Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada

Citation: *A. S. v. Minister of Employment and Social Development*, 2018 SST 864

Tribunal File Number: GP-16-2418

BETWEEN:

A. S.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	David Somer
Claimant represented by:	Lindsay Blair Holder
Teleconference hearing on:	July 10, 2018
Date of decision:	July 20, 2018

Canada

DECISION

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

OVERVIEW

[2] The Claimant was 51 years old at the time of her application. She has a grade 10 education. She last worked in customer service/receptionist/shipper from May 26, 2006 until April 4, 2013 when she suffered a slip and fall accident at work while helping a customer. This resulted in problems with her knee and back. The Minister received the Claimant's application for the disability pension on August 13, 2015. 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, 2015.

ISSUES

[4] Did the Claimant's knee and back pain as well as anxiety and panic attacks result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2015?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2015?

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged[1]. 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

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

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, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

Severe Disability

The Claimant did not have a serious health condition that limited her capacity to work

[7] 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 impairment. I find that the Claimant's physical condition resulted in some limitations; however, she did not pursue recommended treatment. I find the Claimant's psychological condition did not impact on her capacity to work.

[7] The Claimant stated that her main disabling conditions are a right knee meniscus tear and back pain as well as anxiety. She claimed that she is able to sit/stand for 5-10 minutes and walk around her home. She avoids reaching and bending but is independent with her personal needs. She has help from her family with household maintenance. She was prescribed Endocet for her pain as well as Clonazepam and Ativan to treat her anxiety and panic attacks in 2015.

[8] The Claimant testified that, in addition to the slip and fall at work in April 2013, she was involved in a motor vehicle accident (MVA) in July 2013. She suffered a mild neck injury and exacerbated her old injuries. It took a month before she could resume her regular activities. She attended physiotherapy for 6-7 months and did home exercise. The physiotherapy was helpful for only one half hour following each session.

[9] In a report dated August 13, 2015[2], Dr. DiNardo, Family Physician, diagnosed the Claimant with right knee pain secondary to a slip and fall injury at work; and low back pain secondary to mechanical low back pain from her injury. On examination, Dr. DiNardo noted diffuse tenderness of the right knee with minimal swelling. The Claimant was having difficulty with stair climbing, prolonged standing or walking long distances. She has had extensive rehabilitation/ physiotherapy and has plateaued in recovery. The doctor noted that she has

[2] GD2-41-44

chronic pain and the Claimant testified that the pain gets worse with activity. Her pain level in her knee is 7-8/10 with medication and 9/10 without. Sometimes, her knee gives out or locks. Dr. DiNardo stated that he has treated the Claimant for 20 years and began treating her for her main medical condition in February 2013. He further stated that she has a poor prognosis for further recovery. It should be noted that Dr. DiNardo did not note the presence of any disabling psychological issues at that time and he prescribed no medication for any psychological condition other than her prescription for Endocet to control her pain.

[10] A CT scan of the lumbar spine on June 5, 2013[3] was normal with no acute disc herniation identified or evidence of central or foraminal impingement. An MRI of the right knee on June 23, 2013[4] showed lateral meniscus tears. Another MRI on December 22, 2017 showed that the lateral meniscus tear is small and unchanged from the prior examination. There is mild tendinosis of the quadriceps tendon and proximal patellar tendon. Diagnostic imaging does not support severe condition of her right knee.

[11] On June 26, 2015, the Claimant attended Dr. Krystyna Prutis[5], Physiatrist, regarding her low back and right knee pain. Dr. Prutis noted some decreased range of motion in her back but she remains neurologically intact. The doctor's impression was that she had an exacerbation of chronic low back pain and knee pain secondary to an injury. There is no cruciate or collateral ligament instability but she did have a meniscus tear. Dr. Prutis recommended physiotherapy and an orthopedic consultation. The CT scan of her lumbar spine in June 2013 was normal and there was no other medical evidence to establish a serious condition in her lower spine.

[12] The medical evidence reflects that the Claimant had physical limitations that would impact on her ability to work, however, surgery was recommended, surgery she did not pursue. The Claimant underwent a WSIB Comprehensive Assessment by Dr. Ogilvie-Harris[6], Orthopedic Surgeon, on October 25, 2013. Dr. Ogilvie-Harris commented that the Claimant has a torn lateral meniscus in her right knee as a result of a fall downstairs which is complicated by back pain and psychological issues. She is partially recovered; full recovery is not expected unless arthroscopic surgery is carried out. Dr. Ogilvie -Harris pointed out that surgery was

[3] GD2-
[4] GD11-6
[5] GD2-54-56
[6] GD2-48-50

discussed and it was emphasized that this was not absolutely essential but would probably benefit her. The Claimant decided she would like to see how she responds to further rehabilitation before considering surgery. In her testimony, the Claimant stated that she decided against surgery on her knee because there is no guarantee of success and it would require a very intense and prolonged period of physiotherapy for 6 months afterward. I find it unreasonable that the Claimant refused surgery and the following physiotherapy. Dr. Ogilvie-Harris was of the opinion that the surgery would probably benefit her. There is good chance that the surgery would improve her condition and make it possible to return to work in a more sedentary position. There have been no further orthopedic consultations provided in the file.

