Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *CH v Minister of Employment and Social Development*, 2021 SST 432

Tribunal File Number: GP-19-2011

BETWEEN:

C. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by:	Tyler Moore
Claimant represented by:	Jennifer Langille
Teleconference hearing on:	February 4, 2021
Date of decision:	February 12, 2021

DECISION

[1] The Claimant, C. H., is not eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant last worked as a full-time Continuing Care Assistant (CCA) at the X from 2003 until December 2014, when she had a car accident. She indicated that she could no longer work as of that time because of a right foot fracture, right hand injury/fracture that required surgery, and post-traumatic stress disorder (PTSD).

[3] The Claimant applied for a CPP disability pension on July 6, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because the evidence did not support that her limitations precluded all forms of work.

[4] The Claimant previously applied for a CPP disability pension on February 10, 2016. The Minister refused her application initially, and the Claimant did not request a reconsideration of that decision.

WHAT THE CLAIMANT MUST PROVE

[5] For the Claimant to succeed, she must prove that she had a disability that was severe and prolonged by December 31, 2016. This date is based on her contributions to the CPP.[1]

[6] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.[2]

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[1] The *CPP* calls this date the 'Minimum Qualifying Period.' See s. 44(2).
[2] The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove that they are disabled on a balance of probabilities. In other words, they must show that it is more likely than not that they are disabled.

THE REASONS FOR MY DECISION

[7] I find that the Claimant did not prove that she had a severe and prolonged disability by December 31, 2016. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant's functional limitations did not preclude all work

[8] My decision about whether the Claimant's disability was severe is not based on her diagnoses. It is based on whether she had functional limitations that prevented her from working.[3] I have to look at her overall medical condition and think about how her health issues might have affected her ability to work.[4]

[9] I found the Claimant to be generally credible. She did, however, have some difficulty recalling treatment timelines and separating her 2014 car accident injuries from those that were caused by her 2017 accident. For that reason, I have placed more weight on the medical evidence contained in the Hearing File. I must also be mindful that the second car accident happened after the important date of December 31, 2016, so I cannot consider the impact of that accident.

[10] The Claimant argues that the December 2014 accident caused a right ankle/heel fracture, a right hand fracture that needed surgery, whiplash, and anxiety/depression. She reported that she was laid up in bed for nearly 4 months after the accident and then progressed from needing a walker to a cane.

[11] The Claimant had not fully recovered by the time of her December 2017 accident. On her current application that was received in July 2018, she noted that she had a hard time sitting and walking more than 30 minutes, especially walking over uneven surfaces. She had flares of pain/burning/tingling that could happen at any time, even while sitting. She also walked with a limp, and could drop heavy things from her right hand.

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[3] *Klabouch v. Canada (A.G.),* 2008 FCA 33; *Ferreira v. Canada (A.G.),* 2013 FCA 81
[4] *Bungay v. Canada (A.G.*), 2011 FCA 47

[12] In December 2016, the Claimant could drive short distances. She relied on her husband to do the outside maintenance of the home. He also helped with the housekeeping and cooking. The Claimant could do some dishes, sweep, and vacuum in moderation. She sat on a stool while working in the kitchen or folding laundry. She described that her memory and concentration were poor. Her family and close friends still came to visit her, and she also enjoyed camping in her trailer.

[13] The medical evidence from the Claimant's various family doctors, Dr. Dunsinger, Dr. Karabatsos, and Ms. Taylor does not support her argument that she was precluded regularly from any substantially gainful work by December 31, 2016.

[14] In June 2016, the Claimant's family doctor reported that the plan was to start a 10-week functional restoration program to get the Claimant back to work.

[15] In July 2016, Dr. Koshi, physical medicine, reported that the Claimant's main complaint was right foot pain, aching, and throbbing. Walking, bending, climbing stairs, curbs, and sidewalks aggravated it. The Claimant could look after herself, and she was encouraged to put more effort into challenging her ankle and walking.

[16] In July 2017, Dr. Karabatsos, orthopedic surgeon, reported that the Claimant was disabled with respect to heavier pre-collision daily living tasks and heavy lifting or bending/twisting, as well as increased pressure on her right foot/ankle. While she was not physically fit to return to full-time work as a CCA, it was felt that she was physically fit to perform the substantial duties of full-time sedentary work.[5]

[17] In July 2017, a transferable skills analysis by Ms. Taylor, occupational therapist, notes that the Claimant had no difficulty with personal care, she was responsible for meal preparation at home, and she was able to complete the majority of the home maintenance.

[18] In October 2019, Dr. Ohson, family doctor, reported that the Claimant's December 2017 accident resulted in physical injuries and post-traumatic stress disorder that continued to contribute to her inability to return to work. She had difficulty with concentration and mental

[5] This can be found in the Hearing File at GD6-154

tasks, intrusive thoughts, and limited energy. Dr. Ohson was of the opinion that she could not work because of severe mental disease. The report, however, was written almost three years after December 31, 2016 date, and well after the second car accident.

