Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. R. v. Minister of Employment and Social Development*, 2016 SSTGDIS 63

Tribunal File Number: GP-15-212

BETWEEN:

L. R.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Connie Dyck

HEARD ON: August 2, 2016

DATE OF DECISION: August 15, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant, L. R.

The Appellant's husband and representative, G. R.

The Appellant's mother, Ms. S.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 13, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant was 39 years old at the time of his MQP and in the Questionnaire included with her CPP disability application dated November 13, 2013, she indicated that she had completed grade 12. She noted that she last worked as an online pharmacy customer service representative on February 10, 2012 for Staffmax and that she was fired because she could not perform. She also noted that she had been in receipt of regular Employment Insurance benefits from April 2011 to August 2011. She listed the illnesses or impairments preventing her from working to include social anxiety and a learning disorder. As a result of her condition, she was prevented from working because she has breakdowns at work. She noted that she comes home crying when she has lost a job and gets anxious when she is being taught something at work. She noted her functional limitations to be forgetting important things and difficulty with concentration as well as anxiety issues. (GD 2-31)

[3] The hearing of this appeal was by on person for the following reasons:

a) The Appellant will be the only party attending the hearing.

b) The method of proceeding is most appropriate to allow for multiple participants.

c) The issues under appeal are not complex.

d) There are gaps in the information in the file and/or a need for clarification.

e) Credibility is not a prevailing issue.

f) 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

[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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2015.

[8] 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

[9] In a psychiatry Consult dated January 23, 2014, Dr. Nancy Wightman, psychiatrist, stated that she was consulted to provide an opinion if ADD was contributing to the Appellant's functional work challenges. Dr. Wightman diagnosed the Appellant with a learning disability/intellectual disability with associated anxiety and possible social anxiety disorder. She was of the opinion that it was very likely that the Appellant's intellectual challenges interfered with her success in the work place and that her anxiety had intensified some of her concentration difficulties. She stated that the Appellant's decision to lose 100 pounds through regular exercises and diet implied some degree of discipline and motivation. Dr. Wightman reported that the Appellant was not interested in a trial of stimulants. She noted that the only place for a trial of stimulants would be if the Appellant was to return to work to see if stimulants would enhance her concentration and effectiveness at work. Dr. Wightman also recommended that the Appellant contact Market Abilities to see if they could facilitate further vocational assessment and support her in an appropriate work environment that was aware of and accommodating to her deficits. (GD 1-5 - GD 1-8)

[10] At the hearing, the Appellant stated that she did contact Market Abilities as recommended by Dr. Wightman, and that she did not believe any medication would help, since she has been this way from birth and she had not tried any.

[11] In a report dated March 7, 2014, Dr. Robin Westmacott, psychologist, stated that she met with the Appellant on January 23, 2014 and on February 26, 2014. Dr. Wesmacott reported that the Appellant met the criteria for Intellectual Disability (Intellectual Developmental Disorder). She recommended that an application to Market Abilities was appropriate, which would assist the Appellant in vocational planning, training and placement. Dr. Westmacott also stated that successful employment would likely be a stronger contributor to increasing the Appellant's confidence versus any therapeutic intervention. However, she was of the opinion that the Appellant may also benefit from learning more about social anxiety and practicing cognitive and behavioral strategies to assist in her coping. She further noted that a referral to the Shared Care counselor could be made if the Appellant desired. (GD 1-9 – GD 1-13)

[12] In a letter dated October 23, 2015, K. W., manager of WASO Employment Services reported that WASO Employment Services assists individuals with disabilities in preparing, searching for and maintaining competitive employment. She noted that WASO Employment Services had been working with the Appellant since November 14, 2014. (GD 3-2)

[13] The Respondent submitted a summary of a telephone conversation on May 11, 2015, with J. of Market Abilities wherein J. stated that she met the Appellant in October 2014 and that the Appellant was not realistic to her limitations and wanted jobs that she could not do. J. further reported that the Appellant was of the opinion that part-time work was appropriate, such as a housekeeper, fast food industry work and employment that required no multi-tasking or problem solving. She noted that the Appellant was anxious and impatient. In a subsequent call dated June 22, 2015, J. advised the Respondent that the Appellant had been referred to WASO for help with job placement and success. She noted that the Appellant had an interview for a job, but that the Appellant was "picky" and was "going to cabin for 4 months", so the Appellant's file was on hold. (GD 6-14)

[14] At the hearing, the Appellant testified that she was no longer working with WASO, because her first representative helped her and pushed her in the right direction and the new representative was not helping her in the way she thought was helpful. The Appellant also explained to the Tribunal that she last worked through WASO, watering plants, but she was overwhelmed and got lost and only worked one day. She stated that she was doing the same thing at home which was looking for a job. She advised the Tribunal that she continues to do job searches at home on government websites and Workopolis.

