Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *SK v Minister of Employment and Social Development*, 2021 SST 232

Tribunal File Number: GP-20-229

BETWEEN:

S. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Jackie Laidlaw

Claimant represented by: Maiwand Noor

Videoconference hearing on: April 1, 2021

Date of decision: April 14, 2021

Canada

Decision

[1] The Claimant, S. K., 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 a 51-year-old woman who was 42 at the time of her MQP. She was in a car accident on November 30, 2012. She stopped working part-time for a retail store on March 8, 2011 due to pain and depression. Her husband, M. K., attending at the hearing as a witness. While the Claimant agrees that she can read, write and speak English, there was an interpreter present to help her with some translations. Mr. Rahim Milani was the Turkish interpreter present at the hearing.

[3] The Claimant applied for a CPP disability pension on November 1, 2018. The Minister of Employment and Social Development (Minister) refused her application because: there is no indication of a severe condition; her depression began in 2018; she has not demonstrated an inability to work at any job; and, medical evidence is required as evidence of employment efforts and possibilities. 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 provide she has a disability that was severe and prolonged by December 31, 2011 and continuously to the present. 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]

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[1] 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 GP 2-4.
[2] Paragraph 42(2)(a) of the *Canada Pension Plan gives this definition of severe disability.*
[3] Paragraph42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

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

Reasons for my decision

[7] I find the Claimant has not proven she has a disability that was severe and prolonged by December 31, 2011 and continuously to the present. I reached this decision by considering the following issues.

The Claimant's disability was not severe

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

[8] The Claimant has fibromyalgia, chronic headaches, chronic neck pain, chronic back pain and depression. 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]

[9] I find the Claimant does not have functional limitations. Here is what I considered.

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

[10] The Claimant says she has limitations from her medical conditions that affected her ability to work by December 2011, in the following ways:

a) She could not work as she was taking care of her husband who had issues;

b) She had physical problems with pain all over her body; and

c) She was depressed.

[11] Both the Claimant and her husband spoke of her work at the X. Her husband stated she probably would have continued to work if she did not have to look after him. Her husband became disabled in 2006 and the Claimant stated in her reconsideration request that she was her

[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.

husband's only caregiver, and he required care and attention every day. She testified she was helping him take his medications and make appointments with doctors. She also helped him psychologically and emotionally.

[12] I agree with the Minister's submission that, "caring physically for an individual who requires full-time care is in itself a demonstration of capacity consistent with the ability to work".[7]

[13] The Claimant added that it was also depression, as well as headaches and shoulder pain that made her stop working in 2011.

[14] She stated that she did go to her doctor for her pain, and the doctor suggested Tylenol, Voltaren and Robaxicet. I recognize these are all "over-the-counter" medications and do not indicate any severe condition.

[15] The Claimant indicated on her application that she stopped working on March 8, 2011 because of a shortage of work. At the hearing, she stated that was a mistake, probably due to a language problem. The Claimant did not demonstrate any issue with language elsewhere in her application. She stated at the hearing she worked the night shift, as it was easier so she could stay at home in the day with her children and husband.

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

[16] The Claimant must provide objective medical evidence that shows her functional limitations affected her ability to work by December 31, 2011.[8] The medical evidence does not support what the Claimant says.

[17] If the medical evidence does not prove that her functional limitations affected her ability to work by December 31, 2011, medical evidence dated after is irrelevant. Reports written afterward must be based on clinical observations or assessments by December 31, 2011.[9]

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[7] GD 4 10 Ministers submission
[8] The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.
[9] The Federal Court said this in *Canada (Attorney General) v. Angell*, 2020 FC 1093.

[18] The only evidence provided prior to the minimum qualifying period (MQP) are the progress notes from family physician, Dr. Shirley Ostroff from December 13, 2011[10] that showed some tightness in her chest with stress. Dr. Ostroff indicated that she started treating her for the main condition in 2012[11]. I presume Dr. Ostroff was referring to the motor vehicle accident (MVA) of November 30, 2012, which required intervention. Her notes, and the accompanying medical reports, are all based on injuries sustained in the MVA, which occurred a year after her MQP.

[19] Woodbridge physiotherapy noted chronic neck pain and chronic headaches due to the MVA.[12] Karmy Chronic Pain Clinic noted that she had been well until the MVA of 2012.[13] A problem with smelling smoke started after the MVA.[14] And, she was diagnosed with fibromyalgia in 2016[15], well beyond her MQP.

[20] The Claimant has been seeing Dr. Ostroff for more than 20 years. She also has been consulting with Dr. Kerametlian, her husband's doctor, for the past 15 years. Dr. Kerametlian clearly notes, in 2013, that ever since the MVA on November 30, 2012, she has had cervical, dorsal, lumbar pain and headaches.[16]

[21] As for her depression, Dr. Ostroff notes it began in 2018. There is an indication it began earlier, but not as early as 2011. Dr. Kerametlian referred her to an Adult Mental Health and Addiction Program in 2016[17] for non-suicidal depression and pain. She did not follow up for a year, and the file was closed in August 2017[18].

[22] When questioned at the hearing why all the doctors noted the pain came after the accident, the Claimant stated that when she saw her doctor before the accident she was told to use Voltaren, and then after the accident her poor health deteriorated. She does not understand why she did not mention her problems to Dr. Ostroff in 2011, but she did after 2012.

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[10] GD 9 13 to 38 clinical notes from Dr. Ostroff from December 13, 2011 to May 21, 2019
[11] GD 2 83 as noted in his medical report of November 1, 2018
[12] GD 2 89
[13] GD 2 90 May 19, 2017
[14] GD 2 103 Dr. Richard Gladstone, neurologist, October 14, 2015
[15] GD 2 101 January 27, 2016 Dr. Sharon Keidstein
[16] GD 8 16 a script from Dr. Vatche Kerametlian May 14, 2013
[17] GD 8 4 July 12, 2016
[18] GD 8 3 August 1, 2017

[23] It is likely the Claimant had pains in 2011. She testified they only required non-prescription medication. Again, there is no indication she had any severe condition prior to the motor vehicle accident of 2012.

[24] There is no medical evidence that indicated she was unable to work by the end of 2011.

[25] There is no corroborating evidence as to why she left work. If it was to care for her husband, this demonstrates an ability to work. If it was due to a shortage of work, again, it does not indicate an inability to work. If she left due to her health, there is no indication her health was so severe as to prevent her from working at any job.

[26] The medical evidence does not show the Claimant had functional limitations that affected her ability to work by December 31, 2011. As a result, she has not proven that she had a severe disability.

[27] 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.[19] I don't have to do that here because the Claimant's functional limitations did not affect her ability to work by December 31, 2011. This means she did not prove her disability was severe by then.[20]

Conclusion

[28] 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.

[29] The appeal is dismissed.

Jackie Laidlaw
Member, General Division – Income Security Section

[19] The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[20] The Federal Court of Appeal said this in *Giannaros v. Minister of Social Development*, 2005 FCA 187.