



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. L. v. Minister of Employment and Social Development*, 2018 SST 485

Tribunal File Number: GP-17-3193

BETWEEN:

G. L.
(formerly G. R.)

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

TELECONFERENCE HEARING ON: April 17, 2018

DATE OF DECISION: May 5, 2018

DECISION

[1] The Applicant has established new material facts and is eligible for a Canada Pension Plan (CPP) disability pension with payment starting July 2011.

OVERVIEW

[2] The Applicant was 41 years old when she applied for a CPP disability pension in June 2012.¹ She claims that she has been disabled since 2005 because of depression, anxiety including panic attacks, and partial complex seizures.

[3] The Minister denied the application initially and upon reconsideration. The Applicant's appeal to the Social Security Tribunal (Tribunal) was denied on June 15, 2015 as the Tribunal found there was no supporting medical evidence either from examinations or notes at the time of the minimum qualifying period (MQP) of December 31, 2005.

[4] On May 30, 2016 the Applicant filed an application to rescind or amend the June 2015 decision.² On December 9, 2016 the Tribunal dismissed that application. The Tribunal determined:

- a) progress notes from Steven Surkes, mental health counsellor, were not new facts because the Applicant had provided no explanation for not producing them and also because they did not speak to her condition at the MQP;
- b) a June 28, 2016 letter from the Applicant's husband was not a new fact since it was not in existence at the time of the initial hearing;
- c) a letter from Co-operators Insurance dated June 3, 2016 was not a new fact because it was not in existence at the time of initial hearing and it did not provide any information about the Applicant's condition at the MQP; and

¹ This is her second application for CPP disability. Her initial application was made in November 2007 and denied in June 2008. She did not request a reconsideration.

² RA1

- d) a list of medical visits in Alberta for the period July 2005 to June 2006 did not meet the materiality test since it did not clarify what the services were or how serious the Applicant's condition was at the time of the MQP.

[5] On December 7, 2017 the Applicant filed this application to rescind or amend the December 9, 2016 decision.³ She submits as new facts copies of an Alberta walk-in clinic's office notes from August 6, 2005 to March 3, 2006.

ISSUES

1. Are the office notes of the Alberta walk-in clinic new material facts?
2. If so, did the Applicant's depression and other mental health issues result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2005?
3. If so, is her disability long continued and of indefinite duration?

ANALYSIS

Test for New Facts

[6] The Tribunal may rescind or amend a decision if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence (paragraph 66(1)(b) of the *Department of Employment and Social Development Act*).

[7] This is a two-part test for evidence to be considered a new material fact:

- a) It must establish a fact (usually a medical condition in the context of the CPP) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of reasonable diligence (the "discoverability test"), and
- b) The evidence must reasonably be expected to affect the results of the prior hearing (the "materiality test").

³ RAB1

The Alberta walk-in clinic's office notes meet the new fact test

[8] They meet both the discoverability and the materiality tests.

[9] The test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits. These considerations generally require a broad and generous approach to the determination of reasonable diligence and materiality.⁴

Discoverability test

[10] The Applicant testified that she phoned the Alberta Ministry of Health prior to the initial hearing and requested copies of her medical office visits during 2005 and 2006. The Ministry told her that they were unable to locate any files from the walk-in clinics. She tried to contact the clinics. One had closed, and the other told her that they only kept records at their office for a limited period of time until they were sent for storage. That clinic wasn't able to locate any of her records, and she was subsequently told that some records had been destroyed.

[11] She made calls to the Alberta Ministry of Health between the initial hearing in June 2015 and the rescind or amend hearing in December 2016. She was sent a list of health services and told that the doctors should be able to locate their files with the code numbers from the list. She tried to contact the doctors, but one had retired and the others told her that the files had been sent out for storage and couldn't be located.

[12] In October 2017 the Applicant spoke to Dr. Hartford, her family doctor, about her having been denied CPP disability and her problem in locating medical records from Alberta. Dr. Hartford said that the records should have been transferred to her office when the Applicant moved back to Vancouver Island. The Applicant did not know before this that the records had

⁴ *Kent v Canada (Attorney General)*, 2004 FCA 420

been transferred to Dr. Hartford. Dr. Hartford's nurse checked her file and found the records that the Applicant has submitted as new facts.

