



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MK v Minister of Employment and Social Development*, 2021 SST 418

Tribunal File Number: GP-19-1202

BETWEEN:

M. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: Lisa Morell Kelly

Teleconference hearing on: May 5, 2021

Date of decision: June 11, 2021

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension with payment beginning in March 2017.

OVERVIEW

[2] The Claimant was 48 years old when she applied for a CPP disability pension in February 2018. She had started working as a city bus driver in 1999. In February 2016, she injured her shoulder in a car accident. She returned to work on modified duties until March 31, 2016.¹ She stated that she had been unable to work since then. She had another car accident in September 2016. This led to pain in her neck, shoulder, knees, hips, low back, and right arm, as well as headaches and a sleep disorder. In addition, she had depression and symptoms of post-traumatic stress disorder (PTSD).

[3] The Minister denied the Claimant's application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] The Minister submits that while the Claimant may have some ongoing symptoms, this does not mean she is disabled from all work. She has not tried to find alternate work. Further, she has not tried all treatments.

What the Claimant must prove

[5] For the Claimant to succeed, she must prove that it is more likely than not that she had a disability that was severe and prolonged by December 31, 2019. This date is based on her contributions to the CPP.²

¹ GD2-III-2

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 page GD6-5-6.

[6] 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.⁴

Pre-hearing conference

[7] I conducted a pre-hearing conference on February 18, 2021. The Claimant and her legal representative attended, along with John Gebara representing the Minister. The Claimant agreed to accept a teleconference instead of an in-person hearing. Her representative undertook to obtain records from the insurer and family doctor and submit them to the Tribunal no later than April 25, 2021.

ISSUES

[8] Did the Claimant’s health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2019?

[9] If so, was her disability long continued and of indefinite duration by that date?

SEVERE DISABILITY

The Claimant’s disability interfered with her ability to work by December 31, 2019

The Claimant’s account

[10] In March 2018, the Claimant stated that she could sit and stand for only five minutes. She could walk for 15 minutes at the most. She sometimes used a cane. She could do little lifting, reaching, carrying, and bending. She found it difficult to complete personal grooming tasks. Her husband and a friend helped with household maintenance. She had memory problems because of broken sleep and the effects of medications. Her pain woke her up at night. She had trouble driving because of pain and panic attacks.⁵

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 GD2-I-174 ff.

[11] At the hearing, the Claimant testified that her symptoms of fibromyalgia involved body pain beyond her chronic pain. She had pain all over. She felt as if there were a knife stabbing her foot when she was in bed. Her pain on an average day was 8/10 with medication, where 10 is the greatest pain imaginable. In 2019, her pain sometimes confined her to bed all day. She has been unable to do her housework consistently.

[12] The Claimant stated that because of pain in her knees and hips, she was unable to take the stairs. Her husband did everything that has to be done in the basement. She was able to drive, but only to see her mother once or twice a month and for curbside pickup of groceries. She spent her days watching TV and using the computer, but was unable to sit for long. She might walk out to the deck.

[13] In addition, she suffered from fatigue and memory fog. For example, she has been unable to read a book or retain what she reads. She would have been unable to learn a new job.

[14] The Claimant stated that her symptoms of PTSD are hypervigilance and fear. These have become worse since the pandemic started. Because of PTSD, she is no longer able to deal with people.

[15] The Claimant testified that her condition had worsened since the end of December 2019.

The medical evidence supports the Claimant's account

Physical conditions

[16] In April 2016, imaging reports of the Claimant's right shoulder showed possible rotator cuff disease and a tendon tear.⁶ In July 2016 and January 2017, imaging reports of her neck (cervical spine) showed no significant findings. An EMG study of September 2016 showed only that the Claimant was at risk of developing carpal tunnel syndrome. There was no suggestion of radiculopathy.⁷ In May 2018, imaging reports showed a partial thickness tear of a tendon in the left shoulder and tendinosis in the right shoulder.⁸

⁶ GD5-23

⁷ GD2-I-101-2

⁸ GD5-92

[17] The Minister submitted that these test results did not support a finding of a significant physical disability. However, the main physical diagnosis is fibromyalgia or chronic pain syndrome. Numerous doctors have offered one or both of these diagnoses.⁹

[18] Chronic pain and fibromyalgia do not typically show up on imaging reports. In 2014, Dr. Walter Kean, rheumatologist, reported that the Claimant had a history of fibromyalgia. She was taking Lyrica for this.¹⁰

[19] In July 2017, a surgeon and an occupational therapist assessed the Claimant at a chronic pain clinic. She told them that her pain was aching, stabbing, sharp, exhausting, radiating, deep, and at times unbearable. In the twenty-four hours before the pain clinic assessment, her pain averaged 8/10, where 10 was the greatest pain imaginable. The pain worsened with walking, crouching, lifting, moving her shoulder and knees, and driving.¹¹ The assessors evidently believed her account of her health conditions. They recommended that she attend a month-long day program for physical conditioning, along with psychological treatment.¹²

