Citation: *K. C. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 14

Appeal No: GT-125047

BETWEEN:

**K. C.**

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: | Vikki Mitchell |
| HEARING DATE: | May 22, 2014 |
| TYPE OF HEARING: | Videoconference |
| DATE OF DECISION: | June 5,2014 |

**PERSONS IN ATTENDANCE**

K. C. – Appellant

Mike Moreland – Appellant's representative

**DECISION**

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

**INTRODUCTION**

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on January 25, 2012. 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] The hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated March 20, 2014.

**THE LAW**

[4] 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.

[5] 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).

[6] 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.

[7] 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**

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2011.

[9] 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**

[10] The Appellant was 36 years old at the date of her MQP. At the date of application she lived in X Ontario but has since moved to X Ontario to be closer to family and friends for support. She lives with her spouse and son. Her eldest son also lives in X. Her husband works for a contractor and spends a significant amount of time away from home. She has a grade 11 education and attended college for 1 year but did not receive a diploma.

[11] The Appellant was diagnosed with multiple sclerosis, the symptoms of which first appeared in 2003 with optic neuritis and numbness over the entire left side of her body. An MRI in 2004 showed numerous demyelinating lesions in both cerebral hemispheres. There were new lesions noted since the last MRI in 2003.

[12] The Appellant's most recent job was as a supervisor cook at Boston Pizza in X Ontario from February 2007 until August 2009. She initially worked 11 hour shifts 4 to 5 days per week. As her symptoms worsened the restaurant management accommodated her by allowing her to work less hours per week. She also requested to step down from a supervisory position since she didn't feel she could fulfill the requirements of that position. For the last 3 months of work she had vertigo, numbness in her hands and feet, fatigue and difficulties with her eyes. She had to leave this job because the symptoms of multiple sclerosis had reached a point where she could not do her job and also because of safety concerns - specifically falling into a pizza oven. She moved with her family to X because her husband had a job offer there and her son was not doing well in a large school in X and benefitted from moving to a smaller community.

[13] In February 2004, the Appellant attended the Multiple Sclerosis Clinic at St. Michael's Hospital in Toronto. The report from Dr. Hohol stated that the Appellant was diagnosed with optic neuritis and that she was at significant risk for MS. Avonex, a weekly injection, was prescribed and she was to have another MRI in 3 months and monthly CBC and liver function tests. At a follow up appointment in February 2005, it was discovered that Avonex treatments had not begun until April 2004 and were discontinued in June when her insurance coverage was exhausted. This report noted that she had had a second attack and would be eligible for any of the 4 disease modifying treatments. She chose to stay with Avonex. At further appointments in July 2005, and January 2006, the doctor reported that the Appellant was essentially asymptomatic from an MS point of view and was still on Avonex. The Appellant stated that her last consultation at the St. Michael's MS Clinic was in 2009. She could not afford to travel from X to Toronto and did not feel she was getting any benefit from her appointments. She said she would sit in the waiting room for an hour then have a 15 minute meeting with the doctor who did not provide any new treatment suggestions.

[14] The Appellant had an experimental and controversial venoplasty procedure in California in October 2011. At the hearing the Appellant gave a more detailed description of the circumstances surrounding this treatment. A fellow MS patient and friend in Chapleau

had had this procedure done and has benefitted greatly. She can now do things such as ride a bicycle and wear high heeled shoes. This friend made all the arrangements for the Appellant to go to the Renaissance Surgical Arts Centre in Costa Mesa California. The Appellant's friends held a fundraiser to pay for the trip and treatment (approximately $15 000).

[15] On arrival in California, the Appellant went immediately to the clinic for an MRV (Magnetic Resonance Venography) which determined that she was a suitable candidate for this procedure. She then had the 15 minute procedure which she said removed blockages in 3 veins. She remained in hospital for 2 hours then went back to her hotel.
The next day she had a follow-up appointment and was given blood thinners. There were no further follow-ups and she was back home after about 3 days. She said she felt 100% better. The numbness in her hands and feet was gone and her headaches had subsided. However, this situation did not last. After about 6 months her symptoms returned and she had also developed a head tremor. At the hearing she demonstrated that her sitting posture has changed to a slouch to avoid this head shaking.

