



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AP v Minister of Employment and Social Development*, 2021 SST 244

Tribunal File Number: GP-20-984

BETWEEN:

A. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Teleconference hearing on: March 18, 2021 and post-hearing submissions

Date of decision: ~~March 31, 2021~~

CORRIGENDUM DATE: June 3, 2021

DECISION

[1] The Claimant, A. P., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start August 2019. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant was born in 1978. She finished high school. She received diplomas in insurance and early childhood education (ECE). The Claimant alleges that she is disabled under the CPP because of her medical condition. She has bipolar disorder, major depressive disorder, anxiety, and a panic disorder.

[3] The Claimant applied for a CPP disability pension on September 3, 2019. The Minister of Employment and Social Development Canada (the Minister) refused her application because the Claimant should have been able to perform or retrain for a job that is suitable to her limitations.¹ 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 her hearing date.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.³

THE REASONS FOR MY DECISION

[6] I find that the Claimant has a severe and prolonged disability as of April 2019. I reached this decision by considering the following issues

IS THE CLAIMANT'S DISABILITY SEVERE?

¹ See GD2-13

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

³ 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. In other words, they must show it is more likely than not that they are disabled.

The Claimant has functional limitations that affect his [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.⁴ I have to look at her overall medical condition and think about how the Claimant's health issues might affect her ability to work.⁵

[8] The Claimant argues that her medical condition results in numerous functional impairments that affect her ability to work. She has difficulty keeping up with tasks. She has problems with memory and concentration, and performing housekeeping tasks. She has difficulty with walking, bending, and driving. She often struggles with simply getting out [of] bed.⁶

[9] The Claimant testified that her mental health condition has affected her ability to work for many years. She worked in the insurance field as an agent. But she was fired for attendance and behavioral issues. She was argumentative and abrupt with clients.

[10] The Claimant began working in the ECE field at a childcare facility in 2005. She worked part-time at this facility. She eventually moved into a supervisory role. But she experienced stress. She became argumentative and abrupt with management. She left this job in September 2017. She believes that she only lasted as long as she did at that job because her union supported her. She tried to reapply for a position at this childcare facility in 2020, but she was not interviewed.

[11] The Claimant also worked part-time with another company beginning in 2007 or 2008. The company ran a federally funded program for at risk youth. The Claimant delivered pre-written workshops on topics like stress management. She stopped working at this program after the government cut its funding.

[12] The Claimant worked as an educational team leader at a nursery school from August 2018 to April 2019. However, she was fired after clashing with the board of directors.

⁴ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁵ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁶ See GD2-33-36

[13] She tried working again in September 2020. She worked at an outdoor nature school for children with behavioral issues. She stopped working after sustaining a hamstring tear and avulsion fracture in October 2020. She only worked about four to eight hours a week at this job. She felt overwhelmed. Her contract expired in December 2020. She was not working at the time of the hearing.

[14] The Claimant testified that she is looking for work, but that is only because she is legally required to do so in order to collect Employment Insurance. She does not believe that she is capable of performing any type of work.

[15] The Claimant has struggled with her mental health for many years. She had anxiety and panic attacks in her early 20s. She believes that she suffered from attention deficit hyperactivity disorder (ADHD). She struggled at school. She was on an individualized education program when she was a child. When she received her ECE diploma, the school accommodated her by substituting her work experience for school credits.

[16] The Claimant testified that her family doctor has treated her for her mental health since 2002. She has tried over 20 medications. But she still has severe difficulties. Her most recent psychiatrist believes she has had been bipolar for many years. The Claimant suffers from hypomanic states where she feels elated. But she exercises bad judgment and sleeps poorly. She also experiences severe lethargy, where she cannot get out of bed. She experienced side effects with medications, including high blood pressure and rapid heart rates. She experiences severe mood swings. She had to take medical leaves of absence from work before 2019.

[17] The Claimant's mental health affects her ability to concentrate. She has to write everything down. She experiences consistent brain fog. She sleeps poorly and always feels tired. She has difficulty keeping up with tasks. She can start a task, but she often becomes overwhelmed. Her ability to walk and her hand-eye coordination is affected by medications that make her dizzy. She also suffers from endometriosis that leads to cramping, leg pains, and nausea. She cannot receive treatment for endometriosis because of bad reactions to medications.

[18] The Claimant has seen several psychiatrists. She tried individual and group counselling. However, her health is getting worse with time. Treatment is directed at helping with her

activities of daily living, and not towards a return to work. She does not believe that she could guarantee an employer reliable attendance. She even struggled working four to eight hours per week at her most recent job.

