Citation: *Minister of Human Resources and Skills Development v. E. D.*, 2014 SSTAD 122

Appeal No: CP 29015

BETWEEN:

Minister of Human Resources and Skills Development

Appellant

and

E. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division –Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	VALERIE HAZLETT PARKER
HEARING DATE:	May 8, 2014
TYPE OF HEARING	In Person
DATE OF DECISION:	May 27, 2014

PERSONS IN ATTENDANCE

Counsel for the Appellant	Nancy Luitwieler
Witness for the Appellant	Dr. Violet Gonsalves
Respondent	E. D.
Representative for the Respondent	Tina Viney

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On August 7, 2012, a Review Tribunal overturned the Minister's decision to cease payment of a *Canada Pension Plan* (the "CPP") disability pension commencing May 1, 2007.

[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 November 7, 2012.

[4] The PAB granted leave to appeal on January 14, 2013. 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 conducted in person for the reasons given in the Notice of Hearing dated February 7, 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] 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.

[9] Subparagraph 70(1)(a) of the CPP provides that a disability pension ceases to be payable with the payment for the month in which the beneficiary ceases to be disabled.

[10] Section 70.1 of the *Canada Pension Plan Regulations* (CPP Regulations) provides that if a person who has been determined to be disabled within the meaning of the Act returns to work, the person shall so inform the Minister without delay.

ISSUE

[11] The Tribunal must decide whether the Respondent ceased to be disabled under the CPP as of May 1, 2007.

EVIDENCE

[12] The Respondent was granted CPP disability pension, commencing March 1996 when she stopped working for the Province of Alberta. The Respondent suffered from spina bifida, a foot deformity, osteomyelitis, an amputated left forefoot, lumbar instability and illeaconduit. She continues to suffer from these conditions.

[13] The Respondent testified that when she stopped working in 1996 she also suffered from depression as a result of workplace bullying. She no longer suffers from this.

[14] The Respondent explained that in or about 2006 she felt ready to return to the paid workforce. She wanted to work and "be a contributing member of society". She took a course to determine her employability. The course was a classroom program that ran from approximately nine o'clock to four o'clock each day for about three weeks. She then applied for the job at the call centre and was hired. This job was not designed for persons with disabilities.

[15] The Respondent returned to work in 2007, working as a customer service representative at a call centre for a medical laboratory, now called Dynalife. Her income, as reported on her income tax returns, was as follows:

2007 – $15, 261

2008 - $16, 276

2009 - $16, 976

2010 - $17, 608

2011 - $14, 389

2012 - $7, 309

[16] The Respondent testified that when she worked for the Province of Alberta she earned approximately $20, 000 per annum.

[17] When the Respondent returned to work, she initially worked full-time hours. In 2009 she reduced her hours to 22.5 hours per week as she was getting ill when working longer hours. She further reduced her work hours, to approximately 9 hours each week, plus 4.5 hours on one Saturday each six weeks in 2011. She testified that this was done in consultation with her doctor, as her health deteriorated when she worked more hours. She also testified that her health is affected by stress. The Respondent's employer wrote on March 14, 2011 that the Respondent worked 4.5 hours per day, 5 days each week at that time.

[18] The Respondent has missed work because of her health, but has never been disciplined for this. She takes more sick time than what is granted by her union contract. The Respondent confirmed in testimony that she has received raises in pay during the course of her employment. The record of pay from Dynalife for the Respondent shows that she also received bonuses. The Appellant could not recall if they were awarded for performance excellence or not. She hoped that she had done a good job.

[19] The Respondent works the same hours each week at the call centre. Her duties are the same as her co-workers. She does not require any special accommodations from her employer aside from the reduced hours. She did not know if her co-workers were paid differently than she was.

[20] The Respondent also testified that in 2008, for a short period of time (approximately 3 weeks), she assisted a Massage Therapist to organize the paperwork in his office as he set up his practice. The therapist offered to provide massage therapy to the Respondent in return. She found massage therapy very beneficial for the back pain she suffers. This arrangement stopped when the massage therapist closed his business. This assistance was given in addition to the Respondent's regular work.

