



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. P. v Minister of Employment and Social Development*, 2019 SST 1495

Tribunal File Number: GP-19-613

BETWEEN:

B. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Melanie Gardin

Videoconference hearing on: December 4, 2019

Date of decision: December 9, 2019

DECISION

[1] B. P. is the Claimant in this case. She applied for a Canada Pension Plan (CPP) disability pension in May 2018. The Minister of Employment and Social Development (the Minister) denied her application. The Claimant appealed the Minister's decision to the Social Security Tribunal (the Tribunal). I am allowing her appeal. These reasons explain why.

OVERVIEW

[2] The Claimant was born in 1960. She finished high school. She then completed a one-year general secretarial program. She worked as a legal secretary for more than 30 years. She stopped working in November 2016 because of a lung infection called mycobacterium abscessus. The Claimant alleges that she cannot work at any job because of this medical condition.

ISSUES

[3] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the hearing date?

[4] If so, was the Claimant's disability also long continued and of indefinite duration by the hearing date?

ANALYSIS

[5] 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. I find the Claimant's MQP to be December 31, 2019. In this case, I must decide whether it is more likely that not that the Claimant had a severe disability on or before the hearing date, given the future MQP date.

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if incapable regularly of pursuing any

¹ Paragraph 42(2)(a) *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 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.

The Claimant had a severe disability by the hearing date

[7] 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. It’s not a question of whether a person is unable to perform their regular job, but rather the person’s inability to perform any substantially gainful work².

[8] I am satisfied that the evidence shows that the Claimant could not perform any substantially gainful work at the time of her hearing because of her medical condition.

[9] The Claimant in her Questionnaire for Disability Benefits stated that she could not work because of her medical condition as of November 17, 2016. She suffered from weakness, fatigue, and insomnia. She could not perform her housekeeping tasks. She hired a cleaner and relied on her spouse to do the shopping.

[10] The Claimant testified that she has not worked or looked for work since November 2016. She collects disability benefits from Great West Life. Great West Life has not suggested a return to work or retraining. She feels that she cannot work because of difficulty concentrating

[11] The Claimant began experiencing lung symptoms in September 2015. She was put on an antibiotic, which relieved her symptoms. But they returned in October 2015. She coughed frequently. She was placed on another antibiotic in December 2015. Her symptoms never went away. She eventually stopped working in November 2016. She tried numerous antibiotics, which she took orally and intravenously. But her lung infection never cleared up. Her hemoglobin levels fell because of her antibiotic usage in November 2016, which led to a hospitalization.

[12] The Claimant continues to take antibiotics. The only thing that changes is the type of antibiotics that she takes. She keeps getting new infections. She coughs frequently. She suffers

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

from night sweats. She cannot sleep because of her medical condition and suffers from fatigue. She only gets four hours of interrupted sleep a night. She has difficulty maintaining her weight. She cannot concentrate. She has coughed up blood on seven occasions. She continues to receive treatment from an infectious disease specialist and pulmonologist. She also sees her family doctor because the antibiotics that she takes has affected her thyroid.

[13] The Claimant testified that her medical condition has affected her daily life. She does not drive because she feels confused and tired. She used to do all the housework prior to her illness. She now limits herself to light dusting when she has a good day. She cannot predict when she has a good day. She cannot do anything. She relies on a cleaner to do the housekeeping and her husband does 75 to 80% of the shopping.

The medical evidence supports the Claimant's testimony

[14] The Minister argued that the medical evidence did not show any serious impairment that would have resulted in the Claimant being categorized as disabled and unemployable in all occupations.³

[15] I disagree.

[16] The medical evidence shows that the Claimant has suffered from a serious medical condition since September 2015 and she has not been able to work since November 2016.

[17] The Claimant developed a cough and a fever in September 2015. She received antibiotics and recovered. But she began coughing again in October 2015. She received antibiotics and recovered. But her cough returned in December 2015. She lost 10 pounds. She received antibiotics, but her cough did not go away. She was eventually diagnosed with mycobacterium abscessus. She began receiving treatment from an infectious disease specialist, Dr. C. Quan, in April 2016.⁴

³ See GD4-2

⁴ See GD2-44-46

[18] The Claimant began receiving antibiotics intravenously in May 2016. She also received weekly blood work.⁵

[19] The Claimant had to go to the hospital in November 2016 because of low hemoglobin. She felt lightheaded. She suffered from palpitations. She felt lightheaded. She was not eating and had no energy.⁶

[20] Dr. Quan wrote a note on December 5, 2016. She stated that the Claimant could not work because of her medical condition as of November 17, 2016.⁷

[21] The Claimant was taken off antibiotics because of severe side effects in November 2016. But her condition got worse. Dr. Quan put her back on antibiotics in March 2017. Dr. Quan also arranged for the Claimant to receive antibiotics intravenously.⁸

[22] Dr. Quan wrote a letter on May 23, 2017 stating that the Claimant had not been able to work since November 17, 2016. Dr. Quan could not determine when the Claimant would return to work.⁹

[23] A CT scan of her lungs taken on September 28, 2017 showed worsening opacities.¹⁰ The Claimant had another CT scan in March 2018, which showed progression of the Claimant's condition.¹¹

[24] Dr. Quan completed a Medical Report for the Minister on April 23, 2018. She diagnosed the Claimant with a mycobacterium abscessus lung infection. The Claimant had decreased energy and an intermittent cough. CT scans showed a progression of the Claimant's infections, despite receiving antibiotics.¹²

⁵ See GD2-49

⁶ See GD2-140

⁷ See GD2-66

⁸ See GD2-147

⁹ See GD2-65

¹⁰ See GD2-265

¹¹ See GD2-166

¹² See GD2-312-315

[25] The Claimant underwent a bronchoscopy with Dr. W. Rajkumar, Pulmonologist on June 20, 2018. Dr. Rajkumar's operative report stated that the Claimant had a permanent enlargement of her lung.¹³

