Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *MW v Minister of Employment and Social Development*, 2021 SST 123

Tribunal File Number: GP-19-1883

BETWEEN:

M. W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: ~~John Hammond~~ **[Robert H. Littlejohn]**

Videoconference hearing on: January 21, 2021

~~Date of decision:~~ ~~February 28, 2021~~

CORRIGENDUM DATE: March 23, 2021

Canada

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment beginning in May 2021.

OVERVIEW

[2] The Claimant was 59 years old when she applied for a CPP disability pension in January 2019. She had worked since 1997 as the office manager of a court reporting service. She initially stated that she had been unable to work since July 2014, when she had a second kidney transplant. She was still working at the time of the hearing. At the hearing, she stated that she had been unable to work since January 1, 2021 because of chronic low back and left knee pain and obesity.

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

[4] The Minister submitted that the Claimant is not entitled to a CPP disability pension because she was still working.

What the Claimant must prove

[5] For the Claimant to succeed, she must prove that it is more likely than not that she had a disability that was severe and prolonged by the date of the hearing.[1]

[6] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.[2] It is prolonged if it is likely to be long continued and of indefinite duration.[3]

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[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 on pages GD15-6-7. In this case, the Claimant's MQP is December 31, 2022. Because this date is in the future, I must decide whether the Claimant's disability was severe by the date of the hearing.
[2] Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[3] 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 is incapable regularly of pursuing any substantially gainful occupation?

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

THE CLAIMANT HAS A SEVERE DISABILITY

The Claimant's disability interferes with her ability to work

Physical conditions

[9] The Claimant suffers from chronic back and neck pain with osteoarthritis and degenerative disc disease in multiple sites. She also has osteoarthritis in her knee and shoulder pain. Additional pain conditions are fibromyalgia/polyneuropathy (simultaneous malfunction of many peripheral nerves throughout the body). The Claimant also has a history of obesity and kidney failure.

Chronic back and neck pain

[10] The pain in the Claimant's neck, lower back, and left knee are well documented. Recent imaging reports show the following conditions:

- Lumbar spine imaging report, May 2018: advanced facet osteoarthritis from L3-4 through L5-S1;[4]
- Lumbar spine X-ray, November 2020: advanced degenerative disc disease at L3-4 and advanced degenerative facet disease at S1;[5] and
- Cervical spine X-ray, November 2020: advanced degenerative disc disease at three levels, and degenerative neural foraminal narrowing at four levels.[6]

[4] GD2-183
[5] GD9-7
[6] GD9-7

[11] In April 2016, the Claimant told Dr. David Handley, family doctor, that she had suffered from lower back pain since 2014, when she had her second kidney transplant.[7] In January 2019, Dr. Marina Beshay, family doctor, reported that the Claimant had suffered for years from lumbar pain with radiculopathy and neuropathy.[8]

[12] In December 2019, the Claimant saw Dr. Stefan Konasiewicz, neurosurgeon, at a pain clinic. She told him that she had constant throbbing back pain that was usually at a level of 10/10, where 10 is the greatest pain imaginable. Dr. Konasiewicz reported that the pain was likely secondary to multilevel spondylotic changes as indicated by the MRI scan. He stated that the Claimant also likely had an element of sacro-iliitis, as well as myofascial issues and deconditioning. The pain in both her legs was likely secondary to nerve root impingement and irritation as a result of foraminal stenosis and central stenosis.[9]

[13] The appeal file contains records of the Claimant's weekly visits to Dr. Konasiewicz for injections in her lower back, left leg, across her shoulders, and in her right arm.[10] In January 2021, Dr. Konasieicz reported that the Claimant still had back pain at a level of 10/10. The injections provided pain relief for five days.[11] The Claimant testified that they provided only limited pain relief. They reduced her pain level to about 8/10. Significantly, the Claimant received instructions for after the injections. She should not drive for the rest of the day, or lift anything over 10 pounds for 24 hours. She should avoid twisting or bending.[12]

[14] In January 2021, Dr. Beshay put the Claimant on Percocet for chronic back pain.[13]

Knee pain

[15] In April 2017, an MRI of the Claimant's left knee showed a complex tear of the medial meniscus, with mild to moderate osteoarthritis, moderate joint effusion, and bursitis.[14] In August

[7] GD7-II-7
[8] GD2-172
[9] GD4-4
[10] GD13-I-5, report of Dr. Beshay, February 1, 2021; GD13-2-13-181
[11] GD13-II-13-14
[12] GD13-II-15
[13] GD13-1-10
[14] GD2-185

2017, Dr. Christopher Porte, orthopedic surgeon, stated that the Claimant had advanced medial compartment osteoarthritis and an associated meniscal tear. He gave her a cortisone injection in the knee.[15]

