



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DS v Minister of Employment and Social Development*, 2021 SST 419

Tribunal File Number: GP-20-1729

BETWEEN:

D. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: June 10, 2021

Date of decision: June 27, 2021

DECISION

[1] The Claimant (D. S.) is not entitled to Canada Pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant was 46 years old in May 2009 (the date by which she must be disabled). She applied for disability benefits in May 2019.¹ In her application, she reported that she is unable to work because of Reflex Sympathetic Dystrophy Syndrome (RSD) and Multiple Sclerosis (MS). She says she has fatigue, anxiety/depression and pain. The Claimant said she felt she could no longer work because of her medical condition in April 2013.² The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

The Claimant's appeal history

[3] The Claimant first applied for disability benefits in September 2004.³ In that application, she reported that she was not able to work because of Reflex Sympathetic Dystrophy (R.S.D.). She had difficulty walking, carrying and reaching.⁴

[4] The Minister denied that application at the initial and reconsideration levels of adjudication. The Claimant appealed the Minister's reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). A Review Tribunal heard the Claimant's appeal on July 20, 2006. The Review Tribunal decided that the Claimant was not eligible for disability benefits because there was insufficient evidence to decide that her condition was "severe" enough to meet the requirements of the CPP. The Review Tribunal noted there was little or no objective medical evidence of disability.⁵

¹ The 2nd CPP disability application is at GD 2-36.

² This information is at GD 2-39.

³ The 1st CPP disability application is at GD 2-273.

⁴ This information is at GD 2-395.

⁵ This finding of the Review Tribunal is at GD 2-239.

Why the Claimant's appeal history is important

[5] The Claimant's appeal history is important because of a legal principle known as *res judicata*. *Res judicata* means that once a dispute has been finally decided, it cannot be considered again.⁶

[6] Given that a Review Tribunal previously considered the Claimant's eligibility for disability benefits, I must decide whether the principle of *res judicata* applies to the 2006 decision.

ANALYSIS

When *res judicata* applies

[7] The principle of *res judicata* applies to administrative tribunals, like the SST.⁷ For the principle to apply, three preconditions must be met:

- a. the issue in the two proceedings must be the same;
- b. the decision which is said to give rise to *res judicata* must be a final decision;
and
- c. the parties in the two proceedings must be the same.

The three preconditions of *res judicata*

[8] In this case, the Review Tribunal's decision was final. The Claimant did not appeal that decision. The parties to the proceeding before the Review Tribunal are the same as in this appeal.

[9] However, the Review Tribunal did not decide the same question that is before me. The Review Tribunal was looking at the issue whether the Claimant was disabled

⁶ The Supreme Court of Canada decision is called *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 18.

⁷ *Danyluk, supra* and *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100

under the CPP on or before December 31, 2007. The Claimant's MQP as of the date of this hearing is December 31, 2008, with a proration of January 1, 2009 to May 31, 2009.

Applying *res judicata* involves some discretion

[10] The Supreme Court of Canada allowed decision makers to retain a residual discretion to not apply the *res judicata* doctrine.⁸ While discretion exists, I cannot decide for just *any* reason that *res judicata* should not apply. My objective is to ensure that the operation of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice.⁹

[11] The Supreme Court of Canada has set out a list of factors to consider when exercising discretion. These factors include: (a) the wording of the statute (where the power to give the decision comes from); (b) the purpose of the legislation; (c) the availability of an appeal; (d) the safeguards available to the parties in the procedure; (e) the expertise of the prior decision-maker; (f) the circumstances giving rise to the first proceeding; and (g) any potential injustice.¹⁰

[12] There are three important comments to make about these factors.

[13] First, this list of factors is open. This means that all of these factors may not be relevant in every case. It also means that these factors may not be the only factors to consider. Indeed, the court acknowledged that there may well be other factors to consider such as a change in the law after the first proceeding or where further relevant material becomes available after the first decision was made.¹¹

[14] Second, these factors are not meant to be a checklist, and they are not an invitation to engage in a mechanical analysis. However, decision makers are required to address the factors for and against the exercise of discretion.¹²

⁸ The Supreme Court of Canada decision is called *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

⁹ *Danyluk, supra*, at paragraph 67

¹⁰ *Danyluk, supra*,

¹¹ *Danyluk, supra*, at paragraph 67 where the court cited with approval the factors considered in *Minott v. O'Shanter Development Company Ltd.*, 1999 CanLII 3686 (ON CA)

¹² *Danyluk, supra*, at paragraphs 65 and 66

[15] Third, of all the factors to consider, the one that is said to be the most important is the potential injustice factor.¹³ This factor requires me to stand back and ask myself whether, given the entirety of the circumstances, the application of *res judicata* in this particular case would work an injustice.

