



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MM v Minister of Employment and Social Development*, 2021 SST 120

Tribunal File Number: GP-20-610

BETWEEN:

M. M.

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: Monique Long

Teleconference hearing on: February 22, 2021

Date of decision: February 25, 2021

DECISION

[1] The Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension. Her payments start as of December 2017.

OVERVIEW

[2] The Claimant was 50 years old when she applied for a CPP disability pension in November 3, 2018. She was born in El Salvador. She came to Canada in June 1989. She last worked as fashion processor. She stated that she had been unable to work since June 2014 because of several conditions. These include stage four cirrhosis¹, autoimmune hepatitis, fibromyalgia, carpal tunnel syndrome, anxiety, and depression.² The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal.

[3] This is the Claimant's third application for a CPP disability pension. The Minister denied her first application made in June 2016 initially and on reconsideration. The Claimant did not appeal the reconsideration decision. The Minister denied her second application made in December 2017. The Claimant did not request a reconsideration.

[4] For the Claimant to succeed, she must prove she has a disability that was severe and prolonged by December 31, 2016. This date is based on her contributions to the CPP.³

[5] The CPP defines "severe" and "prolonged". A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.⁴ It is prolonged if it is likely to be long continued and of indefinite duration.⁵

¹ A late stage scarring of the liver caused by many forms of liver diseases and conditions. The liver damage done by cirrhosis generally cannot be undone. However, if diagnosed early and the cause is treated, further damage can be limited but, rarely, reversed.

² GD2-345, December 2017 initial CPP report of Dr. Wong, family doctor, at box three

³ Service Canada uses a person's years of CPP contributions to calculate their coverage period, or "minimum qualifying period" (MQP). The end of the coverage period is called the MQP date. See subsection 44(2) of the *Canada Pension Plan*. The Claimant's CPP contribution history is set out at GD4-15.

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

⁵ Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[6] The Minister acknowledges that the Claimant suffers from several medical conditions. However, its position is that the medical evidence does not establish that she was unable to do any type of work at December 31, 2016, when she last qualified for CPP disability.

ISSUES

1. Did the Claimant's medical conditions result in her being incapable regularly of pursuing any substantially gainful employment by December 31, 2016?
2. If so, was her disability likely to be long continued and of indefinite duration by that date?

ANALYSIS

Severe Disability

The Claimant's medical conditions interfered with her ability to work by the end of December 2016

[7] I must assess the Claimant's condition as a whole and consider all the impairments that affect her employability, not just her biggest impairments or her main impairment.⁶

The Claimant's account

[8] The Claimant testified that in early 2013 she developed pain in her abdominal area. In October 2013, she underwent surgery to remove her gall bladder. A liver biopsy then revealed that she had cirrhosis. She went back to work about six months after the surgery. Her pain started to get worse. She had severe muscle pain, aches all over her body, fatigue, migraines, and dizziness. She always felt like she had the flu. In June 2014, she stopped working. She has not been able to return to work since.

⁶ *Bungay v. Canada (Attorney General)*, 2011 FCA 47

[9] In July 2014, she was diagnosed with autoimmune hepatitis. In September 2014, she was hospitalized because of liver wall pain. In April 2015, she underwent a left carpal tunnel release. In February 2016, her daughter was diagnosed with leukemia. In July 2016, she was diagnosed with fibromyalgia.

[10] Ms. Long, the Claimant's representative, submitted that the Claimant suffers from numerous conditions and limitations. These include autoimmune hepatitis that co-exists with her cirrhosis, fibromyalgia that includes a family of myalgias, carpal tunnel syndrome, episodes of loss of awareness for which there has been no diagnosis, anxiety, and depression. The Claimant's symptoms include chronic pain in her joints and abdomen, chronic fatigue and confusion, chronic exhaustion, numbness in her hands and feet, headaches, weakness in her arms and legs, poor memory and concentration, and inability to focus.

