



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. P. v Minister of Employment and Social Development*, 2018 SST 1413

Tribunal File Number: GP-17-2493

BETWEEN:

**A. P.**

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: John Eberhard

Claimant represented by: Ian Aitken

In person hearing on: December 28, 2018

Date of decision: December 31, 2018

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability.

## **OVERVIEW**

[2] The Claimant is 62 years of age and worked for 10 years until April 2010 as a telemarketer. She stated that she had been unable to work since 2011 because of a diagnosis of breast cancer<sup>1</sup>.

[3] She states that she had a variety of jobs over many years that were within her skill sets. Her last job was with a window manufacturer where she was responsible for making telephone calls (telemarketing), setting up appointments for salespeople and hand writing schedules on a wall board. She worked in that capacity with her many historic medical conditions for 10 years. She stopped working in May 2010 when the company downsized by eliminating the jobs of all those doing similar work in the marketing department<sup>2</sup>. She lost her job. She went on Regular Employment Insurance. She testified she knew of the obligations of EI to seek work when on this benefit. She continued on this benefit until January 2011 when she was diagnosed with breast cancer and she was switched over to "Sick EI" until April 2011.

[4] The Minister received the Claimant's application for the disability pension on October 28, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[5] The Claimant had made an earlier application for CPP disability benefits. That application was dated November 18, 2011<sup>3</sup> and is relevant to the extent that the information contained in the questionnaire was closer to December 31, 2012. The application was denied by the Minister<sup>4</sup> in January 2012 and there was no appeal by the Appellant at that time.

[6] I dismiss the appeal for the reasons that follow.

## **ISSUES**

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<sup>1</sup> GD2-157

<sup>2</sup> GD2-155

<sup>3</sup> GD2-170 and 200

<sup>4</sup> GD2-165

- a. Does the Claimant's breast cancer, arthritis, obsessive compulsive disorder and chest pain result in a severe disability, meaning the Claimant was incapable regularly of pursuing any substantially gainful occupation, on or before December 31, 2012 and continuously thereafter?
- b. If so, is the disability long continued and of indefinite duration?

## ANALYSIS

[7] 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, 2012<sup>5</sup>. There is no dispute among the parties of this date.

[8] The Claimant maintains that impairment that prevents her from working is breast cancer<sup>6</sup>. She is appealing the Minister's decision to deny her application for a CPP disability benefit. The Minister asserts that she did not meet the definition of "severe and prolonged" within the meaning of the CPP when her minimum qualifying period ended in December 2012. The evidence of the Claimant is found in her hand written letters and testimony.

[9] The Claimant also bases her disability claim on the additional medical issues of arthritis, obsessive compulsive disorder and chest pain, testifying that these conditions were exacerbated by the Chemotherapy treatments she endured between January of 2011 and August 2011 when her cancer treatments ended<sup>7</sup> and possible a car accident. Cancer has been in remission since that time.

### a) **Severe disability**

*The claimant did not have a serious health condition that affects work capacity*

[10] I am satisfied that the Claimant did not have health conditions that precluded her ability regularly to seek work as of December 2012. There is no medical report around December 31,

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<sup>5</sup> GD2-47

<sup>6</sup> GD2-157

<sup>7</sup> GD2-121

2012 that states that she was without work capacity. The Claimant's subjective symptoms must be corroborated by objective and physical evidence of disease and impairment which in this case is not conclusively supported by imaging, clinical findings on examination; or, self-reported activities of daily living limitations<sup>8</sup>. While she was being treated for Breast Cancer between January and August 2011, there is a significant gap in the medical evidence and corroborative evidence of her level of functionality to the period ending in December 2012.

[11] I accept her evidence that all of her medical conditions referred to in her applications for the disability pension were managed by medications and overseen by her treating family doctor of some 25 years. I am persuaded that these conditions have continued after her diagnosis and treatment for cancer. I also accept her evidence that they may have been exacerbated (although there are no medical reports that focus on this possibility) by her chemotherapy and a motor vehicle accident that occurred some three years after December 31, 2012 and a year before her application for benefits. The evidence of her work capacity as of her MQP is weak.

*Initial Medical Report and Medical History*

[12] I am not persuaded that the medical evidence of her condition as of February 2012 was serious. Four years after December 31, 2012, Dr. V. Nikore, (family doctor) completed the *CPP* initial medical report<sup>9</sup>. The Claimant's diagnoses of diabetes, hypertension, hyperlipidemia, arthritis, an obsessive compulsive disorder (OCD) and left breast cancer were noted. Dr. Nikore wrote that her conditions had progressed over time. No time frame or details were provided. The physician wrote a supporting letter dated August 15, 2017 in which she stated that since the diagnosis of breast cancer, her patient has had difficulty with her copying skills and flare up of her OCD: "She has not been able to work due to lack of concentration, obsessive thoughts, anxiety, fatigue, generalized aches and pains and headaches"<sup>10</sup>.

