standing.¹⁹

[16] In September 2015, Dr. Sudol stated that the Claimant was still very limited in prolonged standing and bending.²⁰ In June 2016, Dr. Sudol reported that the Claimant's symptoms were aggravated with prolonged standing and sitting.²¹ Subsequent reports of Dr. L. Laughland, family doctor, and physiotherapist Kerri-Ann Swartz recorded similar findings to December 2017.²² In November 2018, Dr. Laughland's CPP medical report stated that the Claimant could sit for only half an hour. She could stand for ten minutes. She could walk for up to twenty minutes. She could do no lifting, pushing, or pulling.²³

[17] The Claimant testified that she had the same restrictions at the time of the hearing that she had in December 2017. She is unable to do much around the house – her husband does almost everything. When he has to be away for work, she relies on her next-door neighbours. She tries to avoid pain triggers. However, every so often she will have a random sneeze and be in bed for hours or days.

My findings

[18] The Claimant experiences pain with virtually any movement. In addition, her symptoms can be aggravated by unpredictable events such as sneezing. She has

¹⁸ GD2-V-16

¹⁹ GD2-V-36

²⁰ GD2-V-3

²¹ GD2-V-8

²² GD2-II-38, K-A Swartz January 2017; GD2-IV-13, Dr. Laughland, December 2017

²³ GD2-V-86

chronic pain with intermittent exacerbations. I find that her health condition interfered with her ability to work by the end of November 2018.

The Claimant lacked a regular capacity for substantially gainful employment by the end of November 2018

[19] Employability is the key measure of a severe disability under the CPP.²⁴

The Claimant's three return-to-work/work hardening attempts were unsuccessful

[20] The Claimant testified that in May 2014, the month after her car accident, she tried for three weeks to return to work on modified duties. However, she was unable to perform even this limited work consistently. Her employer pulled her out of the graduated return-to-work plan.

[21] After her rehabilitation program,²⁵ the Claimant was slowly being re-integrated back to work. However, her symptoms recurred and she went off work again in October 2014.²⁶

[22] In May 2017, after almost three years of further treatment, an injection in her sacroiliac joint significantly improved the Claimant's back pain. That improvement was only temporary. By the time a work hardening program was in place in September 2017, the effects of the injection were wearing off. The Claimant experienced flares of her symptoms.²⁷ She "failed" the work hardening program after only two weeks.²⁸ She has not tried to return to work since.

[23] The Claimant's efforts to improve her condition show that she was unable to return to her usual job.

²⁴ *Canada (A.G.) v. Dean*, 2020 FC 206

²⁵ GD2-V-51, 34

²⁶ GD2-III-12

²⁷ See GD2-I-79; GD2-IV-12

²⁸ GD2-II-87

The Claimant's work with the plumbing company fails to show a regular capacity for substantially gainful employment

[24] The Minister relies on the fact that the Claimant does "paperwork" for a plumbing business. It states that this shows that the Claimant has retained work capacity.

[25] I do not accept the Minister's argument.

[26] First, the Claimant explained that this work, which is ongoing, is basically an income-splitting arrangement with her husband. At the hearing, he testified that he has a few customers left over from his days as a plumber. This earns him \$5,000-\$10,000 a year. He splits the income with the Claimant through a partnership. He does the invoices, the billing, and the plumbing. The Claimant does data entry for about an hour a week as she is able. This is not a career. I find that her data entry work does not support a finding that the Claimant has the regular ability to earn a living.

[27] Second, in 2018 the Claimant earned about \$5,000 from this work.²⁹ This is not a substantially gainful amount. Under the law, a "substantially gainful" occupation is one that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.³⁰ In 2018, the maximum annual amount of the CPP disability pension was \$16,029.³¹ The Claimant's work for the plumbing business is not substantially gainful.

The medical evidence shows that the Claimant lacked the capacity to retrain

[28] The Minister states that the Claimant had retained work capacity. It relies on the May 2017 functional capacity evaluation that Lana Malinowsky, occupational therapist, provided to the insurer's disability management company. Ms. Malinowsky stated that she did not observe any objective findings to support the Claimant not being able to manage her former work duties. She should start a return-to-work program in four to six

²⁹ GD9-1. The Claimant testified that the work is ongoing. It brings in about the same amount of money to the partnership annually.

