



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SW v Minister of Employment and Social Development*, 2020 SST 934

Tribunal File Number: GP-20-557

BETWEEN:

S. W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

Claimant represented by: Steve Sacco

Teleconference hearing on: August 19, 2020

Date of decision: September 1, 2020

DECISION

[1] The Claimant is eligible for a *Canada Pension Plan* (CPP) disability pension with payment beginning as of April 2018.

OVERVIEW

[2] The Claimant was 41 years old when she applied for the CPP disability pension in March 2019. Her last job was as an insurance broker. She stated that she had been unable to work since November 2016 because of fibromyalgia, depression, general anxiety disorder, diabetes, sleep apnea, and migraines. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Minister submitted that the Claimant's health conditions did not rule out all work. However, she had failed to try alternate work.

[4] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.¹ A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A 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). Her MQP – the date by which she has to prove she was disabled - is based on her contributions to the CPP.² It ended on December 31, 2018.

ISSUES

[6] Did the Claimant's health conditions result in her having a severe disability, so that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2018?

[7] If so, was her disability long continued and of indefinite duration by that date?

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

² CPP Record of Contributions: GD2-55

SEVERE DISABILITY

[8] When I am deciding whether the Claimant's condition is severe, I have to look at every health issue that might affect her employability.³

[9] The Claimant has well-documented memory problems. During the hearing, she had a number of memory lapses. Under these circumstances, I have relied to a greater extent on the documentary evidence than on her oral testimony.

The Claimant's disability interfered with her ability to work by December 31, 2018

The Claimant's testimony

[10] Sometime in 2016, the Claimant testified, she had trouble with headaches, memory, and vision. She developed joint pain, which worsened after November 2016 and has never improved. She has pain in her shoulders, arms, and back. Her pain level is at an average level of 8/10, where 10 is the greatest pain imaginable. Sometimes the pain reaches the level of 10/10. In 2017, Dr. Dixit, rheumatologist, diagnosed her with fibromyalgia. She also developed depression and anxiety.

[11] The Claimant testified that she has always been very anxious about initiating telephone calls. In addition, because of a traumatic experience in her youth, she becomes anxious when the doorbell rings. Because of anxiety, she rarely leaves the house except for medical appointments. If she pushes herself, she gets panic attacks. This happens about once a month. She has difficulty with her memory. For example, she forgets to turn off the stove.

[12] The Claimant testified that she uses a CPAP machine for severe sleep apnea. However, her sleep is never refreshing. Using the CPAP machine makes little difference in her fatigue level.

[13] The Claimant stated that in December 2018 she had only one or two good days a week. She spent a lot of time in bed because it was painful to sit. She could not sit or stand for long. She relied on family members to do most of the household chores and drive her to appointments.

³ *Bungay v. Canada (A.G.)*, 2011 FCA 47

She testified that she is somewhat more active now. She tries to get out of bed and sit on a chaise lounge. She also tries to make dinner, but has to do this very slowly. Some days she is unable to do it at all. Her housecleaning activities are limited to wiping counters and loading the dishwasher. She has been unable to garden because of back and neck pain.

[14] The Claimant testified that she uses a walker, particularly in the kitchen, so she can rest while preparing meals. She has a handrail in the bathtub. She has a wheelchair, but rarely goes out where she would have to walk long distances. She does not use a cane because when she has to stop walking, she has to stop immediately – she could not continue walking even with the aid of a cane.

[15] In response to the Minister's submission that she was able to take vacations, the Claimant testified that she and her immediate family would visit her parents' rental home in Florida for a week or two every year. She and her husband would also generally take a cruise in the fall. Neither type of vacation was strenuous. Her family doctor approved these vacations.

The medical evidence – mental health conditions

[16] The Claimant has suffered from anxiety since some traumatic experiences in her youth. In November 2016, she informed Dr. Kim Bender, family doctor, that about five years before, she had a bad experience with a co-worker who turned against her. This provoked a depressive episode, and a doctor put her on an antidepressant for about a year. Then, beginning in late 2015, the Claimant was under a lot of stress at work. She had a new position where she had to talk to people. She did not feel she was well suited for this. In November 2016, Dr. Bender diagnosed possible anxiety with social anxiety. She reported that the Claimant's new work position made her social anxiety worse.⁴

[17] From December 2016 to July 2017, the Claimant attended anxiety counselling biweekly with a social worker. In April 2017, her progress in these sessions received a setback when her teenage son was diagnosed with brain cancer.⁵

⁴ GD2-122, 128

⁵ GD2-177-190. Her son's condition is currently stable. He lives at home on a provincial disability pension.

