Citation: *M. M. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 129

Appeal No: CP29037

BETWEEN:

M. M.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Shu-Tai CHENG
HEARING DATE:	February 5, 2014
TYPE OF HEARING	In person
DATE OF DECISION:	May 30, 2014

PERSONS IN ATTENDANCE

Appellant	M. M.
Representatives for the Appellant	Richard H. Atkinson and Benjamin Flight Expert
Witness for the Respondent	Dr. Jean-Guy Baribeau
Counsel for the Respondent	Linda Lafond

DECISION

[1] The Tribunal dismisses the Appeal.

INTRODUCTION

[2] On August 24, 2012, a Review Tribunal determined that a *Canada Pension Plan* (the "CPP") disability pension was not payable.

[3] The Appellant filed an Application for Leave to Appeal that Review Tribunal decision with the Pension Appeal Board (PAB) on November 19, 2012.

[4] The PAB granted leave to appeal on December 29, 2012. 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] This appeal was heard in person for the reasons given in the Notice of Hearing dated December 10, 2013.

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, 2003.

[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 December 31, 2003.

EVIDENCE

[12] The Appellant testified. The Respondent had one witness, Dr. Jean-Guy Baribeau, who responded to questions of the Appellant's Representatives and Respondent's Counsel. The parties agreed and the Tribunal is satisfied that Dr. Baribeau is an expert in general medicine.

[13] The Appellant was 25 years old at the MQP. She completed high school in Thunder Bay. She took some time off of school after high school and intended to save some money and continue with a program in Early Childhood Education (ECE). She attended Confederation College, Thunder Bay, starting in 2003 or 2004 in an ECE program but did not complete it. Later on, in 2010, she started an online bridal consultant course; she has two chapters to do before she completes this course.

[14] The Appellant testified that she started working in high school, mostly on weekends, at the Italian Hall. She worked as a baked goods server and a waitress. This continued after high school, until 2000, when she was working 16-20 hours a week. She also worked babysitting during this time. From 2000, she worked at Airlane/Travel Lodge as a banquet server or waitress, about 20 hours a week with varying work hours. She also babysat, splitting days with her sister about 4 hours each, three or four days a week. In 2001, she worked part-time at Wal-Mart as a seasonal hire, stocking shelves, from August to December.

[15] In June 2002, the Appellant was employed part-time as a lunch supervisor for a local school board, and she was also a caregiver, looking after young children while their parents were at work.

[16] The Appellant was injured in a motor vehicle accident (MVA) on July 3, 2002. She was diagnosed with whiplash but testified that "it was more than that". She had pain in her head, neck and then the knee and arm. These pains continued and she had trouble lifting, sitting and moving; she also has difficulty with her left arm with lifting, holding and grasping.

[17] Right after the accident, the Appellant was given narcotic medications (Percocet, Tylenol 3, Naproxen,Vioxx), but she did not find them helpful and they bothered her stomach. Also, she does not want to be dependent on narcotics and avoids these stronger medications. She takes Aleve, Tylenol or Advil.

[18] The Appellant testified that she has seen specialists. She did physiotherapy for a few weeks (maybe 2 months), but it was only helpful for an hour and she did not continue it. She tried acupuncture once but she fainted so the treatment was stopped.

[19] The Appellant described her current condition as follows: she has trouble getting up in the morning, taking 15 minutes to get out of bed; she can sit for 15 minutes and then feels pain and must shift; she can stand for 20 minutes or half an hour, can walk about 20-30 minutes; she can carry or lift 5-10 pounds; she has trouble holding a phone to her ear and cannot talk more than 5 minutes on a phone; she has trouble typing because her hand seizes from a pinched nerve; she drives but short distances only; she can only do light laundry and light dishwashing; and she can shovel light fluffy snow but nothing heavy.

[20] In terms of activities, before the accident the Appellant enjoyed biking, walking, basketball, soccer, hockey and yard work. Now she does not do any sports and has "a hard time just playing with my kids."

