



Citation: *WF v Minister of Employment and Social Development*, 2021 SST 861

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant (Claimant): W. F.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 31, 2020 (issued
by Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Videoconference

Hearing date: December 15, 2021

Hearing participant: Appellant

Decision date: December 29, 2021

File number: GP-20-388

Decision

[1] The appeal is dismissed.

[2] The Claimant, W. F., isn't eligible for a Canada Pension Plan ("CPP") disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is 57 years old. She last worked on September 22, 2017. She was a personal support worker ("PSW") at X. She also worked up to April 2017 as a labourer for a temporary agency. She has had a complicated recent medical history. She had surgery on her right shoulder in May 2013. She aggravated her shoulder and suffered other injuries in an August 2013 car accident. She eventually returned to work after a long recovery period, but stopped working once she had surgery for uterine cancer in September 2017. She has had other cancer treatments, including radiation and chemotherapy, since then.

[4] The Claimant says her main symptoms now are brain fog, peripheral neuropathy (especially numbness), and an inability to stand for long periods. Her main symptoms are mostly connected to cancer and her subsequent treatment. She also reports swollen fingers and periodic shoulder pain.

[5] The Claimant applied for a CPP disability pension on December 3, 2018. 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.

[6] The Claimant said she enjoyed working before her medical concerns. She even did two jobs at the same time. She would still love to be working now, so that she could support and care for herself properly. She also says her long recovery from the August 2013 car accident had a big financial effect on her. Not working after her cancer treatment began (in September 2017) made her financial situation worse.

[7] The Minister says the Claimant could still do some type of work, even if she could not return to her PSW job. The Minister notes that the Claimant worked full-time after July 31, 2016, and her cancer symptoms only emerged after that date.

What the Claimant must prove

[8] For the Claimant to succeed, she would normally have to prove she had a disability that was severe and prolonged by December 31, 2015. This date is based on her CPP contributions.¹

[9] However, the Claimant had CPP contributions in 2016. While these were below the minimum amount the CPP accepts, they would also let the Claimant qualify for a pension if she became disabled between January 2016 and July 2016.² As a result, she would be entitled to a CPP disability pension if she proved that she had a severe and prolonged disability by July 31, 2016.

[10] The *Canada Pension Plan* defines “severe” and “prolonged.”

[11] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.³

[12] 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 could regularly do some type of work from which she could earn a living, she isn’t entitled to a disability pension.

¹ Service Canada 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 on GD2-89 and GD8-5. She also had some earnings in Barbados. The impact of those earnings is set out on GD2-5.

² See sections 19 and 44(2.1) of the *Canada Pension Plan*.

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

[13] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

[14] 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.

[15] The Claimant must prove she had a severe and prolonged disability by July 31, 2016. She must prove this on a balance of probabilities. This means she must show that it is more likely than not she was (and continues to be) disabled.

Matters I have to consider first

I accepted the documents filed shortly before the hearing

[16] Several documents were filed less than a month before the hearing. However, for the reasons set out below, I accepted all documents into the record.

[17] The Minister filed submissions on November 23, 2021 (indexed as "GD8"). However, GD8 was in response to documents filed by the Claimant and to my question about a possible prorated MQP date. The Minister also met my deadline for those submissions.⁵

[18] The Claimant filed new documents on December 3, 2021 (indexed as "GD9"). These documents were potentially relevant, so I accepted them. Despite the lateness of GD9, the Minister still managed to file submissions on them by December 10, 2021 (indexed as "GD10"). None of the late filings prejudiced the parties.

Reasons for my decision

[19] I find that the Claimant hasn't proven she had a severe and prolonged disability by July 31, 2016.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition.

⁵ See GD7-1. The Claimant's documents were in GD6.

Was the Claimant's disability severe by July 31, 2016?

[20] The Claimant's disability wasn't severe by July 31, 2016. I reached this finding by considering several factors. I explain these factors below.

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

[21] Dr. Chan (Family Doctor) prepared a medical report for CPP purposes in November 2018. Dr. Chan said the Claimant had uterine cancer with metastasis (causing pleural effusion), as well as osteoarthritis in her right knee.⁶ However, I can't focus on the Claimant's diagnoses.⁷ Instead, I must focus on whether she had functional limitations that interfered with earning a living.⁸ When I do this, I have to look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect her ability to work.⁹ I must also consider this ability as of July 31, 2016.

[22] I find that the Claimant had functional limitations by July 31, 2016, but these were far less extensive than what she said in her application and at the hearing.

