



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 198

Tribunal File Number: GP-17-2468

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Connie Dyck

HEARD ON: December 14, 2017

DATE OF DECISION: December 15, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on April 15, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] On February 17, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that a disability pension under the *Canada Pension Plan* (CPP) was payable to the Appellant. The General Division further determined that payments were to start March 2016, four months following the date of disability of November 2015.

[3] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division, claiming that the General Division had erred in determining the deemed date of disability. Leave to appeal was granted on May 12, 2016, solely with respect to a possible error of law associated with the use of the concept of "continuity of care" in relation to the date of disability.

[4] On September 20, 2017, the Appeal Division allowed the appeal on the basis that the General Division erred in law by relying, in significant part, upon an irrelevant consideration of "continuity of care" in determining the date of disability. The issue of date of disability was referred back to the General Division for redetermination.

[5] 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, 2019.

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

- a) More than one party will attend the hearing.

- b) The method of proceeding is most appropriate to allow for multiple participants.
- c) The issues under appeal are not complex.
- d) There are gaps in the information in the file and/or a need for clarification.
- e) Credibility is not a prevailing issue.
- f) 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.
- g) As the only issue before the Tribunal is the date of onset, and in the interest of timeliness, considering this appeal has been referred back to the GD from the AD, a telephone hearing is the most appropriate form of hearing. In addition, it will allow for the quickest scheduling of a hearing.

[7] The following people attended the hearing: the Appellant, J. M.; the Appellant's representative Daniel Griffith.

[8] The only issue before the Tribunal is the date of disability which was referred back to the General Division for redetermination from the Appeal Division.

EVIDENCE

[9] In a Consultation Report dated October 12, 2012, Dr. Steven Bodley of the Pain Clinic stated that the Appellant had a longstanding history of chronic pain issues and a well-established chronic pain disorder. Dr. Bodley discussed the long-term treatment plan for the Appellant's type of pain problem and suggested a regular pattern of exercise may be helpful. Dr. Bodley noted that he did not see anything further that he could offer the Appellant. (GD 4-58 –GD 4-59)

[10] In a Questionnaire completed on November 26, 2012, the Appellant stated that she last worked as a dietary aide from June 2010 to June 2011 and that she stopped work because she "was in too much pain and getting sick too often". She was in receipt of EI sickness benefits from July 2011 to October 2011. She explained that she had daily pain throughout her body.

Standing for long periods of time (approximately 10 minutes), sitting for short periods of time (approximately 5 minutes) and walking (approximately 5-10 minutes) caused her pain and she was fatigued daily. She noted that lifting, carrying and reaching aggravated her back pain. (GD 4-67 – GD 4-73)

[11] In a medical report dated November 21, 2012, Dr. Nayef Al Gharim stated that the Appellant had a 5 year history of joint pain which was usually worse with activity and at the end of the day. The Appellant also had intermittent swelling of her hands and feet. She had tried Tramadol, Advil and Naproxen with no improvement in her pain. Oxycodone helped to relieve her pain partially. The Appellant also had complaints of lower back pain radiating to both knees and the pain was worse with standing and walking. She had a history of fatigue and tiredness and was diagnosed with fibromyalgia two years prior. (GD 4-50 – GD 4-51)

[12] In a report dated March 20, 2013, Dr. Karen Bir, rheumatologist, stated that given the Appellant's history she did meet criteria for systematic lupus erythematosus. Regarding her fibromyalgia condition, Dr. Bir stressed the importance of the upkeep of the Appellant's psychological well-being and also recommended yoga, meditation and even tai chi. (GD 4-48 – GD 4-49)

[13] In a medical report dated April 2, 2013, Dr. Adam Hoirsch, family physician, stated that he had been treating the Appellant since January 2013 and that she had diagnoses of fibromyalgia and systemic lupus. He noted that the Appellant had a 5 year history of joint pain and swelling and chronic pain, despite medications. The Appellant was noted to have diffuse joint pain and swelling, non-restorative sleep, muscle cramps and pains and limited in ROM and strength when joint pain occurred. Dr. Hoirsch reported that this was a chronic condition with intermittent good and bad periods. He was hopeful that with a regular exercise routine, there would be some improvement to the Appellant's physical symptoms. (GD 4-44 - GD 4-47)

