



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. D. v. Minister of Employment and Social Development*, 2017 SSTGDIS 176

Tribunal File Number: GP-16-2209

BETWEEN:

R. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Tyler Moore

HEARD ON: October 4, 2017

DATE OF DECISION: October 23, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on November 6, 2015. The Appellant claimed that she was disabled because of chronic low back pain, degenerative disc disease, COPD, and diverticulitis. 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 Teleconference for the following reasons:

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

[4] The following people attended the hearing:

Appellant: R. D.

Representative for the Appellant: David Little

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

EVIDENCE

[6] The Appellant is currently 56 years of age and lives with her husband in a house in X, Ontario. She completed a grade 8 education. The Appellant last worked as a full-time meat packager at X from August 2007 until February 18, 2014. On her initial application for CPP disability benefits the Appellant indicated that she could no longer work as of that date due to chronic back pain, neck pain, chronic abdominal pain, frequent nausea, vomiting, constipation, ongoing pain from bowel obstruction surgery, diverticulitis, and COPD. The Appellant has not looked for work or attempted any type of re-training since she stopped working at X.

[7] The Appellant submitted that she always struggled in school. Although she kept advancing through grades in the special education class she was placed in, the Appellant testified that she was pushed ahead through grades without actually learning anything. She attempted to attend high school classes but left early on because classmates made fun of her for not knowing how to complete any of the work. According to the Appellant, she is still not able to read or spell. She submitted that her application for CPP disability benefits was completed by her representative, and any subsequent correspondences with the Tribunal were written either by her representative or by a friend who transcribed for her while she dictated.

[8] The Appellant submitted that she was in receipt of ODSP benefits until her mid-40s. Those benefits were suspended when the Appellant was charged with cheque fraud. It was at that time that the Appellant returned to in 2004. She found employment working as a meat packager, initially through a temp agency, at X. The Appellant described her role as heavy physical labour that involved pushing carts of meat repetitively, as well as repetitive lifting and reaching to bring meat down off from hanging hooks.

[9] After working at X for approximately 1 year the Appellant was hired on full-time. When she became a full-time employee, her supervisors requested that she also perform clerical duties and operate metal detectors. When the Appellant tried to approach her employer about her difficulties with those clerical duties she was reportedly ridiculed. Similar ridicule was reportedly a common occurrence the Appellant had to endure while working at X. She submitted that her co-workers and supervisors would make fun of her to the point that she would have to run to the washroom and cry. If her back was hurting while at work and she advised her supervisor, in theory she was told that she could take a break and someone would cover for her,

but they never did. The Appellant also had difficulty operating and keeping up using any machinery she was asked to use. If she asked to be put on another job, however, she testified that she would be yelled at by supervisors.

[10] While continuing to work, the Appellant described increasing stomach issues and at one point she was taken to the hospital where she was admitted for 3 weeks. She underwent subsequent surgery and returned to work in August 2013. Medically, she was advised to return to only light duties, but according to the Appellant on her second day back she was required to perform her regular unaccommodated role. The Appellant persevered for another 6 months at X until she began having significant back pain that was radiating down her leg in addition to the escalating abdominal pain.

[11] The Appellant testified that she has not looked for work since February 2014. This stems from ongoing abdominal pain, radiating back pain, and dizzy spells which have resulted in falls. The Appellant has trialed numerous medications to control her symptoms, including morphine, with little success. Her current list of medication includes Zantac, Apo Amilzide, Crestor, Ventolin, Percocet, Naproxen, Lyrica, Lactulose, Serc, Zoloft, and Breezhalin. She submitted that she has not been referred to a pain clinic and is not currently under the management of any medical specialists for her back or abdominal conditions. According to the Appellant, she has never really undergone any treatment for her back apart from medications. She continues to smoke ½ pack of cigarettes per day.

[12] The Appellant described her abdominal pain as sharp and central pain that comes and goes, but generally lasts approximately one hour. Her low back pain was described as knife-like across her lower back and down her right knee. Pain is aggravated by sitting or standing for any prolonged period, and occurs almost daily. The Appellant can walk for only 10 minutes before having to sit down, and is constantly changing postures to try to get comfortable. With respect to her dizziness, the Appellant submitted that her current medication regime has decreased her symptoms. She has reportedly been advised that her declining hearing is a factor in her dizziness condition. The Appellant also described symptoms of ongoing depression. Her depression is aggravated by ruminating thoughts of others making fun of her, about her poor financial situation, and recent losses that have occurred within her family. Zoloft was prescribe by her

family physician for her depression approximately a year ago, and the Appellant could not recall if she had been prescribed any other anti-depressant medication prior to that time. There have been no psychiatric referrals to date.

