



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *KS v Minister of Employment and Social Development*, 2021 SST 231

Tribunal File Number: GP-19-2008

BETWEEN:

**K. S.**

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: Jackie Laidlaw

Claimant represented by: Katie Conrad

Teleconference hearing on: January 25, 2021

Date of decision: February 8, 2021

## Decision

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

## Overview

[2] The Claimant is 38 years old. She worked in accounts receivable from August 2013 to October 20, 2017 when she stopped working to go on maternity leave. While on maternity leave, she began to feel depressed and anxious. After her maternity leave was over, she did not return to the workforce. Later, she was diagnosed with chronic fatigue and fibromyalgia.

[3] The Claimant applied for a CPP disability pension on December 12, 2018. The Minister of Employment and Social Development (Minister) refused her application because she has not exhausted all reasonable treatment avenues for her mental health, and fibromyalgia does not preclude her from working. The Claimant appealed that decision to the Social Security Tribunal's General Division.

## What the Claimant must prove

[4] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by the date of the hearing.<sup>1</sup>

[5] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup> It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>3</sup>

[6] The Claimant has to prove it is more likely than not she is disabled.

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<sup>1</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 GD 2 4. In this case, the Claimant's coverage period ends on the hearing date.

<sup>2</sup> Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>3</sup> Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## **Reasons for my decision**

[7] I find the Claimant has not proven she has a disability that was severe and prolonged by the date of the hearing. I reached this decision by considering the following issues.

### **The Claimant's limitations do not affect her ability to work**

[8] The Claimant has depression (MDD), generalized anxiety disorder (GAD), post-traumatic stress disorder (PTSD), chronic fatigue syndrome and fibromyalgia. My focus though is not on the Claimant's diagnosis.<sup>4</sup> I must focus on whether she has functional limitations that get in the way of her earning a living.<sup>5</sup> This means I have to look at **all** the Claimant's medical conditions (not just the main one) and think about how her conditions affect her ability to work.<sup>6</sup>

[9] Here is what I considered.

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

[10] The Claimant says she is not motivated due to her GAD and MDD. She has overall pain. The more she uses her wrists and hands, the more pain she experiences. She used to drop things unexpectedly, but that has not happened since last summer.

[11] She states she is unable to work because she does not have the energy to manage day-to-day, and has trouble with her memory.

[12] The Claimant also stated that she knows activity is recommended to treat fibromyalgia. Two rheumatologists, Dr. Fabian and Dr. Zhang along with the pain clinic physician Dr. Habtesallasi, told her this. However, in her case, the chronic fatigue makes her feel worse with activity.

[13] Functionally, she is capable of supervising her two young children through the virtual school (required during this period of COVID-19) and afterschool activity time. She sleeps from 10 pm to 7:30 am, with a few naps during the day. She can stand up to 10 minutes and needs to sit frequently. She can drive for 30 minutes. She makes the children's meals. At

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<sup>4</sup> The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

<sup>5</sup> The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

<sup>6</sup> The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

times, her mother-in-law will help her as well as play with the children. On weekends, her partner takes over so she can nap more.

### **What the medical evidence says about the Claimant's limitations**

[14] I accept the Claimant may feel she is unable to work with her limitations. However, she must provide objective medical evidence that shows her functional limitations affected her ability to work by the date of the hearing.<sup>7</sup> The medical evidence does not support what the Claimant says.

[15] The depression and GAD did not start until January 2018 a few months after giving birth to her second child. Her oldest son, who was a toddler, was diagnosed with epilepsy and had his first seizure in February 2018, which kicked off her GAD. He had a few seizures for a few months, and took medications for the next two years. This caused her to have symptoms of PTSD. As of June 2020, her son had no longer needed medications nor do the doctors need to monitor him any longer.

[16] She stated she is still hyper-vigilant over her children. As her son's epilepsy is now well controlled, it is reasonable that her anxiety would be manageable as well, as her son's seizures were what contributed to her anxiety and possible PTSD<sup>8</sup>, according to Dr. Airia<sup>9</sup>. She has never received any treatment specifically for PTSD, which is attributed to her son's seizures. She had cognitive behavioural therapy (CBT) for her depression in 2018 and 2019, but did not received any further CBT for the emotional trauma of her son's seizures as recommended by psychiatrist Dr. Gerber in 2020.<sup>10</sup> The lack of intervention for the PTSD implies the condition is not medically severe.