[15] A Record of Employment (ROE) issued by Design Group indicates that the Appellant was employed for one day on January 31, 2013 when her employed stopped because of a short of work/end of contract or season. (GD 6-19)

[16] A Record of Employment (ROE) issued by Staffmax Staffing and Recruiting indicates that the Appellant was employed from April 5, 2011 to October 5, 2012 when her employed stopped because of a short of work/end of contract or season. It was noted this was a term position. (GD 6-20)

[17] A second Record of Employment (ROE) again issued by Staffmax Staffing and Recruiting indicates that the Appellant was employed from February 19, 2013 to March 26, 2013 when her employed stopped because of a short of work/end of contract or season. (GD 6-18)

[18] A Record of Employment (ROE) issued by Canadadrugs.com Customer Care indicates that the Appellant was employed from October 28, 2013 to January 22, 2014 when her employed stopped because she was "not a good fit". (GD 6-17)

[19] At the hearing, the Appellant testified that she was fired from every job with Staffmax Staffing and Recruiting which is a temp agency. She stated that the ROEs say she stopped working because of a shortage of work, because they are trying to help her out to get E.I. benefits. The Appellant advised the Tribunal that she was working at Sallys in November 2015 until June 2016 working as a cashier selling beauty products. She stated that she worked 12-15 hours per week. The Appellant stated that the assistant manager told her that she needed to watch herself or her time there would be limited. She assumed that she would be fired and quit.

[20] A Contributions of Earnings sheet indicated that the Appellant had earnings above the yearly exemption amount in 15 of 18 years from 1995 to 2012. The Appellant had reported earnings of $16,274 in 2002; $21,223 in 2003; $10,941 in 2004; $8,383 in 2005; $7,832 in 2006; $11,509 in 2007; $16,185 in 2008; $11,913 in 2009, $6,042 in 2010; $12,812 in 2011 and $6,677 in 2012. (GD 2-22)

[21] The Appellant is unable to work because of her people and social skills. The appellant's husband stated that every task has to be broken down into steps. She is unable to even follow a recipe.

[22] The Appellant's husband stated that he works as a superintendent in the apartment block where they work, so that he is always available for the appellant. He explained that the appellant attempted to use a new stove and almost burned down the house.

[23] The Appellant stated that she is not currently on any medications for her anxiety and is not in any treatment. She stated that she had family members using medication for their condition which was similar to hers and it did not improve their condition. She advised the Tribunal that she does hold a valid driver's licence, but that she does not drive a lot. She would

apply for a job if she did find one on Workopolis or on a government worksite. She does not deal well with other people and it always ends in disputes.

[24] The Appellant's mother said that if it was not for the Appellant's husband, she did not know where her daughter would be.

[25] The Appellant's husband said that he was not giving up on her, work was a possibility, but she needed accommodations such as one on one and a program that would be available.

SUBMISSIONS

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

a) looking at her history of jobs, she cannot work; and

b) her family physician knows that there is something wrong, but he has not referred her to any treatment.

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

a) Treatment recommendations and resources were available to the Appellant to support her ability to regularly pursue some type of work; and

b) The Appellant has not established a severe and prolonged disability within the meaning of the CPP on or prior to her MQP o December 31, 2015 and continuously thereafter.

ANALYSIS

[28] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2015.

Severe

[29] 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.

[30] 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.

