



Government
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Social Security
Tribunal

Tribunal de la
sécurité sociale

Citation: *H. W. v Minister of Human Resources and Skills Development*, 2014 SSTGDIS 47

Appeal No: GT-113070

BETWEEN:

H. W.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Brian Rodenhurst

HEARING DATE: September 23, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: September 30, 2014

PERSONS IN ATTENDANCE

H. W. - Appellant

F. W. - Appellant's sister – witness

Jim Farrell - Appellant's representative

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 March 1, 2010. 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 teleconference for the reasons given in the Notice of Hearing dated June 10, 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, 2007.

[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 53 years of age at the time of the MQP. She was employed at X from 1980 to her severance in 2009. She worked as a dietary aid, and her duties including preparing plates of food, delivering and picking up trays from patients.

[11] F. W. the sister of the Appellant testified. She stated she would help her sister due to the fatigue the Appellant suffered from since about the year 2000. She would drive her to work, cook meals for her sister and help with laundry. She noted her sister would work afternoon shifts due to fatigue in the morning.

[12] F. W. encouraged her sister to seek help through alternative medical providers including acupuncture, naturopaths, and homeopathic treatments. The Appellant testified that she did not have faith in traditional medical doctors who did not diagnosis or help her. F. W. confirmed this evidence, and drove her to alternative medical appointments.

[13] The Appellant told F. W. that she felt pain in her hip, back and ankles, and as well felt very weak. F. W. noticed her sister walked with a limp, and required significant rest even after short trips to the grocery store, or to medical appointments. F. W. moved in with the Appellant in 2007 to help her, previously the Appellant lived with their mother.

[14] F. W. has noticed the Appellant does not sleep well and is up through the night, and after a tough day will sleep in until noon or after. She noticed the fatigue and weakness of her sister from 2000 onwards.

[15] The Appellant testified that she experienced problems coping at work and traded her full 7 hour shifts for 3.5 hour shifts. She testified she had back pain, nausea, and chronic fatigue as a result of fibromyalgia. She indicated she approached the employee assistance program provided by her employer. She was not provided with the help she believed she required, and she testified she last worked in early January 2006.

[16] The employer's records indicate she received a severance package in 2009. The Appellant was an employee of X until October 20, 2009. The Appellant was an employee under the terms of the collective agreement even though she was not attending work, and her employment was terminated as "frustration of employment". The employer noted poor attendance, she required help of her co-workers, and did not have the ability to meet the demands of her job.

[17] The Appellant was vague on the question of whether she exercised as recommended by her medical doctor. She did say she would walk to the market which

she indicated is basically across the street. She does not participate in any other exercise programs such as aqua fit, or other forms of exercise programs.

[18] The Appellant uses drops made by Ms. Kingston of Complementary Health Care. She indicated she does not have faith in traditional medical doctors and relies on service providers such as Reiki and homeopathy.

[19] The Appellant's Questionnaire was received by Service Canada on March 1, 2010 duly signed by her. She answered the question of last day on the job as January 11, 2007. She indicated on the questionnaire the date she could no longer work due to her medical condition as 1996. In the column describe other treatment you receive she wrote: "I had a few appointments with a naturopath, couple appointments with a reflexologist and ionic foot bath. I take a bath sometimes with Epsom salts".

[20] The Appellant also indicated in her questionnaire that she develops severe symptoms of dizzy, nauseated, and vomiting that prevents her from working. She testified she last worked in early 2006.

[21] Dr. Pop her family doctor, filled in the Medical Report that accompanied the Application for Disability. He noted that he started treating the Appellant in 2009. His diagnosis was chronic fatigue and chronic pain syndrome with a poor prognosis. Dr. Pop also wrote that she was not taking any medication, and no further consultations or medical investigations were planned for her main medical condition. He noted that he took over the Appellant's health care from Dr. Munnoch who retired in 2005, and does not have access to Dr. Munnoch's records.

