



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MF v Minister of Employment and Social Development*, 2021 SST 237

Tribunal File Number: GP-20-464

BETWEEN:

M. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Kaity Yang

Videoconference hearing on: April 7, 2021

Date of decision: April 12, 2021

DECISION

[1] The Claimant, M. F., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start January 2018. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant was born in Portugal in 1967. She finished Grade 7 in Portugal. She cut fabric in Portugal. She came to Canada in 1991. She completed a nursing assistant program, which had a high school equivalency. She worked as a live-in nanny from 1991 to 1994. She worked as a health care aide from 1994 to 2001. She worked as a self-employed housecleaner in 2002. She worked at a municipality as a cleaner from 2002 to 2012. However, her health began to deteriorate. She continued working at other cleaning jobs until June 2017. The Claimant alleges that she has not been able to work at any type of job since June 2017 because of her medical condition. The Claimant suffers from fibromyalgia and depression.

[3] The Claimant applied for a CPP disability pension on December 19, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because the evidence did not show that the Claimant was precluded from performing any type of work.¹ The Claimant appealed to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[4] For the Claimant to succeed, she must prove that she has a disability that was severe and prolonged by December 31, 2020. This date is based on her CPP contributions.²

[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.³

THE REASONS FOR MY DECISION

¹ See GD2-9

² The *CPP* calls this date the “Minimum Qualifying Period.” See s. 44(2).

³ The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove they are disabled on a balance of probabilities. In other words, they must show it is more likely than not that they are disabled.

[6] I find that the Claimant has a severe and prolonged disability as of June 2017. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant has functional limitations that affect her capacity to work

[7] My decision about whether the Claimant's disability is severe is not based on her diagnosis. It is based on whether she has functional limitations that prevent her from working.⁴ I have to look at her overall medical condition and think about how the Claimant's health issues might affect her ability to work.⁵

[8] The Claimant has to provide objective medical evidence of her disability as of December 31, 2020. If the Claimant fails to prove that she suffered from a severe disability prior to this date, medical evidence dated after is irrelevant.⁶

[9] The Claimant argues that her medical condition results in severe functional limitations that affect her ability to work. She reported difficulties with bending, sitting, and driving. She had difficulty sleeping and suffered from fatigue. She could only perform light physical duties on a good day. She could not do anything on a bad day. She had problems with her memory and concentration. She also avoided social interactions.⁷

[10] The Claimant testified that she has struggled with pain for years and always felt pain of some kind in 2020. The Claimant was fired from a cleaning job in 2014 because she called in sick a lot. But she continued working. She found another job in December 2014, which she worked at until June 2017. She described her last cleaning job as being physical. She drove a pick up truck and visited job sites. She bent a lot. She picked up and emptied sanitary bins.

[11] The Claimant's pain kept getting worse. She experienced headaches, neck pain, right shoulder pain, and back pain. She had to go off work from December 22, 2016 to January 16, 2017 because of a flare-up of her symptoms. She returned to work on January 16 and 17, 2017.

⁴ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁵ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁶ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and *Canada Pension Plan Regulations*

⁷ See GD2-28-47

But she went off work again from January 18 to 20, 2017. She then returned to modified full-time duties until she went back off work on April 26, 2017 because of pain. She returned to work on May 24, 2017, on a graduated basis. But this work effort failed.⁸ The Claimant stopped working in June 2017.

[12] The Claimant testified that her employer offered her accommodation. She did not have to perform her heavier duties, and her employer would send her to clients where she would not have to go up many stairs. But she still could not handle her job duties. She spoke to one of her doctor's in 2018 about alternative work. Her doctor suggested working as a companion for elderly people. The Claimant tried working as a companion for an elderly woman in 2020. She was not paid for this position. She was given the job in exchange for a room. She did not last two weeks at this position. She could not handle the companion job. She spent so much time in bed that she could not help her companion. The Claimant settled her private disability claim with Manulife. She collects disability benefits from her provincial government.

[13] The Claimant does not feel that she can perform any type of work because of her medical condition. She took pain medications, anti-depressants and muscle relaxants. However, she believes her health is getting worse with time. She cannot drive for long periods because of cramping. She has difficulty performing housekeeping tasks. She can only do light grocery shopping. She cannot sustain any activity for more than 30 minutes

[14] The medical evidence shows that the Claimant had functional limitations that affected her ability to work by December 31, 2020.

