

Citation: *L. W. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 36

Appeal No: GT-117653

BETWEEN:

L. W.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Jeffrey Steinberg

HEARING DATE: November 3, 2014

TYPE OF HEARING: Videoconference

DATE OF DECISION: December 3, 2014

PERSONS IN ATTENDANCE

L. W., the Appellant

Kanji Jain, the Appellant's legal representative

W. W., the Appellant's daughter (observer)

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 March 22, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was held by video conference for the reasons given in the Notice of Hearing dated July 21, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] 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).

[6] 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.

[7] 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

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2012.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before December 31, 2012.

EVIDENCE

Documents

[10] In her Questionnaire for CPP Disability Benefits dated February 9, 2011, the Appellant states that she stopped working on February 6, 2011 due to back and knee problems. She described pain in her knees and back which affects walking, sitting, lifting and bending. She also referred to arthritis in both feet and diabetes mellitus. She is prescribed Celebrex, M-Eslon (opioid analgesic) and Lorazepam.

[11] The Appellant was born in 1952 and completed Grade 12. She attended college and obtained a diploma as a personal support worker (PSW). Between June 24, 2004 and February 6, 2011, she worked as a PSW assisting elderly and palliative care patients.

[12] In the CPP Medical Report dated March 21, 2011, Dr. Lo, the family physician, diagnosed i) lumbar strain-chronic back pain and ii) bilateral knee pain – chronic pain. He indicated that the back pain started years earlier and progressed over the years. According to Dr. Lo, the Appellant was totally disabled even after taking M-Eslon. She was unable to stand longer than 30 minutes, sit longer than 45 minutes and walk greater than 15 minutes. He noted that the Appellant is diabetic and obese, which exacerbates her symptoms. Dr. Lo stated the prognosis was “likely to be indefinite with little chance for recovery as there has been little improvement over the past few years”.

[13] A September 15, 2010 MRI of the lumbar spine revealed spondylosis and predominant L4-L5 involvement with central disc extrusion and possible sequestration. An October 10, 2010 x-ray of the knees failed to reveal any abnormality.

[14] On November 30, 2010, Dr. da Costa, neurosurgeon, saw the Appellant for a neurosurgical consult. He stated that she did not have radicular symptoms and therefore, disc surgery would not affect her back pain. He suggested referral to a pain clinic.

[15] A February 26, 2011 MRI of the right knee revealed high pes anserine bursitis level of the medial femoral condyle posteromedial knee, mild superior patellar tendinosis and early degenerative changes of the medial meniscus. A March 6, 2011 MRI of the left knee revealed: 1. A complex horizontal tear in the posterior horn of the medial meniscus; and 2. Moderate chondromalacia of the patella with suggestion of degenerative osteoarthritis involving the medial compartment of the patellofemoral joint.

[16] On June 9, 2011, Dr. Sattarian, orthopedic surgeon, saw the Appellant for assessment of bilateral knee pain, which she had been experiencing since October 2010. He noted a small effusion of both knees. Range of motion was from 0-110 degrees. Dr. Sattarian did not feel that degenerative tears of the menisci were the source of the Appellant’s pain as opposed to inflammatory joints. He suggested a rheumatology assessment and proposed injecting the knees with Depo-Medro and Xylocaine.

[17] On December 19, 2011, Dr. Sattarian reported that although the Appellant noted significant improvement in her left knee following her last injection, both knees were again very symptomatic with pain and swelling. Therefore, he re-injected them.

[18] On March 21, 2012, Dr. Lo wrote to the Appellant's legal representative. He stated that the Appellant suffers from bilateral knee osteoarthritis, degenerative disc disease of the lumbar spine and tendinopathy of her wrists of several weeks duration. According to Dr. Lo, the back and knee pain were severe. The Appellant required a cane to walk and could only take a few steps at a time. Due to back pain, she could sit only 15 minutes even with analgesics. Although treatments such as injections and anti-inflammatory help for short periods, the Appellant returns to her baseline. To help her cope with pain, Dr. Lo prescribed morphine (M-Eslon 120 mg bid). He described her degenerative disc disease of the lumbar spine and osteoarthritis of the knees as degenerative and chronic. Dr. Lo further indicated that although a total knee replacement may provide some relief, due to the Appellant's young age, surgery was not yet advisable. In reference to employability, Dr. Lo stated the following:

Ms. L. W. is unable to walk without support from a cane is definitely not able to return to her work as a personal support worker (which requires much lifting and the worker to constantly be on their feet). Due to the fact that MS. L. W. is in constant, day-long pain in her knees and back and is unable to stand or walk or sit for any prolonged period of time, I do not believe that there would be any type of employment that she would be suited for with her disabilities. Also, with her high dose Morphine (120 mg bid), she would be incapable of working in any environment that required concentration or operation of heavy machinery or driving a car.

