



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 173

Tribunal File Number: GP-16-1337

BETWEEN:

C. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: November 17, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* ("CPP") disability pension on May 12, 2014. The Appellant claimed that she was disabled because of nerve damage (with pain), fibromyalgia, gastroenteritis, gastroesophageal reflux disease ("GERD"), bowel nerve damage, muscle spasms, pressure headaches, falling, and dizziness. 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, 1999.

[3] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The Tribunal Member has decided that a further hearing is not required.
- b) The issues under appeal are not complex.
- c) Credibility is not a prevailing issue.
- d) 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.
- e) The key issue in this appeal is the redaction of documents. However, the Tribunal has already requested unredacted copies of the documents in question, held a pre-hearing conference on the same issue, put the matter into abeyance for three months to permit submissions on the issue (or to permit the filing of the unredacted documents), and also allowed a further extended period of time for the filing of the unredacted documents.

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

EVIDENCE

[5] The Appellant is 60 years old and resides in X. She has a grade 12 education and one year of unspecified post-secondary education. She has worked intermittently: she had qualifying CPP contributions in 1975, 1976, 1977, 1989, 1998, and 2008. However, she had five daughters and was their primary caregiver. As such, she is eligible to take advantage of the CPP child-rearing provisions from 1979 to 1997.

[6] On August 28, 2003, Dr. Monchesky (Diabetic Clinic) noted that the Appellant had diabetes and her blood sugar control had “always been terrible”. On May 18, 2004, Dr. Monchesky reported that she had a lot of pain in her feet and legs. She also had peripheral neuropathy.

[7] Dr. Monchesky’s December 20, 2005 progress note (at page GD2-85 in the Tribunal file) said that the Appellant should be on Statin, given her sugar levels and her long-standing diabetes. She had her hands full with her children. However, a significant part of this clinical note is redacted. The Respondent later said that the redacted text was about the Appellant’s daughter’s health issues resulting in her daughter’s hospitalization, but did not provide an unredacted copy of the document. On September 7, 2007, lumbar spine imaging revealed mild spondylosis.

[8] In October 2008, the Appellant stopped her self-employment because of dizziness: she could no longer lift or stand. No start date was given for this self-employment but she said it home cleaning and meal preparation. No hours or wages were provided either. She said that she could no longer work because of her medical condition in “approximately 2009”.

[9] Dr. Chong (Endocrinologist) provided an assessment letter on January 20, 2010 (at page GD2-88 in the Tribunal file). The Appellant had some left-sided pain related to a motor vehicle accident. She did yoga and worked out at the gym three days a week but was currently unemployed. Her Type 1 diabetes was currently uncontrolled. However, a portion of Dr. Chong’s letter is redacted. The Respondent later said that the redacted text concerned health issues of her parents, grandparents, and siblings, but did not provide an unredacted copy.

[10] On June 10, 2010, Dr. Green (Gastroenterology and Therapeutic Endoscopy) noted a history of Type 2 diabetes and constipation with vomiting. She had diverticulosis and a tortuous long colon. He thought her symptoms were all on the basis of diabetic autonomic neuropathy.

[11] Although it is not completely clear because of the use of initials in the clinical notes, it appears that Dr. Chong and Dr. Green saw the Appellant again on November 28, 2012 and August 2, 2013 respectively. Dr. Chong reported medical problems that included Type 1 diabetes since 1987, severe constipation, gastroparesis, peripheral neuropathy, GERD, spastic bladder, nephrolithiasis, microalbuminuria, and hypothyroidism. Her diabetes was not well controlled. Dr. Green noted a history of heartburn that had improved but she was considered to have diabetic gastroparesis symptoms. On February 24, 2014, Dr. Lisnevskaja (Rheumatology) assessed the Appellant's aches and joint pains. Her presentation was suggestive of osteoarthritis, lateral epicondylitis, and fibromyalgia.

