



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Z. R. v. Minister of Employment and Social Development*, 2015 SSTGDIS 137

Date: December 14, 2015

File number: GP-14-1536

GENERAL DIVISION - Income Security Section

Between:

Z. R.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by Videoconference on December 10, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Z. R.: Appellant

Domenic Romeo: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on June 20, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on April 8, 2014.

[2] The hearing of this appeal was by Videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) The method of proceeding provides for the accommodations required by the parties or participants;
- c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives; and
- d) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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).

[4] 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.

[5] 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

[6] The Tribunal finds that having regard to the Appellant's Record of Earnings and the applicable Child Rearing Provisions the MQP date is December 31, 2017.

[7] Since this 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 hearing.

BACKGROUND

[8] The Appellant was 37 years old when she applied for CPP disability; she is now 39 years old. She was born in Pakistan and moved with her family to Australia in 1995; she immigrated to Canada in 2002. In Australia she obtained an Information Technology Diploma. Her employment in Australia included working in a daycare while she was studying; working in an administrative/data entry position with the Department of Veterans Affairs; and working at a call centre supporting software for new taxation technology. After coming to Canada she worked for five years as a store manager.

[9] She was injured in a motor vehicle accident (MVA) on January 20, 2009 and has not returned to work since the accident. She was divorced in 2011 and is now living in a house with her two children (ages 6 & 12) together with her sister, her sister's husband, and their young son.

APPLICATION MATERIALS

[10] In her CPP disability questionnaire, signed on May 29, 2013, the Appellant indicated that she has a grade 12 education and that she attended a college/university. She stated that she last worked as an assistant manager (cashier, shipping/receiving, merchandising, payroll etc.) for International Clothiers from 2004 until January 2009. She stated that she stopped working because she was involved in a MVA. The Appellant did not indicate a date as which she was claiming to be disabled. She stated that the illnesses or impairments that preclude her from working are as follows: suffering from neck and back pain; headaches; and cannot stay in one position because of pain.

[11] She explained her difficulties/functional limitations to be as follows: can sit and stand for a maximum of two hours with pain; difficulty walking for more than 15-20 minutes; difficulty reaching; difficulty with personal needs when in pain; often constipated; problems with household activities and always has help from sister; some difficulty with memory and concentration; and able to drive for 15-20 minutes when needed (sometimes has to drive children).

[12] A report dated April 5, 2013 from Dr. Mehvish, family medicine, accompanied the CPP application. Dr. Mehvish indicates that the Appellant has been treated at the clinic for four years and that her last visit was on September 25, 2012. The report diagnosis lower back pain. The prognosis indicates that improvement is expected with continued medical treatment and more physiotherapy, improvement is expected.

ORAL EVIDENCE

[13] The Appellant reviewed in detail her education and employment history. She described the MVA on January 20, 2009 and indicated that she was pregnant at that time. The MVA had a large emotional impact on her because she was worried about the baby. The baby was fine when she born, but she has been slow in development and has “special needs.” She is now six but acts like she is 2 ½ year old. The Appellant finds it hard to manage this child because of her (the Appellant’s) pain. Her sister helps and does sixty per cent of the “looking after the children.”

[14] She described her physical problems as follows:

- **Headaches:** she experiences headaches on average once a week and they last for up to twenty four hours. She takes Tylenol and Advil when she has the headaches, and sometime she massages with Vicks. She experiences her headaches throughout her entire head; she has pain in her eyes and can't focus. She could not remember whether she has seen any specialists for her headaches, and her only current treatment for them is seeing Dr. Kahlon, her family doctor, and medications.
- **Neck:** She experiences constant pain in her neck, mostly on the back side. The pain becomes severe depending on her activities (about once a month). When the pain is severe she takes Tylenol #3 and ibuprofen prescribed by Dr. Kahlon. Otherwise, she takes Extra Strength Tylenol. When the pain is severe it radiates up her head, and down her right shoulder and arm. She tries to avoid activities that exacerbate the pain, but she can't avoid them because of the children.
- **Back:** She experiences pain throughout her entire back on a daily basis. The pain increases with activities, and when it is severe she gets some relief with naproxen.
- **Right arm:** She experiences pain and numbness down her right arm to her fingers. When this becomes severe she just stops doing things.
- **Legs:** pain radiates down her legs from her back (mostly on the left). Her left knee is painful and stiff. She experiences leg pain on a daily basis

