



Citation: *VW v Minister of Employment and Social Development*, 2022 SST 685

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: V. W.
Representative: Vicki Doidge

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 23, 2020 (issued by
Service Canada)

Tribunal member: Tanille Turner

Type of hearing: Teleconference

Hearing date: December 16, 2021

Hearing participants: Appellant
Appellant's representative

Decision date: January 14, 2022

File number: GP-20-1480

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Appellant is 39 years old. She is college educated and has 16 years of experience working as a personal support worker (PSW). The Appellant stopped working after a motor vehicle accident on January 28, 2019. After the accident she was diagnosed with scoliosis which caused a curve in her spine, as well as depression, and chronic neck and back pain.

[4] The Appellant applied for a CPP disability pension on August 15, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says she cannot physically do the work of her job as a PSW. Her musculoskeletal pain in her neck and back affects her daily. She has problems sleeping, chronic headaches and has developed depression.

[6] She does not feel she is able to regularly carry on activity and cannot predict when she would need to rest or take a break. She says her recovery will never return her to 100% of what her function was before the accident.

[7] The Minister says the Appellant's doctor expected her to return to work and there is no evidence that the Appellant has tried to find work suitable to her limitations.¹ The Appellant was only taking vitamins and an iron supplement but not anything for her

¹ See GD3-5.

pain.² Even though the Appellant's prognosis for a full recovery and complete functional restoration was poor, she does not need to be completely pain free to be able to work.³

[8] It appears her psychological symptoms are made worse by situations and might improve with the resolution of some conflicts.⁴ The Minister also argues that not enough time has passed to show whether or not recommended treatments would benefit the Appellant.⁵

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she has a disability that is severe and prolonged by the hearing date.⁶

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

[11] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁷

[12] This means I have to look at all of the Appellant'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 Appellant is able to regularly do some kind of work that she could earn a living from, then she isn't entitled to a disability pension.

² See GD3-7.

³ See GD5-4.

⁴ See GD7-2.

⁵ See GD9-2.

⁶ Service Canada uses an appellant'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 GD2-6. In this case, the Claimant's coverage period ends after the hearing date, so I have to decide whether she was disabled by the hearing date.

⁷ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

[13] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁸

[14] This means the Appellant's disability can't have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

[15] The Appellant has to prove she has 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 is disabled.

Reasons for my decision

[16] I find that the Appellant hasn't proven she had a severe and prolonged disability by the hearing date of December 16, 2021.

Is the Appellant's disability severe?

[17] The Appellant's disability isn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affect her ability to work

[18] The Appellant has depression, scoliosis, pain and numbness in the upper arms, and generalized musculoskeletal pain in the neck and back.⁹ However, I can't focus on the Appellant's diagnoses.¹⁰ Instead, I must focus on whether she has functional limitations that get in the way of her earning a living.¹¹ When I do this, I have to look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affect her ability to work.¹²

[19] I find that the Appellant has functional limitations.

⁸ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

⁹ See GD2-18.

¹⁰ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹¹ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

¹² See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

[20] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says:

- She can only sit for an hour or two. She then has to walk or move around to relieve the pain in her back.
- She can't bend over because of the pain in her lower back.
- She can only stand for 20 minutes to an hour. This impacts how long it takes to clean her house and sterilize baby bottles. After an hour she has to sit down to rest.
- She can drive and be out of the house for no more than two or three hours at a time. But, she has to use heated seats in her car to relieve her back.
- She can't lift heavy weights. She can lift her daughter who weighs 23 pounds but only to take her in and out of her high chair. If the Appellant over exerts herself, she passes out.
- She can't take the garbage out. She has to take out one small grocery bag's worth of garbage at a time or get her older children to help her with larger ones.
- She can't exercise the way she used to before her accident. She can no longer run, jog, swim, row, go camping. She doesn't have the energy to do these things.
- Her depression affects her energy. She is always tired and wants to sleep more. She takes a nap during the day when her youngest children do.

