



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

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

Tribunal File Number: GP-16-2330

BETWEEN:

J. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Susan Smith

HEARD ON: November 15, 2017

DATE OF DECISION: November 20, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on September 29, 2015. The Appellant claimed that she was disabled because calcification of her L-5 disc caused pressure on her sciatic nerve, and she has arthritis throughout her body that cause her pain and limit her mobility. 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, 2015.

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

- a) The Appellant will be the only party attending the hearing.
- 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 has mobility issues and there is no reason to require the Appellant to travel to a Service Canada Center.

[4] The following people attended the hearing:

The Appellant: J. R. (The Appellant indicated she was recently married and has changed her name to J. O.).

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

EVIDENCE

[6] The Appellant is a fifty-nine-year-old woman. The highest level of education she completed was grade eleven. She has had no post-secondary education or training of any kind. She completed a questionnaire in support of her application for disability benefits. She indicated she last worked from May 2009 until April 2014 as a line cook in a café. She indicated in her questionnaire that she stopped working on April 17, 2014 due to back pain causing mobility issues. She noted lung issues with the start of emphysema and COPD. She indicated that she was unable to sit or stand for more than 15-20 minutes due to pain. She was able to walk no more than one block. She was unable to lift, carry, reach, or bend without it causing pain. She had trouble falling asleep and had difficulty dressing and performing household maintenance duties. She received regular Employment Insurance (EI) benefits July 29 to December 2, 2014; and she received medical EI benefits December 31, 2014 to March 31, 2015. She has not worked since April 2014.

Oral

[7] The Appellant testified on her own behalf. She stated that she recently married in May 2017. She said that she met her husband while living in X where she worked as a line cook at a café for five years before she stopped work in April 2014. She indicated that her spouse found employment in the X so they relocated from X. She was questioned regarding the answer on her questionnaire submitted with her application for benefits saying she stopped work due to mobility issues. Upon direct questioning she indicated that she stopped working at the café in X because they were relocating to the X. She quit her job to move. She said she was also beginning to look into her back pain at about the time she quit her job. When asked why she had indicated on her questionnaire that she stopped work because of mobility issues she said it was because she was beginning to have back problems then.

[8] The Appellant stated that she stopped attending school in Grade eleven because she had lost interest. She indicated that she has had various jobs in the past. She has worked as a chef/line cook; a cashier; and a manufacturing assembly position requiring a high level of dexterity. She indicated that she has spent much of her adult life unemployed but she has had a variety of job duties.

[9] The Appellant stated that she attended physiotherapy about two or three times. She said that she attended counseling with Y. R. four or five times and she attended one group therapy course over about an eight week period. She attended most of the scheduled sessions but was sick a couple of times. She says she gets very sick in winter. She gets the flu and it stays with her all winter. She said that her winter time illness has had an influence on her ability to attend therapy sessions.

[10] The Appellant stated that she continues to take Tramacet for pain as needed but she tries to limit the frequency of use because it is addictive. She says she is supposed to see the physiatrist later this month but she is not sure how she would be able to attend any therapy because he is located in X and she doesn't drive. She said is planning to try physiotherapy near where she lives again and she is planning to try massage therapy. She said that her pain level is worsened by things like the weather and increased activity. She said she will only take pain medication when her pain level is high. When asked how frequently her pain level is so high as to require Tramacet, the Appellant did not provide an answer. She replied by saying that she has pain every day and that she uses a walker

[11] The Appellant said that she saw Dr. Gill, the rheumatologist, on one occasion last year. She said that Dr. Gill confirmed a diagnosis of fibromyalgia and said she is not a candidate for back surgery because she has osteoarthritis. She said he discussed treatment options and they agreed injections would not help her discs so there is no reason to try injections. She said she tried Gabapentin but it did not agree with her.

