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

[TRANSLATION]

Citation: *F. D. v. Minister of Employment and Social Development*, 2016 SSTGDIS 103

Tribunal File Number: GP-15-798

BETWEEN:

F. D.

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: Jude Samson

HEARD ON: October 11, 2016

DATE OF DECISION: December 15, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: F. D.

Monique Woolnough (Representative)

Respondent: Written submissions only

INTRODUCTION

[1] The Appellant is from Quebec, but currently lives in an anglophone community in Ontario. She was 55 years old at the time of the hearing and claims to have been disabled since May 16, 2014, due to severe knee pain. On August 19, 2014, she applied for a *Canada Pension Plan* (CPP or Act) disability pension, but her application was refused—initially and upon reconsideration. It is the reconsideration decision of December 17, 2014, that is the focus of this appeal before the Social Security Tribunal (Tribunal).

[2] For the reasons set out below, the appeal is dismissed.

METHOD OF PROCEEDING

[3] The hearing of this appeal was 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;

c) Proceeding in this manner was 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 as quickly as circumstances, fairness and natural justice permit.

[4] A few hours before the beginning of the hearing, the Tribunal received new medical documents from the Appellant (GD13). At the beginning of the hearing, the Tribunal asked whether these documents revealed a new condition that would justify an adjournment. According to her representative, the Appellant believed that her previous health problems were enough to meet the CPP requirements and that this new information had more to do with the prolonged nature of her disability. Therefore, they felt that the Tribunal should proceed with the appeal, even if these new documents were going to cause a delay in the proceedings.

[5] Following the hearing, the Appellant's representative sent the Tribunal the case law and adjudication framework that she had cited during her oral submissions (GD-15). Documents GD13 and GD15 were both sent to the Respondent and it was given until November 4, 2016, to provide a response, but no response was ever received.

THE LAW

[6] Paragraph 44(1)(*b*) of the Act sets out the eligibility criteria 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] Paragraph 42(2)(*a*) of the Act defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are 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

[8] The Appellant does not dispute the date of the MQP as the Respondent has calculated it, that is, December 31, 2017. On August 17, 2016 (GD11), and October 11, 2016 (GD14), the Tribunal asked the Respondent to include in the appeal file an updated record of earnings for the Appellant, but this information was never provided. Without this information, the Tribunal is not able to validate the end date of the MQP. Nevertheless, the Tribunal determines that the Appellant's MQP did not end as of the date of the hearing.

[9] Because the MQP ends in the future, the Tribunal must decide whether it is more likely than not that the Appellant had a severe and prolonged disability on or before the hearing date of October 11, 2016. The onus is on the Appellant to prove she was disabled during the relevant period.

EVIDENCE

[10] The Appellant's application for a disability pension is based on her knee problems (GD2-47 to 53). She claimed to have been disabled since May 2014, when she was forced to quit her job as a security guard because of health issues. In addition to her knee pain, she also complains of arthritis, difficulty walking, standing or sitting for any prolonged period of time, and climbing stairs. According to the Appellant, she needed an operation to have both knees replaced.

[11] The Tribunal took the entire file into account, including the oral and documentary evidence. The evidence that the Tribunal has deemed most relevant is summarized below.

Evidence of the Appellant

[12] At the time of the hearing, the Appellant was 55 years old. She had a high school education and had completed a three-year college course in computerized drafting, but she indicated that she had never been able to find work in that field. Somewhere around 2006, she moved from Quebec to Ontario, where she took English classes full-time for 19 months. Despite this, she said she still had significant difficulties in the English language.

[13] Between August 2008 and May 2014, the Appellant worked as a security guard. She worked nights, so she had little contact with the others. The site where she worked was big enough that it took her two hours to walk around it. Before this job, the Appellant had also worked in hospital maintenance, in the retail sector and in the mining industry. She had also worked in an office—still in the security field—but had not used a computer.

[14] The Appellant claimed that her knee pain started somewhere around 2009 or 2010 and intensified very quickly. When she stopped working in 2014, she said that the pain in her right leg was a 9.5 (on a scale of 1 to 10, where 10 is the most intense pain) and an 8 in her left leg. For this reason, she had reduced her work hours from 40 to 32 hours per week and would have reduced them further if her financial state had allowed it (GD1-8). In consultation with her doctor, she decided she would no longer be able to work until she had both knees replaced—each knee requiring at least a six-month rehabilitation period. Her ability to work would therefore have to be reassessed after her surgeries.

