



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. P. v. Minister of Employment and Social Development*, 2017 SSTGDIS 191

Tribunal File Number: GP-16-3433

BETWEEN:

S. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: David Somer

HEARD ON: December 6, 2017

DATE OF DECISION: December 8, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's current application for a *Canada Pension Plan* (CPP) disability pension on May 4, 2016. The Appellant claimed that she was disabled because of her constant dizziness following surgery in 2002. 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, 2004 under the late applicant provision.

[3] This 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) The issues under appeal are complex.
- d) There are gaps in the information in the file and/or a need for clarification.
- e) A Spanish interpreter will be required preferably on site.

[4] The following people attended the hearing:

S. P., Appellant

M. P., Witness, Husband of the Appellant

Paul Sacco, Representative for the Appellant

Christina Palido-Vielma, Interpreter in the Spanish Language

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

PRELIMINARY ISSUES

[6] The appellant previously applied for CPP disability benefits in May 2006 and January 2010. The 1st application was denied at the initial level and the 2nd application was denied at both the initial level and at reconsideration.

EVIDENCE

[7] The appellant was 54 years of age at the time of her current application. She has a grade 6 education and stopped work in June 2002 due to tiredness, depression, headaches, inability to focus and entire body pain. She came to Canada with her husband in 1988 from Nicaragua where she worked in her family business.

Questionnaire

[8] In the questionnaire submitted with her application, the appellant described her disabling conditions as tiredness, depression, headaches, inability to focus, constant body pain and an inability to leave her home. Her other medical issues are high blood pressure and obesity. She claimed that it was impossible to stand, bend, lift or carry. She has limited walking due to knee pain and limited reaching. She requires help with her personal needs and household chores. She has very severe issues with memory and is unable to think straight due to pain and headaches. She is unable to drive or take public transit.

Oral Testimony of the Appellant

[9] The appellant testified that she began to feel a bump growing on the left side of her head in 1998/99. It grew gradually and then eventually disappeared. Her family physician thought it was a gland but thought that it was unusual in that location. She developed dizziness and often

had to leave work as an office cleaner early. The bump started growing again, one to one and a half years after the 1st time. She went for a CT scan and saw a neurologist who confirmed that it was a tumor after doing a biopsy in November 2002. She required urgent surgery from which she has never recovered and still has not recovered.

[10] The appellant stated that a membrane was removed from right leg during her surgery. This affected her walking and she can no longer walk for long distances. Her sleep is affected by her leg pain. She sometimes uses a cane. She now has back and neck pain and her left arm feels numb. She always feels very drowsy. She still has her dizziness constantly.

[11] The appellant reported that in 2004, she had help at home from a friend until a family member came home. She lives in a townhouse with her husband. They sleep in separate bedrooms.

[12] The appellant claimed that she felt she could never return to work. She has never applied for any other job. She takes medication for her migraine headaches as well as amitriptyline to help her sleep. She is also prescribed Invocana for her diabetes.

[13] The appellant testified that she 1st saw a psychiatrist in 2013 and attended 3-4 times. She took Cymbalta for about one year and stopped because it was not helping anymore. Although the psychiatrist recommended counseling, she was never referred for counseling.

[14] The appellant stated that she sees her family physician on monthly basis regarding pain and diabetes. She has constant frontal headaches which vary in intensity. She also has pain in her back.

[15] The appellant testified that she could not work after 2004 because of constant dizziness following her surgery.

Oral Testimony of the Witness, husband of the Appellant

[16] The appellant's husband testified that he was 56 years of age and he has been married to the appellant for 35 years. He is no longer working due to a WSIB injury 7 years ago.

[17] The witness stated that before her surgery, his wife was very responsible and a hard worker as well as being a good employee. They have 3 children ages 36, 34 and 26. She stopped working in 2002 after her surgery. She changed in her interactions with him including a loss of interest in sex. She suffers from dizziness and became aggressive. She was also forgetful and left the stove on 3 separate occasions. As a result, she no longer does any cooking. She became easily confused and could not tolerate noises. She also felt that she was suffocating around groups of people. She lost her interest in social life and going to church. She stopped doing housework.

[18] The witness testified that her condition has worsened since 2004. She is not capable of returning to work.

