

Citation: *M. S. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 35

Appeal No: GT-119508

BETWEEN:

M. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Vikki Mitchell

HEARING DATE: November 27, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: December 1, 2014

PERSONS IN ATTENDANCE

M. S. – Appellant

G. H. – Witness

Dr. E. Borins – Witness

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 November 8, 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 October 3, 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, 2013.

[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 51 years old at her MQP. She has a 4 year degree in Sociology and Psychology. Her work history began in high school with retail work at The Bay. Following that she worked in social services with special needs children and adults in group home settings. Her most recent work was as a research analyst doing computer work in an office with the City of Toronto from April 1991 until October 2003. She left this job due to multiple chemical sensitivities and post-traumatic stress disorder. At the hearing she stated that prior to leaving, she had requested to work from home but that was not allowed.

[11] In the CPP questionnaire she explained that everyday common exposures caused debilitating fatigue, headaches, confusion, inability to concentrate, read or put thoughts together, impaired speech and sometimes vision. She had several physical reactions

including sore throat, difficulty breathing, chest pains etc. She was taking Palafer and Effexor and had ongoing therapy with Dr. Borins for PTSD.

[12] She had to gradually stop many activities – going to the gym, swimming, going in other people's cars, going to restaurants or movies at busy times, and going to visit people. She cannot go into a bicycle shop because of allergy to rubber, cannot touch a newspaper. She has difficulty with public transportation because of her sensitivity to scents and therefore must drive her own vehicle.

[13] She has flashbacks and nightmares, replaying 5 years of very difficult times at work and in a labour arbitration. These are often triggered by her ongoing communications with her insurance company. In her letter of appeal, dated January 28, 2012, the Appellant described the 5 year history of her experiences with the Ontario Human Rights Commission, WSIB, the Ontario Labour Relations Board, and the Occupational Health and Safety Act. These experiences were all related to the arbitration settlement with her employer. At the hearing she stated that the arbitrator did not think there was any safe place for her to work. The settlement required her to leave her job because the employer could not accommodate her.

CURRENT LIFE

[14] The Appellant moved to X, Ontario in May 2011. She looked for a long time before finding a location that would suit her needs. Her closest neighbor is approximately $\frac{3}{4}$ of a mile away. She is not subject to the chemicals from dyer vents which caused some of her problems in the city. There are no people walking around and few cars. There is no hydro. There are no agricultural odours, no wind turbines. All cleaning products she uses are non-toxic. She uses a Dyson animal vacuum for its filter, a steam cleaner and vinegar for cleaning. If she buys something new, including clothing, it must stay outside until it has off gassed. She has a shed for this purpose. Depending on the season, she primarily uses a barbecue for cooking. When this is not possible she will go to her neighbour's (G. H.) because he has electricity. He also uses only non- toxic products in his home.

[15] The witness, G. H., stated that he does most of her shopping for her because she becomes very disoriented in the grocery store. If she has to do some shopping herself, he will go with her to make sure she's okay. He does a lot of the maintenance work such as grass cutting. He deals with contractors if she needs renovation work. All products used in renovation such as paint and flooring are non- toxic. Her home is a safe place for her.

[16] She rarely attends family gatherings. If she visits her son, her brother or her mother, they must stay outside. She cannot attend community events unless they are outside. She recently tried to join a Weight Watchers group but cannot attend the meetings. Because of the invisibility of the chemicals to which she is sensitive, her reactions are unpredictable.

MEDICAL

[17] The Appellant was seen at Environmental Health Clinic of Sunnybrook and Women's College on April 16, 2002 where she fulfilled the criteria for a diagnosis of Multiple Chemical Sensitivities. She was also diagnosed with multiple inhalant allergies and allergic rhinitis. This report gave a history of the Appellant's problems in her workplace. As a result of a request for accommodation, she had her own office space away from other employees and had an occasional attack of her sensitivity symptoms. She was moved in March 2001 to a different office which was shared with about 30 other colleagues. She had a severe exacerbation of her symptoms which was attributed to off-gassing from new furniture and carpeting. Investigations found that the ventilation system was not working properly. At the hearing she stated that many of the employees who were not computer bound moved to other work areas. Her symptoms were persistent and severe enough that she had to leave early or take time off. Her requests for accommodation were not successful. This report listed several general recommendations as well as 3 that were specific to this Appellant.

[18] A follow-up report dated May 22, 2002 and amended June 18, 2002 indicated that the Appellant's requests for modifications had been turned down and that she had been receiving negative feedback from her employers and coworkers. At the hearing she

elaborated on the workplace harassment particularly from her immediate supervisor. This report reiterated the importance of a scent free office space along with a number of recommendations.

[19] A report, dated March 5, 2007 from Dr. Skotnicki-Grant, who patch tested the Appellant for allergies, indicated that it appeared that the Appellant had developed an intolerance to scents and fragrances in the air but this was not an allergy that could be uncovered with patch testing.

