



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. M. v Minister of Employment and Social Development*, 2019 SST 1583

Tribunal File Number: GP-18-2087

BETWEEN:

A. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Heather Hamilton

Claimant represented by: F. W.

In person hearing on: August 1, 2019

Date of decision: September 12, 2019

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension. I have dismissed the appeal. Here are the reasons why.

OVERVIEW

[2] The Claimant at the age of 54 made an application for a CPP disability pension on December 12, 2017.¹ She was involved in a Motor Vehicle Accident (MVA) in 2013 and 2017. She was the owner of a small convenience store and delicatessen and involved in food preparation, worked as a cashier, and managed the business. She indicated on her questionnaire that she stopped working on December 20, 2017.² The Claimant bases her disability on major depression, severe pain throughout her body, difficulty with walking and standing, swollen joints in her hands, shoulders and back and severe headaches. Her impairments were lack of concentration, erratic behaviour, bad memory, inability to bend, low energy loss of balance and frequent eye infections. 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. The Claimant was a late applicant and had four years of earnings and contributions in the last six years.³ I find the Claimant's MQP to be December 31, 2015.

EVIDENCE ADMITTED AFTER THE HEARING

[4] At the hearing the Claimant told me she stopped working in October 2015. The Claimant and her Representative (Claimant's husband) asked if they could send in additional medical reports and information as evidence to support that she stopped work in 2015. I provided an

¹ Application GD2 pages 21-25

² Questionnaire GD2 page 47 question #16

³ GD5-12

opportunity for the Claimant to submit further information, which she did. I accepted this information as evidence.⁴ I gave the Minister time to respond to it.⁵

ISSUES

[5] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2015.

[6] If so, was the Claimant's disability also long continued and of indefinite duration?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged.⁶ A person is considered to have a severe disability if 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. 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.

Did the Claimant have a severe disability by December 31, 2015?

The Claimant's condition and evidence

[8] I have to decide if the Claimant has a severe and prolonged disability. It is the Claimant's responsibility to prove this.⁷

[9] My decision about whether the Claimant's disability is severe is not based on what impairments or diagnosis she has. The important thing is whether her condition prevents her from earning a living at any type of job.⁸ In deciding this, I have to consider all health issues that

⁴ GD6 pages 1-65, GD9 pages 1-8

⁵ GD12

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

⁷ The legal test is that the Claimant must prove he is disabled on a balance of probabilities; in other words, he must show it is more likely than not that she is disabled.

⁸ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

might affect her employability.⁹ I also have to look at things like age, level of education, language proficiency, and past work and life experience.¹⁰

[10] The Claimant told me that she owns the business and the business is in her name. The Claimant explained the store was open from 7:30 a.m. and usually closed at 5:30. Before the MVA in November 2013 the Claimant was working full time and she worked all day. After work she would go pick up food supplies at places such as Costco. The Claimant was working a very long day of about 11 hours. After the MVA in 2013, the store was no longer open seven days a week, but 5.5 days per week. She continued to work at the Convenience Store in 2014 but fewer days and she continued to work in 2015.

[11] She told me that she stopped working in October 2015 and she has not worked since then. The Claimant's Representative explained that the Claimant's health was deteriorating in 2014 after a MVA accident in November 2013 and the convenience store was already closed a lot of the time. The Claimant's Representative told me he retired on October 1, 2015 from being a Teacher's Assistant with the Vancouver School Board, after he discovered that the Claimant had badly cut herself with a knife while preparing food at the convenience store. He further told me that the Claimant did not work at the convenience store after October 1, 2015 as he took over everything because he did not feel it was safe for the Claimant to be working.

[12] She explained she has hand and joint pain, headaches, back and shoulder pain, and has difficulty bending, standing, sitting and walking for long periods. She is anxious and depressed. She walks with a cane and has problems with incontinence.

[13] The Claimant and the Representative told me that the first lawyer did not tell her she should apply for a CPP disability pension and so she did not know to apply. It was her second lawyer who told her to apply for a disability pension. She hired a new lawyer in April 2017 and her second lawyer told her to apply for a disability pension. The Claimant further mentioned that she and her husband want to sell the convenience store business but that has not happened yet.

⁹ *Bungay v. Canada (A.G.)*, 2011 FCA 47

¹⁰ *Villani v. Canada (A.G.)*, 2001 FCA 248

The Claimant has demonstrated a residual capacity to work at December 31, 2015 and continuously afterwards

[14] On the Claimant's questionnaire from December 2017, she noted that she was still working part-time, five days per week, three to four hours per day. I asked the Claimant if she felt she stopped working in October 2015 why would she write that that she was still working at the convenience store in 2017. The Claimant testified she did not know, did not remember, was confused, and made a mistake on her questionnaire. The Claimant struck me as intelligent, articulate, and capable. I do not believe her memory is as poor as she claimed. I think she was evasive when answering my questions.

[15] I find there is inconsistent and contradictory information with what the Claimant told me at the hearing and the evidence that is in the file. I cannot rely on her statements.

