



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. N. v Minister of Employment and Social Development*, 2018 SST 1208

Tribunal File Number: GP-17-1290

BETWEEN:

J. N.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

In person hearing on: September 6, 2018

Date of decision: October 6, 2018

DECISION

[1] The Appellant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of January 2016.

OVERVIEW

[2] The Appellant applied for a CPP disability pension in March 2016. She claimed she was disabled because of a racing heart, anxiety, headaches, and nerve damage to her right arm; all of which left her unable to work as of September 2015¹. Up to that time she had spent her entire working life – 34 years – as a key punch operator and then a business teller for a bank. The Minister denied her 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 CPP². The Appellant's MQP will end on December 31, 2018. Since this date is in the future, the Appellant must be found disabled on or before the date of this hearing.

ISSUES

[4] Does the Appellant have a severe disability, meaning she is incapable regularly of pursuing any substantially gainful occupation?

[5] If so, is the disability likely to be long continued and of indefinite duration?

ANALYSIS

[6] The CPP defines disability as a physical or mental disability that is severe and prolonged. A person has a severe disability if she is 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 death³.

¹ GD2-36-40, 332-337

² GD5-16

³ CPP paragraph 42(2)(a)

[7] The Appellant answered my questions spontaneously and in a straightforward manner. She did not exaggerate her symptoms; in fact, she described various conditions as manageable. I believed what she told me, and I accept her evidence as an accurate description of her symptoms, limitations and treatment up to the date of the hearing. After considering the written and oral evidence, I find the Appellant has had a severe and prolonged disability since September 2015.

Severe disability

i. The Appellant has debilitating physical conditions

[8] The Appellant has many physical issues because of her age, her activities, two motor vehicle accidents, and an assault by her former husband in 2002⁴:

- She has limited range of movement in her knees, after joint replacement surgery for osteoarthritis in 2009 and 2010.
- She has arthritis and tendinitis in her right arm, and nerve damage in her left arm, caused by many years of work as a keypunch operator and then as a bank teller. These cause tingling and numbness in her hands and fingers. She had left elbow surgery in November 2013 and February 2015. This helped for a time but did not completely resolve her left arm problems, which are still under investigation. She has not had right arm surgery.
- She has varicose veins in both legs. She underwent stripping and ligation many years ago, but the problem has returned over time and causes leg pain.
- She has an extreme perfume sensitivity which causes shortness of breath. She also has recurrent bronchitis and asthma. She has tried to use a CPAP machine, but could not tolerate it, and these problems continue for her.
- Her most significant physical problems stem from the assault. This made her right arm pain worse, and left her with extensive physical damage elsewhere: she has acid reflux, jaw pain, ear pain on both sides, headaches, neck pain, shoulder pain and stiffness, and upper and lower back pain. She gets physiotherapy and chiropractic

⁴ GD2-64, 124, 185, 217, 294-295; GD3-1, 23, 24; Appellant's testimony

care when she can afford it; and she wears a retainer to treat her jaw pain. Her retainer must be adjusted every two weeks, which causes more headaches each time.

[9] Because of her physical condition, the Appellant has difficulty with sitting and standing. She cannot reach above her shoulder with her right arm. She cannot use a computer for more than five minutes because she has difficulty with the mouse. She cannot hold a pencil for long. She drops items so often that she uses paper plates at home. She does some cooking and household chores, but she is slow and inefficient, and she alternates between sitting and standing. She relies on her adult son to help her with many tasks. Since stopping work, she spends most of her day sitting with her legs elevated and her arms propped on pillows⁵.

ii. The Appellant has debilitating psychological conditions

[10] The Appellant believes she has had Attentional Deficit Disorder, dyslexia and possibly some other learning disability since childhood. She was never diagnosed, and I note she managed to complete high school and work for many years despite any pre-existing cognitive issues. I do not think these conditions contribute to her disability.

[11] However, the assault caused psychological damage which, layered on top of the Appellant's long history of alcohol abuse, worsened over time and affected her ability to do her job. She developed depression and anxiety; and frequent panic attacks caused by seemingly harmless things like someone coming up behind her at work. She had to leave work occasionally because of these, but she managed for many years by using different medications and coping mechanisms. As time went on, she noticed she was becoming forgetful, was easily distracted, and she had difficulty sleeping. She developed a racing heart and shortness of breath⁶. She has been diagnosed with anxiety disorder, PTSD, alcohol dependence, and cognitive decline⁷.

[12] The Appellant went on medical leave in May 2014. She returned to work the following March, and managed on medication until August 2015, when her anxiety increased and her sleep became disrupted again. Her memory problems grew worse, and she began forgetting names and how to do daily tasks at work and at home. She was let go from her job in September 2015

⁵ Appellant's testimony; GD2-165-172

⁶ GD2-137-142, 303-306

⁷ GD2-303-306

because she kept forgetting her password - something she had to use many times each day⁸. She has not worked since then.

[13] The Appellant testified she has cut down her drinking but she continues to be forgetful. She leaves notes all over her house. She ties a ribbon on her car so she can find it in a parking lot, because she cannot remember otherwise. She forgets names, and where or why she is going somewhere.

[14] In March 2016 the Appellant was tested because of her memory problems. She scored below average on cognitive testing, but her short-term memory was found to be reasonably intact and she was said to function well in day-to-day activities. She was found to have mild cognitive impairment⁹. A neuropsychological assessment in December 2016 concluded she had low average overall and intellectual functioning, and cognitive impairment. The cause was unknown given her possible learning disability, multiple head traumas, substance abuse, and persistent psychiatric symptoms¹⁰.