– What the Claimant says about her functional limitations

[23] The Claimant says her medical conditions resulted in functional limitations that affect her ability to work. She says her cancer treatment significantly affected her thinking abilities. She complained of "brain fog", and noted issues with memory, focus, and irritation. She has trouble remembering simple things. She wants to be left alone. She cannot recall people's names or the correct words. She will forget to turn off the stove or get off at the right bus stop.

[24] The Claimant says the numbness in her feet affects her ability to stand for long periods. It also affects her ability to wear shoes. The numbness in her fingers affects her ability to document her work and use her hands with patients. She also reports swollen

⁶ GD2-125 to GD2-126

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.

fingers and periodic shoulder pain. Her knees buckle often. She has breathing trouble and fatigue. If she overdoes things, she can't get out of bed the next morning.

[25] I note that the Claimant's evidence focuses on the period after her first treatment for cancer. She worked up to September 22, 2017, which was only three days before her cancer surgery.

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

[26] The Claimant must provide medical evidence to show that her functional limitations affected her ability to work by July 31, 2016.¹⁰

[27] The medical evidence supports what the Claimant says, but only regarding her shoulders.

[28] The only medical evidence before July 31, 2016, relates to the Claimant's right shoulder. Except for one retrospective report, all that evidence is from late 2012 or early 2013. That evidence pointed to restriction of motion and pain in her right shoulder.¹¹ Her cancer diagnosis was not made until 2017. I see no medical evidence between May 2013 and September 2017.

[29] However, in November 2021, Dr. Balkansky (Chiropractor) wrote a retrospective report on the Claimant's shoulder problems. While this report was prepared long after July 2016, I considered its contents because it summarizes Dr. Balkansky's treatment of the Claimant from December 2013 to January 2017.¹²

[30] Dr. Balkansky said that, by the end of treatment, the Claimant still had some chronic functional impairments in her shoulders. She was advised to get help with the heavier physical tasks of her job. Those tasks included lifting more than 10 kg and performing any patient transfers. She was also advised to minimize any repetitive tasks

¹⁰ See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

¹¹ See GD6-2, GD6-3, GD6-5, and GD6-7.

¹² GD9-2

involving the shoulders and the upper back. Breaks were recommended, as needed, to accommodate any potential flare-ups.¹³

[31] I accept that the Claimant still had some limitations in her shoulders by July 31, 2016. However, I note that Dr. Balkansky thought she could still work as a PSW. Dr. Balkansky also prescribed a list of home exercises, but left further treatment to the Claimant's discretion and availability.¹⁴

[32] The medical evidence supports that the Claimant's chronic shoulder condition interfered with her doing the most physically demanding PSW tasks by July 31, 2016.

[33] I now have to decide whether the Claimant could 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.¹⁵

– The Claimant could work in the real world

[34] 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,
- level of education,
- language ability, and
- past work and life experience.

[35] These factors help me decide whether the Claimant could work in the real world—in other words, whether it is realistic to say that she could work.¹⁶

[36] I find that the Claimant could work in the real world by July 31, 2016.

[37] The Claimant was 52 years old at that time. She had completed a one-year college program in health care.¹⁷ She spoke English fluently. She started working as a

¹³ GD9-2

¹⁴ GD9-2

¹⁵ See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

¹⁶ See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

¹⁷ GD2-78

PSW in 2001. However, she had done other types of work. She had worked at a call centre. Many of her jobs involved office work: this included a full-time position entering special premiums for an insurance company, and various office work assignments from a temporary agency. Other temporary placements included working on an assembly line in a cookie factory. She had also been a clerical officer in many different public sector settings.¹⁸

[38] Without considering her medical conditions, the Claimant would have been suited for a broad range of jobs in health care, office work, and general labour. These jobs would have ranged from sedentary to physically demanding. Given her college education, she also would have been a candidate for further training.

[39] In November 2021, Dr. Balkansky said the most physically demanding aspects of the Claimant's PSW job were best avoided. But he still supported working in that role, although it was one of the most physically demanding jobs within her capabilities.¹⁹ She would also still have been capable of doing office work and labour that did not place heavy demands on her shoulders and upper back.

[40] The Claimant's real-world capacity was also shown by her return to work in late 2016. She worked as both a part-time labourer and a PSW. She stopped working as a labourer once she was again a full-time PSW.

– The Claimant tried to find and keep a job

[41] If the Claimant can work in the real world, she must show that she tried to find and keep a job. She must also show her efforts weren't successful because of her medical conditions.²⁰ Finding and keeping a job includes retraining or looking for a job that accommodates her functional limitations (in other words, a job with special arrangements).²¹

¹⁸ GD2-28

¹⁹ GD9-2

²⁰ See *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

²¹ See *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

[42] The Claimant made efforts to work. But these efforts don't show that her disability got in the way of earning a living before she started her cancer treatment in late September 2017.

