



Citation: *NV v Minister of Employment and Social Development*, 2021 SST 696

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: N. V.
Representative: Allison Schmidt

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated March 20, 2020 (issued by Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Teleconference

Hearing date: October 12, 2021

Hearing participants: Appellant
Appellant's representative

Decision date: October 19, 2021

File number: GP-20-1000

Decision

[1] The appeal is allowed.

[2] The Claimant, N. V., is eligible for a Canada Pension Plan (“CPP”) disability pension. Payments start as of July 2018. This decision explains why I am allowing the appeal.

Overview

[3] The Claimant is 38 years old. While her last full-time job was as a program manager at a community association, she spent most of her career as a senior community relations advisor in the regulatory sector. She continued consulting in that field after starting her community association job. Her medical conditions arise from a March 9, 2018, car accident. Her symptoms are consistent with post-concussion syndrome (“PCS”). Her main symptom now is cognitive dysfunction. However, she also has headaches, neck pain, fatigue, mood problems, and sleep problems.

[4] The Claimant applied for a CPP disability pension on March 11, 2019. The Minister of Employment and Social Development (“Minister”) refused her application. The Claimant appealed the Minister’s decision to the Social Security Tribunal’s General Division.

[5] The Claimant says her medical conditions impact her activities of daily living. They also have prevented her from performing any form of substantially gainful work since March 2018. Her conditions include a host of physical and cognitive limitations, as well as mental health issues, that have been continuous since the accident. Any capacity she might have is unpredictable. Despite attempting self-employment, she could not manage work at a level that would be meaningful or substantially gainful.

[6] The Minister says the Claimant could do suitable modified work, including part-time work, within her limitations. The Minister says her condition has improved since the accident, and she may improve further through suitable treatment such as more mental health intervention. The Minister adds that the Claimant’s age, education, and work history gave her many transferable skills and would allow her to learn new skills.

What the Claimant must prove

[7] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by the hearing date.¹

[8] The *Canada Pension Plan* defines “severe” and “prolonged.” A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.²

[9] This means I have to look at all of the Claimant’s medical conditions together to see what effect they have on her ability to work. I also have to look at her background (including her age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether her disability is severe. If the Claimant can regularly do some type of work from which she could earn a living, then she isn’t entitled to a CPP disability pension.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³ This means the Claimant’s disability can’t have an expected recovery date. The disability must be expected to keep the Claimant out of the workforce for a long time.

[11] The Claimant has to prove she has a severe and prolonged disability. She has to prove this on a balance of probabilities. This means she has to show that it is more likely than not she is disabled.

Matters I have to consider first

I accepted the documents sent in just before the hearing

[12] On October 7, 2021, the Claimant filed an October 6, 2021, medical report from Dr. Montgomery (see GD13-2). It was relevant to the Claimant’s appeal. It was also filed

¹ The Minister uses a claimant’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 s. 44(2) of the *Canada Pension Plan*. The Claimant’s CPP contributions are at GD3-13. As her coverage period ends after the hearing date, I must decide whether she was disabled by the hearing date.

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

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

as soon as possible. I decided to admit the document at GD13-2 into evidence. I also decided to accept the document at GD14-1, which was filed by the Minister on October 8, 2021. The GD14-1 document contained submissions on GD13-2. Again, the document was filed as soon as possible. The Minister created it in response to another late document. I told the Claimant about these decisions at the start of the hearing.

Reasons for my decision

[13] I find that the Claimant has a severe and prolonged disability by October 12, 2021. I reached this decision by considering the following issues:

- Is the Claimant's disability severe?
- Is the Claimant's disability prolonged?

Is the Claimant's disability severe?

[14] The Claimant's disability is severe. I reached this finding by considering several factors. I explain these factors below.

– The Claimant's functional limitations do affect her ability to work

[15] The Claimant suffered an MTBI (mild traumatic brain injury) in March 2018. According to Dr. Amoozegar (Neurology), she has PCS.⁴ Dr. Sirianni (Family Doctor) agreed.⁵ Dr. Pachet (Neuropsychology) offered diagnoses of severe somatic symptom disorder and major depressive disorder with anxious distress.⁶ However, I can't focus on the Claimant's diagnoses.⁷ Instead, I must focus on whether she has functional limitations that interfere with earning a living.⁸ When I do this, I have to look at **all** of her medical conditions (not just the main one) and think about how they affect her ability to work.⁹

⁴ GD9-21

⁵ GD7-2

⁶ GD7-114

⁷ See *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

⁸ See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

⁹ See *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

[16] I find that the Claimant has functional limitations.

