



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Tribunal File Number: GP-17-2708

BETWEEN:

Appellant (Claimant)

H. R.

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Claimant represented by: Lucy Jackson

Videoconference hearing on: September 17, 2018

Date of decision: November 14, 2018

Canada

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (CPP) disability pension to be paid as of December 2015.

OVERVIEW

[2] The Claimant was born in 1968. She finished Grade 12 and a finished a legal secretarial course at community college. She began working as a legal assistant in 1988 and she stopped working in December 2014. The Claimant alleges that she cannot work because of recurrent vestibulopathy (RV), depression, and anxiety. The Minister received the Claimant's application for the disability pension on November 10, 2016. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUES

[3] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by the hearing date?

[4] If so, was the Claimant's disability also long continued and of indefinite duration by the hearing date?

ANALYSIS

[5] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2019. In this case, I must decide whether it is more likely than not that the Claimant had a severe and prolonged disability on or before the hearing date, given the future MQP date.

[6] Disability is defined as a physical or mental disability that is severe and prolonged¹. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

The Claimant's disability was severe by the hearing date

[7] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether the disability prevents the person from earning a living. It's not a question of whether a person is unable to perform their regular job, but rather the person's inability to perform any substantially gainful work².

[8] I am satisfied that the evidence shows that the Claimant was unable to perform any substantially gainful work at the time of her hearing because of her medical condition.

[9] The Claimant stated that she could not work because of her medical condition as of January 3, 2015 in her Questionnaire for Disability Benefits. She stated in her Questionnaire that she had an over 50% loss of the vestibular nerve in her right ear that caused vertigo three to four times per week, followed by dizziness and balance difficulties. She reported problems with concentration and she indicated that bending and reaching caused vertigo. She had her driver's licence revoked, but it was reinstated because she was able to safely pull over before having a vertigo attack. She did not use public transportation because doing so triggered bouts of vertigo.³

[10] The Claimant testified that she began working for her most recent employer in November 2001. She worked in a fast paced environment at a major Canadian law firm. Her job required her to multi-task. Her job duties included preparing court documents, preparing and proofreading letters, and entering and preparing accounts. She spent 90% of her time at a computer. However, she has suffered from RV since about 2008 that leads to attacks of severe vertigo that makes her feel like she is strapped to the blade of a helicopter. She then experiences anxiety after

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

² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

³ GD2-137-140

an attack. She feels unbalanced. She has difficulty concentrating and suffers from blurred vision and fatigue. She continues to experience dizziness and headaches after a vertigo attack. Her symptoms after a vertigo attack last for four to five hours. The Claimant has been experiencing four to five vertigo attacks a week since her mother passed away in July 2018.

[11] The Claimant testified that she worked with accommodating lawyers when she was first diagnosed with RV in 2008. She would experience a vertigo attack every two to three months. However, her condition has worsened with time. She began falling with her vertigo attacks in 2014. The frequency of her vertigo attacks has fluctuated with time. She was getting 3 to 4 vertigo attacks a week in 2016 and then she managed to reduce the frequency of her attacks to one every 7 to 10 days in 2017, but the frequency of her attacks have grown in 2018. She believes that stress brings on vertigo attacks, along with anxiety and depression. Working on a computer can also bring on a vertigo attack. A vertigo attack can happen at any time.

[12] The Claimant testified that she was given accommodation by her employer when she was first diagnosed with RV in 2008. She was given one day a week off work. When she had a vertigo attack, she was allowed to go into an office and rest. The lawyers that she worked with would utilize other support staff when she was not feeling well. However, her vertigo attacks worsened in 2014. Her performance at work worsened. She was put on a performance review program at work in October or November 2014. The lawyers that she worked with before had left the firm. The new lawyers that she worked with were not as accommodating. She was given one day a week off, but she was not provided with an office where she could rest. Her stress increased, as did her vertigo attacks. The Claimant stopped working in December 2014 and she has not returned to work since.

[13] The Claimant testified that she began working with her long term disability carrier, Great West Life in June 2016 with respect to a return to work. She was supposed to make a return to work effort in June 2017, but her law firm terminated her employment in May 2017. The Claimant testified that the accommodations that she received in 2008 would not have worked in 2014 because her vertigo attacks were occurring with greater frequency. She has had work stress and family stress since 2014. Her mother and father suffered from poor health, which worsened her anxiety and depression.

