

Citation: *H. A. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 37

Appeal No: GT-118717

BETWEEN:

H. A.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

HEARING DATE: December 4, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: December 5, 2014

PERSONS IN ATTENDANCE

H. A.: Appellant

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 15, 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] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated August 28, 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] The Appellant's Record of Earnings indicates more than 25 years of sufficient earnings (with no earnings in 2011) up until 2013. Having regard to the applicable three out of six years requirement, the Appellant's MQP extends to December 31, 2015.

[9] However, the Appellant turned 65 in November 2014 and, accordingly, the last Possible Date of Onset (LPDO) for her disability is November 30, 2014.

[10] 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 November 30, 2014.

BACKGROUND

[11] The Appellant is 65 years old. She was born in Guyana, and completed her high school education there. She moved to Canada in 1974. She first worked in Canada doing packaging on the assembly line in a plastic factory. She then worked as a sales clerk for K-Mart until 1996, when she stopped working because she was injured in two motor vehicle accidents within six months. After recovering, she returned to work doing quality control at a clothing company; she was inspecting and the work wasn't hard. She left that job after a few years because it was not a good environment, and started working as a sales clerk for Hudson's Bay. She initially worked at a Designer Depot, which only involved clothes; but

after five years, the department was closed and she was transferred to Home Outfitters. The work at Home Outfitters was more physically demanding because she was dealing with all types of home equipment (not just clothes), and she had to go up and down ladders. Her left knee started to bother her, and she was strapping it when she went to work. Eventually, the pain became worse and worse, and by April 2010, she couldn't work anymore.

[12] The Record of Earnings (ROE) printed April 1, 2014 indicates reduced earnings of \$9,573 in 2010; no earnings in 2011; and earnings of \$12,269 in 2012, and \$12,012 in 2013. The Appellant testified that her income in 2011 and 2012 was payments that Hudson Bay started to make after her Long Term Disability payments stopped after two years. She testified that she has not worked since April 2010.

APPLICATION MATERIALS

[13] In her CPP disability questionnaire, date stamped by the Respondent on February 15, 2011, the Appellant indicated that she last worked as a sales clerk for the Hudson's Bay Company from September 21, 2008 until April 24, 2010. She noted that she stopped working because of unbearable pain. The Appellant also noted that she had worked as a sales clerk Designer Depot from October 23, 2005 until September 18, 2008. The Appellant further noted that she was receiving 55% LTD benefits from Great West Life Assurance Company, and that she had received Employment Insurance Sick benefits from May 23, 2010 until August 23, 2010.

[14] She did not indicate a date as of which she was claiming to be disabled, and noted her main illness and impairment to be severe pain in both knees. She noted that her pain is more prominent in the left knee, and that this causes her to limp and have difficulty standing or walking. She indicated that she also has lower back pain, that she has been diagnosed with arthritis, and that the pain travels upward throughout her back and into her neck.

[15] When describing her difficulties/functional limitations the Appellant indicated that she can sit for 30 minutes to one hour; that she can only walk slowly for a few minutes at a time; that she can lift 10 lbs., for 10-15 steps; that reaching is difficult when her back and

neck are in pain; that her bending is limited; that she can cook small meals, do limited cleaning, and not much shopping; and that she is very uncomfortable when she sleeps, and requires pain medication every night. She did not indicate any difficulties/functional limitations with seeing, hearing, speaking, remembering, concentrating, or breathing.

[16] A medical report dated February 13, 2011 from Dr. Gerges, the Appellant's family doctor, accompanied the CPP application. The report diagnosis acute bilateral knee osteoarthritis. The report notes that the Appellant limps while walking, and that she is limited in prolonged standing or walking. The Appellant was waiting for orthopaedic surgery, and the prognosis was pending.

ORAL EVIDENCE

[17] In her oral evidence at the hearing, the Appellant testified described in detail her education and employment history. She stated that she continued to work with pain up until April 2010, because they needed the money and the medical benefits. The pain became unbearable, and her manager noticed that she was having a difficulties – she was limping by the end of her shift. Her manager told her that she couldn't continue working like this, and that she should take sick leave and rest to see if that would help. She hadn't missed any days from work before this; her family doctor had prescribed Celebrex, but she was allergic to it and she started to break out in hives.

[18] She had no discussion with her manager about modified duties. The manager told her that she can't work and that she should stay home and rest. She was also experiencing back pain from her 1996 MVAs, but she could cope with this; if her back became painful she was able to manage the pain by taking Tylenol. She never returned to work after April 2010, and she didn't look for alternative work because she was in too much pain. She has not considered taking any courses to upgrade her work skills.

[19] After April 2010 she went for thirteen sessions of physiotherapy, but she didn't find them helpful. Her doctor prescribed Tramacet, Lyrica, and Flexeril; these helped by masking the pain but they made her groggy. She underwent left knee arthroscopic surgery in February 2011, and she went for therapy for six months after the surgery. She stated that

the surgery didn't help, and that she continued to see Dr. Cartan, her orthopaedic surgeon, on a monthly basis. She stated that she underwent another MRI which showed that the repair had become jagged. She testified that Dr. Cartan had said that her condition had become worse after the surgery. She stated that her pain is now radiating down to her left shin and ankle. About six months ago, she started experiencing bleeding and switched to Tylenol #3 from Tramacet. Her present medications include Lyrica, Flexeril, and Tylenol #3. Dr. Cartan has not discussed a knee replacement with her, and she isn't sure if she wants this.