[20] A letter from Dr. Borins, psychiatrist, dated April 8, 2008 was written in response to the Appellant's previous CPP Disability application which was denied. This letter refers to the "deep psychological and psychiatric difficulties, secondary to her multiple chemical sensitivities and loss of her job" and to the "marathon mediation which has been extremely destructive to her in terms of functioning". These hearings have caused anxiety and:

intrusive recollections of previous invalidating and hostile interviews as well as suffering very significant withdrawal effects following these mediation dates... The question now of working at home is becoming more academic as her difficulties continue. The capacity at present for her to do any productive and meaningful work has diminished below any, even part-time, capacity and would not be reasonable to consider.

[21] The CPP medical report (2010) was completed by Dr. Borins who had known the Appellant and been treating her for the main medical conditions since July 2004. The diagnoses included: multiple chemical sensitivity, post-traumatic stress disorder (severe secondary to workplace abuse), marked sleep disorder, degenerative disease in both knees, moderately severe iron deficiency anemia complicated by serious menorrhagia. The anemia has had to be treated by transfusion.

The patient has a long history of fatigue, headaches, reading problems, anxiety and depression, poor concentration and recent memory is impaired. She has severe environmental chemical sensitivity which can lead to anaphylactic-like reaction with minimal exposure to ordinary chemicals.

[22] Dr. Borin's prognosis regarding the main condition of multiple chemical sensitivity was very guarded. Her difficulties appeared to be increasing. Her prognosis

regarding the Appellant's arthritic and hematology difficulty was more optimistic although some element of the anemia would persist.

[23] Her other medical condition is sleep apnea for which she has used a CPAP machine since 1999. At the hearing she explained that she uses a full face mask with the CPAP machine because her nasal passages swell up. It was adjusted in 2011 to its maximum level. She stated that she could not function without this machine.

[24] At the hearing Dr. Borins explained that the Appellant has a severe sensitivity to multiple chemicals and that sensitivity is getting worse. She has seen the reaction in her own office when the Appellant had a reaction to cleaning products that had been used a week or so previously. The Appellant's reactions include headaches, hives, her chest closes up, and there is mental confusion. This chemical sensitivity disorder has led to the Appellant's post-traumatic stress disorder. The Appellant had been a very high functioning employee of the City of Toronto, and had been very independent. Her chemical sensitivities have forced her to live a very limited life in a fairly isolated area. She cannot involve herself in the community and has become dependent on others for many aspects of her life. Dr. Borins explained that the Appellant would like to be employed but she cannot sustain attention and concentration. The Appellant had some response to Effexor but she felt very disconnected and has discontinued the use of this medication. She takes Ativan as needed for anxiety. The Appellant has telephone appointments with Dr. Borins every 2 weeks and sees her in her office approximately every 3 months.

[25] There are a number of reports (2007 – 2010) from Dr. Wang, hematologist, stating that the Appellant has a long history of menstrual issues, anemia and iron deficiency.

[26] A letter from Manulife financial dated May 24, 2006 confirmed that at that time the Appellant was considered unable to perform the duties of any occupation.

[27] She was determined to be eligible for the CRA disability tax credit from 2003 to 2017.

[28] A letter from Dr. Borins (April 2013) stated that:

the post-traumatic stress disorder is characterized by intrusive recollections of her workplace harassment and the prolonged adjudication ordeal, which followed her attempt to address the injustices. The invalidation that she experienced regarding her chemical sensitivities which have finally been recognized by many aspects of the health care system have contributed significantly to her difficulties. She remains quite dysfunctional and when she has to visit family, she has to remain outside the home as the odours, particularly in her son's new home, are overwhelming and she becomes quite ill. I have witnessed reactions in my own office to any cleaning agent and her problems become acute within a short period of time and do affect her ability to breathe.

[29] A letter from Dr. Borins (January 2014) stated that the Appellant's original difficulties began with a multiple chemical sensitivity that would not be accommodated in the workplace. Dr. Borins explained that in the early 2000s this was a situation which created a major obstacle for large institutions and which now they understand. The adjudication process undertaken by the employer between 2003 and 2008 was significantly demoralizing and traumatizing for the Appellant. Dr. Borins stated that she has spent the last number of years working in PTSD and noted that at present there are no answers. She explained that PTSD survivors suffer extreme difficulties with concentration and recent memory. "Traumatic memory, however, is very active and does represent a different kind of memory system which is constantly being activated." Dr. Borins felt that had the original workplace accommodations been made, the Appellant would not have had to live through the prolonged arbitration process which has caused the PTSD. The Appellant now lives a very isolated life which is painful for her. She has required several trips to the emergency department where she has been given adrenalin because of the severity of her symptoms.

