

Citation: *S. W. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 30

Appeal No: CP 29120

BETWEEN:

**S. W.**

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: April 10, 2014

TYPE OF HEARING: In Person

DATE OF DECISION: April 23, 2014

## **PERSONS IN ATTENDANCE**

Appellant	S. W.
Representative for the Appellant	Jim Franklin
Witness for the Appellant	J. W.
Counsel for the Respondent	Hasan Junaid
Witness for the Respondent	Dr. Micheline Bégin
Observer	Dallas Yuan

## **DECISION**

[1] The appeal is granted.

## **INTRODUCTION**

[2] On September 20, 2012, 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 December 27, 2012.

[4] Pursuant to section 260 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, this Leave Application was transferred to the Appeal Division of the Social Security Tribunal (Tribunal) on April 1<sup>st</sup>, 2013, and leave to appeal the Review Tribunal decision was granted by the Appeal Division of the Tribunal on May 6, 2013.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated January 6, 2014.

## 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.

[10] Subsection 44(2) of the CPP allows for an applicant to extend their eligibility for CPP disability benefits if they are a family allowance recipient after the birth of a child until that child reaches seven years of age.

## **ISSUE**

[11] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is in the future by operation of subsection 44(2) of the CPP (child rearing drop out provision) and the years of valid contributions by the Appellant.

[12] 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 hearing.

## **EVIDENCE**

[13] The Appellant was 38 years of age on the date of the hearing. She completed high school. She testified that she earned a college diploma in medical reception, but never worked in this field. The Appellant also obtained a certificate as a Body Piercer and worked in this field. The Appellant worked as a body piercer from 2005 until August 2007. She left work due to a pregnancy, and ongoing back pain. The Appellant has not returned to the paid workforce since then. As a result, her family is in dire financial straits.

[14] The Appellant claimed that she suffers from low back pain, general musculoskeletal pain, and agoraphobia which rendered her disabled under the CPP. In her application for CPP disability pension, the Appellant wrote that she must lean on something when standing, and is only able to walk one block. She has more difficulty walking over uneven ground. She uses a wheelchair when she leaves home, and testified that this is very hard on her pride as she does not like to be seen in a wheelchair. She avoids bending, and cannot reach below the waist.

[15] The Appellant testified on how she spends a typical day. She testified that her sleep is not restful. She rises at 7:25am each day to assist her youngest child to dress for school. Her Husband prepares lunches and snacks, and does all other tasks to get the children to school. The Appellant rests after the children leave for school, waiting for her pain medication to take effect. She then washes the dishes. The Appellant does light housework, mostly at counter level. The Appellant stretches throughout the day to try to minimize her pain.

[16] The Appellant testified that she and her husband make dinner. Each day the Appellant has a hot bath for approximately one hour after dinner, then she retires for the night. She received a donated mattress which makes her sleep more comfortable. She also has rails on her bedside to assist her to move or roll over. The Appellant uses a wheelchair when she leaves home, has grab bars in her bathroom, a powered bath lift and a “reacher” to assist her in the home. The presence of these aids was confirmed by the occupational therapist with whom the Appellant consulted.

[17] The Appellant testified that one of the only things she can do for her youngest child (age 5) is help him dress in the morning. She insists on doing this so she feels that she has some purpose. Either she or her husband read to him at night before he goes to bed.

[18] The Appellant attempted some volunteer work for two hours each week, assisting people by phone to learn to use the computer in 2012. This was done by telephone, from her home. She testified that she could not continue with this work because she could not manage to sit for two hours.

[19] The Appellant has been treated by a number of medical professionals. She testified that she has had a great deal of difficulty receiving specialist referrals from her family doctor. She most recently learned herself of a chronic disease program, and asked her doctor for a referral. She then waited approximately 18 months, but has spoken with a social worker for this program, which has put her on the wait list to be matched with an appropriate pain specialist. She testified that there are 145 people ahead of her on the list.

[20] The Appellant testified that she has suffered from back pain since the age of 9 when she fell. As an adult she consulted with Dr. Chan, neurosurgeon. On December 3, 2003 he reported that in November 2002 the Appellant began to have back pain that radiated down her left leg to her toes, with numbness and weakness. Physiotherapy did not help. He recommended that a discectomy be performed. This was done on February 3, 2004.

[21] Dr. Chan reported after this surgery in February and March 2004. These reports confirmed that the surgery was successful, and recommended that the Appellant exercise and stretch.

[22] The Appellant testified that the surgery remedied the pain and weakness in her left leg. It did nothing to improve her back pain, and was not expected to relieve her back pain.

