



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. L. v Minister of Employment and Social Development*, 2019 SST 421

Tribunal File Number: GP-18-1327

BETWEEN:

D. L.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Teleconference hearing on: March 25, 2019

Date of decision: March 29, 2019

DECISION

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

OVERVIEW

[2] The Claimant last worked as a full-time hairstylist from 1986 until January 2003. She indicated that she could no longer work as of that time after having to go on bedrest while pregnant with her daughter. The Claimant subsequently developed progressive generalized body pain and suffered from anxiety as well as IBS. The Minister received the Claimant's application for the disability pension on March 8, 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 to be December 31, 2010.

ISSUES

[4] Did the Claimant's conditions result in her having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2010?

[5] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2010?

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

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

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 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.

[7] I found the Claimant to be credible. Her testimony was straightforward and consistent with the written evidence in the Hearing File. I have placed significant weight on the Claimant's oral testimony, particularly with respect to the impact that her condition had on her day to day life leading up to the time of the MQP.

Severe disability

- i. The Claimant suffers from a serious cumulative health condition that greatly affects her day to day life.**

[8] 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 impairment².

[9] The Claimant described the onset of one health problem after another after going off work while pregnant with her daughter in 2003. Those health problems included progressive body pains or fibromyalgia, anxiety, a ruptured appendix, and a heart lining aneurysm which has since required yearly monitoring. She has consulted regularly with her family physicians, Dr. Elliott and then Dr. Maltman. In 2010, she was referred to a fibromyalgia specialist, Dr. Tainsh, and in 2012 she underwent breast reduction surgery in an attempt to alleviate some of her pain. According to the Claimant, Dr. Tainsh advised her in 2010 that she could no longer work.

[10] The Claimant has also trialed numerous medications including Arthrotec, Ativan, Naproxen, Lorazepam, Effexor, Lactulose, Pregabalin, and Amitriptyline. She has participated in acupuncture, meditation, physiotherapy, and yoga. She is currently using cannabis oil as well. According to the Claimant the surgery didn't help with her pain and she has had numerous side effects from medications. As a result of her IBS, she has been more limited in terms of medications she can take on a regular basis. The conditions themselves also affect one another.

² *Bungay v. Canada (A.G.)*, 2011 FCA 47

For example, the Claimant's increased fibromyalgia pain aggravates her anxiety, which triggers her IBS.

[11] I have reviewed the numerous medical reports outlining the Claimant's treatment and progress as well as the letters of support from her family and friends. There was some inconsistency between the reports by Dr. Tainsh and the Claimant's subjective testimony about her health status at that time which I would like to address. Dr. Tainsh made no specific mention in her reports that the Claimant could not return to work. According to the Claimant, however, Dr. Tainsh advised her that she could not work as of 2010. To the contrary, the January 2011 report by Dr. Tainsh indicated that the Claimant's myalgias had improved with Arthrotec and that her insomnia had improved with better sleep hygiene. A follow-up letter written by Dr. Tainsh in November 2018 noted that although she could not recall the specific wording she used with the Claimant at her appointment in 2010, she had no doubt that the Claimant's recollection of the event was accurate in regard to her ability to work.

[12] I accept the Claimant's oral testimony. In order to justify this I have given weight to Dr. Maltman's letter dated January 26, 2018. It outlined the fact that it would not be uncommon for the Claimant to have been improved at one visit and then relapsed shortly after, resulting in severe disability sporadically and unpredictably. He went on to report that he had no doubt the Claimant had severe, recurrent, and prolonged symptoms dating back to 2010. He believed that the Claimant would have had extreme difficulty working as of that time. The Claimant also reiterated that she may very well have been feeling okay at the time of her January 2011 appointment with Dr. Tainsh. Later that day or the next day, however, it would have been a completely different story. This has been consistent for many years. She also had to stop taking Arthrotec medication because it aggravated her IBS.