This is a case where the application of res judicata would cause an injustice

[16] I explained the issue of *res judicata* to the Claimant and her witness the hearing. I explained that if *res judicata* applied, I was bound by the previous Review Tribunal decision, whether I agreed with it or not. If *res judicata* applied, my jurisdiction was limited to deciding if the Claimant became disabled after July 20, 2006. After hearing the evidence of the Claimant and her witness, I decided that it would be an injustice to apply *res judicata*. **This means I can consider all of the evidence, including the evidence that was before the previous Review Tribunal.** Because I have found that *res judicata* should not be applied in this case, I must decide if the Claimant became disabled on or before December 31, 2008 or between January 1, 2009 and May 31, 2009.

[17] My reasons for not applying the *res judicata* doctrine are as follows:

- I asked the Claimant and her witness if there was anything about the Review Tribunal hearing of July 2006 that was unfair to the Claimant. The witness said he was not given an opportunity to talk. He said that he tried to explain the Claimant's limitations with raising her arm and inability to make a fist, but the Review Tribunal told him to stop. He said he was essentially told to stop talking. He told me he found this very disturbing.
- The witness also told me that when he started to explain to the Review Tribunal why the Claimant was disabled, he was told they felt she was capable of other work.

¹³ *Danyluk, supra*, at paragraph 80

- I also considered the decision of the Review Tribunal. The Review Tribunal's conclusion was "The Tribunal is of the view that her disability is prolonged but has insufficient evidence to come to the determination that it is "severe" enough to meet the required of the Act."
- The Tribunal also noted that they had "little or no objective medical evidence of disability". They referred to and relied on only one piece of medical evidence, which was three years before the hearing and from the orthopedic surgeon. The Review Tribunal said "obviously this was nearly three years ago, and it is quite possible that her situation has deteriorated since then." However, the Claimant did submit a letter from her family doctor, which was written the month prior to the hearing, which the Review Tribunal does not seem to have considered.¹⁴
- I also considered that the main reason the Review Tribunal dismissed the appeal was because of "insufficient evidence" and "little or no objective medical evidence". However, the Claimant told the Review Tribunal that her doctor was out of the country and not available. There is no evidence in the decision that the Claimant was offered an adjournment to get medical information from her doctor or wait until his return. I find this especially prejudicial since this was a compelling reason why the decision was dismissed.

[18] For these reasons, I find that the application of *res judicata* in this particular case would be an injustice.

[19] Because I have found that *res judicata* should not be applied in this case, I must decide if the Claimant became disabled on or before December 31, 2008. If I find she was not disabled by December 31, 2008, I must decide if she became disabled between January 31, 2009 and May 31, 2009.

¹⁴ Dr. Apostle's letter is at GD 2-241.

What the Claimant must prove

[20] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2008. This date is based on her contributions to the CPP.¹⁵

[21] The Claimant had CPP contributions in 2009 that were below the minimum amount the CPP accepts. These contributions will also let the Claimant qualify for a pension but only if she became disabled between January 1, 2009 and May 31, 2009.¹⁶

[22] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.¹⁷ It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.¹⁸

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

What the Claimant says about her functional limitations

[24] The Claimant says she has limitations from her medical conditions that affect her ability to work in the following ways.

[25] She has chronic pain, muscle spasms, reduced mobility, balance, vision and speech problems. She also has Reflex Sympathetic Dystrophy affecting her left arm. She has anxiety and depression. She explained she is very fatigued most of the time.

¹⁵ 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 4-15.

¹⁶ This is based on section 19 and subsection 44(2.1) of the *Canada Pension Plan*.

