



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. P. v Minister of Employment and Social Development*, 2019 SST 121

Tribunal File Number: GP-18-1345

BETWEEN:

J. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Susan Smith

Teleconference hearing on: November 22, 2018

Date of decision: November 30, 2018

**[Date of Amended
Decision: January 7, 2019]**

DECISION

[1] The Claimant is not entitled to a Division of Undivided Pension Credits, (DUPE), pursuant to section 55.1 of the Canada Pension Plan (CPP).

[2] The Claimant was not prevented by incapacity from applying sooner for a DUPE.

[3] The Claimant qualifies for a Canada Pension Plan (CPP) disability pension. Payments start as of May 2016.

OVERVIEW

[4] The Claimant applied for a DUPE, or “credit split”, under the CPP more than four years after her common law relationship with CPP contributor D. F. ended due to D. F. suffering a severe brain injury. He was placed under adult guardianship and moved to a care home after his injury in February 2009. His guardian refused to consent to the credit split application submitted in 2016 despite he and the Claimant were living together and had an infant child, just 16 months old, at the time of his brain injury, and despite the Claimant was in dire need of a CPP disability pension. The Claimant’s medical history shows an extensive history of cancer beginning at age eleven with complications or recurrence affecting her repeatedly since. In early 2010 the Claimant had a brain tumor and underwent treatment that further diminished her cognitive abilities. In 2017 the Claimant submitted a terminal illness application. Her application was denied because she did not have enough contributions to CPP. She submitted a declaration of incapacity and requested the Respondent reconsider her applications for DUPE and for CPP terminal illness disability.

[5] The Minister denied each of the Claimant’s multiple applications initially and on reconsideration. The Claimant appealed the reconsideration decisions to the Social Security Tribunal (SST). The Minister notified the SST they did not intend to identify an added party to the appeals and requested that all three appeals be heard together as they are interrelated.¹

[6] To qualify for a CPP disability pension, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP); or, in the case of a

¹ GP-17-396, Part I, May 18, 2018, ESDC correspondence @ page 2

pro-rated MQP, between January 1 and the last day of the month of pro-ration in the year of pro-ration. The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant has two potential periods of pro-rated MQP. She does not have an MQP other than by pro-ration. I find her two possible periods of pro-ration are January 1 to September 30, 2005; or January 1- May 31, 2007.

PRELIMINARY MATTERS

[7] The Claimant did not attend the hearing. She is currently in palliative care and is near the end of life. The hearing was attended by her power of attorney (POA), being the older sister of D. F.; the older brother of D. F.; and the daughter of D. F., now the guardian of the Claimant's eleven year old daughter. All three appeared in support of the Claimant's applications for CPP DUPE, incapacity, and terminal illness benefits.

ISSUES

[8] Has the Claimant met the criteria to succeed in her application for a DUPE for the period she lived common law with the contributor D. F.?

[9] I not has the Claimant demonstrated that her application for the DUPE was submitted beyond the legislated 4 year time limit due to incapacity?

[10] If not, has the Claimant demonstrated that due to the symptoms of her complicated medical condition, she became disabled within the meaning of the CPP during her potential period of pro-rated MQP in 2005, by September 30th; or in 2007, by May 31st?

[11] If so, was the Claimant's disability also long continued and of indefinite duration by September 30, 2005, or alternatively, by May 31, 2007?

ANALYSIS

DUPE

[12] The Claimant submitted an application for a DUPE June 19, 2017. She stated that her common-law relationship ended in March 2009. Her former common-law spouse is now under

the guardianship of an adult guardian due to a severe brain injury in February 2009. The guardian refused to consent to the DUPE.

[13] In the case of common-law spouses a DUPE is may be approved by the Minister if the former common-law partners have been living separate and apart for a period of one year or more, and the application is made within four years after the day on which the former common-law partners commenced to live separate and apart or, if both former common-law partners agree in writing, at any time after the end of that four-year period.²

[14] The four-year statutory period had long since expired by the time the Appellant applied for a DUPE. She was required either to have made the application for the DUPE within four years of the cessation of her common-law relationship, or to have the written consent of her former common-law spouse. She was not able to comply with either requirement.