[21] The Appellant testified that after the accident she worked and retrained as follows:

a) August 2002 to January 2003, part-time at Wal-Mart to fill in on maternity leave; her salary was about $10/hour; she received Employment Insurance benefits for 15 weeks after this;

b) In 2003, babysitting 3-4 times a week, splitting full days with her sister;

c) September 2003 to June 2004 , as a lunch supervisor for Lakehead District School Board, for 1 to1.5 hours a day, 5 days a week; her income was about $10.25 to $10.87 an hour;

d) Starting in 2004 to 2006, she attended college, 3-4 days a week for periods of 3 to 6 hours; she stated that this was for one year, but in the documents in the file state that she was attending ECE courses in 2003;

e) August to November 2007, supervising at a banquet hall, about 15 hours a week; and

f) She has not attempted a job with more than 15 hours a week.

[22] The Appellant was married in 2007. She had her first child in 2010 and second in 2013. She testified that she has difficulty caring for them and has the help of her husband, her mother and her sister to look after them.

Pre-MQP Medical Documentation

[23] The Emergency Room (ER) report of July 3, 2002 stated that the Appellant was hit head-on while seat-belted and that the airbag deployed but she thought that her head hit the steering wheel. The Appellant complained of neck pain.

[24] The ER report of July 19, 2002 stated that the Appellant has been on Flexeril and Naproxen but she still has neck pain with no improvement and back pain. An x-ray report of August 15, 2002 of three views of the right knee stated "no abnormality is identified".

[25] On August 17, 2002, family physician, James Reid, reported (to the insurance company) that the Appellant was diagnosed with an acute cervical strain, acute lumbar strain, strain of the right shoulder and contusion to the right knee.

[26] On October 23, 2002, the Appellant's insurer agreed to pay for physiotherapy: 3x/wk for 8 weeks, then 2x/wk for 8 weeks. In February 2003, the insurer agreed to pay for physiotherapy 2x/wk for 4 weeks.

[27] In May 2003, the Appellant saw Dr. T. Boudreau, orthopedic surgeon on referral from her family physician. He evaluated her for right neck and left arm pain. The examination revealed some pain-limiting ranges of motion in the neck and some pain elicited by stretching the dorsal left forearm and wrist. The diagnosis was whiplash disorder. The prognosis was guarded and Dr. Boudreau noted that litigation was planned. He ordered an MRI of the neck and requested that a neurologist evaluate the Appellant.

[28] In July 2003, the Appellant saw Dr. P. Hindle, neurologist. The examination did not reveal any significant tenderness of the upper back, neck and shoulders. Neurological findings were normal as were the nerve conduction studies.

[29] An MRI of the cervical spine, in July 2003, showed a mild degree of disk degeneration from C4 to C7 and a possible anomaly around C6/7. A radiologist's (Dr. K. Grandberg) written MRI report of November 6, 2003, stated that the anomaly at C6/7 could have been the result of the MVA.

[30] A nurse practitioner's report of December 4, 2003 noted the following: the Appellant was 25 years old, right-hand dominant, a part-time student in ECE and part- time employed as a lunch supervisor. The Appellant's complaints were of left elbow pain, numbness and tingling of the left hand and neck pain. An appointment was made for the Appellant to have a steroid injection, and she would follow up with Dr. Wilson after that. This injection was done in early January 2004.

Post-MQP Medical Documentation

[31] The next medical document is dated January 6, 2004. Dr. Boudreau referred the Appellant to Dr. I. Haq in relation to the C6/7 anomaly. On March 14, 2004. Neurosurgeon I. Haq noted that the examination of the Appellant was normal and opined that the C6/7 changes on the MRI were non-significant. He suggested looking into the possibility of nerve entrapment in the left elbow.

[32] An MRI, with Gandolium contrast, of May 2004 found no significant interval change. The same abnormality in C6/7 was noted.

[33] Dr. Wilson, orthopedic surgeon, wrote on June 3, 2004, that the pain in the elbow could be related to the abnormalities noted in the MRIs of the neck. If the symptoms persist, he suggested a third opinion. Neurologist Dr. Hindle, reported in July 2004, that he was consulted for the neck and left arm symptoms. The examination failed to reveal any significant anomaly. He diagnosed myofascial pain of the right cervical and upper back area with a moderate degree of tennis elbow.

