

Citation: *C. A. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 25

Appeal No: GT-117984

BETWEEN:

C. A.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

TYPE OF HEARING: ON THE RECORD

DATE OF DECISION: August 27, 2014

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on November 22, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Social Security Tribunal.

[3] The hearing of this appeal was by made on the basis of the documents and submissions contained in the hearing file for the reasons given in the Notice of Intention dated July 23, 2014.

THE LAW

[4] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[5] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[6] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is

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.

ISSUE

[7] The Tribunal finds that the MQP date is December 31, 2015.

[8] Since that date is in the future, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the decision.

EVIDENCE

[9] The Appellant is 52 years old. She has a Bachelor of Engineering degree from the University of Waterloo and has completed the Canadian Securities Course. She worked as an engineer for Boeing from 1988 to 1991, as an investment advisor for RBC Dominion Securities from 1991 to 1998, and lastly as an investment advisor for TD Waterhouse from 1998 to 2009. She is presently in receipt of Long Term Disability (LTD) benefits from Manulife.

[10] In her CPP disability questionnaire date stamped by the Respondent on November 22, 2010, the Appellant indicated that she last worked as an investment advisor for TD Waterhouse from August 1, 1998 until October 23, 2010. She noted that she stopped working because of her inability to perform her duties. She claimed to be disabled as of October 23, 2009 and listed her main disabling illnesses and impairments to include: severe clinical depression with recurring suicidal ideations and self-harm tendencies; chronic back, shoulder and neck pain; fibromyalgia; inability to concentrate, read research reports, and remember things; and difficulty sleeping. She further noted that her illnesses and impairments prevented her from working because of her inability to read research reports in a reasonable time frame; her reluctance to call clients; her difficulty completing paperwork; her being stiff and in pain when sitting; her frequent crying spells while at the office; her extreme difficulty making decisions; and her inability to concentrate and focus. She also noted that she experienced low energy, low motivation, and high levels of anxiety and pain.

[11] She described having difficulties and functional limitations with the following: she is in pain after sitting for ½ hour; if she lifts or carries her back seizes up for the next 3-5 days; reaching causes chronic neck and shoulder pain; she has to bend very slowly to avoid injury; she is usually constipated; she cannot clean without her back seizing up, shopping exhausts her, and her back hurts after playing with her children for five minutes; she has difficulty reading, dry eyes, and trouble focusing; she sometimes forgets conversations, has difficulty remembering faces, and forgets most of what she reads; she finds concentrating to be very difficult and exhausting; her sleep is poor; and she gets stiff after driving for an hour. Under treatments she noted trigger point injections for chronic neck, back and shoulder pain; psychoanalysis for depression, mood, and anxiety problems; and occupational therapy for coping with daily living. She listed her treating physicians to include Dr. Huryn, family doctor, for chronic pain and depression; Dr. Fowler, general practitioner and psychotherapist, for depression, mood, and anxiety problems; Dr. Furlan, physiatrist, for chronic neck, back, and shoulder pain; Dr. Shapiro, psychiatrist, Dr. Hamer, psychiatrist, and Dr. Aldaoud, fellow at the Centre for Addiction and Mental Health (CAMH), for depression, mood, and anxiety problems.

[12] A report from Dr. Huryn, family doctor, dated November 25, 2010 accompanied the CPP application. The report diagnosis depression, insomnia, and fibromyalgia. The report notes that the Appellant's prognosis will depend on her treatment progress [in response to] to various therapies. On April 30, 2012 Dr. Huryn reported to Manulife that the Appellant continues to have depressed mood, anxiety with panic attacks, poor sleep, and pain in her back, shoulders and left hip region. He noted that she has not responded to anti-depressant medication, and that she occasionally takes Seroquel or Imovane for sleep. He concluded that "her symptoms prevent her from returning to the workplace."

[13] On January 5, 2010 Dr. Shahid and Dr. Shapiro, from the Toronto Western Hospital Sleep & Alertness Clinic, reported on their assessment of the Appellant for her sleep problems. The Appellant scored 16 on the Athens insomnia scale, which indicates she has insomnia; she scored 11 on the Epworth sleepiness scale which indicates daytime sleepiness; and she scored high on the fatigue severity scale. She scored 43 on the Centre for Epidemiologic Studies Depression scale (CES-D), when a score of 16 is suggestive of

depression. The Appellant was seeing a therapist once a week and taking cognitive behavioural therapy (CBT), but was not finding this helpful. The report reviews the Appellant's history and ongoing symptoms in detail, and concludes that she has a history of depression, insomnia, and fibromyalgia. She was scheduled for two nights of sleep study.

