



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *SR v Minister of Employment and Social Development*, 2020 SST 930

Tribunal File Number: GP-19-1862

BETWEEN:

S. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: George Dietrich

Minister represented by: Alexandra Dejonge

Teleconference hearing on: September 24, 2020

Date of decision: October 2, 2020

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension to be paid as of March 2016.

OVERVIEW

[2] The Claimant was 31 years old when she applied for a CPP disability pension in February 2016. She last worked as a carpenter. She stated that she had been unable to work since May 2015 because of depression, post-traumatic stress disorder, multiple concussions, and constant widespread pain. She also stated that poor sleep and worsening epilepsy prevented her from working.¹

[3] The Minister denied her application both initially and on reconsideration. The Claimant appealed to the Social Security Tribunal. On June 3, 2019, the General Division dismissed her appeal. The Claimant appealed to the Appeal Division. On November 7, 2019, the Appeal Division allowed the appeal and referred this matter back to the General Division for a de novo hearing.

[4] In order to avoid unnecessary duplication, I treated the recording of the evidence at the initial General Division hearing as part of the evidence at this hearing. I also heard additional evidence from the Claimant as well as evidence from her mother, C. R., and her spouse, B. D.

[5] Prior to the hearing, Mr. Dietrich, the Claimant's representative, objected to my use of the recording of the previous General Division hearing. On August 19, 2020, he requested that this matter be referred to another Tribunal member. His reasons for this request are set out in IS23. On September 2, 2020, I dismissed this request. My reasons are set out in IS24.

¹ Disability questionnaire: GD2-404

TEST FOR CPP DISABILITY

[6] For the purposes of the CPP, a disability is a physical or mental impairment that is severe and prolonged.² The Claimant's disability was severe if it caused her to be incapable regularly of pursuing any substantially gainful occupation. Her disability was prolonged if it was likely to be long continued and of indefinite duration.

[7] 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).³ Her MQP – the date by which she has to prove she was disabled – is December 31, 2018. This is the last date when she had valid contributions to the CPP in four out the last six years. It is established by her contributions to the CPP as well as the Child Rearing Provision, which allowed her to exclude years that she cared for a child under seven years old.⁴

ISSUES

1. Did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2018?
2. If so, is her disability long continued and of indefinite duration?

PRELIMINARY ISSUES

[8] On July 21, 2020, I adjourned the hearing to September 24, 2020. I did this even though the Claimant had not requested the adjournment until the day before the hearing. This was because Mr. Dietrich stated he was awaiting additional documents from the provincial disability authorities (ODSP) that might be relevant to the appeal. I scheduled the new hearing date about two months after the adjournment, so the Claimant would have ample time to obtain and file the ODSP documents. In my September 2, 2020 decision dismissing the Claimant's request that this matter be referred to another member, I stated that the Claimant should file forthwith the ODSP

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

³ Paragraph 44(1)(b) CPP

⁴ Record of Contributions, GD4-12; Child Rearing Provision, GD2-32

material so that both the Minister and I would have sufficient time to review it before the hearing.⁵

[9] The Claimant did not file the ODSP material until September 21, 2020, only two days before the hearing. The additional material filed by the Claimant consisted of 259 pages.⁶ Mr. Dietrich acknowledged that his office had received almost all of the additional material by August 19, 2020. The exception was the ODSP medical form completed by Dr. Librach, which Mr. Dietrich received on September 18, 2020. In addition, much of the material duplicated documents that had already been filed. In view of this, I excluded all of IS26 except Dr. Librach's medical form.⁷

[10] On the morning of the hearing, the Claimant filed an additional 233 pages of documents.⁸ These documents were largely duplicated materials that had already been filed. In addition, the documents ran from 2012 to 2019 and were dated mostly prior to the initial General Division hearing. Mr. Dietrich was unable to explain why he had not previously filed these documents. He was also unable to explain why they were of any significant relevance. In view of this, I excluded all of IS28.

[11] Ms. Dejone, the Minister's representative, requested an adjournment so that a medical adjudicator could review the additional documents for the Minister. This request may have been reasonable if all of the documents had been admitted. However, I was not satisfied that an adjournment was necessary since I had admitted only Dr. Librach's September 2020 medical form. That form indicated that there had been no change in the Claimant's previously listed impairments and that she did not suffer from any new impairments. I was not persuaded that Ms. Dejone required a medical adjudication to respond to that report. In view of this, I refused the Minister's request for an adjournment.

