Citation: *R. S. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 13

Appeal No: CP29025

BETWEEN:

R. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

APPEAL MEMBER:	OUDIT NARINE RAI
HEARING DATE:	October 17, 2013
TYPE OF HEARING:	IN PERSON
DATE OF DECISION:	December 17, 2013

PERSONS IN ATTENDANCE

Appellant	R. S.
Counsel for the Appellant	Rajinder SinghJohal
Counsel for the Respondent	Mathieu Joncas
Expert Witness for the Respondent	Dr. Micheline Begin

INTRODUCTION

[1] The Appellant has applied for a Canada Pension Plan disability pension on the basis that arthritis in both of her knees and her back pain has rendered her disabled and that this disability is severe and prolonged.

[2] The Appellant's Application for a *Canada Pension Plan* (the "CPP") disability pension was date stamped by the Respondent on July 16, 2010. The Respondent denied the Application at the initial and reconsideration levels. The Appellant then appealed to the Office of the Commissioner of Review Tribunals. On September 27, 2012, a Review Tribunal determined that a CPP disability pension was not payable and dismissed the Application.

[3] The Appellant filed an Application for Leave to Appeal the Review Tribunal decision with the Pension Appeal Board (PAB). The PAB granted leave on February 25, 2013.

[4] Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Social Security Tribunal is deemed to have granted leave to appeal in this case on April 1, 2013.

[5] The hearing of this appeal was done in person for the reasons given in the Notice of Hearing sent to the parties on August 22, 2013.

[6] To ensure fairness, the Appeal was 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 was made on the basis of an appeal *de novo* in accordance with subsection 84(1) CPP as it read immediately before April 1, 2013.

ELIGIBILITY REQUIREMENTS

[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).

ISSUES

[8] The CPP is a contributory regime. Applicants are only eligible for disability, benefits if they have made a minimum number of years of contribution to the CPP. This is known as the MQP, and it is calculated according to the provisions of the CPP at the relevant time. 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.

[9] There was no issue regarding the MQP because the parties agreed at the commencement of the hearing that the MQP date is December 31, 2011. The Tribunal 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. Accordingly, the onus is on the Appellant to prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

[11] 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. Paragraph 42(2)(a) is reproduced below:

> ***42.****(2)(a) For the purposes of this Act*
>
> *(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,*
>
> > *(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and*
> >
> > *(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.*

EVIDENCE

The evidence in this proceeding is comprised of the oral testimony of the witnesses, the contents of the Hearing Book, and the Exhibits. The Hearing Book contains a variety of documents and reports, including medical reports, independent reports, assessments, and diagnostic imaging reports, most of which were submitted by the Appellant. The Hearing Book also contains documents submitted by the Respondent. The following Exhibits were also filed at the hearing:

Exhibit 1: Letter from Dr. Begin to Dr. Mand dated August 27, 2013. Exhibit 2:

Report from Dr. Mark P. Angelini dated November 15, 2012. Exhibit 3:

Curriculum Vitae of Dr. Begin.

Exhibit 4: Letters from Mathieu Joncas to Nancy LePitre dated October 3, 2013 which includes the Summary of Proposed Testimony of Dr. Micheline Begin.

[12] The significant facts, background, and evidence are summarized in the paragraphs below.

Discussion of the Appellant's case

[13] The Appellant was born and raised in India. She obtained a Bachelor of Science and Bachelor of Education degrees in India. The language medium for both degrees was English. The Appellant testified that she worked as a teacher in a public school in India for about four to five years before migrating to Canada, with the medium of language being Punjabi. The Appellant was 52 years old on her MQP date and is 54 years old at the time of this hearing.

[14] After arriving in Canada, in or around 1989 the Appellant obtained employment as a manual labourer performing pressing and packaging duties. This job lasted for 6 to 7 months. In 1990 the Appellant obtained a labourer job at a plastic company. In 1993 the Appellant obtained employment with an auto parts company and worked there for about 5 years until 1999 when she was laid off due to the closure of the plant. In 2000 the Appellant began working for MSV Plastics on the assembly line. She stopped working on June 17, 2008 because of pain in her right knee. For 8 to 9 months prior to her stopping work, the Appellant experienced pain in her right knee.

