



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. T. v Minister of Employment and Social Development*, 2017 SSTGDIS 206

Tribunal File Number: GP-16-1855

BETWEEN:

A. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

HEARD ON: August 15, 2017

DATE OF DECISION: August 21, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's first application for a *Canada Pension Plan* (CPP) disability pension on April 7, 2014.

[2] The Appellant's second and current CPP disability application was received on November 16, 2015. The Appellant claimed that she was disabled because fibromyalgia (FM) symptoms. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] The appeal was heard by teleconference for the following reasons:

- The method of proceeding provides for the accommodations required by the parties or participants;
- There are gaps in the information in the file and/or a need for clarification;
- 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; and
- Although the Appellant lives within a reasonable distance of the nearest Service Canada Centre in Regina, the Tribunal Member was unconvinced it is necessary for her to travel to Regina to attend a hearing.

[4] The Appellant was the only person to attend the hearing.

THE MINIMUM QUALIFYING PERIOD and MAIN ISSUE UNDER APPEAL

[5] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP).

[6] The calculation of the MQP is based on the Appellant's contributions to the CPP. The Respondent most recently submitted that the MQP is December 31, 2018 (GD6). However, no

evidence was filed along with this submission. The Tribunal finds the Appellant's MQP to be December 31, 2017 based on the CPP contributions record on file (GD2-120).

[7] In either case, the MQP date is in the future, so the issue in this appeal is the same: whether the Appellant had both a severe and prolonged disability on or before the hearing date.

DECISION

[8] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

EVIDENCE

[9] The Appellant talked about an experience she had on December 23, 2008. She was at the scene of a car accident involving her father. Since that day her health has been problematic. Her "life has been deteriorating". For example she has been in pain daily since. Her pain has been "almost paralyzing." She feels pain in her legs and feet. When it attacks her back, she usually has to attend the emergency department to receive morphine. This has made it difficult for her to function. She is on the highest dosage of pain killer available. She takes Tylenol #4 and Tramacet. Her doctors prescribed medical marijuana which has been ineffective. Recently she has been prescribed hydromorphone. She contends with daily side effects such as sensitivity to touch. Showering wears her out completely and feels like needles, so she showers less often. Bathing in a tub causes more pain than the shower. She is sensitive to noise, and temperature changes can flare her pain. She is dizzy and has fallen in the past. Usually she requires assistance to balance herself such as placing a hand on the wall. Her pain has affected her physical and mental wellbeing. Her memory has also been poor.

[10] The Appellant is 46 years of age. She is the mother of four daughters, including twins aged 12. The eldest is 21 and does not live with the Appellant. Her second eldest is 14. The Appellant has a grade 11 education. She took three Early Childhood Education courses by correspondence. She is left completely mentally exhausted after driving a vehicle more than an hour (CPP questionnaire GD2-168, 171, 217).

[11] According to a questionnaire completed on August 26, 2014, the Appellant operated a daycare business. She was a self-employed sole proprietor. She cared for 6 families in 2011 and 2012. She cared for 7 families in 2013 and three in 2014. She worked full-time or part-time depending on the need. In 2014 she worked 3-5 days on a good week. Other weeks she worked 2-3 days. She worked 3-6 hours per day. The Appellant's tasks included telling stories, colouring time, preparing meals and snacks, and napping the children. Her daughters assisted her with some tasks occasionally (taking out the garbage, retrieving crayons). The Appellant considered other work but did not feel it would be realistic to be reliably employed in her condition; she fatigues quickly. Her pain varies daily, and she is physically limited. The Appellant has not stopped working in her business because she needs to financially support her daughters, as their only living parent (GD2-69 to 74).

[12] On January 5, 2017, the Appellant wrote that she cannot keep up with part-time work. Her tolerance is limited to 1-2 hours per day. She works 8 hours per week. She is in daily pain at 7 or 8 out of 10 on a pain scale of 1-10. Her pain is felt in her legs, arms, back and hands. She has attempted every recommended treatment including: walking, physiotherapy, chiropractic, occupational therapy, clean eating, acupuncture, massage. Her condition is rapidly worsening. An appointment with a neurologist (Dr. Milne) and a sleep clinic were pending (GD4). At the hearing, the Appellant said she underwent a sleep study by Dr. Joy on January 30, 2017. The result was negative. She will be seeing another rheumatologist, Dr. Fahlman, for the first time in Regina next week.