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

[20] The medical evidences confirms that she began receiving mental health treatment in 2002.⁷

[21] The Claimant's family doctor noted in a May 10, 2019 clinical note that the Claimant lost her job in April 2019.⁸ Her family doctor completed a medical certificate for EI sickness benefits on May 17, 2019, stating that the Claimant could not look for work at that time because of her emotional and physical health.⁹

[22] The Claimant's family doctor in a clinical note dated August 13, 2019 stated that the Claimant suffered from decreased energy, motivation, and concentration. The Claimant had not been able to look for a new job.¹⁰

[23] A psychiatrist stated that the Claimant only slept four hours a day in a September 3, 2019 report. The psychiatrist believed that the Claimant suffered from a moderate depressive episode.¹¹

[24] The Claimant's family doctor completed a medical report for the Minister on September 6, 2019. She noted that the Claimant experienced fatigue, psychomotor slowing, and a reduced ability to focus. The Claimant had a reduced ability to perform household tasks. It took the Claimant longer to do things. The Claimant experienced continuous anxiety. The family doctor noted that the Claimant also experienced nausea, pain, cramping, headaches, pelvic and back pain because of endometriosis.¹²

⁷ See GD2-98

⁸ See GD2-104

⁹ See GD4-27

¹⁰ See GD2-105

¹¹ See GD2-65

¹² See GD2-95-103

[25] The Claimant's psychiatrist diagnosed the Claimant with bipolar disorder in December 2019. The Claimant was taking lithium.¹³

[26] The Claimant's family physician completed a medical form on February 10, 2020 in support of the Claimant's provincial disability benefits application. The Claimant's family physician stated that the Claimant's mental health condition affected her judgment, ability to think clearly, and interact with others. The Claimant's bipolar disorder affected all aspects of the Claimant's life. She did not believe that the Claimant could seek gainful employment at that time.¹⁴

[27] The Claimant began seeing another psychiatrist at a mood disorders outpatient program in June 2020. The psychiatrist noted that the Claimant could not tolerate lithium. The Claimant was paranoid and anxious. The psychiatrist believed that the Claimant also struggled with emotional dysregulation in addition to her bipolar disorder.¹⁵

[28] The Claimant's family doctor stated in a June 30, 2020 clinical note that the Claimant did not tolerate Abilify. The Claimant had to stop using that medication.¹⁶

[29] The Claimant's family doctor completed a medical report for the Minister on October 4, 2020. The family doctor stated that the Claimant had to discontinue several medications prescribed by psychiatrists because of side effects. The family doctor advised the Minister that the Claimant began a part-time job in September 2020 only because she did not want to lose her house. The Claimant found herself mentally exhausted performing this job. The Claimant had a hard time sleeping and suffered severe anxiety to the point that she could not increase her work hours. The Claimant's family doctor was uncertain as to how the Claimant would be able to maintain long-term gainful employment.¹⁷

¹³ See GD2-83

¹⁴ See GD4-158

¹⁵ See GD4-200-209

¹⁶ See GD4-211

¹⁷ See GD4-12-13

[30] The Claimant's family doctor stated in a November 4, 2020 clinical note that the Claimant tore her left hamstring and fractured her left ischial tuberosity in October 2020.¹⁸

[31] A February 23, 2021 report from a mood disorders clinic stated that the Claimant became involved in an altercation that included aggressive behaviour. The police were called. The Claimant's bipolar disorder was described as being treatment resistant.¹⁹

[32] The Minister argued that the medical evidence did not support a finding that the Claimant had a severe disability. The Minister relies on a comment from the Claimant's family doctor in a report dated September 6, 2019. The Claimant's family doctor stated that she expected the Claimant's condition to improve to the point where she would return to her usual work.²⁰ However, I do not place much weight on this report because the Claimant's family doctor changed her mind about the Claimant's prognosis. The Claimant's family doctor stated in an October 4, 2020 report that ~~the Claimant~~ [she] doubted the Claimant could maintain long-term gainful employment, unless the Claimant's psychiatric team found a successful treatment.²¹

[33] However, I am skeptical about the Claimant receiving successful treatment for her medical condition. The Claimant tried counselling and different medications without success. The most recent report described the Claimant's condition as being treatment resistant.

[34] The Minister also relies on the Claimant looking for work in 2020 as evidence that the Claimant did not have a severe disability.²² However, I do not place much weight on this evidence. I do not believe the Claimant expressing a desire to work means that she has the capacity to regularly pursue a substantially gainful occupation. She told her doctor on September 15, 2020 that she had to work for financial reasons.²³

[35] I also found the Claimant to be a credible witness. She had a good work ethic. She worked from 2005 to 2019, even though she suffered from mental health problems. She tried to return to work in 2020, but had difficulty managing working four to eight hours a week. I believe

¹⁸ See GD5-4

¹⁹ See GD10-2

²⁰ See GD8-5

²¹ See GD4-13

²² See GD8-10

²³ See GD4-240

that the Claimant is motivated to work. She has a young daughter and her household is experiencing financial distress. I am satisfied that the Claimant would engage in substantially gainful work if she could, but I am satisfied that she cannot do so.