[15] The Appellant testified that after she began to experience pain in her right knee, she saw Dr. Gurpal Mand, her family doctor, who advised her that she had arthritis in her knee. Dr. Mand did not order an ex-ray and did not prescribe any medication. The Appellant was placed on modified light duties at her place of employment for the next 8 to 9 months. During this time, she massaged her knee with mustard oil 2 to 3 times per week.

[16] The Appellant testified that after she stopped working on June 17, 2008, Dr. Mand referred her for a whole body scan and prescribed Naproxen. The Appellant next saw Dr. Turchin, an orthopaedic surgeon. She continued to see Dr. Turchin every month for the next while. Dr. Turchin continued her on Naproxen but later changed her medication because she was not getting much relief from Naproxen. Dr. Turchin advised her that her condition was progressively getting worse.

[17] The Appellant was referred to Dr. Shaila Kaloni, a rheumatologist, with whom she consulted in or around June 2009. The Appellant testified that Dr. Kaloni prescribed Tylenol and referred her to physiotherapy. I note that at page 113 of the Hearing Book there is a handwritten report from Dr. Kaloni to Dr. Mand dated June 30, 2009, where Dr. Kaloni stated that the Appellant's current medication was Naproxen 500 mg and Tylenol No. 2, but the plan was for the Appellant to use Voltaren 75 mg and Pennsaid, with an MRI referral. Physiotherapy was also recommended. In the addendum, Dr. Kaloni indicates that the patient was seen on November 16, 2009 and also on January 20, 2010, with no improvements, and Mobicox was recommended.

[18] The Appellant states that she continues to attend physiotherapy to this date even though she only gets about half an hour relief. The sessions lasted half an hour and were done two times per week. The physiotherapy included the use of machines, ultra sound, lazer and heat pads.

[19] The Appellant testified that she was unable to do home exercise as recommended by her physiotherapist because of her knee pain and back pain. Under cross examination, the Appellant stated that she tried weights but she is unable to do weight related exercise because of her pain. She testified that she however does exercises which involve raising her legs and keeping her feet in a vertical position.

[20] The Appellant testified that due to her back and knee pain, she is unable to bend, and can stand for only half an hour. She usually walks inside her home for 5 to 10 minutes. She also usually walks outside her home for 5 to 10 minutes. She climbs the stairs once in the morning and once in the night.

[21] The Appellant testified that Dr. Pandhi injected both knees once but the injection treatment did not result in any relief to her knee pain.

[22] The Appellant testified that Dr. Mand prescribed sleeping pills which she has been using for the last 6 months to a year.

[23] The Appellant described how she spends a typical day. She wakes up around 8 or 9 am, eats breakfast then watches, television, reads, newspapers, prays on her

couch, has lunch, cleans the counter top and after lunch, after dinner she would watch television and then retire upstairs.

[24] The Appellant has two boys, 23 years old and 16 years old who are capable of taking care of their own needs. Her husband works 3 to 4 days per week. He leaves home between 3 am and 4 am. He does the cooking but the boys also assist with preparing dinner. The Appellant contributes a little bit with dinner preparation.

[25] The Appellant testified that her reaching is okay. However, she can only do a little bit of lifting. She is able to comb her hair. Her husband assists her with putting on her clothing.

[26] The Appellant indicated that she saw Dr. Mark Angelini on January 4, 2013, for both knees and that Dr. Angelini advised her against doing knee surgery. Under cross-examination the Appellant testified that during the latter months of 2012, she enquired about surgery and it was then that a referral was made to Dr. Angelini. I note that there is no report from Dr. Angelini.

[27] Under cross-examination the Appellant testified that she visited India in 2007. She also visited India in 2011 for two months. In India she stayed with her parents, did not do any activities and did not attend temple. The trip from the airport to her parent's residence was 7 hours by car.

$10,000.00 Reported Income in 2011

[28] The Service Canada statement of earnings produced by the Respondent indicated that the Appellant had $10,000.00 income in 2011. Under cross examination the Appellant insisted that she did not work in 2011 and that her husband must have included the $10,000.00 which is reported in her 2011 Income Tax Returns. The Appellant also indicated that her husband has his own flyer distributing business.

