



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. B. v Minister of Employment and Social Development*, 2020 SST 322

Tribunal File Number: GP-19-388

BETWEEN:

D. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Claimant represented by: Sunish R. Uppal

Videoconference hearing on: January 9, 2020

Date of decision: February 3, 2020

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (“CPP”) disability pension, to be paid as of October 2018.

OVERVIEW

[2] The Claimant lives with her adult son in X, Ontario. She worked for many years as a legal assistant, until she lost her job in January 2013 due to a restructuring. Beginning in late 2015, she attempted to work on a part-time basis. Her last position, working as a clerk in a flower shop, ended in June 2018. The Minister received the Claimant’s application for the disability pension on July 25, 2017. At that time, the Claimant said she suffered from fibromyalgia, calcific tendonitis (both shoulders), calcific bursitis (both hips), and tendonitis (left elbow). 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 set out in the CPP. More specifically, she must be found disabled (as defined in the CPP) on or before the end of the minimum qualifying period (“MQP”). The MQP calculation is based on the Claimant’s contributions to the CPP. I find the Claimant’s MQP to be December 31, 2021. As this is in the future, she must be found disabled on or before the hearing date.

PRELIMINARY MATTERS

[4] At the hearing, the Claimant said she wanted to file another document. Upon hearing the description of the document, I decided that it could be relevant to the issue of compliance with treatment recommendations. As a result, I received it as evidence (indexed as “GD13”) after reviewing a copy later that day. I gave the Minister until January 31, 2020, to make submissions on GD13. However, I had not seen any submissions by the time of this decision.

ISSUES

[5] Did the Claimant have a severe disability by the date of the hearing?

[6] If so, was her disability also prolonged by the date of the hearing?

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 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 the date of the hearing?

[8] I must assess the severe part of the test in a real-world context.² 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.

[9] The Claimant was 57 years old on the hearing date. She has a Grade 12 education, and a one-year legal secretarial course. She speaks English fluently. She also speaks German and French.³ She worked as a legal secretary for 30 years. She worked briefly as a flower and plant arranger at a greenhouse in 2015. She then worked in a retail role at a florist until June 2018. That job involved assembling bouquets, taking orders, stocking, cleaning, and mopping. Long ago, she also worked as a restaurant hostess. Looking at these factors, and without considering her medical conditions, I find that the Claimant would be suited to legal secretarial work, other non-specialized office work, and retail positions that did not require extensive training.

Does the Claimant have a serious health condition that affects her work capacity?

[10] At the hearing, I found the Claimant's evidence to be credible. Her current medical conditions are fibromyalgia, calcific tendonitis in both shoulders and her hip, depression, anxiety (with panic attacks), fatigue, and difficulty sleeping. Her conditions cause continuous and

¹ Paragraph 42(2)(a) of the *Canada Pension Plan*

² *Villani v. Canada (A.G.)*, 2001 FCA 248

³ GD2-59

widespread pain. Her shoulder pain makes it hard to sleep and affects her ability to do household tasks. She also has Raynaud's Disease: this makes her fingers go white and numb.

[11] The Claimant's son helps with cutting the grass, snow removal, cooking, vacuuming, mopping, and cleaning the bathtub, shower, and toilet. The Claimant can usually cook, but on some days cannot even lift a cup of coffee. She can do the laundry if her son folds the larger items and takes the laundry up and down the stairs.

[12] The Claimant has difficulty sitting in a car for any length of time: she needs to take breaks. She recently declined a family trip to Europe because she could not sit on a plane for that long. She has difficulty standing or walking for extended periods: she walks with a limp and has to stop after 30 minutes. She has trouble using stairs, and needs to hold on to something when accessing the toilet. Her muscles are weak, and she has trouble with tasks like stirring or lifting a pot of water. It is hard to elevate her arms or hold things for any length of time. She wears loose-fitting clothes that are easier to put on. She does not shower on bad days. She often does not blow-dry her hair or shave because it is hard to lift her arms.

[13] The Claimant gets panic attacks, palpitations, shortness of breath, and hot flashes: when these happen, she needs to go outside to get air and to calm down. She will suddenly start crying because her pain is unbearable. In general, she does not take care of her appearance or wear makeup, as she does not feel the need. She was in a relationship about ten years ago, but gave up dating because of her medical conditions. She no longer water-skis, runs, bikes, hikes, or refinishes furniture. She has cut back her gardening drastically. She has word-finding problems and makes lists so she does not forget things. She sometimes forgets to turn off the stove.