[15] I find that because the Claimant did not make the application for the DUPE within four years of the cessation of her common-law relationship, namely by 2013, or have the written consent of her former common-law spouse, she cannot succeed in her application and the Minister's decision to dent her application must stand.

Incapacity

[16] The Claimant submitted a declaration of incapacity in hopes that she might fall within the exception to the rules preventing her from succeeding in her application for a DUPE.

[17] The exception to filing her application for the DUPE within four years of the date of separation under the CPP allow for an application to be deemed to have been made earlier than it was in cases of incapacity.

[18] The exception for incapacity is permitted when the Minister is satisfied, on the basis of evidence provided by or on behalf of a person making an application, that the person had been incapable of forming or expressing an intention to make an application earlier. If there is sufficient evidence of incapacity such that it rendered the claimant incapable of forming or

² Paragraph 55.1 (c)(ii) of the *Canada Pension Plan*

expressing the intention to make an application earlier, and the incapacity was for a continuous period, the Minister may deem the application to have been made earlier.³

[19] The Claimant submitted a declaration of incapacity signed by her doctor treating her at the time of her application. He stated her incapacity began August 26, 2010, when she underwent surgery to remove a brain tumor and he had not been treating the Claimant at the time her incapacity began. The Claimant submitted medical reports that demonstrate that she was living independently and raising her daughter as a single parent during the four years after the cessation of her common-law relationship. The evidence shows the Claimant had significant health issues with debilitating impact on her ability to function, however I find that her limitations fall short of meeting the criteria of incapacity under the CPP, meaning she has not demonstrated she was incapable of forming or expressing an intention to make an application sooner.

[20] In order for Claimant's application for the DUPE to be deemed to be made at an earlier date than it was actually made she must show on a balance of probability that she was incapable of forming or expressing the intention to make an application earlier and I find she has failed to do so.

Disability

[21] Disability is defined as a physical or mental disability that is severe and prolonged.⁴ A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

Severe disability

³ Subsections 60(8) to (10) of the *Canada Pension Plan*

⁴ Paragraph 42(2)(a) *Canada Pension Plan*

[22] I find the Claimant has proven on a balance of probabilities that she had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation and she became so incapable in 2005 by September 30.

The Claimant's limitations related to her medical conditions limit her capacity to work in any occupation

[23] I must consider the Claimant's capacity to work and not just the diagnosis of her disease to determine whether her disability meets the definition of severe.⁵ It is the functional effect of the Claimant's health condition on her ability to work that is important to consider, not the nature or name of the health condition.⁶

[24] The Claimant was not able to attend the hearing because she in palliative care. Her story pertaining to her medical condition began when she was still a child. She was diagnosed with high grade osteosarcoma of her left distal femur at age 12.⁷ She had her left leg amputated in October 1996⁸, while still in high school due to osteosarcoma. In 2003, at age 22, she underwent a significant restructuring surgery, known as Vannesa Procedure where her left leg was further amputated above the knee, because of complications with her prosthesis.⁹ She had fallen and fractured a rod in her leg. Following this surgery her medical record reveals that she began to deteriorate both physically and mentally. She began to experience worsening pain. In March 2004 she was diagnosed with adjustment disorder¹⁰ and in January 2005 she was found to have developed a chronic musculoskeletal pain syndrome¹¹.

[25] The Claimant has submitted extensive objective medical reports outlining her struggles with chronic pain related to the left leg amputation; a brain tumor treated with surgery and chemotherapy in 2010; high grade pelvic retroperitoneal leiomyosarcoma in 2014; papillary thyroid micro carcinoma in October 2016; and now, metastatic high-grade pelvic retroperitoneal leiomyosarcoma with metastases to the lungs bilaterally, the liver, bone, as well as a local

⁵ *Klabouch v Canada (MSD)*, 2008 FCA 33

⁶ *Ferreira v Canada (AG)*, 2013 FCA 81

⁷ GD2-263-65

⁸ GD2-259

⁹ GD2-186

¹⁰ GD2-188

¹¹ GD2-197-198

recurrence in the pelvis in December 2016.¹² She is now in palliative care and has attempted to get her affairs in order for guardianship and financial support of her eleven year old daughter.

