



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. X. v. Minister of Employment and Social Development*, 2018 SST 913

Tribunal File Number: GP-17-2860

BETWEEN:

D. X.

Claimant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Connie Dyck

Teleconference hearing on: August 27, 2018

Date of decision: August 31, 2018

DECISION

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

OVERVIEW

[2] The Claimant was 60 years old when she applied for a CPP disability pension. She last worked as a waitress in July 2018, when she stopped due to ongoing issues related to her heart. The Minister received the Claimant's application for the disability pension on January 3, 2017. 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). In most cases, the calculation of the MQP is based on a person's contributions to the CPP. However, the Claimant has been in receipt of a retirement pension since October 2016. Under the CPP, a person cannot receive a retirement pension and a disability pension at the same time¹. This means, that once a person begins receiving a retirement pension, if he or she applies for a disability pension, he or she must be found to have become disabled no later than the month before his or her retirement pension became payable. The month before the Claimant's retirement pension became payable was September 2016. Therefore, I must find that the Claimant became disabled on or before September 30, 2016.

ISSUE(S)

[4] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by September 30, 2016?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by September 30, 2016?

¹ Subsection 66.1 of the CPP Act and Subsection 46.2 of the CPP Regulations

ANALYSIS

[6] Disability is defined as a physical or mental disability that is severe and prolonged². 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, the Claimant does not qualify for disability benefits.

Severe disability

Although the Claimant had back pain at September 30, 2016, she retained capacity to work

[7] The measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living³. 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 impairment⁴.

[8] The Claimant had a mitral valve replacement in 2000. The family physician also reported that the Claimant had evidence of congestive heart failure with a decreased ejection fraction and had a myocardial infarction in 2012⁵. However, it is a claimant’s capacity to work and not the diagnosis of the disease that determines whether the disability is ‘severe’ under the CPP⁶. The Claimant testified that although she had some limitations with her heart condition while working at the restaurant up to August 31, 2016, she described them as “mild” which required a few hours of rest before being able to return to work again the next day. While it was the family physician’s opinion in December 2016 that the Claimant was “completely disabled for any form of occupation, mainly due to her congestive heart failure and shortness of breath”⁷, the Claimant’s

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

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁵ GD 2-84

⁶ *Klabouch v. Canada (MSD)*, [2008] FCA 33

⁷ GD 2-84

medical conditions, including that of her congestive heart failure did not prevent her from working until July 2018, which is well past her MQP of September 30, 2016.

[9] In July 2015, the Claimant was seen by a neurologist to for evaluation of seizures and changes on an MRI⁸. The Claimant had a neurological evaluation in X because of concerns on a CT scan of the brain performed in October 2014. There was a suggestion of bi-frontal cerebral atrophy NYD. There were no other significant findings such as evidence of tumors or stroke. She underwent MRI of the brain on May 12, 2015 and also had an MRI of the brain performed in X. Coronal imaging was done in X but not in X. It was the neurologist's opinion that there really wasn't much of a difference between the two studies. There was no evidence of strokes, multiple sclerosis or brain lesions. He was also of the opinion that the constellation of neurological symptoms did not point to a specific diagnosis, although a neurodegenerative disorder could be suspected. He noted that there was discord between the findings in X, where the Claimant was told she had epilepsy and was prescribed Keppra, and the MRI findings in Canada as well as the EEG which was normal⁹. However, there is no further evidence of ongoing investigations or treatment.

[10] While the Claimant has had numerous challenging medical situations, they did not make her incapable regularly of pursuing any substantially gainful employment at the time of her MQP, September 30, 2016, as required by the CPP legislation.

The Claimant's condition in combination with her personal circumstances did not prevent her from working as of September 30, 2016

[11] Severity must be assessed in a real world context, meaning that in deciding if the Claimant's condition is severe I must keep in mind factors such as her age, level of education, language proficiency, and past work and life experience.¹⁰

[12] Although the Claimant is of retirement age and has limited education, she has transferable skills including managing a business and staff, owning and operating her own

⁸ GD 2-80

⁹ *ibid*

¹⁰ *Villani v. Canada (A.G.)*, 2001 FCA 248

business for many years, customer service skills and some computer skills. In fact, the Claimant has managed to find employment within 1-2 months each time a job ended.

[13] I considering the Claimant's age and her limited education, I find that in a 'real world context' she would likely be capable of retraining or of performing a suitable job. I find that this evidenced by her securing employment with numerous employers, who were not benevolent employers and jobs without modifications or special accommodations.

The Claimant's work efforts after September 30, 2016 support that she had work capacity

[14] 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 condition¹¹.

[15] Although the Claimant has had numerous health challenges since 2016, the evidence does not support that the Claimant had any medical conditions by September 2016, that would have made her incapable regularly of pursuing any substantially gainful occupation and I find that she retained capacity for work.

