



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *PD v Minister of Employment and Social Development*, 2020 SST 1234

Tribunal File Number: GP-19-1673

BETWEEN:

P. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Claimant represented by: Leo Dillon

Videoconference hearing on: December 3, 2020

Date of decision: December 10, 2020

DECISION

[1] The Claimant, P. D., is not eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant last worked as a full-time warehouse labourer from September 2004 until December 31, 2017. She indicated that she could no longer work as of that time because of a torn left shoulder muscle, pain in both shoulders, headaches, and depression/anxiety. The Claimant applied for a CPP disability pension on June 20, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because her treatment was conservative and she declined recommended shoulder surgery. There was no indication that she required any aggressive psychiatric treatment. The Claimant appealed to the General Division of the Social Security Tribunal.

[3] The Claimant previously applied for a CPP disability pension in April 2014. She claimed that breast cancer prevented her from working at that time. The Minister refused the application initially and the Claimant did not request a reconsideration of that decision.

WHAT THE CLAIMANT MUST PROVE

[4] For the Claimant to succeed, she must prove that she had a disability that was severe and prolonged by December 31, 2019. This date is based on her contributions to the CPP.¹

[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.²

THE REASONS FOR MY DECISION

¹ The *CPP* calls this date the ‘Minimum Qualifying Period.’ See s. 44(2).

² The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove that they are disabled on a balance of probabilities. In other words, they must show that it is more likely than not that they are disabled.

[6] I find that the Claimant did not prove that she had a severe and prolonged disability by December 31, 2019. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant's functional limitations did not preclude her regularly from all substantially gainful work

[7] My decision about whether the Claimant's disability is severe is not based on her diagnoses. It is based on whether she has functional limitations that prevent her from working.³ I have to look at her overall medical condition and think about how her health issues might affect her ability to work.⁴

[8] I found the Claimant's testimony to be generally credible for the most part, but there were some inconsistencies. For example, her testimony about mental health treatment she received was not consistent with what she reported in a phone conversation with the Tribunal in October 2020. For that reason, I have placed more weight on the written evidence contained in the Hearing File.

[9] The Claimant argues that the pain in her arms, shoulders, and neck limits her ability to do simple tasks like buttoning a shirt or combing her hair. The pain makes it hard for her to sleep at night, and she needs to nap during the day because of fatigue. She gets angry easily and for no real reason. She gets anxious when she thinks about her condition. Sometimes the thought of her pain makes her dizzy. The pain also causes nearly daily headaches. She relies on her husband and family to do the most of the household chores and maintenance. She does not go out unless she has to, and she rarely socializes with others.

[10] The medical evidence from Dr. Thobani and Dr. Manolopoulos does not support the Claimant's argument that her functional limitations precluded all work. In June 2018, Dr. Thobani reported that the Claimant had a full-thickness muscle tear in her left shoulder, and that the pain in that shoulder since September 2017 had kept her from being able to do physical labour since January 2018. In November 2019, Dr. Thobani reported that the Claimant's sleep

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

had improved and that she was generally feeling better since starting on Paxil in May 2019. She did have some increasing pain in her right shoulder since October 2019, and an MRI confirmed a muscle tear in that shoulder as well. That is why, Dr. Manolopoulos recommended shoulder surgery that offered an 80% chance for improvement.

[11] The medical evidence does show that the Claimant had some functional limitations that affected her ability to do repetitive physical labour by December 31, 2019. It does not, however, support that she was precluded regularly of doing any substantially gainful work.

The Claimant had work capacity

[12] When I am deciding if the Claimant is able to work, I must consider more than just her 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 to decide if she can work in the real world.⁵

[13] The Claimant was 49 years old in December 2019. She came to Canada in 1989 and Punjabi is her first language. She completed high school and a college diploma in India.

[14] At the Claimant's request, the hearing was conducted using word for word interpretation. However, in October 2020 she was able to carry on a phone conversation with the Tribunal and answer questions in English without any interpretation. The Claimant submitted that she wanted the hearing interpreted because she did not want to provide false answers and she expected the English used during the hearing to be more complex. I accept those reasons, but she demonstrated an understanding and ability to communicate in English. She also testified that English courses were a core part of the college program she completed in India.

[15] The Claimant has only worked as a labourer in Canada. Because of that, she has few transferable skills. She also has some physical and psychological limitations. Despite those limitations, she was relatively young and a good candidate for academic upgrading, re-training, or less physical work.

⁵ 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).

The Claimant did not try to obtain or maintain any alternate work

[16] 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.⁶

[17] When the Claimant stopped working in December 2017, she was working 32 hours per week in a physically demanding job that required constant and repetitive lifting. Her employer did not accommodate her in any way, and the hours she worked were always the same.

[18] I accept that the Claimant could not return to her previous job, but she has not looked for, or attempted, any lighter work or re-training. She has failed to demonstrate that her health condition precluded her from obtaining or maintaining any work, and not just the job that she had been doing.

The Claimant had not exhausted or followed all recommended treatment

[19] The Claimant had not exhausted or followed all medical advice.⁷ Her treatment has been conservative. For her anxiety/depression, she has only tried Paxil medication and participated in a few group therapy phone calls. She has not had any type of one on one counseling or treatment with a psychiatrist or psychologist. Thankfully, the Claimant's cancer has been in remission for several years and she requires no ongoing follow-up or medication for it.

[20] The Claimant takes Maxalt or Tylenol #2 for her headaches, and it helps. She takes Naproxen and Tylenol #3 for her shoulder pain, but that continues to be her main complaint. She has also had a cortisone injection, but that did not help either. The Claimant submitted that the medications she takes make her stomach upset, but she has asked her doctor about treatment options to help with that.

[21] Unfortunately, the Claimant declined the shoulder surgery that Dr. Manolopoulos has recommended. She submitted that she was scared to have the surgery, but she is now considering it. According to Dr. Manolopoulos, there is an 80% chance of improvement from

⁶ This is explained in *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁷ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

surgery. I find that the Claimant's reasoning for not following through with surgery is not reasonable.

[22] By December 31, 2019, the Claimant had yet to exhaust several treatment options for her depression/anxiety and her shoulder condition. Further medication trials, psychiatric/psychological treatment, and surgery on both shoulders all had the potential to decrease her pain and improve her level of function.

THE CLAIMANT'S DISABILITY WAS NOT SEVERE

[23] The Claimant's disability was not severe by December 31, 2019. She had yet to exhaust all recommended treatment options and she was a candidate for desk-type work or re-training. This means that I do not need to decide whether her disability was prolonged.

CONCLUSION

[24] I am dismissing this appeal.

Tyler Moore
Member, General Division - Income Security