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

[21] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by December 16, 2021.¹³

[22] The medical evidence supports what the Appellant says.

¹³ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

- ***Medical evidence supporting the Appellant's physical condition***

[23] An MRI from January 30, 2019 shows the Appellant has mild thoracolumbar scoliosis.¹⁴ The Appellant says this curve in her spine was developed from the impact of her car accident.

[24] The Appellant had a chronic pain assessment on March 11, 2020 by Dr. Karmy, a chronic pain physician. He wrote about the Appellant's chronic headaches and chronic widespread musculoskeletal pain in her neck, shoulders and lower back. The headaches were an eight out of ten in severity and sometimes came with dizziness.¹⁵

[25] The Appellant's neck pain was also an eight out of ten in severity. This pain traveled to both shoulders. She also complained of tingling and weakness in both arms sometimes. Her shoulder pain affected her ability to lift, carry, push, pull and reach overhead.¹⁶

[26] Her lower back pain was constant and also rated as an eight out of ten in severity. It was made worse by:

- bending forward
- heavy lifting and carrying
- standing
- walking¹⁷

[27] The Appellant reported getting 3 to 4 hours of sleep a night. It is difficult for her to fall asleep and stay asleep. Her depression also contributes to her fatigue. Dr. Karmy said that the Appellant was frustrated by her chronic pain and her irritability and mood problems affect her relationships. She is also anxious when in a car either as the driver or passenger.¹⁸

¹⁴ See GD2-133.

¹⁵ See GD4-104.

¹⁶ See GD4-105.

¹⁷ See GD4-105.

¹⁸ See GD4-105.

[28] Dr. Karmy said that the Appellant's prognosis for a full recovery, complete functional restoration and being pain free is poor.¹⁹

- ***Medical evidence supporting the Appellant's mental condition***

[29] A psychiatry consultation note from Dr. Santher from November 2020 diagnosed the Appellant with major depressive disorder, in partial remission; chronic pain, and problems related to the children and ex-partners. He said the Appellant is not fit to be employed and that this would likely be true indefinitely.²⁰ He also said that she had depression the last three or four years and was treated for it in Toronto.²¹

[30] The Appellant says that she has been depressed since the accident because of her limitations and the fact that she had to stop working. She worked a majority of her life and now can't go back. She doesn't have the strength to be a PSW anymore. This makes her sad and she cries easily because of it.²² She says that she is not going to harm herself or anybody else.

[31] The Minister mentioned in its arguments that Dr. Harb did not describe any of the Appellant's mental health issues that led to his recommendation for a psychological evaluation.²³

[32] However, the Psychological Assessment Report completed on December 19, 2019 by Dr. Sadeghi, a clinical psychologist shows a diagnosis of adjustment disorder with mixed anxiety and depressed mood and somatic symptom disorder.²⁴

[33] He said the Appellant had a significant tendency to catastrophize her pain problems and perceived her disability to fall into the range of severe to extreme.²⁵ Despite these findings, Dr. Sadeghi said the Appellant's prognosis was fair because she

¹⁹ See GD4-111.

²⁰ See GD6-5.

²¹ See GD6-4 to 5.

²² See GD2-24.

²³ See GD3-5.

²⁴ See GD2-32.

²⁵ See GD2-29 to 30.

had no psychotic symptoms or thought disorder. The Appellant also had a high motivation to recover.²⁶

[34] The medical evidence supports that the Appellant's chronic pain and depression prevented her from participating in physical activities and working as a PSW by December 16, 2021.

[35] Next, I will look at whether the Appellant followed medical advice.

– **The Appellant hasn't followed medical advice**

[36] The Appellant hasn't followed medical advice.

[37] To receive a disability pension, an appellant must follow medical advice.²⁷ If an appellant doesn't follow medical advice, then she must have a reasonable explanation for not doing so. I must also consider what effect, if any, the medical advice might have had on her disability.²⁸

[38] The Appellant says that her youngest child was one and a half years old at the time of the hearing. She was still breastfeeding this child. Her second youngest child will be four years old in March. She also has two older children who are 15 and 19 years old. The Appellant is divorced and has custody of all four of her children.