[16] There is evidence in the file that when the Claimant did not indicate when she could no longer work on the questionnaire, the Minister returned the form to the Claimant, and the Claimant indicated December 20, 2017 was when she stopped working.¹¹ I find if the Claimant felt she made a mistake on her questionnaire she would not have indicated December 20, 2017 as the date she stopped work when she returned it to the Minister.

[17] In October 2016 Dr. Gagne, Registered Psychologist, reported that after the MVA accident in November 2013 the Claimant reduced her work hours from 11 am to 5 pm and she worked six hours per day. He noted that she worked six hours per day for 1-1.5 years.¹² He then noted that she is currently back to full time hours with difficulties with prolonged standings and bending, avoids repetitive bending and heavier lifting.¹³ In Dr. Gagne's report of February 8, 2019 he reported that prior to the Claimant's second MVA in September 2017 the Claimant continued to own and operate a convenience store, which indicated she continued to work after her MQP.¹⁴

¹¹ GD4-47

¹² GD6 page 29 (viii)

¹³ GD6 page 29 (x)

¹⁴ GD6 page 48 –Point #7

[18] The Claimant testified that she had earnings of \$13,433 in 2013, \$10,715 in 2014, and \$13,483 in 2015.¹⁵ I recognize her earnings were not substantially gainful; however, she is self-employed and her earnings in 2013 were very similar to the earnings in 2015. Her earnings in 2015 were the highest she had earned since 1995 and the earnings in 2015 were higher than 2014. I find the evidence demonstrated she had a residual capacity to work, and was able to perform her duties, she was productive and was paid accordingly. She may have difficulty working now after her second MVA in September 2017; however, at her MQP of December 2015 the evidence demonstrated the Claimant had a residual capacity for work and it was continuous.

[19] The Claimant was 52 at her MQP of December 2015. She took a business management course while in China and immigrated to Canada in 1990. She has a great 12 education and was taking an acupuncture course at College over time but did not complete the course as it was no longer offered. She worked in a hotel for three to four years in housekeeping and worked at the Sunrise Market as a cashier for three to four years. The Claimant also worked as a waitress for one year, and as a nanny. English is not her first language. Cantonese is her primary language. The Claimant purchased a convenience store/delicatessen in 2003 and she worked in the store as cashier, stocking shelves, purchasing food products, dealing with customers, and making food to sell at the delicatessen.

[20] She was self-employed and owned and managed a convenience store and she was very involved in the day to day management of the convenience store. She communicated with her customers that came into the store. She had real work and life experience. The Claimant was working prior to owning a Convenience Store, even though she did not have a good command of the English language she was successful in finding employment. She has transferable skills with her business management. I find she has real work and life experience and she is educated. Her age, education, work experience, and transferable skills make the Claimant employable in the real world and outweigh her lack of English for employability.

¹⁵ GD5-15

The Claimant did not have a severe disability by December 31, 2015

[21] Family Physician Dr. Wan reported on the CPP Medical Report that he started treating the Claimant for the main medical condition in October 2017. He noted she told him she had three visits to the ER in 2017, not admitted, but he noted he did not know her at the time. She has soft tissue injuries from two MVA's in 2013 and 2017, which have resulted in gait problems and falling. She is getting temporary relief with only using medications. She has resolving depression and anxiety. She walks with a cane, has difficulty lifting, has worsening memory and concentration, and she could not lift her shoulder more than 45 degrees.

[22] The medical evidence from Dr. Wan in the CPP Medical Report tells me he did not start treating the Claimant for the main medical condition until October 2017. She is getting relief with using medications and she has resolving depression and anxiety.

[23] Dr. Gagne reported on February 8, 2019 that prior to the Claimant's second MVA in September 2017 the Claimant continued to own and operate a convenience store¹⁶, which indicated she continued to work after her MQP.

[24] The Claimant noted in the August 2019 submissions that she must not be disadvantaged for attempting a return to work following the MVA in 2013. She worked despite her disabling symptoms but she was not able to continue due to her injuries.¹⁷ I find the Claimant had earnings of \$13,433 in 2013, \$10,715 in 2014, and \$13,483 in 2015. This does not support that she was unable to work on a continuous basis since her MVA in 2013. I do not find she had a failed attempt to work.

[25] I recognize that her condition may have become worse after another MVA in September 2017; however, she has shown a residual capacity to work within her limitations and medical conditions at her MQP. The evidence shows me she continued to work until December 20, 2017, which is two years after her MQP. She was not incapable regularly of substantially gainful occupation.

¹⁶ GD6 page 48

¹⁷ GD9 page 4

[26] I understand she feels that she is totally disabled. I conclude the Claimant's disability is not severe at her MQP date of December 31, 2015.

Prolonged disability

[27] Because her disability is not severe I do not have to consider whether it was prolonged.

CONCLUSION

[28] The appeal is dismissed.

Heather Hamilton
Member, General Division - Income Security