



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *HB v Minister of Employment and Social Development*, 2020 SST 928

Tribunal File Number: GP-20-87

BETWEEN:

H. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: August 25, 2020

Date of decision: September 14, 2020

DECISION

[1] The Claimant is entitled to Canada Pension Plan (CPP) disability benefits to be paid as of July 2018.

OVERVIEW

[2] The Claimant is a 58-year-old woman who stopped working as a Personal Support Worker (PSW) in March 2018 for medical reasons. She applied for disability benefits in January 2019, and in her application she reported that she is unable to work because of vertigo, dizziness and imbalance. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal (SST or Tribunal).

ELIGIBILITY REQUIREMENTS FOR CPP DISABILITY BENEFITS

[3] To qualify for CPP disability benefits, 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 is December 31, 2020.

[4] Disability is defined as a physical or mental disability that is severe and prolonged¹. A disability is severe if it renders a person 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 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.

ISSUE(S)

[5] I must decide whether the Claimant has a disability that is severe and prolonged.

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

ANALYSIS

Severe disability

The Claimant has functional limitations that affect work capacity

[6] The evidence shows that the Claimant has functional limitations that affect work capacity.

[7] The Claimant testified that she awoke early one morning in March 2018, with symptoms of vertigo, dizziness and vomiting. Her symptoms were so severe that her 7-year-old granddaughter (who was spending the night) called 911. The Claimant said that her life changed that day.

[8] Since March 2018, she has continued to have attacks of vertigo, dizziness, imbalance, and nausea with vomiting. She also struggles with brain fog. She feels her symptoms have gotten worse since March 2018 in that her attacks have become more frequent and more severe. Her symptoms have caused her to fall and injure herself. For example, she fell on August 1, 2020 and injured her ribs.

[9] The Claimant explained that some days are better than other days. What scares her is the unpredictable nature of her condition in that she never knows when an attack will occur.

[10] She is limited in what she can do. She has a new grandchild (10 months old), and she cannot care for him. She needs help just looking after herself. She rarely leaves the home because she is afraid of having an attack. She used to be “happy H. B.”, and now she is just trying to survive.

[11] I turn now to the medical evidence. It supports the existence of functional limitations that affect work capacity.

[12] In October 2018, the Claimant told her then family physician (Dr. Mana Jahromi) that she was experiencing symptoms every single day. She could not look up and down, or sit down

without having episodes of dizziness, vomiting, and waves of vertigo. She was also having difficulty with her balance. Dr. Jahromi spoke with the Claimant about her driving, and the Claimant promised not to drive until they knew what was going on with the Claimant's health².

[13] On October 30, 2018, Dr. Jahromi reported that because of the Claimant's dizziness, vertigo and balance issues, the Claimant has difficulty with daily activities and with sleep³.

[14] In November 2018, the Claimant saw Dr. Robertson, Otolaryngologist. During that consult, the Claimant explained that her vertigo is triggered by sporadic position changes such as getting in or out of bed, bending over, or looking up. The Claimant also noted issues with head motion intolerance and a pervasive disequilibrium, especially when going down stairs or trying to climb ladders. The Claimant described sensations of rotation, loss of balance, drunkenness, nausea and head foginess⁴.

[15] In February 2019, Dr. Jahromi referred the Claimant to Dr. Jason Archibald, Otolaryngologist, for assessment of the Claimant's chronic vertigo. In her referral letter, Dr. Jahromi explained that the Claimant's symptoms were "debilitating", and she explained that the Claimant was not working and not driving. She also explained that the Claimant has other symptoms, including nausea, when trying to reach above her head⁵.

[16] In April 2019, the Claimant told Dr. Jahromi that the vertigo "comes out of the blue". She reported headaches, feelings of fullness in her head, imbalance, a low, tearful mood and fear⁶.

Objective investigations are not determinative

[17] The Minister submits that the Claimant's objective investigations do not support a finding of total disability. As an example, the Minister points to an MRI of the Claimant's head, done in May 2018, which shows no evidence of any lesion, structural abnormality or acute injury⁷.

