Citation: *K. A. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 6

Appeal No: CP 28929

2013 SSTAD 6 (CanLII)

BETWEEN:

K. A.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Valerie HAZLETT PARKER
HEARING DATE:	September 26, 2013
TYPE OF HEARING:	In Person
DATE OF DECISION:	October 15, 2013

PERSONS IN ATTENDANCE

Appellant	K. A.
Counsel for the Appellant	Kenneth Walton
Witness for the Appellant	T. A.
Counsel for the Respondent	Carole Vary

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DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] On July 5, 2012, a Review Tribunal dismissed the Appeal of the Respondent's decision to cease payment of *Canada Pension Plan* disability benefits to the Applicant.

[3] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the "Leave Application") with the Pension Appeal Board (PAB) on September 21, 2012.

[4] The PAB granted leave to appeal on October 31, 2012. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated September 9, 2013.

THE LAW

[6] To ensure fairness, the Appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

[7] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) Be under 65 years of age;

b) Not be in receipt of the CPP retirement pension;

c) Be disabled; and

d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[8] Section 70(1)(a) of the *Canada Pension Plan* provides that a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled.

ISSUE

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant ceased to be disabled as of January 2011 when the Respondent stopped payment of disability benefits to her.

EVIDENCE

[10] The Appellant is currently 46 years of age. She lives with her Husband T. in C. R., British Columbia. The Appellant completed Grade 12, and has worked in various positions.

[11] In 1993 the Appellant was granted a CPP disability pension. The medical documents stat that the Appellant has a tumour in her cervical spine, that could not be completely removed surgically. This tumour has caused neurological damage, such that she has lost all sensation in her right hand. When the Appellant underwent surgery to have part of the tumour removed, they discovered that she also had a syrinx in her spine.

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After the surgery she had a spinal fluid leak. This caused neurological damage affecting her right leg, such that she walks with a spastic gait. Subsequently the Appellant underwent further spinal surgery to install rods to stabilize her spine.

[12] The Appellant also suffers from Chron's disease, which was finally diagnosed after surgery in 2006. She testified that it has never gone into remission. The Appellant does not rely on Chron's disease as a disabling condition. The Appellant testified that treatment for each of her conditions exacerbates symptoms of the other. For example, fatigue from dealing with her neurological deficits causes increased Chron's symptoms.

[13] The Appellant testified that she is independent with her self-care, except that she requires assistance on some occasions to wash her hair. She has difficulty doing up clasps, buttons, etc. so her Husband does this for her. The Appellant also has trouble doing anything that requires her to use both hands, i.e. opening a jar, putting paper into a clipboard. The Appellant testified that it takes her approximately three and one-half hours from the time she rises in the morning, to ready herself for work, with assistance from her Husband.

[14] The Appellant's Husband either drives the Appellant to work if the weather is inclement, or follows her to work to make sure she gets there safely. The Appellant is unsteady on her feet, and she and her Husband are concerned that she may fall.

[15] In 2010 the Appellant fell on slippery ground as she was going in to work. This resulted in a broken left wrist and concussion, which have now healed. The Appellant testified, however, that this fall caused further functional loss, from which she has not recovered.

[16] The Appellant began to receive CPP disability benefits as of July 1993. Since then, her eligibility for this benefit has been reassessed a number of times. She was first reassessed in 1995 when she attempted, unsuccessfully, to return to work. Benefits were continued.

[17] The Appellant was again assessed in 1997 and benefits were continued as her situation had not changed.

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[18] The Appellant began to work approximately 20 hours per week for a cable company in 2000. Her benefits were terminated, but reinstated just prior to a Review Tribunal Hearing. The Respondent accepted that the Appellant was working for a benevolent employer at that time. The Appellant testified that her employer was a disabled man, and modified the job expectations for. She worked as a collection agent, but did not have a quota of calls to make as did other employees, and did not have to tear apart information sheets as did others since she was unable to do this physically.

[19] The Appellant's eligibility for CPP disability benefits was assessed again in 2005, based on her reported income for 2003. The Appellant testified that from 2002 until 2007, she worked for Surrey Crime Prevention. In this position, the Appellant and a woman who was disabled together filled one position on a job-share basis. Neither of these women had set hours, and would "cover" for the other when they were not well enough to attend work. The job duties were to be at a desk and co-ordinate volunteers who patrolled parking lots to prevent auto crime. The Appellant testified that she and her co-worker approached the Staff Sergeant who ran this program and proposed the job- share arrangement. The Appellant left this job in late 2007 due to staffing changes.
When this was reviewed by the Respondent in 2005, it concluded that the Appellant's employer was benevolent and benefits were continued.

[20] The Appellant then collected regular Employment Insurance Benefits from January 2008 to May 2008. The Appellant testified that she completed the forms stating that she was ready, willing, and able to work during this time based on her duties and accommodations from her last employer.

