



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 132

Tribunal File Number: GP-16-2351

BETWEEN:

S. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: September 14, 2017

DATE OF DECISION: September 18, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 9, 2015. The Appellant claimed that she was disabled because of depression, concentration difficulties, and diabetes. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on July 11, 2016.

[2] This is the Appellant's second application for CPP disability. Her initial application was received on May 29, 2015. The application was denied on August 25, 2015 because of incomplete information. The Appellant did not request reconsideration.

[3] 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).

[4] The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds that based on the Appellant's last four out of six years of pensionable earnings (2011 to 2016) her MQP is December 31, 2016. [Statement of contributions: GD7-11]

[5] The appeal was heard by videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) There are gaps in the information in the file and/or a need for clarification; and
- c) 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.

[6] The following people attended the hearing:

S. S.: Appellant

K. S.: Appellant's husband

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

APPELLANT'S EVIDENCE

[8] The Appellant was 55 years old on the December 31, 2016 MQP date; she is now 56 years old. Her work history has primarily involved working as a taxi dispatcher: she started working as a dispatcher for her father's cab company when she was 12 years old and worked as a dispatcher for the husband's cab company from 2003 until February 2015. Her other employment included working at a chip stand and working in the mail room at the X for six months: she did not get a full-time position because she did not pass the required examinations. She has not had any further education or training since she left school in grade 11.

[9] When asked why she is unable to work, the Appellant stated that she is a severe diabetic and that the diabetes takes control of her body: she always has to go to the bathroom; she is always tired; and she always wants to sleep. She saw Dr. Kelly, a specialist at X Hospital, for her diabetes: she was seeing him every two weeks until Dr. Kelly retired. Dr. Kelly put her on a special diet and checked her blood sugar levels. She has also been seeing a dietician.

[10] She has been feeling a bit better since she was put on Januvia a couple of years ago. Her blood sugar levels are "sometimes high ... sometimes low" and the doctors have told her that they are going to wait a couple of more months before deciding whether to put her on injections. She is trying to lose weight and for exercise tries to go for walks a couple of times a day.

[11] She saw Dr. Ewing-Bui, a stomach specialist, from the X Hospital in February and has a follow up appointment in November: she has a hiatus hernia, acid reflux, a stomach ulcer and lesions on her stomach. Dr. Ewing-Bui prescribed sucralfate but it takes longer for her to heal because she has diabetes. She also gets urine infections.

[12] She always gets confused and is depressed. She hasn't seen any specialists for mental health issues. Dr. Jordan prescribed an anti-depressant but she started to get night-mares and couldn't continue taking it. She has discussed the traumatic events from her childhood (which occurred when she was six and for which she has never had treatment) with Dr. Jordan and he

has said that he will try to arrange for her to see a psychiatrist: she is still waiting for an appointment.

[13] On a usual day she sleeps in, takes a shower, and tries to do the dishes and a little sweeping or vacuuming. She makes supper. Her daughter comes over to help with the heavier work such doing the floors and the shopping.

[14] She confirmed that her limitations listed on her disability questionnaire (GD2-70) are accurate and that she has no problems sitting/standing and no problems driving. She also confirmed that her present medications are accurately set out at GD8-3 to 4. She is not taking any medications for depression or anxiety. She hasn't looked for alternate work since she stopped working in February 2015 because she can't concentrate. She hasn't taken any courses to upgrade her work skills.

K. S.'S EVIDENCDE

[15] He feels that his wife hasn't fully explained the extent of her limitations.

[16] She goes to bed at mid-night and is a very restless sleeper; she is continually getting up to go to the bathroom, and she throws up every morning. She can't do any lifting because of her hiatus hernia. She was always confused when she was working, and was sending different drivers to the same address: she can't concentrate and not working just adds to her depression. Her blood pressure is often out of control after she walks a few blocks to their daughter's house.

[17] He thinks her main problem is post-traumatic stress disorder arising from her childhood trauma and that she should be seeing a psychiatrist. He believes that she won't be able to do any kind of work until she sees a psychiatrist and her health issues are resolved. He stated, "A lot of small things add up to a big problem and her main problem is her depression."

MEDICAL AND DOCUMENTARY EVIDENCE

[18] The Tribunal has carefully reviewed all of the medical and documentary evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

Disability Questionnaire

[19] In her CPP disability questionnaire, signed on October 5, 2015, the Appellant indicated that she has a grade 11 education and that she last worked as a dispatcher for a taxi company from September 1, 2003 to February 18, 2015; she stated that she stopped working because of her inability to concentrate, diabetes, and problems at work. She claimed to be disabled as of February 18, 2015. [Disability Questionnaire: GD2-67 to 69]

