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

Citation: *D. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 134

Tribunal File Number: GP-16-1246

BETWEEN:

D. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Connie Dyck

DATE OF DECISION: September 19, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on August 21, 2015. The Appellant claimed that she was disabled because of chronic pain and depression. 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, 2016.

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

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

b) The issues under appeal are not complex.

c) There are gaps in the information in the file and/or a need for clarification.

d) Credibility is not a prevailing issue.

e) 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.

f) The Appellant advised the Tribunal that due to anxiety issues, she was advised by her physician to not attend the telephone hearing previously scheduled for August 2, 2017. The Tribunal has decided, in the interest of natural justice, to change the form of hearing to a Question and Answer hearing.

[4] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension for the reasons set out below.

EVIDENCE

[5] In a report dated September 15, 2014, Dr. Loris Cristante, neurosurgeon, stated that the Appellant was seen for recurrent low back discomfort. Dr. Cristante noted that the submitted MRI of the lumbosacral spine showed evidence of a shallow protrusion of the L3-4 and L4-5 disc. At L5-S1 there was a slightly more prominent protrusion with a right-sided lateralization. The disc material approached the right-sided S1 root, but there was no significant compression. Dr. Cristante discussed with the Appellant the clinical presentation and radiological findings. The proximal lumbosacral and upper gluteal discomfort arc were very probably mechanical/musculoskeletal. He noted there was some additional arthropathic pain of the right hip that seemed to be the more significant component. He was of the opinion that the more distally radiating pain and sensory deficit may be a mild radiculopathy. Therapeutic options were discussed and Dr. Cristante recommended an expectant attitude as far as surgical decompression was concerned. (GD 2-121 – GD 2-122)

[6] In a report dated September 8, 2015, Dr. Conrad Hoy, Physical Medicine and Rehabilitation Specialist, stated that the Appellant was seen in consultation for low back pains. The historical account of the Appellant's back pain was that about two years prior her pain started as a result of a sneeze. She had back pain on and off in the previous year, but there was a newer, more intense pain than in the past. After one week, the Appellant attended at the St. Boniface ER. The Appellant explained that for the previous six months, the pain was right of midline and radiated across to the left. Medications including a Fentanyl patch did not help and the pain was producing cognitive effects. She noted that continued standing and walking increase the low back pains. It was Dr. Hoy's opinion that the Appellant had a soft tissue (non-specific) low back pain primarily. He noted there may be some mild degree of right S1 radiculopathy, but the clinical management approach would not be any different in the chronic radiculopathic phase. Exercises were strongly encouraged and Dr. Hoy stated that he explained this at length with the Appellant and that this would be consistent with the advice of the neurosurgeon. Dr. Hoy prescribed a massager and recommended that the Appellant do Level One Low Back

Exercises every 2 hours during the daytime, every day of the week. A follow-up was scheduled for 4 weeks. (GD 3-41 – GD 3-42)

[7] The Appellant submitted a summary of a telephone conversation with the Appellant on March January 6, 2016, wherein the Appellant stated that although Dr. Hoy had given her exercises to do every 2 hours, she was not able to do all of the exercises given to her. (GD 2-53)

[8] In a report dated March 1, 2016, Dr. Hoy stated that the Appellant had some flare-ups of back pain and her abdomen (due to pressure). He noted that the Appellant advised him that she tried to do her exercises as much as possible, but had not tired a swimming noodle yet or used a massager, which was previously prescribed. (GD 3-48)

[9] In an Operative Report dated September 25, 2015, Dr. Dana Moffatt, gastroenterologist, stated that the Appellant had a ERCP, spincterotomy, balloon sweep procedure performed and no real stones or filling defects were noted. (GD 3-46) On January 2, 2016, Dr. Moffatt stated that the Appellant underwent a second ERCP where copious amounts of biliary sludge and small stones were removed. Dr. Moffatt indicated that any recurrent attacks of pancreatitis might warrant re-evaluation by a surgeon to see if a complete cholecystectomy should be performed.

