

Citation: *L. L. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 21

Appeal No: GT-115514

BETWEEN:

**L. L.**

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: Raymond Raphael

TYPE OF HEARING: ON THE RECORD

DATE OF DECISION: August 11, 2014

## **DECISION**

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

## **INTRODUCTION**

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on February 5, 2000. 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 decision is being made on the basis of the documents and submissions filed for the reasons given in the Notice of Intention dated June 26, 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**

[1] The Tribunal reviewed the Appellant's Record of Earnings (ROE) which indicates sufficient earnings for the years 1989, 1990 and 2003. There are no earnings indicated for any other years. This appeal initially came on for hearing before the OCRT on June 6, 2012. The hearing was adjourned because the Appellant's counsel indicated that he wanted time to file additional tax returns to cover indicated earnings for 2002, 2004- 2006, and 2009.

[2] No additional income tax returns have been filed and the Tribunal must rely on the ROE in the hearing file. Based on the applicable two out of three years requirement at the relevant time, the Tribunal finds that the MQP date is December 31, 1991.

[3] 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.

## **BACKGROUND AND EVIDENCE**

[4] The Appellant was 35 years old on the December 31, 1991 MQP date; she is now 58 years old. She was born in Portugal and has a primary school education. She moved to Canada in August 1989.

[5] In her CPP disability questionnaire date stamped by the Respondent on February 8, 2010, the Appellant indicated that she was last employed as a cleaner from 2004 until July 20, 2006; she noted that she stopped working because of illness. The Appellant also noted that she was self-employed (L.'s Cleaning) from January 15, 2009 until May 30, 2009 and that she stopped working because she was unable to continue. She described her involvement in the business as "cleaning-managing." The Appellant claimed to be disabled as of May 29, 2009 and indicated her main disabling illnesses and impairments to be

refractory epilepsy and seizures. She noted that she suffered frequent seizures during which she would fall and injure herself, and that she has difficulty walking, slurred speech, and a fear of falling. The Appellant noted depression to be another health-related condition and impairment.

[6] The Appellant listed her treating physicians to be Dr. Goncalves, family doctor, who she first saw in February 2007, Dr. Silveira, psychiatrist, who she first saw in November 2005, and Dr. Del Campo, neurologist, who she first saw in March 1999. She was hospitalized because of refractory epilepsy at Toronto Western Hospital from June 25, 2009 until July 29, 2009, and at St. John's Rehabilitation Hospital from July 29, 2009 until August 12, 2009.

[7] An investigation was performed at Mount Sinai Hospital, at the request of Dr. Fernandez, family doctor, on June 29, 1990, because of the Appellant's history of focal seizures. No significant abnormality was seen.

[8] Dr. Fernandez's clinical notes from 1991 until her last documented visit on August 23, 2005 were reviewed. The only note prior to the MQP date relates to the Appellant's annual health examination on July 9, 1991. The note indicates that the Appellant's persistent epileptic attacks were under control on Tegretol and Rivotril; and that the Appellant was to continue on the same medications. The note indicates anxiety, insomnia, and marital discord, and Dr. Fernandez suggested marriage counselling. The next visit is on August 14, 1992 and this indicates headaches, insomnia and incontinence. The Appellant was continuing on Tegretol and Rivotril. The next visits are in October 1993 for persistent complaints of abdominal pain and constipation. The Appellant was still continuing on Tegretol and Rivotril. The note dated June 27, 2000 indicates that the Appellant continued on Tegretol and Rivotril, that she denied further syncopal or epileptic attacks, and that she was working as a cleaner.

[9] On July 30, 1992 Dr. Sanchez, psychiatrist, reported that the Appellant was working as a cleaner. She complained of anxiety, tension, depression, insomnia, and urinary incontinence. Dr. Sanchez had seen the Appellant in 1990 with similar problems at which time he prescribed Rivotril and Imipramine; however, the Appellant indicated that this

medication did not help. Dr. Sanchez further noted that the Appellant also suffers from epilepsy for which she was taking Tegreton and Rivotril. The Appellant's thought processes, memory, orientation, concentration, insight and judgment were normal. Her affect indicated anxiety, tension and depression; there was no suicidal ideation or death wishes.

Dr. Sanchez's impression was anxiety reaction and he opined that the Appellant was suffering from epilepsy with some depressive components. He advised the Appellant to reduce her medication in view of her drowsiness.

[10] Dr. Del Campo, neurologist, initially saw the Appellant on January 9, 2003 on referral from Dr. Fernandez, the Appellant's family doctor. The report notes that the Appellant was working as a cleaning woman, and that she had initially been seen by another neurologist Dr. Picard but had not had any contact with him for over 10 years. The report also notes that the Appellant had not had any investigations done other than an EEG when she first came to Canada. The Appellant had been referred to Dr. Del Campo because of her history of epilepsy since the age of 17, which typically involved generalized tonic seizures which occurred no more than once or twice a year. Dr. Del Campo was concerned because the Appellant was experiencing more frequent minor seizures, which were occurring three to five times a month. On July 9, 2009 Dr. Del Campo indicated that the Appellant was having intractable seizures, that she had recently been investigated with intracranial recordings, and that she was now in the hospital because of status epilepticus. On March 31, 2011 Dr. Del Campo reported to the CPP that he had known the Appellant for eight years, and that he had diagnosed medically refractory epilepsy. The prognosis was that the Appellant may continue to deteriorate.