The Claimant does not have work capacity

[36] 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.²⁴

[37] I find the Claimant has no capacity to work in the real world. The Claimant is only 42 years old. She has some post-secondary education. She understands English. She has experience working with the public. Her age, education, language and past work and life experience suggest that she should be able to perform many different types of jobs. However, I am still satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation by her hearing date because of her mental health condition.

[38] I do not believe that the Claimant can handle any type of physical work because she lacks energy due to her mental health condition. I do not believe that the Claimant can handle any type of job that she did in the past or any type of sedentary work because of her mental health condition. I believe that the Claimant has a severe impairment in her ability to concentrate. The Claimant testified that she does not have much computer knowledge. I do not believe that the Claimant can realistically upgrade her education and work on a computer because of impaired concentration. I do not believe that she can handle a driving job because of her anxiety and difficulty with focus and concentration. I do not believe that the Claimant can realistically work with the public because of her mental health condition. She has a history of clashing with her employers and members of the public. Her family doctor also noted difficulty with interacting with the public. I accept that her ability to perform her activities of daily living were impaired by her hearing date. I accept her evidence that she has difficulty sustaining tasks for a long enough

²⁴ 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).

period to be able to work in a real world context. I also accept that the Claimant's mental health symptoms vary to the point that she cannot work on a reliable and predictable basis.

The Claimant tried to obtain and maintain employment

[39] If the Claimant has some work capacity in the real world, she must show that she tried to obtain or maintain a job. She must also show that the attempts to work did not succeed because of her health condition.²⁵

[40] I am satisfied that the Claimant's mental health condition played a role in her April 2019 dismissal. I am satisfied that the Claimant has had a severe disability since April 2019, which was when she last engaged in substantially gainful employment.

[41] I do not believe that the Claimant's most recent job from September to October 2020 was substantially gainful. The Claimant testified that she only worked four to eight hours a week at this job. The Claimant's family doctor mentions that the Claimant was contracted to work 16 hours per week. The Claimant's family doctor noted that the Claimant was exhausted working these hours.²⁶

[42] The Minister argued that the Claimant's mental health condition was not the reason her most recent work attempt ending in failure. There is a report that suggests that the Claimant could return to work after her hamstring injury and avulsion fracture heals.²⁷ However, I believe that it is more likely than not that the Claimant will not return to any type of job. Even if the Claimant's hamstring heals, she is still left with a mental health condition that is debilitating and treatment resistant. The Claimant also struggled with her last part-time job before she injured her hamstring. I find that it is more likely than not that the Claimant would not have lasted at her last job due to her mental health condition.

²⁵ This is explained in *Inclima v. Canada (A.G.)*, 2003 FCA 117.

²⁶ See GD4-240

²⁷ See GD5-5

The Claimant has made reasonable efforts to follow recommended treatment

[43] The Claimant has made reasonable efforts to follow medical advice.²⁸ The Claimant has seen psychiatrists. She tried different medications. She tried individual and group therapy. The COVID-19 pandemic has complicated the Claimant's psychiatric treatment. But she still attended telephone appointments with her psychiatrist. The ~~Minister~~ also tried exercise, walking, and yoga to help with her condition. However, treatments have not improved the Claimant's functionality.

IS THE CLAIMANT'S DISABILITY PROLONGED?

[44] The Claimant's disability is prolonged.

[45] The Claimant's condition began in 2002, was present when she last engaged in substantially gainful employment in April 2019 and continues today.

[46] The Claimant's family doctor is of the opinion that it is doubtful that the Claimant will be able to engage in substantially gainful employment, unless her psychiatrist finds a successful treatment.

[47] The Claimant only has to prove that she has a prolonged disability on a balance of probabilities. The Claimant's bipolar disorder has been described as being treatment resistant. She has tried different medication regimens without success. I believe that it is more likely than not that the Claimant's condition will not improve to the point where she can return to regular substantially gainful employment given the lack of successful treatment to date.

CONCLUSION

[48] I am allowing this appeal. The Claimant's disability became severe and prolonged in April 2019, when she last engaged in substantially gainful employment. There is a four-month waiting period before the disability pension is paid.²⁹ This means that payments start as of August 2019.

²⁸ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

²⁹ This is set out in s. 69 of the *Canada Pension Plan*.

ISSUES IN THE TRIBUNAL PROCESS

[49] The Claimant submitted documents to the Tribunal shortly before her hearing. These documents included witness statements³⁰ and updated medical information.³¹ I provided the Minister with an opportunity to make written submissions about these documents. I drafted my decision after receiving the Minister's submissions.

George Tsakalis
Member, General Division - Income Security

³⁰ See GD9

³¹ See GD10