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

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTGDIS 181

Tribunal File Number: GP-16-2853

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: November 20, 2017

DATE OF DECISION: November 27, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 13, 2015. The Appellant claimed that she was disabled because of chronic lower back pain. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on August 22, 2016.

[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).

[3] 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. [Record of contributions: GD2-23]

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

a) More than one party will attend the hearing;

b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;

c) There are gaps in the information in the file and/or a need for clarification; and

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.

[5] The following people attended the hearing:

A. B.: Appellant

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

ORAL EVIDENCE

Background

[7] The Appellant was 50 years old on the X, 2006 MQP; she is now 51 years old. She lives in a bungalow with her husband and their two sons ages X and X. She has no formal education after grade 12 and her employment history includes working as a fast food sales clerk, selling apples at an apple stand, and lastly working as a hospital kitchen aid. She has not worked since October 2014 and she is receiving Long Term Disability (LTD) benefits from Manulife.

The Accidents

[8] The Appellant was injured in workplace accidents in May 2013 and August 2014, and in a motor vehicle accident (MVA) in November 2016.

[9] She described the May 2013 in which she slipped on a mat, caught herself on a counter, and twisted her lower back. She felt like "someone had stabbed her in the lower back." She woke up the next morning in "excruciating pain" and wasn't able to go into work. She returned to work on "ease back" after a couple of weeks and completed a WCB Tier III rehabilitation program. In October 2013 the WCB forced her to go back to work on full duties. She couldn't "tolerate" the work and was missing two to three days a week: she used up her sick and vacation time to cover the days that she was missing. She was only able to work 5-10 minutes at a time, and she would then have to take a break and sit in a recliner.

[10] She described the August 2014 accident in which she pulled her back while she was standing on a stool and reaching to clean the grill. She was taken to the emergency department and after a few days returned to work on "ease back." She stopped working in October 2014 because the WCB wanted her to go back to full duties.

[11] The WCB discontinued her benefits when she wouldn't do a Tier III program. She couldn't do the Tier III program since it would have required her to drive 20 minutes for a physical program and then go to work. She stated that she had done this after she was initially injured, and she found it "very stressful and difficult".

[12] She described the November 2016 MVA in which the car in which she was a passenger was T-boned on the driver's side. After the MVA she started to feel pain on the left side of her neck going down her left arm, and her headaches worsened. This accident also exacerbated her chronic back pain.

Disabling Conditions

[13] The Appellant described her disabling conditions as follows:

- ***Chronic low back pain:*** She suffers from constant low back pain that radiates down her left leg. Her back pain keeps her from doing basic everyday things like washing the dishes and mopping the floors. She stated that she is in "excruciating pain" and when she tries to do anything it takes her much longer than it did before the accidents, and she has to continually stop and take breaks.

- ***Neck pain:*** Her neck has been sore and uncomfortable since the November 2016 MVA. She feels "pins and needles" in her lower arms and she has been told this relates to her neck injury.

- ***Physical limitations:*** Because of her back and neck pain she can't sit, stand, or walk for a long period of time. She has difficulty walking and her knees give out … she has fallen on steps on a few occasions.

- ***Headaches:*** She has experienced migraines for a considerable time and she takes Topamax when she has a headache. Her headaches have been worse since the November 2016 MVA. She stated that she gets headaches once a week and that they last for 10-15 minutes.

- ***Depression and anxiety:*** Dr. Wawer prescribed Cymbalta but she stopped taking it because it upset her stomach. She now takes Ativan about three times a week as needed. She often feels anxious and is especially anxious if she has to drive. She was seeing a counsellor when she was pursuing treatment through the WCB.

- ***Macular degeneration:*** She started having problems with her eyes in October 2016 and it took seven months for her to be able to see an ophthalmologist. She saw Dr.

Sivakumar on July 18 and November 3, 2017. At the outset of the hearing she read to the Tribunal a 2-page report from Dr. Sivakumar dated July 26, 2017 which diagnosed macular degeneration in both eyes. She has difficulty driving at night and Dr. Sivakumar has told her not to use an IPad or computer because the light is bad for her eyes. She is only able to read "a bit" because reading is hard on her eyes. The scan of her right eye had worsened on the November 2017 visit and she is to go back and see Dr. Sivakumar next February.