[17] Clinical notes at the time of leaving work until April 2018 from her previous family physician, Dr. Crawley, did not note anything wrong with her pregnancy or her health. She did not see Dr. Crawley between December 7, 2017 and April 18, 2018. April was the first appointment noting mental health. She was at the time overwhelmed with two children, which is

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<sup>7</sup> The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.

<sup>8</sup> GD 2 103 Dr. Airia also noted "?" PTSD and GD 2 62 Dr. Airia clinical notes in October 2017 states she "thinks" she had PTSD from the sons first seizure.

<sup>9</sup> GD 2 103 medical report November 22 2018

<sup>10</sup> GD 4 157

understandable, noting the older child was diagnosed with epilepsy. There was no recommendation, but a note that she was speaking with EAP.<sup>11</sup>

[18] She began seeing her family physician, Dr. Airia in August 2018, almost a year after she stopped working. Dr. Airia stated she had a long history of depressed mood. When questioned at the hearing about her long history of depression, the Claimant clarified that in her youth she had situational depressive issues, such as boyfriend problems and puberty. She testified that the episodes were short and resolved and she never required medications or treatment. It is also documented in psychiatrist Dr. Gerber's assessment that she had no past psychiatric history.<sup>12</sup> Dr. Airia noted her prognosis as fair, given her long history of anxiety and depression. I do not put much weight on this prognosis given the conflicting evidence about her history of depression.

[19] In March 2019, Dr. Airia wrote her employer a letter stating she would be starting group therapy and recommended she not return to work until she has a psychiatrist opinion<sup>13</sup>. Dr. Airia did not indicate she could not return to any work due to her conditions. She deferred that decision to a psychiatrist. While Dr. Airia may have wanted the Claimant to wait until she consulted a psychiatrist to return to work, Dr. Airia's own evidence is that her condition was stable by May 2019<sup>14</sup>. Dr. Airia did not provide any functional limitations that would prevent her from working.

[20] To this date, the only psychiatric consultation she has received was for a medical/legal report from Dr. Gerber on July 1, 2020<sup>15</sup>, over a year after Dr. Airia wanted a psychiatric opinion to determine her condition. The Claimant's representative relies upon Dr. Gerber's report. He was not the Claimant's treating physician. She only saw him the once. His prognosis was "somewhat guarded", though he still had treatments to recommend. Dr. Gerber noted that the Cymbalta she had recently started taking for pain was positive for her mood. He recommended cognitive behavioural therapy weekly, family counselling with a social worker for her and her

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<sup>11</sup> GD 2 66 Dr. Crawley notes. EAP is a work sponsored program which provides some counselling for a limited number of sessions

<sup>12</sup> GD 4 139

<sup>13</sup> GD 2 62 part of the clinical notes and records.

<sup>14</sup> *ibid*

<sup>15</sup> GD 4 130 Dr. Gerber, psychiatrist July 1, 2020

husband, and to increase the Cymbalta to 120 mg daily or switch to another antidepressant if the Cymbalta does not provide relief.

[21] As the Claimant has asked me to consider Dr. Gerber's one-time assessment, I looked to his overall view of her limitations. For the most part, he lists her limitations as described to him by the Claimant. The Claimant filled out all the questionnaires that helped to make his opinions. I do not put weight on his opinion that, "she clearly is not able to function the way she was able to prior to going on disability"<sup>16</sup> because: he did not know her prior to going on disability; he was not her treating physician; and, the documentation he reviewed, including Dr. Airia's, were after she stopped working.

[22] Both the fibromyalgia and the chronic fatigue began in 2019, well after she stopped working. Dr. Gerber notes the chronic fatigue as being caused by a virus in the winter of 2019. She consulted with rheumatologist, Dr. Jacqueline Fabian, for chronic fatigue, once in September 2019<sup>17</sup> and again in November 2019<sup>18</sup>. Dr. Fabian told her to pace herself. She also consulted with Dr. Zhang and Dr. Sohanpal. She had been diagnosed with fibromyalgia, complicated by chronic fatigue, by rheumatologist Dr. Sohanpal in October 2019<sup>19</sup>. Only Dr. Fabian counselled her on avoiding heavy lifting, carrying, pushing and pulling, and recommended water-based exercise.

[23] The only limitations put on her function ability are the above noted counselling by Dr. Fabian. These limitations would most likely affect her ability to work in any manual labour, but would not prevent her from working in a sedentary job.