[16] The Claimant and her three adult children, along with 14 other employees worked at a family owned restaurant until August 31, 2016, when the business was sold. The Claimant testified that she had mild heart issues during the time she worked at the restaurant and she would need to come home and rest and was then able to return to work the next day. She advised me that her children were working too many hours at the restaurant and therefore they sold the restaurant. I accept the Claimant's evidence that she was having some health issues during this time, however, as described by her, they were "mild" and after leaving work a few hours early and resting, she was able to return to work the next day. I was also persuaded that any health issues, including heart related or back pain, would not have been considered 'severe' as defined in the CPP legislation, by her testimony that it was her intention to continue working, at least part-time, after she began receiving her CPP retirement pension which was only one month after the restaurant was sold.

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

[17] In July 2017, the Claimant began working at X as a customer service employee. A Record of Employment shows that the Claimant quit this employment on July 6, 2017¹². The Claimant confirmed that she did not stop this employment for reasons not related to any health condition, but believed she was about to be fired. She explained that she felt her supervisor “had it in” for her because she had too soft of a voice when speaking with customers and she did not complete the required training, which she explained was due to a computer shutdown. Although this two month employment did not amount to gainful work, it was not due to any health condition, that the Claimant was unable to remain employed.

[18] One month after her employment with X ended, the Claimant began working part-time at X. A Record of Employment confirms that the Claimant regularly worked between 44 and 60 hours in a two week period from August 11, 2017 to December 30, 2017¹³. The Claimant submitted that she worked with no accommodations or job modifications¹⁴. She testified that even though she experienced pain while working at X she thought, this employment might work because every was nice and she felt she would be able to work for as many years as she wanted . The Claimant continued to work at X until January 2018 when she had cataract surgery. She testified that after two months of recovery, she advised X in March 2018 that she was ready to return to work and they advised they would “put her on the schedule”, although the Claimant testified that they did not. She advised me that after a few weeks, she was still not on the schedule so she applied for and secured work at X working as a waitress 3 days a week, 4 hours a day in April 2018. She continued with this work until July 8, 2018 when she experienced a heart related sudden attack which required hospitalization. She testified that she had another one of these attacks previously in May and again in August 2018 which required hospitalization. She has been unable to return to work since the day in July 2018 when she went to work, was not well, told to go home and went to ER because of symptoms and was hospitalized¹⁵.

[19] The Claimant testified that initially when she applied for a CPP retirement pension, it had been her plan to collect the pension while continuing to work part-time. Although the Claimant has had challenges with this plan, I do not find that she did not have work capacity by September

¹² GP 6-17

¹³ GD 6-16

¹⁴ GD 1-10

¹⁵ GD 10

30, 2016. The reason she stopped working at X was not related to any health condition or limitation. Although she testified she was experiencing pain while working at X, she had no modified duties and was regularly working 40 – 60 hours every two weeks. While she took several months off for cataract surgery and recovery, this condition would not be considered ‘severe’ and in fact, she attempted to return to work in March 2018, but again the employment ended because of an employer issue and not because of her health condition. The Claimant then secured employment again in a physical occupation as a waitress. This employment ended due to a medical issue which is ongoing, however, this was well after her MQP of September 30, 2016. While the Claimant may be unable to work today, I do not find that the evidence supports she did not have work capacity at September 30, 2016.

[20] I also considered whether the Claimant’s employment efforts after September 30, 2016 would be considered “gainful”. In respect of an occupation, “substantially gainful” is described as an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension¹⁶. While the Claimant’s earning levels might provide some guidance in determining whether the Claimant was engaged in substantially gainful occupation, her capacity of pursuing with consistent frequency any truly remunerative occupation must also be taken into account¹⁷. Although the total amount of her earnings is less than the prescribed amount for substantially gainful employment, this does not in itself evidence a regular incapacity to pursue substantially gainful employment. That determination must be made on the basis of the entirety of the evidence including the medical evidence.

[21] Further, predictability is the essence of regularity within the CPP definition of disability¹⁸. The Claimant worked between 40-60 hours in a two week period, on a regular basis at X and the testimony of the Claimant was that she worked 3 days per week, 4 hours per day at X. Both of these employment were well after her MQP of September 30, 2016.

Financial hardship is not relevant to the determination of eligibility for a disability pension

¹⁶ Section 68.1 of the *CPP Regulations*

¹⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁸ *Aktinson v. Canada (AG)*, 2014 FCA 187

[22] The Claimant testified that she is the sole provider as she is separated and she receives only a small limited amount of CPP retirement pension. While I am sympathetic to the Claimant's situation, financial hardship is not relevant to the determination of eligibility for a disability pension, that is, it is not a basis on which disability benefits are paid¹⁹.

The Claimant's disability was not severe at September 30, 2016

[23] Although the Claimant has a long history of back pain and heart related issues, she retained capacity to work at the time of her MQP of September 30, 2016. Having considered the totality of the evidence and the cumulative effect of the Claimant's medical conditions, I am not satisfied on the balance of probabilities that the Claimant suffers from a severe disability in accordance with the CPP criteria.

CONCLUSION

[24] The appeal is dismissed.

Connie Dyck
Member, General Division - Income Security

¹⁹ *Canada (MHRD) v. Rice*, 2002 FCA 47