



Citation: *EB v Minister of Employment and Social Development*, 2021 SST 847

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: E. B.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated December 3, 2020 (issued
by Service Canada)

Tribunal member: Michael Medeiros

Type of hearing: Teleconference

Hearing date: October 20, 2021

Hearing participant: Appellant

Decision date: November 18, 2021

File number: GP-21-137

Decision

[1] The appeal is dismissed.

[2] The Claimant, E. 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 56 years old. She started working when she was 16. She worked many different jobs over the years, including more recently as a cleaner. She was diagnosed with oculopharyngeal muscular dystrophy (OPMD) in 2020. It causes muscle weakness and pain in her back, neck, shoulder, hips, buttocks, and legs. There are days when she has no balance and feels unbearable pain.

[4] The Claimant says she started feeling symptoms of her condition in 2013. It has gradually worsened since then. She didn't work for many years until August 2019, when she started working as a cleaner to help with the bills. In March 2020, she stopped working because she could no longer stand the pain.

[5] The Claimant applied for a CPP disability pension on September 18, 2020. 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 says that she has a grave illness that prevents her from working. She lived with these symptoms for many years. She saw many doctors to try to figure out what was wrong. It wasn't until 2020 that she discovered it was OPMD, but her symptoms and inability to work date back to 2013. She tried working in 2019, but she had to stop after seven months because of her condition.

[7] The Minister says that the Claimant hasn't proven that she was disabled by December 31, 2013. The evidence doesn't show any serious pathology or impairment that would have prevented her from doing suitable work within her limitations by December 31, 2013, and continuously after that. In fact, there is evidence that she worked after 2013.

What the Claimant must prove

[8] For the Claimant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2013. This date is based on her contributions to the CPP.¹

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

[10] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.²

[11] This means I have to look at all of the Claimant’s medical conditions together to see what effect they had 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 was severe. If the Claimant was able to regularly do some kind of work that she could earn a living from, then she isn’t entitled to a disability pension.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[13] 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.

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

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 section 44(2) of the *Canada Pension Plan*. The Claimant’s CPP contributions are at GD-5. An explanation of the calculation is found at GD9-12 to 15.

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.

Reasons for my decision

[15] I find that the Claimant hasn't proven she had a severe and prolonged disability by December 31, 2013.

Was the Claimant's disability severe?

[16] The Claimant's disability wasn't severe by December 31, 2013. 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

[17] The Claimant has OPMD and sleep apnea. However, I can't focus on the Claimant's diagnoses.⁴ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁵ 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 affected her ability to work.⁶

[18] I find that the Claimant hasn't proven that, by December 31, 2013, she had functional limitations that would have prevented her from working.

– What the Claimant says about her functional limitations

[19] The Claimant says that her medical conditions have resulted in functional limitations that affect her ability to work. The OPMD causes muscle weakness and pain in her back, neck, shoulder, hips, buttocks, and legs. There are days when she has no balance and feels unbearable pain. She has difficulty swallowing. Her sleep is poor. She says that her symptoms are getting worse and that, according to her doctor, her condition will only worsen.

[20] The Claimant says that she started feeling OPMD symptoms when she moved back to Newfoundland in May or June 2013. She felt weakness and pain in her neck,

⁴ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

shoulder, hip, buttocks, and legs. She says that her legs were bad and that she had very bad balance.

[21] The Claimant says that, in 2010, she stopped working because of unrelated medical issues that resulted in a hysterectomy in 2011. The surgery didn't go well. She had to take strong medication afterward. She didn't look for work at that time because of these issues.

[22] After moving to Newfoundland in 2013, she applied to work at various companies despite not really feeling able to work. She applied to four different home care companies to do light cleaning but was unsuccessful. She tried to find work until November 2013, when she started receiving social assistance. She believes that she received social assistance for at least three years.

[23] The Claimant moved to Alberta in 2018. She worked for seven months between August 2019 and March 2020. She worked full-time hours as a cleaner. She went to work because her family needed help with the bills. She didn't have the capacity to do it, but she pushed herself until she could not do it anymore.

[24] The work she did in 2019 to 2020 was very physically demanding. She had to stand and clean for most of her 8.5-hour shift with only 30 minutes for lunch and a 15-minute break. She would be drained and in pain by the end of the workday. On a scale of 1 to 10, her pain was a 9. The pain was mostly in her right hip and legs, but also in her neck and shoulder. Standing was a struggle. Sitting would help her leg pain, but then her hip would start to hurt. Her balance was also badly affected.

[25] The Claimant says that her condition is "50 times worse" now compared to 2013. It has been getting worse each year. She was able to do light housework in 2013. Now, she can't do any housework. She could also walk better and further in 2013.

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

[26] The Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2013.⁷

[27] There is no question that the Claimant is currently suffering with symptoms of a serious medical condition. However, the issue here is whether the evidence shows, on a balance of probabilities, that her medical condition was preventing her from working by the end of 2013.

[28] The medical evidence doesn’t support a finding that, by December 31, 2013, the Claimant’s OPMD made her incapable regularly of pursuing any substantially gainful employment.

[29] The Claimant may have started feeling symptoms of OPMD by the end of 2013. But, in my view, the medical evidence shows that it wasn’t until 2016 or 2017 that her condition created functional limitations that could have gotten in the way of her earning a living.