Medical

[12] September 22, 2015, Dr. Smith, family physician, completed the standard medical report in support of the Appellant's application for disability benefits. He indicated having known the

Appellant for nine months and having begun treating her for her main disabling condition in December 2014. He noted her diagnoses as: hypo thyroid; mechanical back pain; and COPD (query). Relevant physical findings included: mechanical low back pain worse with bending, twisting, lifting, and pulling; no radiation to suggest radiculopathy; and shortness of breath still present with use of Advair. Further investigation was planned with imaging of L-spine for possible stenosis or spinal compression. Treatment was with Tramacet, Cyclobenzaprine; Synthroid; and Advair. She was also receiving physio therapy but it resulted in limited help. Prognosis of DDD lumbar spine; low back pain, worse with activity, expected to continue to make it difficult to remain mobile and she was already compromised with back pain. She was unable to walk more than 200-300 meters due to too much pain (GD2-43-46).

[13] On October 28, 2015, the Service Canada Medical Adjudicator contacted the Appellant by telephone to further develop the Appellant's claim. The conversation was recorded as follows: Patient states she feels awful. At present she states her mobility is limited due to the constant pain in her back - whether walking, sitting or lying down she cannot get comfortable. At times she also has sciatic nerve pain. She reported the X-ray showed calcification of L4 & LS and she notes she has arthritis throughout her body. Her current treatment regime includes Physiotherapy, pain killers and muscle relaxants. Her symptoms started in the winter of 2014 and came on very suddenly. She could not remember any specific incident or accident that happened that may have caused this problem. The applicant states she has done a lot of research on this issue and she does not want to have surgery or injections. She noted that she plans to discuss further treatment options with her doctor (GD2-15).

[14] On October 30, 2015 the Service Canada Medical Adjudicator wrote to the Appellant's family doctor requesting that he provide a narrative report to include: an overview of treatments to date and the applicant's response to those treatments; an up to date plan of any referrals, treatments, or interventions that are planned, specifically any plans to refer to orthopedic surgeon or neurology; and copies of all consult reports or diagnostics received to date (GD2-41-42).

[15] November 26, 2015, Service Canada sent a reminder to Dr. Smith regarding the request of October 30, 2015, for a narrative report (GD2-40).

[16] January 6, 2016, Dr. Smith's medical office assistant sent a fax noting the medical report requested by the Minister would not be complete as "it had not been done by patient yet". On January 13, 2015, the medical adjudicator followed up by phone with the doctor's medical office assistant to clarify the faxed note. The phone record states the doctor's medical office assistant indicated the Appellant had not been compliant with the care plan and there had been no referrals to specialists of CT to date (GD2-39).

[17] March 14, 2016, Y. R., registered nurse, case manager, indicated the Appellant had been attending the X services since January 2016. She had received one on one counseling every 2-3 weeks and had completed the six session series of the Rapid Access Group and was currently enrolled in a ten session series of the Depression Group. It was anticipated that she would continue to benefit from ongoing one on one counselling and from more group therapy (GD1-17).

[18] June 6, 2016, Dr. Smith, family physician, completed the standard medical report in support of the Appellant's application for disability benefits. He indicated having known the Appellant for 2 years and having begun treating her for her main disabling condition in July 2014. He noted her diagnoses as: mechanical back pain/sciatica; hypo thyroid; asthma; fibromyalgia; and allergic Rhinitis. Since 2010 increasing low back pain and other body pain radiating down left leg with times where pain is 10/10; limiting her activity and employment opportunities; and x-rays show DDD. Low back pain; needs walker for ambulation; decreased range of motion of low back; diffuse muscle pain (fibromyalgia); and needs help with housework and ADL's at times. Will be seeing a rehab specialist/physiatrist to help with future treatment plans and mobilization, and to help with other medication recommendations. Cyclobenzaprine and Gabapentin were some help, and Tylenol as needed. She had tried Nortriptyline but found it too sedating. She uses a walker for safety when out and uses a cane while at home. Prognosis was that DDD would progress to further disability and pain. She needs help with housework and some days even with activities of daily living (GD1-9-12).

SUBMISSIONS

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

- a) She has pain and limited mobility that prevent her from being able to work;
- b) She relies on using a walker;
- c) Her Osteoarthritis will get worse over time;
- d) She has met the burden of proof in showing she met the criteria of a severe and prolonged disability within the meaning of the CPP by December 31, 2015, and onward.

