



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *NK v Minister of Employment and Social Development*, 2021 SST 129

Tribunal File Number: GP-20-1298

BETWEEN:

**N. K.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Shannon Russell

Claimant represented by: Paul Sacco

Teleconference hearing on: February 2, 2021

Date of decision: February 23, 2021

## Decision

[1] The Claimant is not entitled to Canada Pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

## Overview

[2] The Claimant is a 51-year-old woman who used to work two part-time jobs. She worked as an assistant in a pharmacy and she worked as a receptionist in a doctor's office. The Claimant stopped working at both jobs in April 2018. She stopped working for medical reasons.

[3] The Claimant first applied for disability benefits in August 2018. In that application, she reported that she was unable to work because of shoulder and elbow pain as well as liver cirrhosis<sup>1</sup>. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal. A Tribunal Member heard the Claimant's appeal on January 17, 2020 and decided that the Claimant's disability was not severe and prolonged as of the date of that hearing.

[4] The Claimant applied for disability benefits again in February 2020. In that application, she reported that she is unable to work because of symptomatic liver cirrhosis and severe chronic pain, particularly involving the shoulders, arms, neck, hips and hands<sup>2</sup>. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

## The Claimant's appeal history is important

[5] The Claimant's appeal history is important because of a legal principle known as *res judicata*. Generally speaking, *res judicata* means that once a dispute has been finally decided, it cannot be litigated again. The doctrine is motivated in part by public policy concerns and it is intended to advance the interests of justice by preventing a decision from being made again on

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<sup>1</sup> Page GD2-303

<sup>2</sup> Page GD2-33

the same issue. In a case called *Danyluk*, the Supreme Court of Canada explained the public policy concerns this way<sup>3</sup>:

The law rightly seeks finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry...An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

### **When *res judicata* applies**

[6] The principle of *res judicata* applies to administrative tribunals, like the SST<sup>4</sup>. For the principle to apply, three preconditions must be met:

- a) the issue in the two proceedings must be the same;
- b) the decision which is said to give rise to *res judicata* must be a final decision; and
- c) the parties in the two proceedings must be the same.

### **The principle of *res judicata* applies to the decision of January 2020**

[7] The principle of *res judicata* applies to the Tribunal's decision of January 17, 2020. This is because the three preconditions (set out in paragraph 6) are met. First, the issue in the two proceedings is the same – namely, whether the Claimant has a disability that is severe and prolonged. Second, the Tribunal's decision of January 2020 is final. Third, the parties in the two proceedings are the same. The parties in both proceedings are the Claimant and the Minister.

[8] Even when the three conditions of *res judicata* are met, I can still decide not to apply *res judicata*. This is because *res judicata* involves an element of discretion. My objective is to

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<sup>3</sup> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 18

<sup>4</sup> *Danyluk, supra* and *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100

ensure that the operation of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice<sup>5</sup>.

[9] The Supreme Court of Canada has set out a list of factors to consider when exercising discretion. These factors include: (a) the wording of the statute (where the power to give the decision comes from); (b) the purpose of the legislation; (c) the availability of an appeal; (d) the safeguards available to the parties in the procedure; (e) the expertise of the prior decision-maker; (f) the circumstances giving rise to the first proceeding; and (g) any potential injustice<sup>6</sup>.

[10] During the hearing, I asked the Claimant's representative if he intended to argue that *res judicata* should not apply to the Tribunal's decision of January 2020. When I asked my question, I ensured that the Claimant's representative was aware of the *Danyluk* decision, and the fact that the principle of *res judicata* involves an element of discretion. The Claimant's representative told me that he accepts that *res judicata* applies to the Tribunal's decision of January 2020. He said his sole argument on appeal is that the Claimant became disabled after the Tribunal's decision of January 17, 2020.

[11] Given the Claimant's position, I have no reason to find that there would be an injustice in applying *res judicata* to the Tribunal's decision of January 17, 2020.

## **What the Claimant must prove**

[12] For the Claimant to succeed, she must prove that her disability became severe and prolonged between January 17, 2020 and February 2, 2021 (the date of the hearing)<sup>7</sup>.

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<sup>5</sup> *Danyluk, supra*, at paragraph 67

<sup>6</sup> *Danyluk, supra*

<sup>7</sup> 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 on pages GD2-6 to GD2-7. In this case, the Claimant's coverage period ends on December 31, 2021. This means I can assess her disability as of the date of the hearing.

[13] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation<sup>8</sup>. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death<sup>9</sup>.

