



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. H. v Minister of Employment and Social Development*, 2016 SSTGDIS 107

Tribunal File Number: GP-15-816

BETWEEN:

S. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Brian Rodenhurst

HEARD ON: September 20, 2016

DATE OF DECISION: September 28, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

S. H. - Appellant

Bozena Kordasiewicz, Barrister and Solicitor - Appellant's Representative

PRELIMINARY ISSUES

[1] The hearing was set for a videoconference. For reasons unknown the Member could be seen by the Appellant in the Kitchener hearing room however, the Member was unable to see or hear the Appellant and the Appellant's solicitor.

[2] The Appellant's solicitor agreed the hearing could proceed by way of teleconference and this would not prejudice the Appellant.

[3] The Tribunal finds that proceeding with the teleconference was in accordance with the principles of natural justice and did not prejudice the Appellant.

INTRODUCTION

[4] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on May 6, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[5] This appeal was scheduled to be heard by Videoconference for the following reasons:

- a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives
- b) There are gaps in the information in the file and/or a need for clarification.

THE LAW

[6] 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).

[7] 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.

[8] 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

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

[10] 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

[11] The Appellant was 50 years of age at the time of the MQP. She obtained a Grade 12 education and a 6 month secretarial course sometime in the 1980's. She commenced her working career part-time in a retail chain. She then obtained a full-time secretarial position typing notes for an engineering firm. She then sold water filtration systems but this business was not sustainable as the market became saturated. She testified she suffered a "nervous breakdown" in 1995. She was trying to think of another business but was unable. She testified she helped her

husband with his trucking business for three years. She indicated she had a “nervous breakdown” due to the pressure of helping her husband run the business. Her husband drank heavily and she ended up having to get a restraining order to protect herself.

[12] She testified she was on Ontario Disability benefits (ODSP) for about 6 years (medical reports indicate 16years). She re-entered the work force first in a secretarial position typing minutes and then in 2009 worked for a retail jewelry store. She testified she was fired because her boss was having an affair and this made the Appellant anxious so her boss reacted by terminating her employment. The Appellant then worked for a brand name national retail jewelry store from August 2010 to 2013. The hours were part-time increasing around the holiday season. She testified she was accommodated by her boss as she was allowed to leave early to catch her bus. The Appellant has never obtained a driver’s licence.

[13] The Appellant indicated she suffered a slip and fall at a major grocery chain store and she testified she has been unable to work since. She has pursued legal action against the store as there was water on the floor causing her fall.

[14] The Appellant testified that she has not seen a Psychiatrist, Psychologist or other mental health provider since 2003 (Psychologist report is dated 2014). She testified that the report by Dr. Pursley that she declined to pursue counselling was incorrect. She further stated she did decline a counselling group as this would be a negative experience due to people sitting around complaining. She further stated that she attended one visit with a Psychologist and she was “discharged”. Her current medical providers are her Family Doctor who she sees about 4 times a year to fill in forms and update prescriptions, a chiropractor and physiotherapist. She stated her present medication is Percocet, and anti-inflammatory medicine. She has a muscle relaxant but does not take this at the same time as Percocet. She does not take Lyrica any longer due to weight gain concerns.

[15] The Appellant testified that she believed her medical records were “corrected”. She denies the Doctor’s notes indicating she ever abused marijuana or took speed. She further stated she has tried to quit cigarette smoking unsuccessfully. The last attempt was a little over two years ago. She testified her husband had a drinking problem and she joined him in drinking to excess but this was a short term problem. She has not drank to excess since.

[16] She stated that the reason she is unable to work in any substantially gainful occupation or to attend retraining/upgrading of her education is due to four factors 1) lower back pain; 2) left leg pain; 3) anxiety and 4) her hands shake.

[17] The Appellant testified that she is unable to carry out the normal activities of daily living. She stated she sleeps 9-10 hours and bathes when getting up. She makes coffee and lets the dog out. She has problems negotiating the stairs, and is unable to do much of the household chores without breaks. She is limited in her ability to stand and can sit for one hour in the right chair.

[18] Medical reports indicate historically the Appellant suffered from manic-depressive psychosis, and sarcoma of the abdomen.

