



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v Minister of Employment and Social Development*, 2019 SST 1665

Tribunal File Number: GP-18-2477

BETWEEN:

J. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Anne S. Clark

Teleconference hearing on: September 17, 2019

Date of decision: October 29, 2019

DECISION

[1] The Claimant's appeal is allowed. She is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of January 2020.

OVERVIEW

[2] The Claimant has major depressive disorder and treatment resistant depression. Her symptoms began many years ago and until recently, she was able to work as a cook for part of each year. Her symptoms are somewhat controlled with treatment but when she works she has to stop some treatment and her episodes of depression and anxiety increase in severity and frequency. In addition to medication, she requires ongoing cognitive behavior therapy (CBT) and maintenance electroconvulsive therapy (ECT).

[3] The Minister received the Claimant's application for the disability pension on July 26, 2017. 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 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 Claimant's contributions to the CPP determine when the MQP ends. I find the Claimant's MQP will not end until December 31, 2021. Since her MQP has not yet ended, I will assess her disability as of the date of the hearing.

PRELIMINARY MATTERS

[5] The Claimant said her health condition made her increasingly unreliable at work and her employer recently informed her she would have to improve her attendance or she would lose her job. The Claimant requested a delay in the proceeding to allow her to file the employer's letter¹ and the most recent correspondence from a psychiatrist². I allowed time for the Claimant to file

¹ See GD 9 for the full letter of reprimand

² See GD10 for the full report

the additional evidence and allowed until October 11, 2019 for the Minister to file a reply. The Minister did not file a reply submission.

ISSUES

[6] Do the Claimant's conditions result in her having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation?

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

ANALYSIS

[8] The CPP defines disability as a physical or mental disability that is severe and prolonged³. 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 the disability meets both parts of the test, which means if the Claimant meets only one part, she does not qualify for disability benefits.

Severe disability

[9] I must assess the severe part of the test in a real world context⁴. This means that when deciding whether the Claimant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[10] The measure of whether a disability is "severe" is not whether the Claimant suffers from severe impairments, but whether the disability prevents her from earning a living. It is not a question of whether she is unable to perform her regular job, but rather her inability to perform any substantially gainful work⁵.

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

⁴ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁵ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

Is the Claimant's work substantially gainful?

[11] The Claimant has lived with depression and anxiety for many years and her condition worsened until 2008 when she was hospitalized after she attempted suicide. She was unable to return to full time work and recurring depression and anxiety as well as back pain limited the types of work she could do at all. She returned to part time work as a cook but had to stop working while she was pregnant because she could not take some of her medication. After she completed maternity leave, she returned to part-time/seasonal work. Beginning in 2011, she worked as a cook for five or six months each year. The Minister submitted this demonstrates the Claimant is capable of substantially gainful work and she, therefore does not meet the definition of severe under the CPP.

[12] The term substantially gainful in the CPP means 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.⁶ For example, the maximum annual amount for 2017 was \$15,763.92 and \$16,029.96 for 2018. According to the Regulations, an amount of salary or wages equal to or above these amounts describes an occupation that is substantially gainful.

[13] The Claimant's earnings for the years 2017 (\$12, 827.00) and 2018 (\$15,346.00) do not exceed the maximum but her actual earnings are not the only factor I must consider. I must consider her capacity for work and specifically whether she is capable regularly of substantially gainful work. While her earnings may indicate some capacity for work her description of her daily symptoms and the impact on her functional ability show she is not capable regularly of pursuing substantially gainful work. The fact she has been able to push herself to work part of each year shows her determination to provide for her daughter. It is not evidence that she is capable of more work. On the contrary, her testimony, the medical evidence and her employer's most recent letter show her capacity deteriorated in 2019.

[14] The Claimant testified she worked as much as she could in spite of having a severe disability. Her condition would settle somewhat when she was not working and she would be able to return to work each spring. Once she was at work, her symptoms quickly worsened until

⁶ Section 68.1 *Canada Pension Plan Regulations*

she was not able to meet even part time work hours. Moreover, the fact that she worked meant she could not participate in maintenance ECT or regular CBT as the psychiatrist recommends.

[15] The Claimant described her conditions; the impact they had on her ability to work; and how her symptoms deteriorated in 2019. Her depression and anxiety are debilitating. When she works, she becomes less able to meet the daily demands of both work and family. Her absenteeism increased this year and she testified that her daughter also missed many days of school because of the Claimant's health.

