



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. M. v. Minister of Employment and Social Development*, 2018 SST 854

Tribunal File Number: GP-17-1100

BETWEEN:

D. M.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: July 12, 2018

Date of decision: July 13, 2018

DECISION

[1] The Appellant is not entitled to a *Canada Pension Plan* (CPP) disability pension.

OVERVIEW

[2] The Appellant is a former letter carrier who stopped working in February 2013 because of back pain. She then developed pain and a vibrating sensation throughout her body, along with fatigue. These symptoms were intermittent until August or September 2013, when they became constant. The Appellant applied for a CPP disability pension in September 2015¹. That application was denied; and the Appellant did not request reconsideration of it. She applied again in February 2016². The Minister denied this application initially and on reconsideration, and the Appellant appealed to the Social Security Tribunal.

[3] The Appellant must prove on a balance of probabilities that she became disabled on or before the end of her Minimum Qualifying Period (MQP), which is calculated based on her contributions to the CPP³. The Appellant's MQP ended on December 31, 2016.

ISSUES

[4] Did the Appellant's conditions cause a severe disability, meaning she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2016?

[5] If so, was the disability long continued and of indefinite duration by December 31, 2016?

ANALYSIS

[6] A person is disabled under the CPP if she has a physical or mental disability that is severe and prolonged. A disability is severe if the person is incapable regularly of pursuing any substantially gainful occupation, not just incapable of performing her usual job⁴. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in

¹ GD2-49-53, 201-208

² GD2-32-36, 154-161

³ GD4-18-19

⁴ *Klabouch v Canada (A.G.)*, 2008 FCA 33

death⁵. The Appellant must prove on a balance of probabilities that her disability meets both parts of the test.

[7] I accept that the Appellant's condition causes pain, fatigue, and vibration. However, I cannot find that she is disabled under the CPP, because she has refused reasonable treatments that have been suggested and are available to her.

Severe disability

i. Symptoms and limitations

[8] The Appellant worked as a letter carrier in the Vancouver area for over 20 years. She described difficult working conditions including heavy lifting, prolonged standing on hard surfaces, and hours of walking. In 2007 she injured her back when she fell on some ice. She worked at inside duties for a few months and then returned to her regular job. She still had back pain, but she managed for several years by taking Advil and occasionally Tylenol 3; taking time off; and working easier routes when these were available.

[9] The Appellant testified that her back pain grew worse in 2012. For several months her employer helped her by assigning someone else to do part of her route. This was not enough. The Appellant had difficulty standing in one place to sort her mail or walking the rest of her route. She enjoyed her job and felt she was a valuable employee, but one day in February 2013 she had had enough. She could not get out of bed to go to work. She has not worked since.

[10] The Appellant described how it was several months before she could get out of bed. She then went to rehabilitation, where she had physiotherapy and a trainer. She enjoyed this therapy and she felt that her back was improving. However, she then started to feel her nerves vibrating; and she had pain throughout her body, along with fatigue. At first these symptoms would come and go, but by August or September 2013 they were constant.

[11] Over the next two years the Appellant developed other issues including bowel and bladder problems; COPD; and a skin rash that was suspected dermatomyositis. She testified that investigations revealed nothing wrong with her bowels, so she learned to live with the problem.

⁵ Paragraph 42(2)(a) *Canada Pension Plan*

She takes medication to control her COPD; and a cream to control her skin rash. She testified that while she still has these conditions they do not significantly affect her ability to work.

[12] The Appellant testified that she is not capable of pursuing even part-time work because of constant and widespread pain, vibration, and extreme fatigue. She manages her symptoms by lying down and avoiding all activity. She lives with her husband and 23-year-old daughter in a basement suite in her mother's home. Her family members do all the housework and meal preparation, as she can only get out of bed occasionally. She walks twice a day for five or six minutes at a time. She drives very little. Her only activity besides walking is to go to church when she is able.

ii. Diagnosis

[13] The Appellant's back pain is caused by lumbar spondylosis⁶. In 2015-2016 she saw several specialists for assessment of her other symptoms⁷. She described intensive testing over several years, including for Lyme disease and multiple sclerosis, with no conclusive diagnosis. She testified that she did not see any specialists after their last reports in the file, and that eventually the investigations and referrals ended. In May 2016, a resident at her primary care clinic, Dr. Kharrat, suggested she might have fibromyalgia⁸. That, along with lumbar spondylosis, has been her diagnosis since then.

iii. Treatment

[14] In deciding if the Appellant's disability is severe, I must consider whether she has fulfilled her duty to mitigate her condition by undergoing reasonable treatments that have been made available to her⁹. While she appears to have been compliant with medication recommendations made specifically for her low back pain, she has not pursued reasonable treatment recommendations for her fibromyalgia.