[23] The Appellant has been treated by the same family physician for a number of years. On May 6, 2010 Dr. Barclay reported that the Appellant had suffered chronic back pain since the discectomy. He prescribed Percocet, and noted that physiotherapy and chiropractic treatment had not benefitted the Appellant in the past. He concluded that the Appellant's prognosis was guarded, that there may not be a cure for her back pain, but he hoped that the Appellant would find a way to deal with the pain.

[24] On February 15, 2012 Dr. Barclay wrote that the Appellant's ability to be employed was severely restricted.

[25] The Appellant consulted with Dr. Filbey, who wrote a report dated August 6, 2010. He reported that the Appellant suffered from low back and left leg pain. Her symptoms were worse in the evenings, and with movement or prolonged positions. His impression was that the Appellant had chronic low back pain with central pain sensitization, and chronically poor sleep.

[26] The Appellant also consulted with an Occupational Therapist. Ms. Anderson reported on December 12, 2012 that the Appellant's condition significantly impacted her capacity to function fully with respect to her family and her ability to access services and activities in the community. She had difficulty dressing her lower limbs, sat to complete personal grooming, had a stool in the kitchen and suffered pain if she carried laundry. She was unable to bend to pick things up off the floor, and had fallen twice in the prior six months.

[27] The Appellant testified that she has asked her family physician, but he has not referred her to a rheumatologist. Dr. Barclay's clinical notes are also in Exhibit 1. On July 24, 2009 he noted that a public health nurse queried whether the Appellant was suffering from post-partum depression, that she was having some panic attacks and was quite agoraphobic. The Appellant testified that she sought grief counselling after her child was still born early in 2008. She learned "tips" to deal with stress and anxiety that she still tries to use currently. She no longer has panic attacks as she used to.

[28] The Appellant testified that she and her family also attended family counselling, where the counsellor assisted all members of the family until December 2013.

[29] The Appellant testified that she has tried taking a number of different anti-depressant medications. She suffered significant side effects from each of them, including weight gain of 60lbs. She also testified that they made her "incoherent" with her children, which was unacceptable to her.

[30] J. W., the Appellant's husband also testified. He stated that he has known the Appellant since she was 13 years of age. While they were in school she did not participate in sports or gym class because of her back. He lost touch with the Appellant after they completed school until 2007, when they began to live together. Mr. W. testified that the Appellant was then working weekends as a body piercer. He convinced her to stop work when she was pregnant in 2007, because she was having such difficulty working, and commuting from Salt Spring Island to Maple Ridge BC for the weekend of work.

[31] He also testified that over the last seven years he has seen the Appellant's physical abilities decline. She now can't clean the house or care for the children. He completes these tasks, and the grocery shopping 95% of the time. The other times he takes the Appellant with him to the grocery store. When asked, Mr. W. testified that the Appellant sometimes washes the dishes, and will do some folding of laundry at counter height. He puts it into the washer and dryer for her, and helps to fold it. He and the

Appellant and their four children live in a two story home. The Appellant has great difficulty with the stairs, and will only go up them at night to retire.

[32] Dr. Bégin testified for the Respondent. She was accepted as an expert witness in general medicine. She reviewed the medical evidence in this matter to form her opinion.

[33] Dr. Bégin testified that the discectomy surgery performed in 2004 was to address the Appellant`s pain in her left leg, not her back pain. It did this. In her opinion, when Dr. Barclay wrote that the 2004 back surgery had failed, it was an error.

[34] Dr. Bégin also testified that the Appellant suffers from mechanical back pain. This is pain in the muscles and ligaments around the bone. The Appellant has attended for physiotherapy and chiropractic treatment. She has had nerve block injections, and takes narcotic pain medication.

[35] Dr. Bégin testified that Dr. Filbey noted that the Appellant suffered from chronic back pain, and pain sensitization. She explained that this means that the Appellant is more sensitive to pain in her back because of her condition.

## **SUBMISSIONS**

[36] The Appellant submitted that she qualifies for a disability pension because:

- a) She worked until she could do so no longer, and would work today if she could;
- b) she is unable to work; she requires assistance just to complete her activities of daily living;
- c) she has tried a number of modalities to treat her condition without relief.

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

- a) The Appellant`s financial situation is not a relevant consideration;



- b) The Appellant has not produced any medical evidence that states her condition is severe, evidence of her suffering is not enough to find her disabled;
- c) The Appellant has not been formally diagnosed or treated for agoraphobia.

## **ANALYSIS**

[38] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of the hearing.

### **Severe**

[39] 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. The Appellant is young, being 38 years old at the hearing. She completed high school and has a college diploma in medical reception. She has no work experience in this area. The Appellant's work experience is only in body piercing, where she obtained a certificate also. I find, therefore, that she has few transferrable job skills that would assist her to find alternate work.

