



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *CA v Minister of Employment and Social Development*, 2018 SST 1430

Tribunal File Number: GP-17-325

BETWEEN:

C. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Brian Rodenhurst

HEARD ON: March 21, 2018

DATE OF DECISION: March 26, 2018

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 27, 2016. The Appellant claimed that she was disabled because sleep apnea, severe knee pain and hypothyroidism/ Hashimoto disease. 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, 2013.

[3] The appeal was heard by teleconference. The following people attended the hearing: C. A., Appellant; M. C., sister, moral support

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

EVIDENCE

[5] The Appellant was 51 years of age at the time of the MQP. She obtained a Grade 12 education and some certificates in health and safety in the construction safety field. The courses lasted for a few hours up to two days depending on the type of training. The certificates have expired as they needed to be updated and renewed on a periodic basis.

[6] The Appellant was employed for 24 years under contract to deliver mail to Canada Post boxes. She moved from the Maritimes to Northern Alberta where she worked in the oilfields. In October 2010 her employment ended and she was laid off. She collected regular E.I. for 9-10 months. She applied for jobs at her Union Hall. She was unable to return to work due to her knee and leg problems so the Union would not give her clearance to return to work due to health and safety concerns.

[7] She testified that in 2010 she had an incident where she collapsed at work and was rushed to the hospital. She was diagnosed with a thyroid condition and prescribed two medications to treat her condition. She testified that her thyroid condition did not prevent her from working.

[8] The Appellant stated that in 2011 she obtained a job babysitting two children aged two and four years. This lasted for only a couple of days as she could not get up from sitting down to care for the children and as well was fatigued from her sleep apnea. She testified that she had either to lie down or fall down. She cannot wear two shoes of the same size on her feet due to the severe swelling. The only shoe type she now can wear is Crocs.

[9] She testified that there were a number of impairments that stopped her from being able to work at any job on or before December 31, 2013 and continuously since. She cannot stand, sit, her knee swells up, she sleeps only 1-1.5 hours per night, cannot walk due to pain. She further stated that due to her thyroid condition she is unable to take a sleeping pill. Since her knee replacement in 2015 she has been unable to kneel. She further stated that she was admitted twice after the surgery. She was informed by her family doctor the surgery did not replace her knee cap and her condition is as good as it will get.

[10] She does not believe she is capable of retraining as she is 60 years of age and no one will hire her or retrain her at her age. She also feels depressed making it hard to learn.

[11] Her activities of daily living are limited to “puttering around”. She goes out to the bank once a month. She does not do the grocery shopping. Many days she does not even get dressed and spends most of the day resting. She can only sleep 15-20 minutes at a time and remains tired. She does not have any computer skills. The only other time she leaves her residence is to attend the doctor’s office. Her only medical provider now is the family doctor and her pain is treated by Tylenol. She moved back to Nova Scotia from Alberta in August 2017.

[12] Her sister M. C. confirmed the Appellant was disabled now and could not work at any substantially gainful occupation. She did not see the Appellant on a regular basis when she lived in Alberta. She did visit once while the Appellant was still working but does not have direct observation of the Appellant at or around the time of the MQP.

[13] Sherwood Park Medicentre completed the Standard Medical Report on November 2, 2016. The Doctor who signed the report indicated the Appellant was first treated for her main medical condition in May 2014, and she had been a patient for two years. The Diagnoses was: knee replacement surgery, 2015; sleep apnea; and hypothyroidism. Prognosis: yet to be determined – referred to Orthopedic Specialist (Dec. 19 appointment). Treatment: using pain medication/Tylenol #3 to control the pain. The Doctor further noted left knee pain was post-surgical. Limitations: difficult in prolong standing and walking, swelling left knee.

[14] Sleep Therapeutics issued a report dated August 29, 2012. Under the heading Physician Interpretation and Comments: findings are consistent with severe, positional obstructive sleep apnea. She was referred to CPAP therapy.

[15] A brief discharge statement confirmed the Appellant underwent a left knee replacement on March 12, 2015 and was discharged on March 15, 2015 and prescribed oxycodone for pain. On April 17, 2015 a very brief note indicated she was admitted for post-operative complications query infection.

[16] Dr. Jiang, Orthopedic Surgeon, issued a consultation report dated April 27, 2015. He noted the Appellant had a left total knee arthroplasty six weeks ago. She developed some seroma after surgery and seroma in front of the patella was drained twice. All investigations showed that there are no signs of infection. Her pain has settled down somewhat. Her wound has already healed without any signs of infection, with mild swelling around her left knee. Her left knee was stable with valgus/varus stress test. A review of the x-ray showed good position of the prosthesis. The Appellant was encouraged to do more physiotherapy and exercise to increase her range of motion.