In summary, Ms. L.W. suffers from Osteoarthritis of her knees, degenerative disc disease of her lumbar spine, and wrist tendonitis. Each of these conditions contribute to significant morbidity causing her severe and prolonged disability. She will be unable to work in any capacity for the foreseeable future.

[19] On March 27, 2012, Dr. Wan, internal medicine and rheumatology, saw the Appellant for severe knee pain on both sides. She was found to have slight contracture in both knees with soft tissue swelling and severe tenderness at the peri-articular tissue of the

joints. Due to pain, she walked with difficulty and required a cane. According to Dr. Wan, although he saw the Appellant on two subsequent occasions, her knee symptoms had not responded much to medication or intra-articular injection. He stated the following: “This situation is not likely to change in the next twelve months. In her present condition she is unsuitable to return to her previous or any other employment”.

[20] On May 14, 2012, Dr. Sattarian reported that he saw the Appellant for ongoing pain in her knees. Despite previously injecting the knees repeatedly, symptoms recurred. Therefore, he injected them again.

[21] On May 28, 2012, Dr. Sattarian reported that the Appellant first came under his care for her back and knee symptoms on June 9, 2011. She had been experiencing ongoing and severe pain in her knees and lower back and was having difficulty with activities of daily living such as standing walking, kneeling and stair climbing. He injected her knees with Depo-Medrol and Xylocaine: he injected the left knee on July 11, 2011 and injected both knees on December 19, 2011 and May 14, 2012. According to Dr. Sattarian, the Appellant’s knee symptoms were severe and prolonged. He felt she was severely disabled due to her knee condition and noted that her ongoing back pain also increased her degree of disability.

[22] On October 26, 2012, Dr. Marks, psychiatrist, saw the Appellant at North York General Hospital (Adult Mental Health) for chronic pain and depression. According to Dr. Marks, the Appellant’s mood had been sad for approximately 18 months. She would spontaneously cry on a daily basis, was anhedonic, had decreased sleep because of pain, low energy and motivation and difficulty concentrating at times. According to Dr. Marks, other than difficulty with attention and concentration due to immense pain, her cognition was within normal limits. He stated she met the criteria for a mood disorder secondary to a general medical condition: degenerative disc disease and sciatica. The differential diagnosis would be major depressive episode. He recommended an increase in Cymbalta, indicated the Appellant should contact a pain clinic and said he would refer her to a mindfulness based stress reduction program.

Testimony

[23] The Appellant is age 59. She lives with her son, however he does not contribute to her welfare. She came to Canada in 1989. She has Grade 12 and obtained a Diploma at George Vanier in Cosmetology in 1995. She attended Durham Health Care Campus and obtained a certificate as a PSW in 2003. She also took a course in palliative care in 2003 in order to work with terminally ill patients.

[24] The Appellant last worked through the employment agency, VHA Home Healthcare (“VHA”), as a PSW. She started working in 2004 and stopped in 2011. VHA would send her on assignments to private homes and retirement homes. She would assist individuals with their activities of daily living. For example, she would help bedridden patients move from bed to a wheelchair to the bathroom, where she would change diapers, clean the patients and then clean the bathroom. She would also do laundry, feed patients and take them to the park. Many of the patients were “dead weight” and in the last stages of life. Her duties included heavy lifting, transferring of and turning patients over.

[25] Before she started working as a PSW, the Appellant worked for a different employment agency, HCR, which sent her to car parts factories, such as Magna, where she would sand car parts and pack them into bins. At another car parts manufacturer, Master, she assembled hand brakes and placed them into bins. HCR would also send to warehouses where she would clean auto parts and perform janitorial work. She worked for HCR between approximately 1998 to 2003.

[26] Before working for HCR, the Appellant worked for Hotel Ibis and Holiday Inn performing housekeeping. She did this between approximately 1990 and 1993. Between 1993 and 1995, she attended cosmetology school. Between 1995 and 1996, she tried to work as a cosmetologist and build up a clientele however she did not make any money and abandoned this pursuit.

[27] The Appellant has worked full time since she came to Canada. She wanted to contribute to society and be independent.

