



Citation: *CB v Minister of Employment and Social Development*, 2021 SST 856

**Social Security Tribunal of Canada**  
**General Division – Income Security Section**

## **Decision**

**Appellant:** C. B.  
**Representative:** Paul Hosack  
**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated January 13, 2021 (issued  
by Service Canada)

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**Tribunal member:** Pierre Vanderhout  
**Type of hearing:** Videoconference  
**Hearing date:** November 10, 2021  
**Hearing participants:** Appellant  
Appellant's representative  
Appellant's witness  
**Decision date:** November 29, 2021  
**File number:** GP-21-848

## Decision

[1] The appeal is dismissed.

[2] The Claimant, C. B., 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 59 years old. While she admits having some limited home-based self-employment from 2008 to 2010, she says she last worked in June 1993. She was a crossing guard working 20 hours per week. She stopped working on June 7, 1993, just four days before her second child was born. She says her medical conditions date to 1983, when she awoke with "TMJ" pain in her jaw area. She now has a broad range of both physical and mental symptoms and conditions.

[4] The Claimant applied for a CPP disability pension on February 4, 2020. She said her conditions included chronic back pain, herniated discs, restless leg syndrome, bulging discs, an L-4 fracture, thoracic outlet syndrome ("TOS"), Piriformis syndrome, bone loss, osteoarthritis ("OA"), osteoporosis, permanent nerve damage in her right leg/foot and both hands, chronic fatigue, fibromyalgia ("fibro"), "TMJ", mixed muscle tension, migraines, irritable bowel syndrome, weight gain, anxiety, forgetfulness, lack of focus, confusion, menopause, high blood pressure, frequent colonoscopies, a heart murmur, and feeling sad and frustrated.<sup>1</sup> 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] In her Notice of Appeal, the Claimant said the Minister ignored Dr. Johnson's medical report of January 31, 2020, and did not apply the correct test set out by the Federal Court of Appeal in the *Villani* decision. The Claimant said the evidence supports a severe disability.<sup>2</sup> At the hearing, the Claimant said the lack of documents predating late 2003 does not preclude a finding that she was disabled by the end of 2000. She said medical records refer to her condition in 2000, and that chronic pain does not start

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<sup>1</sup> GD2-212 and GD2-213

<sup>2</sup> GD1-4. The *Villani* decision is *Villani v. Canada (Attorney General)*, 2001 FCA 248.

when it is diagnosed. She also said she was not capable of doing anything on a consistent basis. She wasn't even able to maintain self-employment on her own terms.

[6] The Minister said the Claimant didn't prove she had a severe and prolonged disability by her MQP date<sup>3</sup> at the end of 2000. The Minister pointed to her post-MQP work capacity, including earnings of \$15,648 in 2012 and 60-70 hours/week of caring for her grandson in 2016. The Minister also noted the lack of medical evidence until 2004 and the emergence of various conditions well after 2000. It was irrelevant that her condition worsened after her MQP date. The Minister also submitted that she should have been able to adjust to, or retrain for, suitable work.

## What the Claimant must prove

[7] For the Claimant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2000. This is based on her contributions to the CPP.<sup>4</sup>

[8] The *Canada Pension Plan* defines "severe" and "prolonged."

[9] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>5</sup>

[10] 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 is regularly able to do some type of work from which she could earn a living, then she isn't entitled to a disability pension.

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<sup>3</sup> This term is explained in the next footnote.

<sup>4</sup> 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 section 44(2) of the *Canada Pension Plan*. The Claimant's CPP contributions are on GD4-20. The CPP's child-rearing provisions also affect her MQP date. Her children's birth dates are on GD4-22.

<sup>5</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>6</sup>

[12] 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.

[13] 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 it is more likely than not that she is disabled.

## Reasons for my decision

[14] I find that the Claimant hasn't proven she had a severe and prolonged disability by December 31, 2000.

### Was the Claimant's disability severe?

[15] The Claimant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

#### – The Claimant's functional limitations didn't affect her ability to work by the end of 2000

[16] According to her family doctor, the Claimant has chronic back pain, cervical disc disease, and bilateral TMJ dysfunction.<sup>7</sup> However, I can't focus on the Claimant's diagnoses.<sup>8</sup> Instead, I must focus on whether she had functional limitations that interfered with earning a living.<sup>9</sup> 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.<sup>10</sup>

[17] I find that the Claimant didn't have functional limitations that affected her ability to work by the end of 2000.

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<sup>6</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

<sup>7</sup> GD2-451, GD2-452, and GD2-459.

