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

Citation: *D. P. v. Minister of Employment and Social Development*, 2017 SSTGDIS 7

Tribunal File Number: GP-15-3545

BETWEEN:

D. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: January 18, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on September 26, 2014. 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 conducted by "Written Questions and Answers" for the following reasons:

a) The method of proceeding provides for the accommodations required by the parties or participants.

b) Videoconferencing is not available within a reasonable distance of the area where the Appellant lives.

c) The issues under appeal are not complex.

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.

[3] The Tribunal Member sent written questions to both parties on November 16, 2016. Answers were received from the Respondent on November 28, 2016 and from the Appellant on December 5, 2016. In addition, the Respondent replied to the Appellant's answers on December 8, 2016.

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, as the parties agree and the Tribunal finds that the MQP date is December 31, 2016. 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 MQP date.

EVIDENCE

[8] The Appellant is 53 years old and lives in X X X, British Columbia. She has a Grade 12 education as well as an ECED certificate. Her most recent employment was as an Early Childhood Educator at the C. Family Enrichment Centre. She started working there on July 21, 2011 and stopped working on October 21, 2013 due to pain. She claims that she has been unable to work because of her medical condition since October 21, 2013. She says that she has not done any paid or volunteer work since then.

[9] In her application materials, the Appellant stated that her illnesses and impairments were interstitial cystitis ("IC", also known as painful bladder syndrome), severe abdominal pain, urinary urgency and frequency, disturbed sleep due to nocturia, and continuous pain from fibromyalgia and irritable bowel syndrome. She said that this prevented her from working because she had leave her job every 15 minutes to urinate, was unable to sit or stand for long

periods of time due to severe spasms, spent most of her day in the washroom or laying/sitting on heat, and lacked clarity of thought due to pain, medication, and lack of sleep.

History

[10] Prior to working at the C. Family Enrichment Centre, the Appellant held a number of similar positions dating back to 1997 with entities such as X X X Child Care and the M. M. Preschool. She also had qualifying CPP contributions from 1981 to 1989. Immediately upon stopping work on October 21, 2013, she began to receive Employment Insurance sickness benefits. These continued until January 26, 2014. She also appears to be receiving disability benefits from a private insurer.

[11] The Appellant was seen by Dr. Faddegon (Urology) in November and December of 2013. Based on her symptoms of suprapubic bladder discomfort prompting urination, daytime urinary frequency and urgency, and nocturia, Dr. Faddegon affirmed that she had IC and recommended dietary management, stress reduction, regular exercise and adequate sleep, in addition to pharmaceutical treatment. He performed a cystoscopy and bladder instillation on December 16, 2013.

[12] On September 18, 2014, Dr. Street (Family Physician) prepared a Medical Report with a primary diagnosis of IC. He noted the onset of symptoms in September of 2013 and relentless symptoms since then that included severe dysuria, small volume urinary frequency, urinary urgency, occasional urinary incontinence, frequent severe lower abdominal pain, and nocturia (8 times per night) with resultant sleep fragmentation. Although there had been modest benefit from dietary restrictions and Detrol, there had been no benefit from Elmiron and cystoscopic bladder instillation. Oxybutynin and Nortriptyline caused adverse effects.

[13] With respect to functional limitations, Dr. Street wrote that urinary frequency, urgency and dysuria prevented the Appellant from giving consistent attention to work duties. In addition, pain distraction markedly limited her concentration and a loss of sleep markedly reduced her energy and stamina. As the symptoms had been relentless and persistent for a year and no further treatments were available, it appeared likely that they would persist for the foreseeable future.

[14] In her September 23, 2014 Questionnaire, the Appellant stated that her IC had also caused other conditions to act up. These other conditions included irritable bowel syndrome ("IBS"), migraines and fibromyalgia. She said that she was unable to leave her home except to go to her doctor's appointments. She provided an extensive list of functional limitations that included standing (10 minutes, if not leaning), sitting (15-30 minutes), walking (maximum 30 minutes, but requires accompaniment and undergarment pads), remembering, lifting/carrying (under 10 pounds), concentration, sleeping, eating (needs help cooking), washing (must sit down), bowel habits (10-12 times each day), bladder habits (urination every 15 minutes and absorbent pads required), and driving (has stopped as she does not feel alert or cognitively clear).