POST MQP EARNINGS

[30] In response to the Respondent's submission of November 2013, the Appellant has provided written evidence that the earnings shown in the record of earnings in 2008 were accumulated vacation pay and that the earnings and contributions shown in 2012 and 2013 were long term disability benefits from her insurance company. A letter from her former employer dated February 15, 2013 stated that commencing in April 2012, Manulife began

deducting CPP and EI from the monthly LTD benefit. She also indicated that, contrary to the Respondent's submission, she has been prescribed Epipens since before she had to leave work and has had to go to emergency departments due to reactions to chemical exposures.

SUBMISSIONS

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

- a) She would love to be able to work and to contribute but her focus now has to be on just making it through the day.
- b) The arbitrator in her grievance with her employer didn't think there was any safe place for her to work.
- c) The chemicals to which she is sensitive are invisible and therefore she cannot predict when she will have a severe reaction.
- d) Her mind works very slowly now and it takes her a long time to do anything. She could not provide the productivity required by any employer.

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

- a) There was no evidence that the Appellant required aggressive treatment for her reactions such as prescriptions for an Epi-pen or hospitalizations.
- b) Her primary treatment for PTSD is not considered aggressive or exhaustive.
- c) There is no indication that the Appellant has tried alternative work suitable to her needs.

ANALYSIS

[33] The Appellant must prove on a balance of probabilities that he or she had a severe and prolonged disability on or before December 31, 2013.

Severe

[34] An Appellant must provide objective medical evidence of his or her disability. The Appellant was seen at Environmental Health Clinic of Sunnybrook and Women's Sunnybrook on April 16, 2002 where she fulfilled the criteria for a diagnosis of Multiple Chemical Sensitivities. The Appellant's psychiatrist, Dr. Borins both, in her written reports and in her oral testimony at the hearing stated that since 2004 she has been treating the Appellant for PTSD related to her difficulties with her multiple chemical sensitivities, the workplace harassment and the lengthy, stressful arbitration process. She continues to consult and provide counselling to the Appellant by telephone every 2 weeks. The Tribunal finds that the Appellant has provided satisfactory medical evidence of both her major disabilities.

[35] The Appellant has described very clearly the lengths to which she has gone, just to be able to carry on day to day. She has moved to an isolated area, as far as possible from the chemicals that affect her. She has very limited contact with other people and depends on her friend to do most of her shopping. *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB) provides some guidance in this case. An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his 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. It is clear to this Tribunal that the Appellant is unable to work at substantially gainful employment in any environment in which she could not be guaranteed complete isolation from the invisible chemicals that affect her.

[36] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment. The approach of assessing the Appellant's condition in its totality is consistent with section 68(1) of the Plan, which requires claimants to submit highly particular information concerning "any

physical or mental impairment,” not just what the claimant might believe is the dominant impairment: *Bungay v Canada* (Attorney General), 2011 FCA 47.

[37] This Appellant suffers from 2 major impairments – multiple chemical sensitivities and post- traumatic stress disorder. The first makes it impossible for her to work in any area that is not completely isolated from airborne chemicals. The second makes it impossible for her to work at anything requiring significant concentration and/ or that requires working to a deadline. The Tribunal finds that when taken together these 2 conditions prevent the Appellant from pursuing any substantially gainful employment.

[38] 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).

[39] The Tribunal finds that the Appellant does not have a capacity for work and therefore it is not necessary that she show an attempt at obtaining alternate employment. Work away from home is not possible due to the medical conditions outlined above. Working from home is also not possible. According to her own testimony and the evidence of Dr. Borins, her ability to concentrate is impaired and she can only do things at a very slow pace.

[40] The Appellant testified at the hearing and included in the file a prescription for an Epipen. This prescription is dated April 2, 2013. The Appellant testified that she had been prescribed Epipens since before she left her job. Also included is a report from the Huntsville Hospital emergency department dated September 7, 2012. Although the report is not legible, the Tribunal accepts the Appellant’s statement that it is related to her chemical sensitivity. The Appellant and Dr. Borins have bi-weekly telephone appointments related to her PTSD. The Tribunal does not give weight to the Respondent’s arguments regarding her treatments for her chemical sensitivities and PTSD. While these treatments may not appear to be aggressive, they are constant.

[41] The Appellant has satisfied the Tribunal that on a balance of probabilities she had a severe disability as defined in the CPP before her MQP.

Prolonged

[42] The Appellant was first diagnosed with multiple chemical sensitivities in 2002. She went through 5 years of arbitration related to her employer's refusal to recognize this disorder and their refusal to accommodate her in the workplace. Prior to leaving work, the Appellant described significant workplace harassment and absences from work due to her medical condition. She has had to move to a fairly isolated area in order to try to avoid as much as possible the invisible chemicals that affect her. She continues to suffer from these sensitivities and the PTSD resulting from both the medical condition and the lengthy, highly stressful arbitration resulting from her attempt to seek accommodation in her workplace.

[43] The Tribunal finds that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[44] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2003 when she was unable to continue working for the City of Toronto. 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 November 2010; therefore the Appellant is deemed disabled in August 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2009.

[45] The appeal is allowed.

Vikki Mitchell

Member, General Division