



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. R. v Minister of Employment and Social Development*, 2018 SST 1405

Tribunal File Number: GP-17-2781

BETWEEN:

M. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Teleconference hearing on: December 17, 2018

Date of decision: December 21, 2018

DECISION

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

OVERVIEW

[2] The Claimant has a long history of pain, swelling and fatigue. She was able to work in a garden centre in a physically demanding position until late 2013. She also worked from home as a mechanical drafting technician on a casual basis. She continues to work as a drafting technician when she is able. The Minister received the Claimant's application for the disability pension on February 9, 2017. 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 ended on December 31, 2015.

ISSUES

[4] Did the Claimant's conditions result in her having a severe disability, meaning she was 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

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

of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities the disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

Does the Claimant have a severe disability?

[7] Yes. The Claimant's health conditions, primarily fibromyalgia, make her incapable regularly of pursuing any substantially gainful occupation. She has a severe disability as defined by the CPP.

[8] I must assess the severe part of the test in a real world context². This means that when deciding whether the Claimant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Claimant completed high school and technical training. She is a young person and there is no indication she has learning or language deficiencies. I find her personal circumstances would not interfere with her ability to seek employment if her medical conditions allowed her to do so.

The Claimant's oral testimony addressed the Minister's concerns.

[9] The Minister made submissions in support of the position that the Claimant is not entitled to a disability pension. I considered all of the Minister's submissions and the Claimant's oral testimony addressed the Minister's specific concerns.

[10] The Minister did not question the Claimant's credibility and argued the medical evidence on file is not sufficient to prove the Claimant's case. It is the combination of the medical information and the Claimant's testimony that persuades me she has proven her case on a balance of probabilities. The Claimant presented her oral testimony in a clear and forthright manner. She was consistent with the evidence on file did not avoid difficult topics. She addressed the Minister's concerns from the Reconsideration Decision and submissions. The Claimant explained she has three main conditions. Fibromyalgia is the main disabling condition and the only one that is not controlled by medication or treatment.

² *Villani v. Canada (A.G.)*, 2001 FCA 248

[11] The Minister's suggested the evidence does not show the Claimant has a severe disability partly because she has had similar symptoms since she was younger and they did not prevent her from working. The Claimant has had pain and swelling for many years but was able to work in a seasonal position because she had lengthy periods of rest in the off-seasons. Her condition continued to deteriorate. By the end of the 2013 season the Claimant's pain was worse than ever but she hoped she would still improve enough to return to work when the garden centre opened in 2014.

[12] The Minister also argued the Claimant's activity is limited by her pain tolerance and her conditions are controlled with medication. In 2014 the Claimant's family physician told her she had Fibromyalgia and recommended different medications to help her symptoms. One medication helped ease her pain and she had improved mobility in the mornings. She continues to use that medication. Unfortunately she continues to have considerable pain and other symptoms even with medication and treatment. Pain interferes with her sleep and fatigue makes it hard for her to focus. She is always very tired and has widespread body pain that is most severe in her hands, feet and upper spine. Her pain is constant even when she uses over the counter pain medication in addition to the prescribed medication.

[13] The Minister submitted the Claimant refused an offer of psychological counselling and suggested this fact demonstrates the Claimant's disability is not severe. The Claimant has had several family physicians in the past four years. She does not recall an offer of psychological counselling. She testified that she would not refuse such an offer. In fact, she requested a referral to a pain clinic to get help to cope with the pain and fatigue. Further, the evidence does not suggest the Claimant's condition would be improved or that she would be able to return to work with psychological counselling. Therefore, even if she declined an offer to refer her for counselling the evidence does not show that would have hampered her recovery or added to her disability.

[14] The Claimant described her limitations and the impact her condition has on her abilities. She describes herself as "run-down". She is very tired and needs to sleep during the day. She gets skin infections easily and can no longer use public facilities. She had to stop all recreational

activities such as photography, bird club, skiing and skating. She is able to do some light household work but her spouse must do everything else.

[15] The Claimant's conditions were confirmed by her physicians and her testimony shows pain and fatigue are the main limiting symptoms. She agrees she does better and has been stable on medication but she is far from able to work more than she already does.

Is the Claimant capable of substantially gainful work?

[16] 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 the Claimant is unable to perform her regular job, but rather her inability to perform any substantially gainful work³. I find the Claimant's testimony is consistent with medical evidence on file and, on a balance of probabilities, shows she is incapable regularly of pursuing any substantially gainful occupation.

[17] The Claimant stopped working in the garden centre in late 2013 and found she was not well enough to return to work at the beginning of the next season in 2014. She continued to work on a casual basis as a mechanical drafting technician but had to limit her hours because of fatigue and pain. Sitting at her computer increases her symptoms and she requires frequent breaks. She was unable to work at all for most of 2015. In the following years she resumed contract work when she was able. The total hours she was able to work each year were as follows: 2015 – 18.0 hours; 2016 – 29.5 hours; 2017 – 72.5 hours; and 2018 – 205.0 hours. She earns \$20.00 per hour meaning her annual earnings have been approximately \$4000.00 or less per year.

[18] The Claimant testified she could have returned to her job at the garden centre if her health allowed. Also, there is additional drafting work she could have if she were able to do it. She has had to refuse assignments that require her to work more hours. She is simply not well enough to work in any job for more than a very short period of time.

[19] The Claimant's evidence is that she retains some capacity for work. Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

employment have been unsuccessful because of the person's health condition⁴. The Claimant's evidence and work history demonstrate she has persisted and worked many years with her symptoms. Work is available however she reached the point where her condition makes her unable to take more than a few hours of work at a time. I find it is more likely than not that her efforts to return to substantially gainful work are unsuccessful because of her health conditions.

Is the Claimant's disability prolonged?

[20] Yes. The Claimant's disability is prolonged within the meaning of the CPP. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. The Claimant has experienced pain and related symptoms since she was 20 years old. She continued to work while her condition deteriorated and received available treatment without significant improvement. There is no indication that Claimant's condition will improve in the future to allow her to return to work.

CONCLUSION

[21] The Claimant likely had a severe and prolonged disability in 2014, when she could not return to work in the garden centre. 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 pension⁵. The application was received in February 2017 so the deemed date of disability is November 2015. Payments start four months after the deemed date of disability, as of March 2016⁶.

[22] The appeal is allowed.

Anne S. Clark
Member, General Division - Income Security

⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁵ Paragraph 42(2)(b) *Canada Pension Plan*

⁶ Section 69 *Canada Pension Plan*