⁶ GD2-144-145, 167-170,

⁷ Dr. Horton GD2-147-149, 173; Dr. Vorobeychik GD2-135-136, 138-143; Dr. Morton GD2-40; Dr. Gill GD2-129-131

⁸ GD2-77

⁹ *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Sharma v. Canada (Attorney General)*, 2018 FCA 48

[15] Since stopping work the Appellant has regularly seen Dr. Theron or other doctors and nurse practitioners in the same primary care clinic. She testified that Dr. Theron discussed fibromyalgia with her, but he was not very sympathetic. He suggested several avenues of treatment, which the Appellant dismissed.

[16] First, he suggested she see a fibromyalgia expert, Dr. Hyams. His clinic notes indicate the Appellant did not want to do this because she would have to pay \$250¹⁰. The Appellant testified this was not the case. She was prepared to pay whatever she had to, but she could not get to Dr. Hyams' clinic because it was in X, which she stated was about a two-hour drive from her home in X if there was traffic. She testified that she spoke with someone at the clinic and was told they offered therapy for fibromyalgia but no cure, and that she would have to go there several times a week. She was not prepared to endure a lengthy car trip when all that was offered was in her opinion, "the same old thing".

[17] Second, Dr. Kharrat and Dr. Theron suggested a trial of Cymbalta¹¹. The Appellant testified she did not want to take this medication because it is an anti-depressant and she does not have depression. Dr. Theron told her Cymbalta could also be effective for fibromyalgia, but she read that it would "mess with my brain", and her husband did not want her to take it. She tried it for about a week and then stopped. Instead she takes tramadol and a box of Neo-Citran each week, which she stated made her vibrations livable.

[18] Third, Dr. Theron encouraged the Appellant to be more active¹². She testified that he suggested she try activities such as yoga. She did not want to do this, because as part of the physiotherapy program that ended in September 2013 she had gone to a yoga class once; a Pilates class two or three times; and she had tried pool exercise. None of these had helped her, and she did not see the point of trying again. Although there are some references in the clinic notes to physiotherapy or gym programs after September 2013, the Appellant was adamant that she only had this type of therapy and rehabilitation from early 2013 until September of that year, after which she ceased all such activity because of her symptoms.

¹⁰ GD2-77

¹¹ GD2-77

¹² GD2-75

[19] Last, Dr. Theron directed the Appellant to information from programs called “BC Pain” and “Live Plan Be”¹³. The Appellant testified that he gave her some pamphlets. At first she did not look at them, but later she reviewed them quickly. She testified that they contained suggestions about exercising and trying to live with pain, which made her laugh because “they have no idea”.

[20] Except for her reluctance to drive to X for treatment, I find the Appellant’s refusal to follow these suggestions to be unreasonable.

[21] The Appellant is not qualified to make judgements about whether Cymbalta is appropriate for her condition. Cymbalta is recognized as a treatment for fibromyalgia, and was suggested by both Dr. Theron and Dr. Kharrat. Whether the Appellant tried it for a week, as she testified; or not at all, as Dr. Theron indicated¹⁴, she did not give proper consideration or time to see if this medication might be effective.

[22] There is no medical restriction on the Appellant becoming more active, and it is unreasonable of her not to attempt to do more than a few minutes of walking each day. In particular, she has not tried focused and gentle activities like yoga since September 2013. She has no idea if these will help her or not.

[23] The Appellant had no basis for concluding the suggestions in the pamphlets Dr. Theron gave her would not be useful. Again, she is not qualified to make that judgement, whereas Dr. Theron is. He gave her the information because he thought it might help her. According to the Appellant’s evidence, none of the suggestions were costly or involved any risk to her. It was not reasonable for her to dismiss them out of hand.

[24] Usually the analysis of whether a person’s condition is severe includes a consideration of factors such as age, level of education, language proficiency, and past work and life experience¹⁵. However, whatever effect these might have on the Appellant’s work capacity is made irrelevant by her failure to make reasonable efforts to mitigate her condition¹⁶. It is

¹³ GD2-71

¹⁴ GD2-73

¹⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁶ *Sharma v. Canada (Attorney General)*, 2018 FCA 48

possible that Cymbalta, an increase in activity, or trying the suggestions from “BC Pain” and “Live Plan Be”, would have improved the Appellant’s symptoms to the point where she could have attempted some type of work. It is also possible they would not have helped; however, the Appellant has an obligation to at least make reasonable efforts to improve her condition, and she has not done so.

[25] I am aware Sun Life Financial determined the Appellant was totally disabled from performing her own or any occupation¹⁷. The evaluation that formed the basis of that decision is not in the file. The Appellant testified she has not seen it. In any case, I must make my own assessment of the Appellant’s condition based on the criteria set out in the CPP and the case law. While I recognize the Appellant has physical limitations, her failure to do anything to mitigate her condition means that she has not established that her disability is severe as that term is defined in the CPP.

Prolonged disability

[26] A person must prove on a balance of probabilities their disability is both severe and prolonged. Because I decided the Appellant’s disability is not severe, I did not consider whether it is prolonged.

CONCLUSION

[27] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

¹⁷ GD2-20