[20] The specialists who reported to the insurer also found that the Claimant had significant physical symptoms. In January 2018, Dr. Stephen Baker, physiatrist, stated that the September 2016 accident resulted in whiplash associated disorder and headaches. She had strained both shoulders and her hips, as well as injuring her knees. She also had possible nerve damage in her neck.¹³ In June 2018, Dr. A. Mustafa, neurologist, reported that the Claimant had daily headaches, and possible nerve damage in her neck and back.¹⁴

[21] In March 2021, Dr. Eugenio Cicoria, family doctor, stated that the Claimant suffered from neck strain, rotator cuff tears to the right shoulder, pain in her hips, knees, and lower back, fibromyalgia, and chronic pain. She had generalized body pain twenty-four hours a day, seven days a week.¹⁵

⁹ GD2-III-258 Dr. Walter Kean, rheumatologist, 2014; GD2-I-77, Dr. Cicoria, CPP medical report, September 2018; GD5-117, Dr. Rehan Dost, neurologist, September 2018

¹⁰ GD2-I-123. Lyrica is for nerve pain.

¹¹ GD2-III-219

¹² GD2-I-287 ff.

¹³ GD2-I-92

¹⁴ GD2-II-128

¹⁵ GD9-3

Mental health conditions

[22] The Claimant's mental health problems are well-documented. In August 2016, Dr. Cicoria stated that sleep deprivation had led to a decline in her cognitive ability.¹⁶ In April 2017, her score on the Patient Health Questionnaire showed that she suffered from severe depression.¹⁷

[23] In July 2017, Dr. Eleni Hapidou, a psychologist at the pain clinic, diagnosed persistent depression with intermittent major depressive episodes; somatic symptom disorder with predominant pain; and PTSD. The Claimant had above average levels of pain-related interference, depressed mood, catastrophizing, and anxiety.¹⁸

[24] In 2018, the Claimant completed 18 sessions of individual psychotherapy. However, in September 2018 she was still experiencing severe symptoms of PTSD, depression, anxiety, and pain. Her therapist suggested that psychological factors contributed to her physical complaints and would likely interfere with physical treatment strategies.¹⁹

Functional limitations

[25] The Claimant had documented physical limitations. In November 2016, Dr. A.D. Kanalec, radiologist, stated that the Claimant would likely have restrictions on heavy or above-shoulder lifting.²⁰

[26] In November 2017, Dawn Brodie, physiotherapist, reported to the insurer that on objective examination, the Claimant's range of motion in her neck and lower back was 50% of normal in

¹⁶ GD2-III-106

¹⁷ GD2-III-184

¹⁸ GD2-1-115, 164. She based these diagnoses partly on objective testing. In December 2017, Dr. Natasha Browne, psychologist, assessed the Claimant for the insurer and agreed with Dr. Hapidou's diagnosis. In addition, she found that the Claimant suffered from driving anxiety: GD2-III-238, 246.

¹⁹ GD5-132 ff.

²⁰ GD2-III-56. Dr. Kanalec was a medical consultant to the Workplace Safety and Insurance Board.

all directions. She had some limitation in range of motion in lifting her right shoulder.²¹ In September 2018, Dr. Allan Kopyto, family doctor, reported to the insurer that the Claimant's ability to bend forward was only half of normal.²²

[27] In August 2018, Shauna Smith, occupational therapist, stated that the Claimant continued to have trouble with fatigue, pain management, sleep, housekeeping and home maintenance, driving, sleeping, and hand function.²³

[28] In September 2018, the Claimant reported to her psychotherapist, Alisha Mann, that she continued to have difficulty with household chores and day-to-day activities. In addition, results of objective testing suggested to Ms. Mann that the Claimant's anxiety might significantly interfere with her ability to process information. This might lead to an inability to cope with stress, which would in turn reinforce her anxiety.²⁴

[29] The Claimant consistently reported sleep difficulties, along with changes in memory and concentration, including word recognition.²⁵ In May 2018, Dr. Cicoria stated that the Claimant had short-term memory difficulties.²⁶

My findings

[30] By the end of December 2019, the Claimant's pain left her randomly bedridden on a frequent basis. She was unable to stand, walk, or sit for long periods of time. She had difficulty with her activities of daily living and suffered from driving anxiety. Her PTSD meant that she was reluctant to be around people. Her lack of sleep contributed to problems with memory and concentration. I am satisfied that by December 31, 2019, the Claimant's health conditions interfered with her ability to work.

²¹ GD5-80. In September 2018, Dr. Kopyto also reported limitations in the movement of the Claimant's right shoulder: GD2-II-157.

²² GD2-II-155

²³ GD2-II-66 ff.

