

[TRANSLATION]

Citation: *D. P. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 227

Appeal No: CP29065

BETWEEN:

D. P.

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

DATE OF HEARING: June 11, 2014

TYPE OF HEARING In-person

DATE OF DECISION: September 11, 2014

PERSONS IN ATTENDANCE

Appellant	D. P.
Appellant's representative	Gisèle Blanchard
Counsel for the Respondent	Vanessa Luna
Expert witness for the Respondent	Dr. Pierre Bourassa

DECISION

[1] The Tribunal dismisses the appeal.

INTRODUCTION

[2] The Appellant made the following claims for a disability pension:

- (a) On September 7, 2001: The conditions preventing her from working are described as [translation] “an issue with both knees (osteoporosis in the knees, operated twice on the right knee), a muscle problem (fibromyalgia), (chronic fatigue syndrome) (migraines),” as well as issues with her shoulders, heart, blood pressure and stomach. She worked until June 4, 1999, for a [translation] “community project” and stopped working when the project was completed. She also worked as a self-employed hairdresser from July 8, 1999, to September 30, 1999. She wrote that she could no longer work due to health problems on October 2, 1999. On November 20, 2001, the Respondent notified the appellant that she was not entitled to a disability pension because the evidence showed that she was able to work at some form of employment on a regular basis. The Appellant did not file an appeal;
- (b) On March 31, 2004: The conditions preventing her from working are described as [translation] “an issue with both knees (operated twice on the right knee), a muscle problem (fibromyalgia), chronic fatigue syndrome, migraines, bladder
- (c) problems, chronic depression,” as well as issues with her shoulders, heart, blood pressure, stomach, muscles, hip and lower back. The reason why she stopped working and the date as of which she could no longer work were the same as in the

first claim. On July 6, 2004, the Respondent notified the Appellant that she was not entitled to a disability pension because she did not meet all the conditions required to be entitled to receive disability benefits. The Appellant did not file an appeal;

(d) On January 20, 2010: The conditions preventing her from working are described as [translation] “an issue with both knees, operated three times, placement of a prosthetic, pain in both carpal tunnels (right has been operated on, left will be done later), fibromyalgia, osteoarthritis, arthritis, chronic fatigue syndrome, migraines, bladder problems, depression; bipolar, cortisone injections in my shoulders,” and also that she had difficulty with day-to-day living. The reason she stopped working and the date as of which she could no longer work were the same as in the first claim. On June 30, 2010, the Respondent notified the Appellant that she was not entitled to receive disability benefits because she had been able to perform another type of work since December 1997. The Appellant’s representative requested that the Respondent reconsider that decision. In a letter dated July 13, 2011, the Respondent notified the Appellant that the decision was upheld. The Appellant informed the Office of the Commissioner of Review Tribunals that she wished to appeal that decision to a review tribunal.

[3] On October 9, 2012, a review tribunal determined that a disability pension under the *Canada Pension Plan* (CPP) was not payable to the Appellant.

[4] The Appellant previously had filed an Application for Leave to Appeal that Review Tribunal decision (“Leave Application”) with the Pension Appeals Board (PAB) on December 3, 2012.

[5] On March 28, 2013, the PAB granted her leave to appeal. 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.

[6] This Tribunal held an in-person hearing for the reasons set out in the Notice of Hearing dated March 26, 2014.

APPLICABLE LAW

[7] To ensure fairness, this appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Leave Application with the PAB. For this reason, the determination as to whether the appeal has a reasonable chance of success will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the CPP as it read immediately before April 1, 2013.

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for a Canada Pension Plan 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.

[9] The calculation of the minimum qualifying period is significant because a person must establish a severe and prolonged disability on or before the end of the minimum disability period.

[10] 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

[11] The date of the minimum disability period is not in dispute. Reference was made to the possibility of a proration of earnings, but this argument was not submitted by the Appellant. Given that the parties are not in disagreement and that no other date was proven, the Tribunal finds that the Appellant's minimum disability period was December 31, 1997.