[22] Ms. Mary Wang, Acupuncturist who noted she was a doctor in China, confirmed the Appellant attended her clinic for acupuncture and Chinese herbal medicine treatments on three occasions in 2007. Ms. Wang recommended the Appellant take nutritional products. No other observations were noted in her report.

[23] Ms. Ellen Kingston of Complementary Health Care Clinic noted the Appellant attended her clinic from August 30, 2001 to October 11, 2007. She noted seven visits

from the Appellant in that time frame. She noted the complaints of the Appellant but not any diagnosis or any treatment recommendations. The Appellant's complaints included abdominal gas, sciatica pain, weakness, depression and weakness among others.

[24] Dr. Harth, M.D., FRCP reported on August 31, 2011 to Dr. Pop, the Appellant's family physician. Under the heading Problems: the Doctor noted fibromyalgia and vertigo. He noted the Appellant was not taking any medications but rather takes cod liver oil, valerian, magnesium and psyllium to help her bowel movements. He opined that is difficult to know how disabled she is. He noted he went over the health assessment and fibromyalgia impact questionnaire but he was not sure the answers are in fact entirely valid. He recommended the Appellant engage in low-impact aerobic exercise such as walking, and try Cymbalta. He noted the Appellant indicated that she attended his office as CAW advised her to see him with respect to a Canada Pension Plan application.

[25] Dr. Harth concluded in his report that the Appellant is work disabled, and her difficulty in concentrating would alone present a major contraindication to her being gainfully employed.

[26] Dr. Pop wrote to Jim Farrell the Appellant's representative on May 9, 2012 noting that he first saw the Appellant in October 4, 2009 to discuss the possibility of applying for Canada Pension Plan. He noted he was able to obtain a report from Dr. Boyd which indicated the Appellant suffered from a multitude of symptoms since 1995 however, Dr. Boyd has not reached a final diagnosis. Dr. Pop concluded by indicating in his professional opinion the Appellant's condition is chronic and severe and unlikely to improve with any type of medical treatment.

[27] Dr. Parnes, M.D., FRCSC reported to Dr. Pop on November 14, 2012. The Doctor noted that the Appellant herbal supplements, no other medications were noted. Dr. Parnes noted under past medical history, chronic fatigue syndrome, fibromyalgia. He concluded by reassuring the Appellant that her audiogram and head thrust were

normal, and her Dix-Hallpike was negative. She denied a history of vertigo. The Appellant told him she suffers from dizziness predominately lightheadedness with imbalance, and vomiting. She indicated to the Doctor that this would happen about once per year and the last episode was July 2011.

[28] Mary Routenburg R.N. in an undated letter indicated the Appellant had sought treatment for fullness and pressure in her head, nausea, flu like symptoms, breast lumps, fatigue, sore moth, skin coming off her lips, fevers, palpitations, pulsating in her body, right eye pain, glaucoma, diarrhea, vomiting, and feeling all black inside. There were two treatment dates being March 5, 2002, and March 14, 2002.

[29] Larry Ross, Reiki Practioner, submitted an undated report regarding the Appellant. He indicated "I would like to say that as a reiki practioner, I can feel the extreme pain and weakness in her body when I work on her". In addition a report dated July 21, 2014 by Ruth Desmarais, osteopathic practioner, indicated she was treating the Appellant for chronic fatigue and fibromyalgia since May 2013. Ms. Desmarais noted the Appellant is proactive in getting well, and is committed to eating highly nutritious food and taking natural supplements to improve her health.

SUBMISSIONS

[30] The Appellant's representative submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant's medical condition existed prior to the MQP, and the Appellant sought treatment for her condition prior to the MQP.
- b) The Appellant's record of earnings indicates her disability caused her income to significantly decrease resulting in nominal earnings in 2005 -2007. This decrease in income indicates a severe disability prior to the MQP.

- c) A review of the oral evidence of the Appellant and her sister indicates the Appellant suffered from a severe and prolonged disability prior December 31, 2007.

