



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. J. v Minister of Employment and Social Development*, 2020 SST 532

Tribunal File Number: GP-19-1553

BETWEEN:

B. J.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Brian Rodenhurst

Claimant represented by: David Wallbridge

Videoconference hearing on: February 10, 2020

Date of decision: March 3, 2020

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Claimant worked as a Health Care Aid for X from May 2007 to January 2016. Duties included patient transfers – bed, bath, toilet and feeding the residents. In January 2016, the Claimant was involved in a car accident resulting in injuries/impairments. She maintains that because of her injuries she has not been capable of working since the car accident.

[3] The Minister received the Claimant's application for the disability pension on November 28, 2018. 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 calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2017.

PRELIMINARY MATTERS – GD 4

[5] The Representative stated he does not believe he received a copy of the documents collectively known as GD- 4. He indicated he was not worried about this and we could proceed. The lawyer was satisfied that the Claimant was able to answer questions about a conversation noted in GD-4. Mr. Wallbridge was of the opinion the Claimant was not prejudiced and wished the hearing completed without adjournment. A solicitor binds his client. I am satisfied there was no breach of natural justice or prejudice to the Claimant in the circumstances of this appeal. The Claimant was represented by a Barrister and Solicitor. I respect his decision not to seek an adjournment.

ISSUE(S)

[6] 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, 2017?

[7] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2017?

ANALYSIS

[8] 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 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.

Severe disability

Claimant's Oral Evidence

[9] 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 impairment². The Claimant confirmed the totality of her medical conditions/impairments are due to her neck, right wrist, abdominal swelling and related symptoms. I note the Claimant indicated in July 2016 that initially she was off work due to her neck and low back pain, however these conditions have since improved and she is now off work predominantly as a result of her right wrist injury. She testified her abdominal issues did not occur until after December 31, 2017. She experienced two seizures after the MQP. Her doctor was of the opinion they were caused by smoking cessation medication and they have not reoccurred.

[10] The Claimant was employed as a Health Care Aid when she was involved in a serious car accident. In January 2016 her car was hit by a driver that failed to obey a stop sign. The right side of her body took the brunt of the impact. The impact affected her neck, all the right side of

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

² *Bungay v. Canada (A.G.)*, 2011 FCA 47

her upper body, clavicle area, shoulder, arm, and wrist. In addition to the right upper part of the body, she experienced an abdominal tear, and severe headaches. Sleeping has become a problem and fatigue interferes with her ability to work.

[11] The Claimant has experienced abdominal bloating and swelling. She is concerned that it is migrating to her legs and feet. She confirmed this was not present on or before December 31, 2017. She confirmed she is able to use her left hand.

[12] Due to her hand/wrist injury, she was referred to a specialist in Toronto. The surgeon performed a reconstruction of the hand/wrist.. For three years, she attended physiotherapy. In the fall of 2019, physiotherapy ended and she undertook home exercises. She stated she is right hand dominant, and she has very little strength in her right hand. Her estimated daily pain level in her right wrist is 8/10 and at times 10/10. The neck is a big issue for her as it was significantly damaged. This results in mobility issue, problems gripping, twisting, dexterity, and driving beyond 15 minutes and loss of strength. Her limitations result in her doing minimal activities during the average day. The Claimant testified that the only medication she is taking is Tylenol Extra Strength. In addition, she uses a naturopath recommended pain cream. Presently her only medical provider is the Family Doctor who she sees every two or three months. She confirmed she has not had a recurrence of seizures that may have related to a side effect of smoking cessation medication.

[13] Her employment was as a Health Care Aid. She described her duties as physical including pushing, and pulling. She worked with full sized men and found the job very draining both mentally and physically. She testified she loved her job and if she was able to return, she would. The Claimant testified that since her accident there has not been sufficient improvement that would enable her to return to work. She acknowledges a conversation about returning to work in jobs like receptionist, sales and dispatcher. She testified that she has not worked in four years so it was difficult to speculate on what she could do. She is doubtful she could return to work.

[14] The Claimant testified that a friend of hers owns a flower shop. One evening she tried to help her friend but was unable. Looking down at the flowers bothered her neck. After one hour of helping her friend, she was very sore. Her lack of success at this endeavour makes her believe

she could not work at any occupation. In her opinion, if she could not do the floral business for one hour she could not do any job.

Functional Limitations

[15] The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work.³ The Claimant was involved in a car accident that resulted in significant injuries. The injuries result in her not being capable of using her right arm/wrist/hand in repetitive tasks. The injuries also limit her ability to push, lift, or pull objects as well as fine motor skills including typing.⁴ Dr. James Stewart was of the opinion the Claimant was not able to perform the majority of her employment tasks involving patient transfers, feeding and cleaning patients as it required both hands. I agree the Claimant was not capable of returning to her usual job and usual physical duties. 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 work⁵. Dr. Reed noted if modified work was available that would involve no use of the right hand/arm then that would be appropriate, otherwise she should not be working. He further was of the opinion she was capable of duties that involve solely the use of the left wrist and hand.