² Page GD2-88

³ Page GD2-110

⁴ Page GD2-90

⁵ Page GD2-86

⁶ Page GD2-95

⁷ Page GD3-7 at paragraph 29

[18] I agree that the MRI showed nothing remarkable, aside from a slight heterogeneity of the pituitary gland⁸. However, this is not a reason to find that the Claimant's disability is not severe. Not every disability is measurable by objective findings. Moreover, none of the health care practitioners on record has suggested that the Claimant's symptoms are exaggerated, feigned or inconsistent with an otolaryngology disease.

The Claimant has not been able to afford certain treatments

[19] The Minister submits that the Claimant's condition is treatable and that the Claimant can achieve "improved maintenance". In this regard, the Minister points out that Dr. Lam provided the Claimant with vestibular exercises for vertigo and he explained that the uncompensated vestibulopathy is best treated with physiotherapy and balance retraining⁹.

[20] I asked the Claimant if she has tried the physiotherapy and balance retraining, and she said she has not. She explained that she cannot afford the programs. I accept this explanation. The Claimant told me that she lives alone and so she does not have any other household income. She also told me that her finances are such that she had to move from her condo to an apartment and she had to sell her jeep. With respect to the sale of the jeep, the Claimant explained that she had stopped driving (for reasons related to her disability) and so it did not make sense to continue paying insurance for the vehicle).

[21] The Claimant said she tried the exercises that Dr. Lam provided to her, but they did not help. She has also joined an online support group for people with Meniere's disease and she has tried exercises recommended through that group. However, those exercises have also not helped.

The focus is not on the medical diagnosis

[22] The Minister submits that the Claimant's condition (Meniere's disease) gives rise to symptoms that are completely random and does not result in total disability for "any and all work". The Minister adds that the main issue with Meniere's disease is safety-related and so

⁸ Page GD2-117

⁹ Page GD3-7 at paragraph 30

while the disease might prevent the Claimant from doing certain jobs, it would not prevent her from doing *any* substantially gainful occupation.

[23] I have two difficulties with the Minister's argument.

[24] First, the Minister's argument seems to focus on the diagnosis. This is not a correct approach to determining whether a disability is severe. It is an applicant's capacity to work and not the diagnosis that determines the severity of the disability¹⁰. Moreover, the Claimant's specialist (Dr. Archibald) has explained that Meniere's disease does not affect everyone in the same way. He said that the disease has a wide spectrum of presentation in terms of symptom severity, frequency of attacks and prognosis¹¹.

[25] Second, the Minister has used a stricter definition of severe than what is set out in the CPP legislation. A claimant is not required to show that she is incapable of "any and all work". A claimant is also not required to show that she cannot do "*any* substantially gainful occupation". The test is whether the Claimant is incapable *regularly of* pursuing any substantially gainful occupation.

The Claimant is incapable regularly of pursuing any substantially gainful occupation

[26] The Claimant likely has days when she might be able to work. However, she also likely has days when she is incapable of working.

[27] Unfortunately, the Claimant's symptoms are unpredictable. This means that the Claimant is unable to predict in advance what days might be good days and what days might be bad days. This is a problem from an employability perspective because the Claimant would not be able to provide an employer with the predictability of attendance that an employer would require.

¹⁰ *Klabouch v. Minister of Social Development*, 2008 FCA 33

¹¹ Page GD4-2

[28] The Claimant's inability to work is also consistent¹². This is not a case, for example, where the Claimant has long periods of time where she is without symptoms of dizziness, vertigo and imbalance. Any residual capacity to work would continuously be interrupted by disability.

[29] I have medical evidence to support a finding that the Claimant's disability renders her incapable *regularly* of pursuing any substantially gainful occupation.

[30] In July 2020, Dr. Archibald reported that the Claimant has been struggling with suspected left Meniere's disease since March 2018, and that she has been getting "regular disabling attacks" of vertigo since disease onset. He explained that the episodes occur every couple of weeks, and last hours in duration, with associated nausea and vomiting. He added that the attacks are often accompanied by lingering symptoms of imbalance and unsteadiness for a few days. Significantly, Dr. Archibald concluded that the Claimant's disease is causing her "significant disability" and that the unpredictability of the vertigo renders her unable to work¹³.