Medical Evidence

[19] In the initial medical report for the current application dated April 28, 2016, Dr. L. Alexov, family physician, diagnosed the appellant with obstructive sleep apnea, morbid obesity, hypertension, osteoarthritis and depression. She has a history of chronic pain, fatigue, joint/muscle pains and feels lightheaded most of the time. She is less active and not sleeping well and is depressed. Examination findings/limitations show her to be morbidly obese. She has osteoarthritis of her knees with tender medial joint lines and patellar swelling. Her chest is clear and she has a protuberant abdomen. She has weakness in her left eye. She is prescribed Endocet, Baclofen and Naprosyn

[20] Dr. Alexov opined that her condition is guarded. Dr. Alexov has known the appellant for 20 years and began treating her for her main medical condition in March 2009.

[21] The appellant was examined on August 21, 2006 by Dr. Dindar, neurologist, regarding right upper limb symptoms and a one-year paresthesia of her index finger. There is no muscle wasting and sensory and motor exam was normal. Her neck movements were also normal. A right median nerve study was completely normal. She has the clinical features of a C6 or C7 radiculopathy. In a follow-up on January 10, 2007, Dr. Dindar reported that an MRI of the cervical spine showed an osteocartilaginous bar at C4-C5 and C6-C7. There is some spinal

stenosis but no cord signal change. It is likely that her symptoms are from her neck. She does not require a surgical consult. She should avoid aggravating head/neck movement.

[22] On August 12, 2009, Dr. Gawel, neurologist, reported that the appellant's right hip is normal. Her headaches continue and amitriptyline helps. A CT scan shows no recurrence of a tumor. Maxalt was prescribed for her headaches.

[23] The appellant was examined on April 18, 2011 by Dr. Fazi, neurosurgeon, who reported that she was doing quite well with no seizures and no neurological complaints. She has a history of headaches and is on amitriptyline. Her initial surgery occurred in 2002. A repeat CT scan of the brain showed no recurrence of meningioma. Her examination was completely unremarkable.

[24] A July 22, 2013 report from the sleep disorders clinic show that the appellant did well with CPAP. She was obese and was advised to lose weight.

[25] The appellant underwent a psychiatric assessment on August 13, 2013 by Dr. E. Elliott, psychiatrist, regarding long-standing dysthymia plus weight gain as well as difficulty finding and keeping a job. She is supported through her husband's income and ODSP. She has been in an abusive marriage for 33 years. She has been depressed throughout her marriage and her depression became worse after the brain surgery in 2002. She has a long history of depressed mood and has been taking amitriptyline for 8 years. Her mental status examination showed her to be appropriate and cooperative. Her speech was normal and she had no thought disorder or perceptual abnormality. There is no psychosis. Dr. Elliott diagnosed her with depression, chronic, generalized anxiety disorder and chronic pain. She would benefit from Cymbalta, individual short-term therapy and counseling on women's issues.

[26] On June 24, 2014, Dr. Yasser, general surgery/surgical oncology, reported that the appellant has had right lower quadrant pain for a few months and suspected that she had neuropathic pain from arthritis.

[27] In the appellant's 1st application dated May 23 2006, Dr. Alexov diagnosed the appellant with meningioma, migraines, chronic sinusitis and chronic mechanical back pain. Dr. Alexov noted that she had limitations in regard to headaches, fatigue, concentration and ptosis of the left side. Her physical exam was essentially normal and she was on no medications. Her prognosis

was good. Also from her 1st application, Dr. Gawel, neurologist, reported that her meningioma was originally diagnosed in 2002 and she underwent a craniotomy in 2002 with the normal follow-up exam. A CT scan showed no tumor recurrence in 2004. She has some memory problems. An EEG showed mild dysthymic changes. The appellant had not been seen by Dr. Gawel since September 2004.

[28] In the appellant's 2nd application dated January 28, 2010, Dr. Alexov diagnosed the appellant with abnormal tension glaucoma, meningioma resected 2002 and major depression along with the memory deficit. There was C6 radiculopathy. Her physical exam was unremarkable and she showed mild memory deficits. She is prescribed Elavil, Maxalt and Cymbalta. Her prognosis is good. Also from her 2nd application, Dr. Fazi, neurosurgeon reported that the appellant had some recent memory deficit and mild headaches on the left side where she had the previous craniotomy. The CT scan of her brain was completely unremarkable and there is no recurrent tumor and no other pathology.

[29] In a medical assessment dated November 15, 2017 Dr. Alexei completed a questionnaire in which he stated that the appellant continued to suffer from her condition prior to December 2004 and her condition would be considered severe. Her condition is considered long-term/prolonged and she was incapable of working in any job as a result of her condition from 2002 to 2004.

