



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. D. v. Minister of Employment and Social Development*, 2018 SST 860

Tribunal File Number: GP-18-261

BETWEEN:

R. D.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Claimant represented by: Italica Battiston

Videoconference hearing on: July 17, 2018

Date of decision: July 24, 2018

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of December 2012.

OVERVIEW

[2] The Minister received the Claimant's application for a CPP disability pension on November 14, 2013. The Claimant claimed that she was disabled because of multiple conditions caused by or arising from a motor vehicle collision (MVC) in 2007. The Minister denied the application initially and upon reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (Tribunal). The General Division of the Tribunal held a hearing by videoconference and on November 10, 2016 dismissed the appeal. The Claimant appealed the General Division decision to the Appeal Division of the Tribunal. On January 25, 2018 the Appeal Division allowed the appeal, and referred the matter back to the General Division for reconsideration.

[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 ended on December 31, 2009.

PRELIMINARY MATTERS

Can the *de novo* hearing include evidence from the previous hearing?

[4] Yes. If there are no directions otherwise testimony and evidence submitted for the previous appeal can be considered in a proceeding to reconsider a matter the Appeal Division referred to the General Division.

[5] The Appeal Division of the Tribunal may refer the matter back to the General Division for reconsideration in accordance with directions¹. The Appeal Division found the previous

¹ Section 59 *Department of Employment and Social Development Act*

decision contained errors in the application of the law particularly related to the Claimant's employability and the impact her personal circumstances may have on her employability. The Appeal Division directed the General Division hold a *de novo* hearing before a different member. The Appeal Division gave no other direction.

[6] The legislation does not define how the General Division should conduct a hearing when the Appeal Division returns a matter for reconsideration. Specifically, the legislation does not address whether the General Division is required to rehear all of the evidence from the parties or whether a decision can be based, entirely or in part, on evidence already adduced at the first hearing.

[7] Sworn testimony a claimant gave at the first hearing is an integral part of the record². I am satisfied that the recording of the prior General Division hearing forms part of the record in this appeal. The parties knew the hearing was being recorded, the recording was made available to the Appeal Division, and neither party objected. The Appeal Division could have directed that the recording be removed from the record and did not. Finally the Appeal Division allowed the appeal on the basis of errors in law and a contradiction in the conclusions in the decision. The Appeal division did not identify issues or concerns with the previous testimony such as issues of natural justice, bias, or procedural fairness.

[8] The Tribunal is to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit³. It can be quicker to decide a matter based on a thorough review of the evidence previously adduced than to have all parties resubmit evidence and repeat all oral testimony. The parties received a copy of the hearing recording prior to this hearing and had the opportunity to raise any questions or add to the testimony at the videoconference. They also had the opportunity to present further evidence or clarify the evidence previously adduced if necessary.

² *In Re X*, 2005 Carswell Nat 6321

³ Section 3 *Social Security Tribunal Regulations*

[9] Unless there is a reason to do otherwise, the Claimant should not be required to testify again to the same facts when her evidence is available and the Minister did not challenge it. Doing so would offer no benefit to the parties or the process and would unnecessarily lengthen the reconsideration hearing.

[10] This process is also in keeping with the requirement the Tribunal interpret the Regulations so as to secure the just, most expeditious and least expensive determination of appeals⁴. A complete rehearing of an appeal would not be expeditious or the least expensive alternative. The most expeditious and least expensive alternative was to proceed on the basis of: evidence and submissions on file; review of the recording of the prior hearing; and, an oral hearing to allow the parties to clarify or add to the evidence as necessary.

ISSUE(S)

[11] Did the Claimant's conditions result in her having a severe disability, meaning she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2009?

[12] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2009?

ANALYSIS

[13] Disability is defined as a physical or mental disability that is severe and prolonged⁵. 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 probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, she does not qualify for disability benefits.

⁴ Section 2 *Social Security Tribunal Regulation*

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

Is the Claimant's disability severe?

[14] Yes. The Claimant's health conditions make her incapable regularly of pursuing any substantially gainful employment. The Claimant was 52 years old at the end of her MQP. She completed high school in Brazil and worked in sales and real estate until moving to Canada in 2001. Since then she worked cleaning private residences and trained and worked as a personal support worker. In 2007 her neck and back were injured in the MVC. She wanted to continue to work and, with help from her family members she continued to provide support to her clients for a few days. She became unable continue working in less than one week and has not worked since. Her ongoing health conditions include pain, fibromyalgia, Post-Traumatic Stress Disorder (PTSD), depression and anxiety.

Do the Claimant personal circumstances affect her ability to pursue employment given her physical limitations?

