



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. H. v Minister of Employment and Social Development*, 2019 SST 646

Tribunal File Number: GP-18-2360

BETWEEN:

L. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: June 4, 2019

Date of decision: June 24, 2019

DECISION

[1] I have allowed the appeal. The Claimant, L. H., is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of September 2017.

OVERVIEW

[2] The Claimant was diagnosed with breast cancer in April 2017. She had surgery and chemotherapy, and she is now on tamoxifen treatment. She applied for a CPP disability pension in March 2018 because she has not been able to return to school, nor does she think she is capable of working at any job. She says she has not recovered emotionally or physically from the cancer treatments and surgeries. She has constant fatigue, aching joints, and she cannot sleep. Lack of sleep has affected her memory and concentration.¹ The Minister denied the Claimant's application, and she appealed to the Tribunal.

[3] To be eligible for a CPP disability pension, the Claimant must have contributed to the CPP within a time period called the "minimum qualifying period" or MQP. The Claimant's MQP will end on December 31, 2019. Because this is in the future, she must be disabled as of the date I heard her appeal.²

[4] The CPP says a disability must be severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any 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.³

ISSUE

[5] I have to decide if the Claimant has a severe and prolonged disability. It is the Claimant's responsibility to prove this.⁴

¹ The Claimant's CPP disability application and questionnaire are at pages GD2-14-20 and GD2-108-115.

² Paragraph 44(1)(b), and subsections 44(2), and 52(3) *Canada Pension Plan*. The Claimant's CPP contributions are shown at GD5-4. Her MQP is extended because she was the primary caregiver of a child under the age of seven from 2012 to 2017.

³ Paragraph 42(2)(a) *Canada Pension Plan*.

⁴ The legal test is that the Claimant must prove she is disabled on a balance of probabilities; in other words, she must show it is more likely than not that she is disabled.

ANALYSIS

The Claimant has a severe disability

[6] The Claimant testified at the hearing. She answered my questions spontaneously and thoroughly. I believe what she told me about her condition and how it affects her. After considering her evidence and the medical reports, I am satisfied she is incapable regularly of pursuing any substantially gainful occupation.

The Claimant's medical condition affects her ability to work

[7] In April 2017, the Claimant was 44 years old. She was married and had a five-year-old son. She had previously worked as a X, but while she was on leave from that job because of a back injury, she decided she wanted a career with a better income. She had just started training to become a X when she learned she had the BCRA2 gene mutation. She went to a high-risk cancer clinic and quickly had a number of tests that showed she had invasive breast cancer. She went on medical leave from school. In May 2017 she had a bilateral mastectomy and reconstruction, followed by four cycles of chemotherapy from June to August.⁵ In October she had surgery to remove her ovaries, and she started tamoxifen treatment in December.⁶

[8] The Claimant has had a difficult time since her diagnosis. She has emotional issues and pain, as well as weakness, fever, cough, shortness of breath and other symptoms during and after chemotherapy. She has developed joint pain, fatigue and insomnia.⁷

[9] The Claimant has not worked or gone to school since May 2017. She thinks her main problem is with her memory and concentration. She said her brain just doesn't work. She has problems finding words. She has to keep re-reading things because she can't remember what she

⁵ Dr. Gelmon June 21, 2017 GD2-123-126; Dr. Hamilton October 5, 2017 GD2-66-68; Dr. Georgilas September 19, 2017 GD2-61-62

⁶ Dr. Georgilas October 31, 2017 GD2-75-76

⁷ Claimant's testimony and Notice of Appeal GD1-1-2; Dr. Gelmon July 18, 2017 GD2-129-130; Dr. Moore August 19, 2017 GD2-52-53; Dr. Georgilas August 29, 2017 GD2-55-56; Dr. Georgilas September 19, 2017 GD2-61-62; Dr. Finlayson November 29, 2017 GD2-77-78

just read. She feels stressed because of these difficulties. Everything is made even worse if she hasn't had a good sleep.

[10] The Claimant is following medical advice.⁸ She is going to counselling to address the emotional impact of her cancer treatment.⁹ She told me she is also doing brain puzzles at home, and taking courses through the BC Cancer Agency. She has completed a mindfulness course and hopes to start a memory class, but does not feel ready yet.

