



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *C. B. v. Minister of Employment and Social Development*, 2016 SSTGDIS 29

Tribunal File Number: GP-13-1734

BETWEEN:

**C. B.**

Appellant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Rodney Antonichuk

HEARD ON: March 9, 2016

DATE OF DECISION: April 14, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

C. B. – Appellant

Allan Bayda – Appellant’s representative

### **INTRODUCTION**

[1] The Appellant’s application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on September 21, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

- a) More than one party will attend the hearing.
- b) The method of proceeding provides for the accommodations required by the parties or participants.
- c) 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2011.

[7] 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 the date of the MQP.

## **EVIDENCE**

[8] The Appellant was 40 years old at the date of the appeal hearing. She indicated that she holds certification as a Special Care Aide. The Appellant described her main disabling conditions as depression; fibromyalgia (FM); chronic fatigue syndrome (CFS); migratory osteoporosis; low blood pressure; migraine headaches; restless leg syndrome; chronic and constant pain; irritable bowel syndrome (IBS); celiac disease and malabsorption syndrome. She indicated she was last employed as a long term care aide from July 23, 1993 to November 1, 2011 when she stopped working due to pain, fatigue, nausea, weakness, cramping and malaise. The Appellant indicated that she was in pain 70% of the time, was always fatigued, had sleepless and restless nights and was unable to eat regular food due to stomach pain and diarrhea after eating. She indicated she could no longer work as of September 2009.

[9] On March 13, 2008, Dr. Worobetz, Gastroenterologist, reported that while the Appellant continued to be malnourished, she had been extensively investigated in the past with gastroscopy and colonoscopy with repeatedly normal results. Dr. Worobetz was unable to

identify additional investigations or tests that should be repeated and there were no new symptoms to suggest new disease. He recommended a high calorie diet.

[10] On October 19, 2011 Dr. Changela indicated that the Appellant was working full time in a housekeeping job in a care home. On November 2, 2011 he reported that she was working three eight hour shifts per week.

[11] On November 29, 2011, Dr. Changela reported the Appellant had resigned from her job as she felt it would result in deterioration of her condition. However, according to Dr. Changela, she felt that after the New Year she would pursue light duty work at another nursing home.

[12] Dr. Changela, family physician, from a September 4, 2012 report provided a diagnosis of irritable bowel syndrome resulting in chronic abdominal pain. He also listed malabsorption syndrome as a diagnosis in the report.

[13] Dr. Changela wrote on November 15, 2012 that the Appellant's chronic pain syndrome involved backache, leg pain and pelvic girdle pain. She wanted to see a pain specialist; however, Dr. Changela stated he preferred that she try a Fentanyl or Butran (narcotic analgesic) patch as she had been unable to tolerate Gabapentin or Pregabalin (treatment of neuropathic pain).

[14] On March 7, 2013 Dr. Changela advised that the Appellant was feeling better and had been able to maintain her weight at 120 pounds. In April 2013, Dr. Changela noted the Appellant was supposed to undergo testing for Celiac disease. He planned to see her in follow up in May 2013. However, there is no mention of test results for Celiac disease in a report of May 10, 2013 or in any subsequent reports.

[15] Dr. Changela wrote in September 2014, that colonoscopy had ruled out inflammatory bowel disease and at the time of his report the Appellant's IBS related abdominal pain was well controlled.

#### Oral evidence

[16] The Appellant began her testimony stating that she left school in grade nine due to the fact that her mother was sick so she had to stop school in order to take care of her. She stated

that she started working in the care home in 1993 and her first job was in the laundry room. She stated working at this home until she left work in 2011. She stated that she had knee surgery in 2009 and then returned to work.

[17] She testified that her doctor has prescribed many different medications for her in order to combat her pain. She stated that Tylenol did not accomplish anything while when she took Dilaudid knocked her out. She used a fentanyl patch and that made her incoherent. She is currently using Cymbalta (to keep weight on) and amitriptyline (to sleep).

[18] On November 1, 2011 the Appellant stated that she was feeling so bad due to her body hurting, that she was in a patient's room crying and decided to leave work early that day. She went to Dr. Changela because she was too weak and too tired to continue working. That was the last time that she worked at the care home even though she has not resigned.

[19] The Appellant testified that she split with her husband in September 2015 and has been on Social Assistance since then.

[20] The Tribunal was told that the Appellant can stand for 10 minutes and walk for 10 minutes. She stated that she lives with a hot water bottle in order to keep the body aches down and finds that her legs are very weak. She stated that she receives chiropractic treatments and massage therapy however she does not do any acupuncture.

