

Citation: *S. G. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 33

Appeal No: GT-120743

BETWEEN:

**S. G.**

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: November 14, 2014

## **DECISION**

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

## **INTRODUCTION**

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on July 27, 2011. 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] This decision was made on the basis of the documents and submissions filed in the Hearing File for the reasons given in the Notice of Intention dated October 9, 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 and the Tribunal finds that the MQP date is December 31, 2004, and that the Appellant has a potential pro-rated extended MQP of March 31, 2005.

[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 March 31, 2005.

## **BACKGROUND AND EVIDENCE**

[10] The Appellant was 50 years old on the potential extended MQP date of March 31, 2005; she is now 60 years old. In her CPP disability questionnaire, date stamped by the Respondent on August 5, 2011, the Appellant indicated that she has a grade 12 equivalency education, and that she last worked in retail sales from January 1, 2004 until September 15, 2006; she noted that she stopped working because the business closed down. The Appellant also noted that she had worked for E.D. Smith from 1997 until 2001, that she had to take a two year stress leave, and that when she came back the company gave her a severance payment. The Appellant claimed to be disabled as of 2006, and listed her main disabling illnesses to be post-traumatic stress disorder (PTSD), agoraphobia, anxiety, panic attacks, and depression. When explaining her difficulties/functional limitations, the Appellant noted that she does not do household maintenance because she does not have the motivation or desire due to her depression; that she has difficulty concentrating; that she is a chronic worrier, does not sleep at all, hears every noise, and cannot shut off her brain because of

anxiety; that she does not have a driver's license; and that she will not use public transportation because of her agoraphobia.

[11] The Hearing File reveals that the Appellant had post-MQP earnings of \$1,148 in 2005, \$8,305 in 2006, and \$4,159 in 2007. In a telephone conversation with a Service Canada medical adjudicator on April 19, 2014, the Appellant's husband reported that the Appellant had worked between November 2004 and September 2006 under the direction of her psychologist for 5-8 hours per week, and that the job was a form of cognitive therapy. The job involved retail sales of hemp products and the business is closed.

### **AFFADAVIT OF R. G.**

[12] An affidavit, sworn by the Appellant's husband on May 5, 2014, was filed on behalf of the Appellant. The Tribunal has carefully reviewed the affidavit, and the most significant paragraphs attest to the following:

- In 2002 the Appellant developed complex post-traumatic stress disorder after years of sexual harassment in the workplace and was forced to leave her employment with E.D. Smith;
- While at work, the Appellant began to experience severe anxiety with panic attacks that have continued to the present time;
- During a panic attack the Appellant experiences a flight impulse and has to leave wherever she is and return home. She experiences a racing heart, sweating and shortness of breath; and after a panic attack, she is often bedridden for three to four days;
- She attempted to return to work during 2006 and 2007, on the recommendation of her counsellor;

- She worked for a family friend in a small retail setting in the Centre Mall in Hamilton, and it was understood by her employer that, if needed, she could leave the store at any time;
- The employment was part-time consisting of four hour shifts on weekends, and he would accompany the Appellant and be with her during her shift to reassure her;
- The business closed because the Centre Mall was torn down;
- The Appellant is extremely agoraphobic and often refuses to leave the house to go to doctor's appointments. She refuses to attend her lawyer's office, or even allow her lawyer to come to the home to interview her for an affidavit. She has not been able to leave the home alone since 20002;
- Since leaving work in 2002, the Appellant has not been able to return to the workforce. Her one attempt to do so was in a very special setting where her condition was understood and accommodated to a degree that no ordinary employer would accept.

## **MEDICAL EVIDENCE**

[13] A report dated July 25, 2011 from Dr. Brookes, the Appellant's family doctor, accompanied the CPP application. The report diagnosis post-traumatic stress disorder, major depressive disorder, and panic disorder with agoraphobia. The report notes that the Appellant has been unable to leave her home without her husband for ten years. The prognosis indicates that the Appellant will remain unchanged without intensive in- hospital treatment.

[14] A report dated April 14, 2003 from Dr. Dalton, psychologist, indicates that the Appellant has been seeing Jolae Fuller, one of his counsellors, for assistance with her mental health issues. The report notes that the Appellant's current mental health status is causing

severe impairment in her daily functioning, and preventing her from seeking employment. The report diagnoses post-traumatic stress disorder, panic attacks, and agoraphobia.

