



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. L. v Minister of Employment and Social Development*, 2018 SST 1210

Tribunal File Number: GP-17-1634

BETWEEN:

D. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: David Plante

Videoconference hearing on: October 4, 2018

Date of decision: October 9, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of June 2015.

OVERVIEW

[2] The Claimant was born in 1968. She has a youth and child care worker diploma, as well as an early childhood education diploma. The Claimant last worked in the early childhood education field in August 2011. She tried to work at various jobs after that, including working as a housekeeper at a hotel. She has not worked since August 2013. She also went to school and attended a personal support worker (PSW) program, but she could not complete the course because of lifting restrictions. She went to school from May 2014 to February 2016 in a pharmacy technician program. She failed her work placement. The Claimant alleges that she cannot work because of cerebral palsy, depression and anxiety. The Minister received the Claimant's application for the disability pension on May 31, 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, 2015.

ISSUES

[4] Did the Claimant's conditions 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 prolonged¹. 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.

The Claimant's disability was severe by December 31, 2015

[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 living. It's 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 work².

[8] I am satisfied that the evidence shows that the Claimant was unable to perform any substantially gainful work at the time of her MQP because of her medical conditions.

[9] The Claimant testified that her cerebral palsy has progressively worsened over the years. She worked as an early childhood educator from 1998 to 2011. She worked in preschools and at daycares. She worked with her last employer in the early childhood education field from February 2007 to August 2011.³ She testified that she had an employer who used to accommodate her, but new management came in and took these accommodations away. She was forced to work with toddlers. The Claimant had difficulty looking after toddlers because she had problems walking and lifting. She became depressed. She could not keep up with her job. She had conflicts with her employer. She went off work on January 29, 2010 and returned on February 22, 2010. She again went work for medical reasons on December 7, 2010 and returned

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

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

³ GD2-52

on May 9, 2011. She finally quit her job in August 2011. Her employer advised the Minister that she stopped working due to illness or injury.⁴

[10] The Claimant tried to return to the workforce. She went back to school and attended a personal support worker program (PSW) from September 2011 to January 2012. She was advised that she would be able to physically handle the demands of this program even though she had cerebral palsy. This did not turn out to be the case. She could not lift patients and she had to drop out of the program.⁵

[11] The Claimant worked five hours per week as a housekeeper and as a companion from October 2011 to June 2012. She last worked as a full-time housekeeper at a hotel from June 2012 to August 2013. She testified that she could not physically tolerate this position. She had to use a cane to walk and this made carrying garbage difficult. Her employer confirmed that she called in sick on her last day.⁶

[12] The Claimant enrolled in a pharmacy technician course at a community. She began academic upgrading in May 2014 and formally began the academic part of her program in September 2014. She was still in school at the time of the expiry of her December 31, 2015. She managed to finish the academic part of her program, but she ultimately failed her work placement in February 2016. She consequently did not obtain her diploma.

[13] The Claimant testified that she took too much time counting pills during her pharmacy technician work placement. She was slow on the computer. The Claimant suffers from balance and coordination problems because of cerebral palsy. She testified that keyboarding was difficult because she lacks hand eye coordination. She also used a cane when walking. Standing was problematic for her because she has a dislocated hip. The Claimant also suffered from what she described as severe anxiety. She testified that she has felt overwhelmed in the workplace for many years and her anxiety and longstanding physical problems led her to fail her work placement. The Claimant testified that the impairments arising from her physical and mental conditions pre-dated her MQP.

⁴ GD2-52

⁵ GD2-65

⁶ GD2-76

[14] The Claimant testified that she could not work in any capacity by December 31, 2015. She had an accommodating employer that allowed her to work with older children, whom she did not have to lift or chase after. However, she testified that even working with older children would not have been possible because her cerebral palsy symptoms have worsened with time.

[15] The Claimant also testified that her ability to perform her housekeeping tasks deteriorated. She relied upon her elderly mother to do most of the cooking and cleaning as of December 2015.

The medical conditions and impairments that the Claimant referred to at the hearing are supported by the medical evidence

[16] The Claimant's family physician, Dr. J. McAlister drafted a note on February 9, 2010 stating that the Claimant would be would off work for an indefinite period of time because of health reasons. He eventually endorsed a return to regular work as of February 22, 2010.⁷ However, I find that Dr. McAlister's February 9, 2010 note shows that the Claimant was struggling with work prior to her MQP.