[12] Dr. Ballard (Family Physician) completed a Medical Report for the Appellant on May 4, 2014. Dr. Ballard had known the Appellant since October 14, 1977 and had treated her main medical condition since May 2000. Dr. Ballard's diagnoses were (1) Type 1 diabetes with poor control for years, (2) joint aches and pains secondary to osteoarthritis and possible fibromyalgia, (3) gastroparesis and GERD secondary to diabetes, (4) peripheral neuropathy, (5) hypothyroidism, (6) spastic bladder, and (7) back strain secondary to a motor vehicle accident. She had poor balance, frequent tiredness, and numbness in the lower limbs. Due to poor control of her diabetes, her condition would only worsen. Dr. Ballard wrote that she had been unable to work because of her diabetes and also because she was a caregiver to one of her daughters. However, at page GD2-74 in the Tribunal File, part of Dr. Ballard's report (concerning the Appellant's prognosis and "additional information" deemed relevant by Dr. Ballard) was redacted. The Respondent later said that the redacted text concerned a health issue of the Appellant's daughter. However, the Respondent did not provide an unredacted copy.

[13] In the Appellant's letter dated July 16, 2014 (pages GD2-62 in the Tribunal file), a long passage of text was redacted. Immediately following that extensive redaction, the Appellant wrote that she had to spend "the last 25 years being their advocate, caregiver and support person". She said that worked for herself just to make a little spending money but devoted her

time to their care. The Respondent later said that the redacted text was about the health issues of two of her daughters. This letter was also summarized at page GD2-51 of the Tribunal file and was also redacted at that location. The Respondent later said that the redacted text concerned the health issues and living arrangements of two of the Appellant's daughters, but did not provide an unredacted copy. This letter accompanied the Appellant's application for CPP disability benefits.

[14] On April 19, 2017, the Tribunal wrote to the Respondent and requested unredacted copies of pages GD2-51, GD2-62, GD2-74, GD2-85, and GD2-88 (the "Redacted Pages"). The Tribunal stated that a failure to provide unredacted copies of the Redacted Pages could result in an adverse finding against the Respondent. The Tribunal also stated that such a failure could also prevent the Tribunal from being able to make a decision on the file: this could result in a breach of natural justice and/or delays in concluding the appeal.

[15] On May 2, 2017, the Respondent said it considered all of the redacted information to be personal information of a third party and would remain redacted pursuant to s. 26 of the *Privacy Act*. However, it provided very brief summaries of the redacted information. An example is "GD2-74: describes client's daughter's health issue".

[16] The Tribunal then convened a pre-hearing conference that ultimately took place on June 1, 2017. At that time, the Respondent advised that there had been no change in its position and it remained committed to protecting the privacy of the third parties described in the redacted passages. The Respondent also said that it had not relied on the redacted information in reaching its decision and that the redacted information was not relevant to the decision-making process.

[17] The Tribunal then advised the Respondent that ss. 8(2)(a), (b), and (m) of the *Privacy Act* each appeared to permit the Respondent to disclose the information to the Tribunal without violating section 26 of the *Privacy Act*. The Tribunal noted that much of the redacted information was either submitted or written by the Appellant herself in support of her claim for disability benefits. The Tribunal also stated that its ability to make an informed decision on the merits of the case may be compromised by not being able to access the redacted information, as it appeared to be directly connected to the reasons for the Appellant's disability claim. However,

the Respondent still declined to produce unredacted copies of the Redacted Pages. The Tribunal then told the parties that it would subsequently advise the parties on the next steps.

[18] On June 7, 2017, the Tribunal issued an interlocutory decision. The Tribunal found the Respondent's position to be inconsistent with the full and frank disclosure of documents that is essential for a fair resolution of the dispute between the parties. The Tribunal was also concerned that its decision-making capacity was compromised by the redactions: information that the Appellant submitted in support of her application was not being made available to the adjudicator. In the circumstances, the Tribunal was uncomfortable moving forward with assessing the appeal on its merits.

[19] In an attempt to balance the Respondent's concerns, the interest of both parties in having the appeal resolved in a timely manner, and the interest of both parties in having the appeal resolved on the basis of all potentially relevant evidence that had been submitted by the parties, the Tribunal's interlocutory decision placed the appeal in abeyance for a period of three months. The state of abeyance would end if unredacted versions of the Redacted Pages were provided to the Tribunal by either the Respondent or the Appellant. In the alternative, the Tribunal invited the parties to submit binding authority that provided guidance on decision-making by administrative tribunals when material submitted by one party was withheld from the administrative tribunal by the other party.