- ***Vertigo:*** She has had a few episodes where she suddenly became dizzy. She described an incident last year when she had a dizzy spell while getting out of a car. She was taken to the emergency department and the doctor gave her IV, diagnosed vertigo, and told her not to drive for ten days. When she has a dizzy spell she takes Serc and Gravol, and she won't drive. There has never been a suggestion by her medical doctors that her driver's license should be suspended.

- ***Hypothyroidism:*** She takes medication for this but it doesn't interfere with her ability to work.

Ongoing Treatment

[14] She takes medications prescribed by Dr. Wawer and Dr. Sivakumar, and she goes for physiotherapy and massage therapy twice a week for her back and neck. She stated that she finds this helpful. She uses a pump-up cushion for her lower back, an orthopaedic pillow, a TENS machine, a heating pad, and ice packs.

Usual Day

[15] She described her usual day. She ties to find something to do to keep "her mind occupied." She has to pace herself and continually take breaks. Her husband helps with the heavier household maintenance and she goes with him to the grocery store. He does all of the outside yard work and snow removal (they used to split this). She doesn't like to go out and socialize … she finds it very hard to go out for dinner or to a show. She no longer sends emails or uses her Facebook page because Dr. Sivakumar told her to stay off computers.

Alternate Work

[16] She hasn't looked for alternate work because she is very limited in sitting, standing, and walking. She stated, "I can't go back to work…I can't do simple tasks at home…how could I go back to work…it is not fair to my co-workers if I can't do a normal job at work."

MEDICAL AND DOCUMENTARY EVIDENCE

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

Disability Questionnaire

[18] In her disability questionnaire, signed on February 20, 2015, the Appellant indicated that she has a grade 12 education and that she last worked as a utility worker for the X from October 25, 2009 to October 29, 2014: she stated that she stopped working because she could not perform her duties. She did not indicate a date as of which she was claiming to be disabled.

[19] She described the illnesses or impairments that prevent her from working as follows:

> Chronic pain in my lower back. Standing, walking and sitting are limited. Every step is an effort like someone stabbing you. Radiating pain down left leg. Muscle spasms in lower back.
>
> I can only stand or walk for 15-20 minutes at a time. Then I would have to have a seat or even lay in a recliner. How is this [sic] possible to keep my job when I can't perform it.

[20] She stated that chronic migraines and an underlying thyroid were her other health-related conditions or impairments. [GD2-427 to 429]

Limitations

[21] She described limitations in sitting/standing, walking, lifting/carrying, reaching, and bending; some difficulties with her personal needs such as washing her hair and getting dressed; limitations with cooking, housework, and shopping; occasional memory and concentration problems because of constant pain; broken sleep; and that she is only able to drive for 15-20 minutes. [GD2-430

Medical Reports

Dr. Wawer, family doctor

[22] On May 11, 2015 Dr. Wawer reported to Manulife that the Appellant has tried her best to cooperate with the Tier III program and attain its goals but has been unable to do so, and that she found that the WCB was causing her psychological distress and anxiety due to their confrontational manner and their repeatedly putting her back in the same program that had previously failed. [GD3-4]

[23] On May 28, 2015 Dr. Wawer reported to the WCB that the Appellant was not capable of performing the tasks necessary for completion of a Tier III program. [GD2-90]

[24] On September 18, 2015 Dr. Wawer completed the initial medical report in support of the disability application. He diagnosed chronic lower back pain, described the Appellant's workplace injury in May 2013, described her return to work attempts and her reinjuring herself, described her physical findings and functional limitations, and detailed the extensive treatment that she has undergone as well as her current medications. His prognosis was poor and he stated that the Appellant "has been having pain and disability since 2013 despite maximal therapy and management. I do not feel that she is likely to return to the workforce." [GD2-375 to 381]

[25] On October 13, 2015 Dr. Wawer reported to Manulife that the Appellant had ongoing low back pain; that she has pain with ambulation and with sitting; that she walks with an antalgic gait; that she has difficulty with performing many ADLs; that she is in constant pain; and that she finds it difficult to enjoy any form of physical activity. [GD3-5]