## **Preliminary Matters**

### **Post-Hearing Documents**

[14] During the hearing, the Claimant’s representative asked if he could submit updated reports from two doctors – namely, Dr. Bacher (rheumatologist) and Dr. Reed (orthopedic surgeon). He explained that he had mistakenly thought the reports had already been submitted. I told the Claimant’s representative that I would allow him to submit the reports after the hearing, provided he submitted them before the end of the day on February 4, 2021. I decided to accept the updated specialist reports because they were clearly relevant to the Claimant’s case, and it would not have been fair to the Claimant to refuse the documents simply because her representative mistakenly thought the documents were already on file. I explained that once I received the reports, I would share them with the Respondent and give the Respondent an opportunity to comment on the reports.

[15] After the hearing, the Claimant’s representative submitted post-hearing documents. The documents included the updated reports from Dr. Bacher and Dr. Reed, but also included additional evidence that was not discussed during the hearing.

[16] On February 4, 2021, I wrote to the Claimant’s representative and asked him to explain why he was now seeking to submit evidence that was not discussed during the hearing. I also asked him to explain why the evidence could not have been obtained and submitted earlier and why the evidence is relevant.

[17] The Claimant’s representative replied to my letter by acknowledging that only the updated reports from Dr. Bacher and Dr. Reed should be accepted into the record. He asked me to remove the other evidence from the record and he said that evidence is not relevant.

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<sup>8</sup> The definition of severe disability is set out in paragraph 42(2)(a) of the *Canada Pension Plan*.

<sup>9</sup> The definition of prolonged disability is set out in paragraph 42(2)(a) of the *Canada Pension Plan*.

[18] Given the representative's reply, I excluded the "other" evidence he submitted after the hearing<sup>10</sup>.

[19] On February 5, 2021, I shared the updated reports from Dr. Bacher and Dr. Reed with the Respondent, and I gave the Respondent an opportunity to comment on those reports<sup>11</sup>.

[20] The Respondent prepared written submissions on the updated reports, and I received those submissions on February 22, 2021<sup>12</sup>. I have shared the Respondent's submissions with the Claimant's representative.

## **What the Claimant says about her disability**

[21] The Claimant explained how her disability has changed since January 17, 2020. She says that her disability became severe after January 17, 2020 because:

- Her overall pain has gotten worse in the last year;
- She now has pain in both feet, and that pain started at the end of 2020;
- She had an injection for left knee pain in September 2020, but the injection did not work. She has an appointment with her orthopedic surgeon (Dr. Reed) on February 9, 2021, and he will tell her what he can do for her left knee.
- For the past year, her friend has been coming to her home two to three times a week to do the Claimant's laundry, cooking and cleaning. This is because the Claimant is no longer able to do these tasks;
- In October 2020, Dr. Bacher diagnosed her with fibromyalgia; and
- The relief she gets from Dr. Bacher's injections does not last as long as it did before January 2020. She explained that at some point after January 2020, she started getting only about 3 to 4 weeks of relief after an injection, whereas previously she was getting a few months of relief.

[22] The Claimant testified that the main symptom she has from the liver cirrhosis is fatigue.

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<sup>10</sup> I excluded pages GD5-7 to GD5-10

<sup>11</sup> Pages GD8-1 to GD8-3

<sup>12</sup> Pages GD9-1 to GD9-6

She said her fatigue has not changed since January 17, 2020. She also said that there has been no other change with respect to her liver condition.

## **Reasons for my decision**

[23] I find the Claimant has not proven that her disability *became* severe and prolonged between January 17, 2020 and February 2, 2021. I reached this decision for the following reasons.

### **(i) The Claimant's liver condition would not preclude work that is suitable to her limitations**

[24] The Claimant has cirrhosis of the liver secondary to steatohepatitis<sup>13</sup>. The Claimant testified that the symptoms from her liver condition have not changed since January 2020. In February 2020, the Claimant's family physician, Dr. Francisco, reported that the liver cirrhosis and resulting fatigue render the Claimant unable to do strenuous or sustained activities<sup>14</sup>.

[25] The inability to do strenuous activities does not render the Claimant incapable regularly of pursuing any substantially gainful occupation. As for the sustained activities, I have little medical information about what this entails. For example, I do not know what Dr. Francisco considers a sustained activity to be. Without more, and knowing that the liver condition did not change after January 2020, I cannot find that it precludes work that is suitable to the Claimant's limitations.

### **(ii) The medical evidence does not support the severity of pain the Claimant describes**

[26] The medical evidence clearly shows that the Claimant has multiple pain sources including a history of polyarthralgias related to underlying osteoarthritis, rotator cuff tendinopathy, trochanteric bursitis and epicondylitis<sup>15</sup>.

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<sup>13</sup> Page GD2-220

<sup>14</sup> Page GD2-79

<sup>15</sup> Page GD2-87

[27] I accept that the Claimant has pain. I also accept that she has been experiencing pain for a long time, even before January 2020.