[16] Dr. Richards, Professor of Surgery, completed a report to the Claimant's solicitor on January 26, 2018. The Professor was of the opinion the Claimant experienced sustained and ongoing impairment of her occupational ability. He reported the Claimant has permanent limitations for impact activity, heavy lifting, overhead activity, climbing and any repetitive or forceful use of right upper extremity against resistance.

[17] I accept the Claimant is not capable of returning to her usual duties as a Health Care Aid. The Claimant is able to use her left hand without restrictions. She testified the information on her application was accurate. This form indicated her memory concentration, focus and learning new things were "fair". The section dealing with behaviours and emotional abilities indicated she believed her abilities were good or fair. The loss of use of her dominant right arm/wrist/hand does not render her incapable of "any" substantially gainful occupations. The functional

³ *Ferreira v. AGC* 2013 FCA 81

⁴ GD2-70.

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

limitations of the Claimant prevents her from her usual jobs and occupations requiring the physical or repetitive use of her right hand. This does prevent her from all forms of employment.

[18] The Claimant's Representative submitted that chronic pain is a compensable disability. I agree.⁶ I do not find the Claimant experiences chronic pain that results in her being incapable of participating in the workforce⁷. She is treated conservatively for her medical condition. She does not attend a pain clinic and the only medication she takes is Tylenol Extra Strength and a naturopathic cream. She attends with her Family Doctor only every two to three months. Dr. Richards refers to chronic pain in his report on one occasion⁸ but does not indicate on what if any objective criteria was used to qualify the Claimant as a person experiencing chronic pain. The Family Physician notes myofascial pain syndrome⁹ but does not list impairments that would preclude all forms of employment. I recognize the Claimant experiences pain and results in the inability to use her right arm and hand. The objective medical evidence and her functional limitations do not result in a severe disability as defined in the CPP.

Dr. Richard's Report

[19] The Claimant's Representative submitted significant weight should be given to the report of Dr. Richard. He noted the Doctor was of the opinion the Claimant was unable to work at any occupation for which she is qualified by education, training and experience. He further submitted that the insurer accepted her as qualifying for long-term disability as Dr. Richards successfully countered the report of Dr. Cisa. An insurer's definition of disability is different from the CPP. Often there is a discrepancy in opinion between medical providers especially if retained by different parties. Dr. Cisa was of the opinion the Claimant was capable of performing some type of alternate work such as reception, retail sales supervisor, dispatcher or customer and information service representative.

[20] I do not find the report of Dr. Richards convinces¹⁰ me the Claimant is incapable of all forms¹¹ of employment. Dr. Richards concludes the Claimant has numerous physical limitations

⁶ *Nova Scotia (Workers' Compensation Board) vs. Martin*, [2003] 2 S.C.R. 504

⁷ Incapable regularly of pursuing any substantially gainful occupation.

⁸ GD1-18

⁹ GD2-70

¹⁰ Convinces = proof on a balance of probabilities

and ongoing chronic pain makes her unable to work at any occupation for which she is qualified by education, training, and experience. A review of Dr. Richards' Report indicates he spends most of his time repeating subjective information disclosed by the Claimant. He does a physical examination but much of his opinion was based on reviewing reports that were made available to him. He notes permanent limitations for impact activity, heavy lifting and repetitive or forceful use of the right upper extremity against resistance. He concludes these impairments translate to her being unable to work at any occupation. He wrote that his opinion was based on the history he took from the Claimant, his physical examination of the Claimant and review of the medical brief. He concluded limitations include repetitive use of the right extremity, and discounts a number of occupations as possible for her due to this limitation. I do not agree that the inability to undertake specific occupations due to right extremity restrictions equates to an inability to work in any occupation. I do not find his report based on a limited attendance with the Claimant to be persuasive. The objective medical evidence when viewed in its entirety does not corroborate his conclusion regarding the Claimant's ability to work.

Real World Analysis

[21] I must assess the severe part of the test in a real world context¹². 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. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[22] The Claimant was only 48 years of age at the time of the MQP. She obtained a high school education. She is proficient in English. Work experience included working in the floral business for many years as well as P.S.W. Her career gives her some transferable skills. She has the ability to concentrate, focus her attention, learn new things, write an e-mail, stare at a computer screen for at least 20 minutes, use a computer keyboard, and sit for twenty minutes.¹³ These abilities indicate an ability to retrain, learn new skills or upgrade her education to improve her employment skills. The right upper extremity limitations and associated pain would not result in her being an unpredictable employee. The limitations noted by her medical providers

¹¹ Incapable regularly of pursuing any substantially gainful occupation.

¹² *Villani v. Canada (A.G.)*, 2001 FCA 248

¹³ GD2-31

including Dr. Richards do not preclude all types of jobs¹⁴. There is insufficient medical evidence and evidence of employment efforts. I find the Claimant failed to prove it is more likely than not she experiences a severe disability as defined in the CPP when assessed in a real world context.

[23] I acknowledge the Claimant experiences pain and here right side causes her physical limitations. The Claimant must prove that it is more likely than not the totality of her impairments result in her experiencing a severe disability as defined in the CPP. I have considered her oral evidence, the documentation on file, and find she failed to meet the burden of proof.

CONCLUSION

[24] The appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security

¹⁴ Incapable regularly of pursuing any substantially gainful occupation