[16] Dr. Golesic an eye physician and surgeon saw the Appellant in December 2011. In a letter to Dr. Hohol and copied to Dr. Taylor, he stated that the Appellant had noticed an increase in her ocular symptoms and had developed a new head tremor over the last few months. She had a gaze palsy to the left.

[17] The CPP medical report in the file was completed by the Appellant's family doctor, Dr. Taylor. This report was dated February 11, 2012 and indicated that Dr. Taylor had only known the Appellant for 6 weeks. In the questionnaire, the Appellant stated that she had first seen this physician in 2003. Documents in the file show correspondence and reports to Dr. Shapiro in Chapleau and Dr. Meloff in Timmins between 2004 and 2006. When asked at the hearing the Appellant stated that she could not explain the discrepancy but was sure that she had been seeing Dr. Taylor at least since 2009 when she moved from X to X. Since November 2013, the Appellant has a new family doctor, Dr. Saari. This doctor referred her in December 2013 to a neurologist in Sudbury and she is waiting for that consultation.

[18] The doctor states in the report of February 2012 that the Appellant's symptoms worsened in 2007 with severely limited eye movements and tremors affecting her head. At the time the report was written in February 2012,the Appellant's symptoms had improved; however, Dr. Taylor noted the following functional limitations: work with hands limited by residual numbness in digits, unable to lift a cup with left hand, left foot likely to drag, needs help to ascend stairs ,avoids walking outside, difficulty with concentration. She was also diagnosed with depression with anxiety and apparent panic attacks. His prognosis was unknown depending on future developments in therapy. Further deterioration is the likely outcome.

[19] Dr. Taylor's letter of October 2012, in response to a request for further information, indicated that the Appellant's multiple sclerosis has worsened from mid- February 2012.While her gait had improved slightly by early February 2012, her tremor had worsened. Her entire left lower limb is numb and weak. Her left foot drags and on stairs she must raise / lower herself using the right lower limb only while holding onto the handrail. She does not use the stairs at all when she is alone at home. Her best distance for walking outside is 500 feet after which she needs to sit. She describes her left upper limb as "dead" – difficult to control and she cannot do anything with it. In terms of housework, she can do little except for making beds. Her lateral gaze to the left as tested in May 2012 was about 1/2 of the normal range and was difficult to sustain. She had similar trouble with upward gaze

[20] A letter dated May 9, 2012, from Patricia (no last name) at the North Algoma Counseling Service stated that the Appellant had been receiving counselling since March 2012. Patricia observed that the Appellant had difficulty walking, positioning her upper body and making eye contact. She had tried working part time but experienced fatigue or vision problems. The Appellant expressed concerns that if she were to begin working full or part time she would be let go because she thinks she could not keep up with the pace in employment situations. When asked at the hearing about her work attempts, the Appellant stated she had tried to work as a cashier at the Wawa Handy Store but lasted only one 4 hour shift. Her hands were too weak to scoop ice cream and she had difficulty standing. She did not look for any other work.

[21] The Appellant was seen by Dr. Langley at the North Algoma Counseling Service on December 9, 2012. She had been referred by her family doctor because of anxiety and panic in social situations. She told Dr. Langley that after the experimental surgery in California, a number of her most problematic symptoms remitted but over the last few months she has experienced a relapse. She stated she is about 20% worse than before the surgery. She has developed a counting ritual, specifically counting and arranging the towels in her home. The main theme in this discussion was her frustration with the ongoing symptoms of MS. Dr. Langley concluded that he did not see clear evidence for a major depressive illness nor an anxiety disorder but that given her family history of depression and the knowledge of the natural history of MS, she will remain at risk. He did not feel that psychotropic medications were indicated. She will continue in psychotherapy using a cognitive behavior approach.

