



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. S. v Minister of Employment and Social Development*, 2017 SSTGDIS 209

Tribunal File Number: GP-16-2342

BETWEEN:

J. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Rodney Antonichuk

DATE OF DECISION: January 30, 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 February 1, 2016. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant was 55 years old at the date of application with a grade 12 education, and certification as a X as well as a X. The Appellant described her main disabling conditions as a left elbow deformity, hypothyroidism, chronic obstructive pulmonary disease, and a spinal injury. She cited limitations secondary to chronic pain including limited sitting, standing, walking, lifting and carrying, reaching with the left arm, bending, household maintenance, memory and concentration, and with sleeping. The Appellant noted that she had some bladder incontinence with coughing and decreased sensation to her bowel. Because of chronic obstructive pulmonary disease; the Appellant had laboured breathing and chronic coughing. She was able to drive for 15 minutes despite sensing pain. She was not able to use public transportation due to her sitting and standing intolerance. The Appellant indicated she was last employed as a X and a X from March 23, 1993, to May 22, 2009, when she stopped working due to a spinal injury. She indicated that she could no longer work as of May 22, 2009. She attended a rehabilitation program for three months in 2011. The Appellant did not attempt to do a lighter job or a different type of work.

[3] This appeal was heard by Questions and answers for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) The method of proceeding provides for the accommodations required by the parties or participants.
- c) There are gaps in the information in the file and/or a need for clarification.

- d) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[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 because the parties agree and the Tribunal finds that the MQP date is December 31, 2011.

[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.

EVIDENCE

[9] The Tribunal considered all the evidence before it at the close of the hearing. What follows is a summary of the Appellant's most relevant evidence.

[10] A report dated July 29, 2009, from Dr. R. Ardell, Family Physician, noted that the Appellant sustained an injury to her back on May 22, 2009, when she fell with a patient at work. She had specific pain over the left sacroiliac ridge. She had no neurological deficit. Her lumbar spine x-ray showed degenerative findings as well as Grade II spondylolisthesis at the L5 to S1 level. Dr. Ardell indicated that the Appellant's findings were consistent with lumbosacral strain. Treatment included anti-inflammatory medication, physiotherapy, a muscle relaxant when necessary, heat, and gradual mobility. The Appellant had attempted to return to work but was not successful as she was placed into full-duty work which resulted in aggravation of her injury. On her return visit on July 29th, the Appellant continued to have tenderness in the left paralumbar region and left sacral ridge and her mobility was unchanged; nonetheless, there were no neurological findings. Dr. Ardell determined that due to her ongoing soft tissue strain, the Appellant would be off work until August 4, 2009, and that she would participate in a physiotherapist-guided graduated return to work program. He noted that if the Appellant's employer was not able to accommodate her restrictions, then she ought to not return to work until capable of her full duties. [GD2-249 & 250]

[11] A lumbar spine X-ray dated November 3, 2009 showed that the Appellant had a grade II anterolisthesis of the L5 vertebra on the S1 vertebra and the L5 to S1 disc space was lost. There was borderline narrowing at the L4 to L5 level. The remaining discs were normal and the vertebral body heights were well maintained. [GD2-318]

[12] In a report dated March 26, 2010, Dr. Ardell reported that the Appellant was assessed regarding her back situation. The Appellant informed him that her back was no better. She complained of increased pain and spasm in the lower back and increased weight gain due to immobility. Examination revealed tenderness in the mid-lumbosacral spine as well as to the left and over the sacroiliac joint. She had evidence of soft tissue spasm. Her neurological examination was bilaterally symmetrical and there was no evidence of neurologic deficit. The

Appellant's diagnosis remained consistent with lumbosacral strain with spondylolisthesis and her treatment recommendations remained unchanged. [GD2-319]

[13] A report from August 20, 2010 prepared by Summit Physiotherapy and Fitness indicated that the Appellant continued to have symptoms and functional restrictions and it was reported that she did not meet the goals required in order to return to her previous job. [GD2-138 through 155]

[14] Dr. P. Campbell, Family Physician, reported on November 12, 2010 that the Appellant's diagnosis was a prolonged condition of lumbosacral strain and nerve entrapment, with neurological deficit. Dr. Campbell noted that it had been 18 months since the Appellant's injury and her prognosis for recovery was poor as she was unable to feel her lower legs. Spinal surgery was not an option. The Appellant attended a tertiary program and the results showed that she continued to have symptoms and functional restrictions. She did not meet the required goals for the demands of her job. Dr. Campbell wrote that she felt that the Appellant was incapable of work due to permanent incapacity and an inability to weight bear or stand for any period of time. [GD2-318]

