



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. C. v Minister of Employment and Social Development*, 2019 SST 710

Tribunal File Number: GP-19-228

BETWEEN:

L. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Videoconference hearing on: July 17, 2019

Date of decision: July 18, 2019

DECISION

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

OVERVIEW

[2] The Claimant is nearly 57 years old and lives with her husband in X, New Brunswick. Despite having back surgery 20 years ago, she still has back pain. However, she also worked for a number of years after the surgery.

[3] The Claimant was in a major car accident on September 11, 2017, and has not worked since. The Minister received her disability pension application on December 21, 2017. In her application, she said she could not work because a lower back injury caused difficulties with activities such as lifting, bending, reaching, sitting, and opening doors. She also had emotional stress and sleeping issues. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. More specifically, she must be found disabled (as defined in the CPP) on or before the end of her minimum qualifying period (“MQP”). The calculation of the MQP is based on her contributions to the CPP. I find the Claimant’s MQP to be December 31, 2008.

ISSUES

[5] Did the Claimant’s conditions result in the Claimant having a severe disability by her MQP date? In other words, was she incapable regularly of pursuing any substantially gainful occupation by December 31, 2008?

[6] If so, was the Claimant’s disability also prolonged?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged.¹ A person is considered to have a severe disability if she is incapable regularly of pursuing any

¹ Paragraph 42(2)(a) of the *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 that her disability meets both parts of the test. If the Claimant meets only one part, she does not qualify for disability benefits.

Did the Claimant have a severe disability by December 31, 2008?

[8] For the reasons that follow, I find that the Claimant did not have a severe disability by December 31, 2008.

[9] I must assess the Claimant's condition in its totality, which means I must consider all of the possible impairments, not just the biggest or main impairment.² This is potentially important, because the Claimant has identified issues with both her physical and her mental health.

[10] I must also assess the severe part of the test in a real-world context.³ 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. In this case, the Claimant was 46 years old at her MQP date. She has a Grade 12 education, speaks English fluently, and has a certificate from the National Food Safety Training Program. She also took a "flagging" (road construction) course many years ago. Her most recent job was working as a Dietary Aide at a nursing home called X. She has also worked for significant periods of time in a convenience store and as the manager of a seasonal retail store. Other jobs have included flagging, house cleaning, and working at a canteen. Without considering her medical conditions, it appears that the Claimant is best suited for the types of work she has done in the past or work that does not have extensive training requirements.

What is the Claimant's condition now?

[11] There is significant evidence suggesting that the Claimant is unable to work now. In December 2017, Dr. Janmohamed (Family Physician) said she had chronic low back pain secondary to severe L5-S1 disc degeneration with spondylosis. She previously had a L4-L5 laminectomy. She had mild scoliosis at T6, facet osteoarthritis at L4-L5, and moderate

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

³ *Villani v. Canada (A.G.)*, 2001 FCA 248

degeneration at the thoracolumbar junction. She also had anxiety and depression, with significant psychosocial issues. Dr. Janmohamed said she could not manage driving, prolonged standing, or lifting. She was in constant pain. He said she could not cope physically or psychologically, and she would be unable to work in the future.⁴

[12] Dr. Janmohamed's opinion is consistent with the evidence from the Claimant's other current treating professionals. In January 2018, Dr. Klein (Chiropractor) said she would not be able to return to work. In June 2018, Zoe Leclair (Massage Therapist) said a return to work was not advisable. In January 2019, Dr. Janmohamed affirmed that the Claimant had a severe disability that would prevent her from doing any type of work.⁵

[13] These opinions are also consistent with the Claimant's own written and oral evidence, as well as the oral evidence of her husband. I also accept that she has had many recent challenges in her life, including her husband's 2014 heart attack, her mother's struggle with Alzheimer's Disease, and her father's death just two weeks before the hearing.

[14] The recent medical evidence suggests that the Claimant is now severely disabled. However, this is not the only requirement that she must meet. She must also show that she was incapable regularly of pursuing a substantially gainful occupation by December 31, 2008.

The evidence does not support a severe disability since December 31, 2008

[15] The Claimant said she stopped working as a result of back pain in 2006, so she could stay home and have a better quality of life. However, her husband's 2014 heart attack created financial stress for both of them. In order to help cover their costs, she started looking for part-time work. She was hired by the nursing home in September 2014 on a "casual on-call" basis.