The Medical Evidence

[11] The medical evidence is consistent with the Claimant's account. None of the medical reports suggests that the Claimant is feigning or exaggerating her symptoms. None of them suggests she is capable of returning to work.

[12] Dr. Wong has been the Claimant's family doctor since July 2013. He has written several reports running from November 2015 to September 2018. These confirm that the Claimant suffers from numerous disabling conditions. He has repeatedly stated that the Claimant is severely and permanently disabled. He has also repeatedly stated that she has been unable to work since 2014.

[13] In November 2015, Dr. Wong reported that the Claimant still had complaints of abdominal pain, dizziness, musculoskeletal pain, breathing difficulty, fainting, nausea and fatigue.⁷

[14] In his January 2016 report in support of the Claimant's initial application, Dr. Wong diagnosed autoimmune hepatitis, NASH (non-alcoholic fatty liver disease), cirrhosis,

⁷ GD2R-279

fibromyalgia (polymyalgia⁸ and polyarthralgia⁹), anxiety, depression, and bilateral carpal tunnel syndrome.

[15] He described her conditions and related symptoms as follows¹⁰:

- Autoimmune hepatitis/NASH/cirrhosis: Chronic abdominal pain, fatigue, weakness, and daily joint pain.
- Fibromyalgia/polymyalgia/polyarthralgia: Muscle and body aches throughout her body. Swollen elbows, feet, and knees. Fatigue and confusion.
- Anxiety/depression: Ongoing chronic pain has led to severe depression and anxiety. Panics if left alone. Afraid to be left alone. Providing care to daughter contributes to severe depression and increases physical symptoms.
- Bilateral carpal tunnel syndrome: bilateral hand pain. Pain radiates from left hand to left elbow. Numbness, tingling, weakness, and swelling in both hands.

[16] Dr. Wong stated that the Claimant's prognosis was poor. She had been suffering from physical symptoms since 2013 and psychological symptoms since 2016. She had been unable to work since 2014. On most days, she was unable to complete her activities of daily living without assistance from her family. She was afraid to leave her home on her own.¹¹

[17] In May 2016, Dr. Wong stated that the Claimant had to see a liver specialist on a yearly basis. She had to take azathioprine, which lowered her immunity and increased her risk from other diseases. She had five episodes of loss of awareness since June 2014. After each episode, she was fatigued, slow to respond, confused, lost memory, was sad, was scared, and was anxious. Dr. Wong stated that her prognosis remained guarded. She remained functionally limited. Dr. Wong reiterated that she was not able to return to any type of work.¹²

[18] In November 2016, Dr. Wong stated that the Claimant continued to have left hand numbness and weakness despite having undergone a left carpal tunnel release in April 2015. She

⁸ Pain affecting multiple muscles around the joints

⁹ Pain affecting multiple joints

¹⁰ GD2R-345

¹¹ GD2R-348

¹² GD2R-277

also had right hand carpal tunnel syndrome. She had right hand numbness that was worse at night.¹³

[19] Dr. Wong's December 2017 and September 2018 reports in support of the Claimant's second and current applications for CPP disability are similar to his January 2016 report.¹⁴

[20] The Claimant has seen numerous specialists. These include two neurologists, two hepatologists, a rheumatologist, a physiatrist, and an internist.

[21] The Claimant has seen Dr. Aspinall, hepatologist, on a regular basis since September 2014 for autoimmune hepatitis and cirrhosis. In August 2016, the Claimant saw Dr. Jayakumar, another hepatologist, because Dr. Aspinall was on sabbatical. Dr. Jayakumar stated that the Claimant tolerated azathioprine but was having diffuse myalgias and arthralgias. In July 2018, Dr. Aspinall stated that the Claimant was asymptomatic from the standpoint of her liver disease. She continued to take azathioprine.¹⁵ At the hearing, the Claimant stated that the azathioprine makes her susceptible to infections. It also increases her fatigue and drowsiness.