⁵ IS4-2

⁶ IS26

⁷ IS26-14 to 29

⁸ IS28

ANALYSIS

Severe Disability

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

The Claimant's account

[12] In September 2014, the Claimant was injured in a car accident. She did not suffer any significant injuries and did not miss time from work. In May 2015, she stopped working because of a "grief reaction" to the deaths of her grandfather and best friend. On November 28, 2015, she suffered serious injuries in a second car accident. She has not returned to work since.

[13] At the hearing before me, the Claimant testified that she has been unable to return to work because of numerous physical and psychological conditions. She suffers from widespread chronic pain. She experiences increased seizures and falls because of her epilepsy. She has lost her left sided peripheral vision. She suffers from panic attacks, flash backs, and vehicular phobia (extreme, irrational fear of being in an automobile) because of post-traumatic stress disorder. She suffers from depression and anxiety. She isn't able to sleep.

[14] She attempted to return to work as a volunteer clerk in her mother's law office in January of this year. She did this for about four to six weeks. She tried to work for 1-2 hours a day. She wasn't able to get to the office until 11 or 12 o'clock, and was "useless" after she worked for 1-2 hours.

[15] C. R., the Claimant's mother, testified that the Claimant wasn't able to do filing at the office because this was too physically demanding. She couldn't sit or stand for an extended time. She couldn't stare at a computer screen. She had difficulty going up and down stairs. She experienced frequent seizures, and sometimes suddenly threw a pen across the room because of her twitching. Sometimes she wouldn't be able to speak - she wouldn't be able to finish a sentence and had difficulty forming words, particularly when she was fatigued. She needed constant reminders. She also had difficulty controlling her emotions and had conflicts with other persons in the office.

[16] B. D., the Claimant's spouse, testified that the Claimant suffers from constant pain. She suffers from frequent seizures during which her arms and legs shake and twitch. She has left-sided vision difficulties. When they walk, he has to stand on her left side so she doesn't walk into things. After she has a seizure, she doesn't remember what happened. She isn't able to sleep because she suffers from constant shakes and seizures throughout the night.

Medical evidence

[17] The medical evidence supports the Claimant's account. Her most significant disabling conditions are chronic pain, epilepsy, post-traumatic stress disorder, and loss of left side field vision.

[18] I must assess the Claimant's condition as a whole and consider all the impairments that affect employability, not just her biggest impairments or her main impairment.⁹ Although each of her medical problems taken separately might not result in a severe disability, the combined effect of her various health conditions may render her severely disabled.¹⁰

Initial CPP reports

[19] In a February 2016 CPP medical report, Dr. Pantin, family doctor, diagnosed back, chest and rib pain, post-traumatic stress disorder, anxiety, allergic rhinitis, and seizure disorders. His prognosis was guarded.¹¹

[20] In a March 2016 CPP medical report, Dr. Librach, family doctor, diagnosed multiple sequelae from a November 2015 car accident, cervical and thoracic spine dysfunction, left shoulder dysfunction and rotator cuff tendinopathy, pelvic musculature weakness, left hand muscle weakness, and loss of peripheral vision in the left eye. His prognosis for her to return to work as a carpenter was poor.¹²

⁹ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

¹⁰ *Barata v MHRD* (January 17, 2001) CP 15058 (PAB)

¹¹ GD2-394 to 396

¹² GD2-390 to 394

Neurologists

[21] The Claimant suffered her first seizure in October 2000, when she was 15. She suffered a second seizure in August 2001. She first saw Dr. Jichichi, neurologist, in November 2001. She had other seizures in October 2002 and February 2003. She suffered further seizures in February 2005, May and November 2006, and July 2008.¹³

[22] In December 2012, Dr. Jichichi stated that she had been doing well and her symptoms were well controlled by medication.¹⁴ In July 2015, Dr. Jichichi stated that the Claimant's epilepsy was well controlled and she had suffered no further seizures. However, the Claimant reported that she had been extremely depressed, anxious, and experiencing panic attacks since the death of her best friend. She had been off work since the end of May.¹⁵

[23] Dr. Jichichi saw the Claimant in January 2016. The Claimant reported that she had had an unprovoked seizure on November 1st, and that she had been injured in a car accident on November 28th.¹⁶ Dr. Jichichi saw the Claimant again in June 2016. She complained of frequent episodes of shooting pain and electricity like symptoms in her left arm and into her legs. These occurred up to 10 times a day. The Claimant was continuing with counseling for post-traumatic stress disorder. Dr. Jichichi was concerned that some of her symptoms may have been pseudo seizures (non-epileptic seizures that appear similar to epileptic seizures).¹⁷

[24] In August 2016, the Claimant told Dr. Morillo, another neurologist, that the frequency of her seizures had increased to about once a month from about once a year after the November 2015 accident. Dr. Morillo stated that there was no clear evidence of head trauma in the accident.¹⁸

¹³ GD2-65 to 67

¹⁴ GD2-49 to 53

¹⁵ GD2-84 to 85

¹⁶ GD2-125 to 126

¹⁷ GD2-209 to 211.

