



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *I. C. v. Minister of Employment and Social Development*, 2018 SST 1034

Tribunal File Number: GP-17-3142

BETWEEN:

**I. C.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Lianne Byrne

Claimant represented by: D. C.

Teleconference hearing on: July 17, 2018

Date of decision: September 6, 2018

## **DECISION**

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of February 2017.

## **OVERVIEW**

[2] The Claimant is a 49 year old woman who worked as a housekeeper until September 2016, when she stopped working due to fibromyalgia and arthritis in her spine. The Minister received the Claimant's application for the disability pension on October 28, 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 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, 2019.

## **ISSUE(S)**

[4] Did the Claimant's fibromyalgia, arthritis and depression result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the date of the hearing?

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

## **ANALYSIS**

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

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

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 had a severe disability as of the date of the hearing***

[7] I am satisfied that the evidence shows that the Claimant was incapable regularly of pursuing any substantially gainful occupation. 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 living. It is not a question of whether a person is unable to perform their regular job, but rather the person’s inability to perform any substantially gainful work<sup>2</sup>.

[8] I found the Claimant and her husband, D. C., to be forthright, credible and sincere in their testimony. D. C. testified that the Claimant’s health problems began in 1999 and progressed over time. She was able to work as a cook, but, by 2003 or 2004, she had difficulty performing housework, laundry and cooking.

[9] She began to work as a full-time cleaner in a hospital in November 2007. Her duties included cleaning patient rooms and washing the floors. She was able to do this work despite her health problems until October 2013, when she injured her back at work. She returned to work following this injury until she had to stop working altogether in September 2016 following a second back injury.

[10] Since then, she has had constant back pain radiating to her right heel. Her pain increases with activity. She is unable to sleep due to pain. She also suffers from depression. On a typical day, she will wake up by 3-4:00 a.m. due to her pain. She will take medication then lie on the couch. She will go for a short walk then spend the rest of the day lying down. She does not do any tasks around the house. She is unable to sit for longer than 15 minutes, stand for longer than 10 minutes or walk for longer than one minute without rest. She is unable to drive. Her husband drives her to medical appointments, but she must get out of the car to walk around every 10-15 minutes.

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<sup>2</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33

[11] D. C. testified that, despite working a full-time job, he assumed all household responsibilities by May 2017 due to a worsening of the Claimant's health. He uses all of his vacation days to care for her, take her to appointments and do household chores. He has to attend medical appointments with her due to her cognitive difficulties.

[12] The medical evidence on file confirms that the Claimant suffers from longstanding pain and limitations that worsened over time. In particular, I noted that her family physician, Dr. Eric Martin, is very supportive of her application for CPP disability benefits. Dr. Martin reported on October 17, 2016 that she has fibromyalgia (since 1999), severe osteoarthritis in her spine, degenerative disc disease, disc herniation and facet stenosis. She developed right-sided sciatica in October 2013 following a work related accident. Dr. Martin stated that medication does not make her more functional. In his opinion, she cannot return to any gainful employment and her disability is severe. On October 17, 2017, Dr. Martin reported that the Claimant cannot perform sedentary work because of her difficulty concentrating, remembering and her fatigue. He noted that she was not sent for retraining by Worksafe B.C. due to her cognitive impairments.

[13] The remaining medical reports on file are consistent with the report from Dr. Martin. Dr. Mark Kenney, chiropractor, reported on October 13, 2016 that she has chronic low back pain, chronic pain syndrome and mixed connective disease. He noted numerous functional limitations and indicated that she is totally disabled. Dr. Kenney reported again on March 9, 2017 that she has chronic daily lower back pain with radicular pain into the left thigh and calf. She also has fibromyalgia and chronic pain syndrome. He remained of the opinion that she is totally disabled.

[14] Dr. Sean Comstock, spinal surgeon, also indicated on August 10, 2016 that she has fibromyalgia, back and right leg pain and depression. He noted that an MRI showed extensive changes throughout the facets and discs in her lumbar spine. Dr. Luc Bourque indicated on October 12, 2016 that she has had lower back pain for many years that fluctuates in severity.

[15] Dr. William D. Stanish, orthopaedic surgeon, reported on January 24, 2018 that she has objective evidence of marked lumbar spine pathology. He was of the opinion that she is definitely not employable at this point, considering the nature of her lumbar spine disease, and that this impairment has made her completely disabled for work. On March 14, 2018, Dr. Stanish reported that she suffers significant low back pain as a consequence of disc degeneration.