Limitations

[20] She described limitations with walking, lifting/carrying, reaching and bending; that her children help with household maintenance; that she sometimes forgets things; that she has a “very difficult time” concentrating on tasks; and that she has occasional sleep difficulties. She indicated that she can sit and stand; that she has no problems with her personal needs; no problems seeing/hearing and speaking; and that she has no problems driving. [Questionnaire Limitations: GD2-70]

Dr. Jordan, family doctor

[21] On September 20, 2015 Dr. Jordan completed the initial medical report in support of the disability application. He diagnosed diabetes, GERD, depression, and anxiety. He noted that she had a five year history of type II diabetes and that this was poorly controlled due to medication intolerance and poor follow up. He also noted that she was unable to maintain a daily workload due to anxiety around her present job. Dr. Jordan’s prognosis indicated that her medical conditions could improve or worsen based on follow up and compliance. [GD2-44]

[22] The Tribunal carefully reviewed Dr. Jordan’s office notes [GD6] which cover the period from November 2014 to April 2015 and there is no mention of childhood trauma, a psychiatric referral, or any discussion about seeing a psychiatrist.

[23] A problem list printed on November 23, 2016 noted the Appellant’s problems to include GERD; esophageal ulcer; diabetes mellitus; disorder of lipid metabolism; obstructive sleep apnea; organic sleep disorder; COPD: and chronic airway obstruction not elsewhere classified. [GD6-2]

[24] The office note dated September 14, 2015 indicates that the Appellant has episodes of crying out of the blue; that she has nothing that she admits to as a stressor other than her having a hard time dealing with the stress of work; that she is sleeping well and doesn't have suicidal thoughts; and that her weight is stable. [GD6-30]

[25] A referral letter to Dr. Sales dated September 14, 2015 for an assessment of diabetic retinopathy indicates that the Appellant's sugars have been well controlled and that her weight is stable. [GD6-31]

[26] An office note dated September 30, 2015 indicates that the Appellant feels well and that she kept a log of her sugars for one week at different times of the day and that they were all in the 5 to 7 range. [GD6-39]

[27] An office note dated November 12, 2015 indicates that the Appellant is feeling well. [GD6-45].

Dr. Visbal, general surgeon

[28] On January 30, 2014 Dr. Visbal performed an upper GI endoscopy. His report notes that she was under surveillance for a previous lesion in her stomach and that her symptoms of gastroesophageal reflux were controlled. [GD2-52]

[29] On November 3, 2015 Dr. Visbal perform a further upper GI endoscopy and biopsies. The pre-operative diagnosis is persistent ulcer in the GE junction. The operative findings included active ulceration and reflux esophagitis as well as a persistent type I hiatal hernia. Dr. Visbal prescribed Domperidone, sulcrate, and Pantaloc; recommended a repeat GI endoscopy in one year; and also recommended a weight loss program and that the Appellant stop smoking. He noted that similar recommendations had been provided to the Appellant in January 2014. [GD6-43 to 44]

Hospital Admissions

[30] A X Hospital discharge summary dated October 3, 2013 prepared by Dr. Gottman indicates that the Appellant was admitted on October 2, 2013 and discharged on October 3, 2013. The most responsible diagnosis for the Appellant's stay was "query drug reaction" and the

secondary diagnoses included obesity, smoker, type II diabetes, stomach lesion (not yet diagnosed); and query liver pathology (not yet diagnosed). The Appellant was admitted because of retrosternal chest pressure, nausea, vomiting, and headache after receiving an MRI to look at a possible lesion in her stomach and liver. She was treated with IV normal saline, Maxeran, and Gravol with good effect. [GD2-50]

[31] On April 18, 2015 the Appellant was admitted to the X Hospital for vaginal and pelvic pain. She responded to therapy and was discharged on April 22, 2015. [GD2- 59 to 61]

SUBMISSIONS

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

- a) She has severe diabetes and her blood sugar levels are out of control;
- b) She also has high blood pressure, breathing problems, stomach tumours, and stomach ulcers;
- c) Working makes her problems worse;
- d) Her health is deteriorating and it is not expected that she will ever be healthy enough to work again: her medication list is increasing.

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

- a) While the Appellant feels that she is unable to work, the evidence does not show any severe pathology or impairment which would have prevented her from performing suitable work within her functional limitations at her MQP and continuously thereafter;
- b) There is no evidence of secondary complications related to her diabetes;
- c) There is no evidence of any formal mental health counseling;
- d) Her gastroesophageal diagnoses were managed with medication and lifestyle changes;

- e) There is no indication that she has attempted alternative work within her functional limitations;
- f) While the Appellant may have chronic conditions requiring conservative medication management and a hernia repair, no clinical evidence of severe pathology or impairment has been provided;
- g) She does not meet the legislative criteria for severe and prolonged.

ANALYSIS

Test for a Disability Pension

[34] 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.

[35] 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).

[36] 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.

[37] The Tribunal has found that the MQP date is December 31, 2016.

