



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *L. D. v Minister of Employment and Social Development*, 2019 SST 1538

Tribunal File Number: GP-18-333

BETWEEN:

L. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Antoinette Cardillo

HEARD ON: April 15, 2019

DATE OF DECISION: April 30, 2019

DECISION

The Appellant is eligible for a *Canada Pension Plan* (CPP) disability pension starting from March 2017.

OVERVIEW

[1] The Appellant is 52 years old. She trained as a social worker in 1997. She returned to school in 2016/2017 to train as a pharmacist's assistant. The Respondent received the Appellant's CPP disability pension application on May 16, 2017.¹ She has necrotizing fasciitis and anemia. She indicated that she had stopped working as a personal service worker in March 2017 due to an infection caused by group A streptococcal bacteria. The Respondent refused the application initially and on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[2] The Appellant's minimum qualifying period (MQP) date is December 31, 2019. Since the MQP is in the future, I must decide whether it is more likely than not that the Appellant had a severe and prolonged disability that began on or before the date of the hearing. To qualify for a CPP disability pension, the Appellant must meet the requirements set out in the CPP. The calculation of the MQP is based on the Appellant's contributions to the CPP.

ISSUES

[3] Can the Appellant's physical conditions be considered a severe disability that prevented her regularly from pursuing any substantially gainful occupation at the time of the hearing?

[4] Can the Appellant's physical conditions be considered a prolonged disability?

ANALYSIS

[5] To be considered disabled, a person must have a severe and prolonged mental or physical disability.² A person is considered to have a severe disability if they are incapable regularly of

¹ GD2-22.

² CPP, s 42(2)(a).

pursuing any substantially gainful occupation. A disability is prolonged if it is long continued and of indefinite duration or if it is likely to result in death. The disability must not only be severe, but also prolonged for a person to be able to be found disabled as defined by the CPP.

The Appellant's disability is severe.

[6] I find that the Appellant has a severe disability because of her physical condition.

i. Documentary evidence – Medical reports

[7] According to medical visit notes between March 2017 and October 2017,³ the Appellant experienced a lot of pain after her surgery. She had reduced mobility as well as reduced flexibility of her left arm. Medication and physiotherapy did not help. She was also depressed and indicated that she could not find work.

[8] According to a medical report by Dr. Robert, family doctor, dated May 15, 2017,⁴ the Appellant had reduced mobility and contractures. She managed her pain with medication. She also injured herself when she fell on her left arm in March 2017. Her weakness was due to the necrotizing fasciitis. Her prognosis was poor.

[9] According to a physiotherapy report dated October 18, 2017,⁵ the Appellant had received two treatments per week since May 12, 2017. An examination showed that the mobility of her left arm was at 66% and her strength at less than 50% of that of her right arm. She assessed her pain at 6 or 7 out of 10.

[10] Based on a November 2, 2017, report,⁶ Dr. Robert indicated that, after intensive treatment for necrotizing fasciitis, and despite regular physiotherapy, the mobility and strength of the Appellant's shoulder, elbow, and left wrist remained limited. The illness and surgeries caused constant pain that requires the continued use of medication. Dr. Robert was of the opinion that the Appellant would never fully recover and that her limitations, particularly the contractures

³ GD1-37 to 42 and GD2-39 to 44.

⁴ GD2-90.

⁵ GD1-9.

⁶ GD2-75.

(permanent shortening of a muscle or joint) and weakness, would prevent her from working in her usual field.

ii. Testimony

[11] The Appellant testified that she stopped working in March 2017, and she attempted to return to work in January 2018. Unable to find another job, she returned to her former position as a full-time nightshift worker in a residence for independent seniors. She could not return part-time. However, when she works, her pain is constant, and she cannot take her medication because it leaves her drowsy. Furthermore, she used and forced her right arm, and now she has even more pain in both sides.

[12] She thought she could do the same type of work as before her surgery because, before, she could sleep for a few hours during her shift. However, the policy changed in February 2019: There is no longer a sleep period, and she was assigned additional tasks, such as cleaning the floors and restrooms. These tasks are in addition to her responsibilities managing the residents' medications and assisting them. She explained that, even if she wanted to try to find a job as a pharmacist's assistant, she would not feel capable of handling medication because her pain prevented her from having full capacity to carry out her duties. Fatigue is another limiting factor.

[13] She explained that the physiotherapy had not helped the pain or her flexibility, and she stopped treatment in January 2018.

[14] She added that, when she feels stressed, her pain increases. She is limited in her everyday tasks, and, even though she would like to continue working or to find another type of employment, she is unable to because of her reduced flexibility, limited mobility in her left side, and constant pain. Fatigue is also constant.

[15] She explained that she has difficulty from a psychological point of view because of her physical condition and pain and the possibility of dying following the diagnosis of necrotizing fasciitis.

[16] Finally, the Appellant testified that she takes sleep medication because the pain prevents her from resting.

iii. Residual capacity to work

[17] The test that I must consider in determining whether a disability is severe is not whether the person has severe impairments, but whether their disability prevents them from earning a living. The determination of the severity of the disability is not based on the person's inability to perform their regular job, but rather on their inability to perform any work, that is, any substantially gainful occupation.⁷

[18] Also, a real-world approach must be taken with the test for severity. This means that, when deciding whether a person's disability is severe, I must consider factors such as age, level of education, language proficiency, and past work and life experience.⁸

[19] The evidence on file shows that the Appellant experienced significant pain after xxx, and she has significant limitations. The mobility and flexibility of her left arm are considerably reduced.

[20] I have considered all of the medical reports and the Appellant's testimony, and I find that, with her significant limitations, the Appellant could not function in the labour market.

[21] Although she is only 52 years old, I find it unlikely that she would be able to retrain given her life experience with her physical limitations and the resulting psychological impacts, as demonstrated by the evidence and her testimony. I find that the Appellant already tried to retrain before her surgery, but she could not find a job as a pharmacist's assistant due to her physical limitations and pain. I also find that her attempt to return to work in January 2018 was unsuccessful due to her pain and limitations.

[22] I therefore find that the Appellant has had a severe and prolonged disability since March 2017, when she stopped working.

⁷ *Klabouch v Canada (Social Development)*, 2008 FCA 33.

⁸ *Villani v Canada (Attorney General)*, 2001 FCA 248.

The Appellant's disability is prolonged.

[23] As specified, the medical reports on file show that the Appellant's health issues have existed since March 2017 and that they have not improved. The Appellant continues to have constant pain; the mobility and flexibility of her left side continue to be limited despite attempts to take medication and have physiotherapy.

CONCLUSION

[24] I find that the Appellant had a severe and prolonged disability in March 2017, when she stopped working. The disability pension payments start four months⁹ after the date of disability. Therefore, payments will start in July 2017.

[25] The appeal is allowed.

Antoinette Cardillo
Member, General Division - Income Security

⁹ CPP, s 69.