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

- a) While the Appellant may have difficulty returning to her former position as a line cook, the medical evidence does not support that her condition precludes all suitable types of employment;
- b) The Appellant has been referred to a rehabilitation specialist for treatment plans, the result of which is as yet unknown, therefore it cannot be determined the Appellant has attained maximum medical improvement;
- c) The Appellant has not met the burden of proof in showing she met the criteria of a severe and prolonged disability within the meaning of the CPP on or prior to December 31, 2015.

ANALYSIS

Test for a Disability Pension

[21] 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.

[22] 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.

[23] 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

[24] The Tribunal found the Appellant to be an unreliable witness in that her testimony was both internally inconsistent and inconsistent with the objective medical. The Appellant was not able to provide any explanation for stating in her application that she stopped work in April 2014 due to mobility issues when the truth, by her own admission, is that she stopped work of her own accord because she relocated to the X. The Appellant was not able to provide any explanation for her doctor stating that “she was not compliant with the treatment plan” and stating that non-compliance by the Appellant with the treatment plan was the reason he was unable to provide the narrative report requested by the Service Canada Medical Adjudicator. The Appellant had difficulty answering simple but direct questions such as how frequently she experiences severe pain for which she requires Tramacet. Although the Appellant was candid in answering many questions she was not able to answer questions candidly about what specifically prevents her from seeking suitable employment.

[25] 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 relatively young and has had experience in several different job descriptions. She speaks English fluently and had no trouble in either understanding what was being said to her during the hearing or in making herself understood. Her communication skills appear to be excellent. The Appellant has transferable skills and she would not be precluded from pursuing re-training or seeking alternate employment based on factors such as age, education, language skills or life and work experience.

[26] 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 Appellant has not sought any form of alternate employment since she left her position as a line cook to relocate to the X. The Appellant has limitations with mobility due to her chronic low back pain; however, the objective medical evidence does not demonstrate a condition of such severity as to prevent the Appellant from attempting suitable employment on a part time basis.

[27] The Appellant's family doctor completed two standard medical report forms. One was in September 2015 and one in June 2016. The Appellant did not submit any other reports from any specialists or treating physicians. In June 2016, Dr. Smith indicated that the Appellant would be seeing a rehabilitation specialist/physiatrist for future treatment plans. The Appellant testified that she has not yet seen the rehabilitation specialist. Whether treatment options remain that may lead to improvement has yet to be determined. Dr. Smith chose not to provide a narrative report with respect to the effect of treatment because the Appellant had not been compliant with the treatment plan. The Appellant states that she attended physiotherapy but she went for only "about 2 or 3 times". The Appellant stated that she has been reviewed by a rheumatologist but no report has been submitted. The Appellant stated that she is expected to see a specialist later this month but she does not believe she will be able to make the necessary arrangements for transportation in order to participate in any recommended treatment program.

[28] Although the Appellant's family doctor is somewhat more supportive of the Appellant's application for disability benefits by the time of his second report in June 2016 than he had been in September of 2015, the Tribunal must keep in mind the Appellant's MQP ended in December 2015, almost two years ago. The Appellant had not been compliant with the treatment plan by January 2016, nearly two years after she reported she stopped work and nearly two years after the date she claims to have become disabled. It is imperative to show that an applicant has been compliant with recommended treatment plans in order to succeed in her appeal. Where an applicant cannot demonstrate they have done all they can do to mitigate their condition by following recommended treatment plans it is not possible to assess what benefit they may have derived from the treatment plan had it been followed. Given the Appellant's inaccurate report regarding why she stopped working in April 2014, which is also the date she claims to have

become disabled, it is not possible determine when the Appellant may have begun to suffer symptoms of her medical condition of such severity as to have rendered her incapable regularly of pursuing substantially gainful occupation, if at all. This fact coupled with the evidence the Appellant was not compliant with the recommended treatment plan amounts to an insurmountable barrier to the Tribunal being persuaded the Appellant met the criteria of severe disability within the meaning of the CPP by December 2015 and onward.

[29] The Tribunal finds the Appellant has failed to meet the burden of proof in demonstrating she met the criteria of a severe and prolonged disability within the meaning of CPP by December 31, 2015, and onward.

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.

Susan Smith
Member, General Division - Income Security