[21] In 2009 the Appellant began her current job. She was recommended to work as the Restorative Justice Co-Ordinator, C. R. by the Staff Sgt. for whom she had worked in Surrey. She was interviewed by him and City of C. R. staff, then hired for this position. The Appellant works with the RCMP detachment in C. R., but is paid by the City. The City Manager also works in the same building. The Appellant testified that when she was interviewed and hired, her employer knew of her physical limitations.

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[22] The Appellant testified that her job entails reviewing emails and police records daily to assess and determine whether offenders are suitable for restorative justice, which is an alternative to the traditional criminal proceedings. The Appellant interviews the parties to the offence, both offender and victim, arranges and facilitates a forum during which the offender and victim agree on how the wrong committed is to be remedied.

[23] The Appellant testified that she is unable to do some aspects of this job, and has been accommodated by her employer as follows:

- after her fall in 2010, she parks her car in a fire lane, only 20 steps from the door to the building

- the Appellant's Husband or another employee set up furniture in the room for each forum before the meeting, and return the set up to its required arrangement afterwards

- the Appellant's Husband purchases and carries the refreshments for each forum

- coworkers assist the Appellant to do up her pants when she uses the washroom

- coworkers lift and carry binders and other items for the Appellant at work

- meeting with City staff are held at the building where the Appellant work, as are forums

- the Appellant is not required to record, nor account for her hours each week

- the Appellant wears a headset when using the telephone.

[24] The Appellant produced a copy of her employment contract. It states that she is required to work six hours per day, for a total of 30 hours per week. She testified that she does not record her hours, and her employer does not expect her to, unlike other employees.

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[25] The Appellant also produced a monthly record of hours and days worked from January 2009 to March 2012. This shows that the Appellant has been late and absent from work, and has left work early on occasion. Except for just a few months, however, the Appellant has worked over 70% of the hours required of her. She also testified that if she misses time at work, she sometimes will attend on the weekend to make up this time, although she has never been asked to do this. The Appellant also schedules the forums she must conduct in the evening when she is most likely to be able to attend. She holds approximately 50 forums in a year, and has only missed three.

[26] The Appellant prepared a table setting out her income over the years, which was marked as Exhibit 2 at the hearing. The Appellant has earned income as follows:

2000 $4,848

2001 $14,405

2002 $5,243

2003 $14,560

2004 $18,819

2005 $19,144

2006 $18,720

2007 $16,411

2008 no income, only EI for part of the year

2009 $43,275

2010 $45,006

2011 $44,659

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2012 $45,482 including some self-employed income

[27] T. A. was prepared to testify for the Appellant. The Respondent, however, conceded that the Appellant has physical limitations, and requires assistance in the home, with household chores, and getting to and from work. On that basis, Mr. A. did not testify.

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SUBMISSIONS

[28] The Appellant submitted that she continues to be disabled as that term is defined by the *Canada Pension Plan*. Her employment is not substantially gainful, and the only reason she continues to work is because she has been hired by a benevolent employer, who has modified her duties and job requirements for her. She is not competitively employable.

[29] The Respondent submitted that the Appellant ceased to be disabled as of January 2011. She earns significant income, which is near the maximum pensionable earnings under the *Canada Pension Plan*. Her employment is substantially gainful. She has obtained and maintained employment within her limitations.

ANALYSIS

[30] The Respondent must prove on a balance of probabilities that the Appellant has ceased to be disabled under the *Canada Pension Plan* (*Tessone v. Minister of Human Resources Development*, CP03981, February 20, 1997).

[31] The medical facts in this case are not in dispute. The Appellant has permanent neurological damage from a tumour in her spinal cord, and associated procedures. She also suffers from Chron's disease, although this is not the basis of her disability claim. The Appellant has no functional use of her right hand, and has only some use of her left hand. She walks with a spastic gait due to losses in her right leg. The Appellant can not do tasks that require two hands. She needs assistance with some personal care and household chores.

[32] Despite her physical challenges, the Appellant has an exemplary work history. She and a colleague proposed to the Staff Sergeant in Surrey that they work together to co-ordinate a volunteer program. They did so successfully for almost five years.

[33] When the Appellant later moved to C. R., this same Staff Sargeant referred her to a position with the RCMP there. She was interviewed and hired. She continues to work as the Restorative Justice Co-Ordinator some four years later. She did not testify of any complaints about her work.

[34] The Appellant submits that she remains employed only because her employer is benevolent. Counsel provided a definition of this term based on Service Canada policy documents in argument, and takes the position that if the Appellant is only employed because she has a benevolent employer, she remains disabled. There is no case law that defines what a "benevolent employer" is, nor is this term defined in the CPP.

[35] The evidence is also clear that the Appellant has been accommodated by her employer due to her physical limitations. She has a special parking spot, a headset to use on the telephone, and requires assistance with some of the physical tasks associated with her position. The Appellant provided no evidence that these accommodations are beyond what is required of an employer in the competitive marketplace. There was also no evidence of any hardship caused to the employer by making these accommodations. Therefore, I find that although the Appellant's employer accommodated her needs, they did not do so to such an extent that it is a benevolent employer.