SUBMISSIONS

[30] The Appellant's representative submitted that she qualifies for a disability pension because:

- a) She suffered from a severe and prolonged medical condition before her MQP of December 31, 2004.
- b) Side effects from her surgery in 2003 prevented her from working since that time.
- c) Office notes from the family physician dated November 15, 2017 report that she is incapable of working. Clinical notes from March 8, 2003 show that the appellant tires very easily when doing activities of daily living. In a clinical note dated April 14,

2003 it was reported that the appellant suffers from PTSD as result of traumatic surgery and she is not ready to return to work.

- d) In her 1st application, Dr. Alexov diagnosed her with migraines, chronic back pain and chronic headaches mixed in nature. He reported that she had difficulty with concentration and fatigue.
- e) She would not be able to return to work because of her poor concentration and the fact that she is not even able to perform activities of daily living without support.
- f) Her condition has not changed very much since the time of her MQP.
- g) She meets the CPP criteria of severe and prolonged.

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

- a) The appellant bases her disability claim on fatigue, depression, headaches, inability to think or focus and pain over her entire body all the time. While the appellant feels that she is unable to work, the evidence is not show any severe pathology or impairment which would have prevented her from performing suitable work within her limitations as of December 31, 2004. The evidence will show that the appellant had surgery for her benign tumor in 2002; however, she has had no evidence of recurrence.
- b) The appellant indicated that she was last employed as a cleaner until June 2002 when she stopped working due to a severe medical problem. She felt that she could no longer work as of June 2002.
- c) In the initial medical report for the current application dated April 28, 2016, Dr. L Alexov, family physician, diagnosed the appellant with obstructive sleep apnea, morbid obesity, hypertension, osteoarthritis and depression. Treatment included Endocet, Baclofen and Naprosyn. The appellant has an MQP of December 31, 2004 and many the above conditions were not present or identified at that time, nor would conditions such as hypertension, obstructive sleep apnea and stress typically be considered severe conditions which would preclude all suitable work. Moreover, the information provided in Dr.

Alexov's report is dated 12 years after her MQP and would have no bearing on her ability to work at that time.

- d) When the appellant 1st applied for CPP disability benefits in May 2006, she had undergone surgery for removal of a benign meningioma. Her family physician reported at that time that she had chronic headaches, fatigue and some problems with concentration, however she was under no active treatment and he felt that her prognosis was good. There is no indication that the appellant's attempted to return to any type of work, despite there being no evidence of recurrence to date. It is important to note, that this report is dated in December 2005, only one year after the appellant's MQP and as such would be considered an accurate reflection of her condition and limitations at the time.
- e) Dr. M. Fazi performed the surgery and according to the discharge summary prepared on December 9, 2002, there were no complications during surgery; however, postoperatively she developed dysphagia due to dissection of the tumor from the frontal lobe over the speech area. Upon re-examination in January 2003 Dr. Fazi stated that her speech improved and there is no evidence of dysphagia and overall he felt that the appellant had done extremely well and was happy with the progress. Dr. Fazi continued to follow the appellant for another 2 years. While she complained of some residual memory issues and mild headaches, he did not detect any significant clinical findings and her investigations did not reveal any evidence of recurrence. On April 18, 2011, Dr. Fazi reported that the appellant was doing quite well with no seizures or any neurological complaints. He stated that she had a history of headache for which she was prescribed amitriptyline. Her examination was completely unremarkable and the CT scans showed no recurrence.
- f) In August 2009, Dr. Gawel. Neurologist reported that the appellant continues to have headaches but she benefited from taking amitriptyline. He added that she gone to the emergency room with extremely severe headache a CT scan was ordered which showed no recurrence of the tumor. Dr. Gawel prescribed Maxalt to take during exacerbations. This information does not support a severe disability. According to the most recent neurosurgeon report in 2011, the appellant had not had any seizures. It is the capacity to work and not the diagnosis or disease description that determines the severity of the

disability under the CPP. It appears that the appellant's headaches are effectively managed with medication and there is no indication of active seizures. As such, it will be difficult to render the appellant disabled from all work based on the evidence related to these conditions.