[15] A clinical note prepared by Dr. Koole, family practitioner, dated September 24, 2005 indicates that the Appellant is not working, and that she rarely leaves the house because of agoraphobia. Dr. Koole's clinical note of an annual health examination on October 6, 2005 indicates diagnoses of panic disorder with agoraphobia, and dysthymia.

[16] On January 12, 2012 Jolae Fuller, psychological associate, reported to CPP that the Appellant attended many sessions between 2005 and 2009; that the Appellant had previously been diagnosed with agoraphobia with panic attack; that she reported significant anxiety symptoms; and that her levels of self-esteem were significantly impaired. The Appellant's reported symptoms included hypersensitivity to surroundings, grandiose sense of self, odd beliefs (super hearing, attracts spiders and bugs, reads people's thoughts, predict future events), extreme levels of anxious arousal, panic, and mood and cognitive difficulties. The report concludes:

Combined, the symptoms contribute to an inability to function at normal level during the basic day to day tasks. From a psychological perspective, this client would appear to be unable to return to any form of work and this will likely be indefinite. This client is unable to tolerate the mere concept of leaving her home without a significant increase in anxiety and panic symptoms.

## **SUBMISSIONS**

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

- a) Her severe psychological conditions preclude her from pursuing any form of gainful employment;
- b) She has been unable to leave her home, without being accompanied by her husband, since 2002;

- c) Her employment efforts during 2006 and 2007 do not represent substantially gainful employment since her earnings were not substantial, she worked for an accommodating employer, and she worked under accommodated conditions.

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

- a) On her disability questionnaire, the Appellant indicated that she was able to work until 2006 (which is after the MQP), and that she stopped working because the business closed, and not for medical reasons;
- b) The Appellant's age, education, and work experience suggest that she has transferable skills, and that she is not precluded from retraining for and/or performing alternative work suitable to her conditions;
- c) The medical evidence does not support a severe disability since there is no evidence of any hospitalizations, psychotropic medications, or treatment by a psychiatrist.

## **ANALYSIS**

[19] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before March 31, 2005.

### **Severe**

[20] 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.

[21] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[22] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before March 31, 2005 she was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[23] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[24] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[25] The mere fact that someone continues to work after the minimum qualifying period should not automatically preclude them from entitlement to a disability pension. Applicants with disabilities, who continue to work after the minimum qualifying period must be commended, not discouraged, for making an effort to remain financially self-supporting. In the end, what must be decided, where they do work, is whether they have, in fact, the capacity to regularly pursue substantially gainful employment: *Stanziano v MHRD* (November, 2002) CP 17296 (PAB).

[26] The affidavit of R. G. provides compelling evidence of the Appellant's severe disability since at least 2002. The Appellant left her work with E.D. Smith in 2002 because of complex post-traumatic stress disorder. She suffers from agoraphobia, and suffers panic



attacks when she leaves her house. She has been unable to leave her home, unless accompanied by her husband, since 2002. Significantly, the affidavit evidence is consistent with the medical evidence, which confirms diagnoses of post-traumatic stress disorder, panic attacks, and agoraphobia as of April 2003. The medical reports also confirm that the Appellant has undergone extensive therapy and counselling, and that her conditions preclude her from pursuing any form of gainful employment.

[27] The Tribunal does not consider the Appellant's work efforts during 2005 and 2006 to represent substantially gainful employment. She worked for an accommodating employer, her total earnings were low, she only worked part-time for four hour shifts on weekends, and she was accompanied by her husband at all times. These efforts represent a commendable effort to attempt by the Appellant to return to the work force, and to manage her multiple disabling psychological conditions; they do not evidence a capacity to pursue substantially gainful employment on a regular and consistent basis (see *Stanziano*, supra).

[28] The Tribunal has determined that the Appellant suffers from a severe disability in accordance with the CPP criteria.

### **Prolonged**

[29] Having determined that the Appellant's disability is severe, it is also necessary to make a determination on the prolonged criteria.

[30] The Appellant's disability has continued since at least 2002, and despite extensive counselling and therapy, there has been no improvement.

[31] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

## **CONCLUSION**

[32] The Tribunal finds that the Appellant had a severe and prolonged disability in 2002 when she last worked for E.D. Smith. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in July 2011; therefore the Appellant is deemed disabled in April 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of August 2010.

[33] The appeal is allowed.

*Raymond Raphael*  
Member, General Division