[36] I must next determine whether the Appellant's employment is substantially gainful. This term is not defined in the CPP. The Pension Appeals Board has consistently concluded that this term includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed (*Poole v. The Minister of Human Resources Development* CP20748, 2003). The Appellant earns $28.65 per hour in her job. She is paid well for valuable work, and her income is not nominal, or illusory. Prior to being granted CPP disability benefits, the Appellant earned less than

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$20,000 per year. She now earns more than twice that. This substantial increase in earnings is a strong indicator that the Appellant is working at a substantially gainful occupation.

[37] While the Appellant argued that the amount she earns is irrelevant, the Respondent contends that because her income is significant, her employment must be substantially gainful. In the *Minister of Human Resource Development v. Porter* (PAB CP05616 December 3, 1998) decision, the PAB concluded that while the amount earned is not determinative of whether employment is substantially gainful, it is a factor to consider. In this case, it is a strong indication that the Appellant's employment is substantially gainful. In addition, the Appellant also works regular hours each week, with some evening work.

[38] Counsel also referred me to the decision in *Minister of Human Resources and Skills Development v. C.R.* (CP28447, January 2013). This decision includes the Minister's policy document, which sets out a table of income it considers to be substantially gainful each year. This decision is not binding upon me. I am also not persuaded that a policy document should be determinative of the issue before me. I note, however, that the Appellant's current income far exceeds those amounts. This, again, indicates that the Appellant's employment is substantially gainful.

[39] When the Appellant was asked to describe her work duties, the Appellant testified as to the sedentary/non-physical aspects of her job – reviewing emails and police reports, contacting parties, interviewing them, and facilitating meetings. From this I conclude that the essential duties of her position are these, and not the physically demanding tasks such as carrying binders, and setting up a meeting room. She is able to complete these essential job tasks without assistance. This also indicates that the Appellant has capacity to work.

[40] The Appellant has been able to attend work regularly. According to the table she produced, she attends work at least 70% of the time. She uses sick days occasionally. Her employer does not require her to record her time, nor stick to a strict time schedule. There was no evidence of any complaints, nor disciplinary action by the employer because of missed time at work.

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[41] Each case must be decided on its own facts. I am, however, considered the decisions of the Pension Appeals Board. Counsel for the Appellant referred to a number of such cases in argument. Many of these cases can be distinguished from the matter before me on the facts. For example, the Appellant in the case of *Minister of Human Resources Development v. Porter* (PAB CP05616, December 1998) was a quadriplegic, who required a personal caregiver all the time. This caregiver even dialed the phone for Ms. Porter, which was a significant part of her job. In this case, the Appellant is not a quadriplegic. She is partly independent with her self care, can drive, can walk and is able to complete the essential duties of her job without assistance.

[42] The Appellant's counsel also relied on the decision of *L.F. v.Minister of Human Resources and Skills Development* (PAB CP26809 September 20, 2010). In this case the Pension Appeals Board stated that paragraph 42(2)(a) of the CPP is concerned with the capacity of an Appellant to work in a meaningful and competitive environment. It can not be said to be meaningful and competitive where an employer may have to make accommodations by creating a flexible work environment to enable the Appellant to have a job that she would not otherwise be able to do in a normal competitive work environment. To the extent that this decision speaks of what a benevolent employer might be, I find that it does not apply in this case. In that case the Appellant was 56 years old, and not working at all. In this case, the Appellant is 46. She has been working since 2009, and worked for another five years prior to that within her limitations. It cannot be said that her job has been created with such a flexible schedule that she could not complete it in a competitive environment. She works during the regular work week, although she often arrives late. She conducts forums in the evening, when convenient to her. This is not beyond what would be expected in a normal work environment.

[43] Counsel for the Appellant also argued that the Appellant can not attend work predictably, nor stay at work as long as required by the employer. In the decision of *Minister of Human Resources Development v. Clayton Bennett* (PAB CP04757, July 1997) the Pension Appeals Board concluded that predictability is the essence of regularity within the CPP definition of disabled. I agree. Based on the evidence put

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forward in this case, including the testimony of the Appellant and her log of hours worked, I find that she is able to attend work predictably and regularly.

[44] In *Boyle v. Minister of Human Resources Development*(PAB CP26809 April 29, 2003),the Appellant was only able to work 16 hours per week, and many of those hours were unproductive. These facts are very different than the facts before me. Not only is the Appellant able to work more than 20 hours per week on average, but she has done so for over four years in her current position. Her work is productive. There is no evidence to the contrary, nor any evidence that the employer is unhappy with her performance.

[45] It is clear on the evidence presented, that the Appellant has capacity to work. The Appellant has obtained substantially gainful work within her limitations, and maintained it at least since she began her current job in January 2009. For these reasons, I find that the Appellant is not disabled within the meaning of the CPP, and has not been so disabled since January 2011.

CONCLUSION

[46] The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

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