



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *GR v Minister of Employment and Social Development*, 2020 SST 1033

Tribunal File Number: GP-19-429

BETWEEN:

G. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: Angeli Swinamer

Teleconference hearing on: May 7, 2020

Date of decision: May 15, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 59 years old when she applied for a CPP disability pension in June 2017. In her disability questionnaire, she stated that she had been unable to work since February 2008 because of pain and stress. At the hearing, the Claimant testified that she had been unable to work since 2001 because of several medical conditions. The Minister denied the application initially and upon reconsideration, and the Claimant appealed to the Social Security Tribunal.

[3] This is the Claimant's second application for a CPP disability pension. She initially applied in August 2008, and the Minister denied that application in October 2008. The Claimant did not request a reconsideration of that denial decision.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.¹ The Claimant's disability is severe if it causes her to be incapable regularly of pursuing any substantially gainful occupation. Her disability is prolonged if it is likely to be long continued and of indefinite duration.

[5] For the Claimant to succeed, she must prove that it is more likely than not that she became disabled by the end of her Minimum Qualifying Period (MQP) and continues to be disabled.² Her MQP – the date by which she has to prove she was disabled – is December 31, 2002. This is the last date when she had valid contributions to the CPP in four out the last six years.³

ISSUES

1. Did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment December 31, 2002?

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

² Paragraph 44(1)(b) CPP

³ Record of Contributions: GD2-32. The Honourable Gordon Killeen, Q.C., and Andrew James, *2019 Annotated Canada Pension Plan and Old Age Security Act*, 18th edition, (Toronto, 2019), at page 296

2. If so, is her disability long continued and of indefinite duration?

ANALYSIS

Severe Disability

[6] The Claimant's position is that she suffered from multiple medical conditions as of December 31, 2002 including the following: stomach pain caused by irritable bowel syndrome (IBS); urinary incontinence; constant infections; bradycardia (slow heart rate) which resulted in the insertion of a pacemaker; bronchitis; sinusitis; anxiety with panic attacks; and depression.

[7] The Minister acknowledges that the Claimant now suffers from multiple medical conditions and functional limitations that make it difficult for her to work. However, its position is that the medical evidence does not establish that she suffered from a severe disability before the end of December 2002, when she last qualified for a CPP disability pension.⁴

The medical evidence does not establish a severe disability by the end of December 2002

[8] The CPP disability is a government insurance regime based on contributions. The Claimant is covered only for conditions that became severe by the end of December 31, 2002. She is not covered for conditions that became severe afterwards.

[9] Although the medical evidence supports that the Claimant now suffers from a severe disability, it fails to show that her health conditions interfered with her employability at December 31, 2002.

[10] In a recent decision, the Federal Court stated that, in order to succeed, a claimant must provide objective medical evidence of their disability at the time of their MQP. The Federal Court also stated that medical evidence dated after the MQP is irrelevant when a claimant fails to prove that they suffered from a severe disability prior to the MQP.⁵

⁴ GD8-2, para 5

⁵ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and CPP Regulations

[11] In October 1991, the Claimant was injured in a motor vehicle accident. The only medical report in the hearing file about this accident is a May 1992 assessment report by Steven Dunsinger, a clinical psychologist, prepared at the request of the Claimant's lawyer. Mr. Dunsinger stated that the Claimant had sustained a whiplash injury in the accident as well as a deterioration in her ability to deal with stress.⁶ The accident was more than 11 years before the MQP, and there is no medical evidence of any continuing treatment for her accident injuries after this report.