[17] Dr. Thambiraj, Orthopedic Specialist, issued a consultation report dated December 19, 2016. The Appellant disclosed her left knee swells up intermittently and goes down after two or three weeks. When the knee swells it is painful. X-ray of the implant shows good position. She may have non-specific or patello femoral friction. She was advised to exercise and strengthen the quads. A referral back to the surgeon to see if an arthroscopy is required may be helpful.

SUBMISSIONS

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

- a) She wanted to have surgery and get better so she could return to work but the surgery was not successful enough for her to be able to work.
- b) She is in constant pain and cannot do an office job because she is unable to sit, she has to keep changing positions.
- c) She tried babysitting two children in 2011 but lasted only for two days.

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

- a) Attempts to gain further information for her MQP were unsuccessful. Her family physician started treating her knee condition in May 2014. The evidence does not support she had a medical condition that prevented her from doing all types of work on or prior to December 31, 2013 and continuously thereafter.
- b) According to her Record of Earnings she stopped working due to shortage of work. There is no medical evidence provided to support the Appellant stopped working due to a medical condition.
- c) The Appellant based her disability claim on Hashimoto's disease, sleep apnea, arthritis of the right hip and arthritis of the left knee with knee replacement. Her Hashimoto's disease and sleep apnea were appropriately treated. There was no evidence regarding her right hip. There is no information that her knee arthritis was of such severity as to have prevented her from working.

ANALYSIS

Test for a Disability Pension

[20] 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.

[21] 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.

[22] 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.

Minimum Qualifying Period

[23] The Tribunal finds that the MQP is December 31, 2013.

Severe

[24] 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 was laid off and collected regular E.I. benefits in October 2010. She was unable to return to the Alberta oilfields as she could not get medical clearance from the Union as she might jeopardize her safety and the safety of co-workers. She testified that her condition not only stopped her from working in the oilfields it also stopped her from being able to work at any occupation. She described a number of impairments that rendered her incapable of working including an inability to sit, stand, pain when walking, and lack of restful sleep. The Tribunal finds the Appellant to be an honest witness who appeared to give her evidence in a straight forward honest manner. The Tribunal gives the oral evidence of the Appellant due weight and consideration.

[25] A claimant must provide some objective medical evidence of his or her disability (*Warren v. Canada (A.G.)*, 2008 FCA 377). The objective medical evidence must relate to the date of the MQP as well as continuously since. The only medical report that relates to the time period on or before the MQP is a sleep study indicating severe positional obstructive sleep apnea. This would not render the Appellant incapable of any substantially gainful occupation and was treated by a referral for CPAP therapy. This does not constitute a severe disability. The other medical reports filed with the Tribunal are dated after the MQP and do not relate any findings to December 31, 2013 or previously. The Standard Medical Report indicated she was first treated for her main medical condition in May 2014 and indicated the prognosis was yet to be determined. The Orthopedic Surgeon in April 2015 opined her left knee was stable and encouraged to do more physiotherapy. Dr. Thambiraj a specialist in December 2016 advised the Appellant to exercise and strengthen her quads. The reports do not indicate severe findings and do not relate any objective findings or observations concerning the time of the MQP. The Tribunal finds there is insufficient objective evidence of a severe disability on or before the MQP.

[26] The Appellant must prove on a balance of probabilities she suffered from a severe disability not only at the time of the hearing but at the date of the MQP and continuously since. The Appellant must provide not only credible oral evidence but also some objective medical evidence to satisfy the burden of proof. It is unclear what is meant by “objective” medical evidence. It might refer to X-ray, lab tests, or other clinical evidence. Or “objective” medical evidence might be opposed to the subjective evidence given by the claimant (*MHRD v. Angheloni*, 2003 FCA 140). The Appellant failed to provide any objective medical evidence in the nature of lab tests or other clinical evidence that could corroborate her oral evidence. The sleep study does not indicate a condition that was not receptive to treatment. The Appellant failed to meet the burden of proof. The Tribunal understands she has moved between Provinces and accepts this as an explanation for the lack of medical reports on file. It does not however, relieve the Appellant of the obligation to provide sufficient evidence to prove she suffered from a severe disability on a balance of probabilities at the time of the MQP and continuously since.

[27] 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. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[28] The Appellant was 57 years of age at the time of the MQP. She has a high school education and was able to successfully complete training in the areas of occupational health and safety. She has no language barriers and has the ability to retrain or upgrade her education. She has obtained some transferable skills through her work experience. The Appellant did not provide any medical documentation or reports relating to the time of the MQP. There is insufficient medical evidence or evidence of employment efforts and possibilities to prove on a balance of probabilities the Appellant suffered from a severe disability as defined in the CPP at the time of the MQP when assessed in a real world context.

Prolonged

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

CONCLUSION

[30] The appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security