



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: K. C. v. Minister of Employment and Social Development, 2017 SSTGDIS 199

Tribunal File Number: GP-16-112

BETWEEN:

K. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Patrick O'Neil

HEARD ON: December 6, 2017

DATE OF DECISION: December 16, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on November 4, 2014. The Appellant claimed that she was disabled because of injuries sustained in a motorcycle accident on June 10, 2012, including pelvic and left arm fractures, depression, anxiety, bladder incontinence, headaches, and neck, back, arm, and pelvis area pain. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2015.

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

- a) The Appellant will be the only party attending the hearing.
- b) The issues under appeal are not complex.
- c) 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.

[4] The following people attended the hearing: K. C.: Appellant; Hillery Guttman: Appellant's representative.

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

EVIDENCE

Appellant's evidence

[6] The Appellant testified on her own behalf. She was forty-six years old at her MQP and forty-eight years old at the hearing. She has a grade eleven education and a healthcare aide certificate. The Appellant last worked as a customs clearance clerk from October 1, 2010, until June 8, 2012, and has not worked since. Prior to employment as a customs clearance clerk, the Appellant worked as a factory labourer from 1987 until 1992, and as a healthcare aide from 1992 to 2009. The Appellant characterized her duties as a customs clearance clerk as non-physical clerical/receptionist sedentary type work, including answering phones, checking freight, and dispatching vehicles.

[7] The Appellant sustained multiple injuries in a motorcycle accident on June 10, 2012, including multiple fractures of her pelvis and left arm. She testified she has suffered from constant daily severe left arm, back, and pelvis area pain, headaches, bladder urgency and incontinence since the accident, and depression and anxiety which began shortly after the accident, despite treatment, including left arm, bladder, and pelvis surgeries, medication for pain, depression, anxiety, and disturbed sleep, physiotherapy, massage therapy, and aqua therapy.

[8] The Appellant testified she hospitalized for approximately four months following the accident. In addition to the noted treatment, the Appellant requires incontinence products at all times notwithstanding bladder surgery. The Appellant testified she exhausted the maximum allowance for treatment including physiotherapy, aqua therapy, and massage therapy payable under her vehicle insurance policy in 2015, being \$50,000, and has been unable to afford the cost of such additional therapy since.

[9] The Appellant testified there is non-union of a fracture in her left pelvis, with the result she has a one-inch gap, which causes pain when walking, and necessitates use of a cane. The Appellant's current medication includes Zopiclone for sleep, Hydromorphone and Tramadol for pain, and Diazepam for anxiety. The Appellant testified she has been prescribed the same or similar medication for pain, anxiety, sleep, and depression since discharged from hospital in 2012.

[10] The Appellant testified the difficulty/functional limitations noted in the Questionnaire for Disability Benefits (Questionnaire) dated February 11, 2015, have not improved significantly, if at all. She testified she continues to experience severe cognitive difficulties including problems with memory and concentration, disturbed sleep resulting in constant fatigue, constant pelvic area, back and arm pain, that is exacerbated with sitting, standing, and walking more than fifteen minutes, extreme difficulty lifting, carrying, reaching, bending because of back and pelvic area pain, and urinary incontinence. She requires her daughter's help with household maintenance and personal needs, including dressing, showering, cooking, cleaning, and shopping.

[11] The Appellant testified the intensity of her constant pain level increases with minimal activity. She said she has "so-called" good days, which she characterized as suffering with pain of an average intensity of at least 4/10 on a scale of 1 to 10 with 1 being the least pain experienced and 10 being the most, and bad days where her pain level is 10/10. She testified there is no predictability as to when she will have a so-called good day or a bad day, save a bad day always follows a day of modest activity, and will last several days at an exacerbated pain level of 10..

[12] The Appellant has not worked, looked for work, or attended any retraining or educational upgrading program since she suffered the injuries in the motorcycle accident in June 2012. She testified she has never been able to work, or attend retraining or educational upgrading programs due to constant diffuse severe pain, anxiety, and depression. She enquired into volunteer work, and was advised by the volunteer agencies her physical limitations could not be accommodated.