²⁴ GD5-133, 135, 136

²⁵ For example, GD2-I-77; GD2-III-51; GD5-134; GD2-III-243

²⁶ GD2-I-77

The Claimant has a reasonable explanation for some failures to follow treatment recommendations

[31] The Minister submitted that the Claimant had not exhausted all treatment possibilities. However, the law does not require that she do so in order to qualify for a CPP disability pension.²⁷

[32] The Claimant has tried many types of treatment. She had injections for her right shoulder pain from Dr. Kean and Dr. John Pyper, orthopedic surgeon.²⁸ She has tried painkillers including Gabapentin (for nerve pain), Baclofen (muscle relaxant), and Cymbalta. She has also tried Elavil for depression. She took several courses of physiotherapy up until early 2019.²⁹ In May 2018, Dr. Cicoria stated that her response to all forms of treatment had been poor.³⁰

[33] The Claimant had reasonable explanations for failing to follow reasonable treatment recommendations. For example, she was unable to attend treatment at the pain clinic because her insurer would not approve the expense. Also, she had not had shoulder surgery because her operation had yet to be scheduled. In addition, she testified that Dr. Cicoria had not referred her to a psychiatrist because the waiting list was so long. Although she has concerns about mind-altering drugs, Dr. Michael Hart, family doctor, had recommended cannabis, in part to help manage her anxiety.³¹ She had followed this recommendation.

The Claimant lacked a regular capacity for substantially gainful employment by December 31, 2019

[34] Employability is the key measure of a severe disability under the CPP.³²

[35] Until the end of March 2016, the Claimant tried to return to work on modified duties behind the counter with her former employer. However, she was unable to do the job.³³ In

²⁷ The Appeal Division of this Tribunal stated this in a case called *K.C. v. MESD*, 2019 SST 656. This decision is not binding on me but I find it persuasive.

²⁸ GD2-II-73; GD2-III-205

²⁹ GD2-II-152, 213; GD2-III-311; GD2-IV-158, 286

³⁰ GD2-I-79, CPP medical report of Dr. Cicoria

³¹ Claimant's testimony and GD2-II-284.

³² The Federal Court said this in *Canada (A.G.) v. Dean*, 2020 FC 206.

³³ GD5-60

August 2016, Dr. Cicoria stated that the Claimant was completely restricted from work. She had tried modified work without success.³⁴ I see no evidence of work capacity after the end of March 2016. The Claimant is therefore relieved of the obligation to seek alternate employment.³⁵

[36] In September 2016, Dr. Cicoria informed the insurer that the Claimant was substantially unable to perform the essential tasks of her employment, even on modified hours or duties. She was completely unable to carry on a normal life or complete housekeeping tasks.³⁶

[37] In January 2017, Tiffany Zurcher, vocational rehabilitation specialist, stated that she had considered the Claimant's physical limitations. She believed that the Claimant was still able to perform sedentary work. She identified several job possibilities: taxi dispatcher, bus information clerk, and bus ticket agent.³⁷ I attach no weight to this finding because it did not take into account the Claimant's mental health conditions. The Claimant testified that she would be unable to do any of these jobs because she could not stand to be around people.

[38] In November 2018, Don Lesar, physiotherapist, identified several barriers to the Claimant's recovery: significant weight gain since September 2016; chronic pain/fibromyalgia; and mental distress.³⁸

[39] In March 2021, Dr. Cicoria stated that the Claimant was disabled from working at any occupation by December 2019.³⁹

[40] In deciding whether the Claimant's condition was severe, I must take a "real world" approach and consider factors such as her age, level of education, language proficiency, and past work and life experience.⁴⁰ In December 2019, the Claimant was 50 years old. This is fifteen years before the usual retirement age. She is English-speaking and had a college education. She also had a steady work record for seventeen years at the same workplace. None of these personal

³⁴ GD2-III-106

³⁵ The Federal Court of Appeal stated in *Inclima v. Canada (A.G.)*, 2003 FCA 117 that where there is evidence of work capacity, a claimant must establish that she has made efforts to find and keep employment that were unsuccessful because of her health condition.

³⁶ GD2-II-12. See also GD2-II-154.

³⁷ GD2-III-52

³⁸ GD2-IV-292

³⁹ GD9-3

⁴⁰ The Federal Court of Appeal said this in *Villani v. Canada (A.G.)*, 2001 FCA 248.

characteristics would have interfered with her employability. However, I am persuaded that the Claimant's physical and mental health conditions prevented her from pursuing any substantially gainful occupation on a regular basis.

[41] Accordingly, I find that it is more likely than not that the Claimant's disability was severe by December 31, 2019.

PROLONGED DISABILITY

[42] The Claimant has suffered from fibromyalgia since at least 2014 and neck and shoulder pain since early 2016.⁴¹ She suffered additional injuries in September 2016. She went on to develop chronic pain, depression, somatic symptom disorder, and PTSD. Her family doctor has stated that her health conditions are progressive and longstanding. The prognosis for her returning to work was poor.⁴²

[43] I find that the Claimant's disability was long continued and of indefinite duration by December 31, 2019. I therefore find that it is prolonged.

CONCLUSION

[44] The Claimant had a severe and prolonged disability in March 2016, when she stopped working. To calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.⁴³ The Minister received the application in February 2018, so the deemed date of disability is November 2016. Payments start four months after the deemed date of disability, as of March 2017.⁴⁴

[45] The appeal is allowed.

Carol Wilton
Member, General Division - Income Security

⁴¹ GD2-III-124-5, report of Dr. Kean, April 2016.

⁴² GD9-3

⁴³ Paragraph 42(2)(b) *Canada Pension Plan*

⁴⁴ Section 69 *Canada Pension Plan*