[12] In this case, the Tribunal must determine whether it is more likely than not that the Appellant had a severe and prolonged disability on or before the end of the minimum qualifying period (MQP).

EVIDENCE

[13] The Appellant testified. The Respondent also testified and presented a witness, Dr. Pierre Bourassa. The parties agreed, and the Tribunal is satisfied that Dr. Bourassa is an expert in general medicine.

[14] The Appellant was 41 years of age at the time of her MQP date, December 31, 1997. She did not complete high school, as she stopped attending in seventh grade. She enrolled in a hairdressing course at a private school from December 1997 to January 1999.

[15] The Appellant had a very difficult childhood. She was abused by her father for ten years. She was pregnant for the first time at the age of 17, and the boy in question wanted to marry her. She had to work in order to support her family. She had three children, the last of which was born in 1992. Her spouse has been working for a peat moss producer for 40 years in seasonal employment.

[16] In 1973, at the age of 17, she started to work for National Seafood, a fish processing plant. She was employed by the plant for 17 years and was laid off due to a shortage of work. She subsequently worked for three years (from 1994 to 1997) for Seajim Export, another fish processing plant. (She mentioned another employment with the Océanie association, without providing any details.) Every employment was seasonal and, between the seasons, the Appellant applied for unemployment insurance. She worked for a peat moss project from May to June 1999. She explained that [translation] “sometimes we were short some weeks” of work to be able to claim unemployment insurance and that there were community projects that allowed them to gain a few additional weeks in order to qualify for unemployment insurance.

[17] During her employment with National Seafood, the Appellant held several positions: inspecting shrimp, cleaning shrimp, packaging cod fillets, “belting” fish, cutting fish, cleaning and canning crabs, etc. This was not full-time work; rather, it was work on a

day-to-day basis, depending on the week and the harvest. There were three-day weeks and seven-day weeks. The season started in May and ended in the fall.

[18] She testified that, in 1993-1994, she worked but was ill. She had major migraines and pain in her hands. She went to see doctors and had to miss work because she was in pain. This occurred during her three-year employment at a new plant. She panicked and was very nervous. She testified that she was assigned to a less demanding position but that, sometimes, she began work at 8:00 a.m. and could no longer tolerate it by 10:00 a.m. She could not manage a normal work day.

[19] Around 1997, the Appellant could not manage to get all her work done, either on the job or at home. She stated that that was when her depression began. She took a course in order to cope—a hairdressing course at a private school, where the principal understood her situation. With only an elementary school education, the Appellant was accepted into the hairdressing school and took out student loans to pay for the tuition fees. The program ran Monday through Thursday, from 9:00 a.m. to 3:00 p.m., but the Appellant was accommodated and could do shorter days. If she left early, she could complete her hours another day. The course consisted of a total of 1,600 hours. The Appellant believes that the school principal may have assigned her more hours than she actually completed. She believes this was the case because the principal was aware of her situation.

[20] The principal completed an employer questionnaire in May 2011. She confirmed that the hairdressing course took place from December 1997 to January 1999, covering 35 weeks (140 hours per month), for a total of 1,600 hours.

[21] After completing the course, the Appellant thought that she would be able to run a hairdressing salon from her home. Her spouse bought her the necessary equipment, and she had [translation] “maybe four clients.” She gave haircuts and, on occasion, perms or colour treatments. She ran her salon between July 4 and October 2, 1999. She stated that she had to give up her salon because she was in too much pain—she had to bend over too much and she was on her feet a lot. She did not repay the loan for the tuition fees because she did not have the means and was able to make arrangements with the bank in this regard.