Medical evidence

[13] Dr. Liang, the Appellant's family physician since June 2012, completed the medical report dated September 30, 2014, that accompanied the Appellant's application. He noted the Appellant sustained injuries in a motorcycle accident in June 2012. His diagnoses were bilateral fracture of her radii (open reduction and internal fixation on the left, closed reduction on the right); bilateral pelvic rami fractures; left ulnar nerve impingement; lost thumb function; stress incontinence with pelvic fractures; and Stage I vaginal prolapse. He noted the Appellant was in post-operative complex care for six months, and is going for vaginal repair surgery in September

2014. He reported the Appellant has chronic hip and bilateral arm pain, vaginal discomfort and incontinence.

[14] Dr. Lavendy, orthopaedic surgeon, reported November 27, 2012, the Appellant sustained bilateral fractures of her radii and bilateral pelvic rami fractures in an accident in June 2012. He noted the Appellant has experienced some ulnar nerve impairment with respect to her left radius and some loss of function of her left thumb. He noted the Appellant complains of stress incontinence, and will be re-evaluated at her next appointment.

[15] Dr. Lavendy reported March 5, 2013, the Appellant continues with urinary difficulties. He reported radiographs show continued gapping in the posterior and inferior aspects of the pubic rami. He noted the Appellant's right wrist fracture was treated non-operatively, her left wrist fracture was treated with open reduction and internal fixation, and she has stiffness on the left side.

[16] Dr. Lavendy reported April 9, 2013 the Appellant has been having consistent lower back and inner thigh pain since injured in June 2012. He noted a CT scan of the pelvis reveals non-union of a rami fracture on the left side. Dr. Lavendy reported he had a lengthy discussion with the Appellant to the effect she will never be pain-free from her trauma, and will need to accept a new normal in terms of her functional status.

[17] Dr. Chou, urogynecologist, reported June 25, 2013, the Appellant sustained pelvic fractures in multiple areas as well as bilateral radius fractures in an accident in June 2012. She indicated since the accident, the Appellant has had substantial urge and stress incontinence, which is worse on sitting, standing, coughing, bending, and lifting. She noted the Appellant reported frequency every hour during the day, and wears a pad twenty-four hours a day. Dr. Chou reported the Appellant's current medication included Hydromorphone, Meloxicam, Zopiclone, Valium, Tylenol, and Advil. Dr. Chou's assessment was vaginal prolapse. She noted she discussed surgery with the Appellant for prolapse or stress incontinence.

[18] Dr. Lavendy reported further October 15, 2013 the Appellant continues to have issues with pain, specifically with respect to her pelvis and left thumb. He noted x-rays showed continued non-union of her superior ramus fracture.

[19] Dr. Liang reported April 28, 2014 the Appellant sustained bilateral wrist and pelvic fractures, is still unable to bear weight, and is still in physiotherapy. He reported the Appellant is unable to return to work at this time.

[20] Dr. Naudie, orthopaedic surgeon, reported April 15, 2014, the Appellant continues with significant pelvic pain, and is seeing an urogynecologist for a possible prolapse procedure. He noted the Appellant has tried many different modalities for pain, none of which have been working.

[21] Dr. Chou reported further May 13, 2014, studies showed evidence of genuine stress urinary incontinence. She noted the Appellant also has issues with chronic pain related to her orthopaedic injuries. Dr. Chou indicated the Appellant has been booked for a vaginal hysterectomy, uterosacral ligament vaginal vault suspension, cystocele and rectocele repair, and cystoscopy. Dr. Chou reported she discussed with the Appellant that it is unlikely her prolapse surgery will alleviate much of her debilitating pain.

[22] Dr. Chou reported May 29, 2014 the Appellant has been diagnosed with pelvic organ prolapse and stress urinary incontinence. She noted, regarding the Appellant's ability to return to work, her other conditions would certainly contribute towards her ability to work from a physical standpoint, and the fact she reports frequency of urination may be difficult to accommodate within the environment of her job. She noted the Appellant's pain issues may also prevent her from performing her job responsibilities.

