



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. R. v Minister of Employment and Social Development*, 2020 SST 455

Tribunal File Number: GP-19-656

BETWEEN:

C. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Claimant represented by: David Rakovich

Teleconference hearing on: April 6, 2020

Date of decision: April 8, 2020

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of August 2017. My reasons are as follows.

OVERVIEW

[2] The Claimant worked as a full-time education assistant with the Toronto District School Board from September 1999 until April 2017. She claimed that she could no longer work as of that time because of the chronic pain and limitations that resulted from having right foot surgery. The Minister received the Claimant's application for the disability pension on January 30, 2018. 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 that are 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 calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2021, but because that is a date in the future, she must be found disabled by the time of the hearing.

ISSUES

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

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

ANALYSIS

[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 they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and

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

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

The Claimant suffers from a serious health condition.

[7] In my assessment, I have to consider the Claimant's condition in its totality. That means taking into account all of her possible impairments, not just the biggest impairments or the main impairment².

[8] I found the Claimant to be credible. Her testimony was straightforward in answering questions about to her work and health history. I have put equal weight on the credible oral testimony and the evidence contained in the Hearing File.

[9] The Claimant submitted that her life has not been the same since she had right foot surgery in 2017. The surgery was supposed to be routine and it involved removing a Morton's neuroma and doing some forefoot reconstruction. Doctors assured her that her symptoms would get better and that she would be able to return to work. The initial optimism was noted by Dr. Tountas not long after the surgery when he reported that he usually expected a full recovery with the procedure he had performed. That has simply not happened, and the medical evidence supports this.

[10] I find that the Claimant has been compliant with recommended treatment. She has had surgery, physiotherapy, injections at a pain clinic, done exercises, gone swimming, used custom orthotics, and has tried numerous prescription and non-prescription medications. Many of the medications she has tried were stopped because of side effects. Nothing has helped except Oxycodone for her foot and Tylenol #3 for her hip and back pain.

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

[11] There have not been any new treatment or specialist recommendations. Two orthopedic surgeons determined that she was not a candidate for more surgery, and she recently stopped going to a pain clinic because the treatment they were offering was not helping.

[12] The Minister's reconsideration decision states that the Claimant's condition was not severe because conservative treatment over more surgery had been recommended. I am of a different opinion. Just because a person is not a candidate for surgery does not necessarily mean that their condition is not serious. It means that the surgeon could not offer a viable surgical option that was within their scope. In October 2018, Dr. Tountas reported that he was referring the Claimant for a second orthopedic surgeon because her condition was not getting any better.

[13] Just because diagnostic imaging like an MRI from 2018 appeared normal, it does not mean that the Claimant was suffering any less. The root cause of chronic pain is not always something that can be observed objectively. Chronic pain is something that is highly subjective, and for that reason I have given careful consideration to its impact on the Claimant.

[14] According to the Claimant, she has daily pain from the time she gets up. It feels like her toes are sticking up in the air, burning, cramping, and swollen. Even light touch on her bedsheets at night can be excruciating. It affects both the quality and quantity of her sleep. She also walks with an antalgic gait now, because of the way her foot has impacted her right hip and back.

[15] The Claimant's testimony was echoed by Dr. Marcial from the Toronto Western pain clinic in March 2019. He reported that since June 2017 she had had nothing but worsening pain that included constant shooting, throbbing, and burning. In 2019, Dr. Bhatia, from the same pain clinic, attributed the Claimant's symptoms to ongoing neuropathic pain. He noted that the Claimant was having to use morphine to manage her pain. He made some medication and nerve block injection recommendations. The Claimant testified that she followed through with those recommendations, but they didn't help.

[16] I accept that the Claimant's condition has not improved since 2017, despite treatment and compliance. The medical evidence shows an initial optimism that she would recover, but more recent reports show how her condition has evolved into chronic neuropathic pain with few

treatment options. I find that her condition has precluded her regularly from any substantially gainful employment.

The Claimant's daily life has been significantly affected by her condition.

[17] The measure of whether a disability is "severe" is not whether a person suffers from severe impairments, but whether the disability prevents them from earning a living. It's not a question of whether they are unable to perform their regular job, but rather their inability to perform any substantially gainful work³.