[43] Most notably, the Claimant earned \$23,484.00 in the first 9 months of 2017.²² She worked full-time until Friday, September 22, 2017, at a relatively demanding job.²³ She had invasive surgery for cancer on Monday, September 25, 2017.²⁴ Although I see no contemporaneous evidence of when the cancer started, Dr. Chan later said that her cancer onset date was July 27, 2017. That was when he started treating her cancer condition.²⁵ Nonetheless, she continued working full-time for another two months. Dr. Chan only recommended that she stop working on September 24, 2017.²⁶

[44] Dr. Chan said the Claimant's main impairment was peripheral neuropathy. He said it was secondary to her chemotherapy treatment. She was also limited by pleural effusion, which arose when her uterine cancer spread. These impairments would not have existed before she stopped working.²⁷ She frequently referred to "chemo brain": this fogginess makes her forget a lot of things.²⁸

[45] Dr. Chan also gave a diagnosis of right knee osteoarthritis. This prevented prolonged standing or walking. However, Dr. Chan did not give an onset date for that condition.²⁹ Nor do I see any objective record of that condition before Dr. Chan mentioned it in November 2018.

[46] While the Claimant may not be able to work now, I cannot say that her conditions got in the way of earning a living before September 2017. In particular, for an extended period leading up to September 2017, she has not proven that she was "incapable regularly of pursuing a substantially gainful occupation." In fact, her earnings over the

²² GD8-5

²³ GD2-77

²⁴ GD2-130

²⁵ GD2-124 and GD2-125

²⁶ GD2-128

²⁷ GD2-125

²⁸ See, for example, GD2-30.

²⁹ GD2-126

first nine months of 2017 significantly exceeded the “substantially gainful” annual threshold set out in the CPP Regulations. An occupation is “substantially gainful” if it pays more than the maximum annual amount of a CPP disability pension.³⁰ In 2017, the maximum CPP disability pension was \$15,763.92. The Claimant earned 49% more than that in 2017, despite only working for nine months.

[47] Although the Claimant had some restrictions for physically demanding work, I find that she would have been capable of office work or other less demanding work. I also note that she worked full-time as a PSW for a private company, with some restrictions. I see no suggestion that her employer was benevolent during her return to work. It also appears that her employer could accommodate her restrictions until her active cancer treatment began. Finally, I heard no evidence that she was unable to work predictably or on a schedule.

[48] Therefore, I can’t find that the Claimant had a severe disability by July 31, 2016.

Claimant’s submissions

[49] The Claimant emphasized her financial difficulties since 2013. I have considerable sympathy for her. Her reduced 2013 income appears to have led to the loss of her home. She then received an unexpected cancer diagnosis a few years later. She now lives in an apartment with her daughter and her two grandchildren. However, the CPP disability pension is not based on financial need, nor is it a social welfare scheme.³¹ It is based strictly on meeting the disability test set out in the CPP.

[50] Nor are CPP disability benefits available to everyone. This is different from provincial disability programs such as Ontario’s ODSP. If the Claimant had made more CPP contributions between 2013 and 2016, she may well have qualified for CPP in September 2017. Her circumstances clearly affected her earning capacity from 2013 to 2016. She said she still would have paid into the CPP if not for her shoulder injury and the 2013 accident. Alas, the Tribunal is created by statute. The Tribunal can only grant

³⁰ Section 68.1 of the *Canada Pension Plan Regulations*.

³¹ *Granovsky v. Canada*, [2000] 1 S.C.R. 703.

remedies that it has the specific statutory authority to grant.³² I cannot grant a remedy that the legislation does not support.

[51] The Federal Court of Appeal recently commented on a similar situation. The court said many applicants for disability benefits are suffering by the time of the hearing, but many are unsuccessful. The court said this is no reflection on them or their condition. It is a reflection only of the difficult standard applicants must meet to demonstrate a severe and prolonged disability under the CPP. That standard includes proving a severe and prolonged disability by a specific date.³³

Conclusion

[52] I find that the Claimant isn't eligible for a CPP disability pension. Her disability wasn't severe by July 31, 2016. Because I found that her disability wasn't severe by then, I didn't have to consider whether it was prolonged.

[53] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section

³² *R. v. Conway*, 2010 SCC 22, at paragraph 82.

³³ *Gaudet v. Canada (Attorney General)*, 2013 FCA 254.