## **Treatment**

[24] When her depression began in 2018, the only treatment she received was EAP counselling starting in April 2018. She saw the counsellor weekly for a few months in 2018. In December 2018, she began individual therapy with Halton Healthcare, a one-day a week course

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<sup>16</sup> GD 4 56

<sup>17</sup> GD 2 2 September 9 2019

<sup>18</sup> GD 4 112 November 19 2019

<sup>19</sup> GD 4 107 October 5, 2019

for five weeks. In March 2019,<sup>20</sup> she attended a mindfulness consultation with Halton Healthcare, a program that gave her materials to work through. She did four or five courses, each one-day a week for five weeks. Two of the courses were individual therapy, and two were group therapy. Social workers provided these courses.

[25] Recently, in the fall of 2020, she started counselling every three weeks by video with a registered social worker, Katherine Ridolfo, for general mental health, and was given a referral from her doctor to a support network called Layla for different therapies. Dr. Gerber recommended a social worker for her and her husband, and not specifically for her depression.

[26] The lack of psychiatric intervention or any ongoing psychological treatment for depression or PTSD indicates her depression, anxiety and PTSD could be managed with conservative counselling sessions from social workers and EAP counsellors.

[27] She was not taking any medications for her depression because of her breastfeeding. Dr. Airia noted in August 2018 that they discussed if her depression deteriorates she “needs to start medication as the advantages for her outweigh the risks for her baby”.<sup>21</sup>

[28] She attended a consultation with Dr. Habteselassie, pain management, in April 2020<sup>22</sup>. Treatments recommended were lifestyle changes of weight management, pacing and regular exercise. Physiotherapy was recommended. A chronic pain self-management program was recommended. Medications, such as muscle relaxants, Gabapentin or Lyrica, Cymbalta, opioids, nortriptyline or Amitriptyline and medical cannabis were all recommended for use when she stops breastfeeding. Nerve blocks and lidocaine infusions were recommended.

[29] Dr. Sohanpal noted that, “patients with complex chronic pain do not respond favourably to interventional pain management without addressing the social, emotional and general fitness aspects concurrently in a multi-disciplinary manner”<sup>23</sup>. Dr. Sohanpal encouraged the following comprehensive treatment: medications; intravenous lidocaine; low impact exercise program and

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<sup>20</sup> GD 2 92 Adaptive Mindfulness Consultation March 26, 2019 and GD 2 89 a practical clinical assessment at Halton Healthcare August 16, 2018

<sup>21</sup> GD 2 68

<sup>22</sup> GD 4 124 April 13, 2020

<sup>23</sup> GD 4 109 IBID

aquatherapy; physiotherapy; and, a trial of medicinal cannabis. Dr. Sohanpal recognized at the time she was still breast feeding which affected the use of medications and lidocaine infusions.

[30] Medications seem to be an important recommendation for both depression and her physical pain. All her physicians agreed that she would be unable to take the medications until she stopped breast-feeding.

[31] The Claimant stopped breast-feeding in early 2020 that allowed her to go on Cymbalta, as recommended by Dr. Habteselassie. It works for both her pain and her depression. She would now be able to trial the other antidepressants for her depression, if the Cymbalta stops being effective. The Cymbalta is still far from the dosage recommended by Dr. Gerber. As well, she began CBD oil for chronic pain that she finds helps with her anxiety. She has not received any further CBT as recommended by Dr. Gerber. She states she has never been treated by a psychiatrist or a psychologist<sup>24</sup>.

[32] The Claimant goes to physiotherapy once every two to three weeks since August 2020, which helps with the stiffness in general, range of motion and flexibility. She gets chiropractic treatments once a month, which help reduce the pain. She does stretching at home. She tried CBD oil.

[33] Once the Claimant was able to add medications to her treatment plans, the evidence suggests she is getting better. She began taking Cymbalta in May or June 2020, the dosage of which has increased slowly to 90 mg. Dr. Gerber suggested she would be able to go to 120 mg daily. She anticipates she will need a dosage increase soon, but she is still not near the dosage recommended by Dr. Gerber.

[34] She finds the Cymbalta has decreased her pain overall. It has also been noted to control her mood<sup>25</sup>. These are important findings that suggest she is getting better. As well, Cymbalta is the first step in medications for her pain. If it stops helping, she may try Lyrica or other medications for fibromyalgia. She has not tried nerve blocks or lidocaine infusions due to restrictions on physical appointments because of COVID-19. The Claimant stated that she was

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<sup>24</sup> GD 2 70

<sup>25</sup> GD 4 139 as she told Dr. Gerber in July 2020 when she was on a dosage of 60 mg daily



told the nerve blocks would not work because she has generalized pain. Dr. Sohanpal and Dr. Habteselassie were aware of the pain she had and recommended lidocaine infusions. As such, she still has these treatments left to try.