[39] The Appellant has prioritized appointments for her young children over her recovery.

[40] Multiple reports have recommended cognitive behavioural therapy (CBT) or some form of psychological counselling to help the Appellant's depression.

[41] In the medical report supporting the Appellant's application for CPP benefits in August 2019, her family doctor, Dr. Harb, said that she may benefit from a psychological

²⁶ See GD3-32.

²⁷ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁸ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

evaluation.²⁹ Dr. Harb seconded his recommendation for CBT in February 2020 in a medical report related to the Appellant's disability claim with Sun Life Financial.³⁰

[42] A December 2019 report from Dr. Sadeghi said that the Appellant's mental impairments contribute to her pain. She would benefit from CBT for anxiety, depression, somatic symptom disorder and pain. Dr. Sadeghi goes on to say that the Appellant is unlikely to recover without paying sufficient attention to her psychological functioning. She therefore requires a minimum of 12 one-hour sessions of psychotherapy to help address her condition.³¹

[43] There is little evidence of the Appellant attending psychotherapy regularly. She said that she did go to therapy in 2019 but couldn't remember how many sessions she attended.

[44] At her psychiatry consultation, Dr. Santher gave a provisional diagnosis of major depressive disorder in partial remission. There was no plan for follow-up after their consultation in November 2020.

[45] The Appellant said she ultimately stopped going to psychotherapy in 2019 after attending for a few months because she got pregnant with her youngest child.

[46] When I probed her for more details about why her pregnancy made her stop going to psychotherapy, she said that she went to some appointments but that the medical appointments for her two young children got in the way.

[47] There was no way to handle their check-ups and hers. It exhausted her having to drive to and from the appointments, getting her kids in and out of the car and get back home again within two to three hours. For these reasons she has canceled many of her own medical appointments to take her children to theirs.

²⁹ See GD2-121.

³⁰ See GD4-86.

³¹ See GD2-33 to 34.

[48] I understand the Appellant's desire to prioritize her children's health. However, I don't accept her explanation for discontinuing her own care as reasonable. The medical evidence already discussed shows that receiving psychotherapy could have helped both the Appellant's mental and physical condition.

[49] The Appellant said she sees Dr. Harb and her OB/GYN, Dr. Newicki, every one and a half to two months. These purpose of these appointments is a combination of check ups for herself and check ups for her young children. She regularly sees Dr. Newicki about an infection from her C-section with her youngest child that is still being monitored.

[50] It would be reasonable to expect that if the Appellant is capable of going to the doctor every other month, she could also schedule appointments for psychotherapy on a similar or alternating schedule. This could have made a difference in her condition.

[51] It was also recommended the Appellant do physiotherapy to help with her pain symptoms.³²

[52] It is documented that the Appellant stopped physiotherapy in August 2019, but it is unclear from the medical evidence as to why.³³ She became pregnant that month but there is no medical evidence to show that physiotherapy would have been bad for her pregnancy.

[53] The Appellant says that she was encouraged to put her physiotherapy on hold during her most recent pregnancy. The Appellant saw Dr. Khan in her third trimester in March 2020. He recommended she continue with physiotherapy a few months after her pregnancy ends. However, there is no medical evidence in this report or others to show that Dr. Khan told the Appellant to stop going to physiotherapy earlier in her pregnancy.³⁴

³² See GD2-22.

³³ See GD2-120.

³⁴ See GD4-91.

[54] The Appellant says she does seven to eight minutes of stretching every morning before getting up to start her day.

[55] She also said that no treatment, including the physiotherapy, was not going to make her scoliosis go away.