[19] An Ultrasound Bilateral Gluteal was conducted on July 17, 2013. Findings: no gastrocnemius injury is identified; no hematoma is seen; could be a small hematoma involving the gluteus muscles on the left side. The left hamstrings appear to be sonographically unremarkable. Impression: suspected small hematoma within the left gluteal musculature. Otherwise unremarkable.

[20] Notes of Dr. Laura Ostofe Chiropractor, Active Health Associates, were filed with the Tribunal. She noted there was no indication of muscle guarding or hypertonicity. The Appellant stated she was in unbearable pain after treatment. Dr. Ostofe wrote that she was at a loss for an explanation.

[21] Dr. Shoop noted on September 3, 2013 that the Appellant was worried about permanent damage; imaging so far has been normal; exam does not suggest any serious joint/bone/nerve/muscle damage. Presents to Dr. Ostofe (chiropractor) with “cogwheeling” at her ankles, which does not fit at all with mechanics of injury. She presents with fears of permanent damage, pain not improving. Law suit pending. Writer assured Dr. Ostofe that she would not renew the Percocet and would reassure the Appellant there was no serious injury.

[22] October 2, 2013 the Appellant requested a note for an extension for time off work as she stated she is going to be off for another couple of months. The Appellant indicated she needed the note from the Family Doctor. It was noted in the clinical notes the Family Doctor replied “I am sorry, but I really can’t extend this sick note based on the injury/symptoms/imaging she has

thus far. This has been going on since June. There is no medical basis for the ongoing sick leave and her work is not going to accept an extension in any case for this type of injury". Clinical notes dated October 17, 2013 noted the Appellant declined counselling referral.

[23] Dr. McCallum, issued a consultation report in January 2014. Upon examination her extension and flexion were in the 80% range and she complained of pain in the back with these movements. With flexion she was able to touch her knees. There were full movement of the hips, no clear sensory deficits in the lower extremities, straight leg raising 90 degrees and 75 on the left with complaint of back and hip pain. It appeared her pain is principally from her back. Overall he thought she had a favourable prognosis.

[24] Clinical notes of Dr. Shoop dated April 15, 2014 noted she declined regular antidepressants/anti- anxiety as they did not work for her and end up sick, suggested massage, relaxation, exercise – patient protests that there are too many barriers to exercise, already tried that etc.

[25] A Medical Report dated May 8, 2014 was authored by Dr. Shoop, Family Physician. Under the heading Diagnosis: soft tissue injury left leg secondary to fall. Under the heading Prognosis: unclear; does not fit usual pattern. Under the heading Relevant Findings: fell June 20, 2013 while at supermarket. Pain loss of function left leg ever since, according to the patient.

[26] Dr. Pursley, Ph.D., certified Psychologist, issued a consultation report on May 16, 2014. Under the heading Summary and Treatment Recommendations: the Appellant is struggling with chronic pain in her back and legs secondary to a slip and fall accident in June 2013. She is continuing to participate in PT and chiropractic therapy. She has been bothered by heightened anxiety and stress in recent months (legal system stress, worry about health and pain). Although her pain and stress are ongoing the Appellant feels she is coping okay independently and she does not wish to pursue counselling at this time. It is recommended she incorporate regular physical relaxation practice into her pain management regimen. I suggested the option of attending a support group for chronic pain but this is not something the Appellant is interested in. She is aware she is welcome to book an appointment with him in the future should the need arise.

[27] A further report was authored by Dr. Pursley dated June 25, 2014. She noted the Appellant she had started taking Lyrica and has experienced significant benefit from this medication. She reported a reduction in her pain, particularly in her back. Her anxiety has also reduced. She reported feeling a significant improvement in her mood and energy level. She is spending less time in bed, getting up early and sleeping better (soundly 4-5 hours; intermittently 10-12 hours). The Doctor advised the Appellant to pace her activity level. She suggested the Appellant try the relaxation strategies again, now that Lyrica is helping. In conclusion Dr. Pursley wrote: "S. H. has experienced significant improvement in her pain, mood, and anxiety since starting on Lyrica and she feels she is generally coping well. No follow up scheduled. S. H. is aware that she is welcome to book an appointment in the future should the need arise.