[28] Because the Claimant was experiencing pain before January 2020, I need to understand how that pain changed after January 2020. To help me understand how the pain has changed, I asked the Claimant to compare the overall level of pain she had in January 2020 with the overall level of pain she has now. When rating her pain, I asked the Claimant to use a pain scale of 1 to 10, where 1 is very little pain and 10 is the most excruciating pain imaginable such that a person may lose function of their bowels and would have to attend the hospital.

[29] The Claimant testified that in January 2020, her overall pain was a 6 or 7 out of 10. As for her pain now, the Claimant testified that, on average, it is a 9 out of 10.

[30] The medical evidence does not support such a high level of pain. First, the Claimant saw a pain specialist (Dr. Kamawi) in October 2019. The Claimant told me that during her consult, Dr. Kamawi told her that she could return to see her if she needed to. I asked the Claimant if she returned to see Dr. Kamawi, and the Claimant said she did not. If the Claimant's pain increased as much as she said it did after January 2020, then I would have expected her to return to Dr. Kamawi. I know the Claimant testified that she participated in a one-day online workshop for fibromyalgia in January 2021. However, I do not equate a workshop with an individualized consult with a pain specialist.

[31] Second, in October 2020, Dr. Bacher reported that the Claimant said her steroid injections are no longer lasting three months, but she did not suggest, in any way, that the Claimant's overall pain level was as high as what the Claimant described to me. In fact, Dr. Bacher reported that the Claimant was getting some pain relief. She said the Claimant had acknowledged that the injections are still helping her and that her new medications (Gabapentin and fluoxetine) help with the pain<sup>16</sup>. Dr. Francisco had said something similar in February 2020. He wrote that the Claimant's pains are tolerable when she takes her medications (including Lyrica 75 mg and Vimovo), though her pains are continuous<sup>17</sup>.

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<sup>16</sup> Page GD5-2

<sup>17</sup> Page GD2-78



[32] I am not suggesting that a claimant needs to have a pain level as high as 9 out of 10, just to receive disability benefits. My point is that the Claimant's testimony of having a very high level of pain is not supported by the medical evidence, and so I am left without a good understanding of how bad her pain really is.

**(iii) The medical evidence about the Claimant's foot pain is thin**

[33] The Claimant testified that she has recently started to experience pain in her feet. The Claimant's foot pain is mentioned briefly in Dr. Bacher's report of October 1, 2020. Dr. Bacher wrote, for example, that the Claimant feels on some days that she cannot walk due to pain in the soles of her feet<sup>18</sup>.

[34] As a whole, the medical evidence about the foot pain is too thin for me to be able to assess how much of a contributor it is to the Claimant's disability. I do not know, for example, whether the foot pain is related to the Claimant's fibromyalgia or if it has another cause. If it is the latter, I do not know whether there are investigations planned and/or treatment options available for the condition.

**(iv) The Claimant likely had fibromyalgia before January 17, 2020**

[35] The Claimant testified that Dr. Bacher diagnosed her with fibromyalgia in October 2020. I have read Dr. Bacher's report of October 2020, and she does say that the Claimant had "multiple tender points for FM positive today 18/18"<sup>19</sup>. However, the evidence does not show that the fibromyalgia began after January 17, 2020. Instead, the evidence shows the Claimant was experiencing fibromyalgia symptoms before January 17, 2020. In October 2019, Dr. Bacher reported that the Claimant had symptoms of fibromyalgia, and she recommended a referral to a pain management clinic<sup>20</sup>. On January 10, 2020 (before the Claimant's hearing of January 17, 2020), Dr. Bacher again reported that the Claimant had symptoms of fibromyalgia and she recommended exercise, physiotherapy, and Lyrica 150 mg<sup>21</sup>.

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<sup>18</sup> Page GD5-2

<sup>19</sup> Page GD5-2

<sup>20</sup> Page GD2-88

<sup>21</sup> Page GD2-103

**(v) There is uncertainty as to when the Claimant's friend began helping the Claimant**

[36] The Claimant testified that one of the changes that has occurred since January 17, 2020 is that she now requires help from a friend to do things like cooking, cleaning and laundry. She says that her friend comes to her home to perform these chores about 2-3 times a week, and that on the weekends the Claimant gets help from her family.

[37] There is uncertainty in the evidence as to whether the Claimant's friend began helping her after January 17, 2020. The Claimant testified that her friend started helping her "last year". When I asked the Claimant if she could be more specific about the timeframe, the Claimant said that she knows that her friend has been coming to help her for "more than a year". This suggests to me that the Claimant's friend may have been helping her before January 17, 2020. I know the Claimant also said that her friend was not helping her in January 2020, but when I asked her how much time passed (generally) after January 2020 before her friend started helping her, the Claimant said she could not remember. As a whole, the evidence about when the friend started helping the Claimant is not reliable.