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

- a) The Appellant stated she stopped working in 2007 because of chronic fatigue syndrome however she gives a claim date of 1996.
- b) There are no medical records to show she needed to see a medical doctor from 1993 until 2009 when Dr. Pop took over her care.
- c) The information of file does not support a finding that the Appellant met the definition of severe and prolonged within the meaning of the *CPP*, when her minimum qualifying period ended in December 2007.

ANALYSIS

[32] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2007.

Severe

[33] An Appellant must provide some objective medical evidence of his or her disability (*Warren v. Canada (A.G.)*, 2008 FCA 377). The Appellant has used the services of numerous alternate health care providers. The Tribunal finds that the reports of the alternate providers are not objective medical evidence of her disability. Ms. Ellen Kingston of Complementary Health Care has not stated any qualifications or degrees that would lead the Tribunal to believe she is in any way qualified to render an objective medical opinion. The Tribunal notes that she does not have any initials after her name to indicate a professional qualification and has no professional designations

or information concerning degrees on her reports. The Tribunal puts no weight on the list of symptoms that she simply repeated in writing as told by the Appellant.

[34] Larry Ross, Reiki Practitioner, submitted a report regarding the Appellant. He indicated “I would like to say that as a reiki practitioner, I can feel the extreme pain and weakness in her body when I work on her”. The Tribunal places no weight on this report as it does not relate to the MQP, and his observation of feeling pain is not an objective medical opinion.

[35] Ms. Mary Wang, Acupuncturist who noted she was a doctor in China, confirmed the Appellant attended her clinic for acupuncture and Chinese herbal medicine treatments on three occasions in 2007. Ms. Wang recommended the Appellant take nutritional products. No other observations were noted in her report. The Tribunal does not place weight on this report as the credentials of the Acupuncturist as a “doctor in China”, is questionable and there is no objective medical opinion regarding diagnosis.

[36] A report dated July 21, 2014 by Ruth Desmarais, osteopathic practitioner, indicated she was treating the Appellant for chronic fatigue and fibromyalgia since May 2013. Ms. Desmarais noted the Appellant is proactive in getting well, and is committed to eating highly nutritious food and taking natural supplements to improve her health. The Tribunal does not find this report to be objective medical evidence as it does not relate to the MQP, and the author of the report is not a medical specialist and her observation of chronic fatigue and fibromyalgia diagnosis is not reliable.

[37] The Appellant have a personal responsibility to cooperate in their health care (*Kambo v. MHRD, 2005 FCA 353*). The Appellant was vague on the question of whether she exercised as recommended by her medical doctor. She did say she would walk to the market which she indicated is basically across the street. She does not participate in any other exercise programs such as aqua fit, or other forms of exercise programs. This does not indicate she fulfilled her personal responsibility to cooperate in her health care as she failed to exercise as recommended by Dr. Harth.

[38] Dr. Pop wrote to Jim Farrell the Appellant's representative on May 9, 2012 noting that he first saw the Appellant in October 4, 2009 to discuss the possibility of applying for Canada Pension Plan. He noted he was able to obtain a report from Dr. Boyd which indicated the Appellant suffered from a multitude of symptoms since 1995 however, Dr. Boyd has not reached a final diagnosis. Dr. Pop concluded by indicating in his professional opinion the Appellant's condition is chronic and severe and unlikely to improve with any type of medical treatment. The Tribunal does not put a lot of weight on this report. Dr. Pop noted there was not a final diagnosis by Dr. Boyd, and Dr. Pop began treating the Appellant well after the date of the MQP. Dr. Pop further indicated the purpose of the visit was for the Appellant to apply for Canada Pension Plan. The Family Physician is acting as an advocate for the Appellant and makes a conclusion of severe without medical evidence to substantiate his opinion. His conclusion that the Appellant's condition is chronic and severe and unlikely to improve does not relate to the MQP.