[21] On May 13, 2009 the Respondent wrote to Dr. Theman, and stated that she was working 22.5 hours each week. She could not over-exert herself or she would get ill.

[22] Dr. Johnston, neurologist, reported on March 12, 2010 that the Respondent worked full time at a call centre, was independent with all her activities of daily living, and required assistance with housekeeping. The Respondent clarified that Dr. Johnston was incorrect in stating that housekeeping services were provided for her. She paid for this.

[23] The Respondent testified that her medical condition became significantly worse after an incident where she awkwardly raised her leg to climb a step and fell when boarding a bus. This caused significant low back pain. She now takes gabapentin for this pain. Dr. Johnson reported on March 12, 2010 that the Respondent had new leg weakness after this fall, but that the tingling and back pain that resulted from the fall were resolved. She had numbness and pain in her right leg and hip, in both knees and increased weakness in her legs. She worked full time at the call centre, and was independent in her activities of daily living.

[24] On January 25, 2011 Dr. Theman reported that the Respondent was a disabled woman who worked full time until her health deteriorated to a state that her doctor had her stop work altogether. She was thrilled when she was able to return to part-time work. When her hours were increased she had more illnesses and infections, so she had to reduce her work hours. She was working the maximum she was able to at that time, and Dr. Theman did not expect this to change in the course of her working life.

[25] The Respondent's employer completed a questionnaire for the Appellant on July 26, 2010. It reported that the Respondent stopped work for two week stretches in November and December for health reasons (this was when the incident on the bus occurred). She worked part-time due to her health concerns. Her attendance, aside from the absence for the back injury, was good, her work was satisfactory and she did not need additional supervision. She used a scooter to get around the lab area.

[26] Dr. Gonsalves testified for the Appellant. She was accepted as an expert witness in general medicine. She adopted Exhibit 6 as her testimony, after making three typographical changes to it.

[27] Dr. Gonsalves confirmed that the Respondent's main medical condition is spina bifida. This causes leg weakness, bladder and foot issues. The Respondent underwent multiple surgeries as a baby and child because of this condition. She used a scooter for mobility for the last number of years.

[28] Dr. Gonsalves reviewed Dr. Theman's notes found in Exhibit 1. In February 2007 he noted that the Respondent was enjoying her job, had no recent illnesses, and was planning to terminate provincial disability benefits. In 2008 he noted that the Respondent continued to enjoy her job.

[29] On May 1, 2009 Dr. Theman diagnosed low back strain after the incident where the Respondent fell on the bus. In May 2009 the Respondent wrote to her doctor to confirm that she was only working 22.5 hours each week. This was confirmed again by Dr. Theman in January 201l.

[30] Finally, Dr. Gonsalves clarified the Appellant's position at the hearing was that the Respondent was no longer entitled to CPP disability pension from May 1, 2007 onwards, and not just from May 1, 2007 to 2012.

SUBMISSIONS

[31] The Appellant submitted that the Respondent ceased to be disabled because:

a) The medical evidence provided does not demonstrate that the Respondent's disability continued to be severe under the CPP after May 1, 2007;

b) The Respondent has demonstrated her capacity to work by doing so since 2007;

c) The Respondent's work is substantially gainful; and

d) The Appellant had no obligation to remind the Respondent to report any return to work or earned income; the Respondent was obliged to report this without delay;

[32] The Respondent submitted that she continued to be disabled because:

a) She is not capable regularly of pursuing substantially gainful employment because of all the sick time she takes from work;

b) The work the Respondent is able to do is not substantially gainful;

c) Her condition will not improve in the future, and will likely deteriorate; and

d) She was not aware of an obligation to inform the Appellant of any return to work, or income earned.

ANALYSIS

[33] The Appellant must prove on a balance of probabilities that the Respondent ceased to be disabled under the CPP as of May 1, 2007.

[34] Counsel for the Appellant argued that the Respondent's disability was no longer a severe disability after she returned to the paid workforce in 2007. It allowed for three months of earned income before terminating CPP disability pension. This was how it arrived at the date of May 1, 2007 for the disability pension to cease.