[14] The Claimant's evidence is consistent with the report of Dr. Tam (Family Physician). In June 2019, Dr. Tam noted severe fibromyalgia, with diffuse pain involving almost all of the body, mental fog, and non-restorative sleep. The Claimant's pain was worsened by mild activities such as changing bedsheets, prolonged standing, and walking for 15 minutes. She could not think clearly and had memory problems. Dr. Tam also described neck and shoulder issues including calcific tendonitis, osteoarthritis, and left epicondylitis. The Claimant had pain with

neck movement and reduced range of motion. Repetitive movement aggravated her elbow pain. She had trouble with reaching and lifting, which forced her to give up her job.⁴

[15] Dr. Tam also described severe hip osteoarthritis and tendonitis. These affect the Claimant's gait and her ability to get in and out of a car. Dr. Tam said she also had severe depression and anxiety because of her physical conditions. These affected her memory, concentration, and clarity of thought. It was hard for her to function normally. Dr. Tam thought it would be difficult, if not impossible, for the Claimant to obtain or keep gainful employment.⁵

[16] Considering the evidence from the Claimant and Dr. Tam, I accept that she no longer has any work capacity. Her physical limitations alone would prevent the more physical types of work that would be suitable for her. They would also affect her capacity for office work. The cognitive problems arising from her depression and anxiety would prevent her from office work (such as being a legal secretary). They would also affect the kind of work she recently did for the florist. As she currently has no work capacity, I find that she is severely disabled. I must now determine when her severe disability started.

The Claimant's employment up to June 2018 prevents a finding of severity before then

[17] While the Claimant applied for disability benefits in July 2017, I find that she was not severely disabled until at least the end of her employment at the florist. This is because her disability can only be severe if she is incapable regularly of pursuing any substantially gainful occupation. However, her employment earnings for 2018 were "substantially gainful".

[18] "Substantially gainful" earnings are equal to or greater than the maximum amount a person could receive as a disability pension.⁶ For the year 2018, that maximum amount was \$16,029.96. The Claimant earned \$8,005.00 until she stopped working on either June 15, 2018 (according to her employer), or June 16, 2018 (according to her).⁷ Even if I accept the latter date, the Claimant would have been on track to earn nearly \$17,496.00 for 2018. As this exceeds the

⁴ GD7-75 to GD7-76

⁵ GD7-76 to GD7-77

⁶ Subsection 68.1(1) of the *Canada Pension Plan Regulations*.

⁷ GD8-2, GD10-2, and GD12-12

“substantially gainful” threshold, I cannot find her severely disabled when she still worked for the florist in 2018.

[19] I find support for this conclusion in the questionnaire completed by the florist. The florist said the Claimant’s work was satisfactory and her attendance was good. She did not require any special arrangements or help from her co-workers, and worked part-time because that was “all the work that was available”. She could handle the demands of her job, although she had occasional mobility problems.⁸

[20] However, I also find that the Claimant’s increased workload in 2018 (bringing her to the level of substantially gainful earnings that she did not reach in 2016 or 2017) also represented a “breaking point” for her. Dr. Tam was already reporting significant limitations in March 2018.⁹ At the same time, the Claimant said her condition was getting worse.¹⁰ By May 2018, she told Dr. Tam she had to work long hours because a co-worker was sick.¹¹ That month, Dr. Bischoff (Orthopedic Surgeon) said her shoulder issues were worsening, increasingly limiting, and aggravated by work.¹² In August 2018, Dr. Tam said she was not working for medical reasons.¹³

[21] Over the next several months, even with the end of her employment, I do not see any sign of significant improvement. She received Employment Insurance (“EI”) sickness benefits after leaving the florist shop, but did not receive any regular EI benefits. I conclude that the Claimant likely was severely disabled when she stopped working in June 2018. Before determining whether her disability was also prolonged, I will consider some of the Minister’s submissions that are not addressed by the above analysis.