[31] The Appellant's primary claimed disability is an intellectual developmental disorder as well as social anxiety. However, it is not the diagnosis of a condition that automatically precludes one from working. It is the effect of the condition on the person that must be considered (*Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB)). The medical evidence and the testimony of the Appellant and her mother support that the Appellant had life-long learning disabilities. Despite this, the Appellant has had above yearly basic exemption earnings in 15 of 18 years and has a valid driver's licence. The medical evidence of Dr. Wightman in January 2014 was that the Appellant had a learning disability/intellectual disability with associated anxiety and possible social anxiety disorder, and that it was very likely that the Appellant's intellectual challenges interfered with her success in the work place and that her anxiety had intensified some of her concentration difficulties. However, despite this diagnosis, Dr. Wightman recommended the Appellant contact Market Abilities to see if they could facilitate further vocational assessment and support her in an appropriate work environment that was aware of and accommodating to her deficits. There is no evidence to suggest that the Dr. Wightman's diagnosis and the effect of the Appellant's condition on her precluded her from all types of work or that her condition is "severe" as defined in the CPP legislation. This is further corroborated in March 2014, by Dr. Westmacott who reported that while the Appellant met the criteria for Intellectual Developmental Disorder, despite this, successful employment would likely be a stronger contributor to increasing the Appellant's confidence versus any therapeutic intervention. The Tribunal also considered the testimony of the Appellant that she continued to

search for employment and would apply for a job if she did find one on Workopolis or on a government worksite. The Tribunal also considered that the Appellant was in fact able to find employment without the assistance of an agency, in November 2015 at Sally's. The Appellant's husband also testified that work was a possibility, but she needed accommodations such as one on one and a program that would be available. While there is no doubt that the Appellant has limitations, the Tribunal finds that the Appellant has work capacity.

[32] It is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of the disability under the CPP. An Applicant must adduce before the Tribunal not only the medical evidence in support of the claim that their disability is "severe" and "prolonged", but also evidence of efforts to obtain work and to manage their medical condition. *Klabouch v. Canada (MSD),* [2008] FCA 33. The testimony of the Appellant was that she was fired from every job that she had. However, the evidence before the Tribunal does not support this. The ROEs from Staffmax, a business that finds temporary workers for various places of employment, shows that the Appellant was employed for a 19 month period from April 4, 2011 to October 2012. The reason noted for the employment ceasing was due to a shortage of work or end of contract. The Appellant was rehired by Staffmax in February 2013 to fill a short term position which ended on March 26, 2013. There is no evidence to suggest that the Appellant was dismissed at either during either times of these employments. Further, the ROEs completed by Staffmax do not reflect that the Appellant's employment was terminated. The Appellant has argued that the ROES were completed in such a way as to benefit her. However, there is no evidence to suggest that the employer fraudulently completed these legal documents and the Tribunal considered that the employer rehired her in 2013. The Tribunal finds it more probably, on the balance of probabilities that the documents were completed accurately and truthfully especially in consideration of the evidence that the Appellant was rehired in 2013, four months after her first employment ended.

[33] Further, the Appellant was able to secure employment as a cashier in a beauty supply store regularly working 12-15 hours per week from November 2015 until June 2016 at which time she quit. The Appellant was of the opinion that she would likely be fired, so she quit. There is no evidence to support that she was unable to do this job or that she was in jeopardy of being fired and she maintained this employment for 7 months, prior to her quitting. While there

is no doubt that the Appellant has limitations, the Tribunal finds that the Appellant had work capacity and was capable regularly of pursuing substantially gainful occupation and that she does not meet the criteria as set out in the CPP legislation.

[34] The Tribunal also look to *(Bulger v. MHRD* (May 18, 2000), CP 9164 (PAB) which concluded that to be successful, an Applicant for a disability pension is obligated to abide by and submit to treatment recommendations and, if this is not done, the Applicant must establish the reasonableness of his or her non-compliance. In this case, Dr. Wightman suggested a trial of stimulants to see if the stimulants would enhance the Appellant's concentration and effectiveness at work, but the Appellant said she was not interested in any medication. At the hearing, the Appellant advised the Tribunal that other family members were on medication and it did not help them. The Tribunal finds that this reason would not establish reasonableness for non-compliance. Further Dr. Westmacott said the Appellant may also benefit from learning more about social anxiety and practicing cognitive and behavioral strategies to assist in her coping. She further noted that a referral to the Shared Care counselor could be made if the Appellant desired. The evidence of the Appellant was that she was in no therapy and was using no medication.

[35] Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[37] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security