



[TRANSLATION]

Citation: *LM v Minister of Employment and Social Development*, 2021 SST 982

Tribunal File Number: GP-19-346

BETWEEN:

L. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jean Lazure

HEARD ON: March 5, 2021

DATE OF DECISION: April 29, 2021

Decision

[1] The Appellant, L. M., is not eligible for a disability benefit under the *Canada Pension Plan* (CPP). As a result, the appeal is dismissed.

Overview

[2] The Appellant was 58 years old at the time of the hearing. The Appellant has a Grade 12 education. She has about 25 years of experience working as a cook / assistant cook / server at a dairy bar.

[3] The Appellant has not worked since October 2020; she says she has not been able to since then because of medical conditions.

What the Appellant must prove

[4] To be eligible for a CPP disability pension, the person has to meet the requirements set out in the CPP. More specifically, a person must have been found disabled under the CPP at or before the end of the minimum qualifying period (MQP).¹ The MQP is calculated based on the Appellant's contributions to the CPP. I find that the Appellant's MQP ended December 31, 2012. At that time, the Appellant was 50 years old.

[5] In addition, to be considered disabled, a person must have a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are 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.²

[6] So, the issue is whether the Appellant's disability was severe and prolonged on or before December 31, 2012. The Appellant has the burden of proving this.³

¹ Section 42(1)(b)(i) [sic] of the *Canada Pension Plan* (CPP).

² Section 42(2)(a) of the CPP.

³ The applicant must show, on a balance of probabilities, that their disability is severe and prolonged.

Reasons for my decision

[7] I find that the Appellant has not proven that she had a severe and prolonged disability before December 31, 2012. Here is what I have considered in making my finding.

The Appellant's disability is not severe within the meaning of the law

- The Appellant believes her limitations prevent her from working

[8] In the questionnaire the Appellant submitted in support of her benefits application,⁴ the Appellant indicated that she stopped working because of panic attacks and low blood pressure. Also, the March 31, 2017, medical report from Dr. Antoine Saade,⁵ the Appellant's family doctor, confirms a diagnosis of [translation] "severe anxiety disorder with panic attacks."

[9] However, at the hearing, the Appellant and her counsel submitted evidence that these diagnoses were not just symptoms. They said that, all her life, doctors thought that these symptoms were the Appellant's real problems. The Appellant's anxiety and panic attacks were only the symptoms of an illness that took a lifetime to properly diagnose.

[10] The Appellant allegedly suffered from essential tremor all her life. Dr. Saade's April 24, 2020, letter confirms the diagnosis.⁶ The March 26, 2020, report by Dr. Ernest Clevinger, neurologist, also confirms this.⁷ The Appellant welcomed the diagnosis, since it explained why she had suffered all her life.

[11] The Appellant testified that she had shaken all her life. It started when she was young, school age. It started with her voice, then her head, then her hands, and sometimes her arms. Nothing helped her "shakes," as the Appellant calls them. She was tired of burning and cutting herself because of her shaking at work at the dairy bar, where she stopped working in 2010.

⁴ This is at GD2-52 in the record.

⁵ This is at GD2-63 in the record.

⁶ This is at GD5-3 in the record.

⁷ This is at GD5-4 in the record.

[12] When asked why she did not look for another job after 2010, the Appellant said: [translation] “Where did you want me to work shaking like that?” She said her voice [translation] “shook” too much, that she shook too much, period. The Appellant testified that it was difficult to live with her shaking, that it embarrassed her in social interactions.

- **The Appellant does not meet the test under the law**

[13] The test for determining whether a disability is “severe” does not involve establishing whether the person has a severe disability, but rather whether a person’s disability prevents them from earning a living.

[14] Also, determining the severity of the disability is not premised upon a person’s inability to perform their regular job, but rather on their inability to pursue any job—in other words, a “substantially gainful occupation.”⁸

[15] I believe the Appellant when she says she has suffered from her condition. However, I cannot rely on the Appellant’s suffering itself. I simply have to look at just the following question: Was the Appellant incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2012?

[16] The evidence does not convince me of this.