[23] Dr. Weinberg, orthopaedic surgeon, completed an Insurer's Orthopaedic Assessment Report dated May 31, 2014. He reported the Appellant sustained serious injuries in a motorcycle accident on June 10, 2012, being bilateral wrist fractures and pelvis fractures, and continues with residual weakness and stiffness as a result of the left wrist fracture. He noted, regarding the pelvic fractures, there may be non-union in one or more of the fractures that accounts for her ongoing pain. He noted the Appellant will likely experience some degree of permanent impairment with regard to the pelvic injuries. Dr. Weinberg concluded, from an orthopaedic perspective, the Appellant suffers a substantial inability to perform the essential tasks of her employment as a result of the accident. He concluded the Appellant, from an orthopaedic

perspective, suffers a complete inability to engage in any employment for which she is reasonably suited.

[24] Dr. Oshidari, physiatrist, completed an Insurer's Physiatrist Assessment and Report dated May 31, 2014. He noted the Appellant's current complaints included headaches, neck, elbow, wrist, left thumb, pelvis, and abdomen pain. He indicated the Appellant is independent with activities of daily living except lower extremity dressing and undressing and any house chore duties. Dr. Oshidari reported the Appellant's major limitation as non-union fracture of the pelvis. With regard to whether the Appellant suffers a complete inability to engage in employment for which she is reasonably suited, he reported he has reviewed and notes Dr. Weinberg's opinion that the Appellant does suffer a complete inability.

[25] Dr. Lawson completed an Insurer's Psychology Assessment Report dated May 31, 2014. His diagnoses were Major Depressive Disorder with anxious distress, and High Moderate and Somatic Symptoms Disorder with predominant pain, moderate. He concluded, from a psychological perspective, the Appellant's current degree of psychological distress constitutes an impairment that renders her completely unable to perform the essential tasks of her employment.

[26] Dr. Chou's operative report dated August 21, 2014, confirmed the Appellant that day underwent surgery for pelvic organ prolapse and stress urinary incontinence.

[27] Dr. Plotnick, psychologist, completed a Psychological Assessment Report dated September 30, 2014. He noted the Appellant has struggled with pain originating from her injuries in a motorcycle accident on June 10, 2012, notwithstanding the passage of time, rehabilitative measures, as well as relief from work functions. Dr. Plotnick's diagnosis was Major Depressive Disorder moderate to severe. He noted the Appellant incurred severe orthopaedic injuries in the accident, which resulted in a near complete state of infirmity for the first four months following the accident. Dr. Plotnick noted he reviewed a psychological report of Dr. Lawson, and noted Dr. Lawson's report and conclusions are similar to his conclusions. In this regard, Dr. Plotnick noted Dr. Lawson reported the degree of the Appellant's psychological stress constitutes an impairment that renders her completely unable to perform essential tasks of her employment. Dr. Plotnick reported the Appellant's prognosis is quite guarded. He noted there is a synergistic cycle regarding pain and symptoms of depression, that can be very difficult

to breach, noting struggles with pain elicit symptoms of depression and anxiety, which in turn impact upon an individual's capacity to manage pain.

[28] A Multi-Disciplinary Catastrophic Impairment Assessment Report dated June 17, 2015, completed at the request of the Appellant's vehicle insurance company determined the Appellant did not meet the statutory 55% whole person impairment/rating threshold for catastrophic impairment. The urologist determined the Appellant's bladder issues, including urinary incontinence, did not occur as a result of the accident, with the result the combination of the Appellant's physical and mental conditions, excluding the Appellant's bladder condition did not meet the catastrophic impairment threshold. Notwithstanding the aggregate impairment rating given by the various assessors did not total 55% because of the urologist's determination that the Appellant's bladder problems were not caused in the accident, the assessors noted as follows: Dr. Gallimore, orthopaedic surgeon, determined the Appellant sustained bilateral wrist fractures and pelvic fractures in the accident in June 2012, and currently complains of cervical and lumbar spine pain and issues with incontinence. He noted, based on physical examination and file information, the Appellant has a non-union of the pubic symphysis of the left inferior pubic ramus area. He noted the Appellant requires the use of a cane on an occasional basis due to her pelvic fracture. Dr. Jain, urologist, completed a urology assessment. She noted the Appellant underwent surgery regarding her genital and urological problems on August 21, 2014, and continues to experience urinary frequency and incontinence. Dr. Jain opined the Appellant's urinary symptoms are not related to the injury she sustained in the accident. A psychology assessment completed by Dr. Watson, psychologist, reported the Appellant's diagnoses as Somatic Symptom Disorder with predominant pain, persistent, moderate, Major Depressive Disorder, moderate with anxious features, and an Adjustment Disorder with anxiety. He reported the Appellant's current GAF score as 55-57.

