

Citation: *M. B. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 5

Appeal No: GT-117955

BETWEEN:

**M. B.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security**

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SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

TYPE OF DECISION: ON THE RECORD

DATE OF DECISION: February 27, 2014

## **DECISION**

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

## **INTRODUCTION**

[2] The Appellant's application for CPP disability was date stamped by the Respondent on April 8, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] This is the Appellant's second application for CPP disability. Her first application was date stamped by the Respondent on November 14, 2008. The Respondent denied that application at the initial and reconsideration levels and the Appellant appealed to the OCRT. The appeal was heard by a Review Tribunal of the OCRT on September 2, 2010; on October 29, 2010 reasons for decision were released dismissing the appeal. The Appellant did not seek leave to appeal that dismissal to the Pensions Appeal Board.

[4] The decision of this appeal was made on the basis of the documents and submissions contained in the hearing file because no further information is required for the Tribunal to make its decision and there is no contradictory relevant evidence.

## **THE LAW**

[5] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[6] 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).

[7] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[8] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is 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.

## **ISSUE**

[9] The Tribunal has reviewed the Record of Earnings (ROE) and finds that the MQP date is December 31, 2011.

[10] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

[11] In view of the dismissal on the merits of the Appellant's appeal to the OCRT on her first application, the Appellant must for the purposes of this hearing be considered not to have been disabled within the CPP definition as of September 2, 2010 (the date of hearing of that appeal). Accordingly, the onus is on the Appellant to establish that during the period between September 2, 2010 and December 31, 2011 (the window period), there was a material change and deterioration in her condition to establish that, although she was not disabled as of September 2, 2010, she was disabled as of December 31, 2011.

## **EVIDENCE**

[12] In the disability questionnaire in support of this application which was date stamped by the Respondent on April 8, 2011, the Appellant indicated that she last worked as a labourer for Sklar-Peppler Furniture from November 5, 1975 until February 22, 2008; she noted that she stopped working because of a layoff. The Appellant claimed to be disabled as September 11,

2008 and listed her disabling conditions to be degenerative disc disease of the lumbar spine, bulging disc deterioration in her back, and shoulder pain. Her treating physicians are listed as Dr. Barrettara, her family doctor, who she last saw in March 2011; Dr. John, physiatrist, who she last saw in May 2010; and Dr. Sharda, chiropractor, who she last saw in May 2010. Her medications were Tramacet and Flexeril, she was not undergoing any treatments, and no future treatments or medical investigations were planned.

[13] A medical report dated March 21, 2011 from Dr. Barrettara, the Appellant's family doctor, was filed with the CPP application. This report diagnosis degenerative disc disease of the lumbar spine with L4-5 disc herniation/annular tear; bilateral adhesive capsulitis of the right and left shoulders; and degenerative disc disease of the cervical spine. The report indicates that that no further consultations or investigations are planned. The prognosis is poor.

[14] There are no other medical reports in the hearing file during the window period from September 2, 2010 to December 31, 2011. The only investigations are x-ray reports dated March 14, 2011. The x-ray reports of the shoulders reveal no bone or joint abnormality and no calcification. The x-rays of the spine reveal degenerative disc disease at C5-6; minimal changes at C6-7; scoliosis and degenerative disc disease at L4-5; and lumbar rotational scoliosis.

[15] The only other medical report in the hearing file subsequent to the September 2, 2010 hearing date is a report from Dr. Barrettara dated September 25, 2013 which updates the Appellant's medical conditions. This report notes the Appellant's continued complaints of constant neck, shoulder, and back pain, and headaches. The report notes her current limitations, and concludes "Her diagnosis *still remains* (emphasis added) degenerative disc disease of the cervical spine, worsened. Degenerative disc disease of the lumbar spine with L4-5 disc herniation and annular tear, worsened. Bilateral adhesive capsulitis, same. Tension headaches, worsened, and sleep disturbance, worsened."

[16] A careful review of the September 2, 2010 decision makes clear that the Review Tribunal considered the appeal on the merits after hearing oral evidence from the Appellant and after reviewing extensive medical documentation including three reports dated from November 16, 2008 to August 2, 2010 from Dr. Barrettara; two reports from Dr. Sharada, chiropractor, dated from October 2008 to June 2009; four reports from Dr. John, physiatrist, dated from September

10, 2009 to March 18, 2010; and numerous imaging reports including x-rays, a MRI, and an ultrasound.