[22] At the hearing, the Appellant stated that since moving to X she has not attended counselling although she feels she should. The counting ritual continues and now she counts not only her towels but her cutlery and glassware. She thinks counselling is available in X but has not sought information on how to access it.

[23] The Appellant's appeal letter written in June 2012 indicated that her condition changes every day. Her ophthalmologist has indicated to her that the damage to her left eye muscle is permanent. She is frequently dizzy and has a hard time seeing. At the time of this letter she was going to a physiotherapist twice a week.

[24] On a typical day, when her son has left for school, the Appellant is too nervous to stay at home by herself. She is afraid of falling. She goes to a friend's house next door. They will go for a short walk around the block if she can make it that far then will spend most of the day watching television. She cannot read because the words jump around on the page. She does not have people into her home for visits. Family occasions are at someone else's home. Her nightly sleep is usually disturbed. She goes to bed about 10 p.m. but wakes up and often has trouble getting back to sleep. Her sons and her husband do all the outside work – shoveling, grass cutting, taking out garbage, walking the dog etc. Her eldest son or her husband helps her with grocery shopping. There are stairs in the home she is in now so they

are intending to move to a single storey home. The Appellant drives only in X. A friend drove her to the hearing today since she could not have driven the 2.5 hours herself.

**SUBMISSIONS**

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

a) She has had MS since 2003. This disease does not have a cure.

b) She took the recommended Avonex injections for about 7 years and it eventually ceased having any positive effect so she stopped.

c) She tried the much talked about experimental venoplasty procedure which helped for a short period of time but the symptoms have returned and they are getting worse.

d) She could provide no reliable attendance to a job and is at constant risk of falling which would be a concern to any employer.

[26] The Respondent was not present for the hearing but made the following written submissions in the file. The Respondent submitted that the Appellant does not qualify for a disability pension because:

a) Dr. Taylor stated that he had only known the Appellant for 6 weeks prior to writing the medical report, dated February 2012. It is unlikely therefore that he could have provided clinical notes at or prior to the MQP.

b) Dr. Taylor's report of February 2012 stated that the Appellant was not taking any medications.

c) The Appellant's ability to drive for 1.5 hours indicates her visual symptoms were not of a serious nature at her MQP.

d) If she has not proven she had a severe and prolonged disability prior to the MQP, it is irrelevant that the Appellant's condition deteriorated after her MQP.

## ANALYSIS

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

### Severe

[28] 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).

[29] Prior to leaving her job at Boston Pizza, the Appellant's employer tried to accommodate her by reducing her working hours. On her own, she asked to step down from her supervisory position. After about 3 months, even with these accommodations, she was no longer able to work because of vertigo, numbness in her hands and feet, fatigue and eye problems. When she was in X she attempted to work in a convenience store but could not make it through one 4 hour shift. The Tribunal accepts that the Appellant tried unsuccessfully to maintain her employment at Boston Pizza and that she made an unsuccessful attempt to obtain and maintain employment after returning to X. Her efforts were unsuccessful by reason of her health condition.

[30] *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB) provides a guide in assessing the ability to regularly participate in substantially gainful employment. An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for him to be at the place of employment; predictability is the essence of regularity.

[31] In her letter of appeal received in June 2012, the Appellant stated that "things in her health are changing every day". She stated at the hearing that after her son has left for school and perhaps going for a short walk she is exhausted and spends much of the rest of the day

on the couch watching television. She is also particularly concerned about falling and at the hearing said that one of her big concerns before leaving her previous job in 2009 was falling into a pizza oven. Her symptoms of vertigo, numbness in hands and feet, fatigue and eye problems made it impossible for her to continue working regularly. It is unrealistic to expect any employer to hire someone whose attendance would be unpredictable and who is at risk of falling due to balance problems.

