

Citation: *S. H. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 10

Appeal No: CP 27860

BETWEEN:

**S. H.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division – Appeal Decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: Valerie HAZLETT PARKER

HEARING DATE: November 18, 2013

TYPE OF HEARING: On the Written Record

DATE OF DECISION: November 27, 2013

## DECISION

[1] The appeal is dismissed.

## INTRODUCTION

[2] On December 15, 2010, a Review Tribunal determined that a *Canada Pension Plan* (the “CPP”) disability pension was not payable.

[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 March 12, 2011.

[4] The PAB granted leave to appeal on May 11, 2011. 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 on the written record for the reasons given in the Notice of Hearing dated July 17, 2013. This Notice requested that both parties submit any written information for consideration in this decision within 30 days of the Notice. The Respondent provided written submissions. The Appellant did not.

## 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] 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] 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**

[10] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[11] 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.

#### **EVIDENCE**

[12] The Appellant was 55 years of age at the MQP. She was born in Finland, where she completed some high school education. She then immigrated to Canada. Although the Appellant did not complete high school she has obtained two college certificates, a Health Care Aide certificate, and a Dementia Care certificate. The Appellant has some work experience in child care and customer service. She worked at the Hawthorne Care Centre as a Health Care Aide for over 21 years. The Appellant fell down a flight of stairs in October 2007 and suffered a back injury. She has not returned to any work since April, 2008.

[13] The medical reports in the Hearing File (Exhibit 1) state that the Appellant also had a back injury in 1994 that was treated conservatively. The Appellant recovered fully from this injury, and was able to continue working as a Health Care Aide.

[14] The Appellant suffers from insomnia, and has for a number of years. She takes medication to assist with sleeping. The Appellant advised that in 2013 she was referred to a sleep clinic for further investigation of this condition, however, there is no report from this clinic.

[15] The Appellant claims that she is disabled by chronic back pain as a result of the fall, and insomnia. In her application for CPP disability benefits, the Appellant wrote that she is uncomfortable if she sits for longer than one hour, or stands for longer than 30 minutes. She has limitations with regard to reaching and bending, and has difficulty with heavier household chores, such as vacuuming. She is able to complete lighter duties.

[16] The Appellant has consulted with different medical specialists as well as her family doctor regarding her condition. On October 16, 2008 Dr. Feldman, a physical medicine and rehabilitation specialist, reported after conducting a thorough assessment of the Appellant. He confirmed that the Appellant suffers from chronic back pain as a result of a fall at work in October 2007. She attempted to return to her position as a Health Care Aide on two occasions but was not able to do so successfully. The employer was also not able to offer her light duties that may have been within her limitations. The Appellant had attended for physiotherapy and active release therapy, but stopped attending as she was not receiving any benefit from this. Dr. Feldman concluded that the Appellant should find a less physically demanding job.

[17] This doctor recommended that the Appellant attend at a fitness centre to strengthen her core and participate in a general conditioning program.

[18] The Appellant's family physician, Dr. Prem-Smith, penned a number of reports that are in the hearing file. She diagnosed the Appellant with chronic neuropathic pain in October, 2008. She stated that the Appellant cannot work as a caregiver, and is limited in her activities

of daily living and some housework. The Appellant is also unable to complete heavy, repetitive tasks. She is also vulnerable to re-injury.

[19] On August 4, 2009 Dr. Prem-Smith wrote that a less physically demanding job would be a possibility for the Appellant. On February 1, 2010 Dr. Prem-Smith completed a form for Great West Life Insurance, and stated that the Appellant had begun a computer program, and would need some retraining for a job that was not a physical one.

[20] Dr. Prem-Smith also reported that the Appellant obtained some relief when she used a TENS machine.

[21] The Appellant attended a Functional Capacity Evaluation, conducted by Mr. R. Gander, OT, with a report dated March 29, 2010. The Appellant participated in an interview and a number of tests for this evaluation. Mr. Gander reported that the Appellant has had right shoulder symptoms for a number of years (there is no other mention of this in evidence). This was aggravated by the fall in 2007 which resulted in functional limitations above the shoulder. The Appellant also has some numbness in her right foot (there is no other evidence regarding this condition). Mr. Gander observed that the Appellant paces herself and moderates her activity, avoids lifting and crouches rather than bends. She takes pain and sleep medication (advil and tramacet) as prescribed. The Appellant also walks daily, and occasionally uses a stationary bicycle. Her condition had plateaued at that time. He concluded that the Appellant has physical limitations, but is still able to complete a full sedentary workload, working eight hours one day, followed by four hours the next. The Appellant could succeed in clerical job if she received the training for it. He recommended that the Appellant attend a gradual return to work program for tasks requiring strength.

