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

Citation: *A. E. v. Minister of Employment and Social Development*, 2016 SSTGDIS 97

Tribunal File Number: GP-15-1990

BETWEEN:

A. E.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: November 23, 2016

DATE OF DECISION: November 25, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. E.: Appellant

David Brannen: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 26, 2014. A medical report in support of the disability application was date stamped on September 22, 2014 and accordingly the application is deemed to have been received in September 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on June 1, 2015.

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

a) The Appellant will be the only party attending the hearing; and

b) 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.

Adjournment

[3] The appeal was initially scheduled to be heard on October 25, 2016. On October 18, 2016 the appeal was adjourned to November 23, 2016 at the request of the Appellant because she had recently retained Mr. Brannen who was booked on another matter on the scheduled hearing date.

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] The Tribunal finds that the MQP date is December 31, 2015. [Record of Earnings/Contributions: GD2-55]

[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.

BACKGROUND

[9] The Appellant was 55 years old on the December 31, 2015 MQP. Her entire adult employment history involved working for Island Tel and then for Bell Alliant which took over Island Tel. She started in a clerical position and worked up to executive assistant for senior management. She last worked in November 2012.

APPLICATION MATERIALS

[10] In her CPP disability questionnaire, signed on August 27, 2014, the Appellant indicated that she has a grade 12 education as well as a 1-year college secretarial certificate. She noted that she last worked as an executive assistant from June 29, 1979 to November 30, 2011; she stated that she stopped working because of illness (retired). *In her oral evidence, the Appellant*

clarified that she stopped working on November 30, 2012. She claimed to be disabled as of November 30, 2012 and stated that the illnesses or impairments that prevented her from working include sphincter of oddi dysfunction and narrowed bile duct. She also stated that she is in constant pain and takes daily morphine to control the pain.

[11] When describing her difficulties/functional limitations she stated that she can only walk for one block; that her appetite is often very bad; that she is constantly constipated; that she is very tired when she does household maintenance; that her memory and concentration are very bad; and that she cannot drive far when taking medication. [Disability Questionnaire: GD2-130 to 137]

[12] A report dated September 12, 2014 from Dr. Morais, the Appellant's family doctor, was submitted in support of the disability application. The report diagnosis biliary dyskinesia causing abdominal pain, depression, hypertension and gastro esophageal reflux disease (GERD). The report indicates that the Appellant has longstanding recurrent pancreatitis and sever upper abdominal pain episodes; that she has failed multiple endoscopic retrograde cholangiopancreatographies (ECRPs), sphincterotomies and stent procedures; that she is currently on the waiting list for surgery; that she continues to have attacks of severe abdominal pain; that she has had multiple visits to the emergency department and hospitalizations; that she remains on long term narcotics for pain control; that her main limitation is recurring abdominal pain, nausea and vomiting; and that she has missed many days from work and is unable to continue working. The prognosis indicates that some benefit after surgery is anticipated but the specialist feels there may also be a functional gastrointestinal problem contributing to the symptoms. [GD2-14]

Incapacity Claim

[13] In his opening statement, Mr. Brannen advised that the incapacity claim was not being pursued.

ORAL EVIDENCE

[14] The Appellant reviewed her education and employment history. She described in detail her medical difficulties which began in May 2010 when went to the hospital emergency

department after experiencing pain in her chest and back while she was on her way to a fitness class. She was hospitalized for two days and told that she has pancreatitis. She experienced a second attack in December 2010 and was again hospitalized for two days.

[15] She described her condition and medical treatments during 2011 and 2012. She continued to experience severe pain in her back and had to continually go to the hospital emergency department where they gave her saline and narcotic medications. She stated that she went to the emergency department over 35 times and that on a couple of occasions she was admitted for a few days when her enzymes were high. She initially saw Dr. Clarke a gastroenterologist in X. He referred her to Dr. Farina a gastroenterologist in Halifax. She underwent numerous sphincterotomies, investigations and minor surgeries without improvement or a definitive diagnosis. Her condition impacted her work: she was missing a lot of time from work; on many days her bosses were concerned and sent her home ill; and they arranged for other employees to help her out and to "backfill" when she was not able to work. She was experiencing daily pain; she was nauseous and throwing up bile; she wasn't able to concentrate; she had problems walking up the steps at work; and she was making mistakes.

[16] In November 2012 her employer offered to buy her out since she couldn't do the job anymore. There were no lay-offs or restructurings at that time and the offer was entirely the result of her medical situation. She felt that they were trying to be kind to her and she agreed to the buyout because she was "so sick."