[13] According to a CPP contributions record requested June 28, 2016 (GD2-120), the Appellant had the following unadjusted pensionable earnings:

2011: \$10,086

2012: \$9,992

2013: \$12,086

2014: \$10,543

2015: \$10,593

Medical reports and related testimony

[14] On December 30, 2013 Dr. A. Milne (rheumatologist), noted the Appellant's FM history and headaches. The Appellant was advised to wean off narcotics, seek psychological treatment for pain management and coping skills (GD2-165).

[15] On February 10, 2014 Dr. Milne recommended the Appellant undergo an occupational therapy assessment to determine her ability to work. At the time, Dr. Milne was "not able to comment on her plans for permanent disability." (GD2-167)

[16] Hatjue Bista (occupational therapist) discussed the Appellant's assessment of April 7, 2014 in a disability tax credit certification form. According to the assessment, the Appellant was impaired in several functional areas. She had mobility restrictions due to loss of strength and tolerance. She needed assistance with balance and frequent rests. The Appellant said she required bedrest for one hour after doing a task for 30 minutes. She had severe widespread pain as a result of "severe" FM (GD2- 59).

[17] The Appellant stated she attended physiotherapy in February and March of 2015 (GD2-174). She said at the hearing that this was for her arm, after she fell. The treatments aggravated her pain symptoms.

[18] The Appellant's family physician, Dr. L. Narouz, submitted a medical report along with specialists' reports. In her October 29, 2015 report, Dr. Narouz noted the Appellant's "longstanding" and "widespread" FM. Dr. Narouz noted the subjective nature of FM, and that the Appellant reported diffuse, chronic and widespread musculoskeletal pain. The Appellant also complained of exhaustion with minimal exertion, trouble focusing and headaches. The Appellant was taking various medications including Amitriptyline (75 mg daily), Cymbalta (60 mg daily), and Tylenol #4 (2 tablets twice daily). She had minimal response to treatment and was awaiting a consultation with a physiatrist at Wascana Rehabilitation Centre (Wascana). Dr. Narouz' prognosis indicated the Appellant's condition was chronic with no cure, and that treatment aimed at pain control (GD2-21 to 24).

[19] Dr. S. Wunder, physiatrist at Wascana, provided a detailed report dated April 20, 2016. The report discussed the Appellant's FM symptom history, complaints, and treatments including

a past physiatrist assessment in November 2015. Dr. Wunder noted the Appellant “is continuing to work part-time, but finds this extremely difficult” and that she was “insistent that she is not able to work full-time or regularly in the foreseeable future.” Dr. Wunder noted the Appellant had severe and disabling FM symptoms. The Appellant was limited to minimal activity due to persistent fatigue. As far as work capacity, Dr. Wunder provided this opinion:

With regard to her application for disability, we spent quite a bit of time discussing this as well. She is adamant that she will never be able to work again. However, I think that if she is able to get out of the pattern of physical inactivity, she may have a chance of returning to some level of productivity. At the same time, she feels she is unable to continue with her present job due to the symptoms. She may benefit from a period of time away from work so that she can focus on some of the other personal health issues that we discussed as she is quite focused on not having time to do these while she is still working. If this is what is necessary for her to be able to improve, then it is certainly worth considering.

[20] Dr. Wunder made it “quite clear” that he did not agree the Appellant was permanently disabled. Rather, he encouraged her to take some time off work to focus on her health. Dr. Wunder’s report concluded by noting that the Appellant was “strongly encouraged” to consider implementing some of the measures discussed including cognitive behavioural therapy (CBT) (as previously recommended by his colleague in November 2015), increasing her physical activity, and physical therapy. He wrote that “the only way for her to improve her situation will be for her to help herself.” Dr. Wunder noted that medications alone will not provide complete relief, and that long-term relief is achieved by increased activity (GD2-145 to 147).

[21] The Appellant testified about Dr. Wunder’s advice to take time off work and focus on her health. She said provincial social assistance does not cover a leave in her circumstances; so she has had to continue working by caring for just one child in 2017. She cares for him 1-2 hours per day after school. She provides after school snack and supervises independent play. She will earn around \$6,000 gross per year from this work. She added that she receives financial assistance because her twins have developmental delays. Her family also assists her with childcare for her own children, particularly the twins. The Appellant also receives government grants from being an unlicensed childcare centre. These are her three sources of income.