¹⁷ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

¹⁸ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[26] The Claimant also said she has difficulty focusing on tasks. She has cannot manage household tasks. She said she relies on family and friends to help her. She limits socializing due to her pain, depression and fatigue.¹⁹

Reasons for my decision that the Claimant's disability was not severe

[27] The Claimant has Reflex Sympathetic Dystrophy (RSD), Chronic Pain Syndrome, Multiple Sclerosis, Chronic obstructive pulmonary disease (COPD), fissures and depression. My focus though is not on the Claimant's diagnosis.²⁰ I have to look at all of her medication conditions and how these conditions affect her ability to work. I must focus on whether she had functional limitations that prevented her from earning a living by December 31, 2008 or if she became disabled in 2009 by May 31, 2009.²¹

[28] I agree with the Claimant that the medical evidence supports she had some functional limitations with her left hand and leg by December 31, 2008. However, the evidence and her work efforts support that she had work capacity. The testimony of the Claimant and the medical evidence show that the Claimant had capacity to work until 2015, which is well after her MQP date.

What the medical evidence says

[29] The Claimant must provide objective medical evidence that shows she was incapable regularly of pursuing any substantially gainful employment by her May 31, 2009.²²

[30] The Claimant was in a car accident in July 2001. She suffered damage to her wrists, ankle and whiplash. She had surgery on both arms and the right arm (she is right-handed) returned to normal. Her whiplash resolved, but she continued to have

¹⁹ This information is at GD 1-6.

²⁰ The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

²¹ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33 and The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

²² The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.

symptoms in her left wrist and arm. She was diagnosed with left arm complex regional pain syndrome and Reflex Sympathetic Dystrophy (RSD).²³

Reflex Sympathetic Dystrophy (RST)

[31] In September 2001, Dr. Norris (anesthesiologist) reported that the Claimant's range of motion in her left hand was limited and she lacked full extension of all her fingers. Her grip was poor and she was unable to grasp two fingers. He agreed with Dr. McAllister that the Claimant had early Reflex Sympathetic Dystrophy (RSD). He noted she was improving to some extent with physiotherapy and she got good pain relief from Oxycocet, but she was using almost none. She was hesitant because of possible addiction. Dr. McAllister explained the benefit of the medication in this situation. The Claimant agreed to take the Oxycocet every four hours regularly. The Claimant also had nerve blocks.²⁴ Dr. Norris said her pain and dysesthesia responded to the nerve blocks.

[32] An occupational therapy progress report noted in December 2001, that the Claimant had some improvement in her condition, but she continued to have decreased range of motion in her wrists and left hand. She was now partially or fully independent in most activities of daily living. However, she could not lift heavy items or drive a car.²⁵

[33] In October 2002, Dr. Lamontagne (specialist) examined the Claimant in consultation for Reflex Sympathetic Dystrophy. (RSD). He said the Claimant's RSD of her left hand was slowly resolving but it was quite persistent. He noted the Claimant was having block injections with Dr. Norris, which last about two weeks. He noted that she took very little pain medication. She used Oxycocet two or three times a day on her

²³ Dr. Ley's report is at GD 2-117.

²⁴ This information is at GD 2-347.

²⁵ The Occupation Therapy Report is at GD 2-303

worst days but was able to go without it for about seven to ten days after block injections.²⁶

[34] In June 2004, Dr. Apostle (family doctor) said the Claimant had chronic pain from RSD. He said she had nerve damage to left-side, sore, cramps, pain, weak.²⁷

[35] In June 2006, Dr. Apostle said that the Claimant's pain remained an ongoing problem. She had persistent left-sided pain, worse in her arm but also in her leg. She required nerve blocks every two months and was using Oxycocet for pain relief. Dr. Apostle said he considered the Claimant to be unemployable because of her condition.²⁸ However, the Claimant was able to return to work as a cook. I found her work efforts to be evidence of work capacity. I will provide reasons for my findings further in the decision.