[18] The Claimant submitted that there is very little she can do even at home. For example, she can't put much weight on her right toes, she has to sit on a bench while showering, she has a hard time driving anywhere because her foot/ankle gets sore, and she has to rest in between doing loads of laundry or trying to prepare a meal. When she does go to the grocery store it is only for a few items. Many days she can't wear socks or shoes because of how sensitive and painful her foot is. She has tried going to the movies, but she can't sit for that long and has had to leave. She has little social interaction and is confined mainly to her home.

[19] The Claimant is not able to sit, stand, or walk for more than 30 minutes without having a flare-up of pain. When flare-ups occur, she can't do much besides wait it out. She has to keep her leg elevated and take medication. Flare-ups can last up to 7 days. Medication doesn't get rid of her pain, it just makes it tolerable.

[20] The Claimant's testimony reveals that she has to spend the majority of her time and energy just trying to minimize her pain and limit her activity. I accept that her condition has impacted all aspects of her daily life.

The Claimant attempted to return to work but it failed.

[21] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining work have not been successful because of their health condition⁴.

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[22] The Minister submitted that while the Claimant may not be able to return to her previous job, she should be able to do some alternate work given her education and experience. The Minister also pointed to the fact that return to work dates had been discussed with doctors on several occasions. I agree that the evidence supports that the Claimant could not return to her previous job. It was physical at times and required sustained postures while working with children.

[23] There is also evidence of discussions between the Claimant and her doctors about return to work dates. In March 2018, the Claimant attempted to return to her previous job with modifications. She was only required to work 3.5 hours a day, had more frequent breaks, and could alternate between sitting and standing. After 3 days, the Claimant was advised by her doctor to stop working because of increasing pain. On the days she did work, all she could do when she got home was rest with her leg up until the following day. She could not do anything else. I consider this a failed attempt.

[24] The most recent return to work discussion was with Dr. Bhatia in January 2020. He recommended a gradual return to work in March 2020, but with many restrictions. They included no walking on uneven ground, no standing or sitting for more than 30 minutes, no lifting more than 10kg, no climbing more than short flights of stairs, and no kneeling or crouching. He also mentioned that the Claimant's medications could cause drowsiness and imbalance.

[25] The Claimant submitted that even though she knows she can't work she would have tried. But, with all of her restrictions she questioned what type of job she could really do. She can't even do simple tasks on a regular basis at home. The Claimant's employer, the Toronto District School Board, has been in agreement with the Claimant. They could not find her any type of even modified within their organization to return to. The Claimant's limitations could not be accommodated.

[26] I find that the Claimant has demonstrated effort to return to the workplace and comply with the recommendations her doctors have made. Even though Dr. Bhatia recently recommended a gradual return to work, finding a job that would comply with the recommended restrictions is not realistic. That was the sentiment of the Claimant's long-time employer.

Although the Claimant has not applied for work outside of the Board of Education, I am satisfied that her health condition precludes her from both obtaining and maintaining any work.

The Claimant is not realistically employable.

[27] I also have to assess the severe part of the test in a real world context⁵. That means considering things like the Claimant's age, level of education, language proficiency, and past work and life experience.

[28] The Claimant is 59 years old and fluent in English. She finished high school. She last worked for nearly 20 years as a full-time educational assistant, and before that she worked in a daycare. I find that she has few transferable skills. Given her age, lack of transferable skills, and functional limitations, I also find that she is not a good candidate for re-training or for sedentary accommodated work. In consideration for the evidence presented, I conclude that it is more likely than not that the Claimant was suffering from a severe disability, as defined in the CPP, by the time of the hearing.

Prolonged disability

[29] I find that the Claimant's disability was also long continued and of indefinite duration by the time of the hearing. She has had progressively worsening right foot/leg/back problems since 2016. Despite many forms of conservative and invasive treatment, her condition has not improved. Because of how long her condition has gone on for and the lack of improvement to date, I find little prospect that her condition will improve to the point that she could regularly return to any substantially gainful work.

CONCLUSION

[30] The Claimant had a severe and prolonged disability in April 2017, when she stopped working to have right foot surgery. Payments start four months after the deemed date of disability, as of August 2017⁶.

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁶ Section 69 *Canada Pension Plan*

[31] The appeal is allowed.

Tyler Moore
Member, General Division - Income Security