



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. F. v. Minister of Employment and Social Development*, 2018 SST 468

Tribunal File Number: GP-17-348

BETWEEN:

L. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Lianne Byrne

Teleconference hearing on: May 7, 2018

Date of decision: June 7, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of June 2016.

OVERVIEW

[2] The Claimant is a 60 year old woman who worked for over 34 years as a child care provider. She stated in her CPP disability application that she could no longer work as of April 2, 2015 due to excruciating pain in the back of her legs and ankles. The Minister received the Claimant's application for the disability pension on January 27, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant 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 Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2017.

ISSUE(S)

[4] Did the Claimant's pain result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if 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. A person must prove on a balance of

¹ Paragraph 42(2)(a) *Canada Pension Plan*

probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

Severe disability

The Claimant had a severe disability as of December 31, 2017

[7] I am satisfied that the evidence shows that the Claimant was incapable regularly of pursuing any substantially gainful occupation. I considered that the measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It is not a question of whether a person is unable to perform their regular job, but rather the person’s inability to perform any substantially gainful work².

[8] I found the Claimant to be forthright, credible and sincere in her testimony. She testified that she was able to work for over 34 years in a physically-demanding job as a self-employed child care provider. She worked long hours (weekdays from 6:30 a.m. until 5:30 p.m.) and was responsible for up to 6 children at a time. Although she had a long history of left knee pain, she was able to work without difficulty until early 2015, when her pain increased. She began to wear a knee brace to work and was booked for arthroscopic surgery.

[9] Prior to surgery, she had to stop working suddenly on April 2, 2015 due to a dramatic increase in her pain, which had spread to her left hip, both legs, and both ankles. She advised her clients that she planned to return to work on May 1, 2015. Her pain continued to increase to the point that she required a wheelchair, bed pan and assistance with all activities of daily living.

[10] She underwent left knee surgery on April 9, 2015 and, initially, felt an improvement in her left knee pain. However, approximately two weeks after surgery, she again developed excruciating pain in her left knee, along with swollen ankles and purple legs. She advised her clients that she was unlikely to return to work as planned. She remained housebound for the next four months, requiring assistance from her husband and children with all activities of daily living.

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[11] Her symptoms have not improved significantly since then. She continues to have constant pain in both legs, both ankles, both knees and her left hip. She also experiences daily, unpredictable episodes of excruciating pain, which she described as a knife scraping her knee and razor blades in her ankles. Her feet swell on a daily basis. She has a number of functional limitations, including with respect to walking, sitting, standing, lifting, carrying, reaching, and bending. She is concerned about her safety at all times due to frequent falls.

[12] The medical evidence on file confirms that the Claimant has been suffering from pain in her legs and ankles that prevents her from working. Her family physician, Dr. Drummond, who she has known for 35 years, is very supportive of her application for CPP disability benefits. Dr. Drummond explained in a report dated February 1, 2016 that she underwent a left knee arthroscopy in April 2015 and then developed persistent left leg and knee pain. She went on to develop a peripheral neuropathy. He stated that she has been completely disabled from any form of work since April 2015 and remains disabled and unfit for any employment. On October 30, 2017, Dr. Drummond reported that she has been rendered incapable of work. She is unfit for any form of employment.

[13] Dr. Drummond's reports are consistent with the remaining medical reports on file, all of which were considered. In particular, her orthopaedic surgeon, Dr. Riaz, indicated on May 14, 2015 that she has left knee and leg pain as well as tingling and numbness in both legs following her left knee arthroscopy. She was noted to feel fairly incapacitated. Her neurologist, Dr. Myles, indicated on August 11, 2015 and November 18, 2015 that she should be referred to a pain specialist. Her physiatrist, Dr. Willmott, reported on July 6, 2017 that her overall presentation is suggestive of a chronic pain disorder with mechanical pain at the left knee. Her psychologist, Dr. Turnquist, reported on October 23, 2017 that she is very clearly not able to work and should be entitled to CPP disability benefits. Her rheumatologist, Dr. Olaru, indicated on January 16, 2018 that she has evidence of bilateral knee osteoarthritis and also likely has chronic pain syndrome/fibromyalgia.

The Claimant had no work capacity prior to the expiry of her MQP

[14] I must assess the severe part of the test in a real world context³. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in finding that the Claimant's disability is severe, I considered that she was 60 years old as of the MQP with a grade 11 education. She worked for 34 years as a child care provider. Prior to that, she worked in other jobs requiring her to be on her feet all day, including as a waitress and in retail.

[15] The Claimant is precluded from performing the types of jobs she has done in the past, or any other job requiring even light physical duties, due to her pain and functional limitations, including her significant limitations with walking, standing and sitting. She has never held a sedentary job and, given her age, education and work experience, she would be unlikely to obtain a sedentary job even without considering her medical conditions. She is also not a candidate for retraining given her age and education level. I find that the Claimant was not employable in a real world context as of the MQP. I also find that there is no evidence of work capacity.

[16] In addition, I considered that the Claimant worked consistently on a full-time basis for 34 years as a child care worker. She also worked in a concession stand on weekends. She has demonstrated a strong work ethic. She loved her job and had difficulty accepting her inability to work. It is a reasonable inference that a person with her work ethic over the years would not sit idly at home if she could possible work.⁴ I therefore accept the Claimant's submission that she would work if she could.

The Claimant has complied with all reasonable treatment options

[17] I am also satisfied that the Claimant made genuine efforts to improve her health. She underwent left knee arthroscopy and, according to Dr. Riaz, further surgical intervention is unlikely to improve her condition. She has seen numerous specialists, including an orthopedic surgeon, neurologist, rheumatologist, dermatologist, physiatrist and psychologist. She attended physiotherapy and tried laser therapy and "needles", which did not have a positive impact on her condition. She sees a naturopathic doctor and adheres to a strict diet. She receives knee injections every two weeks, which numb her pain a little bit. She has tried numerous pain and

³ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁴ *Jean v. MSD* (June 8, 2005), CP 21909 (PAB)

anti-inflammatory medications. She has been attending a pain class since 2017. She also attends swim therapy 1-2 times per week. She has not refused any recommended treatments and would be willing to undergo any treatment that would improve her situation. I accept that her condition has not improved despite her many efforts.

[18] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest impairments or the main impairment⁵. Having considered the totality of the evidence and the cumulative effect of the Claimant's medical conditions, I am satisfied on a balance of probabilities that she suffers from a severe disability.

Prolonged disability

[19] I find that the Claimant's disability is also prolonged. I considered that Dr. Reid began treating her for her main medical condition in July 2014. He was of the opinion that her disability is prolonged. Dr. Reid also noted on October 30, 2017 that he did not anticipate great improvement in the near future. I also accept the Claimant's oral evidence that she suffers from ongoing pain and numbness, which has not improved over time.

[20] Therefore, I find that there is little likelihood of her condition improving in the foreseeable future and accept that the Claimant's disability is long continued and of indefinite duration.

CONCLUSION

[21] The Claimant had a severe and prolonged disability in April 2015. Payments start four months after the date of disability, as of August 2015⁶.

[22] The appeal is allowed.

Lianne Byrne
Member, General Division - Income Security

⁵ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁶ Section 69 *Canada Pension Plan*

