



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. F. v. Minister of Employment and Social Development*, 2018 SST 852

Tribunal File Number: GP-16-3595

BETWEEN:

G. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Brisette Lucas

Claimant represented by: Andrian Nakarikov

In person hearing on: June 14, 2018

Date of decision: July 8, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of May 2015.

OVERVIEW

[2] The Claimant was 50 years old when she applied for benefits in August 2015. She obtained a grade 10 education in Venezuela before immigrating to Canada in 2004. The Claimant participated in the hearing with the assistance of an interpreter. She claimed that she was disabled because she slipped on ice on the sidewalk and sustained an injury to her right shoulder on January 5, 2015. The Claimant was last employed as a restaurant worker from October 2013 to January 2015, but claimed she could not continue because of limitations including pain in her right shoulder as well as forgetfulness, poor concentration and fatigue.

[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, 2016. The Respondent denied the application initially and upon reconsideration because the Claimant did not have a severe and prolonged disability as of her MQP.

ISSUES

- a) Whether the limitations caused by pain in her right shoulder, forgetfulness, poor concentration and fatigue resulted in her being incapable regularly of pursuing any substantially gainful occupation, on or before December 31, 2016; and
- b) If so, whether the disability was likely to be long continued and of indefinite duration.

ANALYSIS

[4] 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 death¹.

Severe disability

The Claimant had multiple impairments as of December 31, 2016 resulting from injuries caused by her slip and fall accident that occurred on January 5, 2015

[5] On January 5, 2015 the Claimant slipped and fell on ice when she was exiting a bus. She experienced pain and tightness in her right shoulder and claimed she was unable to continue working after that. I reviewed all of the medical evidence and found the following the most relevant in relation to the Claimant's impairments:

- a) In the initial CPP Medical Report dated August 31, 2015, Dr. Cheung, Family Physician, stated that the Claimant had severe right tendinopathy associated with nerve impingement, fibromyalgia and osteoarthritis. Dr. Cheung reported that the Claimant's conditions were likely chronic but that since she is in vocational rehabilitation she may be able to find another job that allows her recovery of function over time.²
- b) In a Clinic Note dated November 16, 2016 Dr. Basile, Neurologist, noted that since her accident the Claimant has had neck pain; shoulder pain bilaterally on the right greater than the left; mid to lower back pain without radicular symptoms down the legs; tingling and vibration sensation in her bilateral upper and lower extremities, torso and abdomen, and throughout her body; occasional numbness; burning sensation in the right shoulder; and pain that can be provoked by certain movements of the shoulder.³
- c) In a subsequent CPP Medical Report dated December 19, 2016 Dr. Cheung noted that the Claimant had an increase in severity and pain flares with respect to her fibromyalgia;

¹ Paragraph 42(2)(a) of the CPP

² GD2-43

³ GD5-27

generalized osteoarthritis; irritable bowel syndrome; dyslipidemia; and occasional acid reflux. Dr. Cheung remarked that the Claimant's fibromyalgia and generalized osteoarthritis was expected to remain the same or deteriorate and that she has not improved over the past year despite medication and being seen by specialists.⁴

[6] At the hearing, the Claimant testified that since the accident she has been in a lot of pain, especially on her right side where she fell. She stated that she cannot work quickly; cannot sit or stand for long periods of time; and that her acute pain does not allow her to concentrate. She testified that she feels fatigued and needs to be in a laid down position for most of the day to experience some relief from her pain. The Claimant testified that, on average, she is impacted by pain five days out of seven and that her condition can depend on variables such as the weather and her mental condition, which includes anxiety and depression. She testified that she complies with recommended treatments including medications, some of which cause her to be sick. She attended a fibromyalgia program for a month so that she could learn to cope with her pain. The Claimant testified that she has difficulty with most of the activities of daily living and requires help from her son and her friends. Consistent with her testimony, the Claimant's written evidence is that she takes longer to do the things she used to do before her accident, such as dressing; washing her hair; cleaning the house; school work (ESL courses); and walking.⁵ She submitted that she takes several medications, including Naproxen, Apo-Omeprazole, Elavil and Rosuvastatin; has trouble with memory, focus and concentration; is anxious and depressed and suffers from non-restorative sleep.

The Claimant has been compliant with pursuing treatment recommendations

[7] I find that the Claimant has done all she can to seek and to follow recommended treatments. She made written submissions that despite ongoing physiotherapy, medication and participation in a fibromyalgia program she has not had any resolution to her pain.⁶ She testified that while she continues taking medication, she can no longer afford physiotherapy. The Claimant also stated that she underwent cortisone injections and they did not give her lasting

⁴ GD4-5

⁵ GD2-11

⁶ GD1-7

relief and that she is followed by a pain specialist and neurologist. The Claimant's testimony and submissions are supported by medical evidence on file:

- a) In August 2015, Dr. Cheung noted that the Claimant participated in physiotherapy, sports medicine and is compliant with her medications, but that despite these treatments she is still experiencing shoulder pain and limitations.⁷
- b) In January 2016, a chiropractor at the X noted that the Claimant was coming twice a week for therapy but that she decreased it to once a month for financial reasons.⁸
- c) In February 2016 Dr. Rozen, Anesthesiologist, noted that the Claimant was not interested in undergoing more cortisone injections as they had not benefitted her in any way.⁹
- d) In January 2017 Dr. Cheung noted that the Claimant could not continue physiotherapy because she did not have the money for it.¹⁰

[8] I find it reasonable that the Claimant did not participate in physiotherapy any longer due to financial constraints and did not undergo further cortisone injections because they did not benefit her in any way, and that she is otherwise compliant with pursuing medical treatment.

