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

Citation: *M. C. v. Minister of Employment and Social Development*, 2017 SSTGDIS 172

Tribunal File Number: GP-15-4429

BETWEEN:

M. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jane Galbraith

HEARD ON: November 14, 2017

DATE OF DECISION: November 16, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 15, 2014. The Appellant claimed that she was disabled because of fibromyalgia, chronic pain and butterfly lupus. 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, 2011.

[3] The hearing of this appeal was by teleconference for the following reasons:

- The Appellant will be the only party attending the hearing.
- 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:

M. C. - the Appellant

T. M. - the Appellant's representative

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

PRELMINARY ISSUES

[6] The Appellant was granted an adjournment on August 3, 2017 as the representative submitted new documents the day before the hearing and additional time was required for the Respondent and the Tribunal to review.

EVIDENCE

[7] The Appellant was 54 years old at the time of her MQP. She completed Grade 9. She was married shortly after leaving high school and had 4 children. She currently lives with a common law partner.

[8] She did not work until she was in her 30's, when she and her husband separated. Her work experience was primarily as a bartender. She did some cleaning of a hotel but the majority of her work was as a bartender. The Appellant worked as a bartender in a hotel from 1998 to 2010.

[9] The Appellant had started having pain and reporting this to her physicians in approximately 2005. She describes it as being in her bones and slowly it got increasingly worse. It has affected her ability to stand and lift and varies in its' intensity. At work she had to ask customers to help her carry in heavy cases on occasion. She reports that she called in sick many times and often was not able to complete her shift due to her increasing pain. She ended up on Employment Insurance (EI) sick benefits for 3 months and did try to return to her job but was unsuccessful. She had to go to Emergency rooms in hospitals for pain relief when it became extremely painful.

[10] It became increasingly difficult for the Appellant to manage her work obligations or be a reliable or productive employee. She recalls that she was reporting her pain regularly to her doctor and was supported in her decision not to work by her physician.

[11] The Appellant initially saw Dr. Turchon as her Family Physician. He was the first physician that prescribed Percocet for the Appellant's pain. She had to change physicians when he left his practice. In 2005 she had Dr. Stemp who completed her first medical report to CPP

with her first application for benefits. He retired and in 2012 Dr. Abesinghe became her Family Physician.

[12] The Appellant had a legal clinic assisting her with her appeal initially and they informed her that they could not gather the medical information from her previous physicians and therefore would no longer represent her. Her niece who now represents the Appellant also attempted to obtain previous medical records dating previous to 2011 but was mainly unsuccessful.

[13] The Appellant's last attempt at working was for a banquet catering company for a few years due to her extreme financial situation. She would agree to work on a certain day but often was unable to attend work. She also had to leave work frequently. She had very small earnings, less than $5,000 in 2012 and 2013 from working as a banquet server.

[14] The Appellant indicates that she could not predict the intensity or severity of her pain on any given day. She does acknowledge that she has good days and bad days are when she is completely immobilized. She clarifies that a good day does not mean that she is pain free, only that it is more manageable. She has constant pain from her fibromyalgia as well as her bladder condition. Pain is the main reason she is unable to work, as she is unable to predict the level of her pain, which has a direct effect on her functional abilities. Her stamina and ability to stand, walk and lift for any duration had decreased over the years.

[15] Dr. Stemp completed a CPP medical report when the Appellant applied for benefits in 2011. He had been her physician since 2005 and reports the Appellant having varying pain problems over the years. He indicated in November 2010 that the Appellant was taking 8 Percocets a day for her pain. He opined that her prognosis was guarded. (GD2-109)

[16] Pharmacy records show that the Appellant was prescribed Oxycodone 8 tablets a day in July 2011, November 2011, January 2012 and February 2012. (GD9-439)

[17] The Appellant has been diagnosed with mild lupus and has been treated with Prednisone on several occasions for a period of time. She reports that she has been prescribed this treatment approximately 3 or 4 times.

[18] Dr. Sogbein, urologist, performed a cystoscopy in April 2014 as opined she has interstitial cystitis. He recommended starting bladder instillation. (GD2-69) This has not been performed yet but the Appellant informs the Tribunal that she believes this be required in the near future.