[29] On October 17, 2013, after the conclusion of the hearing, the presiding member made an endorsement for the Appellant to produce a complete copy of her 2011 Income Tax Returns and Notice of Assessment by no later than October 31, 2013, as

the requested information is relevant to determine whether the Appellant is entitled to CPP disability benefits. The Tribunal provided the parties with the endorsement by letter dated October 18, 2013. By way of letter dated October 29, 2013, counsel for the Respondent objected to the production request taking place after the hearing.

[30] By way of letter dated October 31, 2013, the Tribunal provided counsel for the Minister with a copy of the Appellant's 2011 Income Tax Returns and Notice of Assessment. The Tribunal has not received any further submission from the Respondent in this regard despite the passage of more than a month.

[31] The Appellant's 2011 Income Tax Returns were transmitted electronically to the Canada Revenue Agency, as is evident from the confirmation letter from Buttar and Associates, which is attached with the 2011 Income Tax Returns and Notice of Assessment documents provided by the Appellant. As such, the Appellant did not sign her 2011 Income Tax Returns. No business expense is claimed on the Statement of Business Income or Professional Activities which reported the $10,000.00 income. The reasonable inference from the lack of any business expense whatsoever is that the Appellant was not involved in a business activity. The $10,000.00 income is not reported as T4 employment related income. I accept the Appellant's testimony that she did not work in 2011.

Testimony of Dr. Begin

[32] Dr. Begin reviewed the Appellant's medical reports and prescribed medications. The testimony of Dr. Begin assisted the Tribunal with its interpretation of the medical reports and medication.

[33] Dr. Begin testified that surgeons prefer to defer knee operation as late as possible because they do not want to repeat the surgery and that benefits of the surgery could last for 25 years. According to Dr. Begin, it was reasonable for the Appellant to defer the surgery.

[34] Dr. Begin is also of the view that home exercise is beneficial as it maintains functionality and this helps with the pain. In other words, the Appellant has to endure the pain that comes with exercise to obtain the benefits.

[35] Dr. Begin testified that if the Appellant was her patient, she would recommend that the Appellant return to work as her condition allows her to do some sort of sedentary duties.

Medical, Diagnostic, Imaging, and Assessment Reports

[36] As mentioned above, the Hearing Book contains various medical related documents and reports. While I have carefully reviewed all of these documents and reports, it is not necessary to refer to all of them. In *Simpson v. Canada (Attorney General)* 2012 FCA 82 (CANLII), the court indicated that the reviewing tribunal is presumed to have considered all of the evidence before it and does not have to refer to each and every piece of evidence in the decision.

[37] The x-ray done on June 18, 2008 shows no bone or joint abnormality (Tab A p. 49).

[38] The Bone Scan of August 14, 2008, revealed arthritis in both knees, worse on the right than left. Degenerative synovitis is also noted (Tab A p. 55).

[39] The blood test results of October 22, 2008, shows a Rheumatoid Factor Serum of 12 (Tab A p. 63). This according to Dr. Begin rules out inflammatory arthritis and the Appellant is left with a degenerative arthritic process.

[40] On September 10, 2008, Dr. Turchin reported that the Appellant remains unable to stand for long periods of time due to her knee pain and that she has difficulty standing up from a seated position (Tab A p. 58).

[41] The left knee x-ray report of May 25, 2009, indicates that “no bone abnormality is seen” (Tab A p. 66). According to Dr. Begin, the interpretation of the x-ray result is that the degenerative process has not touched the bones at that stage.

[42] On December 12, 2009, an MRI was done at the William Osler Health Centre (Tab A p. 69). According to Dr. Begin, the result of the MRI indicates that the arthritis in the left knee is getting worse but “it is not severe or very severe”.

[43] Dr. Mand completed a CPP medical report on June 10, 2010 (Tab A pp. 73 - 76) where he indicated that the diagnosis is bilateral knee osteoarthritis, back pain and “DDD”. I note that DDD or Degenerative Disc Disease is not noted in the findings of any of the x-rays or scans. Dr. Mand states the prognosis to be gradual worsening of the condition.

[44] Dr. Begin reviewed the Echocardiography results (Tab A pp. 81 – 82) and the Appellant’s clinical notes (Tab A pp. 87-106) and noted that the patient’s high blood pressure is under control with medication and control of the high blood pressure also assists in controlling the reported Left Ventricular Hypertropy.