[16] Dr. Porte stated that the Claimant would eventually need a knee replacement, but would need to lose "a significant amount of weight."[16] In May 2018, he stated that given her weight and kidney condition, she was not a surgical candidate.[17] In January 2019, Dr. Beshay reported that the Claimant had experienced chronic left knee pain with severe osteoarthritis for years. In May 2019, the Clamant saw a physiotherapist for her knee and received advice on exercises. She also received a prescription for a knee brace.[18]

Shoulder pain

[17] The Claimant testified that in February 2020 she fell in the bathtub. In March 2020, she reported that her shoulder pain increased with activity.[19] In May 2020, an ultrasound of her right shoulder showed tendinosis, tenosynovitis, full thickness tear of a tendon, and fluid under a shoulder muscle.[20]

Fibromyalgia/neuropathy

[18] In March 2016, the Claimant saw Dr. Kenneth Yuen, rheumatologist, for burning foot pain. He thought her symptoms were neurological in origin. He recommended Lyrica or Nortriptline.[21] In August 2016, Dr. Handley increased her Lyrica, noting that her foot pain was primarily peripheral neuropathy.[22]

[19] In January and June 2019, Dr. Alex Jahangirvand, neurologist, saw the Claimant for a history of deep burning and aching feelings in both feet. She had been taking Lyrica (medication for nerve pain) for the past three years. Dr. Jahangirvand stated that the Claimant had features of

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[15] GD2-181. In May 2018, he reported that knee injections were only "marginally helpful:" GD2-179.
[16] GD2-181
[17] GD2-179. Her weight correlated with a high risk of infection. The treatment of her kidney condition with immunosuppressive medication would make it almost impossible to successfully treat an infection.
[18] GD6-46
[19] GD2-II-152
[20] GD13-II-121
[21] GD7-II-5
[22] GD7-II-28

generalized polyneuropathy. Her risk factors for this included high blood sugar, high blood pressure, high cholesterol, and obesity, as well as kidney disease.[23]

[20] In June 2019, Dr. Beshay substituted Cymbalta for Lyrica to treat the Claimant's fibromyalgia and neuropathy.[24] In August 2019, Dr. Beshay reported that the Cymbalta did not take away the Claimant's pain.[25]

Obesity

[21] In December 2014, Sandra Mattok, registered nurse at the renal transplant office, saw the Claimant. She stated that the Claimant had put on a lot of weight since her June 2014 surgery in spite of eating less than 1500 calories per day.[26] In January 2019, Dr. Beshay reported that the Claimant suffered from obesity.[27] In August 2019, Dr. Beshay stated that the Claimant had struggled with weight loss for years. She had tried weight loss medications with little success.[28] Her chronic pain interfered with her ability to exercise and therefore to lose weight.[29] She received a referral for bariatric surgery, but was told that the risk of complications was too high.[30]

Kidney condition

[22] The Claimant has a history of chronic kidney failure. She had a kidney transplant in 1995. She was on dialysis from 2010 until a second transplant in 2014. She testified that she continues to receive annual checkups from her kidney specialist.

[23] In June 2019, the Claimant's ankles became very swollen and tender. This was a result of her kidney condition.[31] Dr. Beshay put her on Lasix to reduce the swelling, but this interfered with her kidney function.[32]

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[23] GD2-109, 117

[25] GD2-69, 142
[26] GD10-II-33, 34
[27] GD2-172
[28] GD7-III-87
[29] GD7-III-47
[30] GD7-III-87
[31] GD2-135, 142
[32] GD7-III-86

[24] The Claimant's kidney condition also limits the options for treating her pain. She is unable to take anti-inflammatories because of the transplant.[33] In addition, she is on immuno-suppressants for her kidney condition. This makes it too risky for her to have surgery on her knee, or bariatric surgery for weight loss because of the danger of infection.[34]

Other physical conditions

[25] In November 2018, the Claimant had bunion surgery.[35] At the hearing, she stated that this had improved her foot pain.

[26] In January 2019, Dr. Beshay stated that the Claimant suffered from hypothyroidism and chronic anemia. She was on Synthroid for her thyroid condition.[36]

[27] In March 2019, the Claimant complained of a significant drop in her hearing over the past five years. Dr. Glenn Thornley, otolaryngologist, inserted a tube in her right ear.[37]

[28] At the hearing, the Claimant testified that she has major headaches at the back of her head. She had shots there for the pain in 2020, but they did no good. In January 2021, Dr. Konasiewicz reported that the Claimant had pain in her neck and scalp.[38]

Mental health condition

[29] The Claimant had depression and a mood disorder as early as 2014. She agreed to talk to her dialysis social worker about this. By April 2015, she was on an antidepressant (Celexa).[39] She was off and then back on this medication in 2016.[40] In August 2019, Dr. Beshay stated that the Claimant has a mood disorder and depression. She had started antidepressants with partial improvement.[41]

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[33] GD2-27
[34] GD7-III-87
[35] GD6-230
[36] GD2-172
[37] GD2-122
[38] GD13-II-13
[39] GD10-II-33, 34
[40] GD7-II-28
[41] GD7-III-86. At that time, she was taking Elavil: GD2-72.

