



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. V. v Minister of Employment and Social Development*, 2019 SST 1617

Tribunal File Number: GP-18-2020

BETWEEN:

L. V.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Katherine Wallocha

Teleconference hearing on: November 4, 2019

Date of decision: November 14, 2019

DECISION

[1] I have decided the Claimant is not eligible for the *Canada Pension Plan* (CPP) disability pension, so I am dismissing her appeal. Here are the reasons why.

OVERVIEW

[2] The Claimant stopped working at her job as a liquor store clerk and assistant manager in June 2015, while she awaited surgery for a prolapsed bladder. She has not returned to work since. She applied for the CPP disability pension on March 25, 2017.

[3] The Minister denied her application initially and on reconsideration. It was determined that while she was unable to perform her usual work, she has not tried alternate, lighter work. The medical evidence did not show any severe limitations that would prevent her from doing suitable work.

[4] The Claimant appealed the Social Security Tribunal stating that she is unable to work due to chronic pain and fatigue.

THERE IS ONE ISSUE IN THIS APPEAL

[5] A person who applies for a disability pension has to meet the requirements that are set out in the law that deals with CPP disability benefits. First, you have to meet the contribution requirements. The legal term for this is the “minimum qualifying period”¹ (MQP). The Claimant’s MQP date is December 31, 2017.

[6] Second, you have to have a disability that is “severe” and “prolonged”². You have to have that disability on or before the MQP date.

[7] The issue I have to decide is whether the Claimant’s disability was severe and prolonged by December 31, 2017. It is up to the Claimant to prove³ this.

¹ It is found at s.44(1)(b) of the *Canada Pension Plan* (CPP).

² This requirement is found at s.42(2)(a) of the CPP.

³ The legal test for proof in this case is that the Claimant has to show it is **more likely than not** her disability is severe and prolonged.

IS THE CLAIMANT'S DISABILITY SEVERE AND PROLONGED?

[8] If the Claimant is incapable regularly of pursuing any substantially gainful occupation because of her disability, that is a severe⁴ disability. If the Claimant's disability is likely to be long continued and of indefinite duration, that is a prolonged⁵ disability. The Claimant's disability must be both severe and prolonged for the Claimant to receive a disability pension.

The Claimant maintained a capacity to work at the time of her MQP

[9] To decide if the Claimant's disability is severe, I have to look at all of the Claimant's medical conditions together to see what effect they have on her capacity to work⁶.

[10] The Claimant maintained a capacity to work at the time of her MQP of December 31, 2017. The medical evidence from this time shows that the Claimant was dealing with a prolapsed bladder and was awaiting her third surgery. She had not yet been diagnosed with osteoarthritis or fibromyalgia. She had not yet begun to experience chronic pain and fatigue. She had not yet begun to experience a rapid decline in her memory. I recognize the Claimant's condition has continued to deteriorate since her MQP date, but at the time of her MQP, the Claimant was unable to work because she was awaiting another bladder surgery. At this point, she maintained a residual capacity to work.

[11] The Claimant initially applied for the CPP pension on March 25, 2017, because she was unable to work due to a prolapsed bladder. She was awaiting surgery.

[12] When she requested a reconsideration of the initial decision, she stated in a letter dated April 8, 2018, that her two surgeries were not fully successful and a subsequent surgery is required. She had not been cleared to return to work, and there was no timeline for when she will be able to return to work after the surgery. She felt she was unable to do any kind of work for an indefinite period of time.

⁴ The legal definition of "severe" is found at s.42(2)(a)(i) of the CPP.

⁵ The legal definition of "prolonged" is found at s.42(2)(a)(ii) of the CPP.

⁶ The Federal Court of Appeal explains this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[13] In her Notice of Appeal dated September 5, 2018, the Claimant stated that due to pain and fatigue because of arthritis, she was unable to work. Her chronic pain is severe and prolonged. She added that she still has bladder leakage.

[14] The Claimant testified explaining that when she had her first surgery, she also had a hysterectomy. She stated that they were supposed to lift and sew up the bladder but because of the hysterectomy, they thought the bladder would come up on its own. The bladder did not come up on its own. In the second surgery, they sewed the bladder and attached it to somewhere, but it fell again.

[15] The Claimant's gynecologist reported on December 21, 2017, that she had a significant prolapse. She was only able to walk for approximately an hour and then she is bothered by symptomatic prolapse. They will proceed with surgery.

[16] On May 1, 2018, the Claimant complained to her family physician that she was achy all over and could not lift her grandchildren, could not get out of a chair, and she thought it was fibromyalgia. She stated that it had been happening for the past four to six months and is getting worse. She also reported very poor sleep, mood was not great, numbness in her left foot up to her ankle, and her memory was not great.

[17] The Claimant had her third bladder surgery on June 8, 2018. The discharge summary dated June 11, 2018, indicated that the surgery was uncomplicated and pain was managed, she was ambulating and tolerating a full diet. The Claimant testified that this time they put in a mesh. She is not sure if her bladder is falling again. She went to see her doctor but they did not check. She continues to have leakage. She reported having to go to the bathroom twice during the hearing.