- g) On August 21, 2006, Dr. F. Dindar, neurologist, assessed the appellant regarding her right upper limb symptoms as well as right-sided neck pain. He reported that her electrodiagnostic studies were normal; however, he felt she had clinical features indicative of right C6 or possibly C7 radiculopathy. On January 10, 2007 Dr. Dindar reported that the MRI scan revealed some spinal stenosis but no change in her spinal cord signal. He presumed that the sensory symptoms she had in her hand were coming from her cervical spine but she did not require any surgical consideration. Of note, while the appellant may have some limitations as a result of the above findings, the symptoms would not preclude all work. More importantly, this information is dated after the appellant's MQP and as such would have no bearing on her ability to work as of December 31, 2004.
- h) The sleep clinic report dated July 22, 2013, showed that the appellant was doing very well on her CPAP machine. She felt more energetic, was able to sleep better and exercise more in the daytime to help her lose weight. This information does not support a severe condition precluding the appellant from all work at her MQP.
- i) The appellant underwent a psychiatric assessment on December 2013 with Dr. Esther Elliott regarding a long-standing history of dysthymia, significant weight gain and difficulty finding keeping and keeping a job. Dr. Elliott diagnosed her with chronic depression, generalized anxiety disorder and chronic pain. Dr. Elliott concluded that the appellant presented with a history of depression, marital problems, chronic pain and social isolation and felt that she would benefit from a trial Cymbalta as well as short-term therapy and community counseling services on women's issues. Again, this information stated well after the appellant's MQP and while a long-standing history of dysthymia is noted, there is no information support a severe psychiatric condition as of December 31, 2004.

- j) Dr. L Alexov, family physician, responded to a questionnaire submitted by the appellant's representative. In November 2017, well past the appellant's MQP, Dr. Alexov opined that the appellant's condition was severe and prolonged and as well, he noted that she was incapable of working between 2002 on 2003. He provided his office visit notes between 2002 and 2003; however, these notes are mostly illegible other than pointing out that the appellant had regular visits with her family physician. Nonetheless, an opinion many years after the MQP and in the absence of correlating clinical evidence does not support that the appellant had a medical condition that was disabling as of her MQP and continuously thereafter.
- k) In the end, the main question is whether the appellant has proven that she suffered from a severe and prolonged disability by the expiry of her MQP of December 31, 2004 and continuously thereafter. If she has not done so, it is irrelevant if her condition should deteriorate after that date. The appellant underwent surgery for removal of a benign meningioma December 2002. She was followed by specialists who remained pleased with her progress. While she reports some residual symptoms in terms of mild memory deficits and headaches, there is no information or clinical examination findings to suggest these lingering issues would have precluded her from suitable work. Many of her remaining conditions were not identified until after her MQP, nor would they be considered severely disabling. Her initial assessment by the psychiatrist was not until December 2013. At her MQP, the appellant was only 43 years old, yet there is no indication she has attempted to return to any type of work, school or retraining. Although the appellant has not worked since 2002 and her conditions may have progressed with advancing age, the whole of the medical evidence provided does not support that she was precluded from all types of suitable work by any of her medical conditions as of her MQP. It is the Minister's position that upon review of the medical evidence, the appellant has not proven that she suffered from a severe and prolonged disability prior to the expiration of her MQP of December 31, 2004.

ANALYSIS

Test for a Disability Pension

[32] 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.

[33] 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.

[34] 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

[35] The Tribunal is satisfied that the evidence establishes that the appellant did not have a severe disability on or before December 31, 2004.

[36] The appellant stopped work as an office cleaner in June 2002 due to tiredness, depression, headaches, inability to focus and entire body pain. The evidence shows that she underwent surgery to remove a benign meningioma January 2003. Subsequent examinations from various specialists as well as diagnostic imaging showed that she had no recurrence of the tumor.

[37] In the initial medical report dated April 28, 2016, Dr. L. Alexov, family physician, diagnosed the appellant with obstructive sleep apnea, morbid obesity, hypertension, osteoarthritis and depression. Treatment included Endocet, Baclofen and Naproxen. Many of these conditions were not present at the time of her MQP of December 31, 2004. The Tribunal concurs with the

Minister's submission that these conditions such as hypertension, obstructive sleep apnea and stress would be considered severe conditions which would have precluded all suitable work at the time of her MQP. Also, the minister points out that the information provided in Dr. Alexov's report is dated 12 years after her MQP and would have no bearing on her ability to work at that time.

[38] When the appellant 1st applied for CPP disability benefits in May 2006, her family physician reported that at that time she had chronic headaches, fatigue and some problems with concentration; however, she was under no active treatment and he felt that her prognosis was good. There is no indication that the appellant attempted to return to any type of work, despite there being no evidence of a recurrence of the tumor to date. This report is dated December 2005, which is only one year after the appellant's MQP and as such it would be considered an accurate reflection of her condition and limitations at the time.