[16] With respect to her psychological conditions, Dr. Patrick Marcotte, psychiatrist, reported on April 12, 2018 that she has severe Major Depressive Disorder with anxiety, severe and refractory chronic mechanical pain and fibromyalgia. She is unable to participate in psychotherapy given the intensity of her symptoms and mobility issues.

[17] I considered the General Work Capacity Evaluation dated May 23, 2017 by Brittany Cameron, Worker's Rehabilitation Centre, which concluded that the Claimant demonstrated the ability to perform full days of general work activities at a sedentary level. However, I found the opinions of Dr. Martin, Dr. Stanish and Dr. Marcotte to be more persuasive because they were her treating physicians. Dr. Martin felt that she cannot return to any gainful employment and cannot perform a sedentary type of work because of her difficulty concentrating, remembering and her fatigue. Dr. Stanish felt that she is definitely not employable and is completely disabled from work. Dr. Marcotte indicated that it is clear that she is not in a state to participate in a vocational rehabilitation program.

***The Claimant had no work capacity as of the date of the hearing***

[18] I must assess the severe part of the test in a real world context<sup>3</sup>. 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. In this case, in finding that the Claimant's disability is severe, I considered that she was 49 years old as of the date of the hearing. Although she has a grade 12 education, D. C. testified that aptitude testing showed that she is at a grade 7 level and would require upgrading in order to retrain. She is fluent in English. She worked for many years in physically-demanding jobs, including as a chef and a cleaner. She has never held a sedentary job.

[19] The Claimant is precluded from performing the types of jobs she has done in the past, or any other job requiring even light physical duties, due to her pain and functional limitations, including her significant limitations with walking, standing, sitting and driving. She has never held a sedentary job and would be unlikely to obtain one given her cognitive difficulties and work experience. She is also not a candidate for retraining given her health and cognitive difficulties, which was confirmed by Dr. Martin. I find that the Claimant was not employable in

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<sup>3</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

a real world context as of the date of this hearing. I also find that there is no evidence of work capacity.

[20] In addition, I considered that the Claimant worked consistently on a full-time basis for 30 years as a cook and cleaner. She has demonstrated a strong work ethic. She had difficulty accepting her inability to work. It is a reasonable inference that a person with her work ethic over the years would not sit idly at home if she could possible work.<sup>4</sup> I therefore accept the Claimant's submission that she would work if she could.

***The Claimant has complied with all reasonable treatment options***

[21] I am also satisfied that the Claimant made genuine efforts to improve her health. Dr. Martin confirmed that she tried chiropractic treatment, physiotherapy, nerve blocks and medications. Dr. Kenney indicated that her treatment consisted of exercises, spinal adjustments, accu-pressure, trigger point therapy and cortisone injections, without satisfactory results. She looked into spinal surgery, but was advised by both Dr. Stanish and Dr. Comstock that there is no surgical option available. She has tried and is currently taking numerous medications, including Pregabalin, Venlafaxine, Esomeprazole, Meloxicam, Nabilone and cannabis oil, which although somewhat helpful, have not improved her functional abilities. I accept that her condition has not improved despite her many efforts.

[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 impairment<sup>5</sup>. Having considered the totality of the evidence and the cumulative effect of the Claimant's medical conditions, I am satisfied on a balance of probabilities that she suffers from a severe disability.

**Prolonged disability**

[23] I find that the Claimant's disability is also prolonged. I considered Dr. Martin's report dated October 17, 2016 in which he indicated that she has had fibromyalgia since 1999 and sciatica since October 2013. He indicated that her prognosis is poor. Dr. Martin also indicated on October 17, 2017 that her disability is prolonged. Similarly, Dr. Kenney reported on October

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<sup>4</sup> *Jean v. MSD* (June 8, 2005), CP 21909 (PAB)

<sup>5</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

13, 2016 that she has progressively debilitating degenerative deterioration in her lumbar spine, which will not improve in the future. Dr. Stanish stated on March 14, 2018 that her pain is chronic. Dr. Marcotte noted on April 12, 2018 that her pain is chronic and refractory to treatment. I also accept the oral evidence provided by both the Claimant and D. C. that she suffers from ongoing pain and limitations, which have worsened over time.

[24] Therefore, I find that there is little likelihood of her condition improving in the foreseeable future and accept that the Claimant's disability is long continued and of indefinite duration.

### **CONCLUSION**

[25] The Claimant had a severe and prolonged disability in October 2016, when Dr. Martin stated that she cannot return to gainful employment and Dr. Kenney stated that she is disabled. Payments start four months after the date of disability, as of February 2017.<sup>6</sup>

[26] The appeal is allowed.

Lianne Byrne  
Member, General Division - Income Security

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<sup>6</sup> Section 69 *Canada Pension Plan*