



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 110

Tribunal File Number: GP-16-1278

BETWEEN:

C. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Connie Dyck

HEARD ON: August 8, 2017

DATE OF DECISION: August 11, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on April 2, 2015. The Appellant claimed that she was disabled because of chronic kidney stones and associated pain. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] 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). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2003.

[3] This appeal was heard by Videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) The method of proceeding is most appropriate to allow for multiple participants.
- c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives
- d) The issues under appeal are not complex.
- e) There are gaps in the information in the file and/or a need for clarification.
- f) Credibility is not a prevailing issue.
- g) 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.

h) a videoconference hearing will better accommodate multiple people at the hearing and is available within a close proximity to the Appellant's residence.

[4] The following people attended the hearing: The Appellant C. C.; The Appellant's representative C. L.

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

WRITTEN EVIDENCE

[6] In her Questionnaire for CPP disability benefits, the Appellant stated that she stopped working as a postal worker in approximately early 1985 in order to stay home and raise her family. She explained that as she was raising her children, her health was deteriorating and although it was her intention to return to work when her youngest child was 5 years old, she realized that she was not healthy enough to commit to any job. (GD 2-65 – GD 2-75)

[7] In a report dated April 29, 2004, Dr. Hosking, urologist, stated that the Appellant underwent shock wave lithotripsy to left renal calculi on January 27, 2004. Since her last visit, she has passed a moderate amount of gravel and was relatively asymptomatic at the time of follow up. A KUB performed at the time of follow up showed no evidence for any residual left-sided stone material and at least three small stones were identified in the right collecting system. Dr. Hosking summarized that the Appellant had done well following left-sided shock wave lithotripsy. As her right-sided stones were asymptomatic, she did not wish to undergo any intervention. A follow-up KUB was scheduled for six months' time or sooner if the Appellant developed any symptoms related to her right-sided stones. (GD 2-38)

[8] In a follow-up report dated March 11, 2005, Dr. Hosking stated that he last saw the Appellant on April 29, 2004. He noted that since her last visit in April, the Appellant was feeling generally well and had not developed any other new significant medical problems. He noted that the Appellant used no medications on a regular basis. Dr. Hosking reported that a KUB showed two stones in the mid-zone of the right kidney and when compared with the previous x-rays, there may have been a slight increase in the size of her right-sided stones. No left-sided stones could be identified. Dr. Hosking summarized that it was possible that the Appellant had mildly

active stone formation. He did offer shock wave lithotripsy to the Appellant for her right sided stones and he would proceed with this, if requested. (GD 3-36) no left sided stones, further treatment available for right sided, if she wanted. In a discharge report dated August 24, 2005, it was reported that the Appellant underwent a right ureteroscopy and laser stone lithotripsy which went well with the stone visualized and removed. (GD 3-34)

[9] In a report dated October 17, 2006, Dr. Denis Hosking, urologist, stated that the Appellant had a history of nephrolithiasis and underwent left ureteroscopy and stone manipulation in August 2006. He noted that at the time of follow-up, the Appellant reported intermittent mild left flank discomfort. A KUB performed at the time of the follow-up showed no evidence for recurrent calculi. It was Dr. Hosking's opinion that the Appellant appeared to have inactive stone disease and he suggested a follow-up in one year. (GD 3-28)

ORAL EVIDENCE AT THE HEARING

[10] At the hearing, the Appellant stated that in 1992, while she was pregnant with her third child, she was in severe pain and thought she was in labour and it was at this time, she discovered she had kidney stones. She was given an injection of morphine at this time. She stated that during her next pregnancy in 1985, she also had kidney stones. Both of her children were born prematurely by several weeks, because of the kidney stone situation. She wanted to nurse her children, so she would time her medication, so that she was still able to nurse them. She stated that she was using Demoral and T2 at that time. She explained that her treatment by Dr. Hopkins was to "go home and pass the stone". The Appellant advised the Tribunal that since experiencing kidney stones in 1992, her regular treatment was to use Demoral when a stone was passing and if a stone could not pass, she would go to the hospital for morphine. She explained that even when she was using Demoral in 1992, it would not take the pain away, but it would take the edge off and it would help relax her enough to try and pass a stone.