[15] Following this recommendation, the Appellant was put on a waiting list and, despite her follow-up efforts, had no idea how long she would have to wait. Furthermore, her orthopedic surgeon had warned her that she would have to be much more careful after the surgery; knee replacements last an average of only 10 years and, due to her young age, it would be important for hers to last as long as possible.

[16] In the meantime, the Appellant testified that she had bad arthritis and pain in her legs, as well as some stability issues. She had a fall in June 2014, and broke three ribs on the toilet bowl (GD1-7). She had to move because she was no longer able to climb the stairs. The new house was adapted to her needs, with a bar in the shower and near the toilet, for example.

[17] The Appellant testified that she is no longer able to dress herself. Her husband had to help her put on her socks, underwear, pants and shoes (GD1-7). Her sleep is interrupted. She wakes up about every two hours to change positions and adjust her pillows. She is able to do a few small household chores, but she does them slowly and with great difficulty. She takes frequent breaks and rests several times during the day. She is unable to lift objects that weigh more than a pot of coffee. She says the most difficult task is making supper. She admits she can run short errands and drive her car for a maximum of 30 minutes.

[18] She takes Tylenol to reduce her pain. Although she could take stronger medication, she avoids it because of a family history of addiction.

[19] After quitting her job, the Appellant applied to work at the Francophone centre near her home, but there was no position available. She also considered working as a dispatcher for the company where she had previously been employed, but she was not familiar with the office environment and was concerned that her English was not strong enough. She also wanted to take an online accounting course, but it was all in English.

[20] Recently, the Appellant felt some pinching. She went to see her doctor and had some tests done, including a stress nuclear-perfusion imaging study (because she was unable to do an exercise stress test). Soon afterward, she underwent an angioplasty with stent implantation. For a year after this surgery, she has to take anticoagulant drugs, which prevent her from having knee surgery during this period (GD13). - 7 -

Medical Evidence

[21] The Appellant's disability application was accompanied by a medical report completed by the family doctor she had had since February 2012, Dr. Goodman (GD2-36). Dr. Goodman diagnosed the Appellant with bilateral knee osteoarthritis as well as a tear in the left anterior cruciate ligament (ACL). She indicated that the Appellant could not stand for extended periods of time and had difficulty walking. Although the Appellant was on a waiting list for her left-knee replacement, Dr. Goodman believed the Appellant would not recover sufficiently to return to her position as a security guard (GD2-39).

[22] X-rays of the Appellant's knees conducted in May 2013 and May 2014 revealed moderate to severe degenerative changes (GD2-40 and 41).

[23] In November 2013, Dr. Clark, the orthopedic surgeon, reported that the Appellant had degenerative changes to the left knee and a torn ACL after slipping and falling (GD2-42). Dr. Clark also noted that the Appellant had similar symptoms in the right knee, which he said were certainly also due to degenerative changes (GD 2-42).

[24] On May 16, 2014, the date on which the Appellant stated she could no longer work, Dr. Clark performed a left knee arthroscopy with a debridement and partial meniscectomy (GD2-43).

[25] During a follow-up visit in June 2014, Dr. Clark indicated that the Appellant should probably have bilateral knee replacement surgery before returning to a job that required walking. In fact, he questioned whether the Appellant would be able to pass a self-defence course with two artificial knees (GD2-45).

[26] During a second follow-up visit in July 2014 (GD2-46), Dr. Clark found that the Appellant was having more difficulty with her left knee, despite the arthroscopy that had been performed at the beginning of 2014. He therefore recommended a left-knee replacement and put the Appellant on the waiting list. In the meantime, Dr. Clark felt that the Appellant could perhaps work in a seated or standing position (GD2-46). But he proposed that, if her pain bothered her too much, she stop working until after her surgery.

[27] In letters dated February 17, 2015 (GD1-9), and March 11, 2016 (GD5-3), Dr. Goodman indicated that the Appellant's condition was of long duration and severe and that she was unable to do substantially gainful work. She is still on the waiting list for a left-knee replacement, with the second knee replacement planned. Therefore, in her opinion, the Appellant met the CPP requirements.

[28] On June 9, 2016, the Appellant filed a copy of the documents presented in support of her Ontario Disability Support Program (ODSP) with the Tribunal (GD7). The Appellant qualified for the ODSP on April 4, 2016 (GD7-2). Included in these documents was another medical report that Dr. Goodman (GD7-5 to 15) had filed. In this report, Dr. Goodman stated that the Appellant had difficulty walking, sitting or standing for extended periods and that she was unable to perform basic activities of daily living without assistance. She felt that the Appellant's condition would last for more than a year and that the prognosis was uncertain (GD7-6). Dr. Goodman also listed several functional limitations the Appellant faces (GD7-13).