[10] In a report dated April 5, 2016, Dr. Peter Rosenthal, psychiatrist stated that the Appellant was a 49 years old divorced mother of an adult son who stopped working in September 2013 due to illness. The Appellant was seen in consultation by Dr. Rosenthal due to symptoms associated with her depressed mood. The Appellant advised Dr. Rosenthal that she did not like leaving her apartment as crowded places made her very anxious and panicky. She denied any suicidal ideation. She used Cymbalta 60mgs OD, Wellbutrin XL 300mgs OD (for about 3-4 wks), and Seroquel 50mgs Qhs. It was noted that the Appellant also talked extensively about her chronic back pain, it's high severity, and it's devastating impact on her functionality. The Appellant explained that she could not do her usual activities of daily living, due to the severe chronic pain, but she was waiting to be seen by one of the Pain Clinics. She also indicated to Dr. Rosenthal that she was having cataract surgery in the following week and that she underwent an ERCP in January 2016 for pancreatitis. It was Dr. Rosenthal’s opinion that the Appellant continued to have a DSM-5 diagnosis of Chronic Back Pain, and secondary Chronic Depression /Anxiety. For treatment, Dr. Rosenthal was of the opinion that the Appellant was on appropriate psychiatric

medications. She should continue taking Cymbalta 60mgs OD, Wellbutrin XL 300mgs OD, and Scroquel 50mgs Qhs. He also suggested that the Appellant may benefit from psychotherapy to help her better manage her emotions, cope better with stressors, and provide support. (GD 3-34 – GD 3-35)

[11] In a follow-up report dated June 21, 2016, Dr. Rosenthal stated that the Appellant continued to have good and bad days and she thought the weather/humidity may be a factor. The Appellant advised Dr. Rosenthal that overall she found her mood better, sleep improved with Imovane and she was coping better. Dr. Rosenthal noted that the Appellant looked better, seemed calmer and more confident. Her mood was improved overall and her self-esteem seemed to be improving. He stated that the Appellant's thinking was integrated and reality based and she was future orientated. (GD 3-39 – GD 3-40)

[12] In a report dated June 15, 2016, Dr. Eric Sutherland, Anesthesiologist, of the Pan Am Pain Clinic stated that the Appellant was seen in consultation for low back pain which worsened in 2013. The Appellant advised Dr. Sutherland that her medications have not particularly helped her pain. She also stated that she had physiotherapy and done exercises, but she did not feel this offered much in the way of ongoing benefit. It was Dr. Sutherland's opinion that the Appellant had degenerative disc disease and consideration of right hip pathology. Dr. Sutherland made numerous recommendations including performing some medication trials such as retrialing the Gabapentin to a total daily dose of 1800mg; or a Lyrica trail; or an Amitriptyline trial. He also suggested a right-sided sacroiliac joint injection; right sided medial branch blocks at the L3, 4 and 5 level; a potential L3, 4, and 5 medial branch rhizotomy on the right hand side; a right piriformis muscle injection; an intra-articular hip injection; and involvement of PMR for consideration of segmental neuromyotherapy. It was Dr. Sutherland's opinion that the Appellant's condition is nonsurgical and he concurred with Dr. Cristante's assessment (of September 15, 2015 – GD 2-121) Dr. Sutherland stated that of most immediate importance was exercise. He advised the Appellant to do 30 minutes, three times a week of brisk walking. He also performed a right-sided S1 joint injection. (GD 3-49 – GD 3-51)

WRITTEN RESPONSES FROM APPELLANT – September 2017 (GD 6)

[13] The Appellant stated that since June 2016 she has not had any physiotherapy treatment. She also noted that she is not participating in any type of regular exercise.

[14] The Appellant reported that as of September 5, 2017, her medications included Omeprazole (20mg); Duloxetine (60mg); Zopiclone (7.5mg); Oxycodone (5/325 mg); Lorazepman (.5mg – approx. 2x/week); and Gabapentin 600mg.

[15] The Appellant advised the Tribunal in writing that she had injections in August, September and October 2016 and in January and July 2017. She also attended one class. She noted that she was waiting for a future appointment with Dr. Neil Berrington, a neurosurgeon.

[16] The Appellant explained that a lighter duty/sedentary job would be hard for her as sitting for "too long" hurts her back and leg. In addition, standing and walking also causes her pain. She noted that she is "constantly having to move around".

[17] The Appellant stated that her anxiety levels were high most days and she could not leave her apartment. She explained that her depression was up and down and most days were spent sleeping, although she was being treated with medication and monthly consultations with Dr. Rosenthal, a psychiatrist.

