



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. M. v. Minister of Employment and Social Development*, 2018 SST 867

Tribunal File Number: GP-17-335

BETWEEN:

D. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

In person hearing on: June 11, 2018

Date of decision: July 2, 2018

DECISION

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

OVERVIEW

[2] The Claimant has a long work history. Her most recent job was a security/receptionist position that she held from December 18, 2000 until July 8, 2015, when she stopped working due to pain, numbness, and neurological symptoms.¹ Some of her problems appeared to flow from a 2004 motor vehicle accident. The Minister received her application for a CPP disability pension on February 24, 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 generally 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, 2018. As the MQP is in the future, I must determine whether the Claimant was disabled on or before the hearing date.

PRELIMINARY MATTERS

[4] The Claimant brought Dr. Joneja’s June 5, 2018 letter to the hearing and asked that it be received as evidence. I found the letter highly relevant to the appeal and agreed that it could not reasonably have been submitted earlier. I accepted it as evidence but allowed the Minister until July 6, 2018 to provide submissions. Those submissions were received on June 26, 2018.

ISSUES

[5] Did the Claimant’s conditions result in the Claimant having a severe disability by her MQP date? In other words, was she incapable regularly of pursuing any substantially gainful occupation by the date of the hearing?

¹ GD2-79

[6] If so, was the Claimant's disability also prolonged?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged². A person is considered to have a severe disability if 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. A person must prove on a balance of probabilities their disability meets both parts of the test. If the Claimant meets only one part, she does not qualify for disability benefits.

Does the Claimant have a severe disability?

[8] 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 impairment³. I must also assess the severe part of the test in a real-world context⁴. 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.

[9] In this case, the Claimant was nearly 61 years old on the hearing date. She completed Grade 12 and a one-year "administrative assistant" college diploma. She speaks English fluently. Prior to her security/receptionist job, her past employment included being a pharmacy assistant, doing data entry, working in reception at City Hall, working in retail, and handling billing and accounting. She also spent some years at home, as one of her children had multiple conditions (autism, Asperger's Syndrome, and attention deficit hyperactivity disorder) and required special care. She also volunteered at his school. I find that the Claimant's background prepares her for most types of sedentary work, provided that such work does not require extensive training. Accordingly, my assessment of severity will focus on her medical conditions rather than her personal characteristics.

² Paragraph 42(2)(a) of the *Canada Pension Plan*

³ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

Does the Claimant have a serious health condition that affects her work capacity?

[10] Less than one week before the hearing, Dr. Joneja (Rheumatology) confirmed the Claimant's diagnoses of osteoarthritis and fibromyalgia. Her symptoms included severe fatigue and chronic diffuse muscle and joint pain. Her conditions affected both her ability to maintain gainful employment and her ability to cope with the activities of daily living.⁵

[11] The Claimant sees Dr. Best (Family Physician) on a monthly basis. Although Dr. Best's clinical notes were not filed as evidence, a number of letters from Dr. Best describe the Claimant's conditions. In the most recent letter, dated January 29, 2018, Dr. Best said the main diagnoses were vertigo, chronic fatigue, and fibromyalgia/chronic pain. The vertigo symptoms continued to interfere with balance and vision, while the chronic pain and fibromyalgia were progressive and debilitating. Dr. Best also found the fatigue to be progressively more severe. Dr. Best concluded that the Claimant was totally disabled for any type of employment.⁶

[12] The recent evidence of Dr. Best and Dr. Joneja establishes that the Claimant has a serious health condition that affects her work capacity. However, the measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents her from earning a living. In other words, I must consider her ability to perform any substantially gainful work⁷.

Did the Claimant have any residual work capacity?

[13] This question is important because, where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition⁸.

[14] At the hearing, the Claimant said every day was painful, with some days being worse than others. She still has bouts of vertigo and often uses walls and other surfaces for support. She sometimes might be "okay" for a couple of hours, but then finds herself exhausted and struggles to stay awake. She does not know from one hour to the next whether she has any capacity. While

⁵ GD9-1

⁶ GD4-2 to GD4-3

⁷ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁸ *Inclima v. Canada (A.G.)*, 2003 FCA 117

the file contained a reference to jewelry-making, she said she is no longer able to do this. She cannot do household chores such as vacuuming or cleaning the floors. She can only do one load of laundry per day. Her spouse does the outdoor chores. She cannot spend much time on the computer. She would like to babysit her grandchildren but is unable to do so. Due to her pain, she often sleeps poorly even if she takes medication. She must sometimes sleep sitting up, because her bed (or even just the bedsheet) hurts her.