SUBMISSIONS

[29] The Appellant argues that she qualifies for a disability pension because she worked for as long as possible, but had to stop working in May 2014 due to unbearable pain. She believes that the X-rays and medical reports demonstrate that her condition is severe and that she has significant functional limitations.

[30] The Appellant's representative pointed out that the Appellant is 55 years old, has always done physical work, has never worked in at a computer in an office, and that she has difficulty communicating in English. Furthermore, she argued that the CPP must be interpreted fairly, broadly and generously.

[31] As for whether her condition is prolonged, the counsel for the Appellant emphasizes the fact that the Appellant does not know when she will be able to have surgery; two knee replacements and their corresponding rehabilitation periods would take a long time, and her prognosis is uncertain because the result of this procedure is unknown. The Appellant therefore submits that she has a prolonged disability, a submission that she argues is supported by the CPP adjudication framework (GD15-2 to 3) and *M.C. v. Canada (MHRDC)*, 2011 LNCPEN 68 (PCA) (GD15-4) and *B.P. v. Canada (MHRSD)*, 2013 LNCPEN 53 (PCA) (GD15-3).

[32] The Respondent is of the opinion that the Appellant failed to establish a severe and prolonged disability within the meaning of the Act and is therefore not entitled to a CPP disability pension. The Respondent acknowledges that the Appellant's abilities are limited due to her bilateral osteoarthritis of the knees, however:

a) the determination of the severity of the disability is premised upon an applicant's inability to perform any work, rather than on their inability to perform their regular job;

b) the Appellant is being treated with just Tylenol, an over-the-counter pain killer, and the Appellant's reports that she is depressed and discouraged are contradicted by Dr. Goodman's report stating that she had no intellectual or emotional issues;

c) the medical evidence does not reveal any severe pathology or deficiency that would prevent the Appellant from doing a job that was adapted to her limitations; and

d) Dr. Clark's report (GD2-46) and a letter from the Appellant (GD2-28) state or imply that the Appellant retained a certain capacity for performing work within the limits of her abilities, but that she did not attempt to do this.

ANALYSIS

[33] In this case, the Tribunal must decide whether it is more likely than not that the Appellant had a severe and prolonged disability on the date of the hearing.

Severe

[34] In *Inclima v. Canada (A.G.)*, 2003 FCA 117, the Federal Court of Appeal stated that where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the person's health condition.

[35] The Appellant testified in a compelling manner regarding her functional limitations. However, the Tribunal determines that she retained a capacity for work within the limits of her capabilities. Dr. Clark, for example, indicated that the Appellant could maybe perform sedentary tasks (GD2-46). Furthermore, the Appellant said that she could consider other types of jobs, such as a dispatcher, and that she would be willing to take online courses. The Appellant may have had justifiable reasons for choosing not to pursue these opportunities, but she testified that it was mostly because she uncomfortable working in English, not because of the state of her health. The lack of job opportunities in French in Ontario is more of a socio-economic factor—something the Tribunal does not have to consider in its determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[36] In the CPP disability questionnaire (GD2-53) and in her application for reconsideration (GD2-28), the Appellant also indicated that she would be willing to retrain, but she preferred to wait until after her surgeries to see whether she could return to her previous field of work. Once again, the Appellant's choice is certainly justifiable, but this evidence also shows that the Appellant retained a certain capacity for work.

[37] The Tribunal supports the Respondent's argument that the severity of the disability is premised upon an applicant's inability to pursue any substantially gainful occupation (*Villani v. Canada (A.G.)*, 2001 FCA 248 and *Patterson v. Canada (A.G.)*, 2009 FCA 178), rather than on their ability to perform their regular job. Because the Appellant did not attempt to obtain work within her limitations, the Tribunal is unable to find that the Appellant has a severe disability.

[38] The severe criterion must be assessed in a real-world context. This means that when deciding whether a person's disability is severe, the Tribunal must consider factors such as age, level of education, language proficiency, and past work and life experience (*Villani* and *Bungay v. Canada (A.G.)*, 2011 FCA 47).

[39] In this case, the Appellant was 55 years old at the time of the hearing. She had a high school education and had taken a three-year college course. Although she lives in a predominantly anglophone community, she communicates well in French and her work history is varied and interesting.