<sup>8</sup> See *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

<sup>9</sup> See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

<sup>10</sup> See *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

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

[18] The Claimant says that her medical conditions have resulted in functional limitations that affect her ability to work.

[19] At the hearing, the Claimant said she began having TMJ issues in December 1983. Around 1986, she first had trouble with depression. This continued through the 1990s, when she was on medication for anxiety and depression. After the birth of her daughter in 1993, she began to have migraines and back pain. She said she didn't return to her crossing guard job because she could not handle standing for prolonged periods. Nor could she handle getting in and out of her car for four hours each day. She said she could only stand for 20 minutes in 1993, and her tolerance worsened as time went on. She said she was diagnosed with TOS, Fibro and OA in the 1990s. She also suffered from endometriosis and a bowel tumour in the 1990s.

[20] While the Claimant could care for her young children (born in 1992 and 1993) during this period, she said it was only thanks to help from her best friend (who lived upstairs), her husband, her mother, and her in-laws. In 1994, she could no longer lift her two-year-old son. She said she made most of the meals, but friends helped her with the housework. She could get a small amount of groceries, but not a full load. Her various physical symptoms also triggered depression, because she felt like a burden.

[21] The Claimant also described her functional abilities in 2000. She said she could walk a block to the corner store. If she walked further, the pain and exhaustion would prevent her from getting back home. She found sitting uncomfortable. While it would depend on the day, she would have been able to sit in an office chair for 30 minutes. She was still cooking for her family, as long as she could complete the meal within 20 minutes. On most days, she would need to have a nap for about 90 minutes because she was exhausted. She did not go out socially. She said she was still unable to return to her crossing guard job, or even any part-time job in 2000. While her migraines improved once she started taking Vioxx in 2001, her other problems remained.

[22] The Claimant's husband also gave evidence at the hearing. His description of her functional limitations around 2000 was similar. She couldn't sit for an hour. He said she

could not walk any distance. She could not stand long enough to be a crossing guard. She was “pretty much housebound” by 2000. Her problems were mostly physical, with her back and leg pain being dominant. She also had to stay in a dark room because of migraines. He did most of the household duties by the end of 2000.

*Comments on the evidence*

[23] More than 20 years have passed since December 31, 2000. I must consider this when assessing evidence given in 2021. I also see inconsistencies in the “retrospective” evidence. The Claimant affirmed that her only work after 1993 was her home-based self-employment from 2008 to 2010. In 2020, she said this lasted from March 2008 to June 2010.<sup>11</sup> However, I see objective references to work at other times.

[24] For example, in November 2005, she told Dr. Dost (Neurology) that her leg was uncomfortable “20 months ago ... while at work.”<sup>12</sup> At the hearing, the Claimant said this was a reference to doing housework. I have trouble accepting this. I do not see any credible reason for Dr. Dost to eliminate a reference to housework, particularly when he used the phrase “at work” rather than “doing work.” Another example is from March 2011, well after the Claimant says she stopped working. At that time, she told Dr. Kamath (Pain Specialist) that she had an online store on eBay.<sup>13</sup>

[25] The Claimant’s tax records show net business income of -\$2,519.00 in 2011.<sup>14</sup> This suggests continued business activity beyond June 2010. The tax records also show income of \$15,648 in 2012.<sup>15</sup> Both the Claimant and her husband said this income came from getting a Disability Tax Credit in 2012 from the Canada Revenue Agency. They said the credit was retroactive to 2002, and this resulted in one-time 2012 income of \$15,648. However, this is not how retroactive tax credits would work. Such credits would be applicable to the tax year in question. In any case, a tax refund is not treated

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<sup>11</sup> GD2-249

<sup>12</sup> GD1-421

<sup>13</sup> GD2-373

<sup>14</sup> GD2-284

<sup>15</sup> GD2-281

as income. It has already been subject to tax.<sup>16</sup> I further note that the 2012 income had income tax deducted from it, which suggests that it arose from work or an investment.<sup>17</sup>

[26] Similarly, the Claimant confirmed at the hearing that her entire work history consisted of being a crossing guard, working at the counter for a dry cleaner, doing various entry-level office jobs, and “one shift” of waitressing. However, her husband said that she had a job delivering pizzas. While I place little weight on it, her husband also said “she was an office manager when I met her.” This is quite different from doing entry-level office work.

[27] Other evidence from the Claimant was difficult to accept. I asked the Claimant about a July 2004 clinical note from Dr. Kursell (Family Doctor) that said the Claimant had “no time to exercise.”<sup>18</sup> The Claimant said “I have serious problems,” and this in turn limited her exercise capacity. She further explained that Dr. Kursell had a “very bad bedside manner.” Her responses did not address the content of Dr. Kursell’s note.