³⁰ Section 68.1, CPP Regulations

³¹ <https://www.canada.ca/en/employment-social-development/programs/pensions/pension.html>

weeks.³² In June 2017, the insurance company terminated the Claimant's long-term disability benefits.³³

[29] At the hearing, the Claimant stated that the Malinowsky report had been discredited. In May 2018, the Claimant's union representative, Jim Jobe, launched a successful appeal of the insurance company's decision. He pointed to the Malinowsky report's finding that the Claimant only could stand/walk for up to 168 minutes (about 2 ½ hours) a day. In addition, he noted that the Claimant had to stop the testing of her other abilities due to pain. He also put the Malinowsky report's conclusions in the context of several medical reports detailing the Claimant's functional limitations from 2016 to 2018. Further, he highlighted the Claimant's failed work hardening program in September 2017.³⁴ In June 2018, the insurance company restored her long-term disability benefits.³⁵

[30] In July 2018, Joel Bland, occupational therapist, performed a Functional Capacity Evaluation (FCE). He considered whether the Claimant was functionally capable of undertaking a school program that would take 2-4 years. He found that she "demonstrated material handling with the sedentary strength capacity." However, she had limitations in virtually all forms of movement due to pain in her back and right leg. Mr. Bland concluded that the Claimant was not functionally capable of participating in a 2-4 year retraining program.³⁶

[31] In November 2018, Dr. Laughland stated that the Claimant had serious restrictions in standing, sitting and walking. In addition, she was unable to lift, push, or pull. She was not suitable for retraining or schooling.³⁷

The Claimant was unemployable in a "real world" context

³² GD2-III-52-103

³³ GD2-I-77

³⁴ GD2-I-77 ff.

³⁵ GD5-64

³⁶ GD2-I-48

³⁷ GD2-V-86

[32] In deciding whether the Claimant's condition was severe, I must take a "real world" approach. This means considering factors such as her age, level of education, language proficiency, and past work and life experience.³⁸ In November 2018, the Claimant was 41 years old, more than 20 years younger than the usual retirement age. She has a college diploma in medical radiography. She is computer literate. None of these personal characteristics would be a barrier to employment.

[33] However, I am satisfied that the Claimant's health condition means that she lacked the regular capacity to pursue any substantially gainful occupation by November 2018. She was unable to endure prolonged sitting, standing, or walking. She was unable to return to her old job. Her alternate work in data entry failed to show that she was able regularly to pursue an alternate substantially gainful occupation. An occupational therapist determined that she was unsuited for retraining. I find that she was not a realistic candidate for employment in the commercial marketplace.

[34] Accordingly, I find that it is more likely than not that the Claimant's disability was severe by November 30, 2018.

PROLONGED DISABILITY

[35] The Minister submits that the Claimant's disability was not prolonged. The Minister relies on Dr. Sudol's January 2019 statement that after a difficult 6 months, the Claimant's symptoms had settled down.³⁹ The Minister also relies on Dr. Sudol's April 2020 report that a lumbar injection three months before had provided some benefit for acute pain.⁴⁰

[36] The Minister's account is selective. It omits the flare-ups in the Claimant's back condition in 2019. Beginning in May 2019, Dr. M. Palanisamy, anesthesiologist, provided medial branch block treatments. When these failed, he tried radiofrequency ablation. After some initial improvement with treatment, he reported in October 2019 that the Claimant's pain had flared again. He concluded in November 2019 that the pain

³⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

³⁹ GD5-86

⁴⁰ GD5-81

was “not settling.” In January 2020, moreover, he stated she did not get much relief from radiofrequency ablation. This was not surprising, since an MRI of December 2019 showed a new central disc extrusion at L4-5.⁴¹

[37] Further, in July 2020, Dr. Laughland reported to the insurance company that the Claimant suffered from discogenic back pain, L3-L5 protrusions, and an L5-S1 protrusion with migration. She had chronic pain and was not eligible for surgery. She continued to have acute on chronic exacerbations. Her condition was not expected to improve. She was unemployable.⁴²

[38] Dr. Laughland’s July 2020 report stated that the Claimant continued to have acute on chronic exacerbations of her pain.⁴³ The Minister concluded from this that the Claimant’s condition was not continuously severe. However, even Dr. Sudol’s January 2019 report, on which the Minister relies, notes that the Claimant had symptom flares in July, October, November, and December 2019. It is not a requirement for a CPP disability pension that a claimant suffer excruciating pain every minute of every day. It is sufficient if the disability prevents a claimant regularly pursuing any substantially gainful occupation. I have found that the Claimant meets the CPP definition of severity.

[39] The Claimant has suffered from back pain since April 2014. In spite of multiple treatments, her condition has deteriorated. She is not expected to get better.

[40] I therefore find that the Claimant’s disability is prolonged.

CONCLUSION

[41] The Claimant had a disability that was severe and prolonged in April 2014, when her accident occurred. However, the CPP says a person cannot be considered disabled more than 15 months before the Minister receives their disability application. After that, there is a four-month waiting period before payments start.⁴⁴ The Minister

⁴¹ GD5-47, 51, 52, 53, 55, 69; GD1-16

⁴² GD5-2-5

⁴³ GD5-5

⁴⁴ Section 69 *Canada Pension Plan* sets out this rule.

received the Claimant's application in August 2018. This means that she is considered to have become disabled in May 2017. Payments of her pension start as of September 2017.

[42] The appeal is allowed.

Carol Wilton
Member, General Division - Income Security