



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AB v Minister of Employment and Social Development*, 2020 SST 990

Tribunal File Number: GP-20-307

BETWEEN:

A. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Teleconference hearing on: September 21, 2020

Date of decision: October 13, 2020

DECISION

[1] The Claimant, A. B., is eligible for a Canada Pension Plan (CPP) disability pension. Payments are to start January 2018. This decision explains why I am allowing the appeal.

OVERVIEW

[2] The Claimant last worked as a full-time health care aide from July 2001 until November 14, 2016. She indicated that she could no longer work as of that time mainly because of low back pain.

[3] The Claimant applied for a CPP disability pension on December 5, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because the Claimant had not tried alternate work suitable to her limitations and her back condition was longstanding. The Claimant appealed the decision to the General Division of the Social Security Tribunal.

WHAT THE CLAIMANT MUST PROVE

[4] For the Claimant to succeed, she must prove that she had a disability that was severe and prolonged by December 31, 2018. This date is based on her contributions to the CPP.¹

[5] A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation. It is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.²

THE REASONS FOR MY DECISION

[6] I find that the Claimant had a severe and prolonged disability as of December 31, 2018. I reached this decision by considering the following issues.

¹ The *CPP* calls this date the ‘Minimum Qualifying Period.’ See s. 44(2).

² The definition is found in s. 42(2)(a) of the *Canada Pension Plan*. The legal test is that the Claimant must prove that they are disabled on a balance of probabilities. In other words, they must show that it is more likely than not that they are disabled.

[7] Of note, the Claimant submitted GD9 just prior to the time of the hearing. The late document was a two page functional assessment report completed by Ms. Huff, physiotherapist, and dated September 16, 2020. Although the report was written well after December 31, 2018, I accepted it for consideration. Ms. Huff has been the Claimant's treating physiotherapist for some time, and the report speaks to the prolonged nature and ongoing functional limitations imposed by her condition. I have also considered the Minister's submissions related to GD9.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant has functional limitations that affect her capacity to work

[8] My decision about whether the Claimant's disability is severe is not based on her diagnoses. It is based on whether she has functional limitations that prevent her from working.³ I have to look at her overall medical condition and think about how her health issues might affect her ability to work.⁴

[9] The Claimant argues that chronic back pain results in an inability to stand/sit for more than 20 minutes, or walk for more than 5 minutes. She has to rely on a cane because of poor balance. Her condition also makes it very hard to climb stairs, bend/lift, and participate in family activities. She has had to rely on friends and family to do basic household tasks like cooking and cleaning.

[10] The medical evidence from Dr. Williamson and Dr. Gosal supports the Claimant's argument. An MRI of the back in 2017 also objectively identifies moderate disc bulges with annular tears and mild central spinal stenosis between L4 and S1.

[11] In October 2017, Dr. Williamson reported that the Claimant had a 20 year history of back pain that had worsened to the point of constant pain over the last 2 years. Prolonged sitting, standing, and walking aggravated her pain. In September 2018, Dr. Gosal reported that the Claimant had not been able to sit for long enough to allow her to complete a re-training course. She could not focus, concentrate, or find a comfortable position to study. In March 2019, shortly after the important December 31, 2018 date, Dr. Williamson reported that the Claimant still had

³ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

neck, mid, and lower back pain. He commented that she appeared to have chronic widespread pain for which interventional, pain procedures, or surgery, would not be helpful. In July 2020, Dr. Gosal reported that the Claimant had been unable to manage activities of daily living, including household chores, because of pain. Her neck pain had gotten progressively worse, she used a cane to walk, and she was quite debilitated by pain.

[12] The medical evidence shows that the Claimant had functional limitations that affected her ability to work by December 31, 2018.

The Claimant does not have work capacity

[13] When I am deciding if the Claimant is able to work, I must consider more than just her medical conditions and their effect on functionality. I must also consider her age, level of education, language proficiency, and past work and life experience. These factors help me to decide if she can work in the real world.⁵

[14] I find that the Claimant has no capacity to work in the real world. I do recognize that she was relatively young at 43 years old in December 2018. She was also fluent in English, completed high school, and a college certificate as a health care aide. However, she possessed limited transferable skills and had many functional limitations. She had only worked as a health care aide.

[15] The Claimant attempted a re-training program in computers at the Academy of Learning Career College from September 4 to 21st, 2018. At the request of her private disability insurer, she attended classes 3 hours per day, 3 days per week. The Claimant described that she was constantly having to change positions from sitting to standing and needing frequent breaks. Her pain was much worse on days that she attended class. She did not complete the program. In September 2018, Dr. Gosal reported that she had been unable to continue to re-train because of postural intolerances, lack of concentration, and lack of focus.

[16] The Claimant has demonstrated that she could not successfully re-train, even on a part-time basis. The program she attended was accommodating and only required go to class for 9

⁵ The Federal Court of Appeal held that the severe part of the test for disability must be assessed in the real world context (*Villani v. Canada (Attorney General)*, 2001 FCA 248).

hours each week. Even that was too much for her. Given the Claimant's functional limitations, limited transferable skills, and failed re-training attempt, I find that she would not realistically be employable in any competitive work environment.

The Claimant has made reasonable efforts to follow recommended treatments

[17] The Claimant has made reasonable efforts to follow medical advice.⁶ She attended physiotherapy, massage therapy, acupuncture, aquatherapy, lost 40 lbs, made diet modifications, and had prolotherapy injections. She was under the care of Dr. Williamson, a pain clinic specialist, but many of the recommended medications resulted in side effects and had to be stopped. Steroid injections did not give her any lasting relief.

[18] Dr. Williamson did initially recommend medial branch block injections. In March 2019, however, he discharged the Claimant from his pain clinic. He reported that further interventional or pain procedures would not be helpful. That is why she did not have medial branch block injections. All other treatment recommendations have been followed through on to the best of the Claimant's ability.

[19] In December 2018, the Claimant was taking an unknown blood pressure medication, thyroid medication, using fentanyl patches, CBD oil, Tylenol, and various neutraceuticals. Unfortunately, all of treatment she has had has not improved her overall functionality. No other restorative treatment has been recommended.

IS THE CLAIMANT'S DIABILITY PROLONGED?

[20] The Claimant's disability is prolonged. Her condition began many years ago, it was present when she left work in November 2016, and it continues today. Despite losing weight, medication trials, numerous conservative and invasive treatments, and numerous consultations with specialists, the Claimant's condition has not improved. Given the chronicity and worsening of her symptoms despite being off work since 2016, I do not anticipate improvement to the point that she could regularly return to any substantially gainful work.

⁶ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

CONCLUSION

[21] The Claimant had a severe and prolonged disability in November 2016, when she stopped working. However, the CPP says that she cannot be deemed disabled more than fifteen months before the Minister received her disability application. After that, there is a four-month waiting period before payment begins.⁷

[22] The Minister receive the Claimant's application in December 2018. That means that she is deemed to have become disabled in September 2017. Payment of her pension starts as of January 2018.

Tyler Moore
Member, General Division - Income Security

⁷ This is set out in s. 69 of the *Canada Pension Plan*.