



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *RS v Minister of Employment and Social Development*, 2021 SST 126

Tribunal File Number: GP-20-1584

BETWEEN:

R. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: February 23, 2021

Date of decision: February 25, 2021

Decision

[1] The Claimant, R. S., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of July 2017. This decision explains why I am allowing the appeal.

Overview

[2] The Claimant is 57 years old. She stopped working as a health care aide in March 2016 when she injured her knee at work. The Claimant says she is unable to walk or stand more than 10 minutes without pain and all of her activities are limited because of pain.

[3] The Claimant applied for a CPP disability pension on June 20, 2018.¹ The Minister of Employment and Social Development (Minister) refused her application because the medical evidence did not show that she had a disability under the CPP. The Minister also believed that while the Claimant may not be able to return to her work as a health care aide, she had capacity for some other type of work. The Claimant appealed that decision to the Social Security Tribunal's General Division. The Claimant's daughter I. S. was a witness at the Tribunal hearing.

What the Claimant must prove

[4] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2019. This date is based on her contributions to the CPP.²

[5] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.³ It is

¹ The application is at GD 2-12.

² Service Canada uses a person'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 subsection 44(2) of the *Canada Pension Plan*. The Claimant's CPP contributions are on GD 2-34.

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

prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

[6] The Claimant has to prove it is more likely than not she is disabled.

Reasons for my decision

[7] I find the Claimant has a disability that was severe and prolonged by December 31, 2019. I reached this decision by considering the following issues.

The Claimant's disability was severe

The Claimant's limitations do affect her ability to work

[8] The Claimant has diabetes, anxiety/depression and knee arthritis.⁵ My focus though is not on the Claimant's diagnosis.⁶ I must focus on whether she had functional limitations that got in the way of her earning a living.⁷ This means I have to look at all the Claimant's medical conditions (not just the main one) and think about how her conditions affect her ability to work.⁸

[9] I find the Claimant's anxiety/depression and diabetes do not interfere with her ability to work. I say this because Dr. Sarai (family physician) identifies no functional limitations because of the Claimant's diabetes at the time of her MQP.⁹ Also, the Claimant is not in psychiatric or any psychological treatment and her anxiety/depression has been treated with Escitalopram since 2019.¹⁰ The Claimant said she found this medication was effective.

[10] However, I do find the condition of knee arthritis interferes with the Claimant's ability to work. Here is what I considered.

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

⁵ The family doctors' diagnoses are at GD 2R-98 and GD 2R-49.

⁶ The Federal Court of Appeal said this in *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.

⁷ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

⁸ The Federal Court of Appeal said this in *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

⁹ Dr. Sarai's October 2019 report is at GD 2R-49

¹⁰ This is in the clinic notes at GD 2R-66.

What the Claimant says about her limitations

[11] The Claimant says she has limitations from her knee arthritis that affects her ability to work in the following ways.

- She has severe pain in both of her knees when she is sitting, standing or walking;
- She cannot stand or walk for more than 10 minutes;
- She needs to manage her pain with Naproxen, Tylenol and rest;
- She has pain all day and at night when lying down;
- Her pain is getting worse;
- She cannot lift heavy items, cannot reach up or bend down without pain; and
- She relies on her family to do the grocery shopping and household duties.

[12] The Claimant's evidence supports that she has functional limitations. However, I must also consider what the medical evidence says.

What the medical evidence says about the Claimant's limitations

[13] I find the medical evidence shows the Claimant has functional limitations that affected her ability to work by December 31, 2019.¹¹ The medical evidence supports what the Claimant says.

[14] The Claimant fell and injured her knee in March 2016. Her knee has been painful ever since. An X-ray taken in September 2016 showed moderate osteoarthritis in her left knee joint.¹² An MRI taken in 2017 showed moderate to advanced medial compartment arthritis in her knee.¹³

¹¹ The Claimant must provide objective medical evidence that shows her limitations affected her ability to work by her MQP. The Federal Court of Appeal said this in *Warren v. Canada (Attorney General)*, 2008 FCA 377.

¹² The x-ray is at GD 2R-103.

¹³ Dr. Schweigel refers to the MRI at GD 2R-102

[15] The Claimant saw an orthopedic surgeon in December 2017¹⁴ because of ongoing right knee pain. It was worse with over exertion such as walking 15 to 20 minutes or climbing stairs. Dr. Schweigel (orthopedic surgeon) said the Claimant had arthritis in her knee.

