



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. S. v. Minister of Employment and Social Development*, 2016 SSTGDIS 66

Tribunal File Number: GP-14-2583

BETWEEN:

C. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: John F. L. Rose

HEARD ON: July 27, 2016

DATE OF DECISION: August 29, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant appeared at the hearing with her daughter and representative Paul J. Cahill.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 18, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] This appeal was by teleconference for the following reasons:

- a) More than one party will attend the hearing;
- b) There are gaps in the information in the file and/or a need for clarification;
- c) The method of proceeding is the most appropriate to address inconsistencies in the evidence; 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2015

[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

Documentary Evidence

[8] The Appellant completed the Questionnaire for Disability Benefit and stated that she had completed high school and received a three year diploma as a medical office secretary at college. She reported that she last worked as a unit coordination assistant at a hospital from April 2002 until November 21, 2012. She stopped working due to depression relating to her husband which was causing her difficulty in concentrating and forgetfulness. She also indicated that she had chronic pain not relating to her current condition.

[9] The Medical Report was completed on November 13, 2013 by her family physician, Dr. Jean Hudson, who diagnosed the Appellant with depression. The Appellant was referred to Dr. Butler, psychiatrist at Halton Healthcare Services as a result of her husband being diagnosed with a terminal illness and she was being treated with medication.

[10] On December 13, 2013 the Appellant was seen by Dr. Mark Ginty, orthopaedic surgeon, regarding bilateral shoulder pain. He did not recommend surgery but stressed the importance of regular strengthening exercises. A report from the Pain Management Centre in May 2014 provided a history of shoulder pain dating back to 1989 and whiplash suffered in a 1990 accident. They suggested a chronic pain self-management program, nutrition, supportive counselling and nerve blocks.

[11] Dr. Butler reported on August 26, 2015 that her major depressive disorder was in remission. It was coming up on the first anniversary of her husband's death and she had been able deal with her grief in a healthier way.

[12] Dr. Hudson's medical notes indicate she had surgery on her right shoulder in June 2015 and in September 2015 she indicated that she should be able to return to work after her left shoulder arthroscopy in January 2016. However, following that surgery Dr. Hudson reported that the Appellant was unable to work as a result of depression and chronic pain.

[13] A letter from Dr. Ginty dated March 23, 2016 provided a history of her shoulder problems and seven surgeries including the arthroscopy on January 2016. While initially related to instability she had chronic problems with recurrent tendonitis in both shoulders. He indicated that she cannot do any type of work involving repetitive movement of the shoulders, including sedentary work she previously did. She was not able to sit at a desk and use a computer without exacerbating it. She was attending a chronic pain clinic and receiving medication but he considered her to be disabled from any type of gainful employment even of the most sedentary nature. While not degenerative and not expected to worsen, her condition was not expected to improve.

Oral Evidence

[14] The Appellant told the Tribunal that she has had pain in her neck and shoulders for a long time but it has become significant in the last two years. She gets a sharp pain if she turns her neck and she is unable to reach or lift with her arms. She also has pain in the middle and lower back along with her left hip, particularly when sitting. She has been told she has arthritis in her hip.

[15] Her right knee also hurts as a result of a work injury, which she did not report. She reports chronic right ankle pain and wrist pain. She was having physiotherapy for her wrist while working which helped however the pain came back when she was off with her husband.

[16] She had surgery in June 2015 and in January 2016 however she still has the pain which her doctor tells her she will always have. The pain is consistent every day.

[17] She has tried nerve blocks in her neck and shoulders which did not work. She had physiotherapy following both of her surgeries.

[18] The Appellant uses a fentanyl patch for the pain and also takes Dilaudid, Advil and Tylenol. She takes Wellbutrin for depression and Olmetec plus for high blood pressure. She has had a severe reaction in the past to higher doses of fentanyl causing sensitivity over all of her body. With the patch her pain level is 6 out of 10 while at rest but she is unable to increase the amount so at times if feels like she is getting no relief. She has allergies to a number of medications which limit what she can take.

[19] She left work when her husband was diagnosed with a terminal illness and she developed depression while she was off. She saw a psychiatrist and was on medication which had to be increased. She also saw a social worker which helped but she couldn't keep going after her last surgery because of the costs. She intends on returning when her physiotherapy ends. She said that she still struggles with depression each day. She tried to make herself normal but she forgets and struggles with concentration. She has to set an alarm so she remembers to take her medication.

[20] Her sleep is disturbed and she is constantly tired. She has trouble sleeping in a bed because she cannot pull herself up so she sleeps mainly in a recliner. She also has to sleep on her back, which increases the pain in her neck. If she takes medication she is able to get about four hours sleep before waking up. If she does not, it is about two hours. She regularly naps for about an hour in chair during the day.

[21] She lives in a house with her daughter who works part time in order to look after her. She has no one else come in to help. Her daughter does the majority of the housework and meals along with the grocery shopping. She does drive for very short distances, usually just

once a week to go to the drug store if her daughter is working. She says she puts a pillow in the seat and sits very close to the steering wheel.

[22] Her typical day includes mainly reclining on the couch. She does try to do simple things like some meals but it is hard for her to do the cutting required. She has tried to dust but can't do the pushing and pulling actions. At night she prefers to sit in the dark and be alone. She says that she used to be able to sew but the cutting motion causes her sharp pain.

