



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

Decision

Claimant: Desiree Burmister
Representative: John Hammond

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: Antoinette Cardillo

Type of hearing: Videoconference
Hearing date: October 26, 2021
Hearing participants: Claimant
Claimant's representative
Decision date: November 18, 2021
File number: GP-20-1143

Decision

[1] The appeal is allowed.

[2] The Claimant, Desiree Burmister, is eligible for a Canada Pension Plan (CPP) disability pension. Payments start as of May 2018. This decision explains why I am allowing the appeal.

Overview

[3] The Claimant is 36 years old. She has a college education in Law and Security, Administration and Customs Border Services. She basis her disability claim on post traumatic stress disorder (PTSD) with depression, poor coping and functionality, inability to drive, social isolation, as well as neck, mid back and lower back pain. She was last employed from January 2013 to October 2016 doing administrative work when she stopped working due to a motor vehicle accident (MVA). She felt she could no longer work as of November 2016.

[4] The Claimant applied for a CPP disability pension on April 5, 2019¹. 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.

[5] The Minister says that the medical evidence does not support that the Claimant required any aggressive psychiatric interventions as would be expected with a severe psychiatric condition. Her mental status examination findings did not describe severe symptoms. She did not require regular follow up by a psychiatrist and her office visits to her family physician were infrequent. There was also no indication she required any medical interventions to address her musculoskeletal issues or headaches. While she had anxiety with driving, the Claimant was able to resume driving. She is young, with a college education and transferable skills, as well as no indication of a language barrier. Her personal characteristics are favourable to pursuing alternative work. As such, the

¹ GD2-28

medical evidence does not support severe pathology or impairments precluding all types of work at the Claimant's MQP of December 31, 2019 and continuously thereafter.

What the Claimant must prove

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

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

[8] A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.³

[9] This means I have to look at all of the Claimant'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 Claimant 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.

[10] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.⁴

[11] 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.

[12] The Claimant 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.

² 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 on GD2-5.

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

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

Reasons for my decision

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

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

Was the Claimant's disability severe?

[14] The Claimant's disability was severe. I reached this finding by considering several factors. I explain these factors below.

– The Claimant's functional limitations do affect her ability to work

[15] The Claimant has PTSD and depression, poor coping and functionality, inability to drive, social isolation, as well as neck, mid back and lower back pain. However, I can't focus on the Claimant's diagnoses.⁵ Instead, I must focus on whether she had functional limitations that got in the way of her earning a living.⁶ 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 affect her ability to work.⁷

[16] I find that the Claimant has functional limitations.

– What the Claimant says about her functional limitations

[17] The Claimant says that her medical conditions have resulted in functional limitations that affect her ability to work. She says that she was involved in a MVA on November 1st, 2016. She worked for Honda doing administrative work: receiving shipment across the border, payments, inventory and other tasks. It was a fast paced environment.

[18] She attempted to return to work after one year but she was no able to work everyday because of stress and her inability to drive to work everyday. She had neck

⁵ See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

⁶ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

⁷ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

pain from the accident. She was not able to bend or move around to collect paperwork or perform data entry tasks because arm, neck and shoulder pain. Since the MVA, she does not have full range of motion on the right side of her neck or full range of motion of her right shoulder and arm. She also has back pain which prevents her from being able to fully move around or pick up objects. On a good day, on a scale from 0-10, her pain level is between 3 and 5 and on a bad day, it is between 7 and 8. She was only able to work for about one month and call multiple times to say she could not go into work.

[19] Since the MVA, she also has psychological issues and social issues. She said that she lost all her confidence. She does not want to be around others and can no longer envisage having children. She drives as little as possible and when she does drive, she needs to take breaks to let the cars go by. When she is a passenger, she is very anxious.

[20] She explained that on a typical day, she does not get dressed, she prepares small meals but not often. She does not leave the house more than once per week. She has anxiety and panic attacks. She also suffers from irritable bowel syndrome whenever she is under stress and has difficulty focusing.

[21] The Claimant said that she does take medication but has side effects, attends counselling sessions and tried physiotherapy but she does not feel her conditions have improved.