[36] In January 2008, the Claimant was in another car accident. The next day she had a stiff left neck, discomfort in her left arm and leg and hip. Dr. Apostle said all injuries were soft tissue and advice only was given.²⁹

[37] In December 2008, the Claimant fell in December and hurt her back and right shoulder. In February 2009, Dr. Apostle prescribed physiotherapy. The right shoulder x-ray showed no fracture or dislocation. He also renewed her Percocet so she could take four pills a day for her chronic pain.³⁰

[38] The medical evidence to May 2009 shows that the Claimant had chronic pain and limitations with her left side as a result of a car accident in July 2001. There was some improvement with physiotherapy, surgery and block injections. The Claimant's right hand injury resolved. Her left hand/arm was being managed with nerve blocks and occasional Oxycocent as noted by Dr. Lamontagne. Although the Claimant continued to

²⁶ This information is at GD 2-329.

²⁷ The medical report is at GD 2-366.

²⁸ This information is at GD 2-241.

²⁹ Dr. Apostle's clinic notes are at GD 2-96.

³⁰ This information is at GD 2-100 and GD 2-154.

have some limitations, she retained capacity to work as shown by her work efforts in 2011 and 2012.

Chronic Obstructive Pulmonary Disease (COPD)

[39] In October 2006, the Claimant had a persistent cough with intermittent hoarseness.³¹ A chest x-ray was normal. She was prescribed a cough suppressant and adjustment were made to Advair (puffer). It was Dr. Apostle's opinion that the Claimant had a chronic inflammation of her upper airways, which should resolve with time.

[40] There is no further medical evidence to support that the Claimant's cough or breathing difficulties required any further medical intervention until April 2012. This is almost three years after her MQP expired.

[41] The Claimant's witness (M.) said the Young Men's Christian Association (YMCA) building where the Claimant worked as a cook in 2011 and 2012 had an air filtration problem in the kitchen. This made the Claimant quite ill and affected her COPD.

[42] In April 2012, the Claimant had an acute exacerbation of COPD.³² Dr. Apostle prescribed Prednisone and Biaxin. He said in May 2012, that she seemed to be better and was certainly nowhere near where she was in April 2012. Her acute exacerbation of COPD settled down. Dr. Apostle recommended that she stop smoking. By July 2012, the Claimant was clinically better, but she was still having symptoms. Dr. Apostle adjusted her medication.³³ In August 2012, Dr. Apostle said the Claimant's COPD was slowly improving, but she continued to smoke. He said she had some episodic laryngitis and the clinical exam failed to reveal any other findings.³⁴

³¹ These clinic notes of Dr. Apostle are at GD 2-93, GD 2-94 and GD 2-153.

³² The clinic note is at GD 2-102 to GD 2-104

³³ The clinic note is at GD 2-106.

³⁴ The clinic note is at GD 2-107 and GD 2-115.

[43] Dr. Vance (family doctor) noted in January 2019 that the Claimant's COPD had remained stable with Spiriva and Advair. She used Ventolin about once a week on average. She continued to smoke.³⁵

[44] Although the Claimant's work environment caused an acute exacerbation of her COPD, with medication, her condition improved and remained stable.

Fissure

[45] The Claimant saw Dr. Apostle in October 2007 for a four to five month history of rectal pain, bowel movement, bleeding and some mucus. Dr. Apostle prescribed medication.³⁶ In February 2008, she continued to have pain with bowel movements. She was referred to Dr. Mossing (general surgeon) for investigation.³⁷ Dr. Mossing diagnosed the Claimant with a chronic anal fissure. He prescribed conservative treatment.³⁸

[46] In May 2008, the Claimant was prescribed ointment. Dr. Mossing anticipated that the ointment would settle over eight to ten weeks. He said the Claimant would have immediate relief from her pain if it was working. He said if this conservative treatment was not successful, a lateral sphincterotomy would be arranged.³⁹ The Claimant did not return to see Dr. Mossing and there is no medical evidence that any further treatment was required until 2016, well after her MQP expired.

[47] In November 2016, Dr. Banks noted the Claimant had intermittent abdominal pain and was constipated. She had a colonoscopy and an anterior fissure was removed. The Claimant's pain and constipation improved significantly.⁴⁰

Depression

³⁵ Dr. Vance's clinic note is at GD 2-148.

³⁶ The clinic note is at GD 2-95.

³⁷ The clinic note is at GD 2-97.

³⁸ Dr. Mossing's report is at GD 2-99.

³⁹ This report is at GD 2-98.

⁴⁰ Dr. Bank's report is at GD 2-134.