[14] There are three reports from Dr. Furlan, physiatrist, from July 22, 2010 to November 20, 2011. The July 22, 2010 report notes that on a body pain diagram, the Appellant marked the following areas of pain: the back of her neck (right and left sides), shoulder area (right and left sides), and interscapular area and lower back region. On physical examination she was found to have active trigger points in the upper trapezius and rhomboids bilaterally. Dr. Furlan performed trigger point injections, and thereafter the Appellant saw an occupational therapist who oriented the Appellant to do stretching exercises for her trapezius and rhomboid muscles. The June 30, 2011 report noted that the Appellant is receiving acupuncture and Shiatsu treatment. The report also notes as follows: "The pain affects her function between 50-80%, which includes general activity, mood, walking ability, normal work, relations with other people, sleep, enjoyment of life, ability to concentrate and appetite." The report further notes that she was seeing a psychoanalyst between 3-4 times per week, and that she thought this was helping with her depression and anxiety. The Appellant reported that the most important pain she was having is the pain in her left hip and groin area, which had started in the fall of 2010 when she resumed running. Dr. Furlan injected the left hip area, and instructed the Appellant on stretches. She was to follow up in the Injection Clinic, which is a multidisciplinary pain clinic comprising occupational therapy and physiotherapy.

[15] On November 10, 2011 Dr. Furlan reported that the Appellant did not meet the current criteria for fibromyalgia because she did not have pain in more than three separate sites simultaneously; she only had pain in her upper back and left hip. Dr. Furlan concluded that the pain was more muscular and all myofascial in nature. Dr. Furlan also noted that the Appellant was undergoing a lot of complicating psychological stressors including her husband's situation, the custody of her daughters, pressure to return to her work, and her pain. She referred the Appellant to the chronic pain program at the Rumsey Centre and for a sleep study.

[16] On September 27, 2010 Dr. Aldaoud, psychiatrist at the CAMH, diagnosed generalized anxiety disorder and major depressive disorder. The Axis II diagnosis was deferred but with obsessional traits. The Axis III diagnosis was fibromyalgia. Dr. Aldaoud assessed a Global Assessment of Functioning (GAF) of 65. The Appellant was referred to interpersonal psychotherapy and started on psychotropic medications.

[17] On February 21, 2011 Dr. Fowler, general practitioner practicing solely in the area of psychotherapy/psychoanalysis, reported to Manulife that the Appellant was attending four times per week for psychoanalysis. Her current diagnoses which led her to seek therapy were depression and anxiety disorder, against a background of underlying personality features that it would be premature to designate as any specific disorder. The report describes in detail the Appellant's depressive symptomology and notes: "Thoughts of suicide have occurred not infrequently, when the outlook has appeared particularly grim; expressions of her despair have taken the form of self-cutting, a symptom which has much meaning beyond any suicidal wish...Anxiety has at times been overwhelming...." Dr. Fowler did not feel that the Appellant would benefit at that time from a rehabilitative program directed at a soon return to work, and was willing to consider with the Appellant, when the time seems more propitious, preparations for resumption of work. On February 25, 2014 Dr. Fowler reported that he has been treating the Appellant with regular psychoanalysis and with some mindfulness approaches added in for over three years. The report states: "The high levels of anxiety and associated somatic symptoms that Ms. C. A. continues to experience on a daily basis make working untenable. I do not believe she would be capable of withstanding the regular demands of employment. Expectations to perform, meet deadlines, remain focused on given tasks and fulfill productivity requirements would include intense emotional responses that would overwhelm her in such ways that she would become increasingly disorganized, distressed, and ultimately decompensate."

[18] On May 9, 2011 Dr. Yiu, psychiatrist, reported on her independent psychiatric examination of the Appellant. The report reviews in detail the history of the Appellant's presenting illness, her typical day, her past psychiatric history, her medications, the clinicians involved in her treatment, and her past medical, family and personal histories.

[19] Dr. Yiu summarized as follows:

C. A. is a 49 year old separated mother of 2 young daughters who overtly appears to be functioning and rational but is privately in horrific emotional turmoil. She has been besieged on many fronts by a number of severe stressors since 2008 without reprieve. Since her leave of absence on October 24, 2009 from her position as Investment Advisor for TD Waterhouse, her mood and self destructive behavior has worsened. She has not responded to or has suffered side effects from psychotropic medications. She has also had the misfortune of having a bad fit with many of the previous psychiatrist/psychologists she's seen prior to Dr. Fowler. She is currently faithfully attending 4 times weekly psychoanalysis and sees this as the only way of her emotional pain.

