



Citation: *MK v Minister of Employment and Social Development*, 2024 SST 102

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

Decision

Appellant: M. K.
Representative on record: Allison Schmidt
Representative at the hearing: Chanel Scheepers

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated December 19, 2022
(issued by Service Canada)

Tribunal member: James Beaton

Type of hearing: Teleconference

Hearing date: January 23, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: January 24, 2024

File number: GP-23-249

Decision

[1] The appeal is allowed.

[2] The Appellant, M. K., is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of December 2020. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant is 59 years old. She last worked as a sales supervisor at a car dealership. She stopped working in November 2018.

[4] The Appellant applied for a CPP disability pension on November 15, 2021.¹ She based her application on depression, anxiety, fibromyalgia, fatigue, and irritable bowel syndrome (IBS). The Minister of Employment and Social Development refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Minister says the Appellant worked with fibromyalgia before, and her mental health has improved. So she should have tried returning to work. Her family doctor, Dr. Vijayan, said she might be a candidate for a gradual return to work. The Minister also argues that the Appellant didn't follow all of the recommended treatments for fibromyalgia.

[6] The Appellant says her mental health hasn't improved. Together with her other medical conditions, poor mental health keeps her from working. She believes that she reasonably followed the recommendations to treat her fibromyalgia.

¹ The Appellant previously applied in July 2020, but she didn't appeal the Minister's decision on that application.

[7] I find that the Appellant followed medical advice. She has no work capacity, so she didn't have to try to return to work.² Dr. Vijayan's prediction is speculative; it is more likely than not that her disability is prolonged.

What the Appellant must prove

[8] For the Appellant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2021, and continuously since then. This date is based on her contributions to the CPP.³

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

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.⁴

[11] This means I must look at all of the Appellant's medical conditions together to see what effect they have on her ability to work. I must also look at her background (including her age, level of education, language abilities, 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 capable regularly of doing 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.⁵

[13] 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.

² See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

³ 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 Appellant's CPP contributions are at GD2-83 and 84.

⁴ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability. Section 68.1 of the *Canada Pension Plan Regulations* says a job is "substantially gainful" if it pays a salary or wages equal to or greater than the maximum annual amount a person could get from a disability pension.

⁵ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

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

Reasons for my decision

[15] I find that the Appellant had a severe and prolonged disability as of November 2018 and continuously since then. I reached this decision by considering the following issues:

- Was the Appellant's disability severe?
- Was the Appellant's disability prolonged?

Was the Appellant's disability severe?

[16] The Appellant's disability was severe by November 2018. I reached this finding by considering several factors. I explain these factors below.

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

[17] The Appellant has:

- anxiety
- depression
- fibromyalgia
- IBS

[18] However, I can't focus on the Appellant's diagnoses.⁶ Instead, I must focus on whether she has functional limitations that got in the way of her earning a living by December 31, 2021.⁷ When I do this, I must look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected her ability to work.⁸

[19] I find that the Appellant had functional limitations by November 2018.

⁶ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁷ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁸ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

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

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

[21] The Appellant applied for a disability pension twice—in July 2020 and in November 2021. Although this appeal is about her second application, what she said in her first application is relevant.⁹

[22] In her applications, she rated many of her physical, behavioural, and emotional abilities as fair to poor. She feels physically weak and can't stand or sit for long periods. Using a computer gives her a headache. She has trouble remembering, learning new things, controlling her emotions, and focusing. She becomes overwhelmed by changes in her routine. She procrastinates and doesn't like leaving the house. She relies on her family and a food service for help with chores and meal preparation. She testified that her IBS episodes are unpredictable but tend to be brought on by stress.

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

[23] The Appellant must provide some medical evidence to support that her functional limitations affected her ability to work by December 31, 2021.¹⁰

[24] The medical evidence supports what the Appellant says. It shows that she stopped working in November 2018 due to medical issues.¹¹ She began seeing Dr. Kwee (a psychologist) in December 2018. She continued to see him regularly until November 2019.¹²

[25] A January 2019 endoscopy clinic note refers to longstanding IBS and fibromyalgia.¹³ Dr. Vijayan confirmed these diagnoses, along with depression and

⁹ The Appellant's 2020 application is at GD2-58 to 71. Her 2021 application is at GD2-34 to 46.

¹⁰ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

¹¹ See GD2-209 to 212. The insurance form is dated April 1, 2019, so the reference to November 29, 2019, being the Appellant's last day of work is clearly an error. The date should read November 29, 2018.

¹² Dr. Kwee's notes are at GD2-267 to 270.

