

Office of the Commissioner
of Review Tribunals
Canada Pension Plan/
Old Age Security



Bureau du Commissaire
des tribunaux de révision
Régime de pensions du Canada/
Sécurité de la vieillesse

REGISTERED MAIL

JAN 31 2001

JAN 30 2001

Hamilton, Ontario

Reference:

Dear :

NOTICE OF DECISION OF REVIEW TRIBUNAL

Attached is the decision rendered on your appeal to a Review Tribunal from the decision of the Minister of Human Resources Development Canada dated May 6, 1999.

Following the hearing held at Hamilton, Ontario on December 12, 2000, the Review Tribunal has allowed your appeal. The Review Tribunal's decision and the reasons are attached.

A party to this appeal who is dissatisfied with the decision of a Review Tribunal may, within 90 days after the day on which that decision is communicated to him/her or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board. An application for Leave to Appeal must be made in writing and addressed to:

The Registrar
Pension Appeals Board
P.O. Box 8567, Station 'T'
Ottawa, Ontario, K1G 3H9

Attached, for your information, is a copy of the Pension Appeals Board Rules of Procedure. Your attention is drawn to Rule 4 in particular.

Yours truly,

Caroline Rutter
G. Peter Smith
Commissioner

Att.

Mr. Ted Stayshyn

DECISION OF THE REVIEW TRIBUNAL

A Review Tribunal was duly constituted pursuant to Section 82 of the *Canada Pension Plan* to hear the appeal of Mrs. [redacted] from the decision of the Minister of Human Resources Development Canada dated May 6, 1999.

The three members of the Review Tribunal were Mr. Andreus Snelius, Chairperson, a member of the bar of a province, Ms. Margaret Martin-Dillon and Mrs. Sheila Knight.

The Review Tribunal was held at Hamilton, Ontario on December 12, 2000.

Having heard the parties and considered the evidence, the Tribunal has allowed [redacted]'s appeal, finding that the Appellant is disabled within the meaning of the *Canada Pension Plan*. The date of onset of disability is September 1997. Payment of disability benefits shall commence effective January 1998 in accordance with the legislation.

The reasons for the decision of the Review Tribunal are as follows:

"Mrs. [redacted] applied for disability benefits in March 1998.

A preliminary review of the Record of Earnings Summary contained in the Hearing Case File provided to the Tribunal led to an initial opinion that [redacted] as last met the Minimum Qualifying Period in December 1997. At the hearing, counsel for Mrs. [redacted] Mr. Ted Stayshyn, provided a brief relating to the Minimum Qualifying Period. That brief was entered as Exhibit A-01. A review of all of the documentation contained in that brief, the Record of Earnings Summary contained in the Hearing Case File and two additional summaries provided by the Minister's representative, Mrs. Joan Kemp, (said summaries being Exhibits M-01 and M-02) leads to the conclusion that the position of the Minister is wrong and that [redacted] as last met the Minimum Qualifying Period in December 1999.

Ultimately, even if the finding as to a Minimum Qualifying Period is wrong, [redacted] as still qualifies for disability benefits as this Tribunal has found that she was disabled. The Tribunal found that the date of onset of disability was September 1997, being earlier than the date put forward by

the Minister's representative as the date that ^s last met the Minimum Qualifying Period. The Tribunal has concluded that the disability has continued without interruption since September 1997.

Mrs. ^s is 59 years of age at the present time. She completed grade 6 in Yugoslavia and eventually came to live and work in Canada. She was employed as an industrial sewing machine operator. On September 10, 1997, Mrs. ^s was a passenger in a motor vehicle driven by her husband. The vehicle was struck from behind and the force of impact pushed the ^s motor vehicle into the vehicle in front of them. Mrs. ^s sustained significant injuries.

An overview of Mrs. ^s' medical condition is summarized under the words

"...DISABLING CONDITION & DIAGNOSIS..." on page 2 of Exhibit A-02, and is listed as follows:

1. Neck pain;
2. Shoulder pain;
3. Neck pain along the cervical spine with diffuse radiation to the shoulder girdle and upper back;
4. Degenerative disc changes at C5-6;
5. Restricted neck and shoulder movements;
6. Low back pain;
7. Numbness in both hands;
8. Jaw pain;
9. Left ear tinnitus;
10. Headaches;
11. Sleep disturbance;
12. Dizzy spells;
13. Fatigue;
14. Chronic pain;
15. Significant ^s levels ^s of ^s accident ^s related psychological impairments;
16. Depression;
17. Illness behaviour;
18. Difficulty concentrating;
19. Post-traumatic stress disorder;
20. Hypertension.

At page 3 of Exhibit A-02, there is a summary of medications taken by Mrs. ^s in the past, along with medications that she is taking at present. The medications she is taking at present are as follows:

1. Nefazodone 600 mg. a day (treatment of depression);
2. Bupropion 150 mg. b.i.d. (treatment of depression);
3. Quetiapine 100 mg. q.h.s. (treatment of certain mental conditions);
4. Lorazepam 100 mg. b.i.d. (treatment of anxiety);
5. Acetaminophen with Codeine 30-1 b.i.d. (analgesic);
6. anti-hypertensive medications.