[11] The Appellant stated that she was a housewife and raising four children at home. She explained that her daughter had a heart issue and the Appellant had to be at home with her. The Appellant explained that because of the daily pain she experienced, she required help from her family who would help her make meals, do laundry, pick up the children from school and help care of the babies. The Appellant explained that she could not be at school with her child who

was having seizures and needed rescue medication, so her sons were trained to provide the rescue medication if needed for their sister.

[12] She stated that even with oxycotin medication, her pain levels are currently 6/10.

SUBMISSIONS

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

- a) Her condition has been ongoing for many years and she now has more stones than kidney;
- b) Her constant pain prevents her from being able to work in any capacity; and
- c) There is no improvement expected in her condition.

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

- a) The medical evidence does not substantiate the presence of any impairment that would have prevented the Appellant from doing some type of suitable work on or prior to December 31, 2003;
- b) Documentation by the urologist in 2004, 2005 and 2006 support that the Appellant had intermittent episodes of nephrolithiasis with renal colic, however these episodes were not of such frequency and duration as to have prevented her from doing all types of work; and
- c) The Appellant's family physician noted that between 2002 and 2004 the Appellant had renal colic and was receiving Demerol for pain control.

ANALYSIS

Test for a Disability Pension

[15] 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 end of the MQP.

[16] 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.

[17] 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

[18] The Appellant must satisfy the Tribunal the she suffered a disability that was both severe and prolonged on or before the MQP. The severe criterion must be assessed in a real world context (*Villani v. Canada (Attorney General)*, 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 was 44 years old at the MQP. She has a grade 12 education and stopped working for Canada Post in 1985 in order to raise a family. These factors, alone, would not restrict the Appellant's ability to find work in the competitive workforce. However, the *Villani* decision also states that a claimant is not required to satisfy the Tribunal that she is unable to do any conceivable job, but any realistic job in the competitive workforce given her limitations.

[19] Not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities. In this case, as the Appellant's MQP was almost 14 years

ago, the objective medical evidence available is limited, however, the medical reports available, corroborate the Appellant's testimony that she has suffered with kidney stones on a continual basis since before her MQP of December 31, 2003.

[20] The Appellant's primary claimed disability is nephrolithiasis (chronic kidney stones). However, the Federal Court of Appeal in *Bungay v. Canada (Attorney General)*, 2011 FCA 47 found that all of the possible impairments are to be considered, not just the biggest impairments or the main impairment. The medical evidence also supports that the Appellant has diagnoses of hypertension, angina secondary to small vessel coronary disease, Hashimoto's thyroiditis, and diabetes with diabetic retinopathy and decreased vision. A claimant's condition is to be assessed in its totality. The Tribunal also looked for guidance to *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB) which found that it is not the diagnosis of a condition that automatically precludes one from work. It is the effect of the condition on the person that must be considered. Therefore, although the Appellant had several diagnosed conditions, the Tribunal looked to the effect of these conditions on her function ability and whether the conditions individually or collectively met the definition of "severe" as defined in the CPP legislation.

hypertension, angina secondary to small vessel coronary disease, Hashimoto's thyroiditis, and diabetes with diabetic retinopathy and decreased vision

[21] The Tribunal finds that the evidence supports that these conditions were not evident at the time of the Appellant's MQP and were diagnosed and the symptoms associated with them transpired well after December 31, 2003. While these conditions may pose limitations to the Appellant today, the evidence does not support that this was the case in December 2003 or prior and therefore, the Tribunal did not consider these conditions or their effect on the Appellant when determining if she was disabled at the time of her MQP.

nephrolithiasis (chronic kidney stones)

[22] 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). In this case, the Appellant initially stopped working in 1985, not because of her medical condition, but because it was her desire to stay home and raise her children. It was her intention to return to work when her youngest child was in full-time attendance at school. The evidence of the Appellant was that during her third pregnancy in 1992, she had sudden pain requiring morphine and hospitalization which concluded that the Appellant had kidney stones. Unfortunately, there was no medical evidence from that time period available to the Tribunal. However, the Tribunal put considerable weight on the objective medical evidence available at the relevant time of the Appellant's MQP. The evidence supports that at the time of her MQP, the Appellant was under the care of an urologist, whom she saw regularly. The medical evidence of Dr. Hosking, the urologist was that in January 2004, the Appellant had shock wave lithotripsy to the left renal calculi. Since that time, the evidence supports that the Appellant required regular left and right lithotripsy treatments. The medical evidence and the testimony of the Appellant corroborates a history of having kidney stones on a continual basis with associated pain, trying to pass stones on her own at home with pain medication including Demoral, hospitalization periods with the administration of morphine for pain and regular lithotripsy treatments to help remove kidney stones. There is no evidence to support that the Appellant's condition ever went into remission or improved. This is corroborated by the report of Dr. Hosking including reports of continued and ongoing lithotripsy treatments and stone manipulation in August 2006. The Tribunal finds that the medical evidence provides a long history starting prior to the Appellant's MQP of kidney stones with symptoms of constant pain.