[20] The three-month abeyance period ended on September 7, 2017. Nothing was received from either party. In a letter dated September 14, 2017, the Tribunal advised the parties that it remained greatly concerned about the Respondent's redactions. However, as also noted in the interlocutory decision, the Tribunal recognizes the interest of both parties in having the appeal resolved in a timely manner. Accordingly, the Tribunal once again provided the parties with an opportunity to provide unredacted copies of the Redacted Pages. However, the Tribunal also indicated that, if the unredacted documents were not received on or before October 18, 2017, the Tribunal would make its decision and might draw an adverse inference from the Respondent's failure to provide unredacted copies of the Redacted Pages.

[21] The Appellant did attempt to provide copies of the Redacted Pages on September 28, 2017, but merely sent copies of already-redacted pages. On October 10, 2017, the Tribunal

advised the parties that it still had not received unredacted copies of the Redacted Pages. The Tribunal indicated that the October 18, 2017 deadline still applied and that it would proceed in accordance with its letter of September 14, 2017 if unredacted copies were not received by that date. The Tribunal further indicated that the Appellant likely did not possess unredacted copies of the Redacted Pages but it had been established that the Respondent did have unredacted copies of them.

[22] Other than an October 12, 2017 submission pointing out that the Appellant had only submitted previously filed information, no response was received from the Respondent by the October 18, 2017 deadline. In fact, no response had been received by the date of this decision.

[23] While communications concerning the redacted documents were being exchanged, the Appellant also indicated on September 27, 2017 that she had cognitive difficulties.

SUBMISSIONS

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

- a) Her disability is of both a physical and mental nature and she has an extremely difficult time meeting deadlines and understanding procedures;
- b) She has difficulty with cognitive functions and cannot recall what she may have done in the past; and
- c) She only worked to generate some spending money, as she was otherwise devoted to support, caregiving, and advocacy for her children.

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

- a) The evidence does not show any serious pathology or impairment which would result in her being categorized as disabled and unemployable in all occupations in December 1999 and on a continuous basis thereafter;

- b) Her work activity in 2008 and her claimed disability date of 2009 each preclude a finding of disability; and
- c) Not everyone with a health problem or who has difficulty in finding and keeping a job is entitled to a disability pension.

ANALYSIS

Test for a Disability Pension

[26] 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.

[27] 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.

[28] 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

[29] Most Tribunal decisions concerning CPP disability benefit appeals follow a similar pattern. The Tribunal first analyzes the documentary evidence (and, if a hearing is held, any evidence from the hearing) to determine whether the Appellant had a severe disability on or by the MQP date. If that test is met, the Tribunal would consider whether the evidence supported a finding that the disability was also prolonged. If the disability is found to meet both the severe and prolonged criteria, CPP disability benefits are granted to the Appellant.

[30] Unfortunately, this particular matter does not follow the usual pattern. The Tribunal observed from the very earliest stage that a significant amount of evidence had been redacted. Other than the material at page GD2-51, it appears that the redacted information was all submitted by the Appellant. Furthermore, it also appears that the Appellant no longer has unredacted copies of the Redacted Pages. She even subsequently tried to submit copies of those pages to the Tribunal, but actually just submitted copies of the already-redacted pages.

[31] The redactions in this case were all made by the Respondent. However, with the exception of page GD2-51, the Respondent redacted information on documents filed by an adverse party. Even more worrisome is the nature of the information redacted. One of the redactions (at page GD2-62) was of a handwritten letter from the Appellant that was attached to her Questionnaire for CPP disability benefits. Another redaction (at page GD2-74) was of the Medical Report specifically prepared by the Appellant's doctor in support of her claim for CPP disability benefits. These redactions are not merely incidental: they are at the core of the Appellant's application and subsequent appeal. The other redactions (at pages GD2-85 and GD2-88) are more difficult to assess but were on medical reports submitted in connection with the Appellant's claimed disability.

[32] As a result of these redactions, the Tribunal is unable to render a decision based solely on the evidence made available to it. It simply does not have access to all of the evidence that the Appellant submitted. As this information is unavailable solely because of the actions of the Respondent, which is adverse in interest to the Appellant, the Tribunal must determine whether to draw an adverse inference against the Respondent. First, however, it will be useful to review whether the Respondent's refusal is justified.

Is the Refusal to Provide Unredacted Copies Justified?