[15] The Claimant also described significant and progressive vision difficulties that currently prevent her from reading or watching television. She has “fibromyalgia fog” that prevents her from multitasking and staying focused. She gets distracted and forgets what she is doing. She said she would require a nap after the hearing. She said she was incapable of working on a schedule. She said she had always enjoyed working and the socialization that went with it. She had not done any paid or volunteer work since she stopped working at the security/receptionist position in July 2015. She did not apply for any jobs because her health kept deteriorating.

[16] L. P., the Claimant’s daughter, also gave evidence at the hearing. I found her evidence to be genuine and believable. L. P. said the Claimant’s chronic pain and fatigue made it very difficult for her to spend time with her daughter and granddaughters. The Claimant cannot supervise or play with her granddaughters. L. P. cannot plan anything with her mother because her mother’s condition is so unpredictable. L. P. affirmed her mother’s desire to work, as well as her enjoyment of getting out and seeing people.

[17] While anxiety and a somatic preoccupation were already noted in 2016 by Dr. Howse (Neurologist), and the Claimant’s written materials have a worrisome level of detail about her various complaints, the evidence from the Claimant and L. P. nonetheless suggests that she does not have any residual work capacity.⁹ I find the lack of predictability to be a particularly important consideration, as predictability is the essence of “regularity” within the CPP definition of disability.¹⁰ I also found it significant that the Claimant described her most recent job as the least physically demanding of all of her jobs. However, she was unable to continue with that job despite reducing her work hours on a number of occasions.

⁹ GD2-10

¹⁰ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

[18] The previously referenced 2018 evidence of Dr. Best and Dr. Joneja also does not suggest any residual work capacity by the date of the hearing. This is further supported by the January 22, 2018, letter from Dr. Cushing (Chiropractor). Dr. Cushing listed symptoms dating back to 2014, with neck pain/stiffness, headaches, and right arm nerve-based impairments currently being the most debilitating. He also affirmed that the Claimant wanted to return to work and was distressed by the prospect of not being gainfully employed in the future.¹¹

[19] After considering the oral evidence at the hearing, as well as the Claimant's personal characteristics and the most recent medical evidence, I find that the Claimant did not have any residual work capacity at the hearing date. This means she has established a severe disability as of the hearing date. To decide whether there is any retroactive entitlement, I must decide whether the Claimant has continuously had a severe disability for any period up to the hearing date.

Did the Claimant continuously have a severe disability up to the hearing date?

[20] While Dr. Best believed the Claimant's condition was worsening over time, I find that she was already severely disabled at the time she stopped working in July 2015. R. L., was the Claimant's most recent work supervisor. On January 24, 2018, R. L. described the Claimant's work performance up to July 2015. R. L. said the Claimant would not know from one day to the next whether she would be able to work. The Claimant often called in sick at the last minute or was sent home. R. L. also described issues with memory, multitasking, concentration, and irritability. R. L. tried to accommodate the Claimant but ultimately it was decided that she would have to go on medical leave.¹² The lack of predictability and reliability persuades me that the Claimant was not employable in a real-world context in July 2015. The subsequent medical evidence supports the continuation of her disability after that date.

[21] Although there is no narrative medical documentation from July 2015, the Claimant was undergoing diagnostic testing at that time.¹³ However, Dr. Cushing's January 22, 2018 letter provides a useful history, as he began treating her on November 3, 2014. In 2014, she presented with foot pain, neck pain and stiffness, low back pain and stiffness, headaches, occasional

¹¹ GD5-3 to GD5-4

¹² GD5-6 to GD5-7

¹³ GD2-51

dizziness, and radiating pain and paresthesia into the right arm and hand. Dr. Cushing also affirmed that she was no longer physically capable of working by the time she stopped working in July 2015. He said she was unable to function effectively in her job.¹⁴

[22] In the last three years, the medical documentation has consistently described significant symptoms that left the Claimant incapable regularly of pursuing a substantially gainful occupation. Diagnostic imaging on November 19, 2015 referenced increased cervical pain and recent syncopal attacks; balance and dizziness troubles had been notable for six months when the Claimant saw Dr. Robertson (Otolaryngology) on December 7, 2015.¹⁵ Dr. Best's February 4, 2016 medical report gave diagnoses of vertigo (recurrent debilitating episodes), fibromyalgia, and chronic pain syndrome. Dr. Best said the progressive episodes of vertigo involved dizziness, nausea, blurred vision, tinnitus, and a loss of coordination, balance and focus. The Claimant had pain in the neck, back, shoulder girdle, hips, knees, ankles, feet, and elbows, as well as numbness and tingling in her hands, elbows and arms. She also had headaches, severe fatigue, sleep disruption, and mood changes. Her spine was tender and she had limited range of motion in the cervical spine. Dr. Best thought she was permanently disabled for any type of employment.¹⁶

