



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. O. v Minister of Employment and Social Development*, 2018 SST 1222

Tribunal File Number: GP-18-302

BETWEEN:

A. O.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: October 19, 2018

Date of decision: October 22, 2018

DECISION

[1] The Appellant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of April 2013.

OVERVIEW

[2] The Appellant applied for a CPP disability pension in March 2014¹. She was 38 years old, and the mother of two young daughters. She claimed she was disabled by anxiety and insomnia since stopping work in August 2010, because medication and lack of sleep affected her memory and made it difficult to concentrate². The Minister denied the application initially and on reconsideration, and the Appellant appealed to the Social Security Tribunal. The appeal was allowed by the Tribunal's General Division in October 2016. On appeal by the Minister, the Tribunal's Appeal Division found the General Division made errors in law. The matter was returned to the General Division for reconsideration. A new hearing took place in October 2018.

[3] A person is disabled under the CPP if she has a physical or mental disability that is severe and prolonged. A disability is severe if the person 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. An applicant for a CPP disability pension must prove she became disabled on or before the end of her Minimum Qualifying Period (MQP), which is calculated based on her contributions to the CPP. The Appellant's MQP will end on December 31, 2021⁴. 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?

¹ GD3-19-22

² GD3-51-58

³ CPP paragraph 42(2)(a)

⁴ GD6-1

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

ANALYSIS

[6] The Appellant and her husband, M. S., testified at both General Division hearings. They answered questions candidly and I believe to the best of their ability. They were both careful not to make statements about events they could not remember; and I accept that with the passage of time, they honestly could not recall many details – particularly about the Appellant’s treatments. Their evidence was plausible, and their description of the Appellant’s condition was generally consistent with what her doctors have recorded and observed over the years. After considering all the evidence, including the testimony and submissions made at the previous hearings, I am satisfied the Appellant has had a severe and prolonged disability since June 2011.

Severe disability

The Appellant has a significant mental health condition

[7] The Appellant has a long-standing diagnosis of Generalized Anxiety Disorder and chronic, severe insomnia; with a history of depressive episodes, and isolated panic attacks⁵. She testified she has had anxiety since childhood and that she developed insomnia later. Her condition and the medication she takes to control it cause fatigue, memory loss, excessive worry, and an inability to concentrate. She testified that over the years these limitations affected her schooling and her employment. She failed to complete a X program; and she barely passed a business program. She did not progress beyond entry-level jobs, and she did not last long at many of them because she was fired, or she quit before she could be let go. Although her jobs involved fairly simple clerical and administrative duties, she never felt confident of her abilities, made errors, and was overcome with anxiety. She believes she was able to continue finding new jobs because she is likeable and she was always confident at the outset. She chose her references carefully, and used the names of employers she worked for on short-term contracts that ended because the contract was over, not because of her performance or because she quit.

⁵ For example GD3-29, 45; IS5-11, 20

[8] The Appellant's last job was in the insurance industry. It included customer service, administering new benefits, and doing data entry. She began working in November 2009, and stopped in August 2010. She was about five-and-a-half months pregnant with her first child. She testified that her due date was the end of November 2010, and that she had planned to work as close to then as possible. However, she experienced cramping and increased anxiety as the pregnancy progressed, and in August her family doctor, Dr. Budzianowski-Kwiatkowski, recommended she stop working early. She went on short term disability or medical leave, and did not return before her scheduled maternity leave started in November. As stated above, I found the Appellant credible and I accept her statement as truthful. Although the Appellant's Record of Employment appears to state that she left because she was going on maternity leave⁶, I find that in fact she left sooner than she had planned because of her health, including anxiety.

[9] The Appellant's maternity leave was to end in December 2011⁷. She testified she had day care organized for her new daughter, and that her mother was available for back-up. Her family needed her income, and she intended to return to work as scheduled. It is possible she would have been able to return to her job and manage there, or quickly find a new one, as she had done in the past. However, in the spring of 2011 the Appellant decided to undergo testing for hereditary cancer because of a known gene mutation in her family. She had not wanted to do this before, but decided to proceed because her daughter could also be affected. The prospect of testing, and the 50% likelihood she would be found to have the mutation, caused additional anxiety. It was made worse when she learned she had the BCRA1 gene mutation, which significantly increased her risk of developing breast and ovarian cancer.