[33] The Respondent was under a legal duty pursuant to section 26 of the *Social Security Tribunal Regulations* to file documents relevant to the reconsideration decision. Those documents were and continue to be in the Respondent's possession. The Tribunal gave the Respondent multiple opportunities to revise its position on the Redacted Pages or to submit binding authority that supported its position. In particular, the Tribunal:

1. requested unredacted copies of the Redacted Pages in a letter dated April 19, 2017;
2. convened a pre-hearing conference that ultimately took place on June 1, 2017 for the sole purpose of addressing the redactions;
3. issued an interlocutory decision on June 7, 2017 setting out the Tribunal's grave concerns about the ongoing refusal to provide unredacted copies of the Redacted Pages;
4. placed the appeal in abeyance for a period of three months to allow an opportunity to file unredacted copies of the Redacted Pages and/or make submissions justifying the Respondent's ongoing refusal; and
5. in a letter date September 14, 2017, gave until October 18, 2017 to file unredacted copies of the Redacted Pages and indicated that a decision would be made after that date.

[34] The Respondent has been given multiple opportunities to reconsider its position. It was also given multiple opportunities to make submissions on why it should be entitled to withhold information that was provided by a party that was adverse in interest. It cannot argue that it has not had an opportunity to respond to the Tribunal's concerns. The only specific authority identified by the Respondent in support of its position was the *Privacy Act*. The Respondent said it considered all of the redacted information to be personal information of a third party and it therefore would remain redacted pursuant to s. 26 of the *Privacy Act*.

[35] Section 26 of the *Privacy Act* states that a government institution may refuse to disclose any personal information requested under subsection 12(1) of the *Privacy Act* about an individual other than the individual who made the request. Section 26 also states that the government institution shall refuse to disclose such information where the disclosure is prohibited under section 8 of the *Privacy Act*. The Respondent is clearly not required to refuse disclosure for information requested under subsection 12(1): the use of the word "may" provides

the Respondent with discretion. The only compulsion exists where such disclosure is prohibited under section 8 of the *Privacy Act*.

[36] Subsection 8(1) of the *Privacy Act* states that personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with section 8 of the *Privacy Act*. However, subsection 8(2) of the *Privacy Act* sets out a number of situations where personal information can still be disclosed. As noted by the Tribunal at the Pre-Hearing Conference and its interlocutory decision on June 7, 2017, ss. 8(2)(a), (b), and (m) of the *Privacy Act* appear to permit the Respondent to disclose the information to the Tribunal without violating section 26 of the *Privacy Act*.

[37] Paragraph 8(2)(a) of the *Privacy Act* permits the disclosure of personal information “for the purpose for which the information was obtained or compiled by the institutions or for a use consistent with that purpose”. This clearly applies to the Respondent: the redacted information was collected for the purpose of assessing the Appellant’s eligibility for CPP disability benefits. This is the exact purpose of the Tribunal’s request for the redacted information.

[38] Paragraph 8(2)(b) of the *Privacy Act* permits the disclosure of personal information “for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure”. Again, the Tribunal is a statutory creation charged with adjudicating appeals concerning, among other things, eligibility for CPP disability benefits. Copies of the Respondent’s file were requested under s. 26 of the *Social Security Tribunal Regulations*, which requires disclosure of any documents relevant to the Respondent’s (reconsideration) decision. While the Respondent may not have specifically relied on the redacted sections in arriving at its decision, this does not mean that they are irrelevant. Indeed, it is difficult to imagine how a narrative account in the Appellant’s application materials or her doctor’s own words on the supporting medical report could not be relevant. In any case, the Tribunal cannot assess the relevance of the redacted information because the Respondent has not allowed the Tribunal to see the redacted information.

[39] Finally, paragraph 8(2)(m) of the *Privacy Act* permits the disclosure of personal information for any purpose where, in the opinion of the head of the government institution, “the

public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure” or where “disclosure would clearly benefit the individual to whom the information relates”. In this case, the information appears to relate (although the Tribunal, of course, cannot be sure) to the Appellant’s daughters. It would be reasonable for the Respondent to conclude that full disclosure of the redacted information could benefit one or all of her daughters, particularly as it has been suggested that the Appellant has had exceptional parental and caregiving obligations for her children. In addition, the public interest in disclosure would also be a compelling consideration, as there is a public interest in a fair adjudication of appeals concerning the provision of social security benefits.

[40] Nonetheless, it is not necessary for the Tribunal to place any reliance on paragraph 8(2)(m) of the *Privacy Act* for the purposes of this appeal. Paragraph 8(2)(m) is merely a statutory provision upon which it appears the Respondent could reasonably have relied if it had disclosed unredacted copies of the Redacted Pages.