[22] The Appellant was referred for a Vocational Assessment, and a report was penned on April 26, 2011. This report reviewed the Functional Capacity Evaluation and the Appellants interests and aptitudes. The report states that the Appellant is able to use email and the internet. She is able to type with two fingers. The report lists a number of sedentary jobs that the Appellant would be able to complete without academic retraining. It also notes that the

Appellant might not earn as much income from these positions as she did working as a Health Care Aide.

## **SUBMISSIONS**

[23] The Appellant submitted that he or she qualifies for a disability pension because:

- a) She is physically unable to continue to work as a Health Care Aide;
- b) She has chronic back pain and insomnia which render her disabled;
- c) She is not trained for any other job where she could earn the same income she earned working as a Health Care Aide.

[24] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) The Appellant does not have a severe and prolonged disability as that term is defined in the CPP;
- b) The medical reports state that the Appellant is able to work in a sedentary capacity;
- c) The Appellant has not made any attempt to retrain or obtain any alternate work.

## **ANALYSIS**

[25] The Appellant must prove on a balance of probabilities that he or she had a severe and prolonged disability on or before December 31, 2010.

### **Severe**

[26] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. Although the Appellant did not complete high school, she obtained two college certificates in her chosen field. The Appellant was able to work successfully in this field for over 20 years. English is not her first language, however, there is

no evidence that she is not able to communicate effectively at work or with her health care providers in this language.

[27] Although the Appellant has suffered with insomnia for a number of years, she was able to work in spite of it. It was not until 2013 that she was referred to a sleep clinic for further investigation regarding this. There is no medical evidence that this condition is severe, nor that it impacted on the Appellant's success at work.

[28] The Appellant suffered a back injury when she fell at work in 2007. This, unfortunately, has resulted in chronic back pain. The back pain is treated conservatively, with over the counter medication. The Appellant attended at physiotherapy and for active release therapy but did not benefit from them. She used a TENS machine. The medical reports indicate that some benefit was provided with this. The Appellant has not, however, undergone any intensive treatment, nor been referred to a pain specialist, a spinal surgeon or a chronic pain program, which is common when a patient is suffering from severe chronic pain.

[29] The Appellant is also able to complete light household chores, and sometimes heavier chores such as vacuuming. There was no evidence that the Appellant has modified her home to accommodate her physical limitations.

[30] The Appellant is commended for attempting to return to her position as a Health Care Aide. She was not successful as she could not tolerate the significant physical demands of this position. The Appellant has not, however, attempted any work that is not physically demanding. The medical reports from Dr. Feldman and Dr. Prem-Smith both state clearly that she could tolerate such a position.

[31] In CPP disability cases, the Federal Court of Appeal has stated clearly that where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant has not put forward any evidence with respect to this. Dr. Prem-Smith wrote that the Appellant began a computer program. There is no evidence, however, that she completed this program. There is no evidence that the Appellant

used the skills learned in this program to look for work. There is also no evidence that she could not complete the program due to her physical limitations.

[32] Finally, the Appellant argued that she is not trained for another job where she could earn the same income she did as a Health Care Aide. In *Canada (MHRD) v. Rice*, 2002 FCA 47 the Federal Court of Appeal concluded that 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. I am bound by this decision. I must determine whether an Appellant is able to work in any substantially gainful occupation, not whether they are able to earn an income similar to what they earned prior to their injury. The vocational assessment report of April 2011 listed a number of jobs that the Appellant could do. It also listed the income that she would earn, and commented that it was less than what she earned as a Health Care Aide. What she would earn in these jobs is irrelevant to my decision whether she is disabled under the CPP. There was no evidence, however, whether she had made any attempt to work at any of these or any other position.

[33] For these reasons, I conclude that the evidence does not demonstrate that the Appellant has a severe disability as that term is defined in the CPP.

### **Prolonged**

[34] Since I have decided that the Appellant does not have a severe disability, I need not decide whether it is prolonged.

### **CONCLUSION**

[35] The appeal is dismissed.

*Valerie Hazlett Parker*  
Member, Appeal Division