[22] The Appellant described her health problems, but had difficulty with the dates. She stated that [translation] “they are written somewhere” in the documents. Among other things, the Appellant testified that her knees had been operated on and that she had had two arthroscopies and subsequently a prosthesis replacement. She had osteoarthritis in both knees. She also suffered from depression and consulted a psychologist and social workers. She is now taking medication for depression. She was operated on both hands for carpal tunnel syndrome and has tennis elbow. She has back pain, degeneration at the L5 level and osteoarthritis. She has bursitis and shoulder tendinitis, and has had cortisone injections. She has migraines and needs to lie down. She has sleep problems and stomach issues (irritable bowels), and she sometimes has suicidal thoughts. She has weight issues and stated that her medications prevent her from losing weight and that, in addition, she does not have the money to eat properly, that she needs to eat more fresh food. The Appellant was referred to specialists, one of which has diagnosed her with fibromyalgia.

[23] With respect to the medications, in 1997, 1998 and 1999, the Appellant took medication for high blood pressure. She did not remember if there were other medications but stated that [translation] “it is all indicated” in the documents.

[24] The documentary evidence filed in this appeal is extensive. The appeal file includes several hundred pages, and a number of documents were filed at the hearing. All the documentation has been read and taken into consideration. A brief summary follows.

Medical documentation before the MQP

[25] The first medical report is dated January 21, 1997. Dr. Sirois, a plastic surgeon, noted her medical history and performed a physical examination. The Appellant was referred to him for abdominal dermatochalasis (“apron belly”) associated with diastasis recti abdominis (weakness in the abdominal wall). The doctor noted the medications that the Appellant was taking: Prepulsid (for gastroesophageal reflux) and Adalat XL, 30 mg daily (for high blood pressure). He recommended an abdominal lipectomy with diastasis repair and applied for an approval of this service with the health insurance authority.

[26] Dr. Louis, a surgeon, saw the Appellant in April 1997 and described the physical examination as follows: [translation] “The patient, 40 years of age, is slightly obese and not in distress”; her head, neck, heart, spine, pelvis and extremities are normal and her lungs are clear; her abdomen is supple and not painful, and her intestinal sounds are normal. He found that she had a hiatal hernia with reflux, as well as gastric erosion. He recommended weight loss, a raised bed and a change in her antihypertensive medication.

[27] The Appellant was referred (by Dr. Chiasson, her family doctor) to Dr. David, an orthopedist, in October 1997, following pain in her upper limbs that dated back to 1997. He found that her carpal tunnel syndrome was resolving itself and recommended an anti-inflammatory treatment. [Translation] “If the symptoms return, one could evaluate ... through electromyographic testing whether carpal tunnel syndrome is developing.” He further noted [translation] “an asymptomatic cyst of the left scaphoid.”

[28] The Appellant was operated on in November 1997 to have the fat removed and to bring her abdominal parts closer together (abdominal lipectomy and diastasis repair). Dr. Bourassa testified that the surgery seemed to have gone well, and there is no follow-up showing any problems.

[29] Dr. Chiasson, the family doctor, made progress notes—those of September 1997 to February 2000 are filed as evidence. The Appellant saw her doctor three times in 1997 to follow up on her high blood pressure (HBP), once in 1998 for HBP, and twice for headaches. On February 2, 1997, the doctor noted stomach and digestive problems. In November 1997, the dosage of anti-hypertensive medication was changed. In December, he noted that the Appellant was intolerant to cold and that she had lost 9.5 pounds. In November 1999, the doctor wrote that [translation] “the hairdresser feels that she has been unable to work since October 2, 1999.”

[30] Dr. Bourassa testified that, before the MQP, there was no depression, arthritis in the knees or carpal tunnel syndrome. The carpal tunnel syndrome was resolving itself in October 1997. The pain in the upper limbs was treated with nonsteroidal anti-inflammatory drugs (NSAIDs). The HBP was treated with anti-hypertensive medication. The abdominal surgery went well. The digestive problems (reflux) were treated with medication. The

ganglion (cyst) on the left caused no distress but could have been removed had that been the case.