Functional limitations

[30] The Claimant submitted that because of her health conditions she has difficulty standing or sitting for prolonged periods, walking long distances, using stairs, lifting, and bending. Since late 2018, she has had to crawl up stairs. Pain wakes her during the night in spite of her using a sleeping pill.[42] Some days, she has fallen asleep at her desk because of side effects of medications or from fatigue.[43] Because of her kidney transplant, she is unable to take anti-inflammatories.[44] Because of her difficulty moving, she can't exercise, which hinders her efforts at weight loss.[45] Her weight prevents her from getting knee replacement surgery. She has trouble with her memory and concentration.[46] In addition, her headaches make it difficult for her to use a computer.

[31] The Claimant says her husband has taken over the cooking and shopping. She is able to clean the house only with great pain.[47]

[32] The Claimant's doctors support her accounts. In April 2016, Dr. Handley reported that going up or down stairs aggravated her lower back pain.[48] In January 2019, Dr. Jahangirvand related that the Claimant walked with a limp because of left knee pain.[49]

[33] In January 2019, Dr. Beshay stated that the Claimant had a reduced range of motion of her lumbar spine. She was able to stand for only 15 minutes because of back and knee pain. She had to alternate between sitting and standing. She could only walk short distances. She had a limited ability to climb stairs.[50]

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[42] GD2-145, 174 (Zopiclone).
[43] GD2-48
[44] GD9; GD2-42
[45] GD2-22
[46] GD2-48
[47] GD7-III-121 May 2019
[48] GD7-II-7
[49] GD2-109
[50] GD2-173

[34] In August 2019, Dr. Beshay stated that the Claimant's thyroid condition left her exhausted. She lacked the energy to perform her activities of daily living.[51]

[35] The Claimant's health conditions cause difficulty with sitting, standing, and walking. Her pain interferes with her sleep. She has difficulties with focus and memory. She has trouble using a computer due to headache pain. I am satisfied that her health conditions interfere with her ability to work.

The Claimant lacks a regular capacity for substantially gainful employment

[36] Employability is the key measure of a severe disability under the CPP. [52] However, working at a substantially gainful occupation does not necessarily disqualify a claimant from entitlement to CPP disability. Other considerations include whether the claimant is working against medical advice, the difficulties the claimant is experiencing while working, whether the claimant is regularly capable of work, and whether the employer is benevolent. In addition, I must consider factors such as the Claimant's age, level of education, and past work and life experiences in determining her employability in the context of her disability.[53]

[37] The Claimant's job as an office manager in a court reporting office involves booking appointments, handling customer relations, scheduling, billing, accounting, collections, ordering supplies, and waitressing.[54]

[38] The Claimant's current work is substantially gainful. For the year 2014 and after, the words "substantially gainful" describe work that gives a salary or wages equal to or greater than the maximum amount a person could receive as a disability pension in a year.[55] In 2019, the maximum amount of the CPP disability pension was $16,347.60. In 2019, the Claimant's earnings were $38,610.[56]

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[51] GD7-III-86
[52] The Federal Court said this in *Canada (A.G.) v. Dean*, 2020 FC 206
[53] See the decisions of the Federal Court in *Ingram v. Canada (A.G.)*, 2017 FC 259; the Federal Court of Appeal in *Villani v. Canada (A.G.)*, 2001 FCA 248; and the Pension Appeals Board in *MHRD v. Bennett* (July 10, 1997) CP 4757 (PAB), a decision that is not binding on me but which is persuasive.
[54] GD2-159: Employer Questionnaire completed August 2019.
[55] This is set out in s. 68.1 of the *Canada Pension Plan Regulations*.
[56] GD15-7

[39] Other considerations, however, point to a finding that the Claimant's disability is severe. In August 2019, Dr. Beshay stated that she had advised the Claimant against full-time work.[57] At the hearing, the Claimant stated that in December 2020, Dr. Beshay had offered to write a note taking her off work. This suggests that Dr. Beshay believed that the Claimant should not be working at that time.[58] The Claimant testified that she did not ask for such a note in December 2020 because she was not sure she wanted to stop work, mostly for financial reasons. She stated that if she weren't working, she and her husband would lose their house. It may reasonably **[be]** inferred that the Claimant was working contrary to medical advice as of the date of the hearing.