[23] She is only able to stand about 10 minutes. She can sit, depending on her medication, for about 30 minutes and then needs to recline. She is not able to use her arms or shoulders much. She can walk short distances with difficulty and has difficulty going up stairs. She had a stair lift installed in the home when her husband was sick and she has kept it and uses it all the time when going up the stairs and sometimes when coming down.

[24] She is not able to do anything to keep active however she has been referred to aqua therapy but it has not yet started.

[25] She has not worked since leaving her regular job. She has not looked for other work because of the constant pain and depression.

[26] The Appellant's daughter also gave evidence. She told the Tribunal that she has lived with her mother for most of her life, except while away at school. She moved back in when her father became ill. She currently works part time because of the need to look after her mother.

[27] She has had to take over the household because her mother cannot. She does most of the essential tasks in the house on a daily basis for her mother including preparing medication, meal and her personal care. She also drives her to her appointments and does the housework and outdoor maintenance.

[28] She told the Tribunal that her mother is forgetful and she sets a timer for her when she is not there to remind her to take her medication. She had to change her schedule at work so that she was at home in the morning to make sure her mother takes her medication. She tries to schedule her days off to coincide with her mother's appointments. She confirmed that her mother does drive but only up to about a kilometer and her doctors are farther than that.

[29] On a typical day she will wake up and take her mother to the bathroom. She then lays out her medication, prepares lunch and starts dinner before she goes to work. Standing, stirring and cutting cause her mother pain so she is not able to assist much with cooking. She usually finds her mother in her recliner chair or in bed when she gets home. She does not believe it possible that her mother could do even part time work.

SUBMISSIONS

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

- a) An acute depressive episode took her out of the workplace,
- b) She has chronic shoulder pain which is progressively worsening; and
- c) The combination of the two constitute a severe and prolonged disability preventing any kind of gainful employment.

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

- a) While she may not be able to perform work requiring repetitive shoulder movements, she retains the capacity for some work;
- b) She has responded to medication with respect to her depression; and
- c) She is relatively young and educated and has some transferable skills.

ANALYSIS

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

Severe

[33] 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.

[34] The Appellant was 52 years old as of the date of her MQP with college education and about 10 years work experience in a hospital. Her circumstances are unfortunate, she stopped working when her husband was diagnosed with cancer and she developed a major depression. While she was off, pre-existing difficulties with her shoulders progressively worsened and despite two surgeries in the past 13 months, she has been unable to return to work.

[35] Both the Appellant and her daughter gave evidence at the hearing and I found both gave their testimony directly and without embellishment. Their testimony was consistent with each other and the medical reports on file. The Appellant's daughter has sacrificed her work and social life to care for her and the Tribunal found her testimony compelling and reliable. I accept the evidence that the Appellant is unable to look after the activities of daily living and requires assistance from her daughter. While she continues to drive, the frequency and distance is minimal at best.

[36] The Respondent notes that in September 2015 Dr. Hudson felt that following her upcoming left shoulder surgery in January 2016 she should be able to return to work. Following that surgery Dr. Hudson reported that she does not think she can work due to the combination of her depression and chronic pain. In addition, Dr. Ginty, who has been treating the Appellant for 17 years, agreed that she is disabled from employment of even the most sedentary nature. He further stated that her condition is permanent nature unlikely to improve.

[37] Dr. Ginty's opinion is also based solely on her shoulder issues. As noted by Dr. Hudson the Appellant also suffers from depression. While Dr. Butler noted in August 2015 that her major depressive disorder was in remission, he continued to prescribe Wellbutrin-XL. In January 2016 Dr. Hudson must have felt that she had regressed as she noted that she needed to refer her back to the psychiatrist. While the acute nature of her initial depression may have subsided, it appears that she continued, past her MQP date, to experience ongoing depression.

[38] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47).

[39] The medical evidence and the Appellant's testimony satisfy the Tribunal that both her shoulder and mental health issues impair her ability to work. The Tribunal finds that while her major depression was temporary and related to her husband's condition, her ongoing depression continued to impair her ability to work in conjunction with her main disabling shoulder condition.

[40] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[41] The Tribunal is satisfied, based on the medical opinions of both her family physician and specialist, that the combination of the Appellant's shoulder impairments and ongoing depression rendered her unable to perform any work. The oral evidence accepted by the Tribunal as to the restrictions in the Appellant's daily life adds support to and confirms this finding. The Tribunal finds that the Appellant has established, on a balance of probabilities, that she is incapable regularly of pursuing any substantially gainful occupation.

Prolonged

[42] The Appellant's shoulder issues are longstanding, having been treated by Dr. Ginty for the past 17 years. They have clearly become worse, notwithstanding two surgeries and the prognosis is for no further improvement. While her major depression has improved one year following the death of her husband, it continues to affect her and will likely do so, at some level, for the foreseeable future. The Tribunal finds that her disability is prolonged.

CONCLUSION

[43] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2015. It appears that by that date her major depression was in remission and she had the first of

recent two surgeries on her shoulders which became the primary disabling condition. While Dr. Hudson initially felt that she may be able to return to work following the second surgery the Tribunal has found that was not the case. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of October 2015.

[44] The appeal is allowed.

John F. L. Rose
Member, General Division - Income Security