[45] An analysis of the Appellant’s pharmacy records indicate that the Appellant is treated conservatively for her pain and arthritis, with a low dose of Lenoltic 15mg, Meloxicam 15 mg and Naproxen.

CASE LAW REVIEW

[46] To be eligible for a disability pension under the Canada Pension Plan (the “*Plan*”), the Appellant must satisfy two requirements. The Appellant must have made valid contributions to the *Plan* for a minimum qualifying period, and the Appellant must prove that the disability is severe and prolonged as defined in paragraph 42(2)(a) of the *Act.* To be classified as “severe” the disability must render the applicant incapable of regularly pursuing any substantially gainful occupation. It will be “prolonged” only if it is determined to be long continued and of indefinite duration, or likely to cause death.

[47] The CPP is a social benefits conferring legislation which ought to be interpreted in a broad and generous manner. In Canada, courts have been careful to apply a liberal construction to social legislation. In *Rizzo v. Rizzo Shoes* 1998 1 S.C.R. 27, at paragraph 36, the Supreme Court emphasized that benefits-conferring legislation

ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant.

[48] In the Federal Court of Appeal case of *Canada (MHRD) v. Rice*, 2002 FCA 47, the court stated that the purpose of the *Canada Pension Plan* disability provisions is to provide individuals who have been disabled with a disability pension, in accordance with the legislation, because they are incapable of pursuing regularly any form of substantially gainful employment. At paragraph 13 the court also stated that the disability provisions are not a supplementary insurance scheme.

[49] The CPP was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution, *Granovsky v. Canada (Minister of Employment and Immigration)* 2000 SCC 28.

[50] The Federal Court of Appeal in *Canada (MHRD) v. Henderson*, 2005 FCA 309 determined that section 42 is aimed at assisting people with "long-term" disability and not to "tide over" those with short term problems.

[51] In *Villani v. Attorney General of Canada* 2001 FCA 248, Isaac J.A. delivered the judgment which favoured this "real world" test. At paragraph 38 he said:

> Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupation which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[52] At paragraph 39 of the same decision, Isaac J.A. said:

> …on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world." It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute.

[53] At paragraph 42 he continued:

> The test for severity is not that a disability be "total." In order to express the more lenient test for severity under the Plan, therefore the drafters introduced the notion of severity as the inability regularly to pursue any gainful occupation… the clear intent of the drafters all indicate with equal force that the crucial phase in subparagraph 42(2)(a)(i)'s severity definition cannot be ignored or pared down.

[54] At paragraph 50 he said:

> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants must still be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[55] In *Minister of Human Resources Development v. Scott,* 2003, docket A-117-02, Strayer J.A., speaking for the Federal Court of Appeal, at paragraph 7 said:

> "With respect I believe that the Board made an error of law in stating the test as being whether the appellant is "incapable of regular employment"… the test of whether a disability is "severe," the issue here is stated by the statute to be whether the person "is incapable regularly of pursuing any substantially gainful occupation…" It is the incapacity, not the employment, which must be "regular" and the employment can be "any substantially gainful occupation."

[56] In *Inclima v. Attorney General of Canada* 2003 FCA 117, Pelletier J.A., speaking for the court, said at paragraph 2:

> "S.42(2) of the Canada Pension Plan, supra, says that a person is severely disabled if that person "is incapable regularly of pursuing any substantially

gainful occupation." In *Villani v. Canada* 2002 1 FC 130 at paragraph 38, this court indicated that severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment."

[57] In *Inclima* the court also stated that:

> "Claimants still must be able to demonstrate that they suffer from a 'serious and prolonged disability' that renders them 'incapable regularly of pursuing any substantially gainful occupation'. Medical evidence will still be needed as will evidence of employment efforts and possibilities. Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition."

[58] In *Klabouch v. Minister of Social Development* 2008 FCA 33 the Federal Court of Appeal reiterated that:

> "…the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether the disability "prevents him from earning a living"… In other words it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP."

[59] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP. The focus should be on any substantially gainful occupation having regard to the Appellant's personal circumstances and not on whether real jobs are available in the labour market. In C*anada (MHRD) v. Rice*, 2002 FCA 47, the court stated that:

> "When the words of subparagraph 42(2)(a)(i) are considered, it is apparent that they refer to the capability of the individual to regularly pursue any substantial gainful occupation. They do not refer to labour market conditions."

