



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MC v Minister of Employment and Social Development*, 2021 SST 279

Tribunal File Number: GP-20-995

BETWEEN:

M. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Videoconference hearing on: February 9, 2021

Date of decision: February 16, 2021

Decision

[1] The Claimant, M. C., 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 57 years old. Her last full time job was as a nanny/housekeeper. The Claimant said she was laid off in March 2018 because increased back pain made her unable to do her job. She said she had to stop work and needed emergency medical care. In her application, she said she has been unable to work at all since March 2018. She collected Employment Insurance (EI) sick benefits and regular benefits. During or after her period of regular EI benefits she applied for various jobs, took a very short training program and worked for one or two months.

[3] The Claimant applied for a CPP disability pension on October 25, 2018. The Minister of Employment and Social Development (Minister) refused her application because she had not tried lighter work and has not investigated retraining. 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 December 31, 2019. This date is based on her contributions to the CPP.¹

[5] 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

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

¹ The minimum qualifying period is calculated based on a person's years of CPP contributions. It is usually called the MQP and is often described using the date the period ended. See subsection 44(2) of the *Canada Pension Plan*. The Claimant's CPP contributions are on page GD6

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.

Matters I have to consider first

- The Claimant's witness was not reliable

[7] The Claimant lives with DB. He testified that he observes the Claimant's activities almost every day. He said they were together for five years. He is retired so he could see every day how her condition worsened over the past five years. He said she sits in a chair and cries most of the time. She seems to be in constant pain.

[8] The Claimant later confirmed that she did not live with DB for five years. She has known him for many years but did not live with him until around September 2019. The Claimant thought DB was confused when he referred to seeing her every day for five years. She said she lived with someone else until after February 2019 so she could not explain why DB said he saw her daily during that time.

[9] I cannot say whether BD meant to mislead me when he testified about the fact that he was with the Claimant almost daily for five years. The Claimant's explanation for this was vague at best. I find it very difficult to accept that it was just a mistake when he said they were together for five years since it was just over one year.

[10] DB used very strong language to describe the Claimant's symptoms. I found he was not credible about his relationship with the Claimant and his description of her symptoms appeared exaggerated at best. Because of that, I cannot accept his evidence as credible.

Reasons for my decision

[11] I find the Claimant has not proven she has a disability that was severe and prolonged by December 31, 2019. I reached this decision by considering the following issues.

The Claimant's disability was not severe

- The evidence does not prove the Claimant's limitations make her unable to work

[12] The Claimant has low back pain, depression and anxiety. My focus though is not on the Claimant's diagnosis.⁴ I must focus on whether she had functional limitations that got in the way of her earning a living.⁵ 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.⁶

[13] I find the evidence shows the Claimant has functional limitations. However, the evidence does not show the limitations would prevent her from working. Therefore, they do not make her disabled within the meaning of the CPP. Here is what I considered.

- What the Claimant says about her limitations

[14] The Claimant said she had symptoms of depression and anxiety since before she was 30 years old. She takes one medication for depression and it helps the anxiety and panic attacks. She does not see a mental health professional but had a session with a counsellor two or three times in 2016 or 2017. She could not recall exactly when she attended counselling sessions.

[15] The Claimant has had a sore back for 10 years. She said she just kept working even though she had pain. In the past, she had pain only when she "overdid it". In the last three years, she has pain every day. She takes over the counter medication and has an injection every four to six months. She said the injection helps for about one month. She understands she is on a waiting list to see a neurosurgeon.

[16] The Claimant had other conditions over the years but said they have resolved or do not bother her enough to affect her ability to work. She had a shoulder injury but it has mostly resolved. It bothers her sometimes but does not prevent her from working. She saw a specialist for problems with her bowels but they resolved. She had some trouble with her hearing but investigation showed her hearing is normal.

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

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

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

[17] The Claimant attributes her inability to work to chronic back pain and depression and anxiety.

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

[18] The Claimant must provide objective medical evidence that shows she has limitations that affected her ability to work by December 31, 2019.⁷ The medical evidence confirms the Claimant is treated for depression and back pain.

[19] The Claimant's family physician Dr. Cheryl Smith treats the Claimant for back pain and depression and anxiety. She said the Claimant has limited employment opportunities because of her age, education and experience. She did not identify limitations caused by the Claimant's health that would likely make her unable to work.