[40] After a careful review of the totality of the evidence, the Tribunal was unable to conclude that the Appellant met the severe criterion under the Act.

Prolonged

[41] A disability is "prolonged" only if it is likely to be long continued and of indefinite duration or likely to result in death (CPP, subparagraph 42(2)(*a*)(ii)). In this case, the Tribunal determines that the success of the Appellant turns on the interpretation of an "indefinite" period.

[42] In this case, the medical evidence indicates that the disabilities incapacitating the Appellant could be temporary:

a) According to Dr. Goodman's letter, the Appellant is *currently* unable to hold gainful employment (GD1-9); and

b) According to Dr. Clark's report, if the Appellant finds her pain is too much, she may have to be put on leave from work *until after her knee replacement surgery* (GD2-46).

[43] Furthermore, the medical opinions are that the Appellant may be unable to return to her previous job. They fail to indicate whether the Appellant will be permanently incapable of pursuing substantially gainful employment.

[44] Her representative believes that the Appellant meets the prolonged criterion because there is uncertainty and unpredictability as to when the Appellant will have sufficiently recovered to return to a substantially gainful occupation. In support of her position, the Appellant relied on two Pension Appeal Board decisions and the CPP adjudication framework (GD15).

[45] However, the Tribunal determines that it must also consider the Federal Court of Appeal decision in *Canada (MHRD) v. Henderson*, 2005 FCA 309. In this case, Mr. Henderson had left his job as a mechanical engineer in 1995 due to a serious knee condition. He then worked as a truck driver, but his knees became so painful that he had to stop this new job in 1997. In January 1999, an orthopedic surgeon proposed knee surgery that would enable him, upon recovery, to perform some type of light or sedentary work. This surgery was carried out successfully in April 2000, and Mr. Henderson testified before the Commission that he would thereafter be able to work four or five hours, four or five days per week. However, he was not able to find a job.

[46] In its decision, the Court interpreted an "indefinite" duration as follows:

> [8] For the purpose of the *Plan*, a disability cannot be "prolonged" unless it is determined to be of "indefinite duration". Since, prior to the operation, the medical opinion accepted by the Board was that surgery would improve Mr. Henderson's condition and enable him to work, the Board was wrong to find that the disability was "prolonged".
>
> [9] Counsel for Mr. Henderson drew our attention to previous Board decisions in which it had found claimants' disability to be prolonged prior to their recovery from treatment and […] awarded pensions for a "closed period" of time: see, for example, *Minister of Human Resources Development v. Upshaw* (CP 07832, January 6, 2000).
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> [10] However, in our view, these "closed period" decisions would appear to be distinguishable from the present case. The medical opinion prior to the prescribed treatment about the likelihood of the claimants' recovery and of their subsequent ability to work was much less clear in those cases than that accepted in

> Mr. Henderson. This point has been made by the Board in other cases, including *Kinney v. Minister of Social Development* (CP 21314, February 24, 2005) and *Tibbo v. Minister of Social Development* (CP 21704, August 23, 2004).
>
> [11] The restrictive language of section 42 indicates that the purpose of the *Plan* is to provide a pension to those who are disabled from working on a long-term basis not tide claimants over a temporary period where a medical condition prevents them from working.

[47] The Tribunal is bound by this decision if the facts in both cases are sufficiently similar.

[48] In this case, the evidence of the likelihood of recovery after treatment is not as clear. On page GD7-6, Dr. Goodman stated that the Appellant's prognosis was uncertain. However, the opinions of Dr. Goodman and Dr. Clark cited above lead the Tribunal to believe that the Appellant will be able to return to some type of work after her surgery and rehabilitation period. Although this period may be long, the Tribunal cannot conclude that the disability will last *indefinitely*. Furthermore, the Tribunal notes that the onus is on the Appellant to prove that she meets the CPP criteria, something that the Tribunal determines was not done (*Litke v. Canada (HRSD)*, 2008 FCA 366 at paragraph 6).

CONCLUSION

[49] The Tribunal acknowledges that the Appellant lives with significant functional limitations and that her rehabilitation may be in the distant future. Despite the Tribunal's compassion for the Appellant, it was her responsibility to provide relevant and convincing evidence relating to her disability.

[50] The Tribunal has carefully reviewed all of the evidence as well as the relevant statutory provisions. However, the Tribunal determines that the Appellant has failed to satisfy, on a balance of probabilities, that she had a severe and prolonged disability within the meaning of the CPP on the date of the hearing.

[51] The appeal is dismissed.

Jude Samson
Member, General Division – Income Security