[16] The Claimant continued to have pain, which limited her activities in April 2018.¹⁵

[17] Dr. Sarai (family doctor) noted in October 2019 that the Claimant was unable to walk more than 15 minutes and she was limited in standing for long periods.¹⁶ She noted injections and physiotherapy had provided no benefit to the Claimant and she was not a surgical candidate. Conservative management options were the only treatment options.

[18] I find the medical evidence shows that the Claimant had functional limitations that affected her ability to work by December 31, 2019 and continue today.

The Claimant cannot work in the real world

[19] When I am deciding if the Claimant can work, I must consider more than just her medical conditions and how they affect what she can do. I must also consider her age, level of education, language ability, and past work and life experience.¹⁷ These factors help me decide if the Claimant has any ability to work in the real world.

[20] I find that the Claimant cannot work in the real world. The Claimant was 55 years old at the time of her MQP (December 31, 2019). This would allow her many years of employment before the standard age of retirement. Although English is not her first language, she developed English language skills and obtained a food safety and care aide course in Canada.¹⁸ She testified that she spoke English with her co-workers and the patients. However, these factors do not outweigh the Claimant's lack of transferable skills and the affect of her functional limitations on working at any employment.

¹⁴ The medical report is at GD 2R-102.

¹⁵ Dr. Meetarbhan's (family doctor) report is at GD 2-98 – GD 2-101

¹⁶ This report is at GD 2R-49

¹⁷ The Federal Court of Appeal said this in *Villani v. Canada (Attorney General)*, 2001 FCA 248.

¹⁸ This information is in her Questionnaire at GD 2R-47.

[21] The Claimant has no transferable skills because of her pain and lack of mobility. She has a limited work history as she has worked as a health care aide for most of her working career. This was her only occupation for 24 years.¹⁹ Her duties were physically demanding. They included lifting and bathing patients and being on her feet for long periods. Because of her knee pain and inability to stand for more than 10 minutes, she would not be able to return to this job and would not have any transferable skills because of the physical nature of her occupation. The Claimant has no computer skills and has never worked in an occupation that was not physically demanding. She would not be a candidate to retrain because of difficulty concentrating and focusing²⁰ as well as being in pain while sitting or standing.

[22] I am satisfied that the combination of her functional limitations and personal circumstances would affect her regular capacity to do alternate, sedentary work.

The Claimant has followed medical advice

[23] To receive a disability pension, the Claimant must follow medical advice.²¹ If she does not do this, then she must have a reasonable explanation for not following the advice. I must also consider what effect, if any, the advice would have had on the person's disability.²²

[24] The Claimant has followed medical advice.²³ The medical advice of Dr. Schweigel (orthopedic surgeon) was that the Claimant's condition should be treated conservatively.²⁴ The Claimant has done that. She uses anti-inflammatory medication, topical creams and a knee brace. She has participated in rehabilitation and had injections in her knee, which provided no benefit.²⁵ Dr. Sarai was considering a referral

¹⁹ This information is in her Questionnaire at GD 2R-47.

²⁰ The Claimant explained these limitations at GD 2R-50.

²¹ The Federal Court of Appeal said this in *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

²² The Federal Court of Appeal said this in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²³ In *Sharma v. Canada (Attorney General)*, 2018 FCA 48, the Federal Court explains the requirement to follow medical advice.

²⁴ Dr. Schweigel's December 2017 report is at GD 2R-44.

²⁵ This information is at GD 2R-64 and GD 2R-65.

to the Oasis Clinic in acupuncture and physiotherapy.²⁶ The Claimant testified that this is where she has physiotherapy and acupuncture treatments. She told me that her most recent treatment was four days before the hearing. She said physiotherapy and acupuncture provide a little pain relief but not enough to improve her function ability. Dr. Sarai noted that the Claimant had previously had physiotherapy and it provided little benefit.²⁷ All of these treatments have had a minimal impact on the Claimant's condition.