[26] On May 16, 2016 Dr. Wawer reported to Service Canada that the Appellant has been unable to work as a result of her low back injury sustained at work; that she has undergone multiple episodes of physiotherapy as well as treatment by the X Spine and Pain Institute; that she has also received medications on several occasions with no great improvement in her symptoms; and that she had attempted to return to work in the past but, unfortunately, was not successful in continuing on at her work. He stated that she suffers from chronic low back pain made worse with ambulation and bending; that she also has problems with prolonged sitting and cannot stay in the same position for too long; that she also suffers from knee pain due to

osteoarthritic changes; and that she suffers from anxiety and depression due to her ongoing chronic pain. He concluded that there is not active treatment for the Appellant since all usual treatment plans have been exhausted and that in his opinion "she remains disabled and unable to return to the work force and I do not see that she will be able to do so at all anytime in the future." [GD2-270]

[27] In a WCB physician's report dated June 26, 2016 Dr. Wawer diagnosed chronic low back pain with sacroilitis and knee pain. He noted that the Appellant was not working; that no transitional duties were available; and that she was currently capable of sedentary work. [GD1-8]

[28] On January 30, 2017 Dr. Wawer reported to the Tribunal that the Appellant continues to be disabled because of her ongoing lower back and neck pain; that this has been ongoing since her workplace injury; that as a result of her chronic pain she also suffers from depression; and that her situation has been made worse by her having been diagnosed with macular degeneration and being involved in a MVA in November 2016 which caused further injury to her neck and lower back. He concluded:

> There is no question in my mind that this is a prolonged problem that is not improving and is very unlikely to improve. It is also a severe problem as it does inhibit her from performing many of her ADL's and certainly decreases her enjoyment of life. This chronic pain and disability is playing havoc with her mental state and she certainly is depressed and has difficulty dealing with her situation.
>
> I am certain she meets the qualifications for prolonged and severe disability and I certainly support her application for Canada Pension.

Physiatrists & Injections

[29] On September 11, 2013 Dr. Watt opined that the Appellant's low back pain is primarily a facet joint related problem. He referred her to Dr. Koshi for facet joint blocks. [GD2-217]

[30] There are reports from Dr. Koshi running from October 2013 to September 2014. He performed a series of bilateral L4-5 and L5-S1 facet joint injections as well as a left intraarticular sacroiliac joint injection.

[31] On November 4, 2013 Dr. Koshi reported that the Appellant had a borderline response to the facet joint injections. [GD2-229]

[32] On January 6, 2014 Dr. Koshi called the Appellant to determine the effectiveness of injections on December 4, 2013. The Appellant reported at least 80% pain relief and was happy with the results of the injections. [GD2-25]

[33] On July 9, 2014 Dr. Koshi saw the Appellant in follow up because her pain had returned. He recommended a left intraarticular sacroiliac joint injection because on examination her pain was more in keeping with left sacroiliac pain. [GD2-105]

[34] On July 15, 2014 Dr. Koshi called the Appellant at home and she reported that she only had 10% relief from the sacroiliac joint injection. [GD2-99]

[35] On September 9, 2014 Dr. Koshi called the Appellant at home and she reported that she had just started to feel some changes in her pain from the August 22, 2014 bilateral L4-5 and L5-S1 radiofrequency denervation of the facet joints. [GD2-110]

Dr. Bryson, psychologist

[36] On June 3, 2014 Dr. Bryson reported on his psychological assessment of the Appellant. She was working modified hours on "ease back." He recommended 12 cognitive behavioural treatment sessions and indicated that her prognosis was good. [GD2-91]

[37] On June 18, 2014 Dr. Bryson reported that the Appellant continued to limit her activities due to her pain symptoms which she feels unable to effectively manage; that she was encouraged to complete activities to the best of her ability; that she was an active participant in session; and that she making slow progress towards Return to Work. [GD2-296]

[38] On July 16, 2014 Dr. Bryson reported that the Appellant was making fair progress in pain management, return to work, and psychological functioning; that she remained quite pain and disability focused; and that she cites her pain as an ongoing barrier to returning to full hours and full duties. He stated that there remained a fair to good prognosis for her achieving her treatment goals. [GD2-101]