[40] The Appellant claimed that she suffers from agoraphobia. She testified that she doesn't leave her home because of mobility issues and not wanting to be seen in a wheelchair. Dr. Barclay, the Appellant's family physician described her in one clinical note as "quite agoraphobic". There was no evidence that she was formally tested or diagnosed with this condition. There was no evidence that she was referred to a specialist for any treatment of this condition.

[41] Although the Appellant did not receive mental health treatment specifically for agoraphobia, she testified that she has participated in grief and family counselling from 2008 until December 2013. She uses "tips" learned from this counsellor to assist with panic attacks and anxiety. I am not satisfied on a balance of probabilities that the Appellant has a mental health disease that is severe as that term is defined in the CPP.

[42] The Appellant clearly suffers from pain. The medical records produced for this hearing refer to the Appellant having low back pain. She testified, however, that her pain is throughout her body. She has recently been referred to a chronic disease/fibromyalgia program for further investigation which has not yet concluded. She has asked for a rheumatologic referral but this has not been made by her doctor.

[43] Counsel for the Minister argued that the Appellant is not disabled because there is no medical evidence that she has a severe medical condition. He relied on the reasoning in *Minister of Human Resources Development v. Angheloni* 2003 FCA 140, where it concluded that the suffering of the Appellant is not an element on which the test of “disability” rests. In that case, the claimant suffered from medical conditions that were diagnosed based on objective testing. In contrast, in this case the Appellant suffers from pain. Pain cannot be measured objectively as one would measure grip strength or levels of elements in blood. There is no test for pain. It is also experienced differently by each person. Therefore, I must rely on the description of the Appellant’s pain from her medical practitioners and the subjective testimony at the hearing.

[44] I find that the Appellant was a credible witness. She testified in a straightforward and honest manner. Her testimony was consistent with what she had written in her application for CPP disability pension. Mr. W. testified at the hearing prior to the Appellant, and his description of her pain was also consistent with hers.

[45] In addition, I find the reasoning in the Pension Appeals Board in *Minister of Human Resources v. Hounsell* (September 18, 2000, CP 10061) persuasive. In that case, the Court concluded that although the CPP Regulations require information by way of medical evidence, the Act and Regulations do not restrict entitlement to a disability pension to those who furnish “objective medical evidence” of their conditions. In this case, the medical evidence is clear that the Appellant suffers from back pain, and has done so for a lengthy period of time. This pain persists despite various treatments.

[46] I find that the Appellant suffers from severe pain. She has been prescribed narcotic medication to treat it. She sits on her couch until it provides some relief each day.

Even then, she is able only to work at counter height. She manages to wash some dishes, dress her son, and prepare some dinners. She can fold laundry with help.

[47] The Appellant requires a wheelchair when she leaves her home. She obtained a mattress by donation. She has numerous assistive devices in her home, including grab bars and a powered bath lift.

[48] The Appellant has been compliant with medical treatment. She attended counseling for various issues over a number of years. She has attended for physiotherapy, chiropractic treatment and nerve block injections. She sought out referrals to specialists, most recently at the chronic disease program.

[49] The Appellant testified that she is in dire financial straits. Counsel for the Minister argued that the Appellant's dire financial situation is not a relevant consideration in determining whether someone is disabled under the CPP. In the *Carter v. Attorney General of Canada* (2008 FC 1046) decision the Federal Court confirmed this. This decision is binding on me. Therefore, although I am sympathetic to the Appellant's financial plight, it is not a consideration in reaching my decision.

[50] The Federal Court of Appeal decided 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). I find that the Appellant has no capacity to work given her disability. If I am wrong on this, however, I find that the Appellant has demonstrated that she cannot maintain work because of her disability. She volunteered assisting people to use computers from her home for two hours at a time. She could not continue with this as she could not maintain her physical position to do so. This clearly demonstrated that she could not maintain even a voluntary position, when she had flexibility regarding when she worked and was doing so from home. She would not have this flexibility in any position in the paid workforce.

## **Prolonged**

[51] I find that the Appellant`s disability is prolonged. She has suffered from back pain since the age of 9. It has become severe. The Appellant has sought treatment for this, and continues to do so without relief. There is no medical or subjective evidence that this pain will be resolved in the future.

## **CONCLUSION**

[52] I find that the Appellant had a severe and prolonged disability in January 2009, after the birth of her last child, and her inability to care for him. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in May 2010; therefore the Appellant is deemed disabled in February 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of June 2009.

[53] The appeal is allowed.

*Valerie Hazlett Parker*  
Member, Appeal Division