¹³ See GD2-171.

anxiety, on an April 2019 insurance form.¹⁴ A rheumatologist diagnosed the Appellant with myofascial pain.¹⁵

[26] In March 2020, Dr. Haq (a psychiatrist) recorded issues with insomnia, anxiety attacks, and fluctuating energy levels and mood. He observed the Appellant to be anxious, emotional, and overwhelmed. He agreed that she had depression and anxiety.¹⁶

[27] During the following months, the medical evidence shows that her mood improved and her anxiety became more manageable. However, Dr. Haq wrote that the Appellant had difficulty walking and exercising. She depended on others for help with daily tasks. Despite sleeping reasonably well, she was tired during the day.¹⁷

[28] Following the Appellant's last appointment with Dr. Haq, Dr. Vijayan maintained the Appellant's medications for anxiety and depression. His clinic notes are brief and sometimes state that the Appellant was doing well or was stable.¹⁸ But an insurance form he completed in August 2021 provides more context. It supports that the Appellant continued to experience pain and depression. Her tolerance for sitting and standing was limited to 30 minutes. Leaving the house was "problematic" and she relied on her husband for help with chores.¹⁹

[29] The Minister says the Appellant's medications haven't changed since June 2020, which indicates their effectiveness. Actually, her medications changed as recently as March 2021.²⁰ Regardless, the fact that her medications haven't changed for a few years doesn't mean she has fully recovered. In a November 2022 letter—the most recent medical evidence available to me—Dr. Vijayan said the Appellant's medications

¹⁴ See GD2-209 to 212.

¹⁵ See GD2-184.

¹⁶ See GD2-140 to 142.

¹⁷ See GD2-131, 145, 148, 151, 153, and 154.

¹⁸ See GD2-127 and 128.

¹⁹ See GD2-136 and 137.

²⁰ See GD2-127.

were moderately effective. But her medical conditions persisted, and her overall condition had likely plateaued.²¹

[30] The medical evidence supports that the Appellant's functional limitations impacted her ability to work as a sales supervisor by November 2018. She was emotional, tired, and distracted by pain.

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

– **The Appellant followed medical advice**

[32] To receive a disability pension, an appellant must follow medical advice.²² If an appellant doesn't follow medical advice, then they must have a reasonable explanation for not doing so.²³ If they don't have a reasonable explanation, then I must also consider what effect, if any, the medical advice might have had on the appellant's disability.²⁴

[33] The Minister argues that the Appellant didn't follow medical advice because she didn't pursue all of the recommended treatments for her fibromyalgia. Specifically, she didn't try physiotherapy, trigger point injections, or "other medications."²⁵

[34] The evidence shows that the Appellant **did** try physiotherapy.²⁶ She testified that it made the pain worse. The documentary evidence supports that she tried to exercise but found it difficult.²⁷ This aligns with her testimony.

[35] She testified that she tried trigger point injections, but they also made the pain worse. I believe her. Her testimony was forthright and detailed. She admitted when she could not remember something.

²¹ See GD2-115.

²² See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²³ See *Brown v Canada (Attorney General)*, 2022 FCA 104.

²⁴ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²⁵ See GD3-7.

²⁶ See GD2-136 and 137.

²⁷ See GD2-141.

[36] Finally, Dr. Gill (the rheumatologist) recommended gabapentin. The Appellant tried magnesium instead because she was already taking several medications and was worried about having side effects or becoming addicted.²⁸

[37] The Appellant's explanation is credible and reasonable. The medical evidence shows that she wasn't opposed to taking medication in principle. She has taken antidepressants and related medications like amitriptyline, aripiprazole, bupropion, citalopram, fluoxetine, and venlafaxine.²⁹ Her concerns about side effects and becoming dependent on gabapentin were legitimate. Furthermore, Dr. Vijayan didn't revisit Dr. Gill's recommendation with her. In his view, she followed medical advice.³⁰

[38] The Minister argues that the Appellant hasn't seen a mental health professional since 2020. I don't fault the Appellant for this. The evidence shows that she made genuine and diligent efforts to pursue mental health treatment.

[39] She saw Dr. Kwee for approximately one year. She stopped because of Covid-19. She didn't go back to Dr. Kwee after Covid-19 restrictions were lifted because she could no longer afford counselling.³¹

[40] She saw Dr. Haq multiple times. In an insurance form from August 2020, Dr. Haq wrote that he would reassess the Appellant in four to six months.³² The Appellant testified that she didn't know she was supposed to book another appointment. I believe her. It doesn't make sense that she would suddenly stop seeing Dr. Haq otherwise.

[41] She attended virtual group therapy. While therapy provided her with coping skills, it was also difficult for her to listen to other people's problems.³³

²⁸ See GD2-184 and the hearing recording.

²⁹ See GD2-140 to 142.