[16] As the nursing home was unionized, the Claimant gradually acquired seniority when other employees quit or retired. This resulted in increased hours: she was sometimes working 6 days a week, for a total of 37.5 to 40 hours per week. She said that this made her back worse, and she took some brief sick leaves in order to recover.

⁴ GD2-61 and GD2-64

⁵ GD1-8, GD1-9, and GD2-89

[17] The Claimant's paid employment after her MQP date does not necessarily preclude a finding that she was severely disabled. However, her earnings at the nursing home were not trivial. She earned \$19,635 in 2015, as well as \$14,258 in 2016 and \$12,267 in 2017. In addition, she received regular Employment Insurance ("EI") benefits from October 16, 2016, until April 29, 2017.⁶ She said her employment earnings had dropped during this period, so the EI benefits "topped up" her income for more than six months. However, in order to receive regular EI benefits, a person must ordinarily be "capable of and available to work".⁷ This means that her 2016 and 2017 employment earnings could possibly have been even higher, had there not been a reduction in the number of work hours available.

[18] The Claimant's 2015 earnings are critical. Since 2014, a "substantially gainful occupation" has been defined as "an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension".⁸ In 2015, a person could receive a maximum pension of \$15,175.08. This means the Claimant's 2015 earnings were more than \$4,000.00 above the "substantially gainful" level. Accordingly, for at least the year 2015, the Claimant was not "incapable regularly of pursuing a substantially gainful occupation". In fact, she clearly demonstrated that she was capable of pursuing a substantially gainful occupation in 2015. This, in itself, is enough for me to find that she has not had a severe disability continuously since 2008. While I do not need to make any findings with respect to 2016 and 2017, her EI top ups suggest she could have earned more than she did.

[19] This does not mean that the Claimant was pain-free in 2015. However, 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.⁹ While it may not have been easy for her, the Claimant demonstrated in 2015 that she could in fact earn a living. She did this at a job that she described as a fast-paced environment with heavy lifting, bending, reaching, and being constantly on her feet. The 40 km drive to work aggravated her condition.¹⁰ The job also appears to have been more physically demanding than other work she did in the past.

⁶ GD4-10 and GD2-55

⁷ Subsection 18(1) of the *Employment Insurance Act*.

⁸ Section 68.1 of the *Canada Pension Plan Regulations*.

⁹ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹⁰ GD1-10

[20] My findings on severity are consistent with other evidence suggesting that the Claimant's condition worsened well after 2008. In her application materials, she said her condition stopped her from engaging in activities such as four-wheeling, walking, camping, dancing, and enjoying her grandchildren. She did not give a date for when she stopped these activities. However, at the hearing, she said she had stopped these activities in May 2017.

[21] The Claimant said she had successful spinal surgery 20 years ago. Although she has had pain since the surgery, she also said there had been no follow-up after the usual recovery period had passed. She did not see any specialists after that recovery period: she saw only her family doctor until shortly before the 2017 accident.

[22] An obvious concern is the lack of any medical evidence before her September 11, 2017, car accident. In her application papers, the Claimant also said she could no longer work because of her medical condition on September 11, 2017.¹¹ At the hearing, she said the September 2017 accident aggravated her condition: she always had pain, but had been able to tolerate it before.

[23] The Claimant's employer said her work was satisfactory, but admitted that her back issues existed while she was still working. She sometimes missed work. She would sometimes need help with lifting pots off the stove, and she used kitchen carts to reduce the strain from lifting. However, her employer also said that her medical condition did not affect her ability to handle the demands of the job: with adjustments in routine and methods, she was capable of performing her duties.¹² Nor has there been any real suggestion that this was a benevolent employer: it was a unionized workplace and she said she would have to take unpaid sick leaves from time to time. In fact, she suggested she was not helped as much as the employer claimed.¹³

[24] In conclusion, the Claimant's substantially gainful earnings in 2015 are enough to establish that she has not been severely disabled since 2008. While it is not necessary for me to

¹¹ GD2-55

¹² GD2-77 to GD2-79. In accordance with the Federal Court of Appeal's decision in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, there is no evidence that the employer's accommodations went "beyond what is required of an employer in the competitive marketplace".

¹³ GD5-2

rely on it, the preponderance of the other evidence also suggests that the onset of a severe disability did not occur until many years after 2008.

Is the Claimant's disability also prolonged?

[25] As I have found that the Claimant has not established a severe disability by December 31, 2008, it is not necessary for me to answer this question.

CONCLUSION

[26] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security