[14] The Claimant lives with her husband. She provides care to her father who suffers from dementia whenever she can, but a personal support worker provides physical care for her father such as bathing him. She tries to perform housekeeping tasks when she feels able, but her husband has taken over many tasks. She no longer cooks. She has some difficulty with bathing and showering when she bends. Her social life has been impacted. She cannot to movies or go on amusement rides. She also misses her friends from work.

[15] The Claimant testified that she cannot work. She would not be able to work even if she received the same accommodations that she had in 2008 because her vertigo attacks have become too frequent. She used to be able to type 85 words per minute, but when she was down to 35 words per minute when she was tested in 2016.

The medical conditions and impairments that the Claimant referred to at the hearing and in her Questionnaire for Disability Benefits are supported by the medical evidence

[16] The medical evidence shows that the Claimant has undergone treatment for vertigo since 2008 and her medical condition has impacted her ability to work.

[17] The Claimant began seeing Dr. J. Rutka, Otolaryngologist in 2008. He noted in a March 25, 2008 report that the Claimant had a feeling of constant imbalance.⁴

[18] She saw Dr. N.A. Baillie at a multi-disciplinary neurotology clinic on December 17, 2008. Dr. Baillie noted that the Claimant would experience vertigo lasting for minutes that left her feeling unsteady and nauseated for most of the rest of the day. Her symptoms had improved to the point where she was having about four to five good days a week.⁵

[19] However, her vertigo worsened again in December 2014. Her vertigo episodes became more frequent and severe. She had several falls.⁶

[20] The Claimant saw Kathleen Short, Physiotherapist on July 2, 2015. The Claimant was suffering from dizziness and decreased balance. The Claimant was having difficulty focusing on computer screens and suffered from motion sensitivity. Ms. Short noted that the Claimant had

⁴ GD2-112

⁵ GD2-105

⁶ GD3-399

significant fatigue and nausea. The Claimant had been unable to work since her vertigo flare up in December 2014 or January 2015. Ms. Short advised that Claimant to avoid prolonged use of a computer and driving. She also told her to use railing when she went up and down stairs, and to avoid walking at night.⁷

[21] The Claimant saw Dr. K. McNichol, Psychiatrist for depression and anxiety on July 16, 2015 at the request of her family physician. The Claimant suffered from panic attacks. Dr. McNichol adjusted the medications that the Claimant was taking for anxiety and depression.⁸

[22] The Claimant saw Hanna Wilmer, Clinical Psychologist on October 5, 2015. The Claimant had fallen the week before this appointment. She noted that the Claimant was socially withdrawn and more irritable.⁹ The Claimant advised Ms. Wilmer that her vertigo was getting worse and she had other falls in November 2015.¹⁰

[23] Dr. Rutka noted in a November 25, 2015 consultation report that he had not seen the Claimant for approximately 5 years when he originally diagnosed her with RV. The Claimant had increasing attacks of dizziness that occurred two or three times per week, as opposed to once every two or three months.

[24] Kathleen Short, in a note dated December 22, 2015, stated that the Claimant felt very fatigued and her symptoms had increased. The Claimant was resting as needed to help manage her dizziness during the day.¹¹

[25] Dr. Rutka completed a form on February 22, 2016 for the Claimant's long term disability insurer. He stated that the Claimant might need to rest when having a dizzy attack and that she could not always be punctual. He was of the opinion that sedentary work could possibly be done depending on the frequency and severity of her dizzy spells.¹²

⁷ GD3-540

⁸ GD3-427-431

⁹ GD3-399

¹⁰ GD3-324 and 348

¹¹ GD3-556

¹² GD3-486

[26] Hanna Wilmer, in a note dated February 22, 2016, stated that the Claimant's driver's licence had been suspended and that she could not use public transportation because of vertigo.¹³

[27] Dr. Rutka wrote a letter to a government agency on March 3, 2016 stating that the Claimant could operate a motor vehicle because she had sufficient warning before a dizzy attack to safely get to the side of the road.¹⁴