[13] In the first rescind or amend decision the Tribunal Member stated that she accepted that the Applicant could not have obtained any better information from Alberta and that she had done what she could to obtain information to support her claim.⁵

[14] The Applicant made reasonable efforts to locate the Alberta medical records prior to the initial hearing and again prior to the first rescind or amend hearing. She did not know, nor could she reasonably have been expected to have known, that the records had been transferred to Dr. Hartford. She did not discover this until October 2017.

[15] I find that the Alberta walk-in clinic's office notes from August 6, 2005 to March 3, 2006 were in existence at the time of the disability hearing and that they could not have been discovered by the Applicant at that time with the exercise of reasonable diligence. I also find that they could not have been discovered at the time of the first rescind or amend hearing. The Applicant has satisfied the materiality test.

Materiality Test

[16] The new facts are five office notes from a Calgary walk-in clinic covering visits between August 2005 and March 2006.

[17] I found the following office notes to be most significant:⁶

- August 5, 2005: prescription for Cipralex
- January 3, 2006: anxiety attacks, depression on and off three years, increased last three weeks
- January 18, 2006: still not improved...increase Effexor ...
- March 3, 2006: discuss medication...doesn't like Effexor ...depression not improved...can't think straight

⁵ December 9, 2016 General Division decision, paragraphs 22 & 25

⁶ RAB1-13 to 15

[18] The Applicant testified that she attended two walk-in clinics during this time. The visits at the second clinic are confirmed by the list of Alberta health services produced on the first rescind or amend application. That list indicated other office visits on July 11, 2005, September 1, 2005, and June 21, 2006.⁷ The Applicant stated that all of the visits were for depression.

[19] At the initial hearing she testified that she tried to get the records for these visits but couldn't find them. In the initial decision the Tribunal Member found that although the Applicant stated that she had a mental breakdown in 2005 she was not able to produce any medical documents close in time to her MQP. The Tribunal Member also found that there was no supporting medical evidence of a severe and prolonged disability from examinations or clinical notes at the time of the December 2005 MQP.

[20] A critical issue in the initial decision was whether the Applicant was suffering from severe depression as of the MQP. That decision attaches significance to the absence of medical records indicating that the Applicant was seeking treatment for depression at that time. The new facts confirm that the Applicant did seek treatment as of the MQP, and the January 3, 2006 office note supports that she was suffering from increased depression as well as anxiety attacks at that time.

[21] I find that the office notes might have reasonably affected the results of both the initial decision and the rescind or amend decision. The Applicant has satisfied the materiality test.

New Facts determination

[22] I find that the Applicant has established new material facts with respect to both the initial June 15, 2015 decision and the December 9, 2016 rescind or amend decision.

[23] Since I have found that the Applicant has established the existence of new facts, I must determine if her disability was severe and prolonged on or before December 31, 2005.

⁷ RA1-21

Disability Pension

[24] I have considered all of the medical evidence and other documents that were before the initial Tribunal Member in 2015, the documents claimed to be new facts on the first rescind or amend application, the 2005 and 2006 office visit notes which I have found to be new facts, and the Applicant's oral evidence at the initial hearing and at this hearing.

[25] A qualifying disability must be severe and prolonged (subsection 42(2) of the CPP). A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

[26] The Applicant must prove on a balance of probabilities that she became disabled on or before the end of her MQP, which is calculated based on her contributions to the CPP. Her MQP ended on December 31, 2005.⁸

Severe Disability

The Applicant's condition was severe as of the MQP

[27] I must assess the Applicant's condition as a whole and consider all of the impairments that affect her employability, not just her biggest impairments or the main impairment.⁹

Although each of the Applicant's medical problems taken separately might not result in a severe disability, the collective effect of her various health conditions may render her severely disabled.¹⁰

i. Oral Evidence

[28] The Applicant ended a relationship in 2003. It was "very nasty": there was violence, break-ins, restraining orders, calls to her work, and threats to her children. Her former spouse was jailed and breached restraining orders after he was released. In 2004 she moved to Calgary from Vancouver Island because of the danger.