Comments on some of the Minister’s other submissions

[22] The Minister argues that the medical evidence does not show any severe pathology. However, I cannot look at the Claimant’s conditions in isolation when assessing her disability. I must assess her condition in its totality, which means I must consider all possible impairments,

⁸ GD8-2 to GD8-4

⁹ GD2-11

¹⁰ GD2-9 to GD2-10

¹¹ GD9-24

¹² GD7-42

¹³ GD9-24

not just the biggest or main impairments.¹⁴ Nor can I disregard conditions such as depression and anxiety, although there is no pathology that clearly “proves” their existence. Similarly, fibromyalgia does not appear on X-rays or MRI images. I need to focus on the combined impact of these conditions, even if some of them cannot be “seen”.

[23] The Minister also notes that conservative treatment options, such as physiotherapy and moderate exercise, have been recommended. The Claimant said she often walks with her dogs. As for other forms of treatment, she often mentions financial barriers. I accept that these barriers are real. She owes more than \$23,000.00 on her line of credit, which charges interest at 7.70%.¹⁵ Last year, Justine Wong (Physiotherapy) said limited funds were a barrier to physiotherapy treatment.¹⁶ At the hearing, the Claimant identified financial barriers for mental health treatment and physical therapy. She did not attend the yoga or aqua-fit classes recommended by Ms. Wong because of her lack of income.¹⁷ I cannot fault the Claimant for not pursuing treatment if she is unable to afford it. I stress that I am not basing my disability findings on financial need. Her financial circumstances are only relevant to explain why she has not pursued some treatments.

[24] Finally, the Minister noted that there appeared to be some improvement in her condition with cortisone injections. This is in Dr. Tam’s clinical note from June 25, 2019.¹⁸ I asked the Claimant about the cortisone injections at the hearing. She agreed that the injection did help. However, she has not had another injection since. Cortisone shots cannot be given often. She expects to have another one this spring. Ultimately, I am not persuaded that the injection had a lasting effect. Dr. Tam’s letter of the same date does not mention the injection or a significant improvement in her shoulder, and his July 2, 2019, clinical note refers to a chronic shoulder condition.¹⁹ Even with a moderate improvement in her shoulder, fibromyalgia would continue to affect almost all of her body.

¹⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

¹⁵ GD13-3

¹⁶ GD9-4

¹⁷ GD9-5

¹⁸ GD9-25

¹⁹ GD7-75 to GD7-77, and GD9-27

[25] After considering all of the Minister's submissions, and specifically addressing some of them here, I am still satisfied that the Claimant had a severe disability when she stopped working in June 2018.

Was the Claimant's disability also prolonged by the date of the hearing?

[26] Nobody has suggested that the Claimant's disability will result in her death. This means her disability is prolonged only if it is likely to be long continued and of indefinite duration.

[27] In June 2019, Dr. Lam described each of the Claimant's four condition groups as "prolonged". While Dr. Lam does not say whether he is using the statutory definition of "prolonged", the implication is that her disability is likely to be long continued and of indefinite duration. In March 2018, Dr. Lam said all her conditions were expected to be "prolonged and possibly even lifelong". He did not expect any major improvement of her severe fibromyalgia or her hip arthritis. He did not expect major improvement with her shoulder either, even with a cortisone injection.²⁰ As Dr. Lam retired in November 2019, the Claimant now has a new family doctor. However, her new doctor has not made a new prognosis, as she has only had two appointments so far.

[28] The other evidence also supports a prolonged disability. Ms. Wong noted worsening hip pain in February 2019 and other symptoms that were not resolving.²¹ At the hearing, the Claimant said there was no job she could see herself doing. While I seldom give much weight to such statements, it is significant in this case. She tried to make a living from low-paying part-time work for several years after earning more than \$60,000.00 as a legal assistant. I find that she wanted to continue working, and only stopped when it was no longer possible to continue.²²

[29] On a balance of probabilities, I conclude that the Claimant's disability is likely to be long continued and of indefinite duration, and has been since at least June 2018. This means her disability has been prolonged since June 2018.

²⁰ GD2-11 to GD2-12

²¹ GD9-5 to GD9-7

²² GD1-6 and GD2-10

CONCLUSION

[30] The Claimant had a severe and prolonged disability in June 2018. Payments start four months after the date of disability, as of October 2018.²³

[31] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security

²³ Section 69 of the *Canada Pension Plan*