[14] In a letter dated August 12, 2013, the Appellant explained that when she was last employed in 2011, she would miss work due to illness almost every second day. Her chronic pain and fatigue had become worse since 2011. (GD 4-13)

[15] In a referral report of September 11, 2014, Dr. Dana Jerome, rheumatologist stated that the Appellant was first diagnosed with SLE in 2012 and at that time reported symptoms of oral ulcers, general ulcers, joint pain, photosensitive rash and new migraines. The Appellant was prescribed Plaquenil at that time, which did help resolve some of her joint pain and other symptoms. The Appellant reported ongoing back pain since her teens which was triggered by lifting and bending and was relieved by medication such as Oxycontin, lying down, rest and massage. The Appellant had complaints of lupus symptoms that were bothersome; increasing joint pain and fatigue. It was Dr. Jerome's opinion that with regard to the Appellant's joint pain and fatigue, it was likely multifactorial and related to a combination of poor sleep and her fibromyalgia. (GD 8-9 – GD 8-10) In a follow-up report of April 9, 2015, Dr. Jerome reported that since the last visit, the Appellant symptoms were unchanged and that her hands were painful with gripping activities and getting worse and she remained fatigued. Dr. Jerome was of the opinion that the Appellant's symptoms were due to fibromyalgia and he recommended that the Appellant continue using Cymbalta and Elavil, pool programs, walking and exercise. (GD 8-20)

[16] In a narrative report dated November 25, 2015, Dr. Hoirsch stated that the Appellant had been diagnosed with both fibromyalgia and systemic lupus erythematosus. She became pregnant in 2011 and at that time her symptoms worsened and had not improved since. She was being followed by a rheumatologist for her ongoing fibromyalgia and lupus and had initially been seen in December 2013 and followed by Dr. Keesal who was a rheumatologist in Toronto. In September 2014 the Appellant was referred to the women's College Hospital and had been followed by Dr. Jerome since that time. Dr. Hoirsch reported that the Appellant had tried methods of treatment with which have been offered by the specialists, although she had not had very good results from any of the treatments. She continued to try to exercise, do aqua therapy and walking on the good days when she can. Dr. Hoirsch stated that even with ongoing medication, the Appellant was still in a lot of pain on a daily basis and she did have symptoms on a daily basis and the pain was debilitating at times. She was unable to sit for about 15-30 minutes at a time before she develops low back pain with radiation to the legs. He further noted that the Appellant was unable to stand for prolonged periods of time as this makes her pain worse and had complaints of back pain on a daily basis as well as bilateral knee pain on a daily basis. Dr. Hoirsch noted further limitations of the Appellant to include being unable to walk for long periods without knee pain and having joint pain in her fingers and hands when using a keyboard or

writing. He was of the opinion that the Appellant's symptoms had not improved since August 2013 despite changes to medications. (GD 8-2)

Oral evidence at the hearing

[17] The Appellant stated that she stopped working in June 2011 because she was very tired and fatigued and her joint pain had increased. She testified that she had increased difficulty walking and climbing stairs. She stated that her symptoms of Lupus intensified when she became pregnant in March 2011.

[18] She explained that she saw her general practitioner, Dr. Ekler who sent her for blood work. The blood tests revealed that the Appellant had Lupus. She was then referred to a rheumatologist in Toronto and treatments began. She advised that she was diagnosed with Fibromyalgia approximately 1-2 years prior then her pregnancy.

[19] The Appellant testified that she started seeing Dr. Hoirch as her family physician in approximately February 2012 when Dr. Ekler retired.

[20] The Appellant testified that her symptoms were that her joints became so painful that she could not even do the dishes or write. She explained that the bottoms of her feet, her soles hurt and she cannot stain. The Appellant also stated that her back pain became more intensified so much so that even lying down hurt. She also started getting migraines during the time she was pregnant.

[21] The Appellant advised the Tribunal that she began using Plaquenil in July 2011 when she was diagnosed with Lupus and Oxycodone for her pain, in January 2012 after her daughter was born.