[16] There is medical information on file that explains the Claimant's conditions and symptoms. The Claimant's family physician reported that he has treated her for major depression since 2006⁷. He described her as having symptoms that disable her but she had no choice to continue working even with her conditions⁸. He went on to explain that he felt she would not be able to keep working.

[17] Dr. S. Amanullah, Psychiatrist reported in August 2019⁹. Some of her comments clearly support the Claimant's testimony. Dr. Amanullah noted the Claimant was "currently" quite functional. She also confirmed the Claimant: has a longstanding history of major depressive disorder; has been treated for a number of years; continues to struggle with her conditions; feels overwhelmed; could not have maintenance ECT because of work; had some relief from ECT; has treatment resistant depression; requires ECT and specifically maintenance ECT; and, requires ongoing CBT.

[18] The Claimant explained that she is unable to participate in recommended treatment when she works. ECT treatments can help reduce some of her symptoms and the specialist recommended she have maintenance sessions to help manage her condition on a monthly basis. She understands she will have the best results if she has ECT every month beginning with two times each week for the first month. The side effects caused by ECT make her unable to function for many days following each treatment. Loss of short-term memory, fatigue and other cognitive

⁷ See GD2-50

⁸ See GD2-30

⁹ See GD10

symptoms make it impossible for her to go to work while she receives ECT. She must have someone to care for her following each treatment and the side effects can last a long time.

[19] The Claimant cannot participate regularly in CBT while working. She cannot afford regular CBT in a private clinic and appointments at the Mental Health Clinic often happen during her work hours. She described her condition as improving and worsening each year but the periods of improvement are getting much shorter. While she is off work, she can take treatment and her feels her symptoms improve making her more comfortable. When she works, her anxiety levels increase and she becomes increasingly depressed. She said her condition may improve with treatment but so far, the treatment is less effective and her symptoms get worse earlier each year.

[20] In 2019, the Claimant found she had to take more time off work than in past years. Her symptoms were more severe and her medication did not seem to help as in the past. Her employer reduced her work hours and threatened to terminate her employment because she was missing time and failed to call work when she unable to attend.

[21] 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 impairment¹⁰. The Claimant has other conditions that affect her functional ability. She has sciatic pain, pain in her hand, shaking, and restless legs. She takes medication for pain and receives injections to block the nerve pain. She recently began taking medication to ease symptoms of shaking and restless legs. She understands her medication for depression and anxiety require adjustments from time to time and knows that will cause some uncomfortable symptoms and will interact with other medication and conditions during the period of change.

[22] The Claimant's description of how her conditions interact and aggravate each other clearly show the increasing difficulty she must face as she manages symptoms that are persistent and increasing in severity. I find it reasonable and believe her when she says she cannot work because of her conditions and the effects of the treatment she needs for those conditions.

¹⁰ *Bungay v. Canada (A.G.)*, 2011 FCA 47

Prolonged disability

[23] I find the Claimant's conditions are likely to be long continued and of indefinite duration. She has a longstanding history of recurrent major depressive disorder that is resistant to treatment. She requires medication that must be adjusted from time to time and will interact with other treatment she also needs. She also requires ongoing ECT and CBT both of which directly affect her ability to work and be available for any work. She takes medication and receives injections for pain and neurological symptoms. Since 2006, her symptoms increased in severity until she attempted suicide and required hospitalization. Her symptoms and functional ability improve somewhat when she is off work but her conditions do not resolve entirely and the periods of improvement are becoming shorter and less frequent. The most recent specialist report notes the Claimant continues to struggle and requires ongoing ECT and CBT as well as increased and/or adjusted medication. There is no evidence the Claimant's condition will resolve with time or treatment.

CONCLUSION

[24] Based on the Claimant's testimony and the evidence on file I find the Claimant proved her condition worsened in 2019 and by the date of the hearing, September 17, 2019, she was incapable regularly of pursuing any substantially gainful occupation. She had a severe and prolonged disability in September 2019. Payments start four months after the date of disability, as of January 2020¹¹.

Anne S. Clark
Member, General Division - Income Security

¹¹ Section 69 *Canada Pension Plan*