



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *DL v Minister of Employment and Social Development*, 2020 SST 1159

Tribunal File Number: GP-19-1024

BETWEEN:

D. L.

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: Bryan Delorenzi

Teleconference hearing on: July 21, 2020

Date of decision: August 31, 2020

DECISION

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

OVERVIEW

[2] The Claimant worked on a factory line for a number of years before becoming a forklift driver. She had back problems and finally one day when bending over her back locked up and she sought medical attention. Prior to the day her back locked-up she experienced aches but nothing like the pain she is now experiencing. She stopped working in April 2016. She maintains she has been unable to return due to her medical condition.

[3] The Minister received the Claimant's application for the disability pension on August 16, 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, 2018.

ISSUE(S)

[5] 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, 2018?

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 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

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

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

Totality of Impairments

[7] 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 was asked several times what the totality of medical conditions were and impairments that she maintains resulted in her not being able to work? She answered the three conditions relied upon are severe arthritis – lower back; degenerative disc disease – lower back and slipping discs – lower back. She on a further occasion confirmed this answer and I note it is consistent with the Questionnaire signed by her in 2018. She testified that depression and GERD are not medical conditions/restrictions that stops her from working. The Claimant stated she had always had problems with her back. In April 2016, she bent over to pick up an object and her back “locked-up”. Her Doctor took her off work and she has not worked since.

[8] The Claimant testified that when considering returning to work it would be to her former employer. She remains “technically employed” and in receipt of benefits, but not salary. She has not looked for employment elsewhere. She does not believe she could work due to her restrictions and pain. There are days she could not get out of bed.

[9] The Claimant testified her back pain was excruciating. On a scale of 1-10³ her daily pain is 5/6 – 10 and some days up to 10/10. She believes her medical condition consists of three issues. She stated she has severe arthritis in the lower back, degenerative disc disease lower back and slipped discs lower back. As a result, she is unable to sit, stand and walk for more than 30 minutes at a time. The Claimant testified she required help with her housework such as vacuuming, washing floors, going up and down stairs to do laundry. Driving her Jeep Wrangler⁴ is difficult however; she believes she would not have a problem with an ordinary passenger car.

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

³ 10 being the worse

⁴ Jeep Wrangler sits higher off the ground than a passenger car.

She testified that her typical day she gets up and does not do much other than sit in a chair and watch television. Her computer skills are “average”.

[10] The Claimant confirmed the answers in her Questionnaire were accurate. She did not have problems with concentrating and remembering. Although not taking any treatment for her sleeping problems, she wakes up often during the night due to pain levels. She has participated in physiotherapy and recommended home exercises. She did not find this helpful. She attended with a back specialist who informed her she was too young for surgery and recommended she lose weight. She has not lost weight. As of the date of the hearing, there are no referrals to specialists pending. The Claimant was referred to the Pain Care Clinic. She attended once. The Clinic advised medication but she did not want to take the medication and did not return to the Clinic. She was concerned about medication side effects. Recently she has been prescribed CBD oil. The oil helps her sleep but pain remains.

Claimant is not capable of performing her usual job

[11] The measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. 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.

[12] The Claimant testified that if she were to return to work it would be to her former employer. She is not able to carry out the physical demands of her regular job as a forklift operator. Her former employer does not have a suitable position available and will not call her back to work. I accept she is not capable of performing her regular job. To qualify for a disability benefit she must be incapable regularly of pursuing any substantially gainful occupation not just her job as a forklift driver.

Functional Limitations

[13] 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 work⁶. The Claimant experiences back pain and

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

⁶ *Ferreira v. AGC* 2013 FCA 81

cannot undertake strenuous physical labour. The question is whether her limitations preclude all occupations. I find they do not.

[14] The Family Doctor lists the functional limitations⁷ on July 31, 2018. Listed limitations were unable to bend at waist, unable to rotate at waist, unable to perform heavy lifting, unable to perform repetitive movements and unable to sit or stand for long periods. These are significant limitations. They are not limitations that preclude light or sedentary occupations.

[15] Dr. Sleiman in a medical update completed in 2017 was of the opinion the Claimant was capable of returning to work with restrictions. Restrictions were no bending, twisting, repetitive motion of three hours, pushing and pulling under 10 pounds only, sitting and walking 30 minutes and lifting restrictions no more than 15 pounds. I note the Claimant has not attempted to secure employment within her limitations. Her attitude is if she were to return to work, it would be with her previous employer. She has not made reasonable efforts to find employment within her restrictions. The medical evidence does not support a finding the functional effect of her medical condition renders her unable to work at any occupation.

Treatment Options not exhausted

[16] The Claimant has not pursued treatment for her medical condition. She was advised to lose weight. She has not. The Claimant testified she has not asked for referrals but has left it up to her family doctor. Other than the family doctor, her care has included one visit with a specialist and one attendance at the Pain Centre Clinic. She engaged in physiotherapy but did not continue and found home exercises not helpful so stopped. It would be expected that with adherence to treatment and pain management her symptoms could be controlled to the point she could manage employment. Diagnostic images indicate moderate degeneration of her lumbar spine. Treatment has remained conservative and no severe pathology is documented. The Claimant has not made reasonable efforts to exhaust treatment options.

⁷ GD2-113

Nurse Practitioner's Report

[17] Christine Russette, Nurse Practitioner (N.P.), completed a brief one-page report on May 3, 2019. I note Ms. Russette indicated the Claimant was new to her practice. She was of the opinion because of chronic pain and inability to work the Claimant suffers from Major Depressive Disorder and Generalized Anxiety Disorder. I do not place significant weight on the report from Christine Russette. She notes the Claimant is a new patient and does not offer an opinion as to the status of the Claimant at the time of the MQP. She does not offer any objective basis for her opinion. I further note the Claimant testified that depression and anxiety are not a factor in her inability to work. Chronic pain is noted by the Nurse Practitioner. Chronic pain is a compensable disability. The problem with the opinion concerning chronic pain is there is not any reason given by the N.P. as to why the condition of chronic pain was noted, or whether it existed prior to May 2019. I note the N.P. referred the Claimant to the Pain Clinic and the Claimant only attended once and did not accept the Clinic's recommendation for medication. I find there is not sufficient objective medical evidence to prove on a balance of probabilities the Claimant experienced a severe disability as defined in the CPP at the time of the MQP and continuously since.

Personal Circumstances of the Claimant

[18] I must assess the severe part of the test in a real world context⁸. 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 required as will evidence of employment efforts and possibilities.

[19] The Claimant was only 53 years of age at the time of the MQP. She has a high school education and technical training as a forklift operator. She has work experience resulting in some transferable skills. She is proficient in English and has some computer skills. She does not have difficulty with concentration and memory⁹ allowing her to upgrade her education or retrain to

⁸ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁹ GD2-121 – confirmed by Claimant at hearing as accurate.

enhance her employment skills. There is insufficient medical evidence and evidence of employment efforts. I find the Claimant failed to prove it is more likely than not she experienced a severe disability as defined in the CPP when analysed in a real world context.

CONCLUSION

[20] The appeal is dismissed.

Brian Rodenhurst
Member, General Division - Income Security