[35] The Federal Court of Appeal concluded that whether a disability is severe 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 Respondent worked for the Province of Alberta until 1996 when she was found to be disabled. Before returning to the paid workforce in 2007 she completed an employabilities program. She then competed for an obtained the job as a Customer Service Representative, where she continues to work.

[36] The Appellant suffers from significant limitations. Under the CPP, however, it is not the diagnosis of conditions, but their effect on the Respondent's capacity to work that

determines whether she is disabled (*Klabouch v. Canada (MSD)*, 2008 FCA 33). In this case, I find that the Respondent had capacity to work when she began to work in 2007. She continues to have some capacity to work, as she continues to work at the same job, albeit, with far fewer hours of work than when she began. The Respondent testified that she works the same shifts each week, with a predictable schedule for Saturday work. She has missed work due to illness. This happened more frequently when she was working more hours.

[37] The Respondent argued that she was not capable, regularly, of working. The Respondent's representative argued that the Respondent's work attendance should not be considered regular as she took more sick time each year than granted by the union contract at her workplace. I also note, however, that the Respondent testified that she has never been disciplined or chastised for her absences from work. She continues to be employed, and has received raises in pay for her work. In addition, the Respondent's family physician, Dr. Theman, has treated her for a lengthy period of time. He did not report that the Respondent cannot work; rather that she is now working the maximum she is able to. Therefore, I find that her capacity to work is regular notwithstanding the need for some medical absences.

[38] In *Canada (Minister of Human Resources Development) v. Scott* 2003 FCA 34 the Federal Court of Appeal concluded that the word "regularly" in the CPP describes the incapacity rather than the employment.

[39] The Federal Court of Appeal also concluded 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 to be considered disabled (*Inclima v. Canada (A.G.)*, 2003 FCA 117). By obtaining the position with Dynalife, and continuing to work the Respondent has demonstrated that she has work capacity, and that she has been successful in working despite her significant medical issues.

[40] For these reasons, I find that the Respondent's disability was not severe when she returned to work and when her CPP disability pension ceased to be paid in May 2007.

[41] The Respondent's representative also argued that the Appellant's work is not substantially gainful. Counsel for the Appellant put forward a number of decisions made by the Pension Appeals Board that concluded that claimants held substantially gainful work based on the income earned, in part-time positions. These decisions are not binding on me. Each case is unique, and turns on its own facts, so I do not place much weight on these decisions.

[42] In *Villani*, the Federal Court of Appeal concluded that substantially gainful occupation was one that was truly remunerative. In *Poole v. The Minister of Human Resources Development* (2003, CP20748) the Pension Appeals Board concluded that to be substantially gainful, the income earned must not be token or illusory, but rather compensation which reflects the appropriate reward for the nature of the work performed. In this case, the Respondent earned approximately $20, 000 per year prior to being found to be disabled in 1996. When she returned to work in 2007 she earned approximately $14,000 to $17,000 per annum until 2011, working full-time then part-time. This income is comparable to what she earned prior to being found to be disabled. I find that this is not token or illusory income. The Appellant testified that the only accommodation she received from her employer was reduced work hours.

[43] Therefore, I find that the Respondent's work was a substantially gainful occupation.

[44] Finally, the Appellant argued that the Respondent was obliged to report her return to work to the Appellant without delay. The Respondent argued that she did not do so as she was unaware of this requirement.

[45] Section 70.1 of the *Canada Pension Plan Regulations* is clear. A recipient of CPP disability pension must advise the Appellant of any return to work without delay. The CPP disability pension application form, which the Respondent signed, also contained an acknowledgement of this obligation.

[46] There is no obligation on the Appellant to remind the Respondent of this, although this is done on a regular basis through a brochure that is provided to CPP disability pension recipients.

[47] For these reasons, I find that the Respondent ceased to be disabled in April 2007, so she ceased to be eligible to receive CPP disability pension as of May 1, 2007.

CONCLUSION

[48] The appeal is allowed.

Valerie Hazlett Parker
Member, Appeal Division