Medical documentation after the MQP

[31] In 1998 and 1999, the Appellant had a scan with dye of the posterior fossa showing no particularities. A dietitian encouraged her to lose weight, specialist medical doctors encouraged her to exercise and lose weight, and NSAIDs were recommended for the pain in her knees. Bradycardia (a slow heartbeat) was resolved by withdrawing an anti-hypertensive.

[32] In January 2000, the Appellant had an arthroscopy of the right knee. Fibromyalgia was diagnosed in November 2000. The Appellant consulted a psychiatrist in February 2001, who diagnosed her with adjustment disorder with depressed mood (since her fibromyalgia diagnosis in November 2000) and recommended psychotherapy and medication. In May 2001, the psychiatrist wrote that her dysthymia was stabilizing.

[33] In March 2001, the Appellant was examined for shoulder pain. The orthopedist determined that she had tendonitis and prescribed NSAIDs.

[34] In September 2001, Dr. Chiasson prepared a medical report in support of the Appellant's first application. The report states that the Appellant suffers from fibromyalgia, reflux, shoulder tendonitis, adjustment disorder with depressed mood, HBP, obesity, arthritis in the knees, and bilateral carpal tunnel syndrome, and that she is taking Elavil, Dalmane, Losec, Paxil, Dexedrin, Indapamide and Metoprolol. In October 2001, the doctor wrote a letter to HRSDC stating that she had been totally disabled since November 1999.

[35] Between October 2001 and August 2003, the Appellant saw her family doctor, a neurologist, a plastic surgeon, an orthopedist and a gastroenterologist. She was operated on for carpal tunnel syndrome (November 2001), she functioned well with her knees (October 2001 and November 2002), and she had a hiatal hernia, reflux and diverticulosis in 2002. The medical reports have been reviewed and considered, and it is not necessary to outline them in detail.

[36] In February 2004, Dr. Chiasson prepared a medical report in support of the Appellant's second application. The report states that the Appellant suffers from fibromyalgia, reflux, shoulder tendonitis, depression, HBP, obesity, arthritis in the knees and bilateral carpal tunnel syndrome and that she is taking Pariet, Paxil, Indapamide and Metoprolol.

[37] Several medical reports from March 2004 to March 2009 have been filed as evidence. The Appellant was diagnosed with bilateral trochanteric bursitis and osteoarthritis of the knees, and had infiltration of the shoulders (2006, 2007); an operation on her right knee was delayed because she had to lose weight (2007, 2008); she also had arthroplasty (replacement surgery) on the right knee (2009). The medical reports have been reviewed and considered, and it is not necessary to outline them in detail.

[38] In November 2009, Dr. Chiasson prepared a medical report in the support of the Appellant's third application. The report states that the Appellant suffers from fibromyalgia, reflux, shoulder tendonitis, dysthymia, adjustment disorder with depressed mood, HBP, morbid obesity, arthroplasty, degeneration at the L5-S1 level and severe osteoarthritis, and that she is taking Nexium, Paxil, Indapamide, Metoprolol, Tyenol and NSAIDs as needed. The doctor notes that the Appellant has been [translation] "incapable of performing any type of work since 2000."

[39] In April 2012, Dr. Chiasson wrote a letter to the review tribunal and again changed the Appellant's disability date to 1997.

Additional medical evidence

[40] Dr. Bourassa noted that there were considerably more post-MQP than pre-MQP medical reports. He reviewed and considered them all. He noted that the following were all post-MQP conditions:

- (a) Fibromyalgia and joint pain – November 2000;
- (b) Symptoms of depression – February 2001;
- (c) Knee imaging and surgery – 2003 and 2009;

(d) Bursitis and osteoarthritis of the knees – 2004; and

(e) Infiltration of the shoulders – 2006 and 2007.