[13] In his report, Dr. Ogilvie-Harris also stated that she is fit to return to sedentary duties; however, the matter is complicated by her ongoing low back pain which determines her function. He also discussed with the Claimant the importance of return to work as part of the rehabilitation process. The Claimant confirmed at the hearing that she made no attempt to return to work in spite of the recommendation of Dr. Ogilvie-Harris.

[14] Regarding the Claimant's psychological condition, in a letter to the Claimant's legal representative dated February 2, 2018,[7] Dr. L. DiNardo, Family Physician, wrote that he was unable to identify any further impairment in regard to depression and anxiety that were not listed previously. Dr. DiNardo noted that the Claimant had been referred to a psychiatrist who prescribed Zoloft and lorazepam but her overall symptoms did not improve significantly. She was advised to seek cognitive behavioral therapy but has not sought this treatment. It should be noted that the Claimant testified that she did not pursue cognitive behavior therapy because she was unable to afford it. The Claimant had not been reassessed by any specialist recently and her condition was managed with stable dosed opioid medication. Dr. DiNardo further noted that he did not have a notation with regard to migraines or the severity of migraines starting from the present time dating back to July 2017.

[15] The Claimant testified that she began having panic attacks in childhood. These have continued to this day and there is no trigger. A panic attack could start without warning. When she had a panic attack at work, she would walk outside for a while or someone would stay with

[7] GD11-2-3

her until she felt better. In some instances, her boss would follow her home to make sure that she got there safely. She stated that she had a very understanding employer. The Claimant underwent a psychiatric assessment on November 18, 2016 by Dr. E. D'Alessandro, Psychiatrist,[8] who concluded that she had chronic depression, anxiety and chronic pain. Dr. D'Alessandro recommended cognitive behavioral therapy, Zoloft and clonazepam, relaxation techniques and continuation of medical treatment for pain. He also noted that the Claimant's most recent psychiatric assessment prior to this was 15 years earlier. Dr. D'Alessandro referred the Claimant back to the care of her family physician. This information is one year after the expiry of the Claimant's MQP and does not necessarily reflect the Claimant's psychiatric condition at the time of her MQP.

[16] The Claimant was assessed on April 30, 2018 by Dr. J. Dhaliwal, Psychiatrist[9], who diagnosed her with depression, anxiety and mood disorder with mixed mood state. Dr. Dhaliwal reported that she has anxiety attacks which may not occur for 3 months or 2 months and then they come from one to 2 months. Dr. Dhaliwal reviewed her medication and added Risperdal and advised her to continue the clonazepam and Zoloft as before. The Claimant has continued to see Dr. Dhaliwal every one to 2 months.

[17] I find, based on the medical reports of Dr. D'Alessandro and Dr. Dhaliwal and the oral testimony of the Claimant, that the Claimant did not have a severe psychiatric condition on or before December 31, 2015 that would have prevented her from suitable gainful employment. According to Dr. Dhaliwal, her panic attacks are infrequent. I further note that the 2 medical reports referred to above are both after the expiry of her MQP and do not address the Claimant's psychiatric condition at the time of her MQP of December 31, 2015.

[18] I must assess the severe part of the test in a real world context[10]. 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. The Claimant was 52 years of age at the time of her application. She has a grade 10 education. The Claimant's work history consisted of customer service, receptionists and shipping clerk for many years. I am of the view

[8] GD4-1-2
[9] GD14-2
[10] *Villani v. Canada (A.G.)*, 2001 FCA 248

that she developed limited transferable skills from her work experience. Keeping in mind the Claimant's personal circumstance, along with her medical condition, it would appear that her personal circumstances would negatively impact on her ability to seek and, if necessary, retrain for part-time employment. However, there must still be medical evidence demonstrating lack of capacity to work. I have concluded that the Claimant's psychiatric problems would not have prevented her from gainful employment. I have also found that she unreasonably refused surgery to her right knee which Dr. Ogilvie-Harris stated could be improved with surgery and physiotherapy. The Claimant maintained a residual capacity to work.

The Claimant has not made efforts to find or maintain suitable work

[19] The Claimant testified that she stopped work after a slip and fall accident in her workplace in February 2013. She worked for several days following the accident in spite of experiencing pain in her right knee and lower back. After several days she saw her family physician and was advised to stop work. She returned to work after one month with restrictions on lifting and carrying. Her work was not strictly sedentary as she had to get up and move to bring items to customers. She finally stopped work in April 2013 because of the pain in her right knee and lower back as well as panic attacks. She has not applied for any other work since then.

[20] 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 condition[11]. The Claimant testified that she did not attempt to return to work or look for alternative employment when she stopped working in April 2013. Therefore, I cannot determine from the evidence before me that the Claimant was unsuccessful in obtaining or maintaining employment by reason of her health condition if she never attempted to look for alternative employment. *Inclima* states that there is an obligation to pursue alternative employment when the Claimant retains the residual capacity to do so. In this case, I am satisfied that the Claimant had the capacity to seek alternative employment but failed to meet her obligation as set out in *Inclima.*

CONCLUSION

[11] *Inclima v. Canada (A.G.)*, 2003 FCA 117

[21] The appeal is dismissed.

David Somer
Member, General Division - Income Security