[48] The Claimant has a long history of depression. She was prescribed Paxil in 2001. She stopped using Paxil for a brief period, but her depression symptoms increased. She resumed using Paxil to manage her depression. She told Dr. Vance in April 2016 that the Paxil was very beneficial and she has been managing well.⁴¹ The Claimant's depression has been managed with medication for many years. There was a brief period after the Claimant's husband passed away that she saw a counsellor. She is not under the care of any psychiatrist, counsellor or in any therapy.

Multiple Sclerosis (MS)

[49] Dr. Jacqmin (orthopaedic surgeon) noted in October 2003 that the Claimant's left lower limb showed neurological evidence of a hyperaesthetic sensation as well as a loss of reflex in the knee and ankle. He said this could be a precursor sign of multiple sclerosis.⁴² However, he noted that the Claimant was not using a cane and was doing quite well. He said she was able to take care of herself, her children and her house. She was able to drive a car. She was able to grocery shop, but needed help with heavy lifting.⁴³

[50] In April 2016, Dr. Kucher (neurologist) said that after examination and review of MRIs, it was his opinion that the Claimant did not have a diagnosis of MS at that time. Examinations in October 2017 showed the Claimant would not meet the diagnostic criteria for MS.⁴⁴ In May 2018, Dr. Casserly noted the Claimant did have multiple periventricular white matter lesions which could be consistent with MS, but overall a relatively mild burden of change.⁴⁵ She said the Claimant did not have any relapses or progressive deficits and her symptoms were fairly stable.⁴⁶

⁴¹ Dr. Vance's clinic note is at GD 2-125.

⁴² This information is at GD 2-389.

⁴³ This information is at GD 2-387.

⁴⁴ This information is at GD 2-223

⁴⁵ Dr. Casserly's report is at GD 2-227.

⁴⁶ This is at GD 2-225.

[51] The Claimant's condition seems to have worsened by November 2018. An MRI showed recent developments of new lesions in the Claimant's brain stem and spinal cord. A diagnosis of MS was made.⁴⁷

[52] However, it is not the date of a diagnosis that determines a disabling condition. Although, the Claimant was only formally diagnosed with MS in 2018, she did have symptoms that were suspicious of MS well before her MQP expired. However, she had relatively little in the way of functional limitations as noted by Dr. Jacqmin. Also, the Claimant testified that since 2015, "things went downhill". She explained to Dr. Casserly that her legs suddenly gave away while walking from her bedroom to the washroom. She said that since that incident, her sensory symptoms have gotten worse and she started to experience left leg cramps.⁴⁸ This is supported by Dr. Kucher's report of April 2016. He noted that the Claimant did have worsening left hemi body numbness and tingling in early 2015 that improved, but did not completely resolve.

[53] I considered the totality of the Claimant's condition. However, the medical evidence does not show the Claimant had functional limitations that would have made her incapable regularly of pursuing any substantially gainful employment by May 31, 2009. As a result, she has not proven that she had a severe disability by December 31, 2008 or became disabled between January 1, 2009 and May 31, 2009.

The Claimant's personal circumstances and work efforts

[54] 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.⁴⁹ These factors help me decide if the Claimant has any ability to work in the real world. The Claimant was only 46 years old at the time of her MQP. She has a grade 12 education and completed a secretarial course. She previously worked in a retail store from 1987 to

⁴⁷ This report is at GD 2-231.

⁴⁸ Dr. Casserly's report is at GD 2-216.

⁴⁹ The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

1998 when the store closed down.⁵⁰ Her age, education and work experience would provide her with transferable skills.

[55] I considered whether the Claimant's income in 2011 could be considered income earned from employment, which might show she was capable regularly of pursuing substantially gainful employment after her MQP. In respect of an occupation, "substantially gainful" is described as an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.⁵¹ A Contribution of Earnings Record shows the Claimant's post-MQP earning history.⁵² She had earnings in 2011 of \$12,034. Although the total amount of her earnings in 2011 were \$1,806 less than the prescribed amount for substantially gainful employment, this is not in itself evidence a regular incapacity to pursue substantially gainful employment. That determination must be made on the basis of the entirety of the evidence including the medical evidence as well as the details of the employment.⁵³ I find the following reasons support that the Claimant's work efforts at YMCA were evidence of work capacity.

