



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *WL v Minister of Employment and Social Development*, 2020 SST 1188

Tribunal File Number: GP-19-1773

BETWEEN:

W. L.

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: Krystal Lee

Teleconference hearing on: July 22, 2020

Date of decision: September 15, 2020

DECISION

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

OVERVIEW

[2] The Claimant was 56 years old when she applied for the CPP disability pension in March 2019. Her last job (2010-2019) was as administrative assistant at a hospital. In February 2017, she injured her right ankle while fixing an overhead light at home. She stated that she had been unable to work since January 2019 because of severe chronic right ankle pain. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] The Minister submits that the Claimant has retained work capacity and has not tried 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 ends on December 31, 2021. Because this is after the date of the hearing, I must decide whether the Claimant was disabled as of the date of the hearing.

ISSUES

[6] Do the Claimant's health conditions result in her having a severe disability, so that she is incapable regularly of pursuing any substantially gainful occupation?

[7] If so, is her disability long continued and of indefinite duration?

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

² CPP Record of Contributions: GD6-12

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] In order to succeed, a claimant must provide objective medical evidence of their disability at the time of their MQP (in this case, the date of the hearing).⁴

The Claimant's disability interferes with her ability to work

The Claimant's testimony

[10] The Claimant stated that she always has pain. The pain is always at a level of 7-10/10, where 10 is the greatest pain imaginable. Her condition continues to deteriorate.

[11] Because of nerve pain, she is unable to walk for more than twenty minutes. If she is wearing her brace, she can't walk that far because the brace causes knee pain. She can shift her weight to the left side of her body, but develops sciatica after a couple of hours. She has to take the stairs sideways and one at a time. When she is active, she experiences pain in her foot that travels up her spine to scar tissue under her arm. From there, the pain travels down her arm to her elbow. If she is too active, she is unable to put any weight on her foot afterwards. She has to stay in bed for days. This happened three times when she was still working. Now she knows the signs of trouble and limits her activity level.

[12] The Claimant stated that when she sits, her foot has to be elevated. She is unable to sit in an office chair – even an ergonomic one - for more than half an hour. She gets pain in her arms and has to lie down. She typically lies down or sits on a recliner with cushions for support. She is able to drive for only about twenty minutes before having burning pain. She has handrails on the side of the shower stall so she can balance.

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

⁴ *Canada (A.G.) v. Dean*, 2020 FC206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 CA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and *CPP Regulations*

[13] The Claimant stated that she had tried physiotherapy, but had limited coverage.⁵ She saw an orthopedic surgeon, who recommended a walking cast. She was unable to tolerate this for long. She saw a chiropractor. Nothing improved the condition of her ankle, and her foot began to hurt as well. She developed nerve pain. She tried Lyrica (for nerve pain), but had to stop because of undesirable side effects.⁶ The Claimant testified that she is generally intolerant of pain medication. In July 2017 and July 2018, she declined oral pain medication when specialists recommended them.⁷ She takes a muscle relaxant (Robaxacet) and uses a topical compound. In August 2020, Dr. Jarratt reported that the Claimant obtained partial relief from “regular pain-relieving agents.”⁸

[14] The Claimant stated that she had not tried to use any motorized mobility device, like a wheelchair or scooter. Either would mean she would have to sit. She would also have to get the device in and out of her vehicle, which would be difficult. She does not use a cane or a walker. There is no medical evidence that any health professional recommended such assistive devices for her.

[15] The Claimant testified that she wakes up ten to twenty times a night because of burning pain. She gets up and takes medication that makes her drowsy so she can go back to sleep. She is always tired. She has trouble focussing on difficult tasks. She is irritable and cries easily.

[16] The Claimant stated that she is limited in her ability to do household chores. Her husband does most of them, including most of the grocery shopping. She may throw a load into the washing machine. Her husband does the preparation for dinner, and she cooks the meal. After half an hour of standing, however, she has to sit down with an ice pack. She does nothing active for the rest of the evening. Her friends have stopped asking her to join their activities because she never knows whether she will feel well enough to go. Her life is limited to managing her pain.

The medical evidence does not entirely support the Claimant’s testimony

⁵ The Claimant CPP questionnaire details her physiotherapy, acupuncture, and chiropractic treatments: GD2-9, 17

⁶ GD4-15

⁷ GD2-73, 75

⁸ GD10-3

[17] There is no dispute that the Claimant suffers from chronic pain in her right ankle. Dr. Mary Jarratt, the Claimant's family doctor, and two physiatrists all reached this conclusion.⁹ The medical evidence up until early 2020 focused on the Claimant's foot and ankle pain. For example, in February 2020, Dr. Bosse reported that the Claimant described her pain as mainly localized over the heel and the outside of her foot. It also moved into her ankle. On examination, she had a normal range of motion in her ankle, but some tenderness there and in her foot. She reported no lower back pain. Dr. Bosse's opinion was that the Claimant had a soft tissue injury to her right ankle and continued to have chronic pain.¹⁰

[18] In August 2020, however, Dr. Jarratt stated that since 2017, the Claimant's pain had progressed and spread to different areas of her body. She had developed sciatica, which extended up her back into her neck and shoulders, and down her arms. The Claimant now had difficulties using her arms, legs, and upper back.¹¹

[19] Similarly, medical reports up to and including early 2020 described the Claimant's functional limitations in the context of her foot and ankle condition. In February 2020, Dr. Bosse reported that the Claimant walked very slowly with a limp on the right side. She stated that she could walk very slowly for 45 minutes, for example to do groceries. The Claimant also stated that she had to sit in a recliner at home with her foot well supported on a stool or cushion. Because of foot pain, she was unable to drive long distances.¹²