[15] On December 11, 2014, Dr. Faddegon noted continuing suprapubic pressure and pain that prompted urination, despite the Appellant's cessation of all caffeine and other bladder irritants such as tomatoes and acidic foods. She had made efforts to reduce stress and other lifestyle contributors. There was urge incontinence two to three times per week, in addition to ongoing urgency. Dr. Faddegon thought there may also be a urinary tract infection ("UTI"). The possibility of hydrodistention was discussed and the Appellant agreed to proceed with it.

[16] By February 26, 2015, Dr. Faddegon wrote that the chronic pain condition itself did not result in any functional limitation. However, the pain episodes could often be severe and preclude the Appellant's ability to attend work. While he said that he was unable to provide an accurate assessment of her work capabilities, he said that there would likely be periods when she would be able to work as well as periods where her pain symptoms would preclude her from functioning at work. The Appellant subsequently wrote that she had the hydrodistention procedure on April 21, 2015 but it resulted in bleeding and severe spasms. She wrote that she lost more bladder control afterwards and sometimes has no warning before her bladder empties.

[17] On July 10, 2015, Dr. Street completed a statement affirming a primary diagnosis of IC, with other diagnoses of GERD, IBS, dyslipidemia and fibromyalgia syndrome. He indicated that the Appellant's expected recovery/return-to-work date was "indefinite" and she was not able to return to work gradually or to any other occupation. The prognosis was guarded.

[18] On September 23, 2015, the Appellant prepared a very long letter with her appeal materials. She said that her health had recently taken a dramatic change: her IC was getting worse and she had spent most of the last few months in bed or in hospital. After a series of bladder infections, she had been diagnosed with kidney stones which were removed by laser. However, this was followed by severe vomiting, diarrhea and fever symptoms and she required antibiotics and potassium intravenously. She said that this eventually resulted in a new diagnosis of Extended Spectrum Beta Lactamase ("ESBL"), although this is not objectively documented.

[19] The Appellant described her typical day as consisting of severe abdominal pain and spasms that radiate down her legs and into her back. Nothing relieved the internal bladder discomfort. She was often in the bathroom for 30 minutes at a time, trying to urinate. She would spend hours each day in the bathroom. She could not walk for more than ½ a block because she felt the urgency to return home to urinate: her life revolved around being close to a bathroom all day. Sometimes, she was incontinent because the pain was so severe that she could not make it to a washroom in time. On bad days with spasms or bleeding, she would spend the day in bed or in a hot bath. She also described increasing stress resulting from her medical condition. She would also be up an average of 8-10 times each night to urinate.

[20] On October 13, 2015, Dr. Street wrote that the Appellant's current active medical conditions included severe IC that was refractory to all medical interventions, recurrent UTIs secondary to multi-drug resistant E. coli, daytime drowsiness secondary to constant sleep fragmentation (itself secondary to severe nocturia), fibromyalgia secondary to sleep fragmentation, and poor stamina secondary to all of those conditions. He wrote that, despite multiple medical interventions, her condition had not improved since his report of September 18, 2014. In fact, there had been a new diagnosis of recurrent multi-drug resistant UTIs. An endoscopic extraction of renal calculi on July 31, 2015 did not appear to have helped with the UTIs. Consultation with an infectious disease consultant was planned.

[21] Dr. Street wrote that IC left the Appellant severely compromised all of the time. Her longstanding predilections to IBS and fibromyalgia had been reactivated by the stress of her urinary condition and the consequent sleep deprivation. The combined burden of her severe

urinary symptoms, sleep fragmentation, widespread myalgias and intermittent diarrhea had become overwhelming. Her stamina was poor with daytime drowsiness, low energy and limited coping resources. She remained motivated to improve but was unable to do so. Dr. Street wrote that any potential employer could expect a high rate of medical absenteeism and very frequent interruptions, even on days that she was at work: he thought it would be absolutely unreasonable for an employer to accept these limitations, even for part-time work. He also opined that the stresses generated by attempting to work would likely worsen her urinary symptoms.

