



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. B. v Minister of Employment and Social Development*, 2020 SST 534

Tribunal File Number: GP-19-1447

BETWEEN:

L. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: May 20, 2020

Date of decision: May 28, 2020

DECISION

[1] I am dismissing the appeal. The Claimant, L. B., is not entitled to a *Canada Pension Plan* (CPP) disability pension. These are my reasons.

OVERVIEW

[2] The Claimant is 60 years old. She worked as a secretary from 1986 to 1997, but has had minimal employment since then. She applied for a CPP disability pension in September 2018. In her application, she said she could not work because she had fibromyalgia, PBC (primary biliary cholangitis, an autoimmune disease of the liver), osteopenia and osteoporosis. These caused memory loss, extreme fatigue, constant muscle ache, and difficulty lifting her arm. She also had high blood pressure, thyroid problems, anxiety, chronic hepatitis, and anemia.¹

[3] The Claimant says she pushed herself to work, but by 1997, she could not do it anymore. Her symptoms continued even after she stopped work. Because they were not investigated thoroughly, she was not diagnosed with fibromyalgia or PBC until 2012. It is not clear when the other conditions were diagnosed. She says she has not improved and she still cannot work.

[4] The Claimant is entitled to a CPP disability pension if she meets these conditions:

- she must have contributed to the CPP within a time frame called the minimum qualifying period or MQP;
- she must have a disability that is severe and prolonged, and
- she must have become disabled on or before the end of her MQP.²

[5] The Claimant's MQP ended on December 31, 1999.³

THE ISSUE IN THIS APPEAL

[6] I have to decide if the Claimant had a severe and prolonged disability by December 31, 1999. The Claimant has to prove this on a balance of probabilities.

¹ The Claimant's CPP application and disability questionnaire are at pages GD2-36-38 and GD2-83-86.

² Paragraph 44(1)(b) and subsection 44(2) *Canada Pension Plan*

³ The Claimant's CPP contributions are at page GD2-4.

ANALYSIS

Severe disability

[7] The Claimant's disability is severe if she is incapable regularly of pursuing any substantially gainful occupation.⁴ That means it must prevent her from earning a living at any type of job.⁵ When I am deciding this, I have to look at every health issue that might affect her employability.⁶ I first have to focus on her condition at December 31, 1999, because her disability had to be severe by that time.

[8] The Claimant and her husband testified at the hearing. They were straightforward. Their story is plausible. I believe what they told me about the Claimant's health problems. However, there is no objective medical evidence that shows she had a severe condition by December 31, 1999. She has provided some evidence from that period, and she has explained why there isn't more. Unfortunately, that is not enough for me to find she is entitled to a CPP disability pension.

Evidence from the Claimant and her husband

[9] In the early 1980s, the Claimant's main job was looking after her two young children. She began to have fatigue. Her family doctor, Dr. Lim, sent her to a specialist. The specialist diagnosed her with an over-active thyroid and prescribed medication. The Claimant took her medication but her symptoms did not improve. She already had anxiety and agoraphobia, and these got worse. She told Dr. Lim about all her health problems, but he did nothing except give her lorazepam and continue monitoring.

[10] With some difficulty because of her anxiety, the Claimant completed a secretarial course and started working in a doctor's office around 1986. After that, she found a position with a provincial ministry. She continued to have fatigue and sometimes fell asleep at her desk. In 1990, she went on medical leave for about a year. She did not get better.

[11] After going back to work the Claimant saw an internist named Dr. Bryson. He told her the fatigue might be caused by blood transfusions she had when she gave birth to her son in

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan*

⁵ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁶ *Bungay v. Canada (A.G.)*, 2011 FCA 47

1978. He thought another possible cause was the lighting at the Claimant's workplace. He ordered an abdominal ultrasound but it was normal. He told the Claimant to keep an eye on her condition. The Claimant continued working.