⁸ GT1-50

⁹ *Bungay* 2011 FCA 47

¹⁰ *Barata v MHRD* (January 17, 2001) CP 15058 (PAB)

[29] She suffered from long-standing depression before 2005, but it would “come and go” and never interfered with her ability to work. She started to go downhill after she moved to Calgary. By the end of 2005 her depression had become worse and she had a complete breakdown: she didn’t want to talk to people; she just wanted to shut herself in; she didn’t want to leave the house even to go grocery shopping; she didn’t want to take her daughters anywhere; and on many days she just “couldn’t do it”. She went to clinics and saw different doctors in Alberta.

[30] After her breakdown she started to experience seizures, but they weren’t diagnosed until after she moved back to Vancouver Island in 2007. When she has a seizure she experiences a “déjà vu”: a weird feeling that she has been there before and she is present in two places at once. After a seizure she doesn’t remember what she saw.

[31] Her severe depression never improved and her anxiety is now as severe as her depression. She has panic attacks during which she has difficulty breathing and she feels like something bad is going to happen. Her condition has not improved since December 2005. She stated, “It has not improved...it is worse...my problems are now mainly depression and anxiety...I don’t sleep well... my memory is terrible...I forget things on the stove...I can’t go on field trips with my daughter because I don’t know what kind day I will have....I don’t know if I will even want to get out of bed”.

[32] She has had numerous trials and dosage adjustments with both anti-depressants and seizure medications. She is now taking Sertraline, an anti-depressant (150 mg, 50 mg capsules three times a day) and clobazam for seizure (10 mg). The medications “wipe her out”. She isn’t sure whether the medications or the seizures are affecting her memory and concentration. She saw a psychiatrist six times in B.C before she moved back to Alberta in October 2017: they just talked and she didn’t get any benefit from this.

[33] She has had no breaks in her depression since 2005. She has seizure triggers a couple of times a week, but as long as she takes her medications she doesn’t lose consciousness and have a full seizure.

ii. Oral evidence is supported by the medical evidence

[34] The new facts confirm that the Applicant attended at walk-in clinics for depression and anxiety between August 2005 and March 2006. The January 3, 2006 office note coincides with the MQP and confirms that she was suffering from depression and anxiety attacks, which had increased over the previous three weeks.¹¹

[35] On September 6, 2007 Dr. Moll, neurologist, reported that the Applicant's seizure symptoms began about 18 months before. This is consistent with her oral evidence that they started after her breakdown in late 2005. Dr. Moll also reported that the seizures continued to occur with increasing frequency and that her symptoms were suggestive of partial complex seizure.¹²

[36] On May 22, 2008 Dr. Hartford reported to Service Canada that the Applicant had been unable to work since she first saw her in June 2007 because of her partial sensory seizures. She was unable to comment on whether the Applicant was disabled as of December 2005 because she wasn't her family doctor at that time.¹³

[37] On June 21, 2012 Dr. Moll reported that the Applicant had a recurrence of partial simple seizures with increased frequency that was possibly related to stress and sleep deprivation. The Applicant was concerned about her inability to remember what she had learnt or been told: when she was working at the X she forgot instructions regarding patient care, and she could not recall what she learned at a business administration and accounting course.¹⁴

[38] In the September 21, 2012 CPP medical report Dr. Hartford diagnosed chronic depression and partial complex seizures. The Applicant's functional physical findings and limitations included anxiety, low mood, decreased concentration, poor sleep, fatigue, irritability, poor motivation, poor energy level, difficulty making decisions, and being easily overwhelmed. Dr. Hartford was hopeful that the Applicant would find some improvement in coping with her

¹¹ RAB1-14

¹² GT1-91

¹³ GT1-85

¹⁴ GT1-70

stressors through counselling. She stated that the Applicant had a long history of depression and continued to have partial seizures on an ongoing basis.¹⁵

[39] A November 28, 2012 initial diagnostic interview note by Steven Surkes, mental health counsellor, stated that there was evidence of sadness, loss of interest, guilt, psychomotor retardation, anger, social anxiety, moderate levels of sleep disturbance, low energy and reduced concentration. Mr. Surkes' initial impression was a double depression in an anxiety- prone and chronically stressed woman. The Applicant had considerable childhood turmoil and significant problems with bad relationships. Despite several medication trials over the years there had been limited mood improvement and the Applicant's seizure disorder had not been well controlled over the previous two years.¹⁶