[17] The conditions set out in the Appellant's current application and in the supporting medical report from Dr. Barrettara are discussed in detail in those reports. Dr. Barrettara's August 2, 2010 report states that the Appellant continues to suffer from low back pain, left shoulder pain, and has now developed neck pains. Dr. John's May 18, 2010 report indicates that the Appellant has an over 25 year history of low back pain which progressively became worse, that she has constant pain, that the pain radiates to her upper back and shoulders, that she has neck pain at times, and that she also gets occipital headaches.

[18] The Review Tribunal accepted that the Appellant has several medical issues, and focused on whether her medical conditions were severe. The Review Tribunal expressed concerns about inconsistencies and vagueness in the Appellant's testimony; it noted that she had stopped working for non-medical reasons because the plant shut down, that she was in receipt of regular Employment Insurance benefits until November 2008 which indicated that she was ready and willing to work, and that she had testified that she never looked for work. The Review Tribunal found that "although the Appellant likely had ongoing limitations occasioned by medical problems, she was not necessarily rendered incapable of all work as at the date of her hearing and beyond." The Review Tribunal concluded that the Appellant's medical problems were not severe as defined by the CPP as at the date of hearing.

## **SUBMISSIONS**

[19] The Appellant submitted that:

- a) She is afflicted with a severe spinal impairment which seriously affects her activities of daily living, and precludes sustainable modified work.

[20] The Respondent submitted that:

- a) The additional medical evidence submitted by the Appellant for the second application does not support an incapacity for all work;

- b) There are no objective investigations or examination findings to support that the Appellant became severely disabled during the period from September 3, 2010 to December 31, 2011.

## **ANALYSIS**

[21] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

### **Severe**

[22] A decision of the Review Tribunal is final and binding. The doctrine of res judicata applies to the September 2, 2010 Review Tribunal decision. A review of that decision shows that it was on the merits and that there was a finding that the Appellant had not established that her disability was severe as of that date. Accordingly, for the purposes of this hearing this Tribunal must proceed on the basis that the Appellant's disability was not severe as of that date, and the focus of this inquiry is to determine whether there was a change in the Appellant's condition during the window period between September 2, 2010 and December 31, 2011 such as a marked deterioration of her condition or a significant new medical problem to establish that her disability was severe and prolonged as of December 31, 2011: *MHRD v Boudreau*, (February 28, 2003), CP 14752 (PAB) and *Leblanc v MEI*, (August 2, 1996), CP3694 (PAB).

[23] The Appellant has the burden of proof and it is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB).

[24] There is only one medical report (Dr. Barretara's March 21, 2011 report) during the window period, and this report does not set out any marked deterioration or any new medical problems. The medical conditions diagnosed in that report were thoroughly canvassed by the Review Tribunal and this report does not differ in any significant way from Dr. Barretara's previous reports. The x-rays taken March 14, 2011 do not reveal any severe pathology; there is no specialist report interpreting those x-rays; and they do not differ in any significant way from the x-ray reports and other imaging studies that were before the Review Tribunal. Dr. Barretara's

September 25, 2013 report is close to two years after the MQP; it does not speak to her condition as of MQP date; it does not reveal any new conditions; and it does not establish a marked deterioration of the Appellant's conditions during the window period between September 2, 2010 and December 31, 2011. At most it contains vague statements as to some of the Appellant's conditions having been deteriorated, but does not indicate when and to what degree there was deterioration.

[25] The Tribunal also noted that there are no specialist consultations and investigations during the window period, or at any time thereafter. There is no significant change in the Appellant's medications and no treatments. Further, no further treatments or specialist consultations are planned. The Tribunal also noted that in her CPP questionnaire the Appellant took the position that she was disabled as of September 11, 2008. This date is two years before the Review Tribunal found that she was not severely disabled. That finding is binding on this Tribunal. Nowhere in the materials is there any indication by the Appellant that the onset of her disability was during the window period.

[26] This Tribunal finds that based on the totality of the evidence, and having regard to the doctrine of res judicata, the Appellant has failed to provide credible and supporting evidence to establish on the balance of probabilities that she was severely disabled as of the December 31, 2011 MQP date.

### **Severe**

[27] Having found that the Appellant's disability was not severe as of the December 31, 2011 MQP date, it is not necessary to make a determination on the prolonged criteria.

### **CONCLUSION**

[13] The appeal is dismissed.

Raymond Raphael General  
Member, General Division