[56] In November 2019, A. A., of Young Men's Christian Association (YMCA), said the Claimant worked from January 2011 to April 2012, as a childcare cook, providing healthy meals and snacks to children. She believed the Claimant quit this job due to an illness. The Claimant confirmed her COPD symptoms were the primary reason she stopped working. The Claimant worked regular part-time hours (5 hours/day) as this was all the work that was available. A. A. said the Claimant's quality of work was satisfactory and she could handle the demands of the job, without any help from others.

[57] The Claimant explained that she did require help from others. She said she worked in the kitchen and this is where the breakroom was. When she needed help with lifting heavy items, straining pasta pots and peeling potatoes, she asked for help from a co-worker who was on break. Although the Claimant required help lifting heavy items,

⁵⁰ This information is at GD 2-392.

⁵¹ This is at Section 68.1 of the CPP Regulations.

⁵² The Contributions sheet is at GD 4-15 – GD 4-16.

⁵³ *Villani v. Canada (A.G.)*, 2001 FCA 248

this would not hinder her from more suitable work that did not require heavy lifting. The Claimant said she was solely responsible for preparing the morning snacks, lunches and afternoon snacks. She did all of the cooking, cleaning, chopping vegetables and preparation work. She did the grocery shopping, but occasionally had help unloading the groceries from her fiancé in the mornings. She said there were about 4-5 times in a month when she did not come to work because of her medical conditions.

[58] I did not find the Claimant's employer to be a benevolent employer. Case law, including the decision *Atkinson v. Canada*,⁵⁴ says that accommodating an employee does not necessarily mean that an employer is benevolent. For an employer to be found benevolent, the accommodation must go beyond what would be expected in the marketplace. A benevolent employer requires a high evidentiary threshold. Commonplace accommodations from an employer does not make it a "benevolent" employer.⁵⁵ In this case, the Claimant's work was productive. The Claimant was paid a competitive wage and there were job duties expected of her. Help from co-workers to lift heavy items was made available to her, when she required it. This is not an accommodation that went beyond what was required of an employer in a competitive market.

[59] The Claimant testified that her COPD was aggravated by the inadequate air filtration in the building. Although she had some physical limitations, she was able to do the job until she had an acute exacerbation of COPD. This is documented in Dr. Apostle's clinic notes.⁵⁶ However, Dr. Apostle noted that with treatment, the Claimant's condition improved and in January 2019, Dr. Vance said the Claimant's condition was stable with medication.⁵⁷ However, the Claimant did not return to work at YMCA.

[60] She applied for a job with a deli that was near her home. She told me that this job did not involve heavy lifting, was also part-time, starting in the afternoons which was suitable for her condition. She said her employer was aware of her medical conditions

⁵⁴ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

⁵⁵ Although not binding on me, I considered a SST Appeal Division decision – *Minister of Employment and Social Development v. T.D.*, 2020, SST 1021

⁵⁶ Dr. Apostle's clinic notes are at GD 2-102 to GD 2-104.

⁵⁷ Dr. Vance's clinic note is at GD 2-148.

and was aware that she might miss a few days for sickness or appointments. Unfortunately, the deli closed shortly after it opened. The Claimant told me that she did not apply for any other jobs as she chose to rather stay home with her children.

[61] I find the Claimant's work at YMCA and at the deli are evidence of work capacity. Her job at the deli did not involve heavy lifting and this job did not end because of any medical conditions.

[62] 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.⁵⁸ That is not the case in this appeal. The Claimant stopped working because of an acute exacerbation of COPD, which improved with treatment. She found more suitable work (less physically demanding) and this job ended, but not because of her health condition.

[63] I find that the Claimant's personal circumstances and work efforts support that she could work in the real world. I recognize that the Claimant's condition worsened in 2015 and while she may not have work capacity today, that is not the issue before me.

CONCLUSION

[64] I find the Claimant is not eligible for a CPP disability pension because her disability was not severe by December 31, 2008 or May 31, 2009. Because I found the disability is not severe, I did not have to consider if it is prolonged.

[65] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security

⁵⁸ This is explained in *Inclima v. Canada (A.G.)*, 2003 FCA 117.