[22] The Appellant advised the Tribunal that when she last worked, she modified her duties to part-time and sitting in an office and doing paperwork, instead of being on her feet doing the duties of a dietician. She explained that she was missing approximately 1-2 days per week because of her pain, so her employer recommended that she reduce her hours to part-time. She advised the Tribunal that this did not help her condition and she continued to miss time from work. Her employer then accommodated her condition by changing her job to a lighter duty,

sedentary office job. The Appellant explained that she tried this job for one month, part-time, before she was forced to stop because of the symptoms of her condition, including pain and being unable to use her hands due to the swelling in her joints. She was no longer able to work as of June 2011 and was given the diagnosis of Lupus the following month.

[23] She explained that she needs to travel to Toronto to see a rheumatologist and often there is a few months gap before she can get into appointments.

[24] The Appellant stated that she was able to care for her daughter, but she had help with her daughter, almost daily from her parents who lived nearby.

SUBMISSIONS

[25] The Appellant's representative submitted that the Appellant should be found disabled by January 2012, the maximum retroactivity she is entitled to, based on the date of her application of April 15, 2013 because:

- a) should be found disabled in June 2011 when she was no longer able to work; and
- b) the evidence supports that her symptoms became severe in June 2011 and have not improved since then.

[26] The Respondent submitted in writing that the date of onset of disability provided to the Appellant by the previous General Division should not be altered and should remain November 2015 because:

- a) despite the Appellant having a diagnosis of lupus, her general examination was continually unremarkable as was radiographical evidence; and
- b) the medical evidence is not supportive of an earlier date of onset.

ANALYSIS

Date of Disability

[27] The only issue before this Tribunal is the date of disability as it was previously decided that the Appellant met the criteria of disabled as defined in the CPP legislation.

[28] The Tribunal finds that the evidence supports that the Appellant date of disability should be June 2011 and that this is when the Appellant's condition met the criteria of 'severe' as defined in the CPP legislation.

[29] The Tribunal considered the Respondent's argument that the medical evidence was not supportive of an earlier date of disability than November 2015, but respectfully disagrees for the following reasons.

[30] The Tribunal considered the testimony of the Appellant, in particular her attempts to remain employed in modified conditions, which was unsuccessful due to her symptoms. Further, these symptoms have remained consistent since this time.

[31] The evidence of Dr. Bodley of the Pain Clinic in October 2012 noted that "the Appellant had a longstanding history of chronic pain issues and a well-established chronic pain disorder". This would support that the Appellant's date of disability was well in advance of November 2015.

[32] The Tribunal looked for guidance to *Forrester v. MHRD* (November 7, 2003), CP 20789 (PAB) which found that when a disability begins and when it becomes severe is a question of fact. In some cases it may take months or years to become severe as defined in the Act. In this case, the Tribunal considered the evidence of Dr. Al Gharim of November 2012, wherein he stated that the Appellant had a 5 year history of joint pain which was usually worse with activity and at the end of the day. The Appellant also had intermittent swelling of her hands and feet. She had tried Tramadol, Advil and Naproxen with no improvement in her pain. She had a history of fatigue and tiredness and was diagnosed with fibromyalgia two years prior. Further, Dr. Hoirch noted in April 2013, that the Appellant had a 5 year history of joint pain and swelling and chronic pain. This medical evidence corroborates the Appellant's testimony that she had ongoing symptoms for years but that these symptoms of fatigue, pain and joint pain intensified when she became pregnant in April 2011.

[33] The Tribunal also considered the evidence of Dr. Hoirch, who was her primary care giver that the Appellant became pregnant in 2011 and at that time her symptoms worsened and had not improved. The Tribunal finds that the evidence supports that although the Appellant had symptoms of fatigue, pain and joint pain prior to 2011, these symptoms all intensified in 2011. Despite this, the Appellant attempted to remain employed, in a modified setting, but was incapable regularly of pursuing any substantially gainful occupation by June 2011.

CONCLUSION

[34] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2011, when she was no longer able to work in any capacity. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) of the CPP). The application was received in April 2013; therefore the Appellant is deemed disabled in January 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2012.

[35] The appeal is allowed.

Connie Dyck
Member, General Division - Income Security