[17] The Claimant's family physician, Dr. J. McAlister completed a Medical Report to the Minister on May 17, 2016. He diagnosed the Claimant with cerebral palsy and depression with superimposed anxiety. He confirmed that the Claimant's cerebral palsy limited her walking and balance. The Claimant had a history of depression that was being treated with Effexor. The Claimant's left leg weakness required her to use a cane. He had referred the Claimant to a mood and anxiety program. He stated that she had a limited response to treatment and she suffered from a permanent disability. He stated that the Claimant was unable to work because of cerebral palsy, depression and anxiety. He was of the opinion that it was unlikely that she would be able to return to work.⁸

[18] Lee Frappier, Social Worker confirmed in a letter dated January 9, 2017 that the Claimant had undergone treatment with a mood and anxiety program.⁹ I am satisfied that the Claimant suffered from depression and anxiety prior to the expiry of her MQP. The Claimant referenced

⁷ GD2-60

⁸ GD2-126-129

⁹ GD2-70

anxiety in her Questionnaire for Disability Benefits that she completed on May 17, 2016.¹⁰ I highly doubt that the Claimant began suffering from anxiety after December 31, 2015. I am satisfied that her mental health conditions manifested themselves prior to her MQP. In addition, Dr. McAlister referenced depression and anxiety in his May 17, 2016 Medical Report to the Minister. He also indicated that the Claimant was not taking a low dosage of Effexor, which leads me to believe that her mental health issues predated her MQP.¹¹

[19] Dr. McAlister in a letter to the Minister dated February 21, 2017 stated that the Claimant had difficulties with ataxia related to cerebral palsy, which limited her employability. Although the Claimant tried to train for alternative careers, she found that she had not been able to find employment. He referred the Claimant to Dr. S. Gupta, Neurologist.¹²

[20] The Claimant saw Dr. Gupta on February 27, 2017. Dr. Gupta saw the Claimant because of progressive difficulty with walking. She could not walk for more than 200 feet. She was suffering from depression, anxiety, and panic attacks. He noted that the Claimant's feet were inverted and that she had a peculiar gait. She had difficulty standing and getting up from a chair.¹³

[21] Dr. Gupta saw the Claimant again on June 19, 2017. Dr. Gupta administered the Montreal Cognitive Assessment (MoCA) test and the Claimant only scored 22/30, which was indicative of mild global decline. Dr. Gupta advised the Claimant that she would not be able to stand and walk for a long time, and her low MoCA test score would not be improve.¹⁴

The Claimant had no work capacity prior to the expiry of her MQP

[22] I must assess the severe part of the test in a real world context¹⁵. 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.

¹⁰ GD2-153

¹¹ GD2-128

¹² GD2-61

¹³ GD4-6

¹⁴ GD4-5

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

[23] After considering all of the evidence, I accept that the Claimant was not employable in real world context prior to her MQP. The Claimant was only 47 years old at the time of her MQP. She had a community college education. She has experience working in sedentary working environments. She understands English. However, I accept that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 31, 2015 because of her physical and mental health condition that led to impairments in the areas of sitting, standing, walking, balance, coordination, driving, lifting, memory, and concentration.

[24] I do not believe that the Claimant could handle any type of work because of her impairments. I do not believe that she could handle any type of physical work because of her restrictions with lifting, walking, balance, and coordination. I do not believe that she could handle a driving job because of muscle stiffness associated with cerebral palsy. A job involving keyboarding was not realistic for the Claimant because she lacks the manual dexterity to perform such an occupation in a reasonable manner. A potentially suitable occupation for the Claimant would have been a sedentary job where she rotated between sitting and standing. However, the medical evidence shows that the Claimant had difficulty moving from a seated to a standing position. Thus, such an occupation was not a realistic option for the Claimant. I am also satisfied that the Claimant was anxious around people because of her failures at work and school prior to her MQP and a job dealing with public would have been difficult to perform on a regular, predictable and consistent basis. I accept that the Claimant had challenges performing her housekeeping work prior to her MQP, let alone being able to perform substantially gainful work.

[25] I disagree with the Minister's submission that the Claimant could have performed suitable work within her limitations.

[26] I accept that individuals who suffer from cerebral palsy can lead productive work lives. I accept that individuals who suffer from depression and anxiety can regularly engage in substantially gainful occupations. I also accept that individuals with mild cognitive impairments can find suitable work within their limitations.

[27] However, 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 impairment¹⁶.