[22] The Appellant was in contact with a physiotherapist clinic in Weyburn after being referred by Wascana. The physiotherapist advised that treatment would aggravate her muscles,

and advised against treatment. The Appellant recalled her saying words to the effect that “FM is such a bad condition and why would you [the Appellant] wish to aggravate it?” The Appellant then decided not to schedule any sessions. She followed up with Wascana by leaving a message that physiotherapy would worsen her condition. No one at Wascana contacted her after that.

[23] As far as Dr. Wunder’s recommendation to increase physical activity (for instance walk her dog), the Appellant said she broke down emotionally when she heard this advice. She replied that walking was difficult and she could be at risk of falling. Roads are gravel where she lives, increasing this risk. Dr. Wunder did not address these concerns in reply. Instead, he turned his focus to prescribing Tramadol which, the Appellant testified, has been an ineffective pain reliever.

[24] The Appellant was asked by the Tribunal whether she has done any other physical activity over and above her usual activity in the past year. She said she has attended chiropractic and massage treatments. She was asked again about exercise. She said she “absolutely” has tried to gradually increase her physical activity. The community in which she lives is located at least 45 minutes away from any community that offers aqua aerobics. The population of her community is less than 200. Some specific additional physical tasks mentioned were: taking her kids to the pool and swimming in another community. She has attempted water therapy by relaxing in the mineral water in Moose Jaw, another different community, once per year.

[25] The Appellant was asked during the hearing about the recommendations to undergo psychological treatment. She was referred to Dr. Milne’s report of December 30, 2013 and the two psychiatrists’ reports of 2015 and 2016 mentioning CBT. She testified that she sought psychological treatment. After she saw Dr. Milne, she attended a counselor in Weyburn in January 2014. Initially her sessions were twice weekly. She was fatigued by traveling to the sessions. She had to drive 45 minutes each way. This was the nearest place to receive psychological treatment. She attended until around summertime 2014. She attended approximately 50 sessions depending on weather. Her sessions involved discussion about journaling and function in day to day activity. She was advised to keep a pain journal; improve her diet; and avoid triggering pain symptoms. Regarding this last item, she mentioned she had to live within her limitations. She repeated that she fatigues very quickly.

[26] The Appellant was asked specifically to discuss the psychiatrists' advice to undergo CBT. The Appellant said she took a CBT course online after attending Dr. Wunder in April 2016. It was focused on journaling and keeping a pain log. She participated in the course at her own pace and completed it around May 2016. The Tribunal asked if the concept of "hurt versus harm" was covered during the online CBT course. It was; and she said she has been pushing through some "hurt" daily to have any kind of quality of life.

SUBMISSIONS

[27] On February 16, 2016 the Appellant submitted made the following submissions in support of her application for a disability pension. Similar submissions were made in her Notice of Appeal to the Tribunal:

- a) Her fibromyalgia is severe and prolonged. It has no cure and will only worsen with time;
- b) Any treatments attempted resulted in symptom flare ups. Her family physician indicated that the only option is to try prevent pain flare ups. Her medications have increased in variety and strength (Cymbalta, Tylenol 4);
- c) She is working because she is required to seek work to support her three children as their only surviving parent. Her function is affected by FM; for example, bathing, sitting and writing is painful. Her symptoms are beyond her control; for example her hands "give out" at the grocery store. She has explosive bowel movements 3-4 times daily and constant urine. She remains sensitive to bright light and noise. She is forgetful of things unless she writes them down within five minutes.

[28] At the close of the hearing, the Appellant reiterated that her condition is mentally and physically disabling. Her pain affects her daily and this affects her ability to function. She has to adjust her function according to her limitations.

[29] The Respondent submitted in writing that the Appellant does not qualify for a disability pension because she continues to work as of January 2017; and she has pending medical appointments and therefore all treatment options have not been exhausted.

ANALYSIS

Test for a Disability Pension

[30] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that she was disabled as defined in the CPP on or before the hearing date (August 15, 2017).

[31] 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 MQP.

[32] 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.

Severe

Legal principles

[33] 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, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[34] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant’s ability to work (*Ferreira v. AGC*, 2013 FCA 81).

[35] 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).