[15] I prefer the Appellant's description of how her memory and anxiety affect her daily, to the fairly positive report of her limitations after testing in March 2016. That report appeared to be based primarily on the Appellant's description of her abilities, and on testing that provided a snapshot of her condition that day. As noted above, I found the Appellant tended to downplay the effect of her condition at times during her testimony, and I think it is likely she did so at other times as well. Similarly, I placed little weight on the Appellant's description of her psychological conditions during her assessment by Dr. Nagendran for possible alcohol treatment in March 2016¹¹. She minimized or denied almost every problem, including alcoholism. It was clear from the report that the Appellant did not want to be there and was likely being uncooperative.

iii. The Appellant has complied with treatment recommendations

[16] The Appellant at first resisted treatment for her alcoholism. This refusal was reasonable considering her condition: it is well-known that one of the biggest hurdles for an alcoholic is

⁸ GD2-154-158

⁹ GD2-324-327

¹⁰ GD3-16-22

¹¹ GD2-246-249

recognizing that there is a problem. In March 2016 the Appellant's illness prevented her from seeing this. However, soon after that she began treatment, and she continues to have it regularly. There is no suggestion the Appellant has not been compliant with any other treatment.

iv. The Appellant does not have work capacity

[17] Although her anxiety and memory issues were the proximate cause of the Appellant's being asked to leave her job, her other conditions have contributed to her inability to resume work at this or any other employment. She testified that her overall condition has not improved since she stopped work. She testified that she struggled at work and she was pampered and accommodated. She did not have to carry bundles of coins or climb up ladders to get to safety deposit boxes. Her computer was set up on her right side because she could only hold her head and neck facing that way. Her co-workers were not allowed to wear perfume, and she was indulged because of her various physical and mental sensitivities.

[18] The Appellant testified that she did not try to return to her job at the bank because it would not have her. She believed the bank considered itself well rid of her. She did not try other work because she did not think she would be able to find a job that would provide the accommodation and understanding she needed to manage all her limitations.

[19] The Minister submitted that, according to the Appellant's family doctor, Dr. Dodd, the Appellant's main barrier to returning to work was pain and numbness in her right forearm and hand; and that this suggested she might improve with surgery and might also try alternate work. That is not what Dr. Dodd said. In fact, she stated that it was the Appellant who felt her right arm symptoms were preventing her from working. Dr. Dodd herself felt the Appellant had "multiple medical issues", and that her memory impairment was closely related to her alcohol addiction, which still needed to be addressed¹².

[20] I agree with the Appellant's assessment of her work capacity. It is possible to comb through the Appellant's medical records and pick out instances where someone has reported or observed improvement or moderation of various symptoms. However, I must consider all her

¹² GD2-189-190

possible impairments, not just the biggest or the main ones¹³. Viewed separately, each of her conditions might not prevent her from working at some type of gainful employment. Viewed as a whole, they do. While each of her symptoms may fluctuate in severity, she is overwhelmed by the totality of her physical and mental conditions, and this has a significant effect on her ability to pursue substantially gainful employment.

[21] The measure of whether the Appellant's disability is "severe" is not whether she suffers from severe impairments or is incapable of performing her usual job, but whether the disability prevents her from earning a living¹⁴. In deciding whether the Appellant's disability is severe, I must keep in mind factors such as her age, level of education, language proficiency, and past work and life experience¹⁵.

[22] The Appellant is 55 years old. She has many physical and psychological limitations, including an inability to sit for long or to work at a computer. She has frequent memory issues and she struggles to remember basic information that she would need to be productive and reliable in a workplace. She tried returning to her previous job – the only employment she has ever had – and failed after several months. Although her employer had previously accommodated her, it was not prepared to do so after September 2015.

[23] Based on the Appellant's limitations and her personal circumstances; and her failed attempt to return to work, I am satisfied she has no work capacity. I find the cumulative effect of her multiple conditions has left her incapable regularly of pursuing any substantially gainful occupation since September 2015.

Prolonged disability

[24] The Appellant's disability is likely to be long continued and of indefinite duration. Dr. Dodd has been the Appellant's family doctor since about 2006. She has observed the Appellant's long struggle and her gradual decline. In April 2016 she stated the Appellant's prognosis was poor because her symptoms had lasted more than two years; she had a suboptimal response to

¹³ *Bungay v. Canada (A.G.)*, 2011 FCA 47

¹⁴ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

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

medical treatment; and because she had multiple conditions¹⁶. More recently, the Appellant's chiropractor, Dr. Nixdorf, stated the Appellant's pain associated with her back and neck conditions; and her associated headaches and loss of mobility; was chronic and was not expected to improve¹⁷. The Appellant has observed no improvement in her physical or mental condition despite taking medication as prescribed, and attending counselling and treatment for alcoholism every two weeks for more than two years now. She has taken advantage of all treatments that are available to her. Although in May 2016 psychotherapist Mr. Rubel thought the Appellant might improve and be able to return to work¹⁸, that has not happened.

CONCLUSION

[25] The Appellant had a severe and prolonged disability in September 2015, when she was let go from her job because of her cognitive problems. Payment of the disability pension starts four months after the date of disability, as of January 2016¹⁹.

[26] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

¹⁶ GD2-306

¹⁷ GD3-22-23

¹⁸ GD2-230-231

¹⁹ CPP section 69