– **What the Claimant says about her functional limitations**

[17] The Claimant says her medical conditions have resulted in functional limitations that affect her ability to work. These limitations are cognitive, physical, and emotional.

[18] Cognitively, the Claimant has decreased memory. She cannot recall information she has read. She also gets nauseous when reading. She has trouble following instructions, such as recipes. She can do small tasks only if she has no distractions. She gets lost with more complex tasks. She finds it hard to finish tasks, even if she paces herself, as she gets distracted or tired. She can only have short and simple conversations, or else she will get headaches. She cannot handle multiple people talking at once. She cannot eat meals with her family because there is too much noise and activity. Too much stimulation forces her to take a nap.¹⁰

[19] Physically, the Claimant still gets daily headaches. They are made worse by noise, activity, lighting, socializing, and eye movement. She often has dizziness, nausea, and imbalance. She gets dizzy when using stairs. Her noise and light sensitivity make her isolate in the basement. She can only look at a computer screen for 10 minutes before her symptoms flare: her neck hurts, her shoulders get heavy, and her eyes get tired. She must wear a hat and glasses when going to a store. She wears noise-cancelling headphones for 90% of the day (even while sleeping) to drown out her tinnitus. The tinnitus is constant and distracting. She has low energy. Fatigue is a big struggle for her, and minimal activity exhausts her. She must nap at least once a day, for anywhere from 20 minutes to 4 hours. Her sleep is interrupted each night due to pain. She wakes up sore every morning.¹¹

[20] Most of the Claimant's pain is in her neck, shoulders, jaw, and upper rib cage. When she looks up, her neck pain is aggravated. Lifting also increases her pain. Lying on her side or carrying groceries is painful for her. Sitting aggravates her rib pain. She

¹⁰ GD9-16 to GD9-17 and GD9-20

¹¹ GD9-18 to GD9-20

can sit for 20 minutes before it becomes uncomfortable. At most, she can stand for 10 minutes before she must start moving around.¹²

[21] Emotionally, the Claimant feels depressed most of the time. Physical symptoms affect her mood. If she goes out, she has to worry about getting a flare or being exhausted. She has daily anxiety, but it fluctuates depending on the day and on what is happening around her. She has no motivation or energy to shower and change her clothes: she only showers weekly, and changes her clothes every few days. She avoids socializing because her symptoms flare too much.¹³

[22] I found the Claimant to be credible. In my view, she would much prefer to be working. She used to lead a very active lifestyle. She loved her work and often put in long hours on evenings and weekends. She said she had a dream job. She consulted in addition to her regular job. In fact, she signed a new consulting contract on the day of her accident. Dr. Sirianni said the Claimant was very motivated to get better.¹⁴

– **What the medical evidence says about the Claimant’s functional limitations**

[23] The Claimant must provide medical evidence that shows her functional limitations affected her ability to work by October 12, 2021.¹⁵

[24] The medical evidence supports what the Claimant says. This evidence comes from the Claimant’s family doctor and specialists.

[25] In May 2021, Dr. Amoozegar said the Claimant’s primary disabling condition was PCS. Her cognitive and memory difficulties lead to poor comprehension and attention. She forgets things in stories or movies. She cannot read or concentrate for more than a few minutes at a time. She has trouble understanding anything complex or requiring steps. She cannot use a computer screen for more than 5-10 minutes. She cannot multi-task or navigate. Lights and noise aggravate her headaches. Lifting aggravates

¹² GD9-17 to GD9-20

¹³ GD9-19 to GD19-20

¹⁴ GD7-2

¹⁵ See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

her neck and shoulder pain. She is quickly fatigued and has to pace herself, even for simple activities of daily living.¹⁶

[26] In April 2021, Dr. Sirianni said the Claimant's primary disabling condition was PCS. She struggled with concentrating and focusing in any meaningful way. She also struggled with staying on task and multitasking. Screen time of 20 minutes makes her thinking "cloudy." Higher-level cognitive activities leave her confused and unable to grasp things. Her word-finding difficulty makes it hard to communicate effectively. She is easily overwhelmed in social settings. Her pain can leave her unable to concentrate.¹⁷