¹⁸GD2-216 to 218

[25] In a May 2017 Health Status report in support of the Claimant's application for ODSP, Dr. Morillo stated that the Claimant had been had been experiencing an increased frequency of seizures.¹⁹

Dr. Jones, psychologist

[26] Dr. Jones treated the Claimant for her mental health conditions from July 2016 until he retired in May 2019. In July 2016, Dr. Jones diagnosed query post-traumatic stress disorder, major depressive disorder, query situational driving related phobia, and somatic symptom disorder. He stated that the Claimant was experiencing a significant psychological impairment because of the accident.²⁰ In November 2016, Dr. Jones stated that the combined effect of the Claimant's epilepsy, high levels of depression, anxiety, and post-traumatic stress disorder was "devastating." The combined effect of these conditions made it "virtually impossible" for her to function in full time employment in "any occupation."²¹

[27] In February 2017, Dr. Jones stated that the Claimant's psychological symptoms included depression and anxiety attacks. She experienced flashbacks, nightmares, dissociative attachment and estrangement, and hypervigilance, as well as vehicular anxiety. He diagnosed post-traumatic stress disorder and vehicle related phobia. He stated that the November 2015 accident had aggravated her pre-existing depressive symptoms. He also stated her long-standing epilepsy complicated treatment of her post-traumatic stress disorder.²²

[28] In June 2018, Dr. Jones stated that the Claimant continued to experience significant symptoms of post-traumatic stress disorder, major depressive disorder, and vehicular related phobia. He diagnosed her physical pain symptoms as somatic symptom disorder. He concluded that she was unable to return to her previous occupation or any other gainful employment for which she was suited by age, education, and experience. He stated that the interaction of her

¹⁹ IS10-62 to 64

²⁰ GD5-105 to 108

²¹GD5-105 to 108, GD5-141

²² IS10 -74 to 79

three conditions (chronic pain, epilepsy, and post-traumatic stress disorder) resulted in a much higher degree of disability than if each of those conditions were considered in isolation.²³

Optometrists

[29] Although the cause is unknown, the evidence from the optometrists confirm that Claimant suffers from significant left field visual loss. Two optometrist provided reports to this effect between November 2016 and April 2017.²⁴

Functional limitations

[30] In her disability questionnaire, signed in February 2016, the Claimant reported difficulties and functional limitations with sitting, standing, walking, reaching, bending, left eye vision, memory, concentration, and sleeping. She did not drive because of seizures.²⁵

[31] In September 2016, Dr. Tester, chiropractor, performed a functional capacity evaluation in September 2016. He concluded that the Claimant could not physically tolerate the demands of her previous employment as a carpenter. This was because of her limits in lifting, carrying, pushing, and reaching with her left arm. In addition, she was unable to negotiate ladders or perform the lifting and carrying required by a carpenter.²⁶

[32] At the initial hearing, the Claimant testified that she was able to do only light chores around the house such as folding laundry. Even then, she had to take breaks and pace herself. Her children did the dishes and her boyfriend cleaned the bathroom, took the garbage out, took her to the grocery store, and drove the children to their activities. She couldn't predict how much pain she would be in when she woke up in the morning. She couldn't sleep for long because she would wake up "groaning and moaning" in pain. She had memory problems, and at times couldn't remember how to pronounce words. Sometimes she would forget how old her children were and lose track of time. Fatigue and stress would set off her symptoms.

²³ GD6 - 2 to 8

²⁴ GD10-62; GD10-58 to 60; GD10-77; GD10-43

²⁵ GD2-405

²⁶ GD5-113 to 140

My Findings

[33] The Minister relies on the multidisciplinary assessment reports referred to below. They were prepared for the insurer in April 2018. However, each of these reports considered the Claimant's employability based on one condition as opposed to considering the combined effect of all of her conditions.