[28] The Appellant stopped working in 2011 because her back and knees bothered her. She recalled one incident where she was transferring a patient from bed to a wheelchair and could not straighten her back. She felt that she placed the patient in jeopardy and could not continue at the job. She subsequently had an MRI of her back which revealed the problem. She has been on morphine for a long time. However, the high dosage caused nausea. The dosage has since been modified. She has not looked for work since she had to stop working because of her severe pain and unreliability. Also, her age does not favour her. She does not sleep. The next day, she feels shaky and weak. Her memory has faded and she cannot stand the way she used to.

[29] In December 2012, the Appellant experienced pain in her back which travelled from the middle down to her waist and legs. The pain feels as though someone is cutting her back in two. She also has difficulty bending. If she lies on her back, she experiences pain as though her bones are breaking. She also has poor mobility. On one occasion, her son helped her to go the bathroom, however she soiled herself before she managed to get there and her son had to clean her.

[30] If she stands, she shakes. She can sit for only up to one-half hour and has to get up after one hour. If she sits too long, her body also shakes. She can walk for 10 minutes and uses a walker and a cane. She also has difficulty with her right wrist. For the past year, fluid has built up in the wrist. She sees a medical doctor who drains the fluid. She uses a walker to ambulate since using a cane puts too much stress on the right wrist.

[31] The Appellant's daughter, who lives 45 minutes away, helps her around the house. Her daughter bathes her, dresses her, does her hair, cooks and cleans for her and does the shopping.

[32] The Appellant saw a specialist at Sunnybrook Hospital for a surgical consult concerning her back. The specialist said that surgery was too risky and he recommended that she go to a pain clinic. She attended at a pain clinic and had some nerve blocks. The pain clinic specialist also asked her to do some exercises. She was unable to perform the exercises following which the pain clinic specialist told her that she was "wasting" his time as he could not help her any more. She cannot remember exactly when she went to

the pain clinic but thinks it was sometime last year. She recalls attending two or three times for nerve block injections.

[33] In December 2012, the Appellant was prescribed Hydromorphone contin 3 mg tid. and Celebrex 200 mg o.d. A full list of the medications at or around that time is described in the October 26, 2012 report of Dr. Marks. As of the date of hearing, she is still prescribed Morphine (although at a lower dosage), Celebrex, Cymbalta, Apo- Pregabalin, Glyburid, Metformin and Melatonin. She has not pursued physiotherapy as it is not covered by OHIP and she cannot afford it. She has purchased various Dr. Ho home devices for her knees and back but they did not really help.

[34] The Appellant suffered knee pain in December 2012. She would hear the bones cracking as she has no cushioning in her knees. She has lost weight but still suffers pain. Cold weather does not help the pain. She experiences swelling and inflammation, discomfort and numbness. She saw Dr. Sattarian, a specialist, who said she was too young for surgery. He performed knee injections in 2012. She still gets them once every 6 months in each knee. At first they helped but gradually the effects have faded.

[35] The Appellant does not believe she could perform a part-time job. She has a bad memory, suffers pain, cannot catch her words and believes her age does not favour her. She has poor sleep consisting of 2-3 hours due to pain and wakes up feeling tired and weak. She asked her doctor for sleep medication but he did not want to prescribe any as she already takes a lot of medication.

[36] In response to questioning by the Tribunal, the Appellant clarified there was no modified work at her last place of employment where she was specifically hired as a PSW. After she saw Dr. Marks in October 2012, she contacted him for a follow-up appointment but never received a call back. He prescribed Cymbalta which she still takes. He did not refer her to any programs.

[37] She does not recall the name of the doctor she saw at the pain clinic and confirmed that she received 2-3 nerve block injections which did not help.

[38] She does not have any reports from the doctor she sees who drains the buildup of fluid in her right wrist.

[39] Although she mentioned arthritis in both feet in her Questionnaire, the Appellant has not seen a specialist for this condition. Metformin controls her diabetes mellitus.

[40] The Appellant did not pursue retraining or other work. She does not believe she can work as she is not reliable due to her pain. If she sits more than one-half hour, she starts to shake and cannot find her words. Her age also works against her.

SUBMISSIONS

[41] The Appellant submitted that she qualifies for a disability pension because:

- a) She suffers from severe pain in her back and knees which affects mobility and sitting;
- b) Despite medication and treatment by various specialists, she has not improved and is incapable regularly of performing any substantially gainful occupation;
- c) She cannot perform physically demanding jobs. Given her age, education and work experience, from a “real world” experience perspective, it is unlikely she will find sedentary employment that would accommodate her medical conditions.