[22] Dr. Street stated that he had been the Appellant's physician for more than 30 years and found her to be an honest, industrious and conscientious woman who was well motivated for work. There was no medical or surgical therapy that might make a decisive difference for her and he strongly supported her application for medical disability.

[23] The Appellant wrote that a CT scan on March 11, 2016 found more kidney stones, although no objective documentation was filed about it. She also indicated that she talked with Dr. Faddegon by telephone on March 15, 2016 and April 12, 2016. She generally consults him by telephone because of the difficulties in travelling 2.5 hours to see him.

[24] On April 13, 2016, the Respondent wrote to Dr. Street and requested updated urologist reports, the results of hydrodistention and lithotripsy tests, the infectious disease consultation, and any psychiatric or psychological assessments. This request was repeated on May 25, 2016. The Respondent never received a response to these requests. However, the Appellant wrote that she saw the infectious disease physician on October 28, 2015 and it resulted in the placement of a PICC (peripherally inserted central catheter) line in her right forearm. She later returned to the infectious disease physician for follow-up but it did not correct her conditions.

[25] In materials received by the Tribunal on December 5, 2016, the Appellant stated that there had been no improvement in her IC since October 13, 2015. She still had severe abdominal pain, bladder frequency and incontinence. She did not leave home alone. She said that the treatment goal was just trying to keep her comfortable and trying to find ways to stop the pain. She reported that she had appointments with Dr. Street on November 6 and December 1 of 2015, followed by additional appointments on January 6, March 15, April 12, May 4, May

24, June 24, July 26, August 25, September 26, October 31 and December 13 of 2016. She said that she was monitored every month for infections and fevers.

[26] The Appellant wrote that she has not received any specialized treatment for fibromyalgia since she stopped work in 2013, as Dr. Street felt that it was connected to her IC and IBS. She had trialed some fibromyalgia medications but had bad reactions to them. As for her IBS since 2013, it was under control until a flare-up in January of 2016. She had a bowel scope done by Dr. Nicole Robbins on November 28, 2016 as the Appellant's bowels had been bleeding. The situation at that time appeared to be satisfactory and Dicetol appeared to have helped with her IBS. This was to be discussed at her December 13, 2016 appointment with Dr. Street.

[27] The Appellant was asked about apparent earnings of $1,645 in 2014 and $1,565 in 2015 that she had received from her former employer. She said that these amounts represented medical and dental coverage that she received for two years after going on medical leave from her employment. She provided an e-mail from her employer that confirmed she had not been working and these amounts were actually taxable benefits rather than income from employment.

SUBMISSIONS

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

a) Her doctor has stated that she is unable to return to work on a gradual basis or to any other occupation;

b) She has not found anything that helps her internal bladder discomfort;

c) She rarely leaves her home due to her various conditions and her need to be close to a washroom at all times;

d) She is physically and mentally drained from her conditions and is constantly stressed by not knowing what will happen in the washroom; and

e) It would be unfair for an employer to pay her for running back and forth to the washroom and being there for extended periods of time.

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

a) The severity of the disability is not based upon a claimant's inability to perform her regular job, but rather any substantially gainful occupation;

b) Alternate employment could not be ruled out, as Dr. Faddegon stated that there would be periods of time when the Appellant would be able to work;

c) She has not attempted any alternate work within her capacity since she stopped work in October of 2013, which precludes a finding of disability;

d) There is no indication that she had the physiotherapy recommended by Dr. Faddegon;

e) No report or recommendations had been received from the infectious disease specialist referenced by Dr. Street, nor did there appear to be any specialised treatment of her fibromyalgia after she stopped working;

f) Despite two requests, Dr. Street had failed to provide the additional documentation requested by the Respondent.

ANALYSIS

[30] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2016.

Severe

[31] As noted above, a person is considered to have a severe disability if she is incapable regularly of pursuing any substantially gainful occupation. 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. In this

case, the Appellant is 53 years old, is well-educated and has professional certification, is fluent in English, and has extensive experience in working with children.