[34] In April 2005, the Appellant was seen by Dr. M. McCormick, to determine if a physiotherapy treatment plan (dated in March 2005) was reasonable and necessary to the Appellant's treatment of injuries sustained in the July 2002 MVA. The conclusion was that

the physiotherapy program is not reasonable and necessary, and investigations to rule out ligamentous instability at C3/4 were recommended. The basis for the conclusion on reasonableness and necessity was that the physiotherapy undertaken had not improved the Appellant's symptoms and there was no indication that use of passive modalities, such as heat, ultrasound or interferential current, for cervical spine pain or for chronic neck pain are of any value. Acupuncture sessions had been terminated and, in any event, there was no indication that the Appellant would respond to acupuncture.

[35] Another MRI of the cervical spine was conducted in June 2005. The impression is that there were some small disc protrusions at the levels of the C5/6 and C6/7 disc spaces and some neural foraminal narrowing at C3/4 and C4/5. There was no evidence of cord flattening or signal abnormality. There is a small (1mm) syrinx, a pseudo cyst, at the level of C6/7. A MRI with Gandolium contrast was recommended.

[36] Orthopedic surgeon, Dr. H. Ahn, was consulted in July 2005 for the left forearm pain. He discharged the Appellant and suggested a strengthening program for her neck and upper limbs.

[37] Orthopedic surgeon, Dr. D. Hoffman, reported to the Appellant's lawyer on August 26, 2005. He concluded "my examination suggests an element of myofascial pain." He also stated that "with appropriate treatment there is still an excellent chance that she will resolve this problem." His recommendations included correction of disturbed sleep with Amitriptyline, an aggressive physical reconditioning program and attendance at a chronic pain program.

[38] A MRI of the cervical, thoracic and lumbar spine was conducted in December 2005. There was no change in the cervical spine, there were minor anomalies in the thoracic spine, and the lumbar spine was normal.

[39] Dr. Hoffman, after reviewing the most recent MRI, amended his report on March 20, 2006. He stated that besides the myofascial pain, "this client may indeed have a problem which amounts to a permanent serious impairment of an important physical function, that

being the presence of a chronically painful thoracic spine along with the other previously outlined abnormalities."

[40] On June 26, 2006, Dr. Hoffman re-examined the Appellant at the request of her lawyer. The examination did not reveal any new significant findings. Dr. Hoffman concluded that: "these injuries may go on to become permanent impairment. That being said, it is going to have a serious effect on her enjoyment of life and perhaps a serious impact as well on her obtaining and continuing with suitable occupation in the future."

[41] Dr. Reid completed a medical report in support of the Appellant's application for CPP disability pension dated April 4, 2008. It noted diagnoses of chronic neck, left shoulder and back pain and prognosis of "disabled from gainful employment". Dr. Reid, in a letter dated November 23, 2008, stated that the Appellant had completed a pain management program in August 2007, her symptoms are managed with conservative measures and a home exercise program, and she was using Amitriptyline at night as needed as well as OTC pain medication as needed.

[42] Dr. Reid saw the Appellant on July 13, 2010 and wrote to her lawyer on August 21, 2010. He reported that "regarding her disabilities in 2003", he saw her once in 2003 (March) and once in 2004 (July). He opined that "given the combination of her symptoms, it would be very difficult for her to do any type of gainful employment." He wrote that the Appellant was "certainly in 2003 disabled."

Other Documentary Evidence

[43] The Appellant's employer, through Employee Relations Officer Mr. R. Laye, completed a questionnaire to CPP on June 23, 2009. It stated that the Appellant worked for the Lakehead District School Board from September 3, 2003 to October 24, 2008, from September to June, as a lunch hour supervisor, for one hour a day. It is noted that the Appellant quit when she moved out of town and that she did well at the job and did not need any extraneous help.

[44] Another employer questionnaire was completed by Mr. A. Narvaez of the Italian Society of Port Arthur (the "Italian Hall"), dated July 20, 2009. It stated that the Appellant worked from August 17, 2007 to November 30, 2007 supervising banquets and services and that she stopped working because they were short of work.

[45] The Appellant brought an action for damages for personal injury, including pain and suffering and damages for future loss of income, in relation to the 2002 MVA. The Defendants in that matter sought an order that the claim was barred by s.267.5(5) of the *Insurance Act* and brought a motion to dismiss that part of the action. The Defendants' motion was dismissed by decision and reasons dated September 26, 2006 of the Ontario Superior Court of Justice which found that "the plaintiff has sustained a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function within the meaning of s.267.5(5) of the *Insurance Act*."