[26] Dr. Rajkumar in a report dated July 16, 2018 stated that the Claimant's cultures were positive for aspergillus fumigatus complex.¹⁴

[27] Dr. Quan noted that the Claimant did not feel well in a June 26, 2019 report. She had decreased energy. She had difficulty sleeping. She had increased cough with an episode of blood in her cough. The Claimant also experienced aching in her legs.¹⁵

[28] Dr. Quan provided the Claimant's legal representative with a report on July 22, 2019. She stated that the Claimant had been unable to work since November 17, 2016. The Claimant suffered from a chronic respiratory infection with mycobacterium abscessus and aspergillus. The Claimant had not been feeling well. She suggested reassessing the Claimant for a return to work in January 2020.¹⁶

[29] A CT scan of the Claimant's chest taken on August 27, 2019 showed progression of her disease.¹⁷

[30] The Claimant had another bronchoscopy on August 28, 2019. Dr. Quan noted in a September 9, 2019 report that the bronchoscopy showed positive findings.¹⁸

The Claimant had no work capacity at the time of her hearing

[31] I must assess the severe part of the test in a real world context¹⁹. 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.

¹³ See GD2-107

¹⁴ See GD2-109

¹⁵ See GD3-12

¹⁶ See GD3-11

¹⁷ See GD7-13

¹⁸ See GD7-7

¹⁹ *Villani v. Canada (A.G.)*, 2001 FCA 248

[32] After considering all of the evidence, I accept that the Claimant could not work in a real work context at the time of her hearing. The Claimant is 59 years old. She understand English. She has some post-secondary education. She has experience working with computers. She seems to have significant transferable skills. But I am still satisfied that she was incapable regularly of pursuing any substantially gainful employment at the time of her hearing. I am satisfied that the Claimant could not regularly work in any capacity at the time of her hearing because of her lung infection. I find that the Claimant's medical condition led to significant impairments in the areas of sleep, chronic fatigue and decreased concentration.

[33] I find that the Claimant cannot perform any type of physical work because of decreased energy and fatigue. I do not believe that the Claimant can perform any type of sedentary work because of her impairment, which includes difficulty concentrating. I accept the Claimant's evidence that the Claimant's difficulty concentrating is because of her lack of sleep and the side effects from the antibiotic medications that she takes. I do not believe that the Claimant can handle a driving job because of fatigue. I do not believe that the Claimant can work with the public because of her susceptibility to infection. I do not believe that she can work from home. Her condition is unpredictable. She can have a good day where she can do a few things, but she has bad days where she cannot do anything. I do not believe that the Claimant can work in a predictable, reliable or regular basis.

[34] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition²⁰. I am satisfied that the Claimant had to stop working as a legal secretary in November 2016 because of her medical condition. I am satisfied that she has not had any work capacity since November 2016.

The Claimant was a credible witness

[35] The Minister argued that the Claimant went to Hawaii for several months in 2018, and this showed that the Claimant did not have a severe disability.²¹ The Minister also argued that the

²⁰ *Inclima v. Canada (A.G.)*, 2003 FCA 117

²¹ See GD4-9

Claimant's condition had improved and that her medical condition did not prevent her from working. The Claimant argued she had no work capacity.

[36] I prefer the Claimant's arguments to those of the Minister.

[37] I found the Claimant to be a credible witness. She appeared to be physically uncomfortable giving evidence. She coughed a lot, which she said was typical for her. I cannot imagine someone working with such a cough on a regular basis. I do not believe that the Claimant exaggerated her symptoms. She has a rare medical condition that is difficult to treat. She also showed determination to work from September 2015 to November 2016, despite suffering from medical problems. The Claimant has an excellent work ethic. She worked with the same employer for more than 30 years. I agree with the Minister that some of the medical records show that the Claimant's condition improved at certain points in time.²² Dr. Quan also suggested a reassessment for a return to work in January 2020. However, I accept the Claimant's evidence that her condition never improved to the point where she could return to work. Even though Dr. Quan suggested a reassessment for a return to work in January 2020, I accept the legal representative's argument that a return to work is not likely. The Claimant suffers from a chronic medical condition that is difficult to control, and I accept her evidence that she cannot work at any job because of it.

The Claimant pursued and complied with reasonable treatment options

[38] I am satisfied that the Claimant did all that she could to seek and follow all reasonably recommended treatment options. A pulmonologist and infectious disease specialist have followed her. She tried both oral and intravenous antibiotics. She receive home care from nurses to help her administer intravenous antibiotics. She underwent several bronchoplasty procedures. She is still under the care of specialists.

Prolonged disability

[39] I find that the Claimant proved that she has a disability that is likely to be long continued and of indefinite duration.

²² See for example GD2-59, GD2-164 and GD3-3

[40] Dr. Quan stated that the Claimant's infection is difficult to eradicate in her Medical Report to the Minister. Dr. Quan's goal is to control the infection and maintain the Claimant's respiratory status. She stated that the Claimant needs chronic antibiotic therapy.²³

[41] I am satisfied that Dr. Quan is managing the Claimant's medical condition, as opposed to trying to find a cure.

CONCLUSION

[42] The Claimant had a severe and prolonged disability in November 2016, when she last worked. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension²⁴. The application was received in May 2018 so the deemed date of disability is February 2017. Payments start four months after the deemed date of disability, as of June 2017²⁵.

[43] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security

²³ See GD2-315

²⁴ Paragraph 42(2)(b) *Canada Pension Plan*

²⁵ Section 69 *Canada Pension Plan*