[56] The Appellant made it clear throughout the hearing that she believes that no treatment will return her to the person she was before her accident. Any medication will only temporarily mask pain and provide comfort. Physiotherapy will help her physically, but not fix her condition totally. She has shown a disinterest in continuing these treatments, saying in her testimony that they don't matter because it's not going to give her a full recovery.

[57] The Minister says that the Appellant doesn't need to be completely recovered to be able to work. I agree. I don't find it reasonable not to pursue treatment that may provide some benefit and potentially enough benefit to be able to pursue substantially gainful employment.

[58] The Appellant has also made it clear that she is not comfortable taking any medication while breastfeeding her youngest child. The Appellant said no doctor would prescribe medication while breastfeeding or pregnant. While I respect the Appellant's choice, the medical evidence doesn't support this belief.

[59] An undated progress note from Dr. Harb mentions that the Appellant declined anti-inflammatory medication because she was breastfeeding and also refused an antidepressant.³⁵

³⁵ See GD4-115.

[60] The Appellant provided a report from Pain Care Clinics dated March 1, 2021. In it, Dr. Kamawi acknowledged that the Appellant wasn't interested in medication because she is breastfeeding. However, the following list of medications to try if her pain relief was inadequate:

- Tylenol Extra Strength
- NSAIDs
- Baclofen and Flexeril muscle relaxants
- Lyrica and gabapentin
- Cymbalta
- Opioids and narcotics as a last resort.³⁶

[61] This tells me that medications were offered to the Appellant by two different doctors, despite the fact that she was breastfeeding.

[62] The Appellant declined to take any of these medications. She made it clear in her testimony that she was only comfortable taking a multivitamin and treating her pain naturally while breastfeeding. The Appellant treats her pain with hot baths and showers, heated bean bags and a water pillow.

[63] It is reasonable for a parent to feel uncomfortable taking medication while breastfeeding. However, I disagree with the Appellant when she says no doctor would prescribe medication to a breastfeeding parent. These treatments were offered to her while she was breastfeeding. They could also be tried when she stops.

[64] The Minister also argues that not enough time has passed to show whether or not recommended treatments would benefit the Appellant.³⁷ I agree. The Appellant has said that she would be willing to take medication after she has weened her daughter.

³⁶ See GD8-5.

³⁷ See GD9-2.

[65] She is currently allowing her daughter to decide when to delatch so there is no expectation of when that can happen or she when can resume some of her treatment options.

[66] I sympathize with the Appellant and how difficult it is to raise four children as a single mother. However, I don't find it reasonable that she has not made a stronger effort with her own appointments or followed medical advice.

[67] I must now consider whether following this medical advice might have affected the Appellant's disability. I find that following the medical advice might have made a difference to the Appellant's disability.

[68] The Medical report from Dr. Harb and the Appellant's application for benefits show different dates for when the Appellant took over the counter pain medication. Dr. Harb says she took Advil from August to November 2019 with some relief.³⁸ The Appellant says in her application that she took Advil or naproxen and Tylenol when needed from January 2019. Both of these medications provided some relief.³⁹

[69] This shows me that had there was potential for medication to make a difference in the Appellant's functionality.

[70] Although there were strong recommendations for the Appellant to attend CBT, there is no evidence of her attending regular therapy sessions or her progress. Therefore, I cannot consider its effectiveness.

[71] The Appellant didn't follow medical advice that might have affected her disability. This means that her disability isn't severe.

[72] When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics. This allows me to realistically assess an appellant's ability to work.⁴⁰

³⁸ See GD2-120.

³⁹ See GD4-57.

⁴⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

[73] I don't have to do that here because the Appellant didn't follow medical advice and didn't give a reasonable explanation for not following the advice. This means she didn't prove that her disability was severe by December 16, 2021.⁴¹

Conclusion

[74] I find that the Appellant isn't eligible for a CPP disability pension because her disability isn't severe. Because I have found that her disability isn't severe, I didn't have to consider whether it is prolonged.

[75] This means the appeal is dismissed.

Tanille Turner
Member, General Division – Income Security Section

⁴¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.