[26] I am satisfied the Claimant has demonstrated that the limitations of her medical condition worsened over time between her surgery of 2003 and early 2005 to the point that the cumulative effect of her physical and mental health conditions became severely disabling and rendered her incapable regularly of pursuing substantially gainful occupation between January 1st September 30th 2005. I am further satisfied that the objective medical evidence does not support that the Claimant has ever experienced such improvement in her condition as to no longer meet the definition of severe disability within the meaning of the CPP from September 2005 onward. She has remained incapable regularly of pursuing any substantially gainful occupation from 2005 onward.

The Claimant's earnings do not demonstrate capacity regularly of substantially gainful occupation and are not a barrier to finding she is disabled within CPP

[27] The Claimant's record of earnings show that she reached less than substantially gainful earnings in 2003, she had no earnings in 2004 and below the year's basic minimum in 2005.¹³ In 2006 she earned a higher amount, however she maintained employment only three months from May 24 to August 28, 2006. She was dependent on narcotic pain medication to function. She returned to the same employer in October 2006 but worked just one day before stopping again. After that she worked only four hours a day two or three days a week beginning in January 2007.¹⁴ She earned below the basic minimum in 2007. In 2008 she worked six months working for X part time and did not reach substantially gainful earnings.

[28] In 2009 the Claimant maintained employment for a period of nine months working at a day care. She stopped work due to a brain tumor and she has never returned to work since that time. Her earnings in 2009 were fairly good. However, I must consider all of circumstances in determining whether her earnings in 2009 demonstrate she was capable regularly of pursuing substantially gainful occupation.

¹² GD2-168-71

¹³ GD2-101

¹⁴ GD2-210-211

[29] The Claimant became very ill during 2009. She lost her spouse in February 2009 when he suffered a significant brain injury. Her former spouse's guardian evicted her from the home she had shared with her common-law spouse for the past six years. She has no financial support from her former spouse because his guardian refused to acknowledge the Claimant's daughter is his child. The child was just 16 months old at the time. The Claimant was only able to obtain child support in 2015 after the guardian required DNA testing of the child. The witnesses that attended the hearing all gave evidence that the guardian has consistently behaved toward the Claimant in a hostile and unreasonable manor without compassion and without regard for the well-being of a minor child. This is relevant because it shows the Claimant, rightly or wrongly, felt she had no other option than to push herself to work so she could provide for her child by herself.

[30] Based on all of the evidence I find that the Claimant's earnings do not demonstrate capacity for substantially gainful occupation and she has never been capable regularly of pursuing substantially gainful occupation since 2005 by September 30.

The cumulative effect of the Claimant's physical and mental health limitations became severely disabling during her pro-rated period in 2005

[31] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment.¹⁵

[32] I am satisfied by the evidence that the struggles the Claimant faced following her above knee amputation escalated to include both mental and physical health symptoms and the cumulative effect of her symptoms rendered her incapable regularly of pursuing any substantially gainful occupation during her period of pro-ration in 2005, by September 30.

Prolonged disability

[33] I find that the Claimant has proven on a balance of probabilities that she had a prolonged disability that was long continued and of indefinite duration by September 30, 2005.

¹⁵ *Bungay v. Canada (A.G.)*, 2011 FCA 47

[34] The Claimant has suffered from the pain and limitations of recurring cancer since childhood. Her condition in 2005 was long continued and of indefinite duration in 2005. It is now likely to result in death. The likely result of her illness is currently immanent.

CONCLUSION

[35] The appeal of the Minister's decision to deny the application for a DUPE is dismissed.

[36] The appeal of the Minister's decision to deny the application for extension of time to apply for a DUPE due to incapacity is dismissed.

[37] The Claimant had a severe and prolonged disability in January 2005, when she was diagnosed with chronic pain syndrome, in addition to adjustment disorder, since above knee amputation of her left leg in 2003. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension¹⁶. The application was received in [~~February~~ **January**] 2017 so the deemed date of disability is [~~November~~ **October**] 2015. Payments start four months after the deemed date of disability, as of [~~March~~ **February**] 2016.¹⁷

[38] The appeal of the Minister's decision to deny the CPP disability terminal illness application is allowed.

Susan Smith
Member, General Division - Income Security

¹⁶ Paragraph 42(2)(b) *Canada Pension Plan*

¹⁷ Section 69 *Canada Pension Plan*