[17] The Appellant described her condition during 2013 and 2014. She stated that she went back to see Dr. Clarke because she was "desperate ...in a lot of pain... and throwing up bile all of the time." He referred her to Dr. Molinari a surgeon in Halifax who conducted two tests and recommended a hepaticojejunostomy. She was on the waiting list for 1 ½ years for this surgery even though Dr. Molinari said he would do it as soon as he could.. She then saw two specialists in Moncton; Dr. Renfrew, a surgeon, and Dr. Schweiger, a gastroenterologist, who were both against the proposed surgery. She then met with Dr. Morais, her family doctor, to go over the reports.

[18] She testified that although she has done everything that the doctors asked her to do her condition has not improved. She also consulted with Dr. Mohamed, a gastroenterologist, at the

hospital where her sister works in Alberta. She is now on the waiting list to see Dr. Beck, who is now the only gastroenterologist in X – she understands that she will have to wait another six months before she is able to see him. Her current medications include Rabeprazole sodium (20 mg, one per day), nortriptyline (10 mg 3 per day), staten morphine (10 mg 2-3 as needed) and Zofran (4 mg as needed).

[19] She stated that nothing has worked. She is still sick, throwing up bile and having attacks. She still has to go to the hospital emergency department by ambulance when the pain is very bad. The pain goes right through her back and up her chest; the doctor has told her to take the morphine as soon as the pain hits. Mr. Brennan referred to Dr. Morais's March 3, 2015 office note [GD2-75] as an example of the Appellant's ongoing symptoms, attacks and medication trials.

[20] The Appellant stated that she has very bad attacks which generally occur at least two days a week. The attacks last from 4-6 hours and when she has a bad attack she is "knocked out and vomiting." It then takes a day or two for her to get back on her feet. It is like having a bad flu day after day. On good days she can do light household tasks in spurts - but she has to pace herself and continually sit down. She rarely goes out and isn't able to babysit her new grandson who is 1 ½ years old.

MEDICAL EVIDENCE

[21] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. It is clear from the medical evidence that the Appellant has seen numerous specialists and undergone numerous surgeries and invasive investigations since May 2010. Set out below are those excerpts the Tribunal considers most pertinent.

[22] On August 7, 2011 Dr. Farina, gastroenterologist, reported that the Appellant has had episodic epigastric pain; that her pain started back in May 2010; and that her attacks have started to become more frequent. The Appellant described her attacks as being like gallbladder attacks located in the epigastrium radiating into her back. [GD1-28]

[23] On January 6, 2012 Dr. Clarke, internal medicine consultant, reported that the Appellant has had attacks of pain which often begin in the epigastric area and move through to her back.

He noted that the Appellant has failed several trials of antispasmodic therapy or irritability in the bowel type of medication. He recommended a repeat ERCP. [GD1-35]

[24] On February 11, 2012 Dr. Clarke reported that the Appellant continues to have frequent nausea and discomfort in the epigastric area that goes through to her back. He stated that the Appellant has difficult to diagnose upper abdominal pain with nausea. He arramged a CT scan with attention to her pancreas and indicated that if this is not diagnostically helpful he would ask colleagues in Halifax to review her. [GD2-110]

[25] On April 11, 2012 Dr. Farina reported that the Appellant is having ongoing pain and that this has become quite incapacitating. [GD1-25]

[26] On December 7, 2012 Dr. Clarke reported that the Appellant is still having episodic spasm like pain and that it feels like a strong punch in the upper right quadrant. [GD2-115]

[27] On January 23, 2013 Dr. Molinari, general surgeon, assessed the Appellant for her long-standing history of recurrent pancreatic and multiple episodes of right upper quadrant pain radiating to her back and associated with nausea. He noted that the Appellant underwent five ERCPs, two sphincterotomies and a stent of her bile duct. He also noted that the stent was recently removed and that she has been diagnosed with sphincter of Oddi dysfunction and that once again she underwent another ERCP and balloon dilation. He further noted that her pain is so severe that she is on slow-release morphine 15 mg twice daily and regular morphine as needed. He stated that the Appellant is a rare case of sphincter of the Oddi dysfunction; that she has been seen by multiple physicians and gastroenterologists in the last few months; and that she is in severe pain and symptomatic. [GD1-

[28] On January 14, 2014 Dr. Molinari, reported that the Appellant was currently on his list for a hepaticojejunostomy. [GD1-22]

[29] On October 1, 2014 Dr. Renfrew, hepato-pancreato-biliary surgeon and abdominal surgical oncologist, reported that the Appellant is presently troubled by daily upper abdominal discomfort; that she usually has multiple episodes a day; and that she is using six or more doses of oral morphine a day for relief of her symptoms. His impression was that she has a puzzling history of recurring episodes of abdominal pain which are reminiscent but not completely

specific for biliary origin. He was not comfortable advocating that she undergo a hepaticojejunostomy or any other surgical intervention. He indicated that he would review the Appellant's case with Dr. Schweiger. [GD1-13]