[11] The Claimant sees her oncologist, Dr. Gelmon, every two months. In March 2018, Dr. Gelmon described the Claimant's "significant problems with concentration and cognitive ability".¹⁰ In March 2019, she said the Claimant continued to have problems with functioning and managing her regular activities of daily living, and was certainly unable to work.¹¹

The Claimant does not have work capacity

[12] My decision about whether the Claimant's disability is "severe" is not based on whether she has impairments or a particular diagnosis, but whether the disability prevents her from earning a living at any type of job.¹² In deciding if she has work capacity, I must look at things like her age, level of education, language proficiency, and past work and life experience.¹³

[13] The Claimant is young and has a varied work experience. Besides being a X, she did office work and she ran a home daycare. She is obviously intelligent and has the advantage of English as her native language.

[14] These positive attributes cannot outweigh the fact that since May 2017, the Claimant has been physically, emotionally and cognitively unwell because of her cancer treatment. I do not think she has had the capacity to perform any type of work or training since then. Therefore she does not have to show that she tried and failed to do so.¹⁴

⁸ Dr. Gelmon February 22, 2018 GD2-104

⁹ C. Matsuda and A. Vijayan April 24, 2019 GD6-10

¹⁰ GD2-106

¹¹ GD6-6

¹² *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

¹³ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁴ If there is evidence of work capacity, a person must show she tried to obtain or maintain employment but could not do so because of her health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

The Claimant has a prolonged disability

[15] In her Notice of Appeal the Claimant said she was not asking for a disability pension to be paid to her indefinitely. She submitted it would be fair to grant her benefits from when she was diagnosed with breast cancer in April 2017, up to one month after her last surgery, which was scheduled to be in early 2019.¹⁵

[16] CPP disability benefits are not intended for temporary periods. A person's disability must be likely to be long continued and of indefinite duration. The Minister submitted the Claimant's condition does not meet this definition because she is currently receiving treatment and expects to get better and return to her studies.

[17] I disagree. First, the Claimant had her first surgery over two years ago. It has been almost two years since her chemotherapy ended. She has been on tamoxifen for almost 18 months. She has suffered from the significant side effects of her treatment since May 2017. I think a condition that prevents a person from working or attending school for over two years is long continued.

[18] Second, while the Claimant's doctors tried to estimate her recovery period, they were wrong. In February 2018, Dr. Gelmon said the Claimant "certainly cannot go back to work for at least 6-12 months" because she needed more surgery and treatment, and she had significant fatigue, pain, and concentration and memory issues.¹⁶ The following month, Dr. Gelmon said she hoped the Claimant would improve so that she would be able to get back to work "but I do not see this happening for at least a year due to the severity of her symptoms."¹⁷ In September 2018, the Claimant's surgeon, Dr. Van Laeken, suggested the Claimant not consider returning to work for at least another six to nine months.¹⁸

[19] These estimated recovery dates have come and gone. There is now uncertainty as to when she will be well enough to work. In August 2018 Dr. Gelmon said she did not think the Claimant's condition would be permanent, but that the Claimant would need "probably a year"

¹⁵ GD1-1

¹⁶ GD2-104

¹⁷ GD2-106

¹⁸ GD1-5

after which she could potentially begin a graduated return to work or school. Dr. Gelmon added that the year was an estimate and that the Claimant would need to be assessed along the way. In April 2019 the Claimant's counsellors could only say they expected it would take some time for her symptoms to resolve.¹⁹ To the extent the Claimant's symptoms are related to tamoxifen – which is unknown – she will be on that medication for a minimum of five years as of December 2017.²⁰ It is pure speculation to think the Claimant's treatment will be over and she will no longer have any functional limitations even by December 2022.

[20] A condition does not have to be permanent to be prolonged. The fact that a doctor expects a condition to improve does not mean it is not indefinite. In this case, there is now medical uncertainty about when the Claimant will recover. She wants to return to school. However, she has not improved enough to do so despite the fact that it is now past her expected recovery date. I am not going to hold her optimism against her. The expected duration of her limitations is now unknown. That means her disability is of indefinite duration.

CONCLUSION

[21] The Claimant had a severe and prolonged disability in May 2017, when she stopped going to school and began treatment. Payments start four months after the date of disability, as of September 2017.²¹

[22] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

¹⁹ C. Matsuda and A. Vijayan April 24, 2019 GD6-10

²⁰ Dr. Levasseur, Dr. Gelmon June 21, 2017 GD2-

²¹ Section 69 *Canada Pension Plan*