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

[22] The Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2019.⁸

[23] The office notes of Dr. Weisbrod, Family Physician, indicated that the Claimant was seen from January 2018⁹ to June 2019 for the following reasons:

- in January 2018, for anxiety and counselling;

⁸ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

⁹ GD2-61 to 72 January to October 2018 and GD2-161 to 176 February 2019 to June 2019

- in February 2018, for counselling and a trial of Paxil;
- in March 2018, the Claimant was feeling better and was less anxious with regard to driving and was seeing a counsellor every two (2) weeks;
- in May 2018, her condition was stable;
- In July 2018, she remained on Paxil; counselling was helpful; and her condition was stable;
- in February 2019, she was taking Paxil, but the Claimant felt it was not working well; she received in-home counselling every three (3) weeks (with limited response); she remained stable; she was referred to Dr. Mulder, Psychiatrist;
- in March 2019, she was stable;
- in May 2019, the Claimant had seen Dr. Mulder who increased her Paxil to 40 mg a day and suggested exposure therapy (a behaviour therapy which involved exposing the patient to the anxiety source), as well as continued counselling at home;
- in June 2019, although it was stated that the Claimant could try a Work Hardening Program, she was unable to be employed due to chronic disability.

[24] An Independent Psychiatric Assessment report dated October 29, 2018¹⁰ from Dr. Luczak, Psychiatrist, indicated that the Claimant had attempted a gradual return to work in October 2017, which was unsuccessful, after she was involved in an MVA on November 1, 2016. She reported anxiety while driving or travelling in a vehicle and had occasional nightmares suggestive of a PTSD and her low mood met the criteria for an adjustment disorder. Dr. Luczak concluded the Claimant's depression and anxiety, in particular anxiety travelling outside her home, caused a complete inability to engage in any employment outside her home. He opined she might be able to perform an in home occupation however with accommodations.

[25] A labour market and vocational assessment (October 2018)¹¹ identified some employment options for the Claimant¹² provided they were within her physical and psychological restrictions.

[26] In January and February 2019, a Catastrophic Determination Assessment¹³ Executive Summary, was prepared by Dr. Rajwani, Chiropractor. He indicated the

¹⁰ GD2-73

¹¹ GD2-84

¹² GD2-94

¹³ GD2-250

Claimant was assessed by Dr. Kiraly, Psychiatrist and Ms Lalani, Occupational Therapist. The Claimant was involved in a rear-end collision with no reported loss of consciousness. She was able to get out of her car on her own and was transported to emergency where she received a stitch on her nose. She saw her family doctor a few days later and was referred for physiotherapy and massage therapy. Cognitive testing revealed no obvious cognitive difficulties and her medication included an antidepressant, Paxil 20 mg daily. She also saw her family physician for some psychotherapy sessions and a social worker came to her house for psychotherapy treatment. The Claimant reported headaches and musculoskeletal issues. Her pains improved but her anxiety and depression symptoms have persisted. Based on her level of daily activities, social functioning, concentration/persistence/pace, adaptation and global impairment, she met the definition of catastrophic impairment.

[27] An Independent Medico-Legal Psychiatric Evaluation done on January 29, 2019¹⁴ by Dr. Kirali, Psychiatrist, indicated that the Claimant suffered from major depression (GAF 50), panic disorder with agoraphobia, PTSD, mixed pain disorder due to psychological factor and medical conditions and chronic pain. Her prognosis was poor due to the chronicity of symptoms and comorbidity of the anxiety, depression, pain, sleep problems and fatigue. Dr. Kirali stated that the Claimant had a complete inability to engage in any employment or self-employment and she was continuously unable to perform any occupation for which she is or may become reasonably qualified for by education, training or experience.

[28] A Driver Anxiety Progress Report dated November 20, 2019¹⁵ indicated that the Claimant still felt sick when she got home from driving and felt increased anxiety about driving in the winter months.

¹⁴ GD2-227

¹⁵ GD2-190

[29] A Social Work Progress Report dated December 30, 2019¹⁶ indicated that the Claimant continued to endorse anxiety symptoms and low mood. The Claimant was assessed by a social worker and occupational therapist.

[30] On May 4, 2020¹⁷, Dr. Weisbrod indicated the Claimant was still having anxieties and occasional panic attacks associated with driving; vivid dreams and nightmares;

[31] A Rehabilitation Therapy Progress Report¹⁸ dated March 19, 2020, indicated that the Claimant's tolerance to daily activities were limited. She had instability in her neck and shoulders and pain and stiffness aggravated with prolonged activity. She also continued to experience low energy levels, low mood, and feeling of anxiousness.

[32] The medical evidence supports that the Claimant's has functional limitations prevented her from working by December 31, 2019.

[33] Next, I will look at whether the Claimant followed medical advice.