[13] I find that the Claimant has been compliant with all recommended treatment, but unfortunately there has been little improvement in her symptoms.

[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 work³.

[15] The impact of the Claimant's symptoms on her day to day life is very important in my assessment of the Claimant's capacity to work. The Claimant described that since 2003 every day has been different in terms of her symptoms. At the time of the MQP she had to rely on her husband to do the majority of the housekeeping, cooking, and care for the children. If the Claimant was having a good afternoon, she may have prepared a simple meal but that was the extent of her contribution to the household. Fortunately, her family has been extremely supportive.

[16] The Claimant reported missing out on a lot of family activities and school/sporting events. She had to lay down most of the time and generally went to bed around dinnertime because she was exhausted and in pain. She had no hobbies and her social life was extremely limited. She didn't like telling other people about her condition because she was embarrassed. She could not recall having any good days, only some good moments. As a result of the burden her husband carried, their relationship has now deteriorated. The only reason they have remained together is because the Claimant could not afford to live on her own.

[17] I find that the Claimant's global condition, and in particular the impact from her fibromyalgia, has negatively impacted all aspects of her daily life. At the time of the MQP, she had to constantly rely on others and spent the majority of her time trying to minimize her pain and control her symptoms. This precluded her regularly from any substantially gainful work.

ii. The Claimant demonstrated some effort to work after 2003, but even that proved to be too much for her.

[18] 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 condition⁴.

[19] The Claimant submitted that she tried cutting hair again after 2003, but only for her family and friends. She had the ability to cut hair when she felt up to it and in the comfort of her

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

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

own home, but even that proved too physically and emotionally demanding. She then tried to help her sister with some basic administrative work related to her business, but found that trying to use a computer and sit for any length of time aggravated her neck and hand pain. She made one last effort to return to the workplace by starting her own small business in 2009 or 2010. It was to involve assisting seniors' with their shopping. Unfortunately, while on her first shopping outing, the Claimant had to have someone retrieve the client and take them home because the Claimant couldn't physically continue. The Claimant has not attempted any work efforts since that time.

[20] I accept the Claimant's testimony that she would love to return to work if she could. She has demonstrated some effort to try to return to the workplace in accommodated situations, unsuccessfully. I find that this is a direct result of her health condition and functional limitations.

iii. The Claimant is not realistically employable.

[21] I must assess the severe part of the test in a real world context⁵. 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.

[22] The Claimant was 47 years of age at the time of her MQP. She is fluent in English and has completed a high school education and certification as a hairstylist. She has only ever worked as a hairstylist and as a result she possesses no transferable skills. The Claimant has very limited computer skills, can't sit for more than 15 minutes at a time, and can't type because of pain. I find that given her numerous functional limitations, limited education, and lack of transferable skills, that she would not be a good candidate for any re-training or for more sedentary work within her limitations.

[23] After considering all of the oral and written evidence presented, I have concluded that on a balance of probabilities the Claimant was suffering from a severe disability, as defined by the CPP, as of December 31, 2010.

Prolonged disability

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

[24] I find that the Claimant's disability was also long continued and of indefinite duration by December 31, 2010. She has been suffering from chronic and progressive myalgias, headaches, fatigue, anxiety, and IBS dating back to 2003. Despite consultations with specialists and trials of numerous medications, the Claimant's condition has little improved. Given the chronicity of her symptoms and lack of improvement to date, I find little prospect that her condition will improve to the point that she could regularly resume any substantially gainful work.

CONCLUSION

[25] The Claimant had a severe and prolonged disability in December 2010, when Dr. Maltman and Dr. Tainsh indicated she was no longer capable of work. 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 pension⁶. The application was received in March 2017 and the deemed date of disability is December 2015. Payments start four months after the deemed date of disability, as of April 2016⁷.

[26] The appeal is allowed.

Tyler Moore
Member, General Division - Income Security

⁶ Paragraph 42(2)(b) *Canada Pension Plan*

⁷ Section 69 *Canada Pension Plan*