[28] I am satisfied that the Claimant has a severe disability when I consider all of the possible impairments arising from her physical and mental health conditions. The Claimant's physical limitations arising from cerebral palsy are compounded by her depression and anxiety. Her depression and anxiety were factors in her leaving her child care job in 2011, her housekeeping jobs in 2013, and her failed attempt to work as a pharmacy technician. The Claimant's ability to perform work was also significantly compromised by her mild cognitive impairments that were demonstrated in her MoCA test scores. I am aware that Dr. Gupta administered the MoCA test after the Claimant's MQP. However, I accept the opinion of Dr. McAlister in his March 26, 2018 letter to the Minister that the medical conditions outlined in Dr. Gupta's reports predated the Claimant's MQP.¹⁷ I place significant weight on Dr. McAlister's opinion because he has treated the Claimant since 2002.¹⁸

[29] 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 condition¹⁹. I am satisfied that the Claimant left her job as a child care worker in 2011 because of her medical condition. She stated in her Questionnaire for disability that she left this job because of differences with management, but her employer confirmed that she left this job because of illness or injury.²⁰

[30] I am satisfied that the Claimant's failure to finish the PSW program in January 2012 was due to lifting restrictions arising from her cerebral palsy.

[31] I am satisfied that the Claimant's failure to work as a full-time housekeeper at a hotel in August 2013 was because of her physical limitations arising from cerebral palsy.

¹⁶ *Bungay v. Canada (A.G.)*, 2011 FCA 47

¹⁷ GD4-3-4

¹⁸ GD2-126

¹⁹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

²⁰ GD2-52

[32] I am satisfied that the Claimant's failure at her pharmacy technician work placement in February 2016 was due to her cerebral palsy, depression and anxiety. It is true that the Claimant was in school at the time of her MQP, but I do not equate attendance at school with the capacity to regularly engage in a substantially gainful occupation. The Claimant testified that she passed the in-class portion of her pharmacy technician program, but she did so with difficulty. She found it difficult to follow her teachers and grasp concepts. I believe that the Claimant was engaged in wishful thinking for believing that she could work as a pharmacy technician. Her physical disabilities made this job an unrealistic option for her, which compounded her depression and anxiety.

[33] I note that the Claimant performed housekeeping and companionship work for about 5 hours every 2 weeks at \$13.00 per hour from April 2011 to June 2012. There is no indication that she left this job for medical reasons. However, I do not believe that working 5 hours every 2 weeks at \$13.00 per hour equates to a substantially gainful occupation. I am satisfied that the Claimant could not work as a companion to the elderly because of her physical limitations. She had difficulty with moving from a seated to a standing position. Her depression and anxiety also makes it difficult for her to be around people.

[34] I find that the Claimant has not been able to work in any substantially gainful occupation since she last worked as a housekeeper in August 2013.

The Claimant's hearing evidence was persuasive

[35] I do not find that the Claimant was exaggerating her symptoms. The Claimant did not indicate that she had problems with sitting, memory and concentration in her Questionnaire for Disability. However, I do not believe that she was misleading the Tribunal. I found the Claimant to be a stoic individual who downplayed some of her symptoms, in particular her mild cognitive impairments. The Claimant had a good work ethic. Her Record of Earnings shows that she was employed for more than 20 years.²¹ The Claimant persevered and worked with her physical disabilities. However, her physical condition deteriorated over time, which helped lead to depression and anxiety. I believe the Claimant when she said that she worked for as long as she could and did the best that she could do with the state of her health. I also found that the

²¹ GD2-4

Claimant was particularly credible because even though her health has worsened, she made several efforts to go back to work and school. Unfortunately, these efforts ended in failure because of her physical and mental health conditions.

The Claimant pursued and complied with reasonable treatment options

[36] I am satisfied that the Claimant did all that she could to seek and follow all reasonably recommended treatment options. The Claimant has been followed by her family physician. She received counseling through a mood and anxiety disorder program. She saw a neurologist. She has tried an anti-depressant medication. She has taken medications to treat her cerebral palsy. However, she had a limited response to treatment.²²

Prolonged disability

[37] I find that the Claimant has proven on a balance of probabilities that she has a prolonged disability that is likely to be long continued and of indefinite duration.

[38] Dr. McAlister was of the opinion in his March 26, 2018 report that the Claimant's physical and psychological medical conditions predated 2015 and have progressively worsened. He stated that the Claimant's conditions are permanent and that it was unlikely that she would return to employment.²³

CONCLUSION

[39] The Claimant had a severe and prolonged disability in August 2013, when she last worked. 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 pension²⁴. The application was received in May 2016 so the deemed date of disability is February 2015. Payments start four months after the deemed date of disability, as of June 2015²⁵.

²² GD2-128

²³ GD4-3-4

²⁴ Paragraph 42(2)(b) *Canada Pension Plan*

²⁵ Section 69 *Canada Pension Plan*

[40] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security