[31] Dr. Archibald's opinion is deserving of weight. First, he is a specialist in the field of medicine for which the disability relates. Second, Dr. Archibald's opinion is not contradicted by any other report on file.

[32] The Minister points out that Dr. Archibald reported that the Claimant is prescribed a high dose of Betahistine (Serc) which has recently led to some improvement in the Claimant's symptoms. The Minister says that this implies the Claimant's condition is effectively treated and managed.

[33] I acknowledge that Dr. Archibald reported that the Claimant is currently taking a high dose of betahistine and has shown some improvement in her symptoms more recently¹⁴. Dr. Archibald did not explain what kind of improvement the Claimant has had, nor did he explain what "recently" means. That said, I do not see how Dr. Archibald's comment implies that the Claimant's condition is effectively treated and managed. As I said previously, Dr. Archibald concluded that the Claimant's disease is causing her "significant disability" and that the

¹² In *Maloshicky v. Canada (A.G.)*, 2018 FC 51, the Federal Court said that the question is not so much whether a claimant is able to work on a consistent basis, but rather whether the inability to work is consistent.

¹³ Pages GD4-2 to GD4-3

¹⁴ Page GD4-2

unpredictability of the vertigo renders her unable to work. Moreover, I asked the Claimant what her current dose of Serc is, and she said she takes 16 mg, three times a day. This is the same dosage the Claimant reported taking in December 2018¹⁵. It therefore does not appear as though the Claimant had increased her dosage in or around the time of Dr. Archibald's most recent report.

[34] In assessing work capacity, I have considered the Claimant's age, education, language proficiency and past work and life experience. Consideration of these factors ensures that the severe criterion is assessed in the real world context¹⁶.

[35] I acknowledge that the Claimant's personal characteristics are not likely to adversely affect her employability. She is 58 years of age and so she is getting close to an age when some people choose to retire. However, she is also proficient in at least one of Canada's two official languages. She is also well educated in that she has secondary school and college diplomas¹⁷. Finally, she has years of work experience as both a PSW and as a Teacher's Aide.

[36] Despite the Claimant's favourable employability attributes, I am unable to find that she has the ability to work. The unpredictable and debilitating nature of her attacks render her incapable regularly of pursuing any substantially gainful occupation.

Prolonged disability

[37] In July 2018, Dr. Allen Lam, Otolaryngologist, reported that the Claimant's dizziness had improved "a great deal"¹⁸. This sounds impressive. However, this statement should not be read in isolation.

[38] First, Dr. Lam's comments seem to have been made in the context of the Claimant's experience in March 2018 when she had at least a week of *continuous* dizziness with nausea and vomiting. Second, other reports on file dated after July 2018 show that the disability persists.

¹⁵ Page GD2-32

¹⁶ *Villani v. Canada (A.G.)*, 2001 FCA 248

¹⁷ Page GD2-41

¹⁸ Page GD2-115

[39] In October 2018, Dr. Jahromi reported that the Claimant's prognosis is unknown. She said the Claimant's symptoms have not improved much since March 2018, when the Claimant was hospitalized for dizziness¹⁹.

[40] In July 2020, Dr. Archibald reported that the prognosis for patients with Meniere's disease is unpredictable because the course of disease itself is unpredictable. He explained that the illness can be quite prolonged but resolves in most patients over time without treatment (70 – 80% over a seven year period). He said that he supported the Claimant's claim for long-term disability until they are able to get better control of her symptoms²⁰.

[41] Given that Dr. Archibald's report was written more than two years after disease onset and given that Dr. Archibald is unable to predict when the debilitating symptoms might resolve, it is reasonable to conclude that the Claimant's disability is long continued and of indefinite duration.

CONCLUSION

[42] The Claimant has a disability that is severe and prolonged. The date of onset of the severe and prolonged disability is March 2018, when the Claimant stopped work. Payments start four months after the date of disability²¹. Four months after March 2018 is July 2018.

[43] The appeal is allowed.

Shannon Russell
Member, General Division - Income Security

¹⁹ Page GD2-113

²⁰ Page GD4-2

²¹ Section 69 of the *Canada Pension Plan*