Application of legal principles to the facts in this appeal

[36] In the present appeal, the Appellant has been suffering from symptoms of FM. Based on her evidence, she was able to operate her daycare business at least on a part-time basis until 2017. She cared for 7 families in 2013 and three in 2014. She worked full-time or part-time depending on the need. In 2014 she worked 3-5 days on a good week. Other weeks she worked 2-3 days. She worked 3-6 hours per day (GD2-69 to 74).

[37] The Appellant reduced her work load due to her worsening health. She fatigued easily and was physically limited. She could no longer do part-time childcare as of January 2017. She has attempted to continue her business, but can only manage to care for one child. Her tolerance is 1-2 hours per day or 8 hours per week. She is in daily pain at 7 or 8 out of 10 on a pain scale of 1-10. Her pain is felt in her legs, arms, back and hands. She is able to do minimal tasks: supervise and provide a snack to a single child. The Appellant is merely trying to provide some kind of financial support for her children, as their sole provider and surviving parent.

[38] The Appellant testified that she will earn \$6,000 gross income for the care of one child in 2017. The Tribunal does not consider this substantially gainful work. Section 68.1 of the *CPP Regulations* states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. In this case, there is no evidence that \$6,000 is equal to or greater than the maximum amount of disability pension the Appellant would receive.

[39] The Tribunal finds that she has made reasonable attempts to work and has demonstrated she cannot regularly pursue any substantially gainful occupation because of her FM symptoms.

The Appellant followed recommended medical treatments

[40] Claimants have a personal responsibility to cooperate in their health care (*Kambo v. MHRD*, 2005 FCA 353). The Tribunal finds that the Appellant met this obligation. The

Appellant said she has attempted every recommended treatment including: walking, physiotherapy, chiropractic, occupational therapy, clean eating, acupuncture, and massage. Despite all these treatments, her condition has been rapidly worsening (GD4).

[41] The Appellant explained at length during the hearing that she followed the advice given by her physicians. She attended physiotherapy in 2015, but this aggravated her symptoms. The Appellant reasonably explained why she has not done physiotherapy more recently: the physiotherapist advised against it, and Wascana has not followed up to dispute this.

[42] The Appellant attended around 50 counseling sessions. She completed a CBT course at her own pace around May 2016. The course covered the difference between “hurt” and “harm.” She has attempted to increase her exercise and do daily activities despite the “hurt” this causes.

[43] It is important to note the Appellant’s circumstances: she resides near a very small community. Walking on grid roads near her home is risky. There are no indoor health facilities in her community. Communities with such amenities require travel by car. Operating a vehicle to nearby communities left her completely exhausted.

[44] The Appellant has been taking a variety of prescription medications including the potent Tylenol #4. These have not been effective in increasing her functionality.

[45] For the above reasons, the Tribunal finds that the Appellant met her onus of establishing a severe disability on or before the date of the hearing.

Prolonged

[46] The Tribunal was also satisfied on balance that the Appellant’s disability was prolonged on or before the hearing date.

[47] In October 2015 Dr. Narouz noted that the Appellant had minimal response to treatment and was awaiting a consultation with a psychiatrist at Wascana. Dr. Narouz’ prognosis indicated the Appellant’s condition was chronic with no cure, and that treatment aimed at pain control (GD2-21 to 24). Further to the Appellant’s assessments at Wascana, particularly by Dr. Wunder in April 2016, her condition has not improved. She followed Dr. Wunder’s advice to increase her

physical activity and pursue physiotherapy and CBT. Despite all the treatments over the years, the Appellant's capacity is reduced to 8 hours a week (or 1-2 hours per day) caring for a single child in her daycare. This work was not found to be reflective of capacity to regularly pursue any substantially gainful occupation in the real world. Her FM symptoms, particularly widespread pain, are felt daily. She said that her condition has been deteriorating. There is no evidence suggesting she will improve or regain the capacity to regularly pursue any substantially gainful occupation in a competitive job market.

[48] In summary, the Appellant met her onus of establishing a prolonged disability on or before the date of the hearing.

CONCLUSION

[49] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2017, when she could no longer work part-time after following Dr. Wunder's advice.

[50] According to section 69 of the CPP, payments start four months after the date of disability.

[51] Payments start as of May 2017.

[52] The appeal is allowed.

Shane Parker
Member, General Division - Income Security