[19] In June 2019, Dr. Dunsinger, psychologist, reported that the Claimant suffered from psychological injuries from her car accidents, but in particular the December 2017 accident. It was only after the December 2017 accident that she was diagnosed with post-traumatic stress disorder. Dr. Dunsinger went on to note that the Claimant's past issues with adjustment disorder and depression following the December 2014 accident made her more vulnerable to psychological problems after her second accident.

[20] Any significant deterioration in the Claimant's health condition after December 31, 2016 is not relevant in my assessment of her capacity to work as of that time. While I accept that she had not fully recovered physically and psychologically from her December 2014 accident by December 31, 2016, the medical evidence does not support that her limitations precluded her regularly from any substantially gainful work as of that time.

The Claimant retained work capacity as of December 31, 2016

[21] When I am deciding if the Claimant is able to work, I must consider more than just her medical conditions and their effect on functionality. I must also consider her age, level of education, language proficiency, and past work and life experience. These factors help me to decide if she can work in the real world.[6]

[22] The Claimant was relatively young at 42 years old in December 2016. She was fluent in English, graduated from high school, and completed a CCA diploma in 2004. She had experience working in a fish factory, as a housekeeper, as a tour guide, and as a CCA. I find that she had some transferable skills. She also had basic computer knowledge.

[23] The Claimant's last job as a full-time CCA was physically demanding and fast paced. It involved being on her feet all day, lifting, reaching, bending, and twisting. I accept that she may not have been able to meet the demands of full-time CCA because of her limitations. I find,

[6] The Federal Court of Appeal held that the severe part of the test for disability must be assessed in the real world context (*Villani v. Canada (Attorney General*), 2001 FCA 248).

however, that despite some limitations, she was relatively young, she had some transferable skills, and all of that made her a good candidate for re-training or for more desk-type accommodated work.

[24] The Claimant has not looked for, or attempted, any work or re-training since December 2014. Based on the Claimant's limited work effort and the medical recommendations for sedentary work, I am not convinced that her health condition rendered her unable to obtain and maintain even part-time by December 31, 2016. In April 2017, Dr. Teeluckdharry reported that the Claimant did not want to consider other jobs because she still wanted to work again as a CCA. The test, however, is whether the Claimant retained the capacity regularly for any substantially gainful work, and not just could she return to her previous job.

The Claimant's treatment was conservative and not exhaustive by December 31, 2016

[25] The Claimant made reasonable efforts to follow medical advice, but she had not exhausted all recommended treatment by December 31, 2016.[7]

[26] The Claimant has tried using custom foot orthotics and compression stockings. She has a TENS machine at home. She last attended physiotherapy around 2019. She had not participated in a functional restoration program, tried Cymbalta, or had trigger point/guided back injections[8]. According to clinical notes from the Claimant's family doctor, the Claimant was apprehensive about going through with the functional restoration program that her physiotherapist recommended.

[27] A transferable skills analysis dated July 2017 listed the Claimant's medications as Dilantin, for longstanding epilepsy, and Lyrica. She only took Citalopram and Lyrica for a few months before stopping because of side effects. She submitted that she was also taking Naproxen in December 2016. She is currently taking Dilantin, Ativan, Tylenol, Paxil, and Naproxen.

[28] In April 2016, Dr. Ohson's noted that the Claimant's depression was well managed with Citalopram. By June 2016, she only required Ativan sparingly for anxiety. She had also only

[7] The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General*), 2018 FCA 48
[8] This can be found in the Hearing File at GD2-128.

needed one refill of that medication since January 2015. Dr. Ohson also confirmed in his February 2019 clinical notes that the Claimant's post-traumatic stress disorder was because of the December 2017 accident, and not the one in December 2014. This does not support that the Claimant was suffering from a severe mental health condition by December 31, 2016.

[29] The Claimant was first referred for psychotherapy in 2015. She testified that she went to counseling with a Ms. Teed before her second car accident. Ms. Teed's clinical notes, however, show that the Claimant did not start any counseling until January 2018, or after her second car accident. She only saw Ms. Teed 5 or 6 times. Dr. Ohson confirmed this in his February 2019 clinical notes. She also saw a psychologist, Dr. Dunsinger, but not until 2018. She attended therapy every few months.

[30] Apart from Paxil that was started in 2018, the Claimant is not currently having any treatment for her mental health. For her physical condition, she takes medication, sees an osteopath every few months, and sees a massage therapist every 4 to 6 weeks. She does not follow-up with any other specialists. In December 2016, the Claimant's treatment remained conservative and was not exhaustive.

THE CLAIMANT'S DISABILITY WAS NOT SEVERE

[31] The Claimant's disability was not severe by December 31, 2016. This means that I do not need to decide whether her disability was prolonged.

CONCLUSION

[32] I am dismissing this appeal.

Tyler Moore
Member, General Division - Income Security