[13] Her reports well past the December 31, 2012 and are of little assistance in my consideration of her employment capacity at that time. The clinical examination findings presented in evidence do not support a condition of such severity as to have precluded all work

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<sup>8</sup> Brent Warren v. Attorney General of Canada (2008 FCA 377

<sup>9</sup> GD2-146 (in November 2016)

<sup>10</sup> GD2-59

as of December 31, 2012. Her family doctor did provide a prognosis of “guarded” as of November 2011. However, the Claimant testified that had her job not been downsized, she would have been able to continue working. I conclude that the subjective evidence provided by the Claimant is not sufficiently compelling to overcome the lack of objective medical evidence as of her MQP.

*The totality of his medical conditions did not reveal a severe disability as of her MQP*

[14] 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 impairment<sup>11</sup>. Her multiple complaints and symptoms set out in the application do not make her unable regularly to seek work as of December 31, 2012. She has a history of hypothyroidism, depression, hypertension besides type 2 diabetes mellitus<sup>12</sup>. Her medications included Diamicron 30 mg four tablets daily, Eltroxin .1 mg daily, Paxil 20 mg a day, Januvia 100 mg a day, metformin 500 mg, Ramipril 2.5 mg daily, metoprolol 25 mg daily<sup>13</sup>. All illnesses are managed by these medications.

[15] *Diabetes:* The Claimant has been treated with oral hypoglycemic medications with good response. She had an episode of elevated blood sugar in March 2011, which was thought to be possibly related to anxiety. Her blood sugars returned to baseline and she was advised to augment the dosage of her oral medication and adhere to a strict diabetic diet. There is no evidence to suggest she has any secondary complications or functional limitations related to diabetes at her MQP or continuously thereafter. Dr. Nikore said her diabetes was still treated with oral hypoglycemic mediations and was under good control<sup>14</sup>.

[16] *Hypertension:* She was reported to have hypertension for 5 years prior to May, 2011<sup>15</sup>. There is no indication that this interfered with her work capacity. The condition is managed with

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<sup>11</sup> Bungay v. Canada (A.G.), 2011 FCA 47

<sup>12</sup> GD2-88

<sup>13</sup> GD2-88

<sup>14</sup> GD2-147

<sup>15</sup> GD2-119

medications and there is no evidence to suggest any severely disabling functional limitations as of December 31, 2012.

[17] *Hyperlipidemia*: Her past medical history has included hyperlipidemia a condition managed with medications. There is no evidence to suggest any severely disabling functional limitations as of December 31, 2012 and there is no indication that this interfered with her work capacity.

[18] *Arthritis*: Dr. Nikore noted his patient had arthritis with pain in her knees, back and shoulder; however, there have been no clinical or investigational findings, nor any specialist's consultation reports provided related to any problems with her knees, back or shoulder to support a severe medical condition or functional limitations in this regard as of December 31, 2012 and continuously thereafter. In his initial medical; report, the family doctor stated that her prognosis was guarded and cited back, knee aches and fatigue<sup>16</sup> to which the Claimant also refers in her hand written notes describing her condition<sup>17</sup>. However, in May, 2011, Dr. Som Mukherjee (Radiologist) undertook a total body bone scan. The only lesion of concern is the right fourth rib mid axillary line. He wrote that this may be related to remote trauma: "If x-rays are normal, then a repeat bone scan in 2 months could be considered"<sup>18</sup>. There was no X-Ray follow-up. I am left with the impression that the objective evidence submitted is without any conclusive evidence of a serious back, knee or shoulder illness that would preclude employment capacity.