[40] On May 29, 2015 Dr. Hartford stated that depression was the main diagnosis preventing the Applicant from working.¹⁷

iii. The Applicant suffered from a severe disability as of the December 2005 MQP

[41] A disability should be considered severe if it renders the Applicant incapable of pursuing with consistent frequency any truly remunerative occupation. I should assess the severity requirement in a "real world context" and consider such factors as the Applicant's age, education level, language proficiency, and past work and life experiences when determining her "employability".¹⁸

[42] Notwithstanding her depression, the Applicant worked at numerous jobs until 2005. She had an impressive work history and often worked for several employers at the same time. She last worked in 2005 sorting donations at a Salvation Army warehouse whose manager was a friend's father. She stated that initially she was able to manage this work, but when her depression worsened she lacked motivation, wasn't sleeping, was calling in sick, and was leaving early. She was being accommodated because she was working for a friend's father; otherwise,

¹⁵ GT1-55 to 58

¹⁶ RA1-20

¹⁷ RAB3-2

¹⁹ Atkinson, 2014 FCA 187

she would have been let go earlier. Eventually she didn't want to go anywhere and couldn't continue working.

[43] The Applicant has a grade 12 education as well as residential care aide college diploma and a business administration certificate. She has worked as a room attendant at a resort, a support worker at a brain injury recovery clinic, and as a teaching assistant. She has also operated a dog grooming business.

[44] I recognize that she was only 35 years old at the MQP, that she is well educated, that she has a varied work history, and that she has transferable skills. I am satisfied, however, that as of December 2005 she lacked the capacity regularly to pursue any form of gainful employment. Because of her severe depression and anxiety she could not have been a regular and reliable employee and predictability is the essence of regularity within the CPP definition of disability.¹⁹

[45] I find that the Applicant's disability was severe by the MQP. I am also satisfied that her disability has been continuously severe since that time because of her intractable severe depression and anxiety, her seizures, and the side-effects of her medications.

The evidence does not establish post-MQP capacity

[46] The Minister submits that the Applicant graduating with honours from a college course in 2007 and her working as a community worker in 2011 establish that she had the regular capacity to pursue employment after the MQP.

[47] The Applicant testified that the 2007 course was self-paced, that she worked on a computer and did not attend classes, and that at times she didn't attend for over a week. The tests were multiple choice and she was able to set her own hours. She stated, "If I had to be there every day I wouldn't have been able to do the course". She also testified that she only worked for a few weeks at the X in 2011. She was on call to help disabled persons with their day to day activities. Even though the Centre was only a 5-10 minute drive from where she lived she "couldn't do it" because of her severe depression.

¹⁹ *Atkinson*, 2014 FCA 187

[48] Persons suffering from a disability do not remain static. They must occupy themselves, try to improve their lot, and be active. Such activity does not necessarily indicate capacity for regular employment.²⁰

[49] I find that the Applicant's post-MQP business course and community work do not establish a regular capacity for gainful employment. The Applicant should be commended for these efforts and these activities represent laudable efforts on her part to be as active as possible.

Severity Determination

[50] I find that the Applicant has established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged Disability

[51] The Applicant's severe depression, anxiety, and seizure disorder have persisted for many years. At best they are managed by medication which has significant side effects.

[52] In her May 29, 2015 report Dr. Hartford stated that the Applicant had not been able to work for long period of time because of her depression, and that she continued to require ongoing anti-depressant therapy but had never completely achieved remission.²¹

[53] I find that the Applicant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[54] I find that the Applicant had a severe and prolonged disability in December 2005 when she suffered a complete breakdown because of her severe depression and anxiety. 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) CPP). The disability application was received in June 2012; therefore, the Applicant is deemed disabled in March

²⁰ *Elwood v. MEI* (June 23, 1994) CP 2781 CEB & PG 8541). This decision is not binding but I find it persuasive.

²¹ RAB3-2

2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2011.

[55] The application is allowed.

Raymond Raphael
Member, General Division - Income Security