[12] In June 2001, the Claimant fainted and fractured her nose. She was diagnosed with an intermittent heart block and a permanent pacemaker was inserted. The Claimant told Dr. Jones, internal medicine, that she had been experiencing fainting spells since she was a teenager, and had fallen on many occasions. Dr. Jones stated that the Claimant was otherwise healthy and had no pre-existing medical or surgical problems.⁷

[13] The Claimant followed up with Dr. Jones on an annual basis until she started to follow up with Dr. Hack, internal medicine, in June 2008. The follow-up reports confirm that the pacemaker was operating normally and there were no related health issues at the MQP.⁸ In June 2004, which was 1½ years after the MQP, Dr. Jones stated that the Claimant's pacemaker was functioning normally.⁹ In February 2012, more than nine years after the MQP, the Claimant told Dr. Hack that she felt well from a respiratory point of view.¹⁰

[14] Ms. Swinamer, the Claimant's representative, acknowledged that there is no contemporaneous medical evidence that any of the Claimant's conditions interfered with her ability to work as of the end of December 2002. Although the Claimant testified that she was experiencing symptoms, experiencing symptoms is not equivalent to experiencing disabling conditions.

⁶ GD9-3 to 4. There are also handwritten notes that appear to have been prepared by the Claimant listing her medical treatment during October and November 1991, GD9-12 to 13.

⁷ Dr. Jones' June 2001 consultation report: GD2-199 to 200

⁸ Dr. Jones' July 2001, June 3, 2002, and June 2003 annual reports are at GD2 -187, 215, and 225.

⁹ GD2-235

¹⁰ GD2-629

[15] Ms. Swinamer relies on an August 2018 letter¹¹ from Dr. Elliott, the Claimant's longstanding family doctor, as well as a CPP disability family physician questionnaire he completed in March 2019.¹²

[16] In his August 2018 letter to the Claimant's lawyer, Dr. Elliott stated that he had treated the Claimant since approximately 2000 for depression, urinary incontinence, gastroesophageal reflux disease, lung disease, goiter, bradycardia for which she received a pacemaker, migraine headaches, and chronic sinusitis for which she had with nasal septum surgery. He stated that these had been present in varying degrees since 2000-2001. He also stated that along with her significant COPD (chronic obstructive pulmonary disease) this was an adequate reason for her to be on a pension.

[17] In the March 2019 questionnaire, Dr. Elliott diagnosed COPD, bradycardia, papillary thyroid cancer, chronic sinusitis, deviated nasal septum, hypertension, and migraines. He stated the Claimant's disabling symptoms included chronic pain, cognitive limitations, and physical limitations. He also stated the symptoms were unpredictable and prevented her from following an employment schedule. He further stated that her disabling conditions had been severe and prolonged since 2000-2001.

[18] I am not persuaded by these reports for the following reasons.

- First, they were prepared more than 15 years after the MQP.
- Second, although I am sure Dr. Elliott was well intentioned, he appears to have assumed the role of an advocate. This is demonstrated by his statement that the Claimant's conditions were an adequate reason for her to be on a pension. When making this statement he stepped outside his role as a medical doctor and advocated on behalf of the Claimant. In the March 2019 questionnaire, he mostly filled in a form provided by the Claimant's lawyer and adopted legal terms such as "severe and prolonged" that were in the form. The Federal Court of Appeal (FCA) has stated that a Claimant has the burden of proving her disability in

¹¹ GD2-926

¹² GD3-3. The Claimant's lawyer sent the questionnaire form to Dr. Elliott.

accordance with the requirements of the subsection 42(2) of the CPP. The FCA has also stated the finding whether a Claimant is disabled is a finding of mixed fact and law that “only the Board” (and by analogy the Social Security Tribunal) can make.¹³

- Third, no contemporaneous medical records show that the Claimant’s conditions (other than her bradycardia) were being treated as of December 2002. Dr. Elliott’s records reveal only one office visit in 2001 and seven in 2002.¹⁴ There are no specialist consultations other than follow- up visits with Dr. Jones. The only investigation is a June 2002 mammogram that revealed no abnormalities.¹⁵
- Fourth, in a November 2018 letter to the CPP, Dr. Elliott stated that the Claimant’s depression started primarily in 2003, her asthma and COPD started in 2007, and her urinary incontinence and sinusitis started in 2010 to 2015. He also stated that the only problem prior to December 2002 was her heart block for which a pacemaker had been inserted.¹⁶
- Fifth, in his October 2008 letter to Service Canada and his May 2017 CPP report, Dr. Elliott indicated the Claimant’s most disabling condition is her severe asthma. However, in his November 2008 letter he stated this condition did not start until 2007, which was five years after the Claimant last qualified for CPP disability. The 2007 start date for the Claimant’s asthma is consistent with the March 2009 report from Dr. El-Halees, internal medicine, which stated that the Claimant’s asthma was diagnosed “two years ago.”¹⁷ This is also consistent with the Claimant’s X claims history on which the first claim for asthma concerns the Claimant’s office visit with Dr. Elliott in March 2007.¹⁸