As well, Mrs. _____ wears a prosthesis at night for jaw pain.

At pages 4 through 13 of Exhibit A-02 is a useful summary of the treatments and assessments that the Appellant has undergone.

At the hearing, evidence was given by the Appellant, _____, and her son, _____. This evidence clearly indicated that Mrs. _____, since the date of the motor vehicle accident in September 1997, has not been able to function at her pre-accident level. This is a woman who is suffering from significant depression, anxiety and pain. Her problems are of such a nature as to render her incapable of carrying out even the ordinary activities of daily living.

At the hearing, Members of the Tribunal also heard the evidence of Dr. Giorgio Ilacqua.

Dr. Ilacqua had been hired in 1999 by Trafalgar Insurance Company to assess Mrs. _____'s situation. On September 27, 1999, he wrote a letter to Trafalgar Insurance Company, which letter is found at Tab 18 of Exhibit A-02.

Dr. Ilacqua states in his letter that Mrs. _____ presents with the salient characteristics of a chronic pain syndrome complicated by depressive and anxious characteristics. He indicates that her presentation was consistent throughout the assessment and that no evident tendency to malingering emerged. It was his view that her condition impeded her recovery to pre-accident state. He felt that her physical, cognitive and emotional presentation were such that they would interfere seriously with her chances to return to her pre-accident functioning levels in the near future. It was his view that she was unable, from a psychological perspective, to return to gainful employment or to her normal activities.

It was Dr. Ilacqua's view that Mrs. _____ would improve readily with proper therapeutic intervention. As a result, he recommended that there be 16 psychotherapeutic sessions dealing with her depressive symptoms and providing coping strategies for pain.

Mrs. _____ did, in fact, undertake the therapy sessions. By letter dated May 25, 2000, Dr. Ilacqua had to report that 15 of the 16 psychotherapy sessions had taken place. Mrs. _____ is still presented most of the symptoms associated with the initial diagnosis, which was that her condition was chronic and debilitating. Dr. Ilacqua felt that Mrs. _____ was unlikely to experience a full recovery in the future given the severe and prolonged nature of her condition.

Dr. Ilacqua's evidence at the hearing was of significant assistance to the members of this Tribunal. He testified as to Mrs. _____'s co-operative nature and the fact that there was no issue of her being a malingerer. He felt that she had been committed to attempting to resolve her health problems. However, despite all steps that have been taken, it was his view that her condition had not improved to a point where she could function in a work environment. Given her condition, there would be various barriers to her being successfully employed, among them being the following:

1. It could not be guaranteed as to when Mrs. _____ would show up for work. There would be many days when she would simply not be able to work. Accordingly, there would not be a possibility of maintaining an employment schedule. According to Dr. Ilacqua, she "would have to be able to find an extremely accommodating employer".
2. Her degree of pain is such that there would be concentration problems of such degree that there would potentially be safety issues at any place of employment.
3. Her physical and mental condition would significantly limit the type and nature of work that she could perform.

Dr. Ilacqua was requested to address the submissions contained in the final paragraph of the Minister's submissions (Exhibit M-03). In that paragraph, it is stated as follows:

"...the available evidence does not support severe pathology that would render her incapable of all jobs. In the absence of a severe organic condition that could make work impossible, or that could worsen significantly if work were attempted, suitable work is not medically contraindicated in a person who has chronic pain. While it is recognized that Mrs. has depression and anxiety associated with her chronic pain, she is being treated with appropriate medications and there have been no reports from a treating psychiatrist to suggest a severe and prolonged psychiatric disorder..."

Dr. Ilacqua disagreed entirely with this submission. In his view, the barriers to Mrs. re-entering the workforce were insurmountable. He stated that she would not be able to work and was not competitively employable.

Members of this Tribunal reviewed all of the other medical information provided. A review of the documents can lead to no other conclusion but that Mrs. is suffering from chronic pain syndrome and that it is of such a degree and nature as to have a significant impact on her ability to function.

The Canada Pension Plan provides that a person may only qualify for disability benefits if the person's condition is severe and prolonged.

The word "severe" is defined to mean that the condition is of such a nature as to render the person incapable regularly of pursuing any substantially gainful employment. The term "prolonged" is defined to mean that the condition of such is to be long continued and of indefinite duration.

Dealing with severity, we conclude as follows:

1. Mrs. ' mental and physical condition is significant enough that she is incapable regularly of pursuing employment.
2. Even if Mrs. were capable of pursuing some form of employment, it would not likely be substantially gainful employment, as she could not devote herself to meeting the requirements of any part time or full time employment.
3. Because of her physical and mental condition, she is not competitively employable.

Mrs. condition is prolonged, in that it is likely to be of a long continued and indefinite duration.

The Members of this Tribunal find that the disability arose as a result of the accident and that the date of onset of disability was the date of the accident, being during the month of September 1997. Accordingly for the purpose of the Canada Pension Plan, we find Mrs. as to have been disabled as of September 1997 and that disability payments should commence, in accordance with the legislation, four months thereafter, being January 1998."

Issued at Ottawa, Ontario on January 29, 2001

Carole Rutter
/G. Peter Smith
Commissioner
Review Tribunals
Canada Pension Plan/Old Age Security