[28] Dr. Ghamudi, MD, FRCP, issued a consultation report to the family physician dated October 7, 2014. He noted the Appellant was complaining from low back pain radiating toward her legs and both buttocks. MRI, ultrasound and EMG study all were with no significant findings except hematoma on her gluteal region. She has history of alcohol and marijuana abuse. She had been fully investigated by a neurologist as per her referral package and there was no indication for any surgical intervention. Her MRI showed mild degenerative changes. Her pain score is 6/10. In summary she has chronic pain syndrome with no indication for epidural steroid injection. The Appellant would like to avoid any steroid injection as she is panicked from possibility of gaining weight. He advised her to try distraction strategy to distract her thinking from pain and to continue with massage and physiotherapy.

[29] Dr. Jahromi, Vascular and Endovascular Surgery issued a consultation report dated January 13, 2015. Dr. Jahromi opined that most of the Appellant's symptoms are secondary to musculoskeletal injury from a year and half ago. He did not think the Appellant had varicose veins. She does have left leg venous incompetence which has led to some lower extremity swelling. Dr. Jahromi recommended active lifestyle and leg elevation. At this time she did not require any intervention. He prescribed compression stockings. The Appellant continued to smoke a pack a day and she was counselled with respect to smoking cessation. The Doctor wrote there was no history of alcohol abuse.

[30] The Appellant testified she does not exercise often. She was going to undertake Pilates however the summer has been too hot. She found the compression stockings too uncomfortable to wear in the heat. She finds applying ice and using her hot tub more beneficial than exercise. She does walk about twice a week around her short block which is less than 30 minutes.

[31] On June 4, 2014 Dr. Shoop authored a referral letter. She noted the Appellant is being referred due to chronic low back pain, left buttock and calf pain since a fall at a supermarket. All imaging has been normal, physiotherapy has not helped. Problem list: manic – depressive illness, sarcoma. Medical History: smoking $\frac{3}{4}$ package a day; was drinking heavily until June 2001; substance abuse – marijuana, speed IV once. None now.

[32] On March 25, 2015 Dr. Shoop completed an Attending Physician's Statement - Disability Benefits addressed to Canada Life. Under Primary Diagnosis: myofascial pain – Left hamstring; Additional Conditions: chronic low back pain, musculoskeletal; Subjective Symptoms: pain – severe daily, anxiety symptoms; Objective findings on examination: nil. Expected Recovery/Return to Work; not expected; Prognosis for recovery: unclear.

[33] Dr. Shoop completed a report dated December 14, 2015. Under the heading Expected Recovery: not expected to return to work. Under the Question: can your patient return to work on gradual basis or to any other occupation at this time? – No. Prognosis for recovery: poor.

[34] On the same report Dr. Shoop completed a section named Current Functional Limitation: Degree of Limitation. Under the following functions: speaking, hearing, vision, dexterity no degree of limitation was noted. Under the functions: cognition and sensation degree of limitation was slight. Under the function Psychological the degree of limitation was moderate. Under the heading Activity it was noted the Appellant could walk up to an hour, stand up to an hour, and sit up to 15 minutes. Dexterity was noted as normal, and lifting up to 5 pounds, with poor focus and concentration due to pain, and the need to move around slightly.

SUBMISSIONS

[35] The Appellant's solicitor submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant has been unable to return to any form of competitive employment due to severe and prolonged medical conditions including chronic pain in her left lower extremity and lower back, as well as depression, anxiety, non-restorative sleep, exhaustion and cognitive impairments.
- b) Despite her compliance with recommended courses of treatment, prescribed medications she continues to experience constant pain and symptoms of anxiety and depression as well as non-restorative sleep.
- c) The Appellant tried to work and even tried self-employment without success. The Doctors have become clearer on the diagnosis and prognosis of the medical condition indicating the Appellant's condition is not improving and limits her from pursuing substantially gainful occupation.