[17] I think that, on that date, the Appellant could no longer work at the dairy bar, where she worked for about 25 years. As for holding other jobs, the Appellant points to her “shakes” that prevented her from doing so. Her counsel’s May 12, 2020, note⁹ says: [translation] “How else could it have been?” Her sister expressed a similar view in her testimony.

[18] There is no denying that the Appellant’s shaking causes her suffering. Still, the fact that it prevents her from pursuing an occupation at the dairy bar is not evidence that she cannot do so anywhere else. Therefore, from the evidence on file, it is difficult for me to find that, on

⁸ *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁹ This is at GD-6 [sic] in the record.

December 31, 2012, the Appellant's shaking prevented her from pursuing any other substantially gainful occupation.

[19] For example, the Appellant testified having suffered in her lifetime from her voice shaking. In particular, she said that it was difficult for other people to understand her when she went to the pharmacy.

[20] Again, there is no denying the Appellant's suffering; she has had to deal with this all her life. However, I simply have to look at only how the Appellant's work capacity was affected.

[21] The Appellant testified before me. I found that her voice trembled. But I think I was able to understand her the whole time during the hearing, which is an environment that is generally stressful.

[22] I cannot find that, before December 31, 2012, the Appellant's shaking made her incapable regularly of pursuing any substantially gainful occupation.

- The medical evidence does not convince me that the Appellant had a severe disability within the meaning of the law

[23] I also base my finding on the medical evidence before me. For the following reasons, I do not believe that it supports a finding of a severe disability within the meaning of the law.

[24] I do not have a medical opinion as to whether the Appellant's disability was severe before December 31, 2012. It is not common to have such an opinion in cases like this one. Rather, the Tribunal member has to look at all the medical evidence together and see what it appears to support. This is what I have noted.

[25] In April 2008, the Appellant saw a neurologist, Dr. Dale Robinson. She also saw a psychiatrist, Dr. Sergey Ostashko, in January 2009. I note that no other specialist was seen between 2009 and 2020; usually, that does not point to a serious disability.

[26] When the Appellant saw Dr. Robinson in 2008, she did not want to try the medication he was suggesting, Propranolol. At the hearing, the Appellant said that it was a [translation]

“pressure pill.” I also note that Dr. Robinson suggested a follow-up in a year’s time, which was not done. I believe that the above is not usually consistent with a serious disability: A disability like that would prompt people to try prescribed treatment and have a follow-up, if not more than one.

[27] The progress notes from Dr. Saade, family doctor, from April 2009 to December 2012 are on file.¹⁰ The Appellant had eight visits in close to four years, which is about two per year. Having consultations that rarely is also not generally consistent with a severe disability.

[28] But, most importantly, none of Dr. Saade’s progress notes talk about the Appellant’s shaking. I am not disputing that her shaking existed, but I find that it not being mentioned calls into question how severe it was before December 31, 2012. Those progress notes talk about other symptoms the Appellant had, in particular anxiety, which, on February 26, 2012, appeared to be under control with the medications Paxil and Ativan.¹¹

[29] Some medical reports mention the Appellant’s shaking. Dr. Robinson’s report says: “slight tremor for much of her life.”¹² Dr. Saade’s letter from April 24, 2020, says: [translation] “Her shaking has worsened over time.”¹³ The March 26, 2020, report from Dr. Ernest Clevinger, neurologist, says: “57 year-old woman who has had at least 20 years of tremor. It is worsening.”¹⁴ Those statements do not allow me to conclude that the Appellant’s shaking amounts to a severe disability—one that prevented her from regularly pursuing any substantially gainful occupation before December 31, 2012.

[30] Therefore, I do not believe that the medical evidence supports a finding of a severe disability.

[31] Because of this, I find that the Appellant’s disability was not severe within the meaning of the law before December 31, 2012.

¹⁰ This is at GD2-87 to GD2-122 in the record.

¹¹ See GD2-110 in the record.

¹² See GD2-67 in the record.

¹³ See GD5-3 in the record.

¹⁴ See GD5-4 in the record.

Conclusion

[32] The Appellant is not eligible for a disability pension under the CPP because I have decided that her disability was not severe. For this reason, I do not need to make a finding on the prolonged criterion.

[33] The appeal is dismissed.

Jean Lazure
Member, General Division – Income Security