[18] In October 2017, Dr. Gary Chaimowitz, psychiatrist, assessed the Claimant for the insurer. He diagnosed major depression with a variety of anxious features, including general anxiety disorder, mild panic attacks, mild agoraphobia, and some obsessive-compulsive features. He estimated her Global Assessment of Functioning (GAF) score at 50 (serious symptoms). In addition, he observed that her own medical condition and that of her son were overwhelming her to the point incapacitating her. She rarely got out of bed.⁶

[19] In February 2018, Dr. Alphonse Pallen, psychiatrist, provided the same diagnosis as Dr. Chaimowitz. The Claimant, he stated, had chronic persistent depression. She was on four medications for her mental health conditions, but also required counselling for depression.⁷

[20] Since June 2018, the Claimant has seen Dr. Lawrence Martin, psychiatrist, every month or two. He tried her on various antidepressants, including Cymbalta, Abilify, and Rexulti. In September 2018, he reported that she was sobbing daily. However, she was trying to be more active.⁸ In October 2018, Dr. Martin stated that the Claimant had been attending a cognitive behavioural therapy (CBT) group with some benefit. She was bathing more often.⁹

[21] In December 2018, Dr. Martin stated that the Claimant had some features of post-traumatic stress disorder. This related to some disturbing experiences as a teenager. A new antidepressant had given her a boost. She was on four antidepressants. Fibromyalgia was limiting her activity level.¹⁰ In January 2019, the Claimant reported continuing trouble with sustained concentration and short-term memory.¹¹

[22] The Claimant's mental health issues are ongoing. In 2019, she began attending a behavioural activation group run by social workers at the Mood Disorders Clinic. The Clinic's records show that the Claimant's condition deteriorated as of May 2019, when she reported some thoughts of suicide. Through May and June 2019, she was sleeping 18 hours a day.¹² In October 2019, her anxiety increased and her mood declined. She was sleeping poorly and her daytime

⁶ GD2-191, 197

⁷ GD2-242

⁸ GD2-103

⁹ GD5-191

¹⁰ GD5-193

¹¹ GD2-108, GD5-192

¹² GD5-99. By December 2018, however, she was back on four antidepressants: GD5-107.

energy was low.¹³ In February 2020, Dr. Martin reported that her pain was very bad. She was trying to make dinner for the family and it “does her in.”¹⁴ In April 2020, she reported that her anxiety had increased because of COVID-19.¹⁵

The medical evidence – physical health conditions

[23] The Claimant’s main ongoing physical problems are fibromyalgia, chronic pain, and sleep difficulties.

[24] In August 2017, Dr. Dixit, rheumatologist, diagnosed fibromyalgia with increased chronic regional pain.¹⁶ In June 2018, Dr. Bender reported that the Claimant was suffering from fibromyalgia with persistent increased complex regional pain that flared at times. She likely had some chronic fatigue as well. The doctor recommended a wheeled walker.¹⁷ In March 2019, the CPP medical report of Dr. J. Bluman, family doctor, stated that the Claimant’s primary disabling condition was fibromyalgia.¹⁸ Also in March 2019, he reported to the insurer that the Claimant suffered from constant severe chronic pain, along with moderate low mood and anxiety.¹⁹

[25] In November 2017, Dr. A. Hasany, respiratory and sleep medicine, diagnosed severe positional sleep apnea and insomnia. The Claimant complied with his recommendation to purchase and use a CPAP machine.²⁰

[26] In April 2020, the Claimant told Dr. Walmsley, her new family doctor, that exhaustion and fatigue were her “number one impairment.” She had bad days about five times a month. On those days, she couldn’t get out of bed, couldn’t concentrate, and couldn’t read. On an average day, she was able to get dressed and make meals. On a good day, she washed her hair, bathed, made dinner, and did light housework.²¹

¹³ GD5-8-66.

¹⁴ GD5-82

¹⁵ GD5-84

¹⁶ GD5-180

¹⁷ GD5-165, 166

¹⁸ GD2-95

¹⁹ GD5-2

²⁰ GD2-213, 233

²¹ GD5-143

[27] In December 2018, the Claimant was suffering from other physical conditions:

- Type II diabetes diagnosed in 2016, controlled with medication, according to her testimony;²²
- Migraine headaches since 2017, improved with medication by August 2018;²³ and
- Intermittent high heart rate (inappropriate sinus tachycardia) since October 2016, treated with medication, improved by November 2019.²⁴

[28] In September 2019, after suffering from nausea for two months, the Claimant saw a gastroenterologist, Dr. W. Romatowski. He believed that the nausea was related to her elevated parathyroid level.²⁵ In January 2020, an X-ray and an ultrasound of the Claimant's right shoulder showed a partial thickness tear in the mid supraspinatus.²⁶ As the nausea and shoulder condition arose after December 2018, I have not taken them into account in arriving at my decision.

Functional limitations

[29] In May 2017, Dr. Bender reported to the insurer that the Claimant's mental health condition had a "severe" impact on her decision-making, socialization, and concentration.²⁷ In October 2017, Dr. Chaimowitz stated that the Claimant's mental health condition interfered with her ability to focus, pay attention, and remember information.²⁸ In March 2018, Dr. Bender stated that the Claimant's problem-solving ability was affected by her mood and anxiety. The Claimant also had difficulty with walking and standing. Further, pain limited her ability to sit.²⁹ In March 2019, Dr. Bluman stated that the Claimant had difficulty with her activities of daily living. She was chronically exhausted. She had limited mobility and energy.³⁰

My findings

[30] As of the end of December 2018, the Claimant's main mental health conditions were anxiety and depression. Her main physical condition was fibromyalgia, along with chronic pain

²² GD2-124, 139, 140, 182, 191-121, 221-224

²³ GD2-234; GD5-178

²⁴ GD5-96, 105, 129

²⁵ GD5-118

²⁶ GD5-133

²⁷ GD2-113

²⁸ GD2-199

²⁹ GD2-205

³⁰ GD5-2 ff.

and chronic fatigue. By 2019, it appears that her heart problems were resolving, and medication controlled her diabetic symptoms.