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

- a) In 2014, Dr. Pursley, Psychiatrist, relayed the Appellant was coping independently; experienced significant improvement in her pain, mood and anxiety with the use of Lyrica. This is not supportive of a severe and continuous psychological medical condition precluding work.
- b) The MRI of the Appellant's left knee revealed a small effusion but there was no evidence of a meniscal tear and the ligaments were intact. Dr. McCallum relayed the Appellant was able to ambulate normally; there were no sensory deficits in her lower extremities and suggest ongoing conservative modalities. It was further noted all imaging was normal and no objective findings of injury.
- c) Despite the unremarkable imaging subsequent to her slip and fall, she has not made any attempt to return to the workforce in any capacity. The Appellant has a history of bipolar disorder but she has not required regular intervention over the years and she has worked with this medical condition.

ANALYSIS

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

Severe

[38] A claimant must provide some objective medical evidence of his or her disability (*Warren v. Canada (A.G.)*, 2008 FCA 377). The medical providers document the subjective symptoms of the Appellant. The objective medical evidence does not support the subjective reports of symptoms by the Appellant. Dr. Ostofe noted no indication of muscle guarding or hypertonicity and was at a loss to explain the unbearable pain described by the Appellant. Dr. Shoop refused to give the Appellant a sick note in October 2013 as there was no medical basis for the ongoing sick leave. Dr. McCallum noted full movements of the hips, no clear sensory deficits in the lower extremities, pain from her back with a favourable prognosis. Dr. Pursley noted in June 2014 the Appellant had significant improvement in her pain, mood and anxiety, was coping well, sleeping soundly, should increase her activity level. Dr. Ghamudi in October 2014 noted her MRI showed mild degenerative changes and recommended conservative treatment of massage and physiotherapy. Dr. Jahromi recommended conservative treatment of active lifestyle and smoking cessation. Dr. Shoop on March 25, 2015 noted subjective symptoms, pain severe daily, anxiety; notably under the heading Objective findings on examination: nil. The Tribunal finds the Appellant did not provide sufficient objective medical evidence to prove she suffered from a severe disability as defined in the CPP.

[39] Dr. Shoop reports in December 15, 2015 that the prognosis for recovery is poor. However, the objective observations in the Current Functional Limitation noted slight cognition and sensation degree of limitation, psychological limitation moderate, activities: could walk up to an hour, lift 5 pounds. These are not indicative of objective criteria that support her prognosis. She noted poor focus and concentration due to pain and the need to move around slightly. These observations do not constitute a severe disability.

[40] *Nova Scotia v. Martin* [2003] S.C.J. 54 recognized that chronic pain is a compensable disability. It was stated that chronic pain's existence is not supported by objective findings.

Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress and the disability they experience is real.

[41] In order to determine whether the Appellant suffers from chronic pain that renders her incapable regularly of pursuing any substantially gainful occupation there must be sufficient credible evidence by the Appellant. The Tribunal finds the Appellant's evidence is not reliable and does not prove on a balance of probabilities she suffers from a severe disability as defined in the CPP. The Appellant stated she never abused drugs and her medical records should be corrected. The Tribunal does not find this credible as the medical records are clear she disclosed this to her doctors. She testified that the written report by Dr. Pursley is incorrect concerning her not wanting to pursue counselling as she was coping okay independently at that time (May 2014). The Appellant testimony appeared to be exaggerated stating she could not exercise despite the opinion of her medical providers that she should pursue an active lifestyle. Dr. Shoop in December 2015 indicated she had the ability to walk or up to an hour. Her adoption of her disabled lifestyle and her evidence of her limitations is not reliable. The fact her evidence concerning past drug use and evidence concerning pursuing counselling is contradicted by the doctors is relevant to assessing her reliability. The Doctors have no reason to not be accurate in their clinical notes and reports. The fact she had a drug problem in the past, or refused to pursue recommended counselling does not result in her being ineligible to be granted a disability benefit. It is the discrepancies in her evidence and her description of symptoms not supported by objective findings that are relevant. The Tribunal does not find the oral evidence of the Appellant to be reliable. The Tribunal finds there is insufficient objective and subjective evidence to prove on a balance of probabilities she suffers from chronic pain that renders her incapable regularly of pursuing any substantially gainful occupation.