[27] Also in April 2021, Dr. Pachet's diagnosed the Claimant with major depressive disorder (with anxious distress) and severe somatic symptom disorder. While Dr. Pachet does not refer to PCS, and listed some cognitive strengths, the limitations he describes are still consistent with what the Claimant and the other doctors say. Dr. Pachet was concerned about the Claimant's tendency to become overwhelmed, negative, and self-injurious¹⁸ due to adversity, pressure and stress. He said these would impact her ability to work in even the most optimal and accommodating settings. Dr. Pachet said that symptoms such as fatigue, discouragement, low energy, and fluctuating interest would impact her work. He said her condition had undermined her ability to work and her vocational outlook was very poor.¹⁹

[28] These medical opinions all strongly support extensive functional limitations which prevent the Claimant from engaging in any significant work. The diagnostic differences are less important than the limitations she faces. I conclude that she could not do either her regular job or her consulting activities by October 12, 2021.

[29] Next, I will look at whether the Claimant followed medical advice.

¹⁶ GD9-21

¹⁷ GD7-2 to GD7-3

¹⁸ The Claimant has cut herself many times. See, for example, GD7-11.

¹⁹ GD7-115 to GD7-116

– **The Claimant has followed medical advice**

[30] To receive a disability pension, a claimant must follow medical advice.²⁰ If a claimant doesn't follow medical advice, then she must have a reasonable explanation. I must also consider what effect, if any, the advice might have had on her disability.²¹

[31] The Claimant has followed medical advice.²² She has seen many different care providers. She sees her family doctor regularly. In April 2021, Dr. Sirianni said the Claimant had been fully compliant with all treatment. She pursued many privately paid options to get better.²³ She even tried psychedelic medications under supervision, as she was "willing to try anything" at that time.²⁴ In May 2021, Dr. Amoozegar said the Claimant's motivation and compliance had been good. Any interrupted treatment was usually because of low tolerance or poor efficacy.²⁵ A few days before the hearing, the Claimant saw Dr. Montgomery at the Pain Centre.²⁶ She also still sees Dr. Mackie (Psychiatry). Dr. McGovern (Physical Medicine) noted that the Claimant's main concern was being able to access occupational therapy to improve her cognition and function.²⁷ Given this evidence, I also accept that the Claimant is highly motivated to improve.

[32] I now have to decide whether the Claimant can regularly do other types of work. To be severe, the Claimant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.²⁸

– **The Claimant can't work in the real world**

[33] When I am deciding whether the Claimant can work, I can't just look at her medical conditions and how they affect what she can do. I must also consider factors such as her:

- age;

²⁰ See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

²¹ See *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²² See *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

²³ GD7-2

²⁴ GD7-8

²⁵ GD9-21

²⁶ GD13-1

²⁷ GD7-29

²⁸ See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

- level of education;
- language ability; and
- past work and life experience.

[34] These factors help me decide whether the Claimant can work in the real world—in other words, whether it is realistic to say she can work.²⁹

[35] I find that the Claimant can't work in the real world.

[36] The Claimant is only 38 years old. Without considering her medical condition, she is highly employable. Early in her work career, she had service-oriented jobs in office and restaurant settings. She then earned a university degree in English Literature, Economics, and Spanish. She speaks English and Spanish fluently. She has extensive work experience in the regulatory sphere, particularly in the community relations sector. In that sector, she advanced rapidly and had two significant senior advisor jobs. She earned more than \$90,000.00 per year in her role at X. She could use her Spanish skills in that role, as X also had operations in the U.S.A. and Mexico. She worked as a community association manager in her latest role. She set up a consulting business on the side and had signed potentially lucrative contracts. She had lined up people to work under her for a contract signed the day of her accident. She had many useful connections in the industry.

[37] The Claimant's work opportunities would seem to be almost limitless, if it weren't for her medical condition. She would be a highly sought employee. Her receipt of multiple job offers after her accident proved this.³⁰

[38] Despite this bright outlook, the Claimant was unable to work. Shortly after the accident, she was offered a business development job. The Claimant said the accident left her unable to perform the job offered, but the employer then gave her an easier job. Alas, the Claimant could not do that job either. Reading comprehension was very hard,

²⁹ See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

³⁰ Job offers are mentioned in June 2018 (GD2-66), July 2018 (GD2-65), February 2019 (3 opportunities: see GD2-59), and June 2019 (GD2-57).

and she could not understand information. She forgot things from one sentence to the next. Lights and sounds were difficult. Even getting to work was a struggle.