[41] On cross-examination, Dr. Bourassa was asked about Dr. Chiasson's opinions regarding the Appellant's disability date. Dr. Bourassa responded by pointing out how the doctor's opinion changed from November 1999 (October 2001 letter) to 2000 (November 2009 report) to 1997 (April 2012 letter). He found it curious that the doctor changed his opinion twice—the second time after the Respondent's analysis and determination, during reconsideration (in a letter dated July 31, 2011), that the minimum qualifying period (MQP) was in December 1997. Dr. Bourassa also noted that the 2012 letter does not explain why Dr. Chiasson changed his opinion, as the letter does not contain any information that was not already in the file.

[42] In response to the question as to whether the Appellant was capable of work at the time, in 2014, considering that she suffered from fibromyalgia, had had a knee replacement with another one to follow and had little education, Dr. Bourassa answered that, in his opinion, the Appellant had residual capacity but whether this was enough [translation] "I cannot say, as it is outside my area of expertise; there are specialists in functional rehabilitation evaluation."

SUBMISSIONS

[43] The Appellant submitted that she was entitled to a disability pension for the following reasons:

- (a) She is disabled and has been unable to work since 1997;
- (b) The hairdressing course does not demonstrate that she was able to work; she was unable to complete the hours and had to be accommodated;
- (c) She was unable to run a hairdressing salon, which shows that she was unable to work after she completed her training due to her medical condition; and

(d) She does not have the education, the ability or the experience required to find employment.

[44] The Respondent submitted that the Appellant was not entitled to a disability pension for the following reasons:

(a) It conceded that the Appellant had had medical problems but stated that the key question was [translation] “at what time?”;

(b) In December 1997, her carpal tunnel issues were resolving themselves and the abdominal operation in November 1997 proceeded without complication; these were the Appellant’s only medical problems before the MQP;

(c) There is no objective medical evidence from before the MQP;

(d) The family doctor provided three opinions regarding the disability date; the last opinion was written 14 years after the MQP; the opinion issued closest to the MQP date, in 2001, states that the disability date is November 1999; and

(e) After the MQP, the Appellant worked on a peat moss project from May to June 1999, took a hairdressing course between December 1997 and January 1999 and worked as a self-employed hairdresser from July to October 1999.

ANALYSIS

[45] The Appellant must establish on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 1997.

Severe

[46] 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.

[47] The Appellant was 41 years of age at the time of the MQP, had an elementary school education and completed a hairdressing course in January 1999. She worked primarily in fish processing plants from the age of 17, in seasonal employment. She also trained and worked as a self-employed hairdresser for a little less than two years.

[48] The Appellant is seeking to establish that she had a severe and prolonged disability before her MQP due to medical problems.

[49] Her medical problems before the MQP consisted of carpal tunnel syndrome and apron belly. The first condition was resolving itself and the second condition was operated on without complication before the MQP.

[50] It is well established that an applicant must provide some objective medical evidence (*Warren v. Canada (A.G.)*, 2008 FCA 377).

[51] There is no such evidence prior to the end of 1997. Dr. Chiasson's reports contain three different opinions. Of these, the only opinion indicating a disability date before the end of 1997 was written in 2012, more than 14 years after the MQP, and it is devoid of any explanation or support for the change in opinion and contains no new information. There are several medical reports that were prepared closer to the MQP date, but none of them makes a connection between the Appellant's medical problems and her ability to work at the end of 1997. In the circumstances, the Tribunal gives no weight to Dr. Chiasson's 2012 opinion.

[52] Moreover, the Appellant completed a hairdressing course (140 hours per month, for 12 months, after the MQP), worked on a peat moss project for a brief time and ran a hairdressing salon for a few months in 1999.

[53] For all the reasons outlined above, I find that the Appellant's disability was not severe on the relevant date, December 31, 1997. In so concluding, I am not discounting the Appellant's medical problems. However, I must respect and apply subsection 42(2) of the CPP and the case law.

Prolonged

[54] As I have found that the disability was not severe, there is no need to examine the requirement concerning the prolonged nature of the disability.

CONCLUSION

[55] The appeal is dismissed.

Shu-Tai Cheng

Member, Appeal Division