[40] The Claimant is experiencing serious difficulties in continuing to work. In August 2019, her employer stated that she was "still working but with extreme difficulty."[59] In November 2020, Dr. Beshay stated that the Claimant found the nerve blocks were not enough. She was in "major pain." She had to drag her feet to go to work. Her sleep was interrupted – "so tired."[60] At the hearing, the Claimant stated that her pain was overwhelming. She testified about her numerous functional limitations. She stated that she is 61 years old and "tired of fighting."

[41] The Claimant's work history fails to support a regular capacity for work. In August 2019, her employer described her attendance as "poor." She missed work due to surgeries, doctors' appointments, and medication changes. In addition, too much physical activity caused her to miss day(s) at the end of the week. The employer could not count on the Claimant appearing for work.[61] In August 2019, Dr. Beshay stated that the Claimant had taken a lot of time off work to accommodate her doctor's appointments and because of being sick so often.[62]

[42] The Claimant testified that in 2019 she began taking Thursday afternoons off work for medical appointments. In January 2020, a new owner took over the business. The Claimant informed the new owner that she would not be working at all on Thursdays. She arranges her medical appointments and injections on that day. In December 2020, she did some of her work

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[57] GD7-III-86
[58] GD13-I-5. Indeed, Dr. Beshay provided a note stating that the Claimant was unfit to work. It was received by the Claimant's lawyer on February 1, 2021. There is no information in the file to show that the Claimant's condition deteriorated significantly between January 21 and February 1, 2021.
[59] GD2-159
[60] GD13-I-10
[61] GD2-160. The Claimant's workplace offers no benefits, such as disability or pension: GD2-161.
[62] GD7-III-98

from home because of her health conditions. In January 2021, she missed two and a half days of work because of her health.

[43] The Claimant's employer was in some respects benevolent.[63] It is true that the Claimant's work was productive. Her employer stated that when the Claimant was present, "I couldn't ask for a better employee." However, the Claimant was an unreliable employee. On a busy day, her assistant had to help her. In addition, the assistant had to be available on a moment's notice to fill in when the Claimant was too sick to work. The Claimant needed help from her co-workers with going up and down stairs, lifting, and tidying boardrooms. She did not have the physical capacity to handle the job.[64]

[44] The Claimant has an extremely strong work ethic. At the hearing, she stated that she had sacrificed her health to keep the business going. She testified that she was brought up to believe you basically have to work unless you are dead. I do not think the CPP imposes such a stringent standard. The Claimant's efforts to continue working are laudable. She should not be penalized for trying to keep working in spite of the extraordinary health challenges she has faced.

[45] The Claimant is English-speaking and has a year of college. She has a remarkable work record of 24 years with the same employer. None of these personal characteristics would limit her job opportunities. However, at the date of the hearing, the Claimant was 61 years old. She is able to work only with great difficulty. Because of her health conditions, she has been unable to keep a regular attendance at work. Predictability is the essence of regularity within the CPP definition of disability.[65] Moreover, given that the Claimant has such difficulty with a job she has been doing for decades, I find it highly unlikely that with her multiple health conditions she would be a realistic candidate for alternate employment in the commercial marketplace.

[46] I am satisfied that the Claimant is unable regularly to pursue any substantially gainful occupation. I therefore find that it is more likely than not that her disability is severe.

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[63] A recent decision of the Appeal Division of this Tribunal sets out the criteria for a benevolent employer: *MESD v. T.D.*, 2020 SST 1021
[64] GD2-161
[65] The Federal Court of Appeal said this in *Atkinson v. Canada (A.G.)*, 2014 FCA 187

THE CLAIMANT'S DISABILITY IS PROLONGED

[47] The Claimant has suffered from kidney disease since 1995. She has also suffered for many years from chronic back, neck, knee, and shoulder pain, among other conditions. She testified that her condition is getting worse.

[48] The Claimant's disability is long continued and of indefinite duration. I therefore find that it is prolonged.

CONCLUSION

[49] The Claimant had a severe and prolonged disability in January 2021, when Dr. Beshay put her on Percocet for pain management. In addition, Dr. Beshay's letter of February 1, 2021 supports a finding that the Claimant was disabled by the date of the hearing in January 2021.[66] Payments start four months after the date of disability, as of May 2021.[67]

[50] The appeal is allowed.

Carol Wilton
Member, General Division - Income Security

[66] GD13-2-5. See footnote 58 above.
[67] Section 69 *Canada Pension Plan*