[15] Dr. Campbell reported on January 27, 2012 that the Appellant had complied with all medical supervision and recommended treatment plans. She attempted to go back to work on a graduated basis but her employer did not adhere to the plan. Dr. Campbell reported that due to the Appellant's circumstances, she was treated for anxiety and depression in August and November 2009 and the conditions did resolve. The Appellant continued to attend Dr. Campbell on a monthly basis for treatment of her pain. [GD2-316]

[16] In his report dated February 23, 2012, Dr. K. Yong-Hing, Spine Surgeon, noted that the Appellant presented with midline lumbosacral, left buttock, and left lower extremity pain, and left foot numbness. He recorded that the Appellant's pain was constant and graded at 4 to 6/10. The pain was aggravated by standing or sitting longer than five minutes and relieved with postural changes or lying down. Following an examination and review of the radiographic investigations, Dr. Yong-Hing concluded that the Appellant's lower back and left lower extremity symptoms were explained by the left L5 radiculopathy from the L5 on S1 spondylolisthesis. He discussed the diagnosis, course and management options including the

details of surgical decompression and fusion. The Appellant did not want operative treatment. Dr. Yong-Hing recommended lifestyle modifications including exercise, weight loss, and smoking cessation. He noted that the Appellant could continue with her activities as tolerated as she would do no further damage by staying active. [GD2-313 through 315]

[17] In a June 20, 2012 report from Dr. Z. Chaudhry, Psychiatrist, Dr. Chaudhry provided a DSM (Diagnostic and Statistical Manual) of Mental Disorders Axis IA diagnosis of panic disorder and adjustment disorder and Axis IB diagnosis of associated generalized medical condition and psychological factor adjustment disorder with depression. He noted on Axis III that the Appellant had generalized medical conditions of L5 to S1 level osteoporosis and spondylolisthesis and on Axis IV he noted that the Appellant had occupational problems. Dr. Chaudhry provided the Appellant with a GAF (Global Assessment of Functioning) of 75 indicating that if symptoms were present, there were transient and expectable reactions to psychosocial stressors and there was no more than a slight impairment in social, occupational, or school functioning. [GD2-233 & 234]

[18] Dr. Campbell reported on June 6, 2013 that the Appellant was diagnosed with hypothyroidism. She was treated with Eltoxin (synthetic thyroid hormone). Dr. Campbell noted that the Appellant had markedly decreased mobility and flexibility due to lower back pain which she controlled medically. She deemed the Appellant unfit to return to any employment that involved standing and sitting for anything other than short periods of time, or lifting more than 20 pounds. Dr. Campbell supported that due to her limitations, the Appellant's careers as an "X" were no longer an option for her. Dr. Campbell also noted that the Appellant did not meet the required goals for her job demands while undergoing tertiary physiotherapy in 2010 and 2011. [GD2-255]

[19] In response to question posed to the Appellant by the Tribunal, the Tribunal received answers from the Appellant dated October 26, 2016. The Appellant stated that she has not been employed since May 2009 and has not felt physically stable enough to be employable for any occupation. The Appellant indicated that she take Eltroxin, Hydro morph contin, Olmtec, Subutamol/ Pulmacourt inhaler, and Tylenol. She also indicated that no treatments are scheduled. The Appellant indicated that her pain level was 10/10 in May 2009 and upon the end of her

treatments with Summit Physiotherapy in August 2010 she was 4 to 6/10 for pain levels. She indicated that she continues to smoke, has gained weight and has pain exercising. The Appellant stated that she currently lives with a nurse assistant who assists with the Appellant's daily living. The nursing assistant does all of the Appellant's household duties including cooking, cleaning as the Appellant's daily routine involved watching television, interrupted sleep patterns and pain management.

[20] The Appellant indicated that she has had COPD since the 70's and that she carries inhalers with her in order to assist with her respiratory issues. She wrote that she decided not to have decompression and laminectomy surgery, because of the high risk for post-operative pneumonia and infection, complicated with allergies. She stated that any type of surgical procedure would be high risk and these risks, and complications existed prior to May, 2009. Finally in regards as to why the Appellant did not have modified duties with her employer, the Appellant stated her employer could not offer anything other than full time duties, therefore she attended Summit Physio. Her physical disability and mental condition contributed to the failure of the return to work program and still continues her unemployable. [GD8-1 & 2]

SUBMISSIONS

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

- a) She has chronic lung problems and spinal pain;
- b) She has bladder issues;
- c) She has advanced arthritis after fracturing her left elbow which has rendered her left arm useless;
- d) She was in a car accident which fractured her lower spine;
- e) She has extreme bouts of depression.