[28] The Claimant saw Dr. B. Maki, Chiropractor on April 4, 2016. Dr. Maki drafted a report to the Claimant's long term disability insurer on April 11, 2016. Dr. Maki recommended a vestibular rehabilitation program and suggested that the Claimant participate in a work hardening program. The Claimant was noted to be able to sit for 20 minutes without any observed limitations. She also performed a one minute online typing test where she scored 31 words per minute.¹⁵

[29] Hannah Wilmer stated that the Claimant was attending physiotherapy and a work hardening program in a note dated April 25, 2016. The Claimant was noted to have a fear of vertigo and falling when she went out, but she was starting to go out on her own.¹⁶

[30] Dr. Rutka prepared a Medical Report to the Minister on June 10, 2016 that there were significant vestibular abnormalities noted on testing. He provided the Claimant with an unknown prognosis.¹⁷

[31] The Claimant saw Dr. McNichol on October 12, 2016. Dr. McNichol was of the opinion that the Claimant had agoraphobia secondary to her vertigo.¹⁸

[32] Dr. Rutka in a letter to the Minister dated March 23, 2017 stated that the Claimant would need to rest and wait for an attack to pass when she had vertigo. This would impact her ability to be punctual for work.¹⁹

¹³ GD3-125

¹⁴ GD2-77

¹⁵ GD3-437-440

¹⁶ GD3-83

¹⁷ GD2-66-68

¹⁸ GD3-12

¹⁹ GD2-23

[33] Dr. Rutka in a letter to the Claimant's disability carrier on March 23, 2017 suggested it might be appropriate to see whether there would be any flexibility for the Claimant to work at home at her own pace if a dizzy attack were to occur.²⁰

[34] Dr. Rutka in a report to the Claimant's legal representative dated August 27, 2017 stated that the Claimant's RV had resulted in her having objective evidence for a bilateral vestibular impairment. The Claimant's medical condition would affect her ability perform physical work. The Claimant should avoid being in unrestrained heights. He anticipated that the Claimant would feel well between vertigo attacks. The Claimant would not be able to guarantee punctuality at work when she had a vertigo attack. He stated that it was often recommended that jobs performed in the confines of her home and at her own pace would be ideally suited for the Claimant. Otherwise, accommodations would have to be made in the work workplace. He stated that after reviewing her presentation over the years, her vertigo attacks were unpredictable. He believed that it was unrealistic to expect the Claimant to return to substantially productive employment in the future.²¹

The Claimant had no work capacity prior to her hearing date

[35] I must assess the severe part of the test in a real world context²². This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[36] The Minister submitted that the Claimant had work capacity. She was seeking a return to work with her former employer. Dr. Rutka suggested that the Claimant could work from home. The Minister argues that the Claimant did not attempt alternative employment within her limitations and her appeal should be dismissed.

[37] I do not accept the Minister's submissions. I prefer the arguments advanced by the Claimant's legal representative that the unpredictability and frequency of the Claimant's vertigo makes it unrealistic for the Claimant to participate in a substantially gainful occupation.

²⁰ GD3-453

²¹ GD1-50-52

²² *Villani v. Canada (A.G.)*, 2001 FCA 248

[38] After considering all of the evidence, I accept that the Claimant was not employable in a real world context prior to her hearing date. The Claimant is 50 years old. She has a community college education. She has a good knowledge of English She has experiencing working on computers. She also has experience working a fast-paced environment. Dr. Rutka suggested that she could possibly work from home. However, I am still satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation at the time of her hearing because of impairments arising from her RV.