[15] The Claimant suffered from pain since around 2007.⁹ She suffered from depression and saw a psychiatrist. She saw a rheumatologist in 2013. The rheumatologist diagnosed her with fibromyalgia. He could not offer her much in terms of treatment. He suggested that the Claimant increase her exercise.¹⁰

⁸ See GD2-19

⁹ See GD2-338-339

¹⁰ See GD2-272

[16] The Claimant experienced back pain in 2016. Her family doctor advised her to avoid heavy lifting.¹¹ The Claimant had numbness in her right hand and her family doctor advised her to avoid repetitive movements.¹² Her family doctor noted that she began performing light duties at work.¹³

[17] The Claimant's health problems continued in 2017. She saw a psychiatrist for depression. Her psychiatrist prescribed anti-depressant medication. She suffered from poor sleep.¹⁴ She would get tired easily.¹⁵ Her rheumatologist increased her Lyrica dose.¹⁶ However, Lyrica made the Claimant drowsy.¹⁷ She had poor mobility.¹⁸ She sometimes could not get out bed.¹⁹

[18] The Claimant saw her rheumatologist on September 8, 2017. He provided an opinion that fibromyalgia was almost impossible to alleviate. He could not offer the Claimant any more treatment. He suggested a referral to a pain clinic, but he did not believe that such a referral would successfully treat the Claimant.²⁰

[19] The Claimant's family doctor completed a medical certificate for Employment Insurance on September 19, 2017. He did not believe that the Claimant was capable of working at that time.²¹

[20] The Claimant injured her neck and back in a September 2017 motor vehicle accident. A chiropractor wrote on October 12, 2017 that the Claimant received chiropractic, massage and physical therapy at his clinic since July 2016 because of fibromyalgia. The frequency of her visits to the clinic increased after the car accident.²²

¹¹ See GD2-288

¹² See GD2-296

¹³ See GD2-297

¹⁴ See GD2-300-302

¹⁵ See GD2-320

¹⁶ See GD2-321

¹⁷ See GD2-322

¹⁸ See GD2-323

¹⁹ See GD2-325

²⁰ See GD2-210-212

²¹ See GD2-234

²² See GD2-148

[21] The Claimant began seeing a doctor at a fibromyalgia pain clinic in November 2017. The pain clinic doctor suggested low impact aerobic exercise.²³ The Claimant also began using cannabis in 2017.²⁴

[22] The Claimant's health problems continued in 2018. A cervical spine MRI taken in January 2018 showed a disc herniation.²⁵ She continued to see the doctor at the fibromyalgia pain clinic.²⁶

[23] The Claimant saw a neurologist in June 2018 because of right sided neck pain, and numbness and tingling in her left arm. The neurologist was of the opinion that her clinical assessment and electrophysiological studies were consistent with mild chronic right radiculopathy in the Claimant's cervical spine. The neurologist did not recommend surgery. She recommended that the Claimant continue with conservative treatment.²⁷

[24] The Claimant underwent a psychovocational assessment in November 2018. The psychovocational assessors did not believe that the Claimant could go back to her last job because of her medical condition. They also believed that the Claimant was not competitively employable and was completely disabled from performing any occupation for which she was qualified by training, education or experience. The psychovocational assessors concluded that the Claimant needed too much accommodation to be employed in the real world. The accommodation that she required included to do lists, flexible scheduling, modified breaks, and a doze alert or other alarms to keep her alert.²⁸

[25] The pain clinic doctor completed a medical report for the Minister on February 3, 2019. She stated that the Claimant suffered from fibromyalgia, generalized daily pain, and persistent fatigue. The Claimant also suffered from depression because of pain and fatigue. The Claimant recovered poorly from activity and had non-restorative sleep.²⁹

²³ See GD2-338-339

²⁴ See GD2-346

²⁵ See GD2-88

²⁶ See GD2-349 and 395

²⁷ See GD2-90-91

²⁸ See GD2-93-117

²⁹ See GD2-75-83

[26] The Claimant began seeing a family doctor and psychotherapist in 2019. She continued seeing this physician into 2021. This physician stated that the Claimant suffered from persistent depression and fibromyalgia.³⁰

[27] The Minister argued that the medical evidence did not support a finding of a severe disability under the CPP. I disagree with the Minister's argument.

[28] I agree that the some of the medical evidence did not suggest a severe disability. The Claimant's psychiatrist noted in February 25, 2017 that the Claimant pain was not too bad and she was getting along with work.³¹ However, this report only encompasses a short period. I am satisfied that the bulk of the medical evidence shows that the Claimant suffers from a serious medical condition that stops her from working.

[29] The Minister pointed out that the Claimant did not require surgery.³² However, the Claimant suffers from fibromyalgia. In many fibromyalgia cases, the objective radiographic evidence does not provide an explanation for the severity of a claimant's pain claimants. The credibility of a claimant is often significant in a fibromyalgia case.

[30] I found the Claimant to be a credible witness. She has a good work ethic. Her Record of Earnings shows that she earned income in each year from 1991 to 2017.³³ She struggled with her medical condition for several years before leaving her last substantially gainful job in June 2017. I believe that the Claimant is motivated to work if she could, but I am satisfied that she cannot because of her medical condition.

[31] The Claimant discussed returning to work with her pain clinic doctor in February 2018. The Claimant was managing her pain. The Claimant wanted to return to a new job, which she could manage with her medical condition. However, I do not believe that this is evidence of work capacity on the part of the Claimant. The Claimant may have felt good on this visit, but the majority of the medical evidence showed that she suffered from severe pain that affected her ability to work. The Claimant testified that her doctor suggested at this appointment that she

³⁰ See GD4-50

³¹ See GD2-307

³² See GD3-9

³³ See GD3-14

work as a companion. The Claimant tried working as a companion in 2020, but failed. I believe that the Claimant engaged in wishful thinking when she explored a return to work. I do not believe that the Claimant's comments to her doctor proved that she could regularly engage in a substantially gainful occupation.