[23] On October 12, 2016, Dr. Best affirmed her previous diagnoses and prognosis. She said the Claimant's vertigo symptoms were ongoing and getting more severe: these included dizziness, tinnitus, blurred vision, and difficulty with balance, coordination, focus, and concentration. The Claimant continued to experience progressive neck, back, and shoulder girdle pain, as well as pain in her hips, knees, ankles, feet, and elbows. Her chronic fatigue was progressive and debilitating. She could not do any sustained activity and needed frequent rests.¹⁷

[24] On December 13, 2016, Dr. Howse reported potential neurological symptoms including imbalance, intermittent dizziness, vision problems, and tinnitus. Dr. Howse also noted longstanding fibromyalgia and ongoing neck pain radiating into both arms. Dr. Howse saw the Claimant again on July 18, 2017 and said her symptoms continued unchanged.¹⁸ As previously noted, Dr. Best's January 29, 2018 letter confirmed the Claimant's ongoing vertigo,

¹⁴ GD5-3 to GD5-4

¹⁵ GD2-49 and GD2-52

¹⁶ GD2-67 to GD2-70

¹⁷ GD2-41 to GD2-42

¹⁸ GD1A-5 and GD4-5

fibromyalgia/chronic pain syndrome, and chronic fatigue. Her vertigo continued to interfere with balance and vision, while the fibromyalgia/chronic pain symptoms continued to be progressive and debilitating. Her chronic fatigue symptoms were also progressively more severe.¹⁹

[25] Given the continuous and significant limitations set out in the objective medical documentation since July 2015, as well as R. L.' evidence showing that the Claimant was no longer employable in a real-world context as of July 2015, I find that the Claimant has had a severe disability from July 2015 until the hearing date.

Does the Claimant have a prolonged disability?

[26] As noted above, a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. However, there is little to suggest that the Claimant's conditions will result in her death. Accordingly, I must determine whether her disability is likely to be long continued and of indefinite duration.

[27] On June 5, 2018, Dr. Joneja described the Claimant's symptoms as "prolonged", although it is not clear whether this particular statement reflected the CPP definition of "prolonged" or was simply describing how long the Claimant's symptoms had already existed. However, Dr. Joneja also said the Claimant's conditions were ongoing, chronic, and likely to continue. I find this highly persuasive, particularly given Dr. Joneja's specialist expertise and the timing of her opinion.²⁰ Dr. Joneja's prognosis is also consistent with Dr. Best's repeated opinion that the Claimant was permanently disabled for any type of employment. Dr. Best first expressed this opinion on February 4, 2016 and most recently expressed it on January 29, 2018.²¹

[28] On January 22, 2018, Dr. Cushing said he failed to see the Claimant returning to a level of gainful employment, although he then appeared to qualify that opinion by adding "especially in the capacity that she was previously employed".²² While I do not assign as much weight to his opinion, as he appears to be treating symptoms more than the underlying conditions, it is nonetheless consistent with the opinions expressed by Dr. Best and Dr. Joneja.

¹⁹ GD4-2

²⁰ GD9-1

²¹ GD2-41, GD2-70, and GD4-3

²² GD5-4

[29] At the hearing, the Claimant said there was no job she could see herself doing. She does not know what she could do, as she could not be on a schedule. She will be scheduling a follow-up appointment with Dr. Joneja. Dr. Joneja has also advised her to see an ear, nose and throat specialist, as she has had blood in her inner ear. On June 4, 2018, the Claimant was told at the Ophthalmology Orthoptic Clinic that she needed corrective surgery for her vision problems. As previously noted, she continues to see Dr. Best monthly.

[30] I do not assign much weight to the Claimant's vision problems, as these may well resolve with surgery. I also assign more weight to the objective evidence of her doctors than to her own evidence concerning her prognosis for the future. However, given her ongoing treatment and the consistency of opinion regarding her prognosis, I find that her disability is likely to be long continued and of indefinite duration. Her disability is therefore prolonged.

CONCLUSION

[31] The Claimant had a severe and prolonged disability in July 2015, when she was forced to stop working at her most recent job. As payments start four months after the date of disability, her payments will commence as of November 2015.²³

[32] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security

²³ Section 69 of the *Canada Pension Plan*