[32] *A.P. v MHRSD* (December 15, 2009) CP 26308 (PAB) provides some guidance with respect to an Appellant's role in their own treatment. An essential element of qualifying for a disability pension is evidence of serious efforts by the Appellant to help himself or herself. This requirement extends to both the obligation to aggressively seek treatment and to the burden which accrues to all Appellants of establishing that reasonable and realistic efforts were made to find and maintain employment while taking into account the *Villani* personal characteristics and his or her employability.

[33] From 2003 until 2009, the Appellant saw Dr. Hohol a neurology specialist at St. Michael's Hospital in Toronto. After the Appellant moved to X she was no longer able to afford these visits to Toronto. She also felt that she was not benefitting from these consultations. She then turned to the widely talked about and controversial procedure of venoplasty available in the United States. Thanks to the fund raising efforts of her friends she underwent the procedure in October 2011. It would be unrealistic to think that a person would have gone through the effort required to undergo this procedure if her condition were not seriously affecting her life. Unfortunately the positive results of this intervention only lasted approximately 6 months. She now has a new family doctor and is waiting for an appointment with a new neurologist. The Tribunal finds that the Appellant has made serious efforts to help herself with respect to her multiple sclerosis.

[34] The second diagnosis noted in the medical report is depression with anxiety and apparent panic attacks. There is no evidence in the file of these symptoms prior to the MQP. The Appellant attended counselling while she was in X but since moving to X she has not sought help for these problems; although she believes she should. The report from the psychologist stated that he did not see clear evidence for a major depressive illness nor an

anxiety disorder. The Tribunal has not given weight to her mental issues in arriving at this decision and therefore her failure to seek counselling in X is not relevant.

[35] The Respondent notes that the Appellant's family doctor indicated in his report that he had only known her for 6 weeks and therefore could not have clinical notes prior to or at her MQP. At the hearing the Appellant stated that she had been seeing him at least since her move to X in 2009. The only written documents in the file on this issue are a letter from Dr. Golesic copied to Dr. Taylor dated December 14, 2011commenting on a recent eye examination. In the CPP medical report, Dr. Taylor refers to the medication Interferon (Avonex) which he stated had initially caused major improvement but showed no benefit beginning in 2009. He also described the improvements following the venoplasty procedure done in October 2011. The Tribunal recognizes that there is uncertainty regarding the length of time that the Appellant was seeing Dr. Taylor but finds that there is sufficient medical information to substantiate the Appellant's condition prior to her MQP and that it is more probable than not that Dr. Taylor has provided reliable information on her condition.

[36] The Respondent also refers to the fact that the Appellant was no longer taking any medication for MS. As stated by Dr. Taylor above, the medication was no longer providing any benefit after 2009. The Tribunal accepts Dr. Taylor's assessment and gives little weight to this argument by the Respondent.

[37] The Tribunal accepts that the Appellant's driving is limited to within the town of X and is not indicative of a capacity to engage regularly in substantially gainful employment.

[38] The Respondent argues that the Appellant has not proven that her disability was severe and prolonged at her MQP and therefore it is irrelevant that the Appellant's condition deteriorated after her MQP. The Tribunal finds that notwithstanding the fact her symptoms remitted temporarily following the venoplasty procedure and before the MQP, the Appellant has a severe disability which has rendered her incapable regularly of pursuing any substantially gainful employment since well before the MQP.

**Prolonged**

[39] The CPP medical report completed by Dr. Taylor states that the Appellant's symptoms began in 2003. MRI reports from 2003 and 2004 show the presence of numerous demyelinating lesions in both cerebral hemispheres. The Appellant was seeing a specialist at the MS Clinic in Toronto from 2004 until 2009. She had an experimental procedure done in 2011. She continues to exhibit symptoms of MS and is too nervous to stay in her home alone for fear of falling.

[40] The Tribunal finds that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

**CONCLUSION**

[41] The Tribunal finds that the Appellant had a severe and prolonged disability in September 2009, when she had to leave her job at Boston Pizza in X. 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 January 2012; therefore the Appellant is deemed disabled in October 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of February 2011.

[42] The appeal is allowed.

*Vikki Mitchell*
Member, General Division