



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *LR v Minister of Employment and Social Development*, 2020 SST 1235

Tribunal File Number: GP-19-1399

BETWEEN:

L. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Tyler Moore

Videoconference hearing on: November 17, 2020

Date of decision: December 2, 2020

DECISION

[1] The Claimant, L. R., is not eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

OVERVIEW

[2] The Claimant was involved in a car accident in 1987 that left her with an L4 spinal fracture and partial paralysis of her legs (diplegia). She last worked as a part-time casino hostess from August 1996 until March 1997. She indicated that she could no longer work as of July 1987 because of her leg paralysis and bowel/bladder problems.

[3] The Claimant applied for a CPP disability pension on June 12, 2018. The Minister of Employment and Social Development Canada (the Minister) refused her application because she was able to work at the casino following her accident. She only stopped working after her employer required that she do tasks that were more physical. She did not attempt to find any alternate work. The Claimant appealed 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, 1997. 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

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.

THE REASONS FOR MY DECISION

[6] I find that the Claimant did not prove that she had a severe and prolonged disability by December 31, 1997. I reached this decision by considering the following issues.

WAS THE CLAIMANT'S DISABILITY SEVERE?

The Claimant's functional limitations did not preclude all work

[7] 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

[8] I found both the Claimant and Witness to be credible. Their testimony was straightforward and candid. They argued that the Claimant's diplegia and bowel/bladder conditions have resulted in her inability to stand or walk without the support of canes/braces, and the use of a wheelchair at home. Her condition has also caused intermittent muscle spasms that lead to extreme pain and affect her ability to sleep. Her poor bowel and bladder control has led to many instances of leakage and accident.

[9] The Claimant submitted that in December 1997 she spent her days doing the dishes, prepping meals for her family, dusting, doing puzzles/games/reading, and watching television. While she could not perform physical tasks, she could do things at home that allowed her to sit. She drove a car that had modified hand controls.

[10] The Claimant has to provide objective medical evidence of her disability as of December 31, 1997. If a person fails to prove that she suffered from a severe disability prior to this date, medical evidence dated after is irrelevant.⁵ Unfortunately, the Claimant was not able to provide any medical evidence from around December 1997. She submitted that she did try to obtain

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

⁵ *Canada (A.G.) v. Dean*, 2020 FC 206, citing *Warren v. Canada (A.G.)*, 2008 FCA 377; *Gilroy v. Canada (A.G.)*, 2008 FCA 116; and *Canada (A.G.) v. Hoffman*, 2015 FC 1348; and *Canada Pension Plan Regulations*.

medical records from around that time, but was not able to. The only medical reports on file are from Dr. Egbeyemi, who first saw the Claimant in 2006. In his 2019 report, Dr. Egbeyemi noted that he could not comment on the Claimant's condition in December 1997 because he had no medical records from that time.

[11] While the oral testimony does show that the Claimant had functional limitations that affected her ability to perform physical work by December 31, 1997, supportive medical evidence is lacking. Based on available evidence, I am not satisfied that the Claimant's condition precluded her regularly from any substantially gainful work by December 31, 1997.

The Claimant had work capacity

[12] 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 could work in the real world.⁶

[13] I find that the Claimant had the capacity to work within her functional limitations and personal circumstances in December 1997. She was 36 years old and fluent in English. But, she only completed grade 10 in school. That limited education combined with her work experience only as a server and hostess meant that she had few transferable skills. Despite that, she was relatively young and a good candidate for re-training or for light accommodated work within her limitations.

The Claimant tried to a limited degree to obtain and maintain employment

[14] If the Claimant had some work capacity in the real world, she must show that she tried to obtain and maintain a job. She must also show that the attempts to work did not succeed because of her health condition.⁷

[15] The Claimant's job as a casino hostess from August 1996 until March 1997 was eventually unsuccessful in large part because her employer added physical duties that were not

⁶ 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).

⁷ This is explained in *Inclima v. Canada (A.G.)*, 2003 FCA 117.

suitable to her functional limitations. The Claimant testified that she could have continued doing the job if it had continued to only require her to greet customers and answer telephones. She could not handle the added duty of having to stand to hang coats. The Claimant stopped working when her employer could not accommodate her. She did not look for any other work.

[16] I recognize that the Claimant's bowel and bladder condition caused her to have a few accidents at work. It also meant that she had to incontinence pads on a daily basis. She also had unpredictable muscle spasms that caused her to miss some days at work, and some difficulty with constant sitting for the duration of her 4-hour work shifts. Unfortunately, she rarely got breaks at work because of how busy the casino was.

[17] There is no question that the Claimant could not have done physical work, or work that involved standing/walking in December 1997. Based on her limited work efforts and testimony, however, I am not satisfied that she could not have obtained or maintained work within her limitations.

The Claimant has made reasonable effort to follow recommended treatments

[18] The Claimant has made reasonable effort to follow medical advice.⁸ The Claimant was hospitalized for several months following her car accident in 1987, and required spinal surgery. In December 1997, she reported taking multiple daily Tylenol #4 because of muscle spasm pain. She stopped taking any pain medication in 2015, because it was making her bowel issues worse.

[19] The Claimant did not talk to her doctor about any alternate treatment options. She is not currently taking any medication or involved in any active treatment. According to the Claimant, the treatment she did have did not have much of an impact on her functionality. I accept this.

THE CLAIMANT'S DISABILITY WAS NOT SEVERE

[20] The Claimant's disability was not severe, according to the CPP definition, by December 31, 1997. There is little supportive medical evidence, and the Claimant's work efforts do not

⁸ The requirement to follow medical advice is explained in *Sharma v. Canada (Attorney General)*, 2018 FCA 48

support that she was precluded regularly from any substantially gainful work at that time. This means that I do not need to decide whether the Claimant's disability was prolonged.

CONCLUSION

[21] I am dismissing this appeal.

Tyler Moore
Member, General Division - Income Security