Other Medical Evidence

[46] Dr. Baribeau summarized the medical documentation during his testimony. He noted that there was a big change in 2005 or 2006. He also noted that the Appellant has avoided taking narcotic type medication, and the documentation indicates that when she had taken Amitriptyline, it had been "as needed". His opinion is that if the Appellant was not taking this medication properly, then she would continue to have pain and disturbed sleep and that with a narcotic, one needs to start with a low dosage, then increase that dosage in order to get relief, not take it "as needed". Dr. Baribeau is of the view that the Appellant's pain must be treated aggressively to break the cycle of pain, and that the medical documentation does not show that this was done.

[47] In answer to Counsel's questions, Dr. Baribeau stated that around the MQP:

a) There were no significant findings that show the Appellant was precluded from working; in fact there were work trials around this time;

b) There were no medical findings that would have precluded her from working; there were statements by the Appellant that she was in pain.

[48] Dr. Baribeau also noted that biokenetically a woman's structure is altered during pregnancy and it is a big surprise to him that the Appellant could go through two pregnancies with the pain levels that she reported on the file.

[49] On cross-examination, Dr. Baribeau stated that he does not disagree with the Appellant's diagnosis. However, he takes issue with how the pain has been managed and treated. It is possible that pain can cause someone to be disabled, but here the documents make this assessment years after the MQP. Dr. Reid stated in 2007 that the Appellant is "best suited to light sedentary types of activity…" There are no notes of Dr. Reid pre- MQP on this point, only a statement in 2008 that she is disabled. As to whether Dr. Baribeau accepts that the Appellant is disabled and unable to work now, the Dr. replied that he did not accept this statement.

SUBMISSIONS

[50] The parties completed their submissions in writing. Written submissions were made by the Appellant, then by the Respondent, and the Appellant filed reply submissions. Written submissions were completed within a month of the in person hearing.

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

a) There is a finding by the Superior Court that the Appellant had a serious impairment of physical function and that she will be unlikely to work, and pain makes her life intolerable;

b) It was Dr. Reid's opinion in 2003 that the Appellant was disabled and her condition has not changed significantly since that time;

c) In 2006, she was still symptomatic with identical symptoms as immediately after the accident;

d) The Appellant has made every effort to maintain employment and just cannot; and

e) The Appellant has engaged in some part-time employment that was not maintained and was not remunerative.

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

a) The evidence does not support a finding that the Appellant had a severe and prolonged disability at the date of the MQP;

b) There was a residual capacity to work and actual work activity and attendance in a college program from 2002 to 2008;

c) The Appellant's limited pain medication is not reflective of a severe disability or, alternatively, indicates a failure to properly manage her pain; and

d) The Appellant's work activities cannot be categorized as failed work attempts.

ANALYSIS

[53] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2003.

[54] The Minister is not required to prove that the Appellant is capable of working; a claimant bears the onus of proving that he or she suffers from a severe and prolonged disability prior to his or her MQP (*Dossa* v. *Canada (PAB)*, 2005 FCA 387).

[55] *In Callihoo v. Canada (AG)*, 2000 FCJ 612, the Federal Court of Appeal heard an application for judicial review of a PAB decision refusing leave to appeal. The Appellant in that case argued that he had satisfied the criteria of disability as defined by the *Alberta Insured for the Severely Handicapped* (AISH) and, therefore, had been found to suffer from a severe and prolonged disability. The FCA held that while there were concepts in the definition of "severe handicap" in the AISH that were somewhat similar to those in ss. 42(2) of the CPP, there were differences as well. Moreover, it does not simply follow that qualification for a benefit provided under the provincial legislation raises an arguable issue concerning a decision that similar evidence does not qualify for benefit under another statute, the CPP.

[56] The FCA's reasoning in *Callihoo* applies to this appeal, in that a provincial court determination in a preliminary motion on a personal injury case that "the plaintiff has sustained a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function within the meaning of s.267.5(5) of the *Insurance Act*" does not qualify the Appellant for benefit under the CPP. The terms and their definitions are different and the relevant time period may also be different.

[57] In order to qualify for benefit under the CPP, the Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2003, within the meaning of subsection 42(2) of the CPP and the associated case law.