[12] Around 1993 the Claimant's daughter was diagnosed with juvenile arthritis and scleroderma. The Claimant and her husband spent most of their free time taking their daughter to medical appointments, going back and forth between Toronto and their home in Timmins. The Claimant did not have time to deal with her own health problems. The family needed her income, so she pushed herself and kept working. Besides her fatigue, she now had constant aching and soreness in both legs. Dr. Lim sent her for an ultrasound to see if she had blood clots. The results were negative. At some point, the Claimant's bloodwork showed she had elevated liver enzymes, but Dr. Lim did not send her for further investigations. No matter what the Claimant complained about, Dr. Lim just told her he would keep monitoring her.

[13] By 1997, the Claimant had been working as a receptionist for a cable company for two or three years. Besides her fatigue and leg pain, she was depressed and anxious about her own health and her daughter's. She often had to leave work, or she would call in sick. Her supervisor complained to her about the quality of her work. Finally, the Claimant could not manage any more. She walked out and did not return.

[14] A few months after this, a friend found the Claimant a cleaning job. She worked one night a week. Although she was only doing light dusting and emptying wastebaskets, she found she was too tired and her legs hurt too much. She quit this job after a few months. She did not work after that except for brief attempts in 2001 and 2002, first at a call centre and then in a hair salon. Both these jobs ended because she could not do the work.

[15] The Claimant started to see another internist, Dr. Adesanya, in 2008. He ordered bloodwork, but could not arrange any other tests or procedures because of the state of the Claimant's liver. As a result, nothing was done for the Claimant until 2012. By that time, her husband was fed up with the lack of action on her long-standing issues. The Claimant was now having abdominal pains as well. Her husband took her to a clinic in Toronto. The doctors there diagnosed her with fibromyalgia. She was also referred to a liver clinic, where she was diagnosed with PBC and started on medication.

[16] The Claimant went to the liver clinic until about 2017. It was difficult and expensive to keep going to Toronto, so she was referred back to Dr. Adesanya in Timmins. She also got a new family doctor, Dr. Raymond. She is being monitored and takes some medication. However, many of her symptoms are still unexplained, and her treatment options are limited because of her liver condition. Her pain and fatigue are not under control.

The medical evidence does not establish a severe disability by December 31, 1999

[17] I recognize the Claimant has struggled with fatigue and leg pains for many years, that these were the main reason she stopped working, and that she still feels unable to work. I realize things have been very difficult for her. However, I cannot allow her appeal based only on what she and her husband have said about her condition. There also has to be objective medical evidence of her disability by the end of the MQP – that is, December 31, 1999. The Federal Court of Canada recently explained that requirement in a case called *Dean*.⁷ It said “[t]he clear wording in the *Canada Pension Plan Regulations* . . . required documentary evidence from [the Claimant] about her claimed medical condition at her MQP.”

[18] The Claimant’s documentary medical evidence up to December 31, 1999, is this:

- An abdominal ultrasound in February 1993, showing normal gallbladder, bile ducts, liver, pancreas, spleen, kidneys and aorta.⁸
- A report from January 1994 by a gynecologist, Dr. Leggat, regarding a recurrence of endometriosis. He recommended laparoscopy, which was done later that month.⁹
- Dr. Lim’s notes showing the Claimant’s visits to him from June 1997 to May 2000. They are mostly illegible, and show only prescriptions for thyroid medication and that the Claimant had plantar fasciitis.¹⁰
- A partly legible printout of an EEG from August 1999 that says “Sinus Rhythm Non-specific ST change”.¹¹ The Claimant told me this was to investigate her fatigue.

⁷(*Canada*) *Attorney General v. Dean*, 2020 FC 206

⁸ GD2-64

⁹ GD1-17-18

¹⁰ GD4-3. The Claimant identified these as coming from Dr. Lim (GD4-1).