[15] She initially had physiotherapy and massage, and went to a chronic pain program in 2011. These didn't help and she just got used to the pain. She hasn't taken any further treatment for her pain other than massages by her sister and pain medications.

[16] She has emotional issues because the pain stops her from doing things - she gets upset. She is not seeing anyone for depression. She takes an anti-depressant prescribed by Dr. Kahlon on a daily basis. She is not sure when she finished taking psychotherapy and indicated that she has only taken psychotherapy from Dr. Pilowsky and Tingling's. Her emotional issues affect her ability to work because she can't concentrate or focus.

[17] Dr. Hussain was her family doctor when she applied for CPP disability. She started to also see Dr. Kahlon about 2-3 years ago. She acknowledged that there are no reports from either Dr. Hussain or Dr. Kahlon in the hearing file. When referred to the report dated April 5, 2013 from Dr. Mehvish which accompanied the CPP application (see paragraph 12, supra), she stated that she doesn't know who Dr. Mehvish is.

[18] She hasn't returned to work since the January 2009 MVA and she acknowledged that she has made no efforts to find alternative work and upgrade her work skills. When asked why not, she stated she is in too much pain and this stops her from doing anything. She stated that while she was going through psychotherapy she was also dealing with marital issues and her daughter's health challenges. She was adamant that pain is her main problem and that she could cope with these other issues if it weren't for her pain. She has travelled to Pakistan on three occasions since the MVA. She went for approximately seven weeks each time, and the flight is about 12 hours. She requested special assistance for getting on and off the flights. Her family in Pakistan arranged and paid for the flights (for her, her two children, her sister, and her son) because they knew that she (the Appellant) was going through a lot of physical and emotional problems.

MEDICAL EVIDENCE

[19] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[20] A psychiatric evaluation by Dr. Azadian, psychiatrist, on April 29, 2009 diagnosed adjustment disorder with mixed anxiety and depressed mood. He assessed a Global Assessment of Functioning (GAF) of 55. He recommended anti-depressants, anti-inflammatories, assessments by a physiatrist to rule out nerve damage and by a neurologist because of her dizziness and headaches. Dr. Azadian also recommended 12-14 sessions of psychotherapy.

[21] A MRI on December 17, 2009 reveals tiny disc bulges at the C3-C4 and C4-C5 levels, an otherwise unremarkable cervical spine study. With respect to the lumbar spine, the MRI reveals multilevel mild degenerative facet changes and no disc herniation, spinal canal or neural foraminal compromise.

[22] On March 21, 2010 Dr. West, orthopaedic surgeon, assessed the Appellant at the request of her lawyer. The Appellant's current symptoms included neck pain; lower back pain with radiation down her legs; frequent and severe headaches; insomnia; and feelings of depression, stress and worry. Dr. West diagnosed myofascial cervical spine strain; myofascial lumbosacral spine strain; and post-traumatic cervicogenic headaches. His prognosis at that time for a complete and full recovery was substantially guarded. Dr. West opined that the Appellant was substantially unable to perform the essential tasks of her employment and that it is "substantially possible" that this inability will persist on an ongoing and indefinite basis.

[23] On March 26, 2010 Dr. Pilowsky, psychologist, diagnosed major depressive disorder, moderate severity; post-traumatic stress disorder; and pain disorder associated with both psychological factors and a general medical condition. She assessed a GAF of 50. She suggested 12 sessions of psychotherapy.