[20] Dr. C. Smith reported in October 2018 that she saw the Claimant nine times in the previous year. The Claimant had low back pain with degenerative changes in her lumbar spine. She had a disc herniation at L5. She is limited in walking and standing. Recommended treatment was Tylenol, gabapentin, steroid injections, and exercise. She has a pending referral to neurosurgery. Potential for return to work was unknown. Dr. C. Smith also said she believed the Claimant's age, lack of education and training made her opportunities for work limited.⁸

[21] In her referral letter to Dr. David Smith dated April 30, 2018, Dr. C. Smith said the Claimant had low back pain for several months. An incident in March 2018 caused an acute exacerbation of her back pain⁹.

[22] Dr. David Smith treats the Claimant's back pain. He said she would be slow to heal but received four to five months of relief with each injection. He did not say that she could not work. He was very clear that activity and exercise was a very important part of her treatment. The Claimant first saw Dr. David Smith in July 2018 for pain management. He wrote that he saw her for an acute onset of back pain from an injury in March 2018. Her general health was "pretty good" and prior to March 2018, she did not have any problems to speak of. He said she would not be able to return to work soon because her injury would be slow to mend. He said it was

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

⁸ Dr. C. Smith's full report is at GD2-83

⁹ Dr. C. Smith's letter is at GD4-54

obvious when she got out of her chair that it was hard for her to walk¹⁰. Dr. Smith injected the Claimant's facet joints in November 2018 and June 2019. The injections gave her three to four months of benefit. Dr. D. Smith said the Claimant reported the pain returned but not as bad as before. He asked her to do more exercises and, since she was benefitting from the injections, he recommended they repeat them. Again, he stated activity and exercise are important for her recovery.¹¹ In September 2020, Dr. D. Smith reported he repeated the injections. He said the previous injections were helpful for about four to five months but she remained "somewhat uncomfortable"¹².

- The Claimant has followed medical advice

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

[24] The Claimant has followed medical advice.¹⁵ She sees her family physician and follows treatment advice. She goes to appointments with Dr. D. Smith for injections to treat the back pain. There is no evidence that she refused to follow medical advice.

[25] 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.¹⁶

- The Claimant can work in the real world

[26] 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,

¹⁰ Dr. D. Smith's letter dated July 14, 2018 is at GD4-50

¹¹ See. Dr. D. Smith's letters dated June 19, 2019 at GD2-69 and September 16, 2020 at GD4-7

¹² Dr. D. Smith's report is at GD4-7

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

language ability, and past work and life experience.¹⁷ These factors help me decide if the Claimant has any ability to work in the real world.

[27] I find that the Claimant can work in the real world. Dr. C. Smith said she thought the Claimant's age, lack of education and training limited her employment opportunities. The Claimant said she believed no one would hire her because of her age.

[28] The evidence shows the Claimant completed grade 12 and, when she was 47 years old completed a course in continuing care. There is no evidence that she has learning deficits or is unable to communicate in one of the official languages.

[29] The Claimant testified that in or after 2018, she completed a short training course for employment with Canada Post. She applied for jobs and worked for one or two months as a delivery helper. She has never heard from any employers so she cannot say why her applications were unsuccessful. She did not provide information or additional detail about the training course or work. She could not remember which year but it was during or after her regular EI finished, so it could have been 2018 or 2019. Given the Claimant's health condition, she would likely need a more sedentary job and may not be able to work full time hours. Based on the evidence before me including the fact that she did pursue work and obtain some employment I find she likely can work. She has not provided enough information to show her personal circumstances prevent her from working in in the real world.

- The Claimant did not try to find and keep a suitable job

[30] The Claimant said she applied for work, took a training course (very short) and worked for one or two months during or after 2018 when she collected EI benefits.

[31] I asked her to provide more information about her employment efforts. She said she submitted applications but could not remember specific details. She has never heard from any potential employer so she cannot say why she was not successful.

[32] 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 condition or

¹⁷ The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

conditions.¹⁸ Finding and keeping a job includes re-training or looking for a job that accommodates her limitations.¹⁹

[33] The Claimant made efforts but they do not show that her disability gets in the way of earning a living. The Claimant could not say why she was not successful and could not describe the types of jobs she applied for. She took one job for a one or two month period. She said she did not try to find any retraining opportunities and only took one very short course so she could apply for a job with Canada Post. There is no evidence on file to show that her efforts to work or retrain were unsuccessful because of her health conditions. Therefore, I cannot find she had a severe disability by December 31, 2019.

Conclusion

[34] 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.

[35] This means the appeal is dismissed.

Anne S. Clark
Member, General Division - Income Security

¹⁸ The Federal Court of Appeal said this in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

¹⁹ The Federal Court of Appeal said this in *Janzen v. Canada (Attorney General)*, 2008 FCA 150.