[39] I do not believe that the Claimant could handle any type of physical because of restrictions with bending, lifting, and walking. I also do not believe that she can handle any type of sedentary occupation because of problems with concentration. She also suffers from nausea, headaches and fatigue. Dr. Rutka seemed to suggest that the Claimant could work from home, but I accept the opinion expressed in his August 27, 2017 report that productive employment is a realistic option for the Claimant. I accept the Claimant's hearing evidence and that of Dr. Rutka's that the Claimant's vertigo attacks are too frequent and unpredictable to make substantially gainful employment a realistic option for the Claimant. Even if the Claimant were to work from home, she could not guarantee that she would be able to work on a consistent and reliable basis. The Claimant might be able to work sporadically from home, but I do not believe that she could work regularly from home. I accept that the Claimant was looking forward to a return to work with her former employer in June 2017, but she was terminated. I believe that the Claimant's desire to return to work was more an expression of wishful thinking on her part, as opposed to a realistic appraisal of her work abilities. Her ability to type had deteriorated. Even though testing showed she could type at around 30 words per minute, I do not believe that the Claimant could perform such work on a regular and predictable basis. I also think a driving job is not realistic because of the frequency and unpredictability of her vertigo attacks. I accept her evidence that the frequency and severity of these attacks has increased with time. Dr. Rutka went from providing the Claimant with an unknown prognosis in his June 2016 to a poor prognosis in his report of August 2017. Dr. Rutka stated in June 2016 that the majority of individuals with the Claimant's condition go into remission, but I am satisfied that the Claimant falls into the category of individuals who do not recover from their RV symptoms based on Dr. Rutka's

August 2017 report. I give Dr. Rutka's reports significant weight because I accept that he is an expert in the field of otology/neurotology that deals with issues of imbalance and dizziness.²³

[40] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition²⁴. I am satisfied that the Claimant stopped working at her last job in December 2014 because of her medical condition. I am satisfied that the Claimant has not had work capacity since December 2014. The Claimant stated in her Questionnaire that she was no longer capable of working as of January 2015, but she stated at her hearing that she last worked in December 2014, and I accept that evidence. The Claimant indicated that at one point in 2017, her vertigo attacks were reduced to one every 7 to 10 days, but I am satisfied that the Claimant never retained her capacity to work. She testified that her disability insurer was apparently of the opinion that she could return to work, but that opinion is not binding upon me, nor is it supported by the evidence. Dr. Rutka in his reports noted that the Claimant needed significant accommodation. I do not believe it is realistic for an employer to allow an employee to be absent from work frequently to deal with vertigo attacks. The Claimant might be able to work sporadically, but I do not believe that she ever reached the point where was capable regularly of performing any substantially gainful occupation.

The Claimant was a credible witness

[41] I found the Claimant's hearing evidence to be persuasive. She was physically uncomfortable giving evidence. I do not find that she was feigning or exaggerating her symptoms. Dr. McNichol stated that the Claimant's depression was in remission as of January 2017.²⁵ I do not doubt that the Claimant has depression and anxiety, but mental health is not her main disabling condition. It is her RV that has led to severe vertigo attacks that occur up to four to five times per week on an unpredictable basis. The Claimant's functional abilities are effectively ruined when she has vertigo attacks. Her ability to perform housekeeping tasks has been significantly impacted. I am satisfied that the Claimant suffers from a serious medical condition that precludes her from working.

²³ GD1-50

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

²⁵ GD3-7

The Claimant pursued and complied with reasonable treatment options

[42] I am satisfied that the Claimant did all that she could to seek and follow all reasonably recommended treatment options. She tried numerous medications to treat her RV. She obtained psychological and psychiatric treatment. She tried vestibular therapy. She has also been followed extensively by Dr. Rutka.

Prolonged disability

[43] I find that the Claimant has proven on a balance of probabilities that she has a prolonged disability that is likely to be long continued and of indefinite duration.

[44] The Claimant continues to suffer from RV. She remains under Dr. Rutka's care. Dr. Rutka advised that the Claimant has tried numerous medications, but all the medications failed to provide any durable remission of her vertigo attacks. Dr. Rutka is of the opinion that he has no reason to believe that the Claimant's condition would change with time. He also stated that it was unrealistic to expect the Claimant to return to employment in the future.²⁶

CONCLUSION

[45] The Claimant had a severe and prolonged disability in December 2014, when she last worked. However, to calculate the date of payment of the pension, a person cannot be deemed disabled more than fifteen months before the Minister received the application for the pension²⁷. The application was received in November 2016 so the deemed date of disability is August 2015. Payments start four months after the deemed date of disability, as of December 2015²⁸.

[46] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security

²⁶ GD1-51

²⁷ Paragraph 42(2)(b) *Canada Pension Plan*

²⁸ Section 69 *Canada Pension Plan*