[20] In March 2020, Dr. Jarratt stated that the Claimant had no specific physical restrictions, but her physical capacity was limited by her pain symptoms. Her pain had prevented her from walking long distances at work. In addition, her chronic pain syndrome interfered with most recreational activities and regular tasks of life, such as housework and shopping.¹³

[21] In August 2020, however, Dr. Jarratt stated that the Claimant now had trouble getting comfortable even sitting or lying down. She was unable to sit at a table or desk for more than a few minutes at a time. She was limited in her ability to care for herself. She had developed

⁹ GD2-65, GD5-3; GD3-12, Dr. Amelia Barry, July 2017; GD3-15, Dr. Bosse, February 2020

¹⁰ GD3-15

¹¹ GD10-4

¹² GD3-17

¹³ GD5-3

depression due to the profound change in her quality of life and the likelihood that her condition would not improve.¹⁴

[22] I attach very limited weight to Dr. Jarratt's August 2020 account of the Claimant's physical condition and functional limitations. Dr. Jarratt's report did not say that she had seen the Claimant or performed a recent physical examination. She did not state that she had herself observed a significant decline in the Claimant's health condition since her report of March 2020. It is well-known that since March 2020, most family doctors have conducted appointments over the telephone because of COVID-19. If it were otherwise in this case, I would have expected Dr. Jarratt to say so. Further, there is no medical evidence of sciatica extending into the Claimant's arms, and no suggestion that the Claimant is on medication for depression or has been referred to a mental health professional for treatment. It is not apparent that Dr. Jarratt's August 2020 report is "objective evidence" that reflects a medical opinion rather than the Claimant's own report of her symptoms.

My findings

[23] The medical reports provide no objective evidence that the Claimant has difficulty sitting, and no evidence of pain radiating to her back, neck, shoulders, and arms. The only evidence of sleep disturbance is her report to Dr. A. Alugo, pain specialist, that she slept for eight hours a night, but her sleep was broken.¹⁵

[24] The Claimant testified that while she was still working, it was painful and difficult for her to walk from the parking lot to her office. It was hard for her to balance in the winter. Once in the office, she relied on her co-workers to do anything that involved walking, such as getting the time sheets or delivering the mail.

[25] I accept that the Claimant suffers from foot and ankle pain. The pain limits her ability to perform weight bearing activities. I also accept that she cannot keep her right foot on the floor all

¹⁴ GD10-4

¹⁵ GD2-68, November 2018

day, as she stated in her CPP application.¹⁶ I therefore find that the Claimant's health condition interferes with her ability to work.

The Claimant failed to prove that she lacks a regular capacity for substantially gainful employment

[26] Employability is the key measure of a severe disability under the CPP.¹⁷

[27] The Claimant testified that she had tried very hard to keep working after her February 2017 injury. She would go to bed as soon as she got home. She missed a lot of time from work. She used up all her vacation time, then took unpaid leave. In July 2017, the Claimant told Dr. Amelia Barry, physiatrist, that she had taken increasing amounts of time off when she returned to work after her February 2017 injury.¹⁸ This is the only documentary evidence of significant absences from work.

[28] The Claimant stated that she has not tried to find other work. She would be unable to do sedentary work, even from home. It would involve sitting in a chair. She would not be able to put in enough hours. She would not be a reliable employee because she can't plan her time. She could not do call-centre type work from home because she can no longer deal with irate people. She is in too much pain to focus on other people's issues.

[29] 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.¹⁹ The Claimant is 57 years old, which might limit her employment opportunities. However, she is English-speaking and has many years of steady work experience as an administrative assistant. She therefore has transferable skills.

[30] Medical reports support a finding that the Claimant would be able to perform sedentary work. In March 2019, Dr. Jarratt stated that the Claimant could not do a job where she would be

¹⁶ GD2-7

¹⁷ *Canada (A.G.) v. Dean*, 2020 FC 206

¹⁸ GD2-75. In May 2019, the Claimant informed an agent of the Minister that after her injury she worked half days for two months before resuming full-time work.

¹⁹ *Villani v. Canada (A.G.)*, 2001 FCA 248

on her feet for more than 25% of the time. She stated that she had not taken the Claimant off work.²⁰

[31] In March 2020, Dr. Jarratt stated that the Claimant had no specific physical restrictions, but her physical capacity was limited by her pain symptoms. Those symptoms meant that she could perform only sedentary clerical work. This would have to take place in a very select setting or ideally at home. The prospects of her returning to work were excellent. Perhaps she could work if she chose to use a wheelchair. However, the psychological effects of doing so would be profound.²¹

[32] In August 2020, Dr. Jarratt stated that, given the Claimant's functional limitations, she did not see how the Claimant could ever return to work. As discussed above, this opinion lacks a foundation of objective medical evidence. Dr. Jarratt also stated that the Claimant's condition was severe and prolonged.²² However, it is for the Tribunal, not a doctor, to determine whether a claimant's condition meets the severity requirements of the CPP.²³

[33] There is medical evidence to support a finding that the Claimant has retained work capacity. However, she has not attempted to return to work or find alternate work since January 2019. She therefore does not meet the requirement of showing that efforts at obtaining and maintaining employment have been unsuccessful by reason of her health condition.²⁴

[34] I am not satisfied that the Claimant lacks the regular capacity to pursue any substantially gainful occupation.

[35] Accordingly, I find that the Claimant has failed to establish that it is more likely than not that her disability is severe.

PROLONGED DISABILITY

²⁰ GD2-65-66

²¹ GD5-3

²² GD10-4

²³ *Lalonde v. Canada (MHRD)*, 2002 FCA 211

²⁴ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[36] As I found the disability was not severe, it is not necessary for me to make a finding on the prolonged criterion.

CONCLUSION

[37] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security