[39] Dr. Fazi, neurosurgeon, continued to follow the appellant for many years after her surgery. On April 18, 2011, Dr. Fazi reported that the appellant was doing quite well with no seizures or any neurological complaints. He stated that she had a history of headaches for which she was prescribed amitriptyline. Her examination was completely unremarkable and the CT scan showed no recurrence of the tumor.

[40] In August 2009, Dr. Gawel, neurologist reported the appellant continues to have headaches but she benefited from taking amitriptyline. He prescribed Maxalt to take during exacerbations. The information from Dr. Fazi and Dr. Gawel does not support a severe disability. Her headaches are effectively managed with medication and there is no indication of active seizures.

[41] In August 2006 and January 2007, the appellant was assessed by Dr. Dindar regarding right upper limb symptoms as well as right-sided neck pain. Her electrodiagnostic studies were normal; however, Dr. Dindar felt that the appellant had clinical features indicative of the right C6 or possibly C7 radiculopathy. An MRI scan revealed some spinal stenosis but no change in the spinal cord signal. This information is dated after the appellant's MQP and as such would have no bearing on her ability to work as of December 31, 2004.

[42] Information from the sleep clinic dated July 22, 2013 did not show any condition precluding the appellant from all work at her MQP.

[43] The appellant underwent a psychiatric assessment in December 2013 by Dr. Esther Elliott. Dr. Elliott diagnosed the appellant with chronic depression, generalized anxiety disorder and chronic pain. This information is dated well after the appellant's MQP. While the appellant has a long-standing history of dysthymia, there is no further information to support a severe psychiatric condition. The appellant testified that she saw Dr. Elliott 3-4 times, but no further reports from Dr. Elliott have been provided and there is no indication that she attended counseling services or any other type of mental health therapy. Again, this information is dated well after the appellant's MQP and does not indicate that she suffered from a severe mental health condition as of her MQP.

[44] The family doctor did not diagnose sleep apnea, obesity, hypertension depression or osteoarthritis in the 1st application in 2006. Depression was diagnosed only in the 2nd application in 2010. All these conditions are long after the appellant's MQP and as such, would not have precluded the ability to work at the time of her MQP of December 31, 2004.

[45] As late as 2011, examinations and diagnostic imaging showed that there was no recurrence of the appellant's tumor. Therefore, the Tribunal concluded that medical condition regarding the meningioma which was surgically removed many years earlier is no longer a medical condition which would preclude all suitable gainful employment at the MQP, the present time or in the foreseeable future.

[46] Dr. Alexov's opinion, in a questionnaire dated November 2017, submitted by the appellant's representative, stated that the appellant's condition was severe and prolonged and she was incapable of working between 2002 and 2003. This opinion is many years after the MQP and as the Minister submitted, in the absence of correlating clinical evidence, does not support that the appellant had a medical condition that was disabling as of her MQP and continuously thereafter.

[47] The testimony of the appellant's husband is compelling but it does not necessarily reflect the appellant's conditions at the time of her MQP of December 31, 2004.

[48] 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 was only 43 years of age at the time of her MQP. She has only a grade 6 education and her speaking, reading and writing skills in English are poor. She worked as a cleaner for many years and it is unlikely that she developed any significant transferable skills from her work experience. Keeping in mind the appellant's personal circumstances, the tribunal has concluded that her personal circumstances would negatively impact on her ability to seek and, if necessary, retrain for part-time employment. However, the Tribunal has determined that the appellant retained residual work capacity at the time of her MQP.

[49] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The Tribunal has concluded that the appellant's medical conditions did not make her incapable of regularly pursuing any substantially gainful employment at the time of her MQP.

[50] 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 testified that she did not attempt to return to work or look for alternative employment when she stopped working in June 2002. Therefore, the Tribunal cannot determine from the evidence before it that the appellant was unsuccessful in obtaining or maintaining employment by reason of her health condition if she never attempted to look for alternative employment. *Inclima* states that there is an obligation to pursue alternative employment when the appellant retains the residual capacity to do so. In this case, the Tribunal is satisfied that the appellant had the capacity to seek alternative employment but failed to meet her obligation as set out *Inclima*.

[51] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). The previous paragraphs show that the Tribunal has considered all the appellant's possible impairments, but even in combination, they do not demonstrate a medical condition that would have precluded all work at the time of her MQP.

[52] The appellant has the burden of proof, and after careful review of the evidence, the Tribunal has found that the appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[53] As the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[54] The appeal is dismissed.

David Somer
Member, General Division - Income Security