[22] In December 2014, Dr. Murphy, neurologist, stated that the Claimant had experienced five episodes of numbness, drowsiness, and fatigue in the previous six months. At the hearing, the Claimant testified that she continues to experience these episodes on a daily basis. They last for about half an hour – she just sits, stares, and feels like her brain is blank.

[23] In July 2016, Dr. Fitzgerald, rheumatologist, diagnosed fibromyalgia.¹⁶ In August 2017, the Claimant told Dr. Chiu, physiatrist, that she had pain 'everywhere.' This involved her neck, shoulders, back, arms, hips, legs, and calves.¹⁷ In October 2017, Dr. Jahanadarost, internist, stated that the Claimant had significant polymyalgia and polyarthralgia. She also had anxiety symptoms.¹⁸

¹³ GD2R-390

¹⁴ GD2R-172, 345

¹⁵ GD2S-210

¹⁶ GDR2-244

¹⁷ GD2R-229

¹⁸ GD2-232

My findings

[24] I find that the combined effect of the Claimant's physical and psychological conditions interfered with her ability to work by December 31, 2016.

The Claimant has a severe disability

[25] A disability is severe if it renders a claimant incapable of pursuing with consistent frequency any truly remunerative occupation. I must assess the severity requirement in a "real world context" and consider such factors as the Claimant's age, education level, language proficiency, and past work and life experiences when determining her "employability".¹⁹

[26] 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.²⁰ The Claimant's capacity to work, not the diagnosis of her disease, determines the severity of her disability under the CPP.²¹

[27] The Claimant was 50 years old on the MQP. She was about 15 years away from the usual retirement age. She has a grade nine education in El Salvador. Her education was in Spanish. She has no additional education or formal training. Her entire work history has involved relatively unskilled physical work. This included working in a shoe factory in El Salvador, as a dishwasher in a hotel, in a blinds factory, and lastly as a fashion processor. Her work as a fashion processor involved separating and putting clothes out on racks. She was trained to use a computer to sign in and to see instructions for placing the clothes. She was not trained to use office programs such as Word or Excel. She has at best rudimentary computer skills. She is able to communicate in English. She has limited English language reading and writing skills – she is only able to read and write with simple words. On balance, her personal characteristics limit her ability to retrain for and/or pursue alternative work.

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

²⁰ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²¹ *Klabouch v. Canada (Social Development)*, 2008 FCA 33

[28] The Claimant suffers from a constellation of disabling symptoms. These include autoimmune hepatitis, cirrhosis, fibromyalgia, carpal tunnel syndrome, anxiety, and depression. She suffers from constant muscle and joint pain throughout her body. She has limited use of her hands and regularly drops things. She suffers from constant fatigue. She has memory and concentration problems. She relies on her family for assistance with her activities of daily living. She is afraid to leave her home alone. She suffers frequent episodes of loss of awareness.

[29] Considering the cumulative effect of her numerous disabling symptoms, she could not be a regular and reliable employee.

[30] I am satisfied that the Claimant lacked the regular capacity to pursue any form of gainful employment. In view of this, she was not obliged to make efforts to pursue alternative employment.²²

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

Prolonged Disability

[32] The Claimant's disabling physical and psychological conditions have persisted for many years. She has undergone extensive treatment, with little improvement.

[33] Although some of her conditions have stabilized, no doctor has suggested that she is likely to improve to the extent that she would be able to return to work.

[34] The Claimant's disability is long continued and that there is no reasonable prospect of improvement in the foreseeable future.

[35] I find her disability is prolonged.

²² *Inclima v Canada (Attorney General)*, 2003 FCA 117

CONCLUSION

[36] I find that the Claimant had a severe and prolonged disability in June 2014, when she last worked. However, the CPP says a person cannot be considered disabled more than 15 months before the Minister receives their disability application. After that, there is a four-month waiting period before payments start.²³ The Minister received the Claimant's application in November 2018. That means she is considered to have become disabled in August 2017. Payment of her pension starts as of December 2017.

[37] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security

²³ Section 69 of the *Canada Pension Plan* sets out this rule.