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

- a) The medical evidence does not show that the Appellant has a serious pathology or impairment which would prevent the Appellant from doing suitable work within her limitations;
- b) The Appellant diagnosis of hypothyroidism occurred well after the Appellant's MQP of December 2011 and this condition was being treated with medication and would not prevent her from being substantially gainfully employed;
- c) There is no evidence on file to support the contention that the Appellant's COPD is of such a severity that it would prevent her from working;
- d) The Appellant's depression and anxiety has been treated successfully with medication and treatment;
- e) There are treatment options still available to the Appellant to deal with her back pain issues;
- f) The Appellant has not attempted to perform alternate employment suited to her limitations and failed that work due to her medical condition.

ANALYSIS

[23] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

Severe

[24] 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.

[25] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to

perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[26] 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).

[27] 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).

[28] The Tribunal notes that the Appellant was 51 years of age at the time of her MQP. The Appellant therefore still has some years of work opportunity ahead of her. The Appellant's education consists of a grade 12 education along with the required education and training to become a X. The Tribunal notes that the correspondence from the Appellant indicates an intelligence level that would suggest that she has transferable skills. The Tribunal finds that the Appellant has numerous transferable skills that she gained from her education and her work experience that would allow for her to attempt finding alternative employment.

[29] The Tribunal notes that when questioned if the Appellant had attempted any other types of employment since leaving her employer in May 2009 the Appellant stated that she had not been employed since then as she had not felt physically well enough to attempt any employment. The evidence indicates that the Appellant did attempt a return to work with her employer but she was not successful as she was placed into full time work and this caused her to aggravate her back injury. The evidence indicates that the Appellant's employer could only offer her full time employment duties and so therefore the ability to stay with that employer was beyond her capabilities. The Tribunal notes that the Appellant's family doctor indicated in November 2010 that she was not able to return to any type of work. The discharge report from Summit Physiotherapy from August 2010 indicated that the Appellant had participated in the rehabilitation program for eight weeks and for four weeks in a work hardening program and while the Appellant had shown improvement in her symptoms she had not met the goals needed in order to return to her past job duties. The evidence also indicates that by February 2014 the Appellant's family doctor was still reporting that the Appellant was unable to do any work that

required prolonged sitting or standing or lifting over 20 pounds which indicates to the Tribunal that the Appellant's condition had shown some improvement since her MQP. The Tribunal finds that although the evidence indicates that the Appellant was unable to return to her previous job there is no medical evidence to indicate that she was unable to be substantially gainfully employed. While the Appellant's doctors have placed limits on her abilities to work the Tribunal is unable to ascertain that she is unable to work at all positions, including a sedentary position.

[30] The Appellant stated that her pain level in May 2009 was 10/10 and after her rehabilitation it had subsided to 4-6/10 without activity however it rose to 10/10 with activity. While the Appellant indicated that she was in constant pain the evidence also indicates that the Appellant was able to manage her pain levels without the use of narcotics.

[31] In a report from Dr. Yong-Hing from February 2012 he recommended to the Appellant that she stay active and stop smoking. Dr. Yong-Hing recommended surgery but the Appellant indicated that due to her COPD, pneumonia and allergies to antibiotics and anesthetic drugs she was declining surgery because any surgery would be too high of a risk. The evidence presented to the Tribunal in the form of X-rays indicated that the Appellant's chest was essentially normal and there was no presence of a severe pulmonary disease. While the Tribunal cannot fault the Appellant for declining surgery that may or may not help her symptoms that Tribunal notes that the Appellant has not followed Dr. Yong-Hing's recommendations to stop smoking and to stay active. As well the evidence indicates that the Appellant's assertion that she was unable to undergo surgery due to her COPD is incorrect as the X-ray reports do not indicate a presence of severe pulmonary disease.

[32] The Tribunal referred to the medical reports regarding the Appellant's mental state and how it had impacted her ability to return to work. The evidence clearly indicated that while the Appellant's mental state may have interfered with a successful return to her previous job the treatment for her anxiety and depression in the winter of 2009 was successful and the Appellant's condition was resolved. The Tribunal also notes that the Appellant was consulted by a psychiatrist in June 2012 and there was no evidence of anxiety or depression on the part of the Appellant.

[33] The Tribunal notes that in the Appellant's written submission to the questions posed by the Tribunal that the Appellant is currently assisted by an individual. The Tribunal notes however that this assistance is recent and there is no indication in the medical evidence that the Appellant required any type of assistance at the time of her MQP.

[34] While the evidence indicates that in May of 2009 the Appellant was suffering from the effects of a spinal injury, there is no evidence that at this time that the Appellant has met the criteria required to establish that his condition was severe and prolonged as those terms are defined in the CPP and by the case law set out above. Specifically the Appellant has not proven, using the guidelines from *Inclima*, that she has shown that an effort at obtaining and maintaining employment has been unsuccessful by reason of her health condition.

Prolonged

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

CONCLUSION

[36] The appeal is dismissed.

Rodney Antonichuk
Member, General Division - Income Security