[13] The Appellant has never held a valid driver's license because she has been unable to comprehend the written test. She goes grocery shopping with her husband and leans on a cart while there. He carries all of the groceries and does the majority of the home maintenance. The Appellant submitted that she is unable to push a vacuum because of her back. The Appellant did submit that she stopped working in February 2014 primarily as a result of her escalating back and stomach pain.

[14] There are several medical reports contained within the Hearing File, all of which have been reviewed in detail by the Tribunal.

[15] On July 2, 2014, Dr. Davis, general surgeon, reported that the Appellant had undergone previous small bowel follow-through which did not show any signs of obstruction. In conjunction with a CT scan, there was no surgically correctable source of the Appellant's bowel discomfort. Dr. Davis recommended referral to a pain clinic.

[16] On July 16, 2015, Dr. Soric, physical medicine, conducted an independent medical assessment in which he noted the Appellant complained of constant stomach pain and secondary low back pain. She indicated her symptoms had evolved as a result of bowel surgery. To date she had never had any physical treatment and was instead treated with various medications. Dr. Soric noted that the Appellant was a poor historian. Based on his assessment, he could not recommend any specific functional restrictions, although he noted she had become quite deconditioned. The Appellant saw herself as being very disabled. Dr. Soric could not find any physical pathology or physical impairment that might preclude the Appellant from managing her own occupation. While Dr. Soric opined that the Appellant did not require any treatment for her lumbar pain, he could not comment on her abdominal symptoms.

[17] On Jun 26, 2016, an MRI of the lumbar spine revealed no significant degenerative disc disease. There was mild bilateral neural foraminal narrowing at L5-S1 secondary to minor anterolisthesis and bilateral pars defects.

[18] On December 21, 2016, Dr. Maraj, family physician, reported that the Appellant had been under the care of Dr. Shipley until 2015. She had not been referred to a specialist related to her back pain because Dr. Shipley felt that it would not be of benefit. As the Appellant had become a legal case, Dr. Maraj agreed to order an MRI of the spine and to refer her to specialists as he sought fit.

[19] On May 23, 2017, Dr. Boulton, psychologist, completed a psycho-educational assessment at the request of the Appellant's representative. Dr. Boulton noted that the Appellant quit school after grade 8. She also met the criteria for mild mental impairment and was mildly functionally mentally disabled. She also met the criterion for major depression disorder along with severe anxiety. Dr. Boulton noted that the Appellant's general cognitive ability was within the extremely low range of intellectual functioning.

SUBMISSIONS

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

- a) According to Dr. Boulton, the Appellant suffers from major depression, mild mental retardation, and low intellectual functioning. Some noted validity issues may in fact be the result of the Appellant's intellectual deficits with regards to self-expression and not overtly related to effort.
- b) Though referral to a pain clinic was recommended by Dr. Davies, the Appellant's family physicians Dr. Shipley and Dr. Maraj have not followed-up recommended pursuing such a referral.
- c) There is reference in the Hearing File with respect to the Appellant's vertigo. Though there was some medical investigation, there has been incomplete resolution of that condition.
- d) There is a documented history of abdominal pain that is not yet resolved.
- e) Objective findings have been noted in the lumbar spine via X-rays and MRI.

- f) The Appellant's depression is likely longstanding and noted by Dr. Maraj. The Appellant was taking medication for that condition in 2016.
- g) All of the Appellant's physical conditions should be considered in light of Dr. Boulton's findings.
- h) The Appellant has only worked in physically intensive labour. She has no literacy skills and overwhelming barriers for employment.

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

- a) The Appellant has had longstanding issues with respect to abdominal pain, including surgical procedures. Though she required a prolonged healing time in 2013, she has fully recovered with no residual surgical issues.
- b) The lumbar MRI from June 2016 did not reveal any significant degenerative disc disease. There is no evidence that she has required any treatment or follow-up related to her back pain.
- c) With respect to the Appellant's complaint of COPD, there is only X-ray evidence of mild over-inflation, but no active pulmonary disease.
- d) The psycho-educational assessment completed by Dr. Boulton was at the request of the Appellant's representative. While that report is informative, the cumulative reports on file do not support the presence of any severely physical or mental condition that would preclude all work.
- e) In July 2015, a physiatrist was of the opinion that the Appellant could do her work or alternate work.
- f) The Appellant is under no active treatment aside from pain medication and it has been suggested that she attend a pain clinic.

ANALYSIS

Test for a Disability Pension

[22] 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.

[23] 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.

[24] 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

[25] The Tribunal found the Appellant to be credible. She testified in a forthright fashion answering questions related to her work and health history as well as the impact that her condition has had on her day to day life.

[26] 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. The Appellant is currently 56 years of age. She completed a grade 8 education in a special education program because of learning deficits. While the Appellant is fluent in English, she has a very limited ability to read or write. She also possesses no transferable skills given the uniformity of her employment as an unskilled labourer. In consideration for the Appellant's age, lack of transferable skills, very limited formal education,

diagnosed mental impairments and functional limitations, the Tribunal finds that the Appellant would not be a good candidate for re-training or for more sedentary work.