The Claimant's functional limitations prevent her from performing any substantially gainful occupation

[9] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. Severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any substantially gainful occupation¹¹.

[10] I find that that the Claimant's physical and cognitive functional limitations prevented her from performing any substantially gainful occupation as of December 31, 2016. The Claimant's last job, from October 2013 until her accident in January 2015, was full-time as a worker in a

⁷ GD2-43

⁸ GD3-12

⁹ GD3-13

¹⁰ GD5-5

¹¹ *Klabouch* 2008 FCA 33

restaurant. It was a physical job that required her to be on her feet, do food preparation, cook, clean and be nimble in her efforts to help service the clients of the restaurant. The Minister submits that the medical evidence does not show any serious pathology of impairment which would result in her being categorized as disabled and unemployable in all occupations. I find that it does. The Claimant testified that due to the pain she was experiencing after her accident in January 2015 she could no longer work as a kitchen worker as of the time. While Dr. Cheung was initially hopeful in August 2015 that the Claimant would be able to find alternate work with vocational rehabilitation, by December 2016 Dr. Cheung acknowledged that that the Claimant's pain had increased in severity and that her fibromyalgia and generalized osteoarthritis is expected to stay the same or deteriorate. While I accept, based on the testimony and medical evidence that the Claimant could not work in her usual position which was physically demanding I must examine whether she could work in an alternate, more sedentary position.

[11] The Claimant testified that she attempted to take English as a Second Language (ESL) classes from September 2015 to May 2016 but could not continue due to the pain she was experiencing during that time. She testified that she was able to pace herself, unlike what would be expected from an employer in a work situation and that even with pacing she could not complete the coursework. The Claimant's written submissions confirmed that she was unable to complete her ESL coursework past May 2016 due to struggling with writing; inability to sit for long periods; and trouble looking down to her work due to pain in her neck.¹² The Claimant's testimony and submissions are consistent with medical evidence on file. In a November 2016 report Dr. Cheung noted that the Claimant was unable to sit in her ESL classes.¹³ I find that the combination of physical pain and limitations in her right shoulder, general osteoarthritis, lack of focus and concentration and fatigue would make it difficult for the Claimant to find and retain even more sedentary employment.

[12] I must also consider factors such the Claimant's age, education level, language proficiency, and past work and life experiences when determining her employability¹⁴. The Claimant was 51 years old as of December 31, 2016. She only has a grade 10 education, which she obtained in Venezuela. She immigrated to Canada as an adult and English is her second

¹² GD1-7

¹³ GD5-8

¹⁴ *Villani* 2001 FCA 248

language. The Claimant could not continue her ESL coursework to be vocationally rehabilitated due to her limitations. Her only work experience in Canada has been as a restaurant worker; she has never worked in an office setting. She testified that although she knows how to “look things up” on the computer she is not proficient in programs such as Word or Excel. It is difficult to imagine the type of work that the Claimant could realistically perform in a competitive employment environment given her limitations, even a more sedentary role. The Claimant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities.¹⁵

[13] In conjunction with the functional limitations resulting from her slip and fall accident, I find that the Claimant’s relatively limited work experience, low education, low level of English language skills and low proficiency in computer usage would be additional barriers to her ability to obtain alternative employment. The Minister submits that the Claimant did not attempt to find alternative employment within her limitations. Because I have found that the Claimant did not have work capacity by December 31, 2016, she is not required to establish that she has made efforts to obtain and maintain employment that were unsuccessful by reason of her health conditions.

The Claimant has established a severe disability

[14] I find that the Claimant has established on the balance of probabilities, a severe disability as defined in the CPP.

Prolonged disability

[15] Having found that the Claimant’s disability is severe, I must also determine whether her disability is prolonged. The Claimant testified that her disabling conditions have persisted since January 2015 and have not improved significantly with treatment, medication or assessment by specialist. I also find the following medical evidence persuasive:

¹⁵ *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB). This decision is not binding, but I consider it to be persuasive.

- a) In December 2016 Dr. Cheung noted that the Claimant had been compliant with all her treatments and specialists' appointments but that she has not had a good response to these common treatment modalities.¹⁶
- b) In a report dated January 27, 2017, Dr. Cheung noted that the Claimant's impairments include worsening osteoarthritis and tendonitis in her right shoulder, and pain flares in generalized joints and muscles and that her restrictions include: inability to work, do basic things such as dressing/combing her hair/lifting utensils to cook food, inability to lift her arms above her shoulders, difficulty walking, sitting or standing due to lower back pains and inability to stay in one position for too long.¹⁷

[16] Dr. Cheung's opinion about the Claimant's limitations remained the same before and after the expiration of her MQP. The Claimant's disability is long continued and of indefinite duration. I find her disability is prolonged.

CONCLUSION

[17] I find that the Claimant had a severe and prolonged disability in January 2015. CPP payments start four months after the deemed date of disability¹⁸. Payments will start as of May 2015.

[18] The appeal is allowed.

Brisette Lucas
Member, General Division - Income Security

¹⁶ GD4-5

¹⁷ GD5-5

¹⁸ section 69 of the CPP