[29] A Catastrophic Impairment Report dated February 10, 2016, was completed at the request of the Appellant's litigation lawyer by Dr. Herschorn, urologist, and Dr. Becker, psychologist. Dr. Herschorn concluded there is a link between the injuries the Appellant sustained in the motorcycle accident and her urinary symptoms. He noted, notwithstanding surgery, the Appellant has urinary frequency every one to two hours, urinary urgency one to two times daily, and urinary incontinence every other day. Dr. Becker's psychological assessment noted the

Appellant's current pain complaints include headaches, neck, back, hip, and wrist pain, which are exacerbated with prolonged sitting, standing, walking, repetitive acts, lifting, carrying, bending, and humid weather. She noted the Appellant has problems with sleep initiation and maintenance despite the use of Zopiclone, with reduced energy and fatigue. She noted the Appellant reported sadness every day, which began immediately after the accident and has further deteriorated. She indicated the Appellant reported problems with attention, concentration, memory, and reduced processing speed. Dr. Becker's diagnoses were Major Depressive Disorder moderate chronic, Pain Disorder, and Adjustment Disorder with anxiety. She reported the Appellant's current GAF score as 51-55. She noted her and Dr. Watson's diagnostic impression were identical in that they both concluded the Appellant meets the criteria for Major Depressive Disorder and Adjustment Disorder with anxiety, and both agree psychological factors are impacting upon the Appellant's pain, resulting in a diagnosis of Pain Disorder. Dr. Becker concluded the synergistic effect of the Appellant's pain, worry about pain, fear of sustaining further harm, depressive symptomatology, irritability, fatigue, reduced energy, cognitive symptoms, and medication side effects substantially interfere with her ability to engage in any occupation. She reported these factors substantially interfere with the Appellant's ability to participate in cognitive and physical demands of a job, maintain attention and concentration for extended periods, complete tasks in a timely manner, multitask, make decisions, plan and organize, maintain regular attendance, and complete a normal work day/work week without interruptions from psychologically based symptoms. Dr. Becker opined, as more than three years have elapsed since the motorcycle accident, and the Appellant continues to report and evidence significant psychological sequelae, it is not anticipated, given the severity and chronicity of the Appellant's psychological problems, that her emotional functioning will appreciably improve.

[30] Dr. Liang's clinical note of the Appellant's attendance May 2, 2016, reported the Appellant remains disabled with chronic pain, insomnia, and sleep disorder. He reported the Appellant's current medication as Dilaudid, Valium, Cymbalta, Imovane, and Zantac.

SUBMISSIONS

[31] The Appellant submitted that she qualifies for a disability pension because her disability is both severe and prolonged. She submits she has suffered from headaches, neck, arm, back, hip, and pelvis area pain, depression, anxiety, and urinary urgency and incontinence, since injured in a motorcycle accident in June 2012, resulting in severe and diffuse body pain, disturbed sleep, low energy, fatigue, cognitive difficulties, and urinary urgency and incontinence with bladder accidents, making it impossible for her to work at any occupation on a regular basis since June 2012.

[32] The Respondent submitted that the Appellant does not qualify for a disability pension because she did not have a severe and prolonged disability on or before her MQP of December 31, 2015.

ANALYSIS

Test for a Disability Pension

[33] 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.

[34] 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.