[19] The Appellant underwent a coronary angiogram in December 2013 and it was recommended she be treated medically for a borderline lesion. (GD2-66) In July 2014 Dr. Ravi, cardiologist, evaluated the Appellant and found that her symptoms were not cardiac in nature. (GD2-62)

[20] Dr. Abeysinghe, Family Physician, completed the CPP medical in February 2015. Her doctor has been treating her since March 2012. The diagnoses listed are chronic pain since 2005, chest pain and interstitial cystitis. It is noted her chronic pain is ongoing with flare-ups as well as her bladder condition. She requires Oxycocet to keep her pain at a level so that she can function. The prognosis was guarded and opined that her condition will remain the same. (GD2-60)

[21] The Appellant wrote a letter in July 2015 describing the effect her medical conditions have had on her life. She describes herself as a previously active woman who always was available to help her family. She finds this is no longer the case. She can sometimes be bedridden for days and she has been fighting depression due to her inability to do the simplest tasks and that her husband has had to shoulder the financial burden. She has also had a knee replacement, treatment for interstitial bladder cystitis and has been informed she requires a pacemaker. (GD2-13)

[22] The Appellant also clarified that she has had two surgeries on the knee requiring the replacement. She had the initial surgery and then another surgery on the same knee a year later. She had some relief of pain in her knee but has had many problems recovering from this surgery and regaining a functional joint. The Appellant has encountered significant swelling in her knee that has impeded her recovery from this procedure.

[23] The Appellant reports that she had a pacemaker inserted at some time between the two surgeries on her knee. Her pacemaker is monitored every 6 months.

[24] Dr. Abeysinghe wrote in September 2017 that he was aware of the Appellant's long-standing history of chronic generalized pain and fibromyalgia. He notes that all treatment modalities have been a failure. This includes her attempt to return to work due to her severe condition. He reports that any purposeful movement aggravates her pain. She is unable to return to work. (GD12-2)

SUBMISSIONS

[25] The Appellant's representative submitted orally and in writing on her behalf that she qualifies for a disability pension because:

a) A real world context should be considered when determining if the Appellant meets the definition of severe and prolonged. No employer would reasonably accept the unpredictable nature of the Appellant's ability to attend work regularly or even make it though a shift.

b) The Appellant's condition has become more severe over the years and the Appellant is not able to manage the pain despite the medication she has been prescribed.

c) The Appellant has multiple medical conditions, which impact her functional abilities. Her chronic pain has become more severe, continues to have bladder and kidney issues that cause pain and has developed cardiac issues requiring a pacemaker.

d) The Appellant has attempted unsuccessfully to work after her MQP. She was not able to regularly report for scheduled work or remain at the workplace consistently. The Appellant indicates that she would work if she could.

e) There has been no improvement and actually a decline in the Appellant's condition. Her condition has been prolonged with added medical conditions after the MQP.

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

a) The Appellant has several conditions. Her angina is mild and controlled with medication, her interstitial cystitis is episodic and she has been diagnosed with chronic pain, which has been present for many years on and off.

b) The Appellant has not been involved with any chronic pain or treatment program and has relied solely on the use of narcotics to control her pain.

c) Based on the information and considering her age, education and work history, the Appellant has not shown she was continuously disabled since the expiry of her MQP or her possible prorated date of March 2012.

d) The Appellant has had chronic pain for several years but the evidence does not support the conclusion that the Appellant was incapable of performing part-time, modified activities or more sedentary work or attend school at the time of her MQP. Her medical conditions and finding after the MQP are not relevant.

ANALYSIS

Test for a Disability Pension

[27] 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.

[28] 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.

[29] 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.

[30] Paragraph 49(1)(b)(ii) describes when a disability benefit was considered under the late applicant provision. If the individual was able to meet the contributory requirements applicable at an earlier date he or she may establish a minimum qualifying period. It indicates that benefits are payable to a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for disability pension was actually received.

Minimum Qualifying Period

[31] The Tribunal finds that the MQP is December 31, 2011.

[32] Section 19 of the CPP provides that when an appellant's earnings and contributions for a calendar year are below that year's basic exemption, their earnings and contributions can be prorated if they became disabled during the prorated period. In 2012 her earnings were below the yearly valid earnings.

[33] In this case, the Tribunal must first decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the MQP of December 31, 2011. If not then her 2012 earnings could be considered and the Tribunal must decide if it is more likely than not that the Appellant became disabled between January 1, 2012 and March 32, 2012. If this was the case, the proration provision could be applied.

Severe

Evidence considered

[34] The Tribunal is of the view that the Appellant was a credible witness, straightforward in her testimony, not indicating any clear intention of overstating her situation. The representative, her niece, was allowed by the Tribunal to provide testimony to the Tribunal, as she has had

frequent contact with the Appellant for many years. The Tribunal considered this testimony valuable to consider. The witnesses' testimony provided evidence that cannot be disregarded, despite the fact that there is limited medical documentation about the Appellant's condition prior to 2011. The Tribunal notes that this oral evidence was not available to the Respondent when they made their decision.

[35] The Tribunal is also aware that there is no requirement in the CPP that objective medical evidence must be adduced to support a finding of severe disability. In determining this issue, the Tribunal must assess all of the relevant evidence, which includes oral testimony. The existence of medical evidence in support of the finding is highly relevant, but a lack thereof does not determine the issue. Although not binding on the Tribunal it takes note and is persuaded by the *Minister of Human Resources Development v. Chase,* CP 06540, November 6, 1998 (PAB).