[18] On July 12, 2018, the Claimant reported to her family physician that she has had significant pain since her surgery. In the last five days, her pain was in her groin.

[19] An EMG nerve conductive study dated July 19, 2018, reported the Claimant still had urgency issues but this did not prevent her from her activities of daily living. Given the Claimant's generalized symptoms, with no inciting injury, including hand weakness, morning

stiffness, pelvic, hip and back pain, there was enough evidence to suggest a generalized osteoarthritis/osteoarthrosis pattern.

[20] On July 24, 2018, the Claimant's family doctor indicated that the Claimant is still cautiously optimistic about her most recent surgery in June 2018. She has since developed myalgias and decreased exercise tolerance which may preclude her returning to work even if her surgery is successful.

[21] On March 12, 2019, the surgeon reported that the Claimant is bothered by urgency and urge incontinence. The surgeon reported that the bladder seemed well supported and descended only during deep valsalva. He did not think further surgery is going to resolve her bladder symptoms and recommended eliminating caffeine, bladder retraining, and a trial of Toviaz.

[22] On June 6, 2019, a neurologist reported cognitive symptoms in the past one to two years, more prominent in the past eight months. Her neurological exam was normal except for problems with higher-level concentration. Her memory was fairly reasonable. She was still functioning appropriately in her everyday activities for the most part and would meet the criteria for mild cognitive impairment. Could be early neurodegenerative disorder with increased atrophy but he was unable to make that diagnosis at the time.

[23] The rheumatologist reported on July 16, 2019, that the Claimant has multilevel degenerative disc disease of the cervical and thoracic spine. Physiotherapy was recommended, and pain management through over-the-counter medications. She was also diagnosed with fibromyalgia syndrome, but was not prescribed medication.

[24] The urologist reported on August 20, 2019, that the Claimant still experienced incontinence at least on a daily basis. She admitted to four or five cups of coffee per day. She had tried Toviaz, which led to dry mouth. It was successful but the possibility of cognitive impairment was also brought up and she was asked to stop the medication. They reviewed Toviaz and saw that it was tested in patients with dementia and has been proven to be safe. She continued to have mild stress incontinence, but this is much less bothersome for her. She was given a sample pack of Mirabegron and if that failed, they would combine it with a low dose of Toviaz.

[25] The Claimant's family doctor provided a letter to the Social Security Tribunal dated October 24, 2019. The doctor believes the Claimant's multiple issues and particularly her memory concerns, preclude her from work of any sort. I agree with the Claimant's doctor; however, her memory decline, her chronic pain and fatigue, and her diagnoses of degenerative disc disease and fibromyalgia did not occur until after her MQP date of December 31, 2017. The Claimant is required to prove that she was disabled and unable to maintain any employment on or before her MQP date. At that time, she was dealing only with her incontinence problem.

[26] The medical evidence following her MQP reveals that she had a third surgery and her bladder was well supported. She was prescribed medication to help with her incontinence and it was working but she was forced to stop taking the medication because of her cognitive impairment issues. Although she continues to have bladder leakage that requires her to wear a pad, I am satisfied that she maintained a residual capacity to work on December 31, 2017.

[27] In combination with her medical condition, I have to look at the Claimant's background (including age, level of education, language and past work and life experience) so I can get a realistic or "real world" picture of whether her disability is severe⁷.

[28] The Claimant completed grade 11 and she has no other formal training. She worked mostly in retail and fast food. Her last employment was as an assistant manager of a liquor store from June 2008, until June 2015, when she stopped working while she awaited surgery. Her duties at the liquor store involved receiving stock and putting it away. This involved heavy lifting which she was prevented from doing because of her prolapsed bladder. She would also deal with staff issues, work the cash and deal with customers. She stated that her employer tried to give her lighter duties but there was no way around not lifting so she was unable to continue in her regular job.

[29] I recognize the Claimant is unable to return to her regular job. However, at the time of her MQP, her functional limitations did not prevent her from doing any other job. She had not been cleared to return to work by her doctor, but her third surgery seemed to have provided some relief to her symptoms that would have allowed her to retrain for a more suitable job without any

⁷ The Federal Court of Appeal explains how to understand the concept of a "severe" disability in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

lifting. Unfortunately, the Claimant then began to experience chronic pain, fatigue, and a loss of cognitive abilities. She has been unable to return to work for these reasons and not because of her incontinence issues. From this, I find that the Claimant was capable regular of pursuing substantially gainful employment at the time of her MQP of December 31, 2017.

[30] There is no need for me to consider whether the disability is prolonged, because I have decided the disability is not severe.

CONCLUSION

[31] The Claimant does not have a severe and prolonged disability. The result is that her appeal is dismissed.

K. Wallocha
Member, General Division - Income Security