Severe

[58] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience, when determining whether a person is incapable regularly of pursuing any substantially gainful occupation.

[59] The Appellant was 25 years old at the MQP, had a high school education and had worked as a waitress in a restaurant and catering hall, a caregiver of young children, and a lunch supervisor at a school, in addition to stocking shelves at Wal-Mart. She seeks to show that due to chronic pain in her neck, left arm and right knee she had a severe and prolonged disability on or before her MQP.

[60] The pre-MQP medical reports did not conclude that Appellant would be unable to work. They are silent on this point.

[61] As to actual work pre-MQP and post-MQP:

a) The Appellant returned to work between August and December 2002 at Wal- Mart, as a sales associate with light duties, and worked shifts of 8 hours, 4-5 times a week, earning about $10 an hour;

b) She worked at Wal-Mart in January 2003 for a time and then was laid off; she received 15 weeks of regular EI benefits from January 19, 2003 to May 2003; regular EI benefits require that the claimant attest that she is ready, willing and able to work; the Appellant testified that had she not been laid off, she would have kept working;

c) She worked as a part-time lunch supervisor, between September 2003 and October 2008, for a local school board; this work was for 1 to 1.5 hours a day, 5 days a week, from September to June, annually; the Appellant was paid $10.87 per hour and she did not require any special accommodation to do this work;

d) Also in 2003, she performed light-duty childcare (babysitting), 3-4 times a week for 8 hours; she could not remember the date range of this work;

e) In the period 2003-2006, for one to two years, the Appellant attended a college ECE program; she attended classes 3-4 days a week, from 3-6 hours per day; the Appellant testified that she quit school due to her medical condition; there is no evidence on file that the Appellant requested or required special accommodation during the time she attended college;

f) From August 17 to November 30, 2007, she worked as a night supervisor for the Italian Society, doing light duty work such as preparing work schedules, supervising staff and overseeing banquets and services; she worked about 15 hours a week at an hourly wage of $11; she did not require special arrangements to accommodate her physical condition;

g) From September to December 2007, the Appellant worked at two jobs for a total of 20 hours a week; and

h) The Appellant has not returned to the work force since 2008.

[62] 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).

[63] The Appellant's position is that she cannot work because she is in pain, can only sit, stand or walk for short periods of time, can only carry or lift light objects, has difficulty typing, cannot talk on the phone for more than five minutes and can only do light activities. In other words, she cannot work because of her medical condition.

[64] The severity of a disability is not premised upon an individual's inability to perform his or her regular job, but rather his or her inability to perform any work (*Canada (M.H.R.D.) v. Scott*, 2003 FCA 34). This includes modified activities at the applicant's usual workplace, any part-time work whether at the usual workplace or elsewhere, or sedentary jobs (*Micelli-Riggins v. Canada (A.G.)*, 2013 FCA 158, para. 15).

[65] The Appellant was able to perform part-time light duty work from August 2002 to January 2003 and September 2003 to October 2008, including attending college in the 2003 to 2006 time frame. These jobs were limited in terms of hours. However, prior to the MVA in 2002, the Appellant had also worked part-time hours. Her hourly earnings in 2002 to 2008 were in the range of $10 to $11 per hour, and these positions were at a similar level to her pre-MVA positions.

[66] In April 2008, the Appellant's family doctor, Dr. Reid, prepared a medical report with the prognosis "disabled from gainful employment". In August 2010, he wrote that the Appellant "certainly in 2003 was disabled". However, this conclusion was not reported pre-MQP by Dr. Reid or any of a number of specialists who had examined the Appellant at or before the MQP. In August 2005, Dr. Hoffman believed that there was an excellent chance of resolving the impairment, then in March and June 2006, he modified his opinion stating that the Appellant "may indeed have a problem which amounts to a permanent serious impairment of an important physical function" [emphasis added].
Reports in 2006, 2008 and 2010 are given less weight than pre-MQP reports.

[67] As of the relevant date of December 31, 2003, the Appellant did not have a "severe" disability within the meaning of the CPP and associated case law. In saying this, I do not minimize the pain and discomfort the Appellant has been experiencing. This Tribunal is simply bound by the wording of subsection 42(2) of the CPP and the associated case law.

Prolonged

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

CONCLUSION

[69] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division