[28] The Claimant’s explanation for a March 2011 clinical note by Dr. Miller (Family Doctor) was also difficult to accept. Dr. Miller recorded that the Claimant “has been helping with construction for an apartment with [her] mother-in-law.”<sup>19</sup> The Claimant said her help was simply “hosting her for a cup of tea, to give emotional relief.” Similar to the “no time to exercise” response, I found this rather implausible given the wording of the clinical note. As with the previously discussed evidence from Drs. Dost and Kamath, I find it highly unlikely that Drs. Miller and Kursell would make those notes if they weren’t true.

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

[29] The Claimant appears to genuinely believe that her functional limitations affected her ability to work by 2000. However, the other evidence doesn’t support what the Claimant says. The earliest objective evidence is a clinical note from November 2003. It

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<sup>16</sup> I may take judicial notice of any laws of Parliament, including the *Income Tax Act*.

<sup>17</sup> GD2-282

<sup>18</sup> GD1-347

<sup>19</sup> GD2-372

says that the Claimant received a flu shot that day.<sup>20</sup> All the other objective evidence is from 2004 or later.

[30] At the hearing, the Claimant acknowledged the lack of evidence by the end of 2000. However, she said many later documents referenced her condition at or before the end of 2000. The following chart (the “Medical Chart”) sets out those references:

<u>Date</u>	<u>File location</u>	<u>Nature of reference</u>
March 18, 2004	GD1-401	Intermittent back pain for the last 12 years
February 13, 2005	GD1-408	Back pain since second pregnancy; diagnosed with TOS at the same time
March 28, 2006	GD1-436	Minor changes (in CT scan) explain the back pain
February 25, 2007	GD1-485	Had a hospital admission at age 25 for depression
June 12, 2008	GD1-24	Severe osteoporosis in spine (mild osteopenia in hip)
Nov. 13, 2008	GD1-33	Still having chronic pain. Chronic TMJ pain.
March 8, 2011	GD1-101	Chronic depression
March 10, 2011	GD1-102	TMJ pain since age 21; Fibro “for a long time”; “long-standing pain”

[31] I will discuss later why these references are not all helpful. Overall, however, the Medical Chart does suggest that the Claimant had some medical conditions before the end of 2000.<sup>21</sup>

[32] But even if the Claimant had medical conditions before the end of 2000, this is not (in itself) enough to support her claimed functional limitations by the end of 2000. She reported working right up to the birth of her second child in June 1993, but her reported TMJ pain, back pain, and depression all predate that. This strongly suggests that the existence of these conditions was not enough to prevent her from working. This is particularly true for her TMJ pain going back to about 1982: her 1982 income was much higher than her previous income, and she made qualifying CPP contributions yearly from 1982 to 1991.<sup>22</sup>

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<sup>20</sup> GD1-341

<sup>21</sup> . The March 2004 entry refers to intermittent back pain for the last 12 years (since 1992). The February 2005 entry mentions conditions during her 2<sup>nd</sup> pregnancy (to June 1993). The February 2007 entry refers to depression at age 25 (end of 1986). A March 2011 entry refers to TMJ pain since age 21 (end of 1982).

<sup>22</sup> GD4-20



[33] While the Claimant's CPP contributions show no formal employment after 1993<sup>23</sup>, she said she was the primary caregiver for her children (born in March 1992 and June 1993) to at least age 7.<sup>24</sup>

[34] I have also considered binding Federal Court decisions about the need for medical evidence in particular. The Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2000.<sup>25</sup>

[35] Some of these references in the Medical Chart are far too vague to conclude that functional limitations affected her ability to work by the end of 2000. For example, I do not find a 2011 reference to "chronic depression" helpful in showing functional limitations by the end of 2000. The same goes for a 2011 statement that she had Fibro "for a long time."

[36] The reference to "intermittent" back pain is also problematic. Without corroborating evidence, this could just as easily refer to pain that appears briefly once every several years. When the Claimant reported the intermittent back pain at the hospital in 2004, it had only been getting worse in the preceding 7-10 days.<sup>26</sup> Finally, it is not at all clear that her back pain prevented physical activity (or was caused by physical activity). In fact, her family doctor treated her at the hospital in 2004 and recommended that she become more active.<sup>27</sup>

[37] Ultimately, I do not find the combined Medical Chart references to be persuasive. Firstly, they are entirely self-reported by the Claimant. I have difficulty assigning much weight to "medical" evidence that is simply the patient's description of past events. It might be different if the Medical Chart entries from 2004 onward were based on earlier objective records from a care provider.