[27] 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). The Tribunal has placed significant weight on the oral testimony presented and on the more recent psycho-educational assessment completed by Dr. Boulton as it is telling with respect to the Appellant’s global condition.

[28] The Tribunal does not fault the Appellant herself for any lack of overt objective findings obtained to date through traditional diagnostic testing. According to the Appellant’s family physician, at the time of her MQP she had been diagnosed with mild degenerative disc disease in the lumbar spine and chronic abdominal pain and nausea, the origin of which had not been determined despite investigation. Given those limited objective findings but a consistent report by the Appellant of ongoing back and abdominal pain as the chief complaints precluding her ability to work, careful consideration has gone into the subjective impact of the Appellant’s chronic pain symptoms on her day to day life.

[29] The Tribunal finds that the Appellant has a myriad of barriers limiting realistic employment. She has to rely on her husband to perform the housekeeping and home maintenance as she cannot push or pull even a vacuum. The Appellant holds no valid driver’s license because she is incapable of reading or comprehending the questions provided on a written test. That limited comprehension and ability to read has been further exemplified through the oral testimony which revealed that the Appellant relied on her representative and friends to complete all written correspondences to the Tribunal, including her initial application for CPP disability benefits. The Appellant has demonstrated difficulty in the workplace completing complex tasks and those requiring any written communication or reading comprehension. Though the Tribunal is cognizant that the assessment by Dr. Boulton was at the direction of the Appellant’s representative, the Tribunal finds the report to be telling with respect to the impact the

Appellant's mild mental impairment and functional mental disability has had on her compounding physical symptoms.

[30] The Tribunal finds that the Appellant has been compliant with treatment. Though a pain clinic referral was once recommended, the Appellant's family physicians made no follow-through consciously. The Tribunal does not penalize the Appellant for a lack of medical specialty referrals for her physical or psychological conditions, or for failing to recommend physical treatment options. The Appellant's family physicians have seen fit to manage those conditions with copious amounts of medications and numerous trials, with limited success.

[31] With respect to the report from Dr. Soric in 2015 who opined that the Appellant could resume her regular work duties, Dr. Soric based that opinion solely on his examination of the Appellant's back. He made no consideration for her intellectual capacity, abdominal condition, dizziness, or depression. As such, the Tribunal has given little weight to that report when assessing the Appellant's capacity to regularly participate in any substantially gainful employment.

[32] 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). The oral testimony revealed that the Appellant has only ever worked as an unskilled labourer in physically demanding roles, most recently as a full-time meat packager. Shortly after being hired on full-time at X, she attempted to perform menial clerical work. Simple, sedentary tasks proved to be too much for the Appellant given her limited intellectual capacity and comprehension skills. In 2013, she was hospitalized and underwent bowel surgery which necessitated a prolonged absence from the workplace. She attempted to return to light duties, but her employer was not compliant with that recommendation and due to escalating symptoms the Appellant had to leave the workplace in February 2014. While the Appellant has not sought alternate employment, the Tribunal accepts her oral testimony that her condition has not improved to the point that would have allowed her to be able to do so. The Appellant continued working in the only role for which she was qualified based on education and experience for as long as she could, perhaps to her own detriment psychologically and physically. Based on her failed efforts to successfully maintain roles as a physical labourer as

well as performing basic sedentary clerical duties, the Tribunal finds that the Appellant's global condition which encompasses her psychological, physical, and intellectual functioning precludes her from both obtaining and maintaining employment.

[33] 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). The Appellant's individual conditions might not render her condition as severe according to the CPP definition when assessed separately. However, when the radiating back pain, major depression, idiopathic chronic abdominal pain, dizziness, and mild mental impairment are considered cumulatively the Tribunal finds that the Appellant is persuasively precluded from regular and substantially gainful employment.

[34] Based on consideration for the evidence presented, the Tribunal concludes that on a balance of probabilities the Appellant suffers from a severe disability, as defined by the CPP.

Prolonged

[35] The Tribunal also finds that the Appellant's disability is prolonged. She has been suffering from chronic abdominal and back pain dating back to at least 2013. Her intellectual and learning deficits have been lifelong. Despite numerous medication trials and surgical intervention to improve her chief complaints, there has been little overall improvement to date. Given the chronicity of her symptoms and lack of substantial improvement, the Tribunal finds little prospect that her global condition will improve to the point that she could regularly resume any substantially gainful employment.

CONCLUSION

[36] The Tribunal finds that the Appellant had a severe and prolonged disability in February 2014, when she stopped working. 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 November 2015; therefore the Appellant is deemed disabled in August 2014. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2014.

[37] The appeal is allowed.

Tyler Moore
Member, General Division - Income Security