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

- a) According to the neurosurgeon’s report, her MRI revealed mild degenerative changes and a disc herniation. However, the spinal cord and nerves were not affected. No severe physicians findings were noted and surgery was not recommended;
- b) She has been treated conservatively with physiotherapy, anti-inflammatories and pain medication. She has not exhausted all treatment options and is awaiting

referral to a pain clinic. It is reasonable to expect some improvement in her pain with regular ongoing treatment;

- c) Her MRI reports indicate some degenerative changes in her knees however no severe findings were noted;
- d) Although she previously worked in physically demanding work as a PSW, there is no information on file indicating she attempted alternative light duty work which may be more suitable to her limitations.

ANALYSIS

[43] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

Severe

[44] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[45] Based on the medical record and Appellant's evidence, the Tribunal is persuaded that the Appellant could not carry out her previous physically demanding job as a PSW. The Tribunal is satisfied that her restrictions which affect walking, standing, lifting, bending and carrying would also prevent her from performing any other physical job.

[46] The Tribunal is also satisfied based on the medical record and Appellant's evidence that the Appellant is incapable regularly of performing lighter sedentary work. The Tribunal accepts the Appellant's evidence, which is supported by Dr. Lo, that after sitting less than 45 minutes (GT1-55) or 15 minutes (GT1-85), her back pain becomes "intolerable" even with the use of analgesics. The Tribunal is further satisfied that the Appellant's constant unremitting pain, which necessitates strong painkillers such as morphine, would also affect her ability to concentrate and focus on any job.

[47] The Tribunal has also considered the October 26, 2012 report of Dr. Marks who diagnosed a mood disorder secondary to a general medical condition of degenerative disc disease and sciatica. Dr. Marks commented that the Appellant's mood had been sad for approximately 18 months (i.e., April 2011), the onset of which would be approximately two months after she had to stop working in a job which she testified she took pride in. Although the Tribunal is satisfied that the Appellant's disability was severe by virtue of the knee and back conditions, the Tribunal is further satisfied that her mood disorder compounded her physical disability shortly after she stopped working.

[48] The Tribunal has also considered tendinopathy of the wrists which Dr. Lo indicated on March 21, 2012 was of several weeks duration and which results in weakness and pain affecting use of the hands or wrist. Although this condition is not central to the Tribunal's finding that the Appellant would be unable perform light sedentary work, it is also an additional factor which the Tribunal has noted in considering the Appellant's overall condition.

[49] The Tribunal is satisfied that the Appellant has been compliant with treatment, including medication, nerve block injections, and knee injections, despite which her condition remains serious. Although the Appellant testified that the pain clinic specialist asked her to perform certain exercises and that she did not do so, the Tribunal accepts the Appellant's testimony that she did not feel capable of performing these exercises. She testified that Dr. Sattarian continues to inject her knees and that she attempted to follow up with Dr. Marks after she saw him for a psychiatric consultation.

[50] As the Tribunal is satisfied that the Appellant did not possess residual capacity to perform lighter work on or before the MQP resulting from the cumulative impact of her knee and back condition, she was exempt from the requirement to seek retraining or look for alternative work.

[51] The Tribunal is satisfied that the Appellant suffered from the onset of a severe disability as of February 2011 when she could no longer perform her PSW job because of her significant and serious low back and knee pain and was further rendered incapable

regularly of pursuing any substantially gainful occupation including lighter sedentary work given her i) restriction against prolonged sitting and ii) problems with attention and concentration resulting from her pain.

Prolonged

[52] The Tribunal finds that the Appellant's disability was prolonged as of February 2011. She had to stop working on February 6, 2011 because of her back and knee problems. According to the medical reports, she had been experiencing bilateral knee pain since October 2010 and started receiving treatment from Dr. Sattarian in June 2011. In May 2012, Dr. Sattarian stated that the knee symptoms were severe and prolonged. He further noted that ongoing back pain was increasing the degree of disability. In terms of back pain, Dr. Lo noted in the CPP Medical Report that it started years earlier and had progressed over the years. The September 15, 2010 MRI revealed spondylosis and predominant L4-L5 involvement with central disc extrusion and possible sequestration. In his March 21, 2012 report, Dr. Lo confirmed that the back pain worsened in 2010. He stated that it is degenerative in nature, chronic, incurable and progressive.

CONCLUSION

[53] The Tribunal finds that the Appellant suffered from a severe and prolonged disability commencing in February 2011, when she was no longer able to work as a result of her knee and back pain. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of June 2011.

[54] The appeal is allowed.

Jeffrey Steinberg
Member, General Division