[15] I must assess the severe part of the test in a real world context⁶. This means that when deciding whether the Claimant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Appeal Division identified an error in the previous decision regarding the analysis of the Claimant's personal circumstances and how they might affect her ability to pursue employment.

[16] In her testimony the Claimant's discussed her attempts to attend training before her injuries and the impact her language, work history and education have on her ability to compete for a job in a competitive market. The Claimant went to high school in Brazil and worked for herself in door to door sales and as a real estate agent. When she moved to Canada she attended some English classes and some classes in Theology. She did not complete any courses. Since her injuries in 2007 she is unable to attend any classes because her physical health does not allow her to use stairs or drive on a regular basis. Her mental health makes her unable to interact with others.

[17] Since she moved to Canada the Claimant's work has been labour intensive and physically demanding. That kind of work is no longer within her capabilities. She is able to communicate

⁶ *Villani v. Canada (A.G.)*, 2001 FCA 248

on a basic level in English but requires an interpreter for more complicated communication. All of her education with the exception of some incomplete courses was completed in Brazil. The *Villani* decision also states that a claimant is not required to satisfy the Tribunal that she is unable to do any conceivable job, but any realistic job in the competitive workforce given her limitations. Given her education, work experience and language skills it is unrealistic to expect the Claimant could pursue, in a competitive market, employment she could do within her limitations.

[18] As the Minister noted there are a variety of opinions about the Claimant's conditions, causation and her capacity for work. As she was managing her injuries the Claimant saw various health professionals including her family physician, a chiropractor, a physiotherapist, a psychologist, a rheumatologist and physiatrist for treatment and investigation⁷. She was diagnosed with: diffuse myalgia and arthralgias; fibromyalgia; multi-level degenerative disc disease involving the cervical, thoracic, lumbar and sacral spine; supraspinatus right tendon; Post Traumatic Stress Disorder (PTSD); and Major Depressive Disorder⁸

[19] The Claimant describes her symptoms as extreme pain in her head, neck, arms, low back, and legs. Her pain is aggravated by movement. Her symptoms also become worse when she tries to sleep and as a result her sleep is very poor. She follows an at home exercise program and sees a chiropractor and massage therapist when needed. She finds pain medicine bothers her and she tries to limit what she takes. In any event she finds medication does not reduce her pain to the point where she can resume physical activity.

[20] The Claimant also manages depression and anxiety that became a problem for her since she has been unable to work. She feels hopeless and useless. She takes medication for her depression and anxiety and believes counselling helped her learn how to control her symptoms to some extent although they are always present. With medication she can function around her home but she struggles to go outside and becomes shaky and tearful if she has to be in public. She sees her family physician for prescription refills and continues to deal with depression and anxiety using techniques she learned in counselling.

⁷ For examples see; GD1-7, 19, and 31

⁸ GD2-53

[21] As noted above there are many reports and opinions about the Claimant's health conditions. I find her description of her injuries and ongoing symptoms are consistent with medical evidence on file. For example, Dr. W. Pruzanski, Internal Medicine assessed the Claimant in 2009, before the end of her MQP⁹. He concluded the Claimant had a widespread musculoskeletal injury with recurrent headaches. She developed post traumatic fibromyalgia with marked pain in her left shoulder, trapezium, neck, parascapular area and lumbar spine. He directed she avoid activities including domestic duties, sports and recreation and, in particular activities such as lifting or moving weight and repeated rotation of her upper and lower girdles.

[22] 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 impairment¹⁰. Prior to the end of her MQP the Claimant had and was treated for multi-level degenerative disc disease; fibromyalgia; post traumatic headaches; depression and anxiety; and, hypothyroidism. Medication and other treatment help her manage symptoms from these conditions but the combined effect makes her incapable regularly of pursuing any substantially gainful occupation.

Is the Claimant's disability prolonged?

[23] The Claimant's disability is also prolonged. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. The Claimant was injured in 2007. Her injuries did not improve significantly with extensive treatment. Reports confirmed that she reached maximum medical recovery and her health will likely continue to deteriorate. The evidence does not indicate the Claimant's condition is likely to resolve or improve in the future.

⁹ GD1-32

¹⁰ *Bungay v. Canada (A.G.)*, 2011 FCA 47

CONCLUSION

[24] The Claimant had a severe and prolonged disability in November 2007, when she was injured in the MVC. While she attempted to return to work immediately after the MVC her efforts were unsuccessful and she has been unable to work since. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension¹¹. The application was received in November 2013 so the deemed date of disability is August 2012. Payments start four months after the deemed date of disability, as of December 2012¹².

[25] The appeal is allowed.

Anne S. Clark
Member, General Division - Income Security

¹¹ Paragraph 42(2)(b) *Canada Pension Plan*

¹² Section 69 *Canada Pension Plan*