[32] In assessing the severity of the Appellant's condition, the Tribunal has placed considerable weight on the comprehensive and relatively recent letter provided by Dr. Street on October 13, 2015. Dr. Street has been the Appellant's doctor for more than thirty years and is well-placed to comment on both her motivation and her ability to work. Dr. Street made it clear that the Appellant was motivated to work but was rendered unable to do so by her interstitial cystitis and the associated conditions. The Appellant would be frequently absent from work and, even when she did attend, her work would be constantly interrupted and she would also suffer from poor stamina, drowsiness, pain and low energy. He wrote that the frequency and nature of the interruptions are inconsistent with the pursuit of gainful employment. Based on this very persuasive evidence, the Tribunal finds that the Appellant would have been incapable regularly of pursuing any substantially gainful occupation, not just her most recent position, as of October 13, 2015.

[33] However, in order to be successful, it is also necessary for the Appellant to establish that a severe disability existed through the date of the hearing. This is made more difficult by the fact that no objective medical evidence was filed after Dr. Street's letter of October 13, 2015, despite the Respondent's explicit requests to Dr. Street. Nonetheless, there is no evidence that the Appellant attempted to obstruct the provision of such information. The Tribunal also has the benefit of a comprehensive response from the Appellant in December of 2016 to the Tribunal's written questions. The response contains numerous details about the Appellant's recent symptoms and medical treatment.

[34] While it would have been preferable to have this information directly from the doctors involved, the Tribunal does not have any concerns about the reliability of these answers from the Appellant. Her answers are complete and consistent with other information provided by her in the file. It is clear that she continues to be seen regularly by her family doctor and had also consulted Dr. Faddegon on a couple of occasions in 2016. She had an IBS flare-up in 2016 that required a bowel scope procedure and, based on Dr. Street's October 2015 letter, appears likely to have flowed from her ongoing IC condition. There are no significant inconsistencies between

the December 2016 responses from the Appellant and the October 2015 letter from Dr. Street. The Tribunal is satisfied that the Appellant remained severely disabled through the date of the hearing and that such disability has continued from October 13, 2015.

[35] The next question is whether the Appellant's severe disability existed continuously from any date prior to October 13, 2015. Although the Appellant stopped working in October of 2013, the initial 2013 documentation from Dr. Faddegon is not as conclusive about a severe disability. Her symptoms were more episodic at that time and there is some question about whether the Appellant could have mitigated her condition through exercise, stress reduction and adequate sleep. There is also a lack of objective documentation from December 16, 2013 through to Dr. Street's report of September 18, 2014. It is notable that the September 18, 2014 report reveals a significantly worsened condition and aligns with Dr. Street's letter of October 13, 2015 and his statement of July 10, 2015.

[36] While it is possible that the Appellant was severely disabled at some point prior to September 18, 2014, it is up to the Appellant to meet this onus on a balance of probabilities. The evidence before the Tribunal is ultimately not persuasive on this point. However, the Tribunal is satisfied that a severe disability did exist by September 18, 2014: Dr. Street's report from that date is persuasive, particularly when combined with the symptoms and limitations reported by the Appellant at about the same time. The Tribunal must now determine whether a severe disability existed continuously from September 18, 2014 to October 13, 2015.

[37] The key evidence during that period consists of three letters from Dr. Faddegon. These letters disclose that the Appellant's symptoms continued despite making significant lifestyle changes in an attempt to deal with her IC. Dr. Faddegon confirmed that standard medical therapy had failed and that hydrodistention might ultimately assist: although this eventually took place in the spring of 2015, it was unsuccessful. However, it is necessary to carefully consider Dr. Faddegon's February 26, 2015 statements concerning the Appellant's ability to work.

[38] Dr. Faddegon wrote that IC did not, in itself, result in any functional limitations. On its face, this suggests some work capacity. However, he then stated that while there would likely be periods during which the Appellant could work, at other times her pain symptoms would

preclude her from attending work. He acknowledged that these pain episodes could be severe. He also stated that, due to the nature of IC, he could not provide an accurate assessment of her work capabilities.

[39] The definition of severity requires that a claimant be "incapable regularly" of pursuing a substantially gainful occupation. The Tribunal finds that the Appellant's symptoms do leave her "incapable regularly", even if there may be brief periods during which she is able to work. The Tribunal also finds that Dr. Faddegon's commentary appears to be restricted to the Appellant's urological symptoms. As noted by Dr. Street, the Appellant is affected by other symptoms including daytime drowsiness, fibromyalgia and poor stamina. 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). Accordingly, the Tribunal finds that Dr. Faddegon's February 26, 2015 statements do not interfere with a finding of severity between September 18, 2014 and October 13, 2015.