[41] However, the provisions in paragraphs 8(2)(a) and 8(2)(b) of the *Privacy Act* appear to have been enacted for the express purpose of permitting disclosure in cases such as this one. In light of these two paragraphs, the Respondent’s purported reliance on the *Privacy Act* appears to take an incomplete view of the applicable legislation and of the reasons for the full disclosure of the redacted information to the Tribunal. The Respondent’s refusal to provide unredacted copies of the Redacted Pages therefore does not appear to be justified.

[42] The Tribunal made it clear from the outset that an adverse inference could be drawn if unredacted copies of the Redacted Pages were not provided. The Tribunal must now consider whether such an inference ought to be drawn in this case.

Adverse Inference

[43] In *Eli Lilly & Co. v. Nu-Pharm Inc.*, 1996 CarswellNat 2601, [1997] 1 F.C. 3 (FCA), the court drew an adverse inference against a pharmaceutical company when it failed to provide evidence of its manufacturing process, even though that evidence was within its knowledge. The court held that a claim for protection of trade secrets was not a reasonable explanation for withholding the evidence; rather, the correct procedure was to file the evidence with the court

and to seek a confidentiality order. In this case, the Respondent failed to file unredacted copies of the Redacted Pages and also failed to seek a confidentiality order. It merely maintained its reliance on the *Privacy Act*, despite having multiple opportunities to address the Tribunal's concerns.

[44] In other cases involving a potential adverse inference, factors considered by the adjudicative body have included consideration of whether the evidence was material, whether the party would reasonably be expected to present the evidence, whether the evidence was exclusively within that party's control, and whether a reasonable explanation had been given for not providing the evidence.

[45] In this case, the documents identified by the Tribunal were material to the issue of disability. Several of them were medical documents, and the Respondent had addressed the medical assessment of the Appellant's diabetes and other conditions in their reconsideration decision. The existence of complete medical documents is essential because much of the foundation for a finding of a severe and prolonged mental or physical disability is the medical history of an appellant (see *Villani v. Canada (A.G.)*, 2001 FCA 248, at paragraph 50, as well as subsection 68(1) of the *Canada Pension Plan Regulations*).

[46] Another redacted document was part of the Appellant's application materials in which she explained why she ought to be granted disability benefits. It is difficult to conceive of a document being more material than a narrative letter explaining in the Appellant's own words why she believes she is disabled.

[47] In addition to being material, the Redacted Pages were mostly submitted by the Appellant herself: she clearly wanted the redacted information to be considered by the Respondent and, ultimately, the Tribunal. It follows that the Respondent would reasonably be expected to provide that evidence to the Tribunal. For the one page that was not submitted by the Appellant, the redacted information was the Respondent's summary of information submitted by the Appellant. All of the evidence in question was solely within the Respondent's control: the Appellant even tried to submit it in response to the Tribunal's requests, but was unable to do so because she only had redacted copies. Her original, unredacted copies were in the hands of the Respondent.

[48] Finally, the Respondent does not appear to have provided a reasonable explanation for not providing the evidence. The Tribunal is satisfied that the Respondent, on a full reading of the applicable legislation, was not compelled to refuse disclosure of the Redacted Pages. It made a conscious decision to do so, despite being advised on more than one occasion of the legislative provisions permitting it to make such disclosure. The Tribunal also cannot rely on the Respondent's assertions that the withheld information is not relevant, if the Respondent does not provide unredacted copies to the Tribunal for its review.

[49] Accordingly, the Tribunal finds sufficient grounds to infer that the Respondent failed to provide relevant documents in its possession which it was obligated to file in unredacted form pursuant to section 26 of the *Social Security Tribunal Regulations*. In the circumstances of this appeal, it is reasonable to conclude that the Respondent could not maintain its reconsideration decision and prevail on appeal to the Tribunal except by withholding certain information on the Redacted Pages. Accordingly, the Tribunal finds that the Appellant had a severe and prolonged disability that commenced not later than December 31, 1999.

CONCLUSION

[50] The Tribunal finds that the Appellant had a severe and prolonged disability by December 1999, as the Tribunal inferred that evidence withheld by the Respondent would have supported the commencement of a severe disability on or before the expiry of the Appellant's MQP on December 31, 1999. 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 *Canada Pension Plan*). The application was received in May 2014: the Appellant is therefore deemed disabled in February 2013. According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability. Payments will therefore start as of June 2013.

[51] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security