[30] On October 28, 2014 Dr. Schweiger, gastroenterologist, advised the Appellant that she has unexplained abdominal pain which was atypical for biliary pain. He strongly advised against a hepaticojejunostomy and explained to the Appellant that they may never find the etiology of her pain but that it certainly sounds like 'gut pain' which could include entities such as non-ulcer dyspepsia, colonic or intestinal spasm, irritable bowel syndrome (IBS) etc. He suggested one more ERCP. He concluded that in the presumed presence of an unremarkable ERCP they should try to modify her pain without narcotics and consider drugs such as Gabapentin and low-dose Elavil. [GD1-17]

[31] On November 26, 2014 Dr. Schweiger summarized the findings of the repeated ERCP and other blood tests. He was convinced that the Appellant's symptoms are non-biliary and that he would not recommend biliary type surgery. [GD2-87]

[32] In May 2016 Dr. Mohamed, gastroenterologist, advised the Appellant by email that he did not see any value in a repeat ERCP. He suggested that she continue to work on management of IBS with diet modifications, stress reduction, regulation of bowel habits and the use of medication when needed. [GD5-3]

[33] On June 3, 2016 Dr. Khan, gastroenterologist, performed a colonoscopy. [GD5-5]

SUBMISSIONS

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

a) Although there is no agreement on the diagnosis the focus of CPP disability is on the Appellant's capacity to work;

b) The Appellant mitigated by continuing to work for as long as she was able until November 2012;

c) No doctor has suggested that she is malingering or exaggerating her symptoms;

d) Her lengthy work history shows that she is the type of person who would have continued to work if she were able to do so.

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

a) The multiple medical investigations do not indicate any significant pathology and the specialists did not offer that the Appellant's conditions impaired her from performing all types of work;

b) Although Dr. Morais's September 2014 report indicates that the Appellant has depression there are no mental health care reports submitted to indicate the severity of her mental health condition;

c) The specialist's reports have concluded that the Appellant does not require surgery for her subjective abdominal complaints and have suggested conservative treatment in the form of non-narcotic medication. These findings do not identify a severe condition precluding all work activity;

d) She has transferable skills and has not made any efforts to seek appropriate work since she retired.

ANALYSIS

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

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.

[38] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2015 she was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani* 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.

[39] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation (*Villani* 2001 FCA 248**).**

[40] 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: *Klabouch v. Canada (MSD),* [2008] FCA 33.The effect of the disease or condition on the person should be considered in light of all factors that must be considered in determining whether a person's condition is severe and prolonged within the meaning of the CPP: *Petrozza v MSD* (October, 2004), CP 12106 (PAB).

[41] The Appellant gave compelling evidence concerning her longstanding disabling conditions and how they have affected her life and capacity to work. Although there does not appear to be any definitive diagnosis her symptoms include continual attacks of severe abdominal and back pain which require long term narcotics to control; nausea and vomiting; constipation; fatigue; and poor memory and concentration. Since May 2010 she has seen numerous specialists; has undergone many surgeries and invasive investigations; and has been taken to the hospital emergency department on multiple occasions because of severe pain attacks.

[42] Her oral evidence was entirely consistent with and confirmed by the extensive medical evidence in the hearing. There is no suggestion in the medical evidence that the Appellant is feigning or exaggerating her symptoms. She continued to work as long as was feasible until her employer suggested an early retirement package in November 2012. The Tribunal noted that the Appellant missed extensive time from work; that she was often sent home early; and that her employer arranged for other employees to assist and cover for her.

[43] As the *Klabouch* decision, *supra*, indicates, it is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of her disability under the CPP. Having regard to her numerous symptoms and limitations the Tribunal is satisfied that the Appellant could not pursue with "consistent frequency any truly remunerative occupation." (see *Villani*, *supra*)

[44] The Tribunal has determined that the Appellant has established, on the balance of probabilities, a severe disability in accordance with the CPP requirement.

Prolonged

[45] Having found that the Appellant's disability is severe, the Tribunal must also make a determination on the prolonged criteria.

[46] The Appellant's disabling conditions have persisted since her first pain attack in May 2010, and despite her best efforts and those of her treating physicians there has been no improvement.

[47] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[48] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2012, when she last worked. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b)CPP). The application is considered to have been received in September 2014 when the Respondent date stamped the medical report in support of her application; therefore, the Appellant is deemed disabled in June 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of October 2013.

[49] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security