[40] Considering all of the above, it appears that the Appellant has established a severe disability commencing by September 18, 2014 and continuing through to the date of the hearing. Before making a final finding on severity, however, the Tribunal will consider the submissions from the Respondent that have not yet been addressed through the above analysis: the apparent lack of physiotherapy (despite Dr. Faddegon's recommendation) and the lack of specialised fibromyalgia treatment after she stopped working.

[41] Physiotherapy was specifically recommended by Dr. Faddegon on November 6, 2013 and there is no evidence that the Appellant ever participated in it. However, even though there are a number of subsequent reports from Dr. Faddegon, none of them make reference to physiotherapy. Dr. Street makes no reference to it either. The Tribunal also notes that the physiotherapy recommendation predates the earliest possible onset date of a severe disability and that the nature of the Appellant's symptoms changed after November 6, 2013. In these particular circumstances, the Tribunal does not find that the apparent failure to pursue physiotherapy would interfere with the onset of a severe disability by September 18, 2014.

[42] As for the lack of specialized fibromyalgia treatment, the Tribunal relies on Dr. Street's October 13, 2015 letter. Dr. Street identified fibromyalgia as being secondary to sleep fragmentation (which, in turn, was secondary to severe nocturia). Elsewhere in the letter, he wrote that fibromyalgia was previously quiescent and was only reactivated by the Appellant's urinary condition and consequential sleep deprivation. The Appellant also stated in December of 2016 that Dr. Street felt that her fibromyalgia was connected to her IC and IBS. These statements suggest that treatment for fibromyalgia would best be approached by addressing the underlying causes. Furthermore, the Appellant wrote that she had previously received medication for fibromyalgia but had reacted badly to them. Given the relatively secondary role played by fibromyalgia in the Appellant's constellation of symptoms, the Tribunal finds that the recent lack of specific treatment for fibromyalgia is not material for the issue of severity.

[43] Given all of the above, the Tribunal finds that the Appellant has established a severe disability commencing on September 18, 2014 that continued through to the date of the hearing.

Prolonged

[44] A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. As there is no evidence suggesting that the Appellant's disability is likely to result in death, the Tribunal must determine whether it is likely to be long continued and of indefinite duration.

[45] As with the analysis of severity, the Tribunal places significant reliance on the October 13, 2015 letter from Dr. Street when assessing the "prolonged" criterion. Dr. Street stated then that the Appellant's condition had not improved despite multiple medical interventions. He added that no medical or surgical therapy was available that might make a decisive difference for her treatment. He described her condition as severe and persistent, while also noting her recent development of recurrent multi-drug resistant bacterial UTIs and her long-term predilection to IBS and fibromyalgia. The Appellant experienced an IBS flare-up in 2016 and indicated that there had been no improvement in her condition since October 13, 2015. Her description of her current prognosis suggests an essentially palliative approach to her care. This all supports a finding that her severe disability is likely to be long-continued and of indefinite duration.

[46] Although earlier evidence must necessarily carry less weight, it is nonetheless notable that Dr. Street assessed the Appellant's recovery/return-to-work date as "indefinite" in July of 2015 and provided a "guarded" prognosis. On February 26, 2015, Dr. Faddegon described the Appellant's IC condition as being chronic, while Dr. Street opined on September 18, 2014 that her symptoms would likely persist for the foreseeable future. These also support a finding that her disability will be long-continued and of indefinite duration. There is no persuasive evidence after her disability onset date of September 18, 2014 that suggests otherwise.

[47] Based on the above, the Tribunal finds that the Appellant's disability is prolonged.

CONCLUSION

[48] The Tribunal finds that the Appellant had a severe and prolonged disability in September of 2014, when Dr. Street prepared a Medical Report in support of her application for CPP disability benefits. According to section 69 of the CPP, payments start four months after the date of disability. Payments therefore start as of January, 2015.

[49] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security