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<sup>23</sup> GD4-20

<sup>24</sup> GD2-211

<sup>25</sup> See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

<sup>26</sup> GD1-401

<sup>27</sup> GD1-402

[38] The Claimant also said the Minister ignored Dr. Johnson's medical report from January 31, 2020.<sup>28</sup> However, in that report, Dr. Johnson could not give the onset date of the Claimant's conditions. He could only say that two of them had onset dates "many years" before he started treating her. Dr. Johnson said he had only treated the Claimant for 1-2 years, with the first treatment in August 2017.<sup>29</sup> This evidence is too vague to help the Claimant.

[39] Without objective medical evidence before the end of 2000, I also have difficulty relying entirely on the Claimant's evidence. As noted earlier in this decision, I found inconsistencies and other issues with the retrospective evidence from the Claimant and her husband.

[40] In my view, the evidence (including the Medical Chart) doesn't show that the Claimant had functional limitations that affected her ability to work by December 31, 2000. She may have had medical conditions, but I am not persuaded that these resulted in functional limitations. As a result, she hasn't proven she had a severe disability.

[41] When I am deciding whether a disability is severe, I usually must consider a claimant's personal characteristics.

[42] This allows me to realistically assess a claimant's ability to work. This Federal Court of Appeal set this out in the *Villani* decision.<sup>30</sup>

[43] I don't have to do that here because the Claimant's functional limitations didn't affect her ability to work by December 31, 2000. This means she didn't prove her disability was severe by then.<sup>31</sup>

#### *Authorities cited by Claimant*

[44] Through her representative, the Claimant recognized that the lack of medical evidence up to November 2003 might be problematic. I was urged to consider some

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<sup>28</sup> This statement is at GD1-4. The medical report starts at GD2-447.

<sup>29</sup> GD2-450 to GD2-452 and GD2-459

<sup>30</sup> See *Villani v. Canada (Attorney General)*, 2001 FCA 248.

<sup>31</sup> See *Giannaros v. Minister of Social Development*, 2005 FCA 187.

previous decisions of the Pension Appeals Board. While such decisions are not binding on me, they can be of persuasive value.

[45] The first decision is called *McDonald*.<sup>32</sup> That decision says a person's cumulative mental and physical conditions must be considered when assessing disability under the CPP. I agree with the underlying principle in *McDonald*. However, I do not see how it assists the Claimant with the lack of medical evidence before the end of 2003.

[46] The second decision is called *Curnew*.<sup>33</sup> The Claimant says *Curnew* states that chronic pain syndrome does not start when a doctor puts a name on it. In turn, the onset date of chronic pain could be before the end of 2000 even if the doctor didn't name it until later. This aspect of the *Curnew* decision relies on *Thompson*<sup>34</sup>, another decision cited by the Claimant.

[47] Once again, I accept the underlying principle in *Curnew*. Even if the Claimant was not diagnosed with chronic pain syndrome until after 2000, she may still have had it by the end of 2000. However, this does not change the fact that there is no objective medical evidence before November 2003. Decisions of the Federal Court, such as those in the 2020 decision in the *Dean* matter<sup>35</sup>, are binding on me. The *Dean* decision affirms an earlier Federal Court of Appeal decision. That earlier decision imposed a duty to provide objective medical evidence of disability relating to the MQP date (December 31, 2000, in this case).<sup>36</sup>

[48] The Claimant also said she made efforts to obtain the medical records created before the end of 2003. She said that the records were eventually thrown out. I appreciate that obtaining medical records going back more than two decades is extremely difficult and perhaps even impossible. However, the *Dean* decision also

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<sup>32</sup> *MNHW v. McDonald*, (1988) CP 1527.

<sup>33</sup> *Curnew v. MHRD*, (2001) CP 12886.

<sup>34</sup> *Thompson v. Minister of Employment and Immigration*, CCH Employment Benefits and Pension Guide Reports (1996), No. 8621, pp. 6168-6169.

<sup>35</sup> See *Canada (Attorney General) v. Dean*, 2020 FC 206.

<sup>36</sup> See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.

involved unavailable medical records going back more than two decades. In *Dean*, the Federal Court declined to overlook the need for objective medical evidence.<sup>37</sup>

## Conclusion

[49] I find that the Claimant isn't eligible for a CPP disability pension. This is because her disability wasn't severe by December 31, 2000. As I found that her disability wasn't severe, I didn't have to consider whether it is prolonged.

[50] This means the appeal is dismissed.

Pierre Vanderhout  
Member, General Division – Income Security Section

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<sup>37</sup> See *Canada (Attorney General) v. Dean*, 2020 FC 206.