[25] Dr. Sarai said the Claimant was not a surgical candidate.²⁸ The orthopedic surgeon said in December 2017 that if the Claimant's pain was worse, a knee replacement might be an option.²⁹ I asked the Claimant about this. She told me that her family doctor has not referred her for follow-up to an orthopedic surgeon. She explained that Dr. Schweigel told her that she was too young for a knee replacement because it would only help for a "little time and won't make much difference"³⁰. Also, he said that there was no guarantee it would improve her function ability. While this might be a future option, it remains uncertain if the Claimant would even be a candidate for a knee replacement or if it would improve her condition. I say this because Dr. Schweigel said "a knee replacement might be an option" (my emphasis). I find that the Claimant has met her duty to follow recommended treatment options. Her condition has not improved despite her strong motivation and faithful compliance.

[26] I now have to decide if the Claimant can regularly do other types of work. To be severe, the Claimant's limitations must prevent her from earning a living at any type of work, not just her usual job.³¹

The Claimant tried to find and keep a job

[27] 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 were not successful because of her

²⁶ The clinic note is at GD 2R-65.

²⁷ The clinic note is at GD 2R-64.

²⁸ This information is at GD 2R-64.

²⁹ Dr. Schweigel's report is at GD 2R-102.

³⁰ These were the Claimant's words at the hearing.

³¹ The Federal Court of Appeal said this in *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.

medical condition.³² Finding and keeping a job includes re-training or looking for a job that accommodates her limitations.³³ The Claimant made these efforts. They show that her disability gets in the way of earning a living.

[28] The Claimant returned to modified work as a health care aide. The Claimant said it was the recommendation of the Rehabilitation Specialists that she attempt a gradual return to work. It was expected that this could reduce her pain. Although this was the same employer, her duties were very different. She explained that she had only light duties and was not required to do any physical work. She would help feed the patients and push them in a wheelchair. Despite not doing any physical work, the Claimant testified that she was only able to work in ten-minute intervals. She explained that she would work for ten minutes and then would have to sit down and rest for 10 minutes. Unfortunately, her pain only increased and she was no longer able to do even light duties by September 2018.

[29] The Claimant's efforts show she was incapable regularly of pursuing any substantially gainful work by December 31, 2019. Therefore, I find her disability was severe.

The Claimant's disability was prolonged

[30] The Claimant's knee condition and pain began in March 2016 when she injured it at work. It has continued since then and will more than likely continue indefinitely.³⁴ Dr. Moetarbhan (family doctor) noted in April 2018 that her arthritis would like progress over time.³⁵ Dr. Sarai noted in October 2019 that the Claimant would likely need a knee replacement in the future, but that would be dependent on orthopedic advice.³⁶ To date, the advice is that her condition be treated conservatively.

³² The Federal Court of Appeal said this in *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

³³ The Federal Court of Appeal said this in *Janzen v. Canada (Attorney General)*, 2008 FCA 150.

³⁴ In the decision *Canada (Attorney General) v. Angell*, 2020 FC 1093, the Federal Court said a person has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously thereafter. See also *Brennan v. Canada (Attorney General)*, 2011 FCA 318.

³⁵ This prognosis is at GD 2R-101.

³⁶ This prognosis is at GD 2R-50.

[31] To be prolonged, a disability does not need to be permanent.³⁷ While it might be possible that the Claimant's condition will improve with a knee replacement surgery in the future, presently this is a hypothetical treatment option. There is no evidence that the Claimant will have knee surgery or that it will improve her condition. Based on the Appellant's testimony and medical reports, it is evident that her condition has not improved despite treatments and taking medication. The Claimant's disability is likely to be long continued and of an indefinite duration. I find her disability was prolonged by December 31, 2019.

When payment begins

[32] The Claimant had a severe and prolonged disability in March 2016, when she was no longer able to work. However, the CPP says a person cannot be considered disabled more than 15 months before the Minister receives their disability application. After that, there is a four-month waiting period before payments start.³⁸ The Minister received the Claimant's application in June 2018. That means she is considered to have become disabled in March 2017. Payment of her pension starts as of July 2017.

Conclusion

[33] I find the Claimant is eligible for a CPP disability pension because her disability is severe and prolonged.

[34] This means the appeal is allowed.

Connie Dyck
Member, General Division - Income Security

³⁷ *Litke v. Minister of Human Resources and Social Development Canada*, 2008 FCA 366.

³⁸ Section 69 of the *Canada Pension Plan* sets out this rule.