



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JN v Minister of Employment and Social Development*, 2021 SST 234

Tribunal File Number: GP-20-1568

BETWEEN:

J. N.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Claimant represented by: Palma Pallante

Videoconference hearing on: April 20, 2021

Date of decision: April 22, 2021

Decision

[1] The Claimant, J. N., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2019. This decision explains why I am allowing the appeal.

Overview

[2] The Claimant applied for a CPP disability pension on December 11, 2019.¹ For the application to succeed, the Claimant must have a disability that is severe and prolonged by December 31, 2021.

[3] The Claimant is almost 58 years old. She worked at a sandwich shop for 12 years until August 2019. She stopped working because of a right shoulder cuff tear. She says the pain and limited use of her arm/shoulder prevent her from returning to work.

[4] The Minister of Employment and Social Development (the Minister) denied the Claimant's application. The Minister said the evidence does not reveal any severe condition or impairment that would prevent her from performing suitable work within her limitations. Such work could include sedentary or light work and she has not attempted to return to any type of work.

[5] The Claimant disagreed with the Minister's decision and appealed to the Social Security Tribunal's General Division.

What the Claimant must prove

[6] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by the date of the hearing (April 20, 2021).² This is because her minimum qualifying period (MQP) is in the future – December 31, 2021.

¹ The application is at GD 2-20.

² 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 2-45. In this case, the Claimant's coverage period ends on the hearing date so I have to decide if she was disabled by the hearing date.

[7] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.³ It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

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

The Claimant’s disability is severe

[9] I find the Claimant has a disability that was severe and prolonged by April 20, 2021. I reached this decision by considering the following issues.

The Claimant’s limitations do affect her ability to work

[10] The Claimant has a right shoulder rotator cuff tear and hypothyroidism.⁵ My focus though is not on the Claimant’s diagnosis.⁶ I must focus on whether she has functional limitations that get in the way of her earning a living.⁷ 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.⁸

[11] I find the Claimant does have functional limitations. Here is what I considered.

What the Claimant says about her limitations

[12] The Claimant says she has limitations from her medical conditions. She explained that she is in constant pain, especially from her right shoulder down to her hand. Because of the pain, she cannot sleep at night.

[13] The pain makes her tired and she needs to lay down and rest during the day. The Claimant told me that she rarely leaves the house. She spends most of her day laying down watching TV or reading Arabic books. She is too tired to socialize.

³ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁵ The medical report is at GD 2-73 and GD 2-74.

⁶ The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

⁷ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

⁸ The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[14] She said she cannot hold or lift items without dropping them. She has pain in her shoulder/arm even when doing small light tasks. She relies on her daughters to do most of the cooking and household chores.

What the medical evidence says about the Claimant's limitations

[15] The Claimant must provide objective medical evidence that shows her limitations affected her ability to work by April 20, 2021.⁹ The medical evidence supports what the Claimant says.

[16] Dr. Angilletta (family doctor) started treating the Claimant in July 2019 for a right shoulder rotator cuff tear.¹⁰ He said the Claimant's functional limitations included decreased range of motion and pain with movement. He did not expect the Claimant's condition would improve. He recommended that she stop working in August 2019.

[17] Dr. Amba (rheumatologist) also saw the Claimant for her right shoulder pain.¹¹ An ultrasound showed full thickness small tear in supraspinatus tendon. Dr. Amba said the Claimant had evidence of a small rotator cuff tear and was starting to notice significant restriction of shoulder movement. He reported that the Claimant had not responded to conservative measures and was having difficulty sleeping at night.

[18] In October 2020, Dr. Angilletta said the Claimant continued to have decreased range of motion in her right shoulder and constant chronic pain.¹²

[19] The medical evidence shows the Claimant's pain and limited range of motion because of her right shoulder full thickness tear prevented her from doing any activity or task that would involve the use of her right arm by April 20, 2021.

⁹ The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.

¹⁰ Dr. Angilletta's report is at GD 2-69.

¹¹ This information is at GD 2-82.

¹² Dr. Angilletta's letter is at GD 3-3.

The Claimant has followed medical advice

[20] To receive a disability pension, the Claimant must follow medical advice.¹³ If she does not do this, then she must have a reasonable explanation for not following the advice. I must also consider what effect, if any, the advice would have had on her disability.¹⁴

[21] The Minister has submitted that the Claimant's condition has only been treated with anti-inflammatory medication, muscle relaxants and steroid injections on two occasions. The Minister suggests that the use of limited medication supports that the Claimant's condition is not severe. However, the severity of a disability is not determined based on the types of medication used. Further, even the specialist did not prescribe any medication.

[22] The Claimant has an obligation to follow the advice of her doctors. In this case, the Claimant has done this.¹⁵ Her family doctor prescribed medications that he felt would provide the Claimant with the most benefit. He prescribed Celebrex and Baclofen for the Claimant's shoulder pains. He noted that both of these medications only had a minimal effect.¹⁶ He also noted that the cortisone (Depo-Medrol) injections the Claimant received in her right shoulder only had a minimal effect. The Claimant testified that the cortisone injections did not provide her with any pain relief. She told me the rheumatologist recommended that she receive no more cortisone injections if they were not helping her.