[39] Starting in December 2018, she again tried self-employment in business development and government/public relations.³¹ By March 2019, she said she tried to take on a modified workload but had to stop. She was only focused on very limited relationship management.³² She said her ability to understand and retain things was greatly impaired, even when working from home.³³ In December 2019, she did about 30 minutes of computer work but it made her extremely fatigued.³⁴ In May 2020, Dr. Sirianni said they “tried to get her back to work” but she was only able to tolerate 20 minutes of screen time before she got overwhelmed and “fuddled” in her thinking.³⁵

[40] In March 2021, Dr. Sirianni said the Claimant’s self-employment plan never came to pass. Dr. Sirianni said her symptoms were “too debilitating and her cognition difficulties make it virtually impossible to sustain employment of any kind.” Dr. Sirianni added that repeated “attempts to develop skills where she could try some work from home were never successful.” She could not do any position that required sustained concentration or personal interaction. Dr. Sirianni concluded that she was “highly unlikely to achieve substantially gainful work of any sort.”³⁶ In April 2021, Dr. Pachet relayed that the Claimant tried some consulting work in 2018 but sent the work to someone else because she could not do it.³⁷

[41] At the hearing, the Claimant said X. offered her a contract after 2018. However, she could not figure out how to get to the initial meeting. After finally being picked up at her home, she could not gather information and complete the required documents. In 2019, she sold her rental property (at a big loss) because she was unable to manage it.

³¹ GD2-29

³² GD2-30

³³ GD2-59

³⁴ GD7-16

³⁵ GD7-14 and GD1-17

³⁶ GD4-11

³⁷ GD7-103

Later, at the start of the pandemic, she bought a 3-D printer to make face masks. Alas, despite struggling for months, she couldn't figure out how to do it correctly.

[42] While the Claimant's functional limitations leave her unable to work, she has made several attempts to work anyway. None of these attempts have succeeded, even those she tried from home and on her own schedule. She was unable to complete even an accommodated assignment from what may have been a benevolent former employer. The evidence shows that even the relatively simple restaurant and office jobs she did in her teens are now beyond her reach.

[43] I also find it unlikely that the Claimant can retrain for a different job. Her cognitive limitations are the main problem. They would prevent her from being able to complete and retain any training. Her physical limitations, while somewhat improved, would also interfere with successful training.

[44] I find that the Claimant's disability was severe by October 12, 2021.

Is the Claimant's disability prolonged?

[45] The Claimant's disability is prolonged.

[46] Although the Claimant had a pre-accident history of headaches, she was still able to work with them. Her disabling conditions really began with the accident in March 2018. These conditions have continued since then, and they will more than likely continue indefinitely.³⁸

[47] The recent medical evidence supports a prolonged disability. In May 2021, Dr. Amoozegar had seen much improvement in the Claimant's neck pain and headaches since the accident. However, he had not seen much improvement in her cognitive status. He also said cognitive dysfunction was her biggest problem.³⁹

³⁸ In *Canada (Attorney General) v. Angell*, 2020 FC 1093, the Federal Court said a claimant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v. Canada (Attorney General)*, 2011 FCA 318.

³⁹ GD9-21

[48] In April 2021, Dr. Sirianni said she hadn't seen any significant recent improvement in the Claimant's cognitive issues or pain that would make employment feasible.⁴⁰

[49] Also in April 2021, Dr. Pachet said the Claimant's mental health struggles, persisting somatic symptoms, poor coping, and personality traits had undermined her ability to work and made her vocational outlook very poor. Dr. Pachet seemed to offer more treatment options than the other doctors. In particular, he suggested significant mental health intervention. Nonetheless, even this was qualified. With effective treatment and an associated improvement in introspection, coping, and emotional resolve, he said the Claimant might become less symptom sensitive and her underlying personality traits could become less important. However, he admitted that lingering symptom sensitivity, emotional reactivity, and depressive and somatic qualities were most likely to remain.⁴¹

[50] In March 2021, Dr. Sirianni gave a more detailed opinion about the Claimant's prospects. Dr. Sirianni said it was clear the Claimant may never return to any work. Her symptoms were too debilitating and her cognition problems made it virtually impossible to sustain any type of work. Repeated attempts to develop skills for working from home were never successful. While she made some initial gains, it had been well over a year since any significant changes. Her recovery had plateaued and Dr. Sirianni did not see things improving much more.⁴²

[51] While Dr. Pachet and the other doctors diverge about the Claimant's diagnosis, none of them endorse a successful return to work in the foreseeable future.