[35] 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

[36] The evidence established the Appellant has suffered from severe headaches, neck, back, arm, hip, and pelvis pain, depression, anxiety, bladder urgency and incontinence, since injured in June 2012. The Appellant was hospitalized after the accident for almost four months and was immobile for several months thereafter. Despite surgeries, including surgeries for bilateral arm fractures, pelvic fractures, and urinary incontinence, the Appellant continues to suffer from severe diffuse pain and urinary incontinence. The evidence established continued non-union of one of her pelvic fractures, resulting in a significant gap, and pain.

[37] The Appellant's treatment to date has included several surgeries, extensive physiotherapy, massage therapy, and aqua therapy, and medication for pain, depression, and anxiety. Notwithstanding treatment, the Appellant only attained minimal relief from pain, depression, and anxiety. There are several assessments in the file obtained at the request of the Appellant's insurer and at the request of the Appellant's then representative. The assessments are consistent in reporting the Appellant's complaints, the seriousness of the injuries sustained in the accident, and the severe impact of her numerous physical and mental conditions on her work capacity. The orthopaedic and psychological assessments do not differ in the diagnosis of the physical injuries sustained in the accident, the diagnosis of the Appellant's mental condition, which began shortly after the accident, and the severity of her symptoms. The only significant difference in the assessments related to whether the Appellant's bladder condition, which has resulted in urinary urgency and stress incontinence, occurred as a result of the injuries sustained in the June 2012 accident or was not related to the accident. That distinction is not important for the purposes of the issues to be determined by the Tribunal.

[38] 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).

[39] The Appellant has not looked for work or attended any retraining or education upgrading program since she last worked in June 2012.

[40] In *Adatia v. MHRD* (July 22, 2003), CP 20124 (PAB), the Pension Appeals Board (Board) considered the failure of an Appellant to make any effort to retrain and/or obtain less

strenuous work. The Board noted there was evidence the Appellant was permanently disabled. The Board stated the following:

“[14] There is no satisfactory evidence before the Board that the Appellant could have worked at lighter work on a regular, gainful basis from December, 1995, onwards. On the contrary, the medical evidence tends to prove the opposite. [15] Under the circumstances, there should be no requirement for the Appellant to show that she has made reasonable efforts at retraining to do less strenuous work, and to make efforts to secure less strenuous work.”

[41] The Tribunal determined there was no requirement for the Appellant to make any effort to obtain work, or participate in any retraining or educational upgrading program, as the evidence substantiated she has been incapable regularly of pursuing any substantially gainful occupation since June 2012.

[42] The Appellant was considered by the Tribunal as a credible witness. The Tribunal accepted her evidence describing the debilitating symptoms she has suffered from and her difficulty functioning on a daily basis since June 2012. There was no indication of exaggeration in her presentation and no mention of it in the reports which support much of her evidence. None of the Appellant's treatment providers or assessors suggested the Appellant's symptoms did not exist, or were exaggerated, and none suggested she is malingering or has been able to work since June 2012.

[43] 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).

[44] The Tribunal concluded the evidence of the Appellant, her family physician, psychologists, orthopaedic surgeons, urologists, and other assessors, substantiates the Appellant has suffered from severe diffuse pain, depression, anxiety, and urinary urgency and incontinence since injured in June 2012 despite a variety of treatment modalities and medication. The Tribunal determined the combined effect of the Appellant's physical and mental conditions has rendered the Appellant incapable regularly of pursuing any substantially gainful occupation since June 2012. The Tribunal finds the Appellant's disability severe since June 2012.

Prolonged

[45] The evidence substantiates the Appellant has suffered from chronic diffuse pain since injured in a motorcycle accident in June 2012, depression, anxiety, and urinary incontinence, which began shortly thereafter without improvement or expectation of improvement. The Tribunal concluded the Appellant's disability is likely to be long continued and of indefinite duration, and accordingly prolonged.

CONCLUSION

[46] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2012, when the Appellant sustained severe injuries in a motorcycle accident. 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 November 2014; therefore the Appellant is deemed disabled in August 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2013.

[47] The appeal is allowed.

Patrick O'Neil
Member, General Division - Income Security