APPELLANT SUBMISSIONS

[60] The Appellant submitted that she is eligible for a CPP disability pension because of her medical condition which has resulted in her inability to move around and difficulty to get to work. The Appellant also submitted that her age and language

difficulties are real world barriers to obtaining employment and to be retrained. Accordingly, the Appellant is incapable of performing any regular gainful employment.

RESPONDENT SUBMISSIONS

[61] The Respondent submitted that the Appellant does not qualify for a disability pension because her medical disability is not severe as of the MQP date and that even if it was severe, the prolonged test is not satisfied because the Appellant's medical condition is under control with ongoing treatment and the Appellant has delayed her knee surgery. Also, the pharmacy records indicate that the narcotic medication the Appellant is treated with is mild and not consumed on a regular basis.

[62] The Respondent submitted that an adverse inference ought to be drawn from the Appellant's failure to produce her 2011 Income Tax Returns in order to verify the nature of the $10,000 income which is shown on the statement of income produce by the Respondent from Service Canada.

[63] The Respondent further submitted that the Appellant's disability is not severe or prolonged because the Appellant's medical condition did not prevented her from taking a long plane trip to India and a long car trip in India. Furthermore, the Appellant did not attempt to seek employment and by doing so has failed to satisfy her obligations under the *Inclima* test.

ANALYSIS

[64] The onus is on the Appellant who must prove on a balance of probabilities that her disability is a severe and prolonged disability, as defined in the CPP, on or before the MQP date of December 31, 2011.

[65] I would point out that the provisions of other public and private plans for disability pensions or other periodic payments vary from those involved here. The legislated rules discussed above that determine eligibility for a disability pension under the CPP are strict and inflexible. However, although the threshold for a disability pension under the CPP is a high and stringent one, it is not an insurmountable threshold.

Severe Criterion

[66] The severe criterion must be assessed in the real world context as discussed above in the *Villani v. Canada* case. This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of occupation, language proficiency, and past work and life experience. In this case, the Appellant was 52 years on her MQP date, she is educated with two degrees but notwithstanding the fact of her education she was only able to obtain employment as a labourer since coming to Canada. The Appellant's language barrier and non-fluency in English did not prevent her from obtaining gainful employment in Canada. The Appellant's pain is mostly restricted to her knees and is being treated conservatively.

[67] The Appellant has an onus to provide the Tribunal with updated medical information right up to the date of the hearing. There is no updated medical information after the June 10, 2010 medical report provided by Dr. Mand despite the passage of almost 28 months.

[68] The Appellant was referred to and did see Dr. Mark Angelini in January 2013. However, the Appellant did not file any report from Dr. Angelini. It is quite possible that Dr. Angelini reported his findings to Dr. Mand. The Appellant could have obtained a report from Dr. Angelini and provided this to the Tribunal but failed to discharge this onus.

[69] The Appellant's arthritic condition is restricted to osteoarthritis in her knees. Her pain appears to be under control with medication. Although the Appellant referred to pain in her back, it is not supported by any clinical evidence. I find that the Appellant has work capacity and her medical condition does not render her incapable regularly of pursuing any substantially gainful occupation. While the Appellant is not able to return to her regular employment as a factory labourer, she has capacity to perform sedentary duties.

[70] Although the Appellant's medical condition is under control, she has failed to look for employment and has also failed to make any efforts at retraining, be it education or job retraining. In failing to make efforts to obtain employment, the Appellant has failed to satisfy the *Inclima* test where "*an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition*".

CONCLUSION

[71] I have carefully reviewed and considered all the evidence. I find that the Appellant's disability was not severe on or before December 31, 2011. Furthermore, the Appellant was not incapable regularly of pursuing any substantially gainful employment on or before December 31, 2011. The Appellant has not met the onus under the legislation of showing, on a balance of probabilities, that her disability was severe as defined in the CPP legislation and case law.

Prolonged

[72] Because I have found that the Appellant's disability was not severe on or before her MQP date, it is not necessary for me to make a finding on the prolonged criterion.

DECISION

[73] The appeal is dismissed.

Oudit Narine Rai
Member, Appeal Division