[19] *Obsessive Compulsive Disorder (OCD)*: The Claimant was diagnosed with OCD in 1992 for which she has been on medication since 1995<sup>19</sup>. In the early part of her illness she received group sessions and counselling through mental health services where she learned the skills to cope with her illness. She was able to manage and work with this illness until 2010. The family physician reports in 2016 that the Claimant had racing thoughts and found it difficult to concentrate. Treatment at the time was with Paxil (an antidepressant also used in the treatment of anxiety and obsessive compulsive disorder) with "reasonable" response. She did report that she has not been able to work due to lack of concentration, obsessive thoughts, anxiety, fatigue,

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<sup>16</sup> GD2-149

<sup>17</sup> GD2-20 and GD1-9

<sup>18</sup> GD2-73

<sup>19</sup> GD2-58

generalized aches and pains and headaches but there is no evidence to support the severity of this condition at December 31, 2012 in terms of frequency of or any participation in any type of treatment program. As for the cognitive complaints, I would have expected to have evidence of visits with a neurologist, psychiatrist or mental health professional giving rise to reports of severe mental status examination findings, medication trials and responses. This has not been the case. In the absence of specialist finding related to the symptomology, I find that the medical evidence does not support the Claimant's assertion that she was unable to work because of her mental health conditions as of December 31, 2012. Her OCD has been controlled for several decades. She continues to be medicated with Paxil. This has been the case since well before here cancer treatments started.

[20] *Left Breast Cancer:* The Claimant was diagnosed with invasive ductal carcinoma of her left breast in 2011<sup>20</sup>. This was treated with a lumpectomy, chemotherapy and radiation and is now in remission<sup>21</sup>. She sustained three cycles of chemotherapy<sup>22</sup>. She was discharged from the Oncologist in August 2011<sup>23</sup> and follow-up was suggested annually over the next five years. This would include clinical breast examinations every six months and mammograms every year. She has been compliant with these instructions and there has been no diagnosed reoccurrence since 2011.

[21] This was a serious medical issue for the Claimant. As the Minister asserts, while she would have required time off work related to this diagnosis and necessary treatment, there is no indication she was incapable of a return to suitable work because of this condition. Dr. S. Gudelis, (Oncology) provided an up-date on November 9, 2011<sup>24</sup> in which he noted that no further follow up with the radiation oncology team is planned. Dr. H. Liaonis (General Surgeon) reported in October 2011 and May 8, 2012<sup>25</sup> that apart from some pulling and discomfort in the left axilla, she is asymptomatic. There is no palpable cervical, supraclavicular adenopathy. There is no palpable axillary adenopathy. Both her scars have healed well. There are no concerning lesions. She had a mammogram which was negative for any recurrence. No doctor

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<sup>20</sup> GD2-119 and 113

<sup>21</sup> GD2-103

<sup>22</sup> GD2-111

<sup>23</sup> GD2-121

<sup>24</sup> GD2-123

<sup>25</sup> GD2-131

reported at the time of any side effects to the Chemotherapy. Her family doctor reported only fatigue and poor stamina in 2011<sup>26</sup>. This does not describe a severe disability.

[22] *Motor Vehicle Accident:* The Claimant was assessed in October 2015 (subsequent to her MQP) regarding a seizure she experienced in the emergency department following a motor vehicle accident. This occurred well after December 31, 2012 and would have no bearing on her capacity to work at her MQP. Her neurological examination was normal, a CT scan of her head and neck was normal; as was an MRI scan of her brain and an EEG (electroencephalography is an electrophysiological monitoring method to record electrical activity of the brain and used to diagnose conditions such as seizures, epilepsy or tumours). There is no evidence to support any ongoing medical condition or functional limitations related to the 2015 seizure. Her evidence, while earnestly given did not distinguish between the exacerbation of her fatigue and aches and pains related to the accident from the similar symptoms described as a result of her chemotherapy. There are no medical documents that focus on this distinction nor conclusive evidence that her condition in 2018 is a direct result of cancer treatments.

*The medical conditions do not disclose a serious limitation on her activities of daily living*

[23] The Claimant has not supported her claim that she has been unable to work since 2012 with any independent evidence as to her functional or employment functionality as of December 31, 2012. Her earlier questionnaire<sup>27</sup> indicated fatigue, tenderness of ankles, wrists and hands. A history of Carpel Tunnel surgery and knees giving out, and OCD were the chief complaints. There are inconsistencies and positive changes in her functional capacity between the two questionnaire submissions. The Claimant also submitted a questionnaire<sup>28</sup> in 2016 supporting her claim.

[24] She did not provide independent reports from December 2012 to assist me in making a conclusive finding on her then functionality. She did report limitations in 2016 with completing household chores. She noted that they take longer to complete and added that she has had to stop

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<sup>26</sup> GD2-188

<sup>27</sup> GD2-194

<sup>28</sup> GD2-155



gardening. She has continued to drive a car since last working. In her 2011 Questionnaire she indicated no difficulty with personal needs and could perform household maintenance although she sits to rest after completion. She could walk up to 40 minutes and standing was limited to 15-20 minutes, otherwise, she had few limitations that she did not believe were associated with her then chemotherapy from 7 years ago.