[23] The Tribunal examined the Appellant's ability to work at a regular job and looked to *Stalwell v. MHRD* (October 25, 2001), CP 11228 (PAB) for guidance, which says a predictable interruption to a work schedule or inability to commit oneself to a work schedule from one day to the next because of varying degrees of pain may render an individual unemployable. The Tribunal also looked for guidance to *MSD v. Schuurmans* (January 15, 2007), CP 23478 (PAB) which found that an individual who is prevented from attending work regularly due to intermittent and unpredictable flare-ups of a chronic disease may be considered disabled. The Tribunal finds that the Appellant's constant physical pain, render her incapable of adhering to any type of work schedule. The Tribunal looked for guidance to the Pension Appeals Board decision *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB), where it was stated that

regularly means the Appellant must be capable of coming to work as often as is necessary. Predictability is the essence. In this case, the evidence supports that the Appellant required frequent help from various family members to be able to do basic activities of daily living and household chores. In addition, the evidence further shows that the Appellant was unable to commit to even a one day field trip or a specific day to be in her daughter's classroom, due to the pain and symptoms associated and experienced by her because of her chronic kidney stone condition. When considering *Leduc v. MNHW* (January 29, 1988), CP 1376 (PAB) which found that the question to be assessed is whether a real employer in the real world, required to deal with the realities of commercial enterprise, would remotely consider hiring the Appellant, the Tribunal was convinced that her constant pain and inability to make any attendance commitment, it was unrealistic to expect that any employer would consider hiring the Appellant.

[24] 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). In this case the Tribunal is not satisfied that the Appellant had capacity to work. She was significantly restricted physically by constant pain and regular flare-ups of extreme pain when a stone was lodged or passing which required narcotic medication. She had limitations with even with daily activities of living and required regular help from numerous family members. Absent work capacity, the Appellant was therefore not obliged to try to demonstrate that she could not obtain or maintain work because of her disability.

[25] The Tribunal gives significant weight to the Appellant's testimony. The testimony was credible and the Tribunal sees no reason to doubt it. The Appellant's condition has been ongoing since 1992, is permanent and, as such, she will always have symptoms and limitations. In accordance with the principles established in *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB), the Tribunal finds that there is a credible evidentiary foundation to establish that the Appellant is precluded from engaging regularly in any substantially gainful occupation.

[26] In the opinion of the Tribunal at the time of the Appellant's MQP, the Appellant's ongoing symptoms of pain are adequately supported by the evidence and render her unfit for any sort of employment. Taking a "real world" approach, it is difficult to imagine how the Appellant, given her physical limitations would be able to retrain or secure alternative employment with

such physical disabilities. Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal is satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[27] The Tribunal found that the Appellant's disability is long continued. She testified that her pain goes back to 1992 and the medical objective evidence supports that since at least 2003 she has been under the care of a specialist and receiving regular treatments. The Appellant's condition would also appear to be of indefinite duration, as it is difficult to see how her condition can significantly improve at this late date. The medical evidence supports that the Appellant had kidney stones present and there is no evidence to support an improvement is expected in the Appellant's condition. For these reasons, the Tribunal concluded the Appellant's disability was indeed "prolonged" in accordance with the statutory definition.

CONCLUSION

[28] The Tribunal finds that the Appellant had a severe and prolonged disability in December 1992, the year in which the Appellant's debilitating kidney stone pain commenced and continued despite treatments. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) of the CPP). The application was received in April 2015; therefore the Appellant is deemed disabled in January 2014. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2014.

[29] The appeal is allowed.

Connie Dyck
Member, General Division - Income Security