– **The Claimant has followed medical advice**

[34] To receive a disability pension, a claimant must follow medical advice.¹⁹ If a claimant 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.²⁰

[35] The Claimant has followed medical advice.²¹

[36] The office notes of Dr. Weisbrod from January 2018²² to June 2019 show that the Claimant was taking medication, had counselling and psychotherapy sessions.

¹⁶ GD2-909

¹⁷ GD2-25

¹⁸ GD2-51

¹⁹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁰ See *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

²¹ See *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²² GD2-61 to 72 January to October 2018 and GD2-161 to 176 February 2019 to June 2019

[37] I now have to decide whether the Claimant can regularly do other types of work. To be severe, the Claimant's functional limitations must prevent her from earning a living at any type of work, not just her usual job.²³

– **The Claimant can work in the real world**

[38] When I am deciding whether the Claimant 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

[39] These factors help me decide whether the Claimant can work in the real world—in other words, whether it is realistic to say that she can work.²⁴

[40] I find that the Claimant can't work in the real world.

[41] Although, the Appellant is only 36 years of age and has a good education, I find that the Claimant does suffer from a severe disability due to her ongoing limitations caused by PTSD and depression, poor coping and functioning ability, inability to drive and social isolation.

[42] The Minister said that Claimant's mental status examination findings did not describe severe symptoms. She did not require regular follow up by a psychiatrist and her office visits to her family physician were infrequent. While she had anxiety with driving, the Claimant was able to resume driving.

[43] I disagree with the Minister's submissions. Based on the evidence, in October 2018²⁵, Dr. Luczak indicated that the Claimant had attempted a gradual return to work in

²³ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

²⁴ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²⁵ GD2-73

October 2017, which was unsuccessful, after she was involved in an MVA on November 1, 2016. Dr. Luczak concluded the Claimant's depression and anxiety, in particular anxiety travelling outside her home, caused a complete inability to engage in any employment outside her home. He opined she might be able to perform an in home occupation however with accommodations. However, in January and February 2019, based on the Claimant's level of daily activities, social functioning, concentration/persistence/pace, adaptation and global impairment, she met the definition of catastrophic impairment²⁶; on January 29, 2019²⁷ by Dr. Kirali indicated that the Claimant suffered from major depression (GAF 50), panic disorder with agoraphobia, PTSD, mixed pain disorder due to psychological factor and medical conditions and chronic pain. Her prognosis was poor due to the chronicity of symptoms and comorbidity of the anxiety, depression, pain, sleep problems and fatigue. Dr. Kirali stated that the Claimant had a complete inability to engage in any employment or self-employment and she was continuously unable to perform any occupation for which she is or may become reasonably qualified for by education, training or experience; a Driver Anxiety Progress Report dated November 20, 2019²⁸ indicated that the Claimant still felt sick when she got home from driving and felt increased anxiety about driving in the winter months; and finally, a Social Work Progress Report dated December 30, 2019²⁹ indicated that the Claimant continued to endorse anxiety symptoms and low mood.

[44] I find therefore that her disability was severe. The Claimant's efforts show that, by December 31, 2019, she can't regularly do any work.

Was the Claimant's disability prolonged?

[45] The Claimant's disability was prolonged.

²⁶ GD2-250

²⁷ GD2-227

²⁸ GD2-190

²⁹ GD2-909

[46] The Claimant's conditions began on November 1st, 2016. These conditions have continued since then, and they will more than likely continue indefinitely.³⁰ The medical reports from 2016 to 2019 show that the Claimant's psychological issues have not improved despite treatment and she still has physical limitations. Her prognosis was poor.

[47] I find that the Claimant's disability was prolonged by December 31, 2019.

When payments start

[48] The Claimant's disability became severe and prolonged in November 2016, when she had a MVA.

[49] However, the *Canada Pension Plan* says a claimant can't be considered disabled more than 15 months before the Minister receives their disability pension application. After that, there is a four-month waiting period before payments start.³¹

[50] The Minister received the Claimant's application in April 2019. That means she is considered to have become disabled in January 2018.

[51] Payment of her pension starts as of May 2018.

Conclusion

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

[53] This means the appeal is allowed.

Antoinette Cardillo

Member, General Division – Income Security Section

³⁰ In the decision *Canada (Attorney General) v Angell*, 2020 FC 1093, the Federal Court said that a claimant has to show a severe and prolonged disability by the end of their minimum qualifying period and continuously after that. See also *Brennan v Canada (Attorney General)*, 2011 FCA 318.

³¹ Section 69 of the *Canada Pension Plan* sets out this rule. This means that payments can't start more than 11 months before the application date.