[39] On June 30, 2014 Dr. Bryson reported that the Appellant continues to struggle with active management of pain; that she was not receptive to treatment in a Tier III program which she described as having been "brutal"; and that she had returned to work on "ease back" on July 29,

2014. When asked about barriers to her returning to work the Appellant stated, "I'm going to go as long as I go, until I can't handle the pain anymore. I don't have any plans." [GD2-106]

[40] On August 26, 2014 Dr. Bryson reported that the Appellant had a new injury when she slipped on ice when walking into a freezer on August 15th. He stated that the Appellant reported an exacerbation of her current symptoms such that she has decreased her current activities. He further stated that given "her ongoing perception with perceived symptoms, her self-reported slow progress regarding RTW at full hours and full duties, [and] her focus on disability and effective pain management, it is recommended that she be referred for a Tier III assessment." [GD2-116]

Workers Compensation Board (WCB)

[41] A WCB physical abilities assessment report in September 2013 concluded that the Appellant was demonstrating overall functional tolerances within the sedentary workload classification, with some light workload abilities. [GD-117]

[42] On March 5, 2015 Dr. Milburn, from CBI Rehab, reported on his Tier III medical assessment of the Appellant. He noted that the Appellant had attended their program in 2013 and that she had finished in October 2013, and that she was deemed capable for work at that point. The Appellant complained of "constant, unremittent, disabling low back pain." She felt disabled by the pain and that she was not capable of going to work. He reported that the Appellant "stormed out of the office" after a disagreement with him. He stated:

> In speaking with her today, she makes it abundantly clear that she has no intention of going back to work. She feels quite justified in being off with her pain, which she feels is special from other people's low back pain. She feels that her pain is a specific disability that would not allow her to go back to work in any circumstances. She said that she would be going back to work only if her pain was cured.
>
> This lady was not only resistant to the suggestion that pain is not a disability and that we could help her back to work, but was actually quite angry and left the office in quite a huff.
>
> She is clearly not a reasonable Tier 3 candidate. Her mind is made up about her pain. She tells me that she is getting support from her family doctor on being disabled due to non-specific pain. She is not at all open to the idea of trying to function better despite her discomfort.

> As such, there is nothing that a Tier 3 program could provide her to increase her function or encourage return to work.
>
> From a medical point of view, this lady has no specific findings. She has a benign MRI and bone scan. Her lack of response to injections indicates no specific physiologic source of her pain. Rather, I believe that the source of her disability is much more based in her attitude and approach to dealing with her pain. [GD2-56]

[43] A WCB Functional Capacity Evaluation report dated March 9, 2015 stated that the overall test findings, in combination with clinical observations, suggest that considerable question should be drawn to reliability and accuracy of the Appellant's reports of pain and disability, and that she demonstrates overall functional tolerances within the sedentary work classification. The report also stated that she is currently not a functional match for her occupation as a dietary aide; that she has a current estimated workday tolerance of four hours, within her demonstrated functional abilities; and that due to her self-limiting during the Functional Capacity Evaluation due to reported pain, this is not likely indicative of her maximal functional abilities. [GD2-68]

SUBMISSIONS

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

a) She suffers from a severe physical disability;

b) Her family, mental, financial, physical and social wellbeing have been severely affected;

c) She has pursued extensive treatment and unsuccessfully attempted to return to work;

d) There is no improvement in sight.

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

a) While the Appellant may not be able to perform the tasks of her former employment, she has not tried lighter alternate work;

b) The medical evidence does not show any serious pathology of impairment which would prevent her from doing suitable work within her limitations;

c) The Minister does not dispute the Appellant's pain experience, but it is not to a degree that would preclude her from all forms of substantially gainful work activity;

d) The Appellant demonstrated misperceptions of her condition and a disability mind set;

e) Since the Appellant has mechanical back pain, without evidence of significant underlying pathology, there is no medical reason to preclude her from regularly performing substantially gainful work

f) She has not tried alternate light to sedentary suitable work which would support or refute her disability claim. Further, sub maximal effort on functional testing makes it very difficult to measure or justify true disability. Her self reported limitations in the absence of pathology, do not support that she is disabled as per the CPP legislative criteria.

ANALYSIS

Test for a Disability Pension

[46] 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.