[39] Dr. Parnes, M.D., FRCSC reported to Dr. Pop on November 14, 2012. The Doctor noted that the Appellant herbal supplements, no other medications were noted. Dr. Parnes noted under past medical history, chronic fatigue syndrome, fibromyalgia. He concluded by reassuring the Appellant that her audiogram and head thrust were normal, and her Dix-Hallpike was negative. She denied a history of vertigo. The Appellant told him she suffers from dizziness predominately lightheadedness with imbalance, and vomiting. She indicated to the Doctor that this would happen about once per year and the last episode was July 2011. Lightheadedness and imbalance occurring once a year is not indicative of a disability that is severe and prolonged as defined by the CPP. The tests were normal and the Appellant denied a history of vertigo. Dr. Parnes notes chronic fatigue syndrome and fibromyalgia, but this information came from the Appellant and is not supported by any objective medical evidence that relates to the date of the MQP.

[40] Dr. Harth, M.D., FRCP reported on August 31, 2011 and noted fibromyalgia and vertigo. He noted the Appellant was not taking any medications but rather takes cod

liver oil, valerian, magnesium and psyllium to help her bowel movements. He opined that is difficult to know how disabled she is. He noted he went over the health assessment and fibromyalgia impact questionnaire but he was not sure the answers are in fact entirely valid. He noted the Appellant indicated that she attended his office as CAW advised her to see him with respect to a Canada Pension Plan application. The report of Dr. Harth does not substantiate the Appellant suffered from a severe disability as of the date of the MQP. The Doctor indicated that it is difficult to know how disabled she is, and questioned the validity of her answers, and was not taking any medication. This does not support his conclusion the Appellant is work disabled, a conclusion without supporting medical evidence, and a conclusion influenced by the statement of the Doctor she entered the room to see him because the CAW advised her to see him with respect to a Canada Pension Plan application.

[41] The Tribunal does not find the evidence of the Appellant to be reliable. The Appellant indicated on her questionnaire that she was unable to work due to her medical condition since 1996, but in fact worked until 2006. She indicated on her questionnaire that she last worked in January 2007, and testified she last worked in 2006. The Appellant also indicated in her questionnaire that she develops severe symptoms of dizzy, nauseated, and vomiting that prevents her from working. This contradicts the information she gave to Dr. Parnes, who was told these symptoms occurred once a year, and further noted the tests he ordered came back normal. The Tribunal notes Dr. Harth wrote that he had difficulty determining how disabled the Appellant was as he was not sure the Appellant's answers were valid. The Tribunal is not finding the Appellant is dishonest or trying to mislead the Tribunal, but rather is finding the evidence is not reliable and cannot be given sufficient weight to overcome the lack of objective medical evidence related to the date of the MQP.

[42] The Appellant's sister gave evidence of difficulties that the Appellant had since the year 2000. This evidence indicated the Appellant suffered from fatigue and she helped her sister by driving her to work and helping her with household chores. F. W. encouraged her sister to seek help through alternative medical providers including

acupuncture, naturopaths, and homeopathic treatments. This evidence does not indicate the Appellant suffered from a severe and prolonged disability as defined in the CPP. The Appellant may have had some limitations as described by her sister but this does not necessarily indicate the Appellant was incapable regularly of pursuing any substantially gainful occupation. The use of alternative medical providers does not substantiate a severe disability.

[43] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[44] The Appellant was 53 years of age at the time of the MQP and had been employed for a substantial period of time with X. She has transferable skills and is proficient in English. She has the ability to seek and maintain a gainful occupation in a real world context.

[45] The Tribunal has considered the documentation and medical reports on file, and listened to the evidence of the Appellant and her witness. The Tribunal finds that the Appellant has not proved on a balance of probabilities she suffered from a severe and prolonged disability as defined by the CPP at the date of the MQP.

Prolonged

[46] Since the Tribunal found the disability was not severe it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[47] The appeal is dismissed.

Brian Rodenhurst
Member, General Division