³⁰ See GD2-115.

³¹ See the hearing recording.

³² See GD2-153 and 154.

³³ The Appellant's testimony explains why she told Dr. Haq that group therapy was helpful (GD2-131) whereas she told Service Canada that it wasn't helpful (GD2-93).

[42] She tried eye movement desensitization and reprocessing (EMDR) therapy until cost became a barrier.³⁴

[43] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.³⁵

– **The Appellant can't work in the real world**

[44] When I am deciding whether the Appellant can work, I can't just look at her medical conditions and how they affect what she can do. I must also consider factors such as her:

- age
- level of education
- language abilities
- past work and life experience

[45] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say she can work.³⁶

[46] I find that the Appellant can't work in the real world. She was unable to work as of November 2018.

[47] The Appellant's personal characteristics favour employability. As of November 2018, she was only 51 years old. Her age would not have kept her from finding suitable employment. She was fluent in English and had a high school diploma, plus varied work experience. Before becoming a sales supervisor, she worked as an office assistant, in sales for Home Depot, and installing blinds for Home Depot.³⁷

³⁴ See GD2-93.

³⁵ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

³⁶ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

³⁷ See GD2-45, 46, 70, and 71; and the hearing recording.

[48] Unfortunately, the Appellant's functional limitations outweigh these positive factors. She can't sit or stand for more than 30 minutes at a time. She gets headaches from using a computer. Simple daily tasks are exhausting; she depends on others for help. Stress provokes anxiety attacks and IBS episodes. The Appellant would not be able to cope with the demands of a job or the expectation of engaging professionally with colleagues and customers.

[49] The Appellant's work history demonstrates that she has already tried to find suitable work and failed because of her medical conditions. For example, reaching to install blinds for Home Depot was too painful. So she took an office assistant job. But she found that sitting at a computer was "hard on her body" and gave her headaches. She then took the car dealership job because it allowed her to walk around during the day. This is when her mental health deteriorated. She had anxiety attacks from the stress. She asked for a part-time position but was turned down.³⁸

[50] The Minister says the Appellant worked with fibromyalgia before. According to the Minister, the Appellant should be able to return to some type of work now that her mental health has improved. I have already discussed that the Appellant's mental health challenges are **ongoing**. I don't think she has reached a point in her recovery where she could work at any job and be a dependable, professional employee. Even non-supervisory roles involve their own stressors and require employees to interact professionally with other people.

[51] All signs point to the Appellant's desire to work; I believe that she would work if she could. She explored different jobs to suit her limitations. As early as December 2018, she told Dr. Kwee that she was ashamed of not being able to work.³⁹ Dr. Vijayan observed that she "appears motivated to work, but has trouble getting to do tasks required of her job."⁴⁰

³⁸ See the hearing recording.

³⁹ See GD2-270.

⁴⁰ See GD2-115.

[52] I find that the Appellant's disability was severe as of November 2018, the month she stopped working.

Was the Appellant's disability prolonged?

[53] The Appellant's disability was prolonged as of November 2018.

[54] The latest medical evidence from Dr. Vijayan and the Appellant's testimony support that her disability continued to be severe from November 2018 to the hearing date.⁴¹

[55] The Appellant's disability will more than likely continue indefinitely. She has dealt with her medical conditions for years and pursued various treatments. Although Dr. Vijayan wrote in November 2022 that the Appellant "may be a candidate to try [a] gradual return to work in the next little while," I find this speculative, especially considering Dr. Vijayan's opinion that the Appellant has plateaued in her recovery.⁴² I also give weight to Dr. Haq's opinion that the Appellant's mental health conditions are refractory and chronic.⁴³

When payments start

[56] The Appellant had a severe and prolonged disability in November 2018.

[57] However, the *Canada Pension Plan* says an appellant can't be considered disabled more than 15 months before the Minister receives their disability pension application.⁴⁴ After that, there is a four-month waiting period before payments start.⁴⁵

[58] The Minister received the Appellant's application in November 2021. That means she is considered to have become disabled in August 2020.

⁴¹ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that an appellant must show a severe and prolonged disability by the end of their MQP and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

⁴² See GD2-115.

⁴³ See GD2-153 and 154.

⁴⁴ Section 42(2)(b) of the *Canada Pension Plan* sets out this rule.

⁴⁵ Section 69 of the *Canada Pension Plan* sets out this rule. This means payments can't start more than 11 months before the application date.

[59] Payments of her pension start as of December 2020.

Conclusion

[60] I find that the Appellant is eligible for a CPP disability pension because her disability was severe and prolonged by November 2018.

[61] This means the appeal is allowed.

James Beaton
Member, General Division – Income Security Section