[11] In an attending physician's statement dated March 8, 1993 Dr. Fernandez indicated that the Appellant's epilepsy was stable, and that she was taking Tegretol.

[12] On November 24, 2005 Dr. Costa, a psychologist with the Portugese Mental Health and Addiction Services, reported that the Appellant suffered from epilepsy since the age of 17 and that she reported that after immigrating to Canada she spent several years without experiencing any seizures, but that she has deteriorated over the past five years. The report states, "Patient reported that he [sic] was a very active person who was involved with

multiple activities in her community, but who has been little by little becoming withdrawn and isolated. She had a cleaning company but decided to downsize it as she was feeling too stressed out. She is now looking for a partner to do cleaning with her so she will not stay alone in her client's houses as she is more apprehensive about her episodes of absence. She also reported frequent falls but she is unsure if they are associated with seizures. She just finds herself on the floor and does not know exactly how she fell down.”

[13] On December 22, 2005 Dr. Silveira, psychiatrist, reported that the Appellant has a 32-year history of seizure disorder and that “rather than improvements in her seizure disorder overall, she has noted that it has been worse over the past 10 years and then again even worse over that past 3 years and then again particularly bad over the past year.” Dr. Silveira's working diagnosis was mood disorder secondary to a seizure disorder. He suggested the initiation of Lamictal as a mood agent rather than as an anti- convulsant.

[14] A discharge summary form Toronto Western Hospital indicates that the Appellant was admitted on February 13, 2008 and discharged on March 7, 2008. The most responsible diagnosis was status epilepticus and the additional diagnosis was ventilator- associated pneumonia (resolved).

[15] On November 27, 1998 Dr. Picard, neurologist, reported that the Appellant had a 25 year history of epilepsy and that “The manifestations of this are not entirely clear at the moment.” He noted that the Appellant had not had any further seizures in the last three years but she did have attacks characterized by anxiety, dizziness, possibly faintness, and headaches. He arranged numerous investigations. On February 12, 1999 Dr. Picard reported that the Appellant had not experienced any further seizures or attacks since he last saw her.

[16] A discharge summary from St. John's Rehabilitation Hospital indicates that the Appellant was admitted on July 29, 2009 and discharged on August 12, 2009. The Appellant had been admitted to the hospital following a bout of status epilepticus, and she had to be put in a coma. When she recovered, she developed left hemiparesis and some slurred speech.

[17] In a self-employment questionnaire dated February 15, 2011 the Appellant indicated that she had started her own business in January 2003 and that she stopped working in the business in November 2003 because she could not work due to the progression of her illness. The business involved cleaning and housekeeping; she worked 18 hours per week; and she had no employees or partners. She concluded as follows, "I was really trying to have a normal life and be able to go to work. I really did push myself and commit to it, until I couldn't do it anymore. My illness progressed and I was putting my life at risk. My husband and kids were really worried about me and it had to come to an end."

## **SUBMISSIONS**

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

- a) She is totally and permanently disabled from pursuing any form of reasonably gainful employment;

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

- a) In both her CPP disability questionnaire and self-employment questionnaire the Appellant indicated that she worked as a cleaner for many years after the December 31, 1991 MQP;
- b) The medical evidence does not support a severe disability as of the MQP date.

## **ANALYSIS**

[20] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 1991.

### **Severe**

[21] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of

pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[22] The measure of whether a disability is "severe" is not whether the Appellant suffers from severe impairments, but whether her disability "prevents her from earning a living" *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703. It is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD)*, [2008] FCA 33.

[23] It is a question of fact as to when a disability begins and when it becomes severe. In some cases the severity may occur in an instant. In other cases, it may take months or years for the disability to become severe as defined by the CPP: *Forrester v MHRD* (November 3, 2003) CP 20789 (PAB)

[24] Although the Tribunal recognizes that the Appellant was suffering from significant illnesses at the time of the MQP including long-standing epilepsy and depression, the evidence establishes that she was able to continue working as a cleaner for many years thereafter. In an attending physician's statement dated March 8, 1993, Dr. Fernandez, the Appellant's family doctor, indicated that the Appellant's epilepsy was stable. Dr. Fernandez's clinical note dated June 27, 2000 (more than nine years after the MQP) indicates that the Appellant continued on Tegretol and Rivotril, that she denied further syncopal or epileptic attacks, and that she was working as a cleaner. The initial report from Dr. Del Campo, the Appellant's neurologist, on January 9, 2003 (12 years after the MQP) notes that the Appellant was working as a cleaning woman, and that she had initially been seen by another neurologist Dr. Picard but had not had any contact with him for over 10 years.

[25] In her CPP disability questionnaire, the Appellant indicated that her last employment was as a cleaner from 2004 until July 20, 2006, and that she was self-employed (L.'s Cleaning) from January 15, 2009 until May 30, 2009. She claimed to be disabled as May 29, 2009 (more than 18 years after the MQP). In her self-employment questionnaire, the



Appellant indicated that she had started her own business in January 2003 and that she stopped working in the business in November 2003 because she could not work due to the progression of her illness.

[26] The evidence establishes that the Appellant's conditions had not progressed to being severely disabling in accordance with the CPP criteria until many years after the MQP.

### **Prolonged**

[27] Having found that the Appellant's disability was not severe as of the MQP, it is not necessary for the Tribunal to make a determination on the prolonged criteria.

### **CONCLUSION**

[28] The appeal is dismissed.

Raymond Raphael  
Member, General Division