[31] The Claimant's difficulties with focus, concentration, and memory would have affected her ability to perform any job or to undergo retraining. Her trouble with sitting, standing, and walking would have hindered her efforts to pursue any job.

[32] I am satisfied that the Claimant's health conditions interfered with her ability to work by the end of December 2018.

The Claimant lacked a regular capacity for substantially gainful employment by December 31, 2018

[33] Employability is the key measure of a severe disability under the CPP.³¹

[34] The Claimant testified that she had considerable difficulty doing her job in the month or two before she stopped work. She was having trouble with headaches, memory, and vision. She would have co-workers read her emails before she sent them out. Finally, in November 2016, her family doctor took her off work.³²

[35] In December 2016 and January 2017, Dr. Bender provided notes to the Claimant's employer extending the time the Claimant needed to be off the job.³³ In May 2017 and March 2018, Dr. Bender's reports to the insurer stated that the Claimant was unlikely to be capable of returning to work.³⁴

[36] In October 2017, Dr. Chaimowitz stated that the Claimant could not engage in any work that required the exercise of higher cognitive function, or interaction with coworkers or members of the public. Trying such work would probably worsen her condition and might increase her suicidal ideation. He continued: "her ability to focus, pay attention, and recall the appropriate information would be compromised by her medical difficulties."³⁵

³¹ *Canada (A.G.) v. Dean*, 2020 FC 206

³² GD2-128

³³ GD2-134, 139, 140, 147

³⁴ GD2-112 ff., 205

³⁵ GD2-199

[37] The Minister submitted that in his March 2019 CPP medical report, Dr. Bluman stated that from a strictly medical standpoint, he expected the Claimant to return to work in the future. I attach little weight to this observation. Dr. Bluman did not know when the Claimant might return to work. He did not expect it to happen in the next year. In addition, he did not know what type of work he expected she could do.³⁶ I should only act on credible and supporting evidence and not on speculation.³⁷ I am not persuaded that the information the Minister cited provides evidence of residual work capacity.

[38] In April 2020, Dr. Laura Walmsley, family doctor, reported that the Claimant felt that her condition had improved since November 2016. However, the Claimant believed that she was still unable to work because she became stressed so easily. Dr. Martin, who saw her about every six weeks, had stated that he was supportive of her. Dr. Walmsley stated that it was difficult to determine whether she would be able to return to work, although this was not an impossibility.³⁸ The fact is, however, that the Claimant has been off the job for more than three and a half years. Further, there appears to be no prospect of her returning in the foreseeable future.

[39] At the hearing, the Claimant testified that she could not return to her former job because it is too stressful. In addition, her memory and concentration are too poor for her to retrain. For example, she cannot retain what she reads. She testified that her disability insurer has never discussed retraining with her.

[40] In deciding whether the Claimant's condition was severe, I must take a "real world" approach and consider factors such as her age, level of education, language proficiency, and past work and life experience.³⁹ The Claimant was only 42 years old in December 2018, many years before retirement age. She has a Grade 13 education, training as an insurance broker, and many years of experience doing office work. None of these factors would have interfered with her employability. However, given her many physical and psychological conditions and functional limitations, I am satisfied that she lacked the capacity to work by the end of December 2018. She

³⁶ GD2-98

³⁷ *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB). Although this decision is not binding, I find it persuasive.

³⁸ GD5-143

³⁹ *Villani v. Canada (A.G.)*, 2001 FCA 248

is therefore not obliged to provide evidence that she was unable to find or keep a job because of her health condition.⁴⁰

[41] I am satisfied that the Claimant lacked the regular capacity to pursue any substantially gainful occupation by December 31, 2018.

[42] Accordingly, I find that it is more likely than not that her disability was severe by that date.

PROLONGED DISABILITY

[43] The Claimant's disability is long continued. She has suffered from anxiety all her adult life. Since 2016, she has also suffered from serious depression and fibromyalgia. Her disability is of indefinite duration. The medical evidence fails to show that her condition will improve.

[44] I therefore find that the Claimant's disability is prolonged.

CONCLUSION

[45] The Claimant had a disability that was severe and likely to be prolonged in November 2016, when she stopped working. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension.⁴¹ The Minister received the application in March 2019, so the deemed date of disability is December 2017. Payments start four months after the deemed date of disability, as of April 2018.⁴²

[46] The appeal is allowed.

Carol Wilton
Member, General Division - Income Security

⁴⁰ *Inclima v. Canada (A.G.)*, 2003 FCA 117

⁴¹ Paragraph 42(2)(b) *Canada Pension Plan*

⁴² Section 69 *Canada Pension Plan*