She has frequent suicidal ideation and turns to self cutting and alcohol as coping mechanisms.

[20] Dr. Yiu's Axis I diagnosis was major depressive disorder; severe; chronic. The Axis II diagnosis was deferred. The Axis III diagnosis included: cervical myofascial syndrome; fibromyalgia; chronic gastric pain; cardiac arrhythmia NYD; and hearing impaired in both ears. The Axis IV diagnosis included: second daughter with very difficult temperament; hostile and ongoing divorce proceedings with her former husband who is demanding spousal support; protracted law suit from former client; lack of social supports; increased use of alcohol; non-compliance secondary to poor/bad response to psychotropic medications; development of self-cutting as a coping mechanism; and dwindling connection with daughters due to her erratic behaviour and involvement of Children's Aid Society (CAS). The Yiu assessed a GAF of 50. Dr. Yiu opined that although the Appellant was motivated to return to work, she was limited from returning to work because of her symptoms which include emotional lability, fatigue, poor stress tolerance, and self cutting; that more stressors would worsen her condition; and that it was not possible to predict the expected duration of the Appellant's symptoms.

[21] On January 30, 2012 Dr. Ferreira, from the Centre for Sleep and Chronobiology Sleep Disorders Clinics, assessed the Appellant for unrefreshing sleep and referred her for a sleep study. The polysomnographic report dated March 3, 2012 reports evidence of mild obstructive sleep apneas-hypopneas predominant in supine posture-related sleep accompanied by intermittent soft snoring that was associated with very mild arterial blood oxygen desaturations.

[22] On November 28, 2013 Dr. Ho, who was serving under Dr. Furlan, reported on her assessment of the Appellant at the Toronto Rehab Musculoskeletal Injection Clinic. The Appellant presented with an eight year history of thoracic back pain and indicated that the pain had gradually started in January 2005, after her last daughter was born. The Appellant reported that she had tried physiotherapy, massage, chiropractic, and acupuncture and had found that they only gave temporary relief; she had found trigger point injections from Dr. Furlan to be beneficial. The Appellant's past medical history included: fibromyalgia; chronic neck, shoulder, back pain, and myofascial syndrome; chronic major depressive disorder; and a left humeral fracture in 1991. On physical examination Dr. Ho found a number of myofascial trigger points, and the Appellant agreed to proceed with trigger point injections. The Appellant was taught strengthening exercises for her rhomboids and paraspinals.

[23] On December 2, 2013 the Appellant enrolled in a pain management group program at the Toronto Rehab, Rumsey Centre running from January 16 to March 20, 2014.

[24] On December 10, 2013 Dr. Gladman, rheumatologist, assessed the Appellant for the onset of Raynaud's phenomenon with complaints of dry eyes and dysphagia, and to investigate whether lupus could be a unifying syndrome. Dr. Gladman noted that the Appellant has been on medical leave since October 2009 for both her pain syndrome and significant psychiatric morbidity. Dr. Gladman summarized that the Appellant presents with longstanding Raynaud's phenomenon which has, perhaps, worsened in recent years without any associated pathologic features such as ulcers, pits or interepisodic pain. He reported that she has a prominent pain/ fibromyalgia disorder; that while she does not meet the conventional threshold for fibromyalgia tender point count, the fibromyalgia guidelines have recently been update; and that her symptomatology is suggestive of a pain disorder along this spectrum.

SUBMISSIONS

[25] The Appellant submitted numerous detailed letters setting out why she qualifies for CPP disability and responding to the submissions made by the Respondent. In these letters:

- a) She sets out in detail the extensive treatments and therapies that she has and continues to undergo for her depression and myofascial pain;
- b) She details the numerous medications she has attempted which have not been helpful, and some of which made her depression worse;
- c) She explains that she was in the past highly functioning, and that this is no longer true because of her depression, brain fog, low energy, poor sleep and chronic pain, all of which are symptoms of fibromyalgia;
- d) She confirms that she stopped active employment in October 2009 and has been on medical leave since that time; that the income reflected on her Record of Earnings subsequent to that time is from the sale of her client base which the TD Bank showed as a bonus paid over a three year period and for which they issued T-4 slips; and that this does not reflect income from any employment since she has not been gainfully employed in any capacity since October 2009;
- e) She details her unsuccessful attempts to do volunteer work including:
canvassing on a political campaign where she went out for a little under two hours and had to stop because she became intolerably cold and ended up with back spasms and white hands, even though it was not a particularly cold day and she had dressed warmly; working as a scrutineer on the phone to find out who had not yet voted, half way through which she realized she had become confused about the process, felt overwhelming stress and once again ended up with intolerable anxiety, back spasm, and white hands; and a third occasion when she volunteered to count pizza money for her child's school and during which she constantly was confused and felt a lot of pain after a short time.
- f) Although she continues treatment for her physical and psychiatric conditions, there has been no noticeable improvement and chronic pain, insomnia, fatigue, inability to concentrate, anxiety and depression persist on a daily basis at levels that render her incapable of pursuing regular employment.

[26] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) Although she has significant psychiatric symptoms and maladaptive coping behaviours as set out in Dr. Yiu's May 2011 report, she is undergoing the recommended treatment and no further psychiatric reports have been submitted;
- b) The Appellant's Record of Earnings reflects substantial earnings from 2010 to 2012, and that these earnings have not been accounted for;
- c) Since her treatment remains ongoing and the post 2009 earnings have not been accounted for, it is impossible to conclude that the Appellant's medical conditions preclude her from performing substantially gainful work.

ANALYSIS

[27] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of the date of this decision.

Severe

[28] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[29] The burden of proof lies upon the Appellant to establish on the balance of probabilities that she is disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency,

and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[30] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada* (Attorney General), 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[31] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: *Inclima v Canada* (Attorney General), 2003 FCA 117.

[32] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for her to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[33] The medical evidence in this case is compelling and strongly supportive of the Appellant's disability claim. The most significant reports are those from Dr. Huryn, her family doctor, from Dr. Fowler and Dr. Ho from the Toronto Rehab Clinic who have performed trigger point injections and provided exercise and pain management, from Dr. Fowler, her treating psychologist who has been providing psychoanalysis and other psychological treatment four times per week since 2011, and from Dr. Yiu, who performed a very detailed and thorough independent psychiatric assessment at the request of Manulife, the Appellant's LTD insurer. These reports confirm the Appellant's numerous physical and psychiatric conditions for which she continues to undergo extensive treatment and for which, unfortunately, there has been little improvement.

[34] All of these reports are entirely consistent with each other and with the detailed and thorough submissions and letters from the Appellant. There is no suggestion in any of the reports that the Appellant is feigning or exaggerating her symptoms, or that she has not been totally compliant with all treatment recommendations. The Appellant is highly motivated, she has an impressive education and work history, and she obviously has numerous transferable skills. The Tribunal has considered the cumulative effect of her multiple psychiatric and physical conditions and symptoms including severe depression and anxiety, chronic pain, fibromyalgia, insomnia, and fatigue, and is satisfied that despite her very impressive education and work skills, she lacks the capacity to pursue on a regular and consistent basis any form of gainful employment. The Tribunal also noted that the Appellant has been unable to successfully pursue even minimal efforts at volunteer work. (See paragraph 25 (e) above). Since she is unable to pursue even these minimal volunteer efforts, it is difficult to envision any form of gainful employment that she could successfully pursue.

[35] The Minister's relies on the Appellant's Record of Earnings which shows substantial post 2009 earnings and submits that this has been unexplained and supports that the Appellant has the ability to pursue gainful employment. Although this may not have been explained at the time of the Minister's submissions, it has now been explained by the Appellant. These earnings represent the sale of an asset, and do not in any way reflect gainful employment. The Appellant has confirmed that she has not returned to any gainful employment since October 2009, and this is consistent with the very extensive medical documentation in which there is no suggestion whatsoever of any return to work by the Appellant. (See paragraph 25 (d) above).

[36] Having regard to the clear and compelling medical evidence as well as the detailed and thorough letters and submissions from the Appellant, the Tribunal is satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[37] Having found that the Appellant's disability is severe, it is also necessary to make a determination on the prolonged criteria.

[38] The Appellant's disabling conditions have been ongoing since at least when she stopped working in October 2009, and despite very extensive and continued treatments there has been little improvement.

[39] The Appellant's disability is long continued and likely to continue for an indefinite period.

CONCLUSION

[40] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2009, when she last worked. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of February 2010.

[41] The appeal is allowed.

Raymond Raphael
Member, General Division