[35] It is reasonable to expect that her conditions could improve with further treatment and medications.

### **Capacity to work**

[36] I have already determined that there were no limitations imposed by any treating physician that would prevent the Claimant from working at least in a sedentary position.

[37] When I am deciding if a disability is severe, I sometimes have to think about a person's age, level of education, language ability, and past work and life experience. This allows a realistic assessment of their work capacity.<sup>26</sup>

[38] The Claimant is 38 years old. She was 34 years old when she went on maternity leave and stopped working. Her age is not a deterrent to finding a suitable job or retraining. Nor is her high school education, as she has always managed to get employment. She has worked in a variety of occupations: McDonalds; shipping and receiving in a warehouse; temporary work in accounting and customer service; and eventually a job in credit and collections. The last job was relatively sedentary in that she would phone and email customers to keep their accounts current. There is no indication she was unable to do that job.

[39] While Dr. Gerber has noted she is disabled from her previous employment and any employment for which she is suited by education, training and experience since October 2018, he did not provide any objective evidence as to why she was unable to do her previous job or any job for that matter. He did not list her job duties and why she could not do them. He did not place any restrictions on her abilities to function, such as restricting lifting, or avoiding stressful workplaces. The limitations he noted were self-reported by the Appellant and not substantiated by any efforts at working with these conditions. As well, I note, he is making his determination based on her physical and mental health. In October 2018, the only conditions of note affecting

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<sup>26</sup> The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

the Claimant were her depression, anxiety and possible PTSD, according to Dr. Airia her treating physician.

[40] It is possible with her chronic fatigue and fibromyalgia she would be unable to do warehouse work again. However, there are no indications from the rheumatologists who diagnosed the chronic fatigue and fibromyalgia, or from the social workers at Halton Healthcare, or even her family physician, Dr. Airia, that she would be unable to work at any occupation. In a realistic assessment of the Claimant's work capacity, I find the Claimant may be capable of retraining and working, at least at a sedentary job.

[41] I would also like to point out that all of her conditions began after the Claimant left work for maternity leave. She has therefore never worked with these conditions, and has therefore never proved she is incapable of doing so.

**The Claimant did not try to find and keep a job**

[42] If the Claimant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts were not successful because of her medical conditions.<sup>27</sup> Finding and keeping a job includes re-training or looking for a job that accommodates her limitations.<sup>28</sup>

[43] The Claimant did not make these efforts.

[44] Once again, I am aware that the Claimant was capable of working until she went on maternity leave in October 2017. She did not begin to have symptoms of depression and anxiety until January 2018. The fatigue began in February 2019 and became chronic fatigue by October or November 2019. Fibromyalgia was also diagnosed in 2019. She had none of these symptoms when she worked.

[45] The Claimant submits that she cannot perform sedentary work. However, she has never shown that she cannot perform any work because of her conditions. She has submitted that her

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<sup>27</sup> The Federal Court of Appeal said this in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

<sup>28</sup> The Federal Court of Appeal said this in *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

cognition impairs her ability to work. However, there is no medical evidence that supports a cognitive impairment of such severity to prevent her from working.

[46] I have found there is a capacity to work at least at a sedentary level, and the Claimant has failed to demonstrate she cannot find work, or maintain employment due to her physical and mental conditions.

## **CONCLUSION**

[47] The evidence shows the Claimant does have some limitations due to her mental and physical health. During the two and a half years the Claimant was breastfeeding she was unable to use any medications for either her mental health or her physical pain. Overall, both her mental health and her physical conditions have recently shown positive changes with the treatments and introduction of Cymbalta. Now that the Claimant is able to take medications, there are still treatments left to try for both the mental and physical conditions if the Cymbalta is no longer effective.

[48] The Claimant states she cannot work, but her functional limitations in combination with her personal circumstances do not rule out a work capacity. As she has an ongoing work capacity, she must prove she cannot work because of her health condition. The Claimant has not done so. Therefore, her disability cannot be severe.

[49] I find the Claimant is not eligible for a CPP disability pension because her disability is not severe. Because I found the disability is not severe, I did not have to consider if it is prolonged.

[50] This means the appeal is dismissed.

Jackie Laidlaw  
Member, General Division – Income Security Section