[24] On March 3, 2011 Dr. Debora, chiropractor with Professional Chronic Pain Associates, in a discharge report diagnosed chronic mechanical neck pain; cervical radiculopathy; chronic mechanical thoracic pain; chronic mechanical low back pain; lumbar radiculopathy; and chronic cervicogenic headache. He detailed the treatments rendered and indicated that the Appellant has made mild to moderate progress in the pain management program and that the treatments received have given her the ability to deal with day to day activities of normal living as well as increase her mobility.

[25] On March 26, 2012 Dr. Wong, physiatrist, assessed the Appellant at the request of her lawyer. His diagnoses included: moderate myofascial injury of the cervical spine paraspinal muscles; cervicogenic headaches; moderate myofascial injury of the thoracic spine muscles with referred pain to the shoulders and arms; moderate myofascial injury of the lumbar spine paraspinal muscles and upper sacral spine gluteal muscles with referred pain to the legs; post-traumatic insomnia; and psychological problems. Dr. Wong opined that the Appellant has suffered a substantial inability to perform the essential tasks of her pre-accident employment. He explained that her job required a lot of standing and walking, repetitive arm movements, as well as heavy lifting which she could not perform. Dr. Wong further opined that the Appellant has suffered a complete inability to perform the essential tasks of any employment given her

education, skill and training. He explained that she suffers with multiple injuries involving her neck and back which is complicated with insomnia and stress. He indicated that the duration of this inability is “undetermined at this time.” His recommendations included a chronic pain program, psychological treatment, and a neurologist.

[26] On April 27, 2012 Dr. Kagal, rheumatologist, assessed the Appellant at the request of her lawyer. He diagnosed myofascial cervical strain, myofascial lumbar strain, post-traumatic headaches, and posttraumatic fibromyalgia. Dr. Kagal opined that due to her musculoskeletal impairments, the Appellant was unable to return to her pre-accident employment, and that the duration of this restriction is indefinite.

[27] The office notes from Doctors-R-Us as of November 1, 2012 indicate three visits in 2012 (the last on September 25th); five visits in 2011; six visits in 2010; and 11 visits in 2009 after the January MVA. Many of these visits relate to ongoing neck and back pain. There is no indication in the office notes of depression or of any significant psychological issues.

[28] On October 15, 2013 Dr. Vitelli, psychologist, reported on his assessment of the Appellant at the request of her lawyer. He stated that she continues to experience pain and emotional problems that make her unable to work. The Appellant reported occasional problems with memory and concentration but did not view this as being a major concern. No formal testing was done but she showed no problems with temporal or spatial orientation. She also showed no overt problems with language production or comprehension and appeared articulate and appropriate during the interview. Aside from driving anxiety, she was not reporting posttraumatic symptoms except for pessimism about her future recovery. Dr. Vitelli diagnosed adjustment disorder with mixed anxiety and depressed mood, and chronic pain associated with both psychological factors and a general medical condition. He opined that it is unlikely that she will be able to return to work without substantial pain treatment and supportive counselling. He also opined that given the length of time since her accident, she is unlikely to improve significantly without further treatment.

[29] On October 29, 2013 Dr. Devlin, physiatrist, reported on his assessment of the Appellant at the request of the insurer. He noted that the Appellant’s history was that she had not returned to work on the basis of ongoing chronic pain. He did not believe that she was completely unable

to engage in any employment for which she is reasonably suited by education, training or experience. The report states, “She offers a previous history of having worked in more secretary type jobs, and I could not find anything on examination to indicate she could not do so, if she chose to do so.”