**(vi) There are still treatments to try**

[38] The evidence shows that there are treatments that have not yet been tried, which may be helpful in reducing or managing some of the Claimant's pain.

**a. The knee condition**

[39] The first treatment involves the Claimant's knee condition. There is no question that the Claimant is having difficulties with her left knee. In September 2020, Dr. Reed reported that the Claimant's left knee became quite painful and swollen in December 2019. He said that a recent MRI shows evidence of a significant medial meniscus tear and there may be a small, displaced fragment.

[40] Dr. Reed recommended conservative measures, including injection therapy with cortisone and hyaluronic acid. Dr. Reed also explained that if the injection therapy does not work then they may need to consider arthroscopic surgery<sup>22</sup>.

[41] The Claimant told me that she had the injection (in September 2020), but it did not help. It is unfortunate that the injection did not help. However, it appears there is still a treatment to try (i.e. the arthroscopic surgery).

[42] The Claimant has previously had arthroscopic surgery on her right knee (in 2016) for a meniscus tear, and Dr. Reed reported that she did quite well after that surgery. He also noted that she subsequently had injections into her right knee and responded quite well to that too<sup>23</sup>. While he noted in September 2020 that the Claimant's right knee has been "slightly" more bothersome lately, he said this is likely due to the fact that she has been favouring her right leg due to the left knee problem<sup>24</sup>. It is reasonable for me to infer from this that successful arthroscopic surgery on the left knee may help the Claimant's right knee problem as well, in that she will no longer have to favour her right leg.

#### **b. Recommendations from the pain specialist**

[43] The next treatments involve recommendations that were made by a pain specialist (Dr. Kamawi) in October 2019. Dr. Kamawi recommended nerve blocks for lower back pain and trigger point injections, as well as a trial of a BuTrans patch for ongoing pain relief<sup>25</sup>.

[44] When I asked the Claimant if she has tried any of these treatments, she said she has not. She was not clear as to why she has not tried the BuTrans patch, except to say that Dr. Kamawi talked about it but did not give it to her. As for the injections, the Claimant said that once she told Dr. Kamawi that she receives injections from Dr. Bacher, Dr. Kamawi indicated that there was no need for the injections she was recommending because they were the same as the injections the Claimant was getting from Dr. Bacher.

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<sup>22</sup> Page GD5-3

<sup>23</sup> Pages GD2-85 and GD5-3

<sup>24</sup> Page GD5-3

<sup>25</sup> Page GD2-100

[45] I do not believe that the treatment that Dr. Kamawi was offering (i.e. the nerve blocks and trigger point injections) was the same as what Dr. Bacher was providing. Dr. Kamawi was aware that the Claimant was getting injections from Dr. Bacher because she mentioned those injections in her report. Despite this, Dr. Kamawi still recommended the nerve blocks and trigger point injections. Moreover, Dr. Kamawi reported that when she discussed the interventional treatment with the Claimant, the Claimant was hesitant to pursue that kind of treatment<sup>26</sup>. This tells me that the Claimant was likely aware that the injections were different from the ones provided by Dr. Bacher.

#### **vii. The Claimant can work in the real world**

[46] When I am deciding if the Claimant can work, I must consider more than just her medical conditions and how they affect what she can do. I must also consider her age, level of education, language ability, and past work and life experience<sup>27</sup>. These factors help me decide if the Claimant has any ability to work in the real world.

[47] I find the Claimant can work in the real world. She is only 51 years of age, and thus has several years ahead of her before the standard age of retirement. She is also proficient in English (as well as Punjabi and Hindi). As for her education, the evidence is inconsistent. In her CPP Questionnaire of 2018, the Claimant reported that she completed grade 10<sup>28</sup>. In her CPP Questionnaire of February 2020, the Claimant reported that she completed two or more years of secondary school<sup>29</sup>. During the hearing, the Claimant told me she did not finish grade 10. Despite the inconsistency, it appears the Claimant does not have a high level of education. However, she was able to secure employment, as evidenced by the fact that she held down two part-time jobs from about 2008 to 2018. She worked as an assistant in a pharmacy and she

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<sup>26</sup> Page GD2-100

<sup>27</sup> The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248

<sup>28</sup> Page GD2-301

<sup>29</sup> Page GD2-42

worked as a receptionist in a doctor's office. It is reasonable for me to infer that both of these jobs allowed the Claimant to acquire valuable transferable skills<sup>30</sup>.

## **CONCLUSION**

[48] The appeal is dismissed.

Shannon Russell  
Member, General Division - Income Security

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<sup>30</sup> Transferable skills include talents and abilities that can be used in different types of jobs.