SUBMISSIONS

[18] The Appellant submitted in writing that she qualifies for a disability pension because:

a) She is still unable to work due to her injury; and

b) Her anxiety levels are high most days and she spends most of her days sleeping.

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

a) The medical evidence does not show any serious pathology or impairment that would prevent the Appellant from doing suitable lighter work;

b) Assessments by multiple specialists regarding low back pain have determined that the Appellant back pain is primarily mechanical in nature and soft-tissue related; and

c) The Appellant's secondary depression and anxiety have shown improvement with medication and psychotherapy;

ANALYSIS

Test for a Disability Pension

[20] 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.

[21] 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.

[22] 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

[23] 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 50 years old at the date of the hearing and has a long work history. She has a grade 12 education. These factors, alone, would not restrict the Appellant's ability to find work in the competitive workforce and the Tribunal finds that the Appellant would have transferable skills.

[24] 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.

[25] The Appellant's primary claimed disability is back pain. 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 a diagnosis of depression. 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.

DEPRESSION

[26] The evidence supports that the Appellant has depression, however, it also supports that with recent proper treatment the Appellant's condition has had improvement. The Appellant first saw Dr. Rosenthal, psychiatrist, in April 2016. Dr. Rosenthal was of the opinion that the Appellant was on appropriate psychiatric medications. He also suggested that the Appellant may benefit from psychotherapy to help her better manage her emotions, cope better with stressors, and provide support. In May 2016, the evidence of the Appellant's family physician was that the Appellant's mood, situations stress and anxiety were improved and that the Appellant found her mood was somewhat improved and her visits with psychiatry were beneficial. The following month in June 2016, Dr. Rosenthal noted that the Appellant was looking better, seemed calmer

and was more confident. Her mood was improved overall and her self-esteem seemed to be improving. Dr. Rosenthal also stated that the Appellant's thinking was integrated and reality based and she was future orientated. She was coping better and her sleep was improved with Imovane. The Appellant stated in September 2017, that she continues to see Dr. Rosenthal once a month. The Tribunal finds that the evidence supports that with treatment which commenced in April 2016, there have been improvements in the Appellant's condition and as the treatment is ongoing, it is reasonable to expect further improvement.

BACK PAIN

[27] The Tribunal also considered the Appellant's condition of back pain. She indicated in her application for a CPP disability benefit on August 21, 2015 that she was no longer able to work as of September 2013 due to an injury to her back. The medical evidence of Dr. Hoy in September 2015, rehabilitation specialist was that the Appellant had a soft tissue low back pain and his recommendation was exercises every two hours in addition to the prescription of a massager. In January 2016, the Appellant stated that she was not able to do all of the exercises and in March 2016, Dr. Hoy again encouraged the Appellant to do exercises, use a swimming noodle and again recommended the massager, which the Appellant had not purchased. In June 2016, Dr. Sutherland of the Pain Clinic again advised the Appellant that the most immediate importance was exercise, including brisk walking 3 times per week. The Appellant advised the Tribunal in September 2017 that she was not involved in any exercise program. The Tribunal finds that the primary recommendation of specialists is exercise, yet the evidence of the Appellant does not support that she has followed these recommendations. The Tribunal also considered the suggestion of Dr. Sutherland that the Appellant's Gabapentin daily dosage be increased to 1800mg, or a Lyrica trial or an Amitriptyline trial. There is no evidence to support that Lyrica or Amitriptyline have been tried and the evidence of the Appellant in September 2017 was that her dosage of Gabapentin was 600mg. Further evidence of the Appellant was that a future appointment with a neurosurgeon was pending, which may provide further treatment options. Therefore, the Tribunal finds that further treatment options, including exercise and medications are available to the Appellant.

[28] 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. Further, 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 evidence supports that there has been improvement in the Appellant’s depression symptoms since treatment with a psychiatrist. Recommendations of specialists included exercise including brisk walks. While the Appellant has submitted that sitting for long periods hurts her back, the functional limitations noted by the Appellant in her questionnaire dated August 2015 would not preclude her from suitable lighter duties or more sedentary type work, even on a part-time basis.

[29] Having considered the totality of the evidence and the cumulative effect of the Appellant’s medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[31] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security