## **SUBMISSIONS**

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

- a) Given the Appellant's education, her learning difficulties, her lack of any ability or experience other than a physical job, her physical difficulties and her medications make it impossible for her to regularly pursue any substantially gainful employment.
- b) The Appellant is unable to keep weight on and has gone down to as low as 93 lbs.

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

- a) While it is acknowledged that the Appellant would not be able to return to her former physical work as a care aide, the medical information does not support that she is unable to work in a job more suited to her limitations.
- b) Treatment options remain that could improve management of her pain.
- c) The information on file does not show that the Appellant has ever been assessed by a neurosurgeon to determine the cause of her back pain or that she has been referred to a pain clinic for assessment and treatment.
- d) There are no examination or assessment findings to support that the Appellant has met the diagnostic criteria for a diagnosis of fibromyalgia and chronic fatigue syndrome.

## **ANALYSIS**

[23] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

### **Severe**

[24] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[25] The Appellant was 43 years of age at the time of the appeal hearing. She stated that she had a grade nine education and that her work history consisted of manual labour. The Appellant appeared before the Tribunal and exhibited good communication skills. While she was somewhat unsure of specific events in the past her ability to tell her story was straight forward and helpful. Her work history was such that she had developed skills which gave her the ability to develop transferable skills. Given the age of the Appellant and her work history the Tribunal finds that she has transferable skills which would assist her in finding alternative employment.

[26] The Respondent argues that there are numerous references in the Appellant's family physician reports that indicate a diagnosis of fibromyalgia and chronic fatigue syndrome. The Respondent also indicates that there are no examination or assessment findings in Dr. Changela's reports to indicate that the Appellant met the diagnostic criteria for these diagnoses. The Tribunal reviewed the medical evidence and is unable to find any evidence indicating that the Appellant was diagnosed with either of these disorders. There is no indication that the Appellant was referred to a fibromyalgia specialist in order to determine if she in fact had FM and there is no indication of any treatment program for the Appellant in order to deal with her symptoms. The Tribunal notes that the evidence indicates that the Appellant's physician seemed to deal with her symptoms through the use of pharmacological means and did not attempt any other treatment options.

[27] The Tribunal is guided by the decision in *Gaudet v. Canada (Attorney General)*, 2010 FCA 59 that stated

Identifying a medical condition as sarcoidosis or fibromyalgia is and of itself does not bring the applicant closer to a disability pension in the absence of persuasive evidence that the applicant was disabled within the meaning of the PP as of the MQP date.

[28] The Appellant was referred to a specialist for her irritable bowel syndrome (IBS). The gastroenterologist who reviewed the file found the Appellant to be malnourished but could not find any indication from his gastroscopy or colonoscopy review of anything outside of normal results. While Dr. Worobetz understood the Appellant's frustration at not having an explanation for her inability to keep weight on and why she had pain he was unable to medically explain the reason for these issues.

[29] The Tribunal also noted that the Appellant had complained of back pain. The records show that the Appellant asked her family doctor to be referred to a specialist however instead she was given an assortment of medications to try and deal with the pain. There is no indication of any referral to a neurosurgeon for treatment of her back pain.

[30] 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).

[31] The Tribunal was told by the Appellant that she had not tried any other jobs upon leaving her full time employment because of the fact that she felt that no one would hire her. She told the

Tribunal that she could not even clean her own house so she was not certainly how she could be hired by someone to do work that she knew that she could not do. The Tribunal noted that the Appellant's family doctor had indicated in his clinical notes from November 29, 2011 that while the Appellant had resigned from her job she had also stated that she had planned on looking for a job doing lighter work within the home care area after the New Year. This was at the time of her MQP.

[32] The Tribunal also notes that the Appellant had her job hours modified in order to help her cope with her symptoms. While her job description did not change her employer did allow her to cut back on her hours. The Tribunal notes that this ability to limit her hours was helpful to the Appellant but due to the physical nature of her symptoms it did not allow her to continue on with her employment.

[33] The Tribunal also notes that while the Appellant did attempt to see if modifications to her job hours would allow her to continue her employment, there was no attempt by the Appellant to adjust her job. The Appellant is a young woman who has transferable skills that may have had limitations but there is no indication that she was unable to be substantially gainfully employed in all areas. The Tribunal is drawn to the clinical notes of the family physician that indicate that the Appellant was caring for her grandchild after leaving her employment in 2011.

[34] While the evidence indicates that in November of 2011 the Appellant was suffering from the effects of a number of symptoms, there is no evidence that at this time that the Appellant has met the criteria required to establish that his condition was severe and prolonged as those terms are defined in the CPP and by the case law set out above.



## **Prolonged**

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

## **CONCLUSION**

[36] The appeal is dismissed.

Rodney Antonichuk  
Member, General Division - Income Security