[30] On December 11, 2013 Dr. Rosenblat, psychiatrist, reported on his assessment of the Appellant at the request of the insurer’s lawyer. After a detailed review of the medical documentation, an extensive interview, and psychometric testing he opined that that the Appellant meets the criteria for a diagnosis of major depressive disorder; that she does not meet the criteria for a diagnosis of post-traumatic stress disorder (PTSD); that she suffers from significant symptomatology related to PTSD; and that she meets the criteria for a diagnosis of somatic symptom disorder (pain). The prognosis was poor and suggested treatments included mindfulness based stress reduction, cognitive behavioural therapy and psychiatric medications. Dr. Rosenblat opined that the Appellant suffered from a complete inability to engage in any employment for which she is reasonable suited by education, training or experience.

[31] On August 20, 2013 Jeff Ford, occupational therapist, reported on his assessment of the Appellant at the request of the insurer’s lawyer. With respect to the Appellant’s ability to work he stated, “With evidence of an inconsistent and/or sub-optimal effort put forward by the plaintiff on August 12, 2013, this writer would not state that I have been provided with objective and verifiable evidence of a functional limitation that would prevent the plaintiff from returning to work, based on injuries sustained in the motor vehicle accident of January 19, 2009.”

[32] On October 2, 2013 Dr. Wong reported on his reassessment of the Appellant at the request of the Appellant’s lawyer. He opined that the combination of the Appellant’s physical and psychological problems are preventing her from returning to any significant work given her education, training and experience. His recommendations included a chronic pain program, that the Appellant be followed by a psychologist, and the she be evaluated by a psychiatrist for her depression.

[33] On November 13, 2013 Dr. Frank, psychologist, reported on his assessment of the Appellant at the request of the insurer’s lawyer. Dr. Frank diagnosed major depressive disorder,

chronic, moderate in severity; pain disorder associated with both psychological factors and a general medical condition; and adjustment disorder. He assessed a GAF of 51-55. With respect to the Appellant's ability to work he opined:

From a strictly psychological perspective it is my opinion that Ms. Z. R.'s Pain Disorder, coupled with her Major Depressive Disorder result in impairment in energy, stamina and pain coping resources to the point that she would be effectively unable to return to her pre-accident job at a clothing store at this point in time. Complicating the Issue is the fact that her daughter is developmentally delayed and requires a lot of her mental and physical energy...

It is difficult to predict Ms. Z. R.'s future capabilities as there is considerable variability in treatment response. On one hand, she has apparently undergone a considerable course of psychotherapy and remains symptomatic after several years. On the other hand, I understand that her psychotherapy was general in its focus, with some attention given to issues with Ms. Z. R.'s daughter's difficulties. She indicated that she has not undergone any chronic pain management programs. It is quite possible that she would exhibit meaningful improvement with participation in a course of intensive pain management psychotherapy, ideally provided as part of an interdisciplinary pain program. She may very well be able to return to work upon completion of such a program.

SUBMISSIONS

[34] Mr. Romeo submitted that the Appellant qualifies for a disability pension because:

- a) Based on the totality of the evidence including the oral evidence and the medical documents, she meets the severe and prolonged test for CPP disability;
- b) She has ongoing physical problems and chronic pain, which are aggravated by activity;
- c) Although she has some transferable skills, she could not work at a sedentary job because of her limitations.

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

- a) The family doctor indicated that her only diagnosis was back pain due to a MVA in 2009;

- b) Neither the Appellant nor her family doctor mentioned depression at the time of her disability application;
- c) The medical evidence does not reveal a severe pathology precluding the Appellant from all types of work;
- d) She has not attended a chronic pain program, attempt alternative work, and did not document a date when she felt she was no longer able to work because of her medical condition;
- e) There is no indication that she requires aggressive medical or psychiatric interventions and was deemed capable of sedentary work.

ANALYSIS

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

Severe

[37] 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.

Guiding Principles

[38] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[39] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of hearing she was 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.