[25] The Claimant argues that she cannot reasonably be expected to perform any substantially gainful employment today because of the impact of her Chemotherapy. I am unable to conclude that her condition prevented her from returning to her previous employment, had the job still been available to her. There is no indication that active participation in a multidisciplinary pain management program or use of assistive medical devices (except the occasional use of a cane) has been required. I find that employment outside of her restrictions could not be realistically achieved. However, I conclude that she had the same functional capacity as of December 31, 2012 as she did when her job was eliminated. She has not persuaded me that she had no work capacity when her job was eliminated.

#### *Personal Circumstances*

[26] I must assess the “severe” part of the test in a real world context<sup>29</sup>. 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. She is 62 years old with a grade 9 education. She has few, if any, transferable skills but is proficient and articulate in the English language. Because of her physical limitations it might be necessary for employers to make special accommodations for her, such as allowing for extra training time and by providing step-by-step instructions and allowing her to work at her own pace recognising that she is computer illiterate. None of her many previous jobs have required the use of computer skills. Having limited life and work experience are factors that have not prevented a lengthy working career in the past when working within her physical restrictions.

#### *Residual work capacity*

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<sup>29</sup> Villani v. Canada (A.G.), 2001 FCA 248

[27] 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 condition<sup>30</sup>. The Claimant stopped work for non-medical reasons in 2010 and underwent treatment for breast cancer in 2011 but there is no indication she has attempted a return to a type of work that would be within her limitations subsequent to the successful treatment of her cancer. The Claimant bases her inability to work on breast cancer, arthritis and obsessive compulsive disorder. I have weighed the evidence and determined that the medical evidence does not support conditions that would have continuously precluded her from working as of December 31, 2012. The Claimant stopped work because her employer eliminated her job. While she sought work while on EI, none of the jobs that she applied for were within the scope of her restrictions. There is inconclusive evidence that she could not have sustained work similar to her last job because of her medical conditions.

[28] The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement or disability. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined the benefits and the terms of entitlement, including the level and duration of an Appellant's financial contribution<sup>31</sup>. The CPP is aimed at assisting people with "long-term" disability and not to "tide over" those with short term problems<sup>32</sup>.

[29] It may be that a job identical to the one at which she last worked may be difficult to find. When the words of subparagraph 42 (2)(a)(i) are considered, it is apparent that they refer to the capability of the individual to regularly pursue any substantially gainful occupation. They do not refer to labour market conditions. The disability provisions of the CPP is to provide individuals who have been disabled in accordance with the words of the Act with a disability pension because they are incapable of regularly pursuing any substantially gainful employment<sup>33</sup>.

[30] I have weighed the evidence of her personal circumstances and determined that the Claimant had residual work capacity from 2010 to the time of her MQP in 2012<sup>34</sup>. She did not

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<sup>30</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117

<sup>31</sup> *Granovsky v. Canada*, [2000] 1 SCR 703.

<sup>32</sup> *Begley v. MSD*, (June 19th 2007), CP 24213 (PAB)

<sup>33</sup> *Minister of Human Resources Development and Milford Rice*; January 29, 2002, Federal Court of Appeal, 57.

<sup>34</sup> With reference to findings of the SST (AD) *Netten, Shirley (S.G. and Minister of Employment and Social Development)* paragraphs 19 through 21

work again in the real world environment that had been proven to provide sustained work for her. Accordingly there is no evidence to demonstrate that she was unable to work because of her medical condition. I cannot conclude that her current functionality issues were present in 2012.

*The Claimant did not have a severe disability at her MQP*

[31] A claimant bears the onus of proving she suffers from a severe and prolonged disability prior to the expiration of her MQP. The measure of whether a disability is “severe” is not whether she suffers from severe impairments, but whether the disability prevents the person from earning a living. While I recognize the Claimant experienced pain and functionality symptoms related to her chemotherapy, the evidence does not support these symptoms were of such severity as to have precluded all work as of December 31, 2012.

[32] Disability is defined as a physical or mental disability that is severe and prolonged<sup>35</sup>. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. 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. I conclude that the Claimant did not have a severe disability as of December 31, 2012.

**b) Prolonged Disability**

[33] Since I find that the Appellant did not suffer a disability within the meaning of the CPP as of December 31, 2012, there is no need to address the issue of whether his disability was prolonged.

**CONCLUSION**

[34] The appeal is dismissed.

John Eberhard  
Member, General Division - Income Security

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<sup>35</sup> Paragraph 42(2)(a) *Canada Pension Plan*