



Citation: S. M. v Minister of Employment and Social Development, 2018 SST 1238

Tribunal File Number: GP-17-2239

BETWEEN:

**S. M.**

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: Raymond Raphael

Claimant represented by: Jayson Swain

Teleconference hearing on: November 13, 2018

Date of decision: November 19, 2018

## **DECISION**

[1] The Claimant is not eligible for a *Canada Pension Plan* (CPP) disability pension.

## **OVERVIEW**

[2] The Claimant was 61 years old when she applied for a CPP disability pension in June 2016. She states that she has been unable to work since 2010 because of low back pain and limited mobility. The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal.

[3] This is the Claimant's second application for CPP disability. Her first application was received by the Minister in September 2010. The Minister denied the application at the initial and reconsideration levels and the Claimant appealed to the Office of the Commissioner of Review Tribunals (OCRT). On April 17, 2012 a Review Tribunal of the OCRT dismissed the appeal. The Claimant did not seek leave to appeal that dismissal to the Pensions Appeal Board.

## **ISSUE(S)**

1. Was there a material change and deterioration in Claimant's condition to establish that although she was not severely disabled as of December 31, 2011, she was severely disabled as of December 31, 2012?
2. If so, is her disability long continued and of indefinite duration?

## **ANALYSIS**

### **Test for a Disability Pension**

[4] A qualifying disability must be severe and prolonged.<sup>1</sup> A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.

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<sup>1</sup> Subsection 42(2) of the CPP

[5] The Claimant 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 CPP. Her MQP ended on December 31, 2012.<sup>2</sup>

### **Severe disability**

[6] Mr. Swain acknowledged that the doctrine of *res judicata* (the matter has been decided) applies to the April 2012 OCRT decision. *Res judicata* precludes the rehearing or litigation of matters that have previously been determined. The April 2012 OCRT decision decided that the Claimant was not suffering from a severe and prolonged disability by her then MQP date of December 31, 2011. Accordingly, for the purposes of this appeal she must be considered not to have been disabled within the CPP definition as of December 31, 2011.

[7] In the current case the Claimant's MQP was extended to December 31, 2012 because of a division of pensionable earnings with her former husband in November 2012.<sup>3</sup> Since the April 2012 OCRT decision is not determinative of whether the Claimant was severely disabled as of December 31, 2012, I must determine whether she became severely disabled during the window period between January 1, 2012 and December 31, 2012 (the window period).

[8] The onus is on the Claimant to establish, on the balance of probabilities, that during the window period there was a material change and deterioration in her condition to establish that although she was not severely disabled as of December 31, 2011, she was severely disabled as of December 31, 2012

[9] I must focus on the Claimant's condition during the window period and the case law is clear that medical evidence is required to support a claim that a disability is severe.<sup>4</sup>

[10] The Claimant testified that her back became worse between January 1, 2012 and December 31, 2012. She was falling more frequently. Her pain increased from a level six to a level ten (where ten is the worst pain imaginable). In addition her functional capacity including

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<sup>2</sup> Record of contributions: GD3-13

<sup>3</sup> GD2-36

<sup>4</sup> *Villani* 2001 FCA 248; *Warren*, 2008 FCA 377

her ability to walk, bend, and lift was more limited. She stated that the worsening of her back pain was precipitated by lifting and carrying things when she moved in September 2012.

[11] The difficulty facing the Claimant, however, is that there is no medical evidence to support a material change or deterioration of her condition during the window period.

[12] They are only three records of medical treatment during that period in the hearing file. None of these records mentions falls, increased pain, or any material change in functional limitations. None of these records indicates that there had been any significant flare up of Claimant's back condition:

- First the November 2012 office note by Dr. Albert, the Claimant's family doctor, indicated that she was seen for left lower abdominal pain and referred to Dr. Roldan, general surgeon, for assessment. Although the referral note indicated that the Claimant suffered from chronic low back pain, there is no indication of any treatment or referral for this.<sup>5</sup>
- Second Dr. Roldan's November 28, 2012 report indicated that he saw the Claimant for lower abdominal pain and ordered a colonoscopy. Although this report mentions that the Claimant had difficulty moving around because of her back pain Dr. Roldan did not treat or assess her for her back pain.<sup>6</sup>
- Third a colonoscopy and endoscopy in December 2012.<sup>7</sup>

[13] Dr. Albert's January 16, 2013 office note indicated that the Claimant suffered from recurrent low back pain and walked with a cane; but the Claimant acknowledged that she was walking with a cane when she appeared before the OCRT Review Tribunal. In the CPP medical report dated January 29, 2016 Dr. Albert diagnosed mechanical low back pain. He stated that the Claimant had suffered severe back pain for six years, her response to treatment had been marginal, and her prognosis was poor.<sup>8</sup> On March 13, 2017 Dr. Albert reported to Service

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<sup>5</sup> GD2-88

<sup>6</sup> GD2-138

<sup>7</sup> GD2-135

<sup>8</sup> GD2-175 to 178

Canada that he began talking with the Claimant about her recurrent low back pain in January 2013 and that by March 2013 he was talking with her “a bit more” about the severity of her back pain.<sup>9</sup>

[14] Although Dr. Albert’s notes and reports confirm that the Claimant suffered from long-standing chronic back pain there is no mention of any treatment or referral for this. They do not support a material deterioration during the window period.

[15] It is my duty to act to act only on credible and supporting evidence and not on speculation.<sup>10</sup> In view of the lack of supporting medical evidence, I am not satisfied that there was a material change or deterioration of the Claimant’s low back condition during the window period from January 1, 2012 to December 31, 2012.

[16] The Claimant has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP requirements.

## **CONCLUSION**

[17] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>9</sup> GD2-148

<sup>10</sup> *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB). This decision is also not binding but I find it persuasive.