[30] Service Canada obtained the Claimant’s medical records for the period from January 1, 2013, to December 31, 2018.⁸ Between January 1, 2013, and September 1, 2016, there are records for only three visits to the Claimant’s local health centre. And none suggest she had symptoms that were causing severe functional limitations. Below is a summary of those records:

- **January 14, 2014** – Complained of general fatigue, memory loss. Sent for blood work.⁹

⁷ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁸ See ESDC Submission at GD7-2 to 3; and the medical documents for the period from 2013 to 2018 at GD8.

⁹ See the medical documents dated January 14, 2014, at GD8-6.

- **January 21, 2014** – Had follow-up appointment for blood work. Follow-up in six months.¹⁰
- **November 22, 2014** – Complained of right ear drainage from days prior. Also slipped/fell on floor. Was tender right side, elbow, and left knee, but had full range of motion.¹¹

[31] Her next visit to the doctor was on September 9, 2016. She visited the doctor three times in September 2016. Below is a summary:

- **September 9, 2016** – Complained of feeling tired, down, and of recent weight gain. It was noted that she was “still doing normal activity” and that her sleep was “okay.” A history of chronic back pain was also noted. Blood work was ordered.¹²
- **September 22, 2016** – Had follow-up appointment for blood work. She complained of headaches and leg swelling at times. Her mood was down. Relationship issues were noted. Medication was provided for hypertension.¹³
- **September 30, 2016** – Had follow-up appointment for hypertension. She reported no swelling in feet and no headaches. She was feeling better, and her mood had improved. She was to continue counselling for relationship issues.¹⁴

[32] The Claimant sought medical attention more often and with specific complaints of pain and physical limitations starting in September 2017. She visited the health centre more often, a CT scan and MRI were ordered, and she was referred to a specialist. The medical records noted complaints of back pain, decreased power and reflexes in her

¹⁰ See the medical documents dated January 21, 2014, at GD8-13.

¹¹ See the medical documents dated November 22, 2014, at GD8-7.

¹² See the medical documents dated September 9, 2016, at GD8-13.

¹³ See the medical documents dated September 22, 2016, at GD8-14.

¹⁴ See the medical documents dated September 30, 2014, at GD8-14.

right leg, and right gluteal (buttocks) atrophy.¹⁵ In November 2017, the Claimant reported having the atrophy for more than five years.¹⁶

[33] A physiotherapy assessment form dated October 23, 2017, described the Claimant's pain as "achy."¹⁷ The question "severe pain" was checked "no" on the form.¹⁸ At a December 18, 2017, appointment, the Claimant's back was noted to be painful at times.¹⁹ At a January 4, 2018, appointment, right neck and arm pain were noted, and her back was "still painful at times."²⁰ At an April 27, 2018, appointment, the Claimant's pain was noted to be stable, but bad off and on.²¹

[34] More recent medical reports also support the finding that the Claimant's symptoms didn't intensify until 2016 at the earliest. Dr. Rautenbach completed two reports in the fall of 2020 that included the "date of onset" for the Claimant's medical condition. The earliest date he listed was January 1, 2016.²²

[35] The medical evidence strongly supports the view that any symptoms in 2013 didn't cause functional limitations that would have prevented the Claimant from working. It doesn't look like she visited the doctor in 2013. Her visits in 2014 don't suggest severe pain and/or functional limitations. She didn't visit the doctor in 2015.

[36] By contrast, the Claimant sought frequent medical attention in 2017 and 2018 for pain that was causing physical limitations. This was well past December 31, 2013.

¹⁵ See the medical documents dated November 30, 2017, at GD8-28.

¹⁶ See the medical documents dated November 30, 2017, at GD8-28.

¹⁷ See the medical documents dated October 23, 2017, at GD8-38.

¹⁸ See the medical documents dated October 23, 2017, at GD8-38. At the hearing, the Claimant testified that the form was wrong and that "severe pain" should have been checked "yes" because she was in severe pain at the time.

¹⁹ See the medical documents dated December 18, 2017, at GD8-17.

²⁰ See the medical documents dated January 4, 2018, at GD8-18.

²¹ See the medical documents dated April 27, 2018, at GD8-20.

²² See the Attending Physician's Report dated October 22, 2020, at GD2-20; and Dr. Rautenbach's medical report dated September 24, 2020, at GD1-9. The Claimant says she thinks that 2018 was listed as a date of onset at GD1-9 because she told her doctor that her symptoms got worse in 2018. She says she told her doctor that her condition had been getting progressively worse since 2013. Concerning the 2016 date of onset mentioned at GD2-20, she disagrees that the form is legible enough to read the date as 2016.

[37] I don't doubt that the Claimant has been feeling symptoms of OPMD for some time, and perhaps as early as 2013. And I don't doubt that these early symptoms may have made it harder for her to work. However, the medical evidence doesn't show that she had functional limitations that made her incapable regularly of pursuing any substantially gainful occupation by December 31, 2013. As a result, she hasn't proven she had a severe disability.

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

[39] This allows me to realistically assess a claimant's ability to work.²³

[40] I don't have to do that here because the Claimant's functional limitations didn't affect her ability to work by December 31, 2013. This means she didn't prove her disability was severe by then.²⁴

Conclusion

[41] I find that the Claimant isn't eligible for a CPP disability pension because she hasn't proven that her disability was severe by December 31, 2013. Because I have found that her disability wasn't severe by that date, I didn't have to consider whether it was prolonged.

[42] This means the appeal is dismissed.

Michael Medeiros
Member, General Division – Income Security Section

²³ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁴ See *Giannaros v Minister of Social Development*, 2005 FCA 187.