



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. H. v Minister of Employment and Social Development*, 2018 SST 1221

Tribunal File Number: GP-17-1456

BETWEEN:

M. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Nicole Zwiers

Claimant represented by: Enzo Timperio

Teleconference hearing on: September 26, 2018

Date of decision: October 22, 2018

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of February 2014.

OVERVIEW

[2] The Claimant contracted Lyme disease in 2013 and she was diagnosed with fibromyalgia. The Claimant stopped working in October 2013. The Minister received the Claimant's application for the disability pension on August 21, 2014. 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, 2017.

ISSUE(S)

[4] Did the Claimant's conditions of Lyme disease, fibromyalgia, depression and anxiety result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

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

¹ 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 has been unable to work since October 2013 due to her condition

[7] The Claimant testified that she worked at X since 1998 through to October 2013 as X. She further testified that she enjoyed her job and wanted to return but her symptoms from Lyme disease as well as the depression and anxiety she experiences make that impossible. The Claimant further testified that she has grade 11 education and has not received any further education except WHMIS and CPR training provided at work. The Claimant testified that she continued working despite the flu-like symptoms she felt earlier in 2013 and for 7 months she continued to work until she could no longer get out of bed.

[8] The Claimant attempted to return to work after the initial course of antibiotic treatment for Lyme Disease because she felt much better. However, she returned to work with medical restrictions including not reaching over her head or looking up or down. Her employer was not able to accommodate her restrictions. She was therefore unable to work and she has not returned to any work since.

[9] The Claimant testified that she continues to receive antibiotic treatment by intravenous every Wednesday. The Claimant has followed all recommended treatments and has seen every specialist she has been referred to. The Claimant testified that she takes many different medications including 5 Oxycocet tablets and medicinal marijuana for pain. Her depression and anxiety are treated with Concerta, 54 mg, once daily and Clonazepam, 1 tablet daily. The Claimant is taking a neurological drug on a trial basis that has been used to treat Parkinsons and MS. The Claimant testified that she sees a psychiatrist every 12 weeks for her depression and anxiety as well as attending a Lyme group for therapy once a month. Further, every 2-3 weeks the Claimant receives counselling.

[10] The Claimant has done dry needling, physiotherapy and chiropractic treatment. She does morning stretches as well as stretches before bed, yoga and light meditation. The Claimant naps during the day as she experiences fatigue. The Claimant testified that she thought about working

but her lack of energy and tiredness prevent her from working. In addition, her treating physicians have told her she cannot work.

[11] The Claimant's testimony is supported by the medical documents filed with the Tribunal. A letter from the Claimant's family physician, Dr. Amster, is dated August 29, 2018 and provides an overview of the Claimant's various medical conditions as well as Dr. Amster's opinion that the Claimant is precluded from working as she is totally disabled.² Dr. Amster notes that the Claimant experiences flare-ups of her Chronic Lyme Disease and the last such flare-up was in June 2018. He described the symptoms from the flare-up to be immobilizing to the Claimant who is then unable to drive, concentrate or focus and she has no energy. Dr. Amster cited the Claimant's physical limitations as no climbing, no repetitive bending or squatting, no lifting overhead and no lifting of greater than 4 lbs, very limited dexterity, sitting as tolerated, walking limited to 100 yards stopping when necessary and no looking up or down.³ Dr. Amster concluded that the Claimant is permanently disabled with a poor prognosis due to the chronicity of the disease and that she will never return to work.⁴

[12] I accept the evidence of Dr. Amster and note that the medical evidence filed with the Tribunal is also supportive of the conclusion that the Claimant has suffered the ill effects of Chronic Lyme Disease since 2013 and has significant flare-ups that are without notice and are of varying duration. In particular, the CPP Medical Report completed by the Claimant's former family physician, Dr. Barnard and date stamped August 11, 2014, supports Dr. Amster's assessment.⁵ Dr. Barnard diagnosed the Claimant with Lyme Disease and fibromyalgia and concluded that the Claimant was permanently disabled due to both conditions.⁶

² GD9-3

³ GD9-4

⁴ *Ibid*

⁵ GD2-101

⁶ GD2-104

The Claimant does not have capacity to work

[13] I must assess the severe part of the test in a real world context⁷. 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. The Claimant is incapable of working because of the nature of her Chronic Lyme Disease. Although the *Villani* factors highlight that the Claimant is relatively young at 52 years' old at the time of her CPP application, she is fluent in English and with many years' work experience in an office setting, I find that the chronic and uncertain nature of the Claimant's Lyme Disease is such that she does not have capacity to work or to retrain. The Claimant is unreliable as a result of her medical conditions and the ongoing medical treatment such as weekly IV antibiotic treatment. Moreover, the tendency for the Lyme Disease to flare-up renders the Claimant incapable of regularly pursuing any substantially gainful employment. Further, Lyme Disease places physical restrictions on the Claimant that, in addition to worsening symptoms during a flare-up, prevent the Claimant from engaging in even the most sedentary work or retraining.

[14] 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 work⁸. I find that the Claimant's Chronic Lyme Disease prevents her from performing any substantially gainful employment.

[15] 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 impairment⁹. The medical evidence filed with the Tribunal also provides a diagnosis of fibromyalgia as the Claimant was found to have 18 out of 18 tender points as of, at least, 2013.¹⁰ When I consider the Claimant's other medical conditions including fibromyalgia, depression and anxiety in addition to her Chronic Lyme Disease, I find that the totality of her impairments preclude substantially gainful employment.

⁷ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁸ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁹ *Bungay v. Canada (A.G.)*, 2011 FCA 47

¹⁰ GD9-23

Prolonged Disability

[16] The evidence before the Tribunal is that the Claimant's symptoms related to Lyme Disease arose in 2013. The Claimant has received ongoing medical treatment for this disease but it is chronic and there is no suggestion that any treatment will cure the condition. To the contrary, the medical evidence before me is that the Claimant will be negatively impacted by the symptoms of Lyme Disease for the rest of her life experiencing periods when she feels better and other periods when she has a flare-up. Accordingly, I find that the Claimant has a disability that is long continued and of indefinite duration as of prior to her MQP of December 31, 2017 and continuously thereafter.

CONCLUSION

[17] The Claimant had a severe and prolonged disability in October 2013, when she stopped working due to her symptoms from Lyme Disease. Payments start four months after the date of disability, as of February 2014¹¹.

[18] The appeal is allowed.

Nicole Zwiers
Member, General Division - Income Security

¹¹ Section 69 *Canada Pension Plan*