[10] This created a whole new source of worry for the Appellant: fear of developing the disease; having to decide whether to have prophylactic removal of her breasts and her ovaries; and the fact that her daughter and any future children had a 50% chance of having the mutation as well. She testified that for the first few months she had managed reasonably well being off work and caring for her daughter, who still slept most of the day. Her ability to cope with her

⁶ IS6-7 where the code "F" is given as the reason for issuing the Record of Employment. A code description at IS6-12 indicates the code for "maternity" is "F00". There are no other "F" codes.

⁷ IS6-7

anxiety deteriorated after that, and at some point Dr. Budzianowski-Kwiatkowski advised her not to return to work when her maternity leave ended. It appears this occurred in June 2011⁸.

[11] As discussed below, the evidence is that since then the Appellant has continued to suffer from anxiety and insomnia, and that these have a significant, daily impact on her ability to function.

The Appellant does not have work capacity

[12] The measure of whether the Appellant's disability is "severe" is not whether she suffers from severe impairments, but whether the disability prevents her from earning a living. She must be incapable regularly of pursuing any substantially gainful occupation; not just incapable of performing her former job⁹. I must therefore decide if the Appellant has any work capacity. In doing so, I must keep in mind factors such as her age, level of education, language proficiency, and past work and life experience¹⁰.

[13] On the surface, the Appellant seems an unlikely candidate for a CPP disability pension. She is still quite young, at 43 years old. Her native language is English. She has a high school diploma and business training from a community college. Although she has longstanding mental health issues, she was gainfully employed every year between the ages of 18 and 35. However, the evidence persuades me that, despite these positive attributes, the Appellant is no longer capable regularly of substantially gainful employment.

[14] When the Appellant left work in August 2010, she was struggling in her job, where she had been working as a customer service representative, administering new benefits, and doing data entry. She testified she had been spoken to about her work performance. In an Employment Questionnaire, her employer stated her work was unsatisfactory, that she made data entry errors, did not understand her role, had poor attendance, and needed help from co-workers. She did not have the ability to handle the demands of her job; and her probation period had been extended¹¹,

⁸ IS5-20; IS7-10

⁹ *Klabouch v Canada (A.G.)*, 2008 FCA 33

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

¹¹ IS7-6-8

[15] In December 2011 Dr. Budzianowski-Kwiatkowski reported the Appellant's severe depression, anxiety and insomnia caused ongoing problems with daytime agitation, anxiety, severe fatigue, and total insomnia. She had ongoing problems caring for her daughter, and required a lot of help from her friends and family members; she also had difficulty caring for herself and difficulties functioning on a daily basis. Dr. Budzianowski-Kwiatkowski did not think the Appellant would be able to function in any capacity in the workplace in her current state¹².

[16] The medical evidence supports testimony by the Appellant and her husband that she has never improved to the point where she would be able to work in any job. From October 2011 to July 2012 she saw Dr. Guan, a psychiatrist at a clinic focused on reproductive mental health. When she became pregnant with her second child in early 2013 she was referred to Dr. Bowering, another psychiatrist in the same clinic. In May 2013 Dr. Bowering noted she had access to Dr. Guan's records. She described the Appellant's "well-documented history of generalized anxiety and a history of depression". She had performance-type social anxiety, and ruminated on negative events. Generalized anxiety ruled her life, and "most everything she does is through the lens of anxiety and worry". She worked herself up to the point of being physically ill, and had chronic insomnia secondary to the anxiety, which interfered with her concentration. She had low energy¹³.