[52] As noted above in the analysis of "severity", the Claimant's multiple work attempts have been unsuccessful. There are no current plans for another return to work. While her doctors have affirmed her desire to restore her work capacity, she also has not applied for any work since November 2019. She said she has been focused on

⁴⁰ GD7-3

⁴¹ GD7-116

⁴² GD4-11 to GD4-12

trying to recover, but has not been successful with that either. She added that she asks herself daily whether there is any job she could do. Despite wanting to work, she cannot identify any such job. As noted, I also accept her evidence (supported by the medical evidence) that she would rather work than be disabled.

[53] I find that the Claimant's disability was prolonged by October 12, 2021.

When payments start

[54] In the analysis above, I found that the Claimant's disability was severe and prolonged by October 12, 2021. However, I also find that the Claimant's disability became severe and prolonged in March 2018.

[55] The Claimant's accident was on March 9, 2018, although she continued trying to work until late March. On March 28, 2018, Dr. Sirianni described initial neck pain but also the development of new symptoms. These included occasional vertigo, continuous headaches (different from her previous ones), foggy/cloudy thinking, being easily distracted, and finding it hard to stay on track in conversations. She would forget why she was talking to someone. Even at that early stage, Dr. Sirianni suggested a diagnosis of PCS. Over the next few weeks, Dr. Sirianni also recorded severe light and noise sensitivity, limited screen time, and being quickly overwhelmed by social stimuli.⁴³

[56] I see little change in the Claimant's work capacity since those early days. In August 2018, for example, she was easily confused and had trouble with word finding and concentrating. She had to read things repeatedly.⁴⁴ In February 2019, her ability to understand and retain things was "greatly impaired."⁴⁵ In May 2019, she continued to struggle with cognitive dysfunction and memory problems. She also had headaches, mood changes, fatigue and reduced energy.⁴⁶ In May 2020, Dr. Sirianni thought it was not realistic for the Claimant to work at any type of job.⁴⁷

⁴³ GD2-68 to GD2-70

⁴⁴ GD2-65

⁴⁵ GD2-59

⁴⁶ GD2-79 to GD2-80

⁴⁷ GD7-14

[57] From time to time, the Claimant appeared to have some work capacity. In November 2019, for example, Dr. Amoozegar reported that her cognition and memory had improved to some extent. As a result, she was setting some goals for herself. These goals included studying for the LSAT⁴⁸ and maybe going to law school in the future.⁴⁹ I asked the Claimant about this. She said she was goal-oriented and needed a milestone that she could measure. She also said she had originally thought about the LSAT while still at university. She found the LSAT problems fun then. However, after the accident, she could not get through even one LSAT question.

[58] In any case, periods of hope did not last very long. In December 2019, shortly after setting the LSAT goal, the Claimant tried about 30 minutes of computer work but it caused extreme fatigue. At the same time, she found it difficult to drive because of multiple distractions.⁵⁰ I saw no further mention of the LSAT or law school. Dr. Amoozegar's May 2021 letter strongly suggests that she would not have been capable of pursuing them.⁵¹ As a result, I find that the Claimant would have been incapable regularly of pursuing any substantial occupation ever since her March 2018 accident.

[59] There is a four-month waiting period before payments start.⁵² This means that payments start as of July 2018.

Conclusion

[60] I find that the Claimant is eligible for a CPP disability pension because her disability is severe and prolonged.

[61] This means the appeal is allowed.

Pierre Vanderhout
Member, General Division – Income Security Section

⁴⁸ LSAT is the short form for the "Law School Admission Test."

⁴⁹ GD7-71 to GD7-72

⁵⁰ GD7-16

⁵¹ GD9-21

⁵² Section 69 of the *Canada Pension Plan* sets out this rule.