[47] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[48] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

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

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

[51] The severity requirement must be assessed in a "real world" context (*Villani* 2001 FCA 248). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

Severe

[52] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2016 she was disabled within the definition.

[53] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation (*Villani, above)*.

[54] The Appellant testified in a somewhat halting manner, she required several breaks, and she displayed symptoms of pain by continually switching between standing and sitting positions. She also appeared to have a somewhat flat and distracted aspect. The Tribunal felt that this was genuine and that the Appellant was not attempting to feign or exaggerate her symptoms. Although she had some memory problems she was a fairly good historian. The Tribunal found the Appellant to be a credible witness and accepts her oral evidence as being truthful and accurate.

Multiple Disabling Conditions

[55] 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* 2011 FCA 47). Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[56] There is no authorative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real: *Nova Scotia (Worker's Compensation Board) v Martin* [2003] SCC 54.

[57] The Appellant's primary disabling condition is her longstanding chronic back pain which stems from her initial May 2013 accident and was exacerbated by her August 2014 and May 2016 accidents. In addition, she has suffered from chronic neck pain since the November 2016 MVA. It is clear that the Appellant has pursued extensive treatment including WCB programs, physical therapy, psychological counselling, and injections without success. Although there are limited objective findings the Tribunal is satisfied that she is "suffering and in distress", and that the disability she is experiencing is "real." As a result of her chronic pain she has significant limitations in sitting, standing, and walking.

[58] Further, a result of her long-standing chronic pain she has developed anxiety and depression. She has gone for counselling through the WCB and has taken anti-anxiety and anti-depressant medications prescribed by her family doctor. In his January 30, 2017 report (paragraph 28, above) which was only one month after the MQP, Dr. Wawer reported to Service Canada that her chronic pain and disability "is playing havoc with her mental state and she certainly is distressed and has difficulty dealing with her situation." This is consistent with the Tribunal's impression of the Appellant during the hearing.

[59] Another significant disabling condition is her macular degeneration which has been causing eye problems since October 2016. This creates additional barriers to employment since she has difficulty driving at night, her ophthalmologist has told her not to use an IPad or

computer because the light is bad for her eyes, and she is limited in reading because it is hard on her eyes.

[60] The Tribunal has considered the cumulative effect of her multiple conditions and is satisfied that they when considered in their totality they are severely disabling. She cannot pursue "with consistent frequency any truly remunerative occupation" (see *Villani*, above): she could not be a regular and reliable employee.

The WCB Reports

[61] The Tribunal is mindful of the WCB reports that question the reliability and accuracy of the Appellant's reported pain and disability and are critical of her unwillingness to return to a Tier III program. The Tribunal, however, prefers the reports of Dr. Wawer, her long-standing family physician, who knows her best and is strongly supportive of her claim for disability. His reports confirm her multiple conditions, that she has diligently pursued extensive treatment, that she made genuine efforts to continue working after her accidents despite her pain and depression, and that that her condition is unlikely to improve.

[62] The Tribunal attaches little weight to Dr. Wawer's June 26, 2016 WCB report (paragraph 27, above) in which Dr. Wawer noted that the Appellant was capable of sedentary work: he was merely checking a box on a WCB form and this notation conflicts with his numerous other detailed reports. Further, the Tribunal relies on its impression and observations of the Appellant at the hearing at which it found her to be genuine, and that she was not exaggerating or feigning her symptoms.

[63] The Appellant sincerely believes that she suffered during the Tier III program in 2013 and it is not reasonable to expect her to once again pursue such a program. The Tribunal noted Dr. Wawer's May 2015 reports (paragraphs 22 & 23, above) which stated that she found that the "WCB was causing her psychological distress and anxiety due to their confrontational manner and their repeatedly putting her back in the same program that had previously failed" and that she "was not capable of performing the tasks necessary for completion of a Tier III program."

Severity Determination

[64] The Tribunal finds that the Appellant has established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[65] Having found that the disability is severe, the Tribunal must also make a finding on the prolonged criteria.

[66] The Appellant's disabling conditions have persisted for many years. Despite extensive treatment there has been little improvement.

[67] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[68] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2014, when she last worked. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of February 2015.

[69] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security