¹³ *Lalonde v. Canada (MHRD)*, 2002 FCA 211, para 23. This decision is binding on both the AD and the GD.

¹⁴ GD2- 335

¹⁵ GD2-38

¹⁶ GD2-348

¹⁷ GD2-118.

¹⁸ GD3-39

[19] The Claimant has failed to provide credible medical evidence that she was disabled by December 31, 2002.

The Claimant has stated that she was not disabled until 2008

[20] The Claimant stated on several occasions that she became disabled in 2008. In her June 2017 disability questionnaire, the Claimant stated she could no longer work because of her medical condition as of February 2008.¹⁹ In a letter dated June 2017 to Service Canada, she stated that she had not been able to hold any form of employment since 2008 when she blacked out while working as a teller for the lottery. She also stated that this was the first time she had blacked out since her pacemaker was inserted in June 2001.²⁰ In a December 2017 telephone conversation with Service Canada, she stated she was not disabled in 2002.²¹

[21] When asked about these statements at the hearing, the Claimant responded that she was confused about the CPP term “disabled” and thought that she would not be considered to be disabled because she had been able to work for short periods of time. Since 2002, she had only worked part-time as a hairdresser for seniors and at a lottery booth, and needed help to do her work.

[22] I am not satisfied with the Claimant’s response.

- First, she did not provide this explanation before the hearing even though the Minister relied on these statements in its December 13, 2017 denial decision²², its January 2019 reconsideration decision²³, and in its September 2019 submissions.²⁴
- Second, she did not apply for CPP disability until February 2008. This was more than five years after she is now claiming to have been disabled.

¹⁹ GD2-948

²⁰ GD2-968 to 969

²¹ GD2-928

²² GD2-10,

²³ GD2-5

²⁴ GD4-7, para 29

- She had earnings of \$4,919 in 2005 and \$8,288 in 2007. Although these earnings are low, they are consistent with her historical earnings. Her earnings in 2007 were her highest earnings on record.
- In April 2009, Dr. MacNeil, psychiatrist, stated that the Claimant had been off work for a year, she had been self-employed prior to that as a hairdresser since 1977, and she had recently had significant health problems.²⁵ This supports that the Claimant was not disabled before 2008.

The Claimant has failed to prove her disability was severe by the end of 2002

[23] A disability is severe if it renders a claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a “real world context” and consider such factors as the Claimant’s age, education level, language proficiency, and past work and life experiences when determining her “employability”.²⁶

[24] The Claimant was only 45 years old at the MQP, which was 20 years before the usual retirement age. Although she initially left school in grade 11, she was later able to complete grade 12 and a college cosmetology course. She has worked primarily as a self-employed hairdresser but has also worked as cashier and a lottery booth attendant. She is proficient in English. There is nothing in her personal characteristics or work history that would have presented a significant barrier to her pursuing many types of employment in December 2002.

[25] Most significantly, she has not provided medical evidence establishing that she was disabled prior to the end of December 2002. Further, she has repeatedly stated that she was not disabled until long after the MQP.

[26] The Claimant has failed to establish that it is more likely than not that she suffers from a severe disability in accordance with the CPP requirements.

²⁵ GD2-112

²⁶ *Villani* 2001 FCA 248

[27] Since she has failed to establish a severe disability, I do not need to make a determination on the prolonged criteria.

CONCLUSION

[28] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security