Severe

[38] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[39] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2106 she was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani* 2001 FCA 248). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[40] There is no question that the Appellant suffers from multiple physical ailments including diabetes and various stomach issues. She also relies on depression and in his oral evidence the Appellant's husband raised the issue of post-traumatic stress disorder arising out of a childhood traumatic event.

[41] The difficulty facing the Appellant, however, is that the medical evidence does not support that her conditions whether considered in isolation, or considered cumulatively, are severely disabling in accordance with the CPP requirements. Although the Appellant may not be able to return to her previous stressful position as a taxi dispatcher, the Tribunal is not satisfied on the balance of probabilities that she lacks the regular capacity to do alternative work.

Diabetes

[42] In her oral evidence, the Appellant relied primarily on her being a "severe diabetic" as her main disabling condition. In this regard the Tribunal noted the following:

- Although Dr. Jordan in his September 2015 report (paragraph 21, above) mentions that her diabetes is poorly controlled due to medication intolerance

and poor follow up, his prognosis is that her conditions could improve or worsen based on follow up and compliance.

- The oral evidence suggests that the medical intolerance was related to Metformin and that the Appellant has been feeling better since she was placed on Januvia.
- The September 2015 referral letter to Dr. Sales (paragraph 25, above) indicates that the Appellant's sugars have been well controlled.
- The office note dated September 30, 2015 (paragraph 26, above) indicates that the Appellant feels well and that a log of her sugars for one week were all in the 5-7 range.
- These office notes suggest that as of September 2015 (the time of Dr. Jordan's initial medical report) her sugar levels were being controlled.
- Although the Appellant testified that she saw Dr. Kelly on a regular basis for her diabetes there are no reports in the file from Dr. Kelly.
- There is no evidence of any secondary complications relating to her diabetes.

[43] The Tribunal finds that that the evidence does not support that the Appellant's diabetes is of such severity, that it precludes her from having the regular capacity to pursue substantially gainful employment.

Depression and anxiety

[44] In his oral evidence the Appellant's husband stated that he believes that her main problem is post-traumatic stress disorder arising from childhood trauma. The Appellant stated that she had discussed this with Dr. Jordan and he had indicated that he will try to arrange for her to see a psychiatrist. The Tribunal carefully reviewed Dr. Jordan's office notes in the hearing file and there is no mention of childhood trauma, post-traumatic stress disorder, or seeing a psychiatrist. Further, there is no indication of this anywhere in the hearing file.

[45] It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB): the Tribunal cannot rely upon a diagnosis made by the Appellant's husband (no matter how well-intentioned) without any supporting medical evidence.

[46] The Appellant also relies on depression and her inability to concentrate. The only reference to what might be considered symptoms of depression in the hearing file is Dr. Jordan's September 2015 office note (paragraph 24, above) which refers to episodes of crying and his diagnosing depression and anxiety in his September 2015 initial medical report (paragraph 21, above).

[47] Not only must there be medical evidence to support a claim that a disability is "severe" and "prolonged", but also evidence of efforts by the Appellant to obtain work and to manage his or her medical condition (*Klabouch* 2008 FCA 33; *Angheloni* 2003 FCA 140).

[48] There is no evidence of a course of treatment to support that this is a severely disabling condition. Although the trial of one anti-depressant was unsuccessful there were no efforts to try another anti-depressant or any anti-anxiety medication; there is no referral to a mental health specialist; and there is no evidence of any therapy or counselling.

[49] The Tribunal finds that there is no medical evidence to support that the Appellant's depression and anxiety are severely disabling and no evidence of significant steps taken by her to medically manage this condition. If childhood trauma is a significant factor as suggested by the Appellant's husband, the Appellant should take steps to have this addressed by medical and other professionals.

Stomach Conditions

[50] There is evidence of various stomach conditions and that the Appellant may require a hernia repair. However, the medical evidence suggests that these are being conservatively managed with medication and there is no suggestion that they are severely disabling.

Individual Factors

[51] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: (*Inclima* 2003 FCA 117).

[52] The Tribunal is mindful that the Appellant was 55 years old on the MQP, that she has a limited education, and that she has a fairly narrow work history primarily as a taxi dispatcher. The Tribunal however noted that in terms of functional limitations she acknowledged that she has no limitations in sitting, standing, or driving. She also acknowledged that she has made no efforts to pursue alternative work or to upgrade her office skills. The Tribunal is satisfied that there are no significant physical or other barriers to the Appellant pursuing alternative less stressful sedentary type work.

[53] The Tribunal finds that the Appellant retains the residual capacity to pursue alternative employment and that she has failed to make reasonable efforts to do so. She has failed to satisfy the test set out in *Inclima*, above.

[54] The Appellant has the burden of proof and although the Tribunal recognizes that she is suffering hardship by reason of her condition she has not established, on the balance of probabilities, that she is disabled in accordance with the CPP criteria

Prolonged

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

CONCLUSION

[56] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security