[32] The Minister also argued that the psychovocational report did not show a severe disability on the part of the Claimant. The Minister argued that the assessors suggested various accommodations that led it to conclude that the Claimant could perform some type of work.³⁴ However, I believe that the amount of accommodations recommended would not have made the Claimant employable in the real world. I do not believe that a real world employer would allow the Claimant to take breaks as needed and to have an alarm present to prevent her from falling asleep.

The Claimant does not have work capacity

[33] When I am deciding if the Claimant is able to work, I must consider more than just the Claimant's 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 decide if the Claimant can work in the real world.³⁵

[34] I find the Claimant has no capacity to work in the real world. The Claimant was 53 years old as of December 31, 2020. She came to Canada when she was about 24 years old. I am satisfied that she understands English. The Claimant managed to complete a nursing assistant program in Canada. The Claimant worked with a smart phone at her last job. An argument could be advanced that the Claimant has the ability to perform sedentary work. However, I am satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2020 because of her medical condition.

[35] I am satisfied that the Claimant would not have been able to handle any type of physical work by December 31, 2020 because her fibromyalgia left her too fatigued to perform physical tasks. I am satisfied that the Claimant could not have worked at any type of sedentary job by

³⁴ See GD3-10

³⁵ 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).

December 31, 2020 because of her impairments, which included difficulty concentrating. I do not believe that the Claimant could have upgrade her education and work on a computer because of her impaired concentration. I do not believe that she could have handled a driving job because her pain affected her ability to concentrate. I do not believe that the Claimant could have handled a job working with the public because her depression and anxiety make it difficult for her interact with others. I accept that her ability to perform her activities of daily living was impaired by December 31, 2020. I accept her evidence that she can only sustain activities for about 30 minutes. I am satisfied that the Claimant cannot sustain activities for a long enough period to be employable in the real world. I am also satisfied that the severity of the Claimant's symptoms were unpredictable to the point where she could not work on a regular, reliable or predictable basis at any type of job by December 31, 2020.

The Claimant tried to obtain and maintain employment

[36] 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.³⁶

[37] I am satisfied that the Claimant stopped working at her last cleaning job in June 2017 because of her medical condition. The Claimant tried to find a job that was suitable for medical condition. She discussed performing companion work with her pain clinic doctor. The Claimant worked for about two weeks in 2020 as a companion to an elderly woman. I am satisfied that the Claimant failed at this work attempt because of her medical condition. She spent too much time in bed to be of much help to her client. I am satisfied that this two week stint as a companion was not evidence of substantially gainful employment, but rather a failed return to work effort.

[38] I am satisfied that the Claimant has been incapable regularly of pursuing any substantially gainful occupation since she stopped working at her last cleaning job in June 2017, which was the last time she ever engaged in substantially gainful employment.

The Claimant has made reasonable efforts to follow recommended treatment

³⁶ This is explained in *Inclima v. Canada (A.G.)*, 2003 FCA 117.

[39] The Claimant has followed medical advice.³⁷ The Claimant has followed up with her family doctor. She saw a rheumatologist. She saw a psychiatrist. She received counselling through a family physician who also offers psychotherapy. She saw a neurologist. She saw a doctor at a fibromyalgia pain clinic. She tried physiotherapy, massage therapy, chiropractic treatment, and acupuncture. She tried yoga exercises and stretching. She tried different pain and anti-depressant medication. These treatments have not improved the Claimant's functionality to the point where she can return to substantially gainful employment. The Claimant continues to suffer from fibromyalgia and depression.

WAS THE CLAIMANT'S DISABILITY PROLONGED?

[40] The Claimant's disability is prolonged.

[41] The Claimant's condition began in around 2007, was present when she last engaged in substantially gainful employment in June 2017 and continues today.

[42] The Claimant's pain clinic doctor stated in February 2019 that fibromyalgia has no cure and can be difficult to manage. She stated that the Claimant could improve if a better treatment became available. However, I do not see evidence that any treatment the Claimant attempted led to her being able to regain the capacity to regularly pursue a substantially gainful occupation after June 2017.

[43] The family doctor and psychotherapist who is currently treating the Claimant described the Claimant's fibromyalgia and depression as being persistent.³⁸

[44] I do not believe that the evidence shows that the Claimant's physicians are contemplating the Claimant returning to substantially gainful employment.

CONCLUSION

[45] I am allowing the appeal.

³⁷ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

³⁸ See GD4-50

[46] The Claimant had a severe and prolonged disability in June 2017. However, the CPP says she cannot be deemed disabled more than fifteen months before the Minister received her disability application. After that, there is a four-month waiting period before payment begins. The Minister received the Claimant's application in December 2018. That means she is deemed to have become disabled in September 2017. Payment of her pension starts as of January 2018.

George Tsakalis
Member, General Division - Income Security