[36] The Appellant, her previous representative and her current representative made many unsuccessful attempts at obtaining medical documentation due to her change of physicians. The Tribunal accepts that this was a concerted effort that proved difficult and unproductive. The Tribunal accepts the Appellant's testimony about her condition prior to the MQP and gives it significant weight. The Appellant's description of her condition was confirmed by her witness's testimony that saw the Appellant and spoke to her on a regular basis.

[37] Subjective evidence can even outweigh the absence of any objective clinical evidence as noted further in the decision of *Smallwood v. MHRD* (July 20, 1999), CP 9274 (PAB). The Tribunal finds that the medical descriptions by the Appellant and her verbal accounts at the hearing of her increasing pain and the limitations it caused her are compatible with these decisions.

Villani factors

[38] The severe criterion must be also 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.

[39] The Appellant completed a Grade 9 education with no further education. She was 54 years old at her MQP. She did not enter the workforce until she was in her 30's and worked at a manual job, which was primarily bartending. This was a physically demanding job, which she managed for many years and continued to do so with the help of narcotics to manage her pain.

[40] The Tribunal does not come to the same conclusion as the Respondent when considering her age, education and work history.

[41] The Tribunal concludes that with her education and work experience combined with her current condition it is not realistic or reasonable that the Appellant would be able to retrain at her age. It is also clear to the Tribunal that the Appellant would not be able to work at any job that would be substantially gainful employment considering her condition and personal factors outlined. Her personal characteristics meet this aspect of the Villani test for severity.

Work capacity

[42] 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).

[43] The Appellant worked with increasing pain for many years until she stopped working and collected EI sick benefits for a period of time. She later tried working for a catering company that was not full time and she would be called in when needed.

[44] She made very little income doing this work and only attempted this employment due to her dire financial situation. She reports and the Tribunal accepts her testimony that she often would accept work but then on the day scheduled would have to call in sick. She also would frequently not be able to work for her whole shift and have to go home.

[45] The predictability and reliability of the Appellant in the work force are significant considerations in the analysis of whether the Appellant is disabled within the meaning of the *CPP*. The Tribunal is persuaded but not bound by *B.B. v. MHRSD* (October 14, 2008), CP 25356 (PAB).

[46] The Tribunal finds that because of her medical condition, she would be unreliable in her attendance at best. The unpredictable nature of her condition made her attempt at part-time work unsuccessful. Her testimony and her small earnings confirm this during the years that she worked in this position.

[47] 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. The Appellant was not capable of a substantially gainful occupation after she stopped working as a bartender.

[48] The Tribunal accepts that it was reasonable that the Appellant did not make efforts to seek other employment after being unable to manage part-time work. She has demonstrated to the Tribunal that she did not have work capacity at the time of her MQP.

Totality of conditions

[49] 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).

[50] There is no doubt that the Appellant has been experiencing a chronic pain condition for many years. She has worked during the time with the help of narcotic medication. Her physicians did not refer her to a pain management program or other treatments suggested by the Respondent but the Tribunal does not place weight on that, as it was not in her control. Her physicians continued to prescribe strong pain medications, which support her submission she was having ongoing pain. The Appellant had several physicians over the years, which may affect her care.

[51] There is also no doubt that the Appellant has had several conditions at the same time. Her bladder condition is still being treated and has caused her pain. She has complained of pains in her chest and despite being assessed for cardiac problems in the last few years she had to have a pacemaker implanted. She has also been treated for a mild case of Lupus on at least three occasions. The totality of the Appellant’s conditions is a significant factor. The Tribunal is clear that her chronic pain is the primary reason the Appellant was unable to work at her MQP.

[52] The Tribunal has carefully reviewed the medical reports and listened attentively to the evidence of the Appellant. The Tribunal finds that the Appellant has satisfied the Tribunal that on a balance of probabilities the Appellant does have a severe disability within the meaning of the Act at the time of her MQP.

Prolonged

[53] For the Appellant to qualify for a disability benefit, the Tribunal must be satisfied not only that the mental or physical disability is "severe", but also that it is "prolonged." To make such a finding, there must be sufficient evidence to establish that the disability is both "long continued" and "of indefinite duration", or is likely to result in death.

[54] The Appellant has required knee replacement surgery after her MQP. Another surgery on the same knee was required a year later. She has developed a cardiac condition requiring a pacemaker.

[55] Her main concern of chronic pain has increased and continues to be unpredictable in his intensity and frequency. She has seen no improvement in this condition and the Tribunal can see no opinion stating any optimism that it will improve in the foreseeable future.

[56] Therefore the Tribunal agrees that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[57] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2011, when she was no longer able to work on a regular basis due to her ongoing and increasing pain. 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 October 2014; therefore the Appellant is deemed disabled in July 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2013.

[58] The appeal is allowed.

Jane Galbraith
Member, General Division - Income Security