[34] John Haratsis, physiotherapist, performed a functional abilities evaluation. He concluded that the Claimant was able to function at a light to medium physical demands level on a full-time basis.²⁷ However, his evaluation considered only her chronic pain. It did not take into account her post-traumatic stress disorder, epilepsy, and loss of left side field vision. Similarly, the orthopaedic examination report also considers only her chronic pain.²⁸

[35] The neurological examination report considers only the Claimant's increased seizures and concluded that from "a purely neurological perspective," the Claimant does not suffer a complete inability to engage in any employment for which she is reasonably suited by education or training.²⁹

[36] The neurocognitive examination report concludes that from a neurocognitive perspective alone the Claimant does not suffer from a complete inability to engage in any employment for which she is reasonably suited by education, training or experience. The report also concluded that she had no psychiatric conditions resulting from the accident that would prevent her from working. However, this report fails consider the psychiatric diagnoses of post-traumatic stress disorder, major depressive disorder, and vehicular related phobia made by the Dr. Jones.³⁰

[37] To the extent there is a conflict, I prefer the findings of Dr. Jones who had seen and treated the Claimant on 27 occasions by June 2018 as opposed to Dr. Watson who saw her only during a snap shot of time for the purpose of an assessment.³¹ In addition, Dr. Jones considered

²⁷ IS5- 43, 44 & 46

²⁸ IS5- 50, 51 & 56

²⁹ IS5-84

³⁰ See paras 26 to 28, above

³¹ GD6-5

the combined effect of all of her conditions while Dr. Watson considered only her neurocognitive conditions.

[38] I find that the combined effect of the Claimant's epilepsy, post-traumatic stress disorder, depression, anxiety, and loss of left field vision interfered with her ability to work by December 31, 2018

The Claimant has established a severe disability

[39] A disability is severe if it prevents a Claimant from pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a "real world context." This means such factors as her age, education level, language proficiency, and past work and life experiences when determining her "employability".³²

[40] The key question in CPP cases is not the nature or name of the medical condition, but its effect on a claimant's ability to work.³³ A claimant's capacity to work, not the diagnosis of her disease, determines the severity of her disability under the CPP.³⁴

[41] Ms. Dejonge acknowledges that the Claimant is unable to return to her previous physically demanding work. However, the Minister's position is that she is able to pursue alternative suitable work within her limitations.

[42] The Claimant was only 33 years old as of the December 31, 2018 MQP. This is many years from the usual retirement age. She successfully completed high school as well as a college carpentry program. She has a varied work history including working as a waitress, bartender, in a beer store, and as a carpenter. These are positive factors when considering her capacity to retrain for and/or pursue alternative less physical employment.

[43] However, she suffers from dyslexia and was diagnosed with epilepsy in her first year of high school. As a result, she required accommodations and had to repeat grade 11. She requires a longer time to read and understand. Her spelling is affected and she often misreads words. She

³² *Villani v. Canada (A.G.)*, 2001 FCA 248

³³ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

³⁴ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

types the wrong words on a computer and requires speech recognition software. She initially failed several times the only examination course for her carpentry diploma. She eventually passed because the professor sat with her in person when she did the examination. Because of these problems, she has worked only at physical jobs.

[44] The Claimant's mother testified that although the Claimant was a good student she had learning and language comprehension difficulties. This was because she had undiagnosed dyslexia. She transposed syllables. When the Claimant worked at her mother's law office, she had problems taking messages – she would transpose names and numbers.

[45] I am satisfied that because of the combined effect of her several disabling conditions, the Claimant lacks the capacity to regularly pursue any kind of substantially gainful employment. She was unable to work at her mother's law office, even for very limited hours. She suffers from numerous physical and cognitive limitations.³⁵ She could not be a regular and reliable employee.

[46] I find that the Claimant has established that it is more likely than not that she has a severe disability in accordance with the CPP requirements

Prolonged Disability

[47] The Claimant's physical and psychological disabling conditions have persisted for many years. Despite extensive treatment, there has been little improvement. The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future. I find her disability is prolonged.

CONCLUSION

[48] I find that the Claimant had a disability that was severe and likely to be prolonged disability in November 2015, when she was injured in a car accident. Payments start four months after the date of disability.³⁶ Payments start as of March 2016.

[49] The appeal is allowed.

³⁵ See paras 30 to 32, above

³⁶ Section 69 of the CPP

Raymond Raphael
Member, General Division - Income Security

ANNEX

The following documents were excluded.

1. IS26 except for Dr. Librach's medical form at IS26 -14 to 29.
2. IS28