[17] The Appellant saw Dr. Bowering every three months for the next two and a half years. She sometimes reported improvement in some areas, but she continued to have significant limitations as a result of her anxiety and her inability to sleep¹⁴. There was little analysis of her work capacity, likely because she had been approved for long-term disability benefits in February 2012¹⁵; however, in October 2014 Dr. Bowering had a long discussion with the Appellant about returning to work. The Appellant described being anxious and exhausted after having completed just a few tasks each day, and expressed concern about how she would be able to cope in the workplace because of this. She was also anxious about the surgeries she had decided to have. Dr. Bowering stated she did not think even a graduated return to work would be

¹² IS5-20-21

¹³ GD3-43-45

¹⁴ GD3-39-42, 47-50; IS5-4-9, 13-19

¹⁵ IS7-10-12

successful, but this might be reassessed after the Appellant had her surgery and recovery¹⁶. When the Appellant last saw Dr. Bowering in October 2015, she was still struggling with generalized anxiety disorder and chronic sleep problems. She was easily overwhelmed, fatigued, in a fog, and had poor concentration¹⁷.

[18] The Appellant was discharged from Dr. Bowering's care after this, because the program was intended for prenatal and post-partum psychiatric care and her second daughter was by then almost two years old. She recalled seeing psychiatrists after this but did not remember any details – just that none of them seemed to be a good fit for her. She remembered that she did not get along well with Dr. Daszkiewicz, whom she saw in November 2016. She did not return for a second appointment and Dr. Budzianowski-Kwiatkowski referred her to someone else. She did not remember seeing Dr. Hameer in January 2017. Both Dr. Daszkiewicz and Dr. Hameer indicated the Appellant reported continued anxiety and insomnia. She reported constant worry to Dr. Daszkiewicz, and poor energy, concentration and focus to Dr. Hameer¹⁸.

[19] I considered that the Appellant's psychiatrists described her in positive terms such as pleasant, co-operative, coherent, goal-directed, well-groomed, and with good insight and judgment. I do not think this supports a conclusion that she has work capacity. She may present well on a superficial level, but she did not perform well in her previous job because of her anxiety and insomnia. Since stopping work, her anxiety has worsened and she continues to have severe insomnia.

[20] I also considered whether the fact that the Appellant has been the primary caregiver of her two daughters since they were born indicates she has work capacity. While this might be true in some cases, I do not think it is here. The Appellant manages with a great deal of help from friends and family members. She testified that some days are better than others, but she does not know when these will occur. Every day is different, and she often has to call her mother on short notice to come over. If her mother is not available, her husband comes home from work early or does not go in at all. Her days are somewhat more manageable now that her daughters are in school full-time; but her limitations still have a significant impact on her day. Her daughters are

¹⁶ IS5-13-15

¹⁷ IS5-10-12

¹⁸ IS7-22-24, 37-43

frequently late for school because she cannot get them there on time if she has not slept the night before. She has to nap every day. She often forgets to pick her daughters up. She makes notes and sets alarms for almost everything. She does not volunteer regularly at school because she cannot commit to anything. At best she will sign up for a specific event, and may cancel at the last minute. She testified that she has a supportive group of friends at her daughters' school, who understand her situation and help out when necessary. At home she manages the bare minimum of housework and cooking, and she sometimes has to go to bed as soon as her husband comes home at 6:15 p.m. In these circumstances, I do not think the Appellant's ability to function in the home and care for her children is evidence of work capacity.

[21] The Appellant testified that in 2014 she took part in a vocational rehabilitation program that included sessions of cognitive behavioural therapy and many visits to her home by an occupational therapist. She was determined not to be able to return to her job, and the insurance company decided not to continue paying for therapy for her. Although there are no vocational rehabilitation reports in the file, I accept the Appellant's evidence that this occurred. It was also confirmed by Dr. Budzianowski-Kwiatkowski¹⁹. Although not conclusive, the fact the Appellant was found unable to perform an entry-level position in a supportive workplace, by an insurance provider with a financial interest in having her return to work, carries some weight.