[40] However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities

[41] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, she must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: *Inclima v Canada (Attorney General)*, 2003 FCA 117. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[42] The issue as to whether the Appellant has attempted to find alternative work or lacked motivation to do so is clearly a relevant consideration in determining whether the disability is "severe": *Klabouch v. Minister of Social Development* 2008 FCA 33. Appellants must show that reasonable and earnest efforts were made to find and maintain employment which can accommodate their limitations. An Appellant's failure to do so undermines her claim because it raises a suspicion that she has simply chosen to adopt a disabled lifestyle in the belief that she is unemployable: *F.E. v MHRD* (June 17, 2011) CP 26480 (PAB)

[43] The Appellant should demonstrate a good-faith preparedness to follow obviously appropriate medical advice and to take such retraining and educational programs as will enable her to find alternative employment when it is obvious that her prior employment is no longer appropriate: *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB).

[44] It is not sufficient for chronic pain syndrome to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. It is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

Application of Guiding Principles

[45] Although there are some conflicts in the medical evidence, the Tribunal is satisfied that the preponderance of the evidence supports that the Appellant continued to suffer from significant chronic pain as well as depression and other psychological symptoms as of late 2013. In this regard, the Tribunal noted that assessments obtained on behalf of the insurer (see paragraphs 30 & 33, supra) were supportive of continuing significant chronic pain and psychological symptoms.

[46] The difficulty facing the Appellant, however, is that despite the numerous recommendations that she, inter alia, attend for chronic pain management, psychological treatment, a psychiatric evaluation and a neurological evaluation, there is no evidence of any significant treatment after 2011. Her psychotherapy treatments from Dr. Pilowsky appear to have been completed in 2011, and there is no evidence of any psychotherapy after this. There is no evidence of her having been treated by a psychiatrist and at most she is taking a single anti-depressant prescribed by her family doctor. She was discharged from the chronic pain program at Professional Chronic Pain Associates in May 2011 and there is no evidence of any further attendance by her for chronic pain management. The last evidence of attendance for treatment by her at Doctors-R-Us is September 25, 2012. The Appellant testified that she is being treated by two family doctors, Dr. Hussain and Dr. Kahlon. There are, however, no reports from either of those doctors in the hearing file. Without such reports the Tribunal cannot determine the extent and nature of treatment that they may be providing.

[47] The Tribunal also noted that the only report from a family practitioner is Dr. Mehvish's April 15, 2013 report which accompanied the CPP application. Although the Appellant testified that she does not know who Dr. Mehvish is, he is a family practitioner with Doctors-R-Us where the Appellant attended for treatment from the date of the MVA until September 2012. This

report indicates that improvement is expected with continued medical treatment and more physiotherapy. There is, however, no evidence of any significant further treatment.

[48] The Appellant has acknowledged that she has made no efforts to upgrade her work skills, and no efforts to pursue alternative less physically demanding employment. She was only 33 years old at the time of the MVA and she is now only 39 years old. She has a good education, a varied work history, good computer skills, and is fluent in several languages in addition to English. In her CPP disability questionnaire she indicated that with pain she can sit and stand for a maximum of two hours, walk for 15-20 minutes, and that she has “some” difficulty with memory and concentration. The questionnaire indicates mild limitations that should not preclude all forms of gainful employment. In October 2013 the Appellant reported to Dr. Vitelli (see paragraph 28, *supra*) that she has “occasional problems with memory and concentration but did not view this as being a major concern.” The Tribunal also noted that there is no mention of depression in either the Appellant’s CPP disability questionnaire or in Dr. Mehvish’s accompanying medical report.

[49] The Tribunal finds that the Appellant has the residual capacity to pursue alternative less physically demanding work and that she has failed to meet the test set out in *Inclima* (*supra*). Her failure to make reasonable and earnest efforts to find employment which can accommodate her limitations raises a suspicion that she has simply chosen to adopt a disabled lifestyle in the belief that she is unemployable (see *F.E.* decision, *supra*).

[50] The Tribunal recognizes that the Appellant is suffering because of her condition; however, she has the burden of proof and she has failed to establish, on the balance of probabilities, that she is disabled within the meaning of the CPP.

Prolonged

[51] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[52] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security