[19] The next medical documents are lab results from 2008.¹² There is nothing after that until October 2012, when the Claimant saw Dr. Nevin in Toronto. He diagnosed her with fibromyalgia, and noted she had been referred to the liver clinic for chronic liver disease.¹³

[20] The lack of evidence from around the MQP is not the Claimant's fault. She tried her best, but faced several obstacles. First, there was very little investigation of her symptoms, so there are not many records to begin with. Second, Dr. Lim could not locate the Claimant's file and could not provide any medical records from January 1999 to May 2019,¹⁴ except for a medical report he prepared in May 2018.¹⁵ Third, the only specialist the Claimant saw for fatigue during this period was Dr. Bryson. He is no longer practicing, and the Claimant could not obtain any records from him.

[21] The medical documents from 1999 and earlier do not help the Claimant. They show just a few visits to Dr. Lim over a period of several years, and normal or inconclusive results of tests that were carried out for reasons that are not apparent in the medical record. There was no follow-up after these tests. The remaining documents relate to the Claimant's endometriosis, and her claim is not based on that condition or on the procedures she had to deal with it. Even if it was, the medical record does not show it was severe or prolonged at December 31, 1999.

[22] I don't think the Claimant has to produce a medical document dated on or before December 31, 1999, to meet the requirements in *Dean*. But there has to be documentation related to that date, such as a later report from a doctor or other health care professional based on clinical observations or assessments from December 1999 or earlier. Some of the more recent medical reports say the Claimant's condition is chronic or has persisted for years, but those statements do not appear to be based on objective notes from December 1999 or earlier.¹⁶

[23] The only report from a doctor who saw the Claimant around that time is Dr. Lim's. This report, dated May 2018, does not shed any light on the Claimant's condition at the MQP. Dr. Lim said he had known the Claimant for 20 years, and began treating her for PBC, hypothyroid,

¹¹ GD3-2

¹² GD7-2-11

¹³ GD2-59

¹⁴ GD4-47

¹⁵ GD2-71-73

¹⁶ GD2-62, 75

hypertension, osteoporosis and fibromyalgia in October 2017.¹⁷ This is confusing, since Dr. Lim was on record as the Claimant's physician more than 25 years earlier, when she had the abdominal ultrasound in 1993.¹⁸ His office notes show he prescribed thyroid medication to the Claimant in the 1990s.¹⁹ He received reports from the liver clinic for the Claimant's visits in November 2015 and June 2017.²⁰ All of these took place before October 2017.

[24] However, while these errors in dates show Dr. Lim may have been careless, they do not help the Claimant. Except for hypothyroidism, there is no medical evidence to show Dr. Lim was aware of or began treating the Claimant for any of these conditions on or before December 31, 1999, or for many years after. And there is no evidence that hyperthyroidism caused the Claimant's debilitating symptoms at any time. She told me she had been on medication for it since the early 1980s. She worked in spite of it until 1997. There is nothing to suggest it got worse after that.

[25] I have to follow what the Federal Court said in *Dean*, unless there is a way to distinguish it on its facts.²¹ I can't see any way to do that. The Claimant here is in the same position as the claimant in *Dean*: through no fault of her own, she does not have medical records for the period up to and including her MQP that show she was incapable regularly of pursuing any substantially gainful occupation by that time.²² As a result, she cannot be found disabled under the CPP.

[26] In some circumstances, an assessment of whether a person's disability is severe has to include consideration of things like age, level of education, language proficiency, and past work and life experience. That is so there can be a realistic assessment of their work capacity.²³ I did not do that assessment here, because medical evidence is still needed to support a finding of disability.²⁴ As discussed above, the medical evidence does not establish that the Claimant had a condition that had any effect on her ability to work at December 31, 1999.

¹⁷ GD2-72

¹⁸ GD2-64

¹⁹ GD4-3

²⁰ GD2-74-82

²¹ This is because of a legal rule called *stare decisis*. It means the Tribunal must follow previous decisions of higher courts – in this case, the Federal Court of Canada.

²² *Dean*, paragraph 20

²³ *Villani v. Canada (A.G.)*, 2001 FCA 248

²⁴ *Villani*, paragraph 50; *Giannaros v. Minister of Social Development*, 2005 FCA 187

CONCLUSION

[27] Because I decided the Claimant's condition was not severe, I did not consider whether it was prolonged.

[28] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security