[22] In May 2018 Dr. Budzianowski-Kwiatkowski reviewed the Appellant's condition generally and stated she had severe anxiety, severe insomnia, and chronic fatigue; and that her condition worsened after she had her first child. She did not think the Appellant was capable of any productive activity on a full or part-time basis²⁰. The Minister submitted this report was of little value because Dr. Budzianowski-Kwiatkowski did not refer to the evidence on which she based her decision. On the contrary, Dr. Budzianowski-Kwiatkowski referred to Dr. Bowering's reports, to her own chart notes, to the Appellant's return to work plan, and to her sessions at a sleep clinic. The Minister offered no evidence that Dr. Budzianowski-Kwiatkowski was fabricating or imagining what had occurred, or that she was not qualified to distill other medical evidence into her own report. I find her report is a valid summary of the Appellant's medical

¹⁹ IS5-2

²⁰ IS5-2

history to date. As she has been the Appellant's family doctor and has seen her frequently for 12 years, she is well-qualified to assess the Appellant's work capacity.

[23] Although the Appellant has periods in which she is functional, and she appears able to look after her children with some support, a realistic assessment of her value to an employer leads me to conclude she has no work capacity. She was performing badly at her previous entry-level job before she was forced to leave because of her health. Since then, her condition has worsened: she has had two children and a devastating health scare that affects her and her daughters. These stressors have significantly added to her anxiety, and in my view have eliminated whatever work capacity she may have had when she stopped working in August 2010. She is chronically unable to sleep, causing mental fog and exhaustion on most days. On her best days she has to sleep during the day; she makes mistakes as a parent that would not be tolerated in a workplace; and she frequently relies on others to take over for her. Her engaging personality might mean she could persuade someone to hire her; but it is unlikely she would be able to keep any job. Her condition would make it difficult to go to work regularly, or to work in a competent and productive manner while she is there.

[24] The Appellant is incapable regularly of pursuing any substantially gainful occupation. Because there is no evidence of work capacity, the Appellant does not have to show that she tried to return to work and was unsuccessful because of her condition²¹. Even if she did, her failed attempt at vocational rehabilitation satisfied this onus.

The Appellant has reasonably followed treatment recommendations

[25] The Appellant's extensive treatment is outlined in numerous medical reports, and was summarized by Dr. Budzianowski-Kwiatkowski in May 2018²². She has tried many different medications and suffers side-effects from all of them. She has had sleep studies; cognitive behavioural therapy; biofeedback; and counselling from therapists and psychiatrists. Nothing has consistently worked for her.

²¹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

²² IS5-2-3

[26] I find the Appellant's failure to return to see Dr. Daszkiewicz was reasonable in her circumstances. She did not establish rapport with her. Dr. Budzianowski-Kwiatkowski understood this and offered to refer her to someone else. I find that any gaps in the Appellant's psychiatric care are the result of waiting lists – she is currently on one – and the difficulty of finding someone she connects with. She has shown herself to be eager and willing to try any treatment that has been suggested.

Prolonged disability

[27] The Appellant's disability is likely to be long continued and of indefinite duration. When she first left work her prognosis was good²³, but she did not improve. In May 2014, Dr. Bowering thought she might improve slowly with continued cognitive behavioural therapy and a medication trial²⁴. However, these did not provide lasting benefit. By October 2014, Dr. Bowering did not think the Appellant's capacity for work was worth reassessing until after she had her major surgeries²⁵. The Appellant had a double mastectomy in December 2016, but she is not scheduled yet for removal of her ovaries. She does not know when that surgery will take place. Furthermore, Dr. Budzianowski-Kwiatkowski stated that after removal of her ovaries, the Appellant will go into surgical menopause which will likely worsen her anxiety and insomnia, and may cause severe depression²⁶.

[28] The Appellant's limitations have left her unable to work for over seven years. She has tried every available treatment. She is more likely to get worse, rather than better. Her condition is prolonged.

CONCLUSION

[29] The Appellant had a severe and prolonged disability in June 2011, when Dr. Budzianowski-Kwiatkowski determined she should not return to work when her maternity leave ended. However, to calculate the date of payment of her disability pension, the Appellant cannot

²³ IS5-20-21

²⁴ GD3-39-42

²⁵ IS5-14

²⁶ IS5-3

be deemed disabled more than fifteen months before the Minister received her application²⁷. The application was received in March 2014, so the Appellant's deemed date of disability is December 2012. Payments start four months after the deemed date of disability, as of April 2013²⁸.

[30] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

²⁷ CPP paragraph 42(2)(b)

²⁸ CPP section 69