[42] 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). The Appellant has not made any effort to engage in retraining or any effort at obtaining employment. She indicates she suffers from anxiety however she does not attend with a Psychologist despite the invitation by the Psychologist to make an appointment as needed. Dr. Ostofe, chiropractor noted the subjective complaints of the Appellant however she was at a loss to explain these complaints. In October 2013 the Family Doctor (Dr.

Shoop) noted there was no medical basis for the ongoing sick leave. Dr. McCallum noted back pain with a favourable prognosis. The Appellant has some limitations however she has not shown any motivation to pursue upgrading or an occupation within her limitations. Dr. Pursley recommended she increase her activity level. Dr. McCallum in a consultation report indicated a favourable prognosis and did not note any significant limitations or restrictions. The Tribunal finds the lack of effort of the Appellant in obtaining or maintaining employment is not due to her health condition.

[43] Claimants have a personal responsibility to cooperate in their health care (*Kambo v. MHRD, 2005 FCA 353*). Dr. Shoop recommended to the Appellant she engage in exercise, but noted the Appellant protests there are too many barriers to exercise. Dr. Jahromi also recommended an active lifestyle however the Appellant's oral evidence indicates she has not followed this advice. Dr. Pursley recommended she attend a support group for chronic pain but this was not something the Appellant was interested in. It was noted by Dr. Pursley that Lyrica was helping her and she was generally coping well on this medication. The Appellant stopped taking Lyrica concerned about weight gain. Dr. Jahromi noted the Appellant continued to smoke a pack of cigarettes a day and recommended smoking cessation. The Appellant testified she tried to quit a few times and the last time was a little over two years. She stated she saw a Psychologist on one occasion and was "discharged". The Psychologist Dr. Pursley wrote the she was aware she was welcome to book an appointment in the future should the need arise. The evidence indicates the Appellant did not book another appointment after the two appointments in May and June 2014. The Tribunal finds the Appellant did not fulfill her personal responsibility to cooperate in her health care. She has not pursued an exercise program, continues to smoke, stopped the medication that improved her symptoms and failed to follow up appointments with a Psychologist despite testifying she suffers from anxiety. The Tribunal acknowledges that there are challenges to exercising and cessation of smoking however the Appellant has not made reasonable attempts to comply with the recommendations of her medical providers.

[44] 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*). The Appellant indicated there are a number of symptoms that result in her being unable to retrain or pursue any substantially gainful occupation. The

subjective evidence of the Appellant as to her impairments is not supported by the medical providers. Dr. Pursley noted in June 2014 the Appellant had significant improvement in her pain, mood and generally is coping well. Dr. Shoop completed a Current Functional Limitation: Degree of Limitation report dated in December 2015. There was only slight cognition and sensation degree of limitation. She could walk for up to an hour, stand up to an hour and sit for 15 minutes. Dexterity was normal and could lift up to 5 pounds. There was only moderate psychological degree of limitation. Poor focus due to pain and the need to move around slightly was noted. The limitations noted by Dr. Shoop do not constitute a severe disability that renders the Appellant incapable of “any” substantially gainful occupation. The limitations noted indicate a capacity to engage in sedentary occupations that do not require lifting more than 5 pounds or standing/walking for more than hour. Dr. Shoop opined the Appellant could not return to work however the functional limitations noted by her do not support her opinion. There are not any opinions on file by specialists indicating the Appellant is precluded from regularly pursuing any substantially gainful occupation. The Tribunal finds the Appellant did not prove on a balance of probabilities that all of the possible impairments in their totality constitute a severe disability as defined in the CPP.

[45] 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.

[46] The Appellant was only 50 years of age at the time of the MQP. She obtained significant work experience including some skills from self-employment. She has worked in a secretarial position, retail, self-employment selling water systems, and helping her husband’s business, thus obtaining a variety of skills and experience. She does not suffer from any barriers with regards to language proficiency and obtained a high school education as well as some secretarial courses. She testified she can sit for an hour on the right chair and there is no indication of cognitive barriers to retraining or upgrading her education to enhance her employable skills. The Tribunal finds the Appellant did not prove on a balance of probabilities she suffered from a severe disability as defined in the CPP at the time of the MQP in a real world context.

Prolonged

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

CONCLUSION

[48] The appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security