[23] The Claimant testified she tried physiotherapy on one occasion, but it made her pain worse. No physician has recommended that she try physiotherapy again. Dr. Amba discussed the role of local measures, an exercise program and over the counter medications to help reduce her pain levels.

¹³ The Federal Court of Appeal said this in *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

¹⁴ The Federal Court of Appeal said this in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

¹⁵ In *Sharma v. Canada (Attorney General)*, 2018 FCA 48, the Federal Court explains the requirement to follow medical advice.

¹⁶ The medications are noted at GD 2-73.

[24] Although there is no suggestion in the medical evidence that the Claimant may be a candidate for surgery, I asked her about this. She told me that she had asked her family doctor if she could have surgery to fix her shoulder. She said he did not recommend surgery. He told her an operation would likely not work. I have no reason to doubt the Claimant's testimony and I note that her family doctor did not refer her to a surgeon or to any specialist for possible surgery.

[25] The Claimant has followed all treatment recommendations made to her and continues to take all prescribed medications.

[26] I now have to decide if the Claimant can regularly do other types of work. To be severe, the Claimant's limitations must prevent her from earning a living at any type of work, not just her usual job.¹⁷

The Claimant cannot work in the real world

[27] 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.¹⁸ These factors help me decide if the Claimant has any ability to work in the real world.

[28] I find the Claimant cannot work in the real world. The Claimant will be 58 years old in less than two weeks. She has a junior high-level education from Iraq. She has had no education in Canada and Arabic is her first language. She has limited knowledge of the English language and cannot read or write. She managed to work at a sandwich shop with her limited English because other employees also spoke Arabic. She limited interacting with the customers to words involving only the sandwich toppings. She has limited transferable skills. Since coming to Canada in 1992, she has worked painting furniture and at a sandwich shop. Her duties included baking bread and cookies and making sandwiches. She was never trained as a cashier. Making sandwiches and baking bread would not provide her with transferable skills to other work, including customer service. Her work experience has been in two physically

¹⁷ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

¹⁸ The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

demanding jobs. Because of her physical limitations, the Claimant has no transferable skills. She has no computer skills other than to watch YouTube videos or use Facebook and she has never worked in a sedentary job. Her age, limited English language skills and lack of education, are all barriers for her to retrain or find sedentary work.

[29] Also, I find the Claimant would not be a reliable employee. The Claimant testified that her constant pain makes her tired. She said her nighttime sleep varies from a few hours to none at all. She does not have the energy to go anywhere and spends her days laying down and resting. Given her limited nighttime sleep, lack of energy and need to lay down and rest during the day, I do not think the Claimant would be a reliable employee. The definition of severe addresses the capacity of a Claimant to work in a meaningful and competitive work environment. An employer should not have to put up with occasional absences from work and make accommodations by creating a flexible work environment to enable the individual to have a job that he or she would not otherwise be able to perform in a normal competitive work environment.¹⁹ Predictability is the essence of regularity within the CPP definition of disability. The Claimant lacks the capacity to work in a meaningful and competitive environment.

[30] I find that the Claimant cannot work in the real world and her disability is severe by April 20, 2021.

The Claimant's disability is prolonged

[31] The Claimant's condition began in July 2019 and has continued since then and will more than likely continue indefinitely.²⁰

[32] Dr. Angilletta said that the Claimant's condition was not expected to improve.²¹ One year after Dr. Angilletta advised the Claimant to stop working, she continued to

¹⁹ Although not binding on me, I consider this Pension Appeals Board case for guidance *L.F. v. MHRSD* (October 5, 2010), CP 26809 (PAB)

²⁰ In the decision *Canada (Attorney General) v. Angell*, 2020 FC 1093, the Federal Court said a person has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously thereafter. See also *Brennan v. Canada (Attorney General)*, 2011 FCA 318.

²¹ This prognosis is at GD 2-73.

have decreased range of motion in her right shoulder and constant pain.²² It remains Dr. Angilletta's opinion that the Claimant's pain is chronic and severe. This shows me that the Claimant's disability is likely to be long continued and of indefinite duration.

[33] I find her disability was prolonged by April 20, 2021.

When payment begins

[34] The Claimant's disability became severe and prolonged in August 2019 when she was no longer able to work because of her medical condition. There is a four-month waiting period before payments start.²³ This means that payments start as of December 2019.

Conclusion

[35] I find the Claimant is eligible for a CPP disability pension because her disability is severe and prolonged.

[36] This means the appeal is allowed.

Connie Dyck
Member, General Division – Income Security Section

²² Dr. Angilletta's letter of October 22, 2020 is at GD 3-3.

²³ Section 69 of the *Canada Pension Plan* sets out this rule.