[20] When asked by the Tribunal why she had not filed any medical reports relating to her treatment after October 2011, the Appellant stated that she hadn't filed these reports because she was told at a legal clinic that she would not be approved for CPP because she was receiving LTD payments, and the insurance company was pushing her to proceed with the application. When asked by the Tribunal whether she wished an adjournment in order to obtain copies of post October 2011 medical records from her family doctor, the Appellant indicated that she didn't want to do this because she didn't feel that her getting CPP disability would make much of a difference.

[21] When describing her typical day, she stated that she feels like she is housebound because of her knee pain. Her husband helps her to do light things around the house. He does the laundry because she has difficulty using the stairs to the basement. She does a little dusting and cleaning, together with her husband. She doesn't go out much, and her husband does the grocery shopping. She does a lot of reading, but she doesn't know how to use a computer. She stated, "I don't do anything much."

[22] She testified that she stopped working because of her knee, and that she could have managed her back and shoulder pain with pain killers. She is not going for any treatments, and she is debating whether to have a knee replacement. She stated that her pain is constant, and that the medications make her groggy. She uses a cane when her pain is really bad. She has problems going up and down stairs (she has to walk one step at a time, and use the railing). She has installed grab bars in the shower. She uses a heating pad, but doesn't do any exercise or stretching because her pain is so bad. Her

shoulder and neck pain have become worse, and the pain now radiated up her neck and into both shoulders. Her family doctor diagnosed fibromyalgia, and told her to take Lyrica. Her family doctor did not suggest that she see a specialist for her fibromyalgia, and he didn't suggest a light exercise program. He told her to continue using Lyrica.

[23] The Appellant concluded that she is not able to do any type of work because she is always in pain, and that when she takes medications to mask the pain she becomes very groggy.

MEDICAL EVIDENCE

[24] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[25] An x-ray of the Appellant's lumbar spine on April 26, 2010 revealed severe disc space narrowing at L5-S1.

[26] A MRI of the left knee on September 3, 2010 revealed mild to moderate joint effusion; tricompartmental osteoarthritis; degeneration of the menisci; a large bucket handle tear arising from the lateral meniscus; and a complex tear of the posterior horn of the lateral meniscus.

[27] A MRI of the right knee on September 4, 2010 revealed mild tricompartmental osteoarthritis, and degeneration of the small superior surfacing tear of the anterior horn of the lateral meniscus.

[28] On October 21, 2010 Dr. Liu, rheumatologist, reported that the Appellant's knee pain was mechanical in nature, that the imaging confirms degenerative disc disease at L5-S1, and meniscal tears in the left knee. Dr. Liu concluded that these changes are likely contributing to her significant pain and disability.

[29] There are reports from Dr. Cartan, orthopaedic surgeon, from February 14, 2011 through to October 27, 2011. On February 14, 2011 Dr. Cartan assessed the Appellant for complaints of bilateral, left greater than right, diffuse knee pain and intermittent effusion.

He noted that the MRIs revealed advanced degenerative arthritis. He was going to arrange an arthroscopic examination of the left knee, with a view toward debridement of meniscal pathology and perhaps shaving of articular defects. He was not optimistic that this would provide a solution, and opined that arthroplasty will likely be necessary.

[30] On February 23, 2011 Dr. Cartan performed an arthrotomy and lateral meniscectomy of the left knee. The post-operative diagnosis was left knee meniscal tear.

[31] A note from Miriam Zajic, physiotherapist, on June 2, 2011 indicated that the Appellant's pain and discomfort continued to persist. The note also indicates that she has improved range of motion, and unresolving pain.

[32] A bilateral shoulder ultrasound on September 29, 2011 reveals a clinical indication of left shoulder pain, no major tears of the tendons of the rotator cuff, and small left joint effusion.

[33] On October 27, 2011 Dr. Cartan reported that the Appellant remains essentially disabled because of persisting left knee pain despite the open lateral meniscectomy. He noted that the arthroscopic and ultimate open meniscectomy were unsuccessful in relieving her pain. The report concludes:

There is no question she remains disabled. She is ambulatory with a stick only. She has healed all operative wounds. She has a range of motion of from full extension to about right angle of bend with a stable knee and a mild effusion. I think this lady will remain disabled in the future until such time as symptoms demand a further procedure on the left side, in particular a knee arthroplasty.

[34] There are no medical reports in the hearing file after Dr. Cartan's October 27, 2011 report.

SUBMISSIONS

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

- a) She has worked hard for many years, and only stopped working because her knee became too painful for her to continue;

- b) She also suffers from shoulder and back pain;
- c) Her medical conditions prevent her from working in any capacity.

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

- a) The Appellant's report of her limitations on the CPP disability questionnaire indicated that she could sit for up to an hour, and she reported no problems with memory, concentration, or driving;
- b) The Appellant's limitations do not preclude her from light sedentary employment, and she has made no efforts to pursue alternative less physically demanding employment;
- c) The evidenced does not establish a severe and prolonged disability in accordance with the CPP criteria.

ANALYSIS

[37] The Appellant must prove on a balance of probabilities that he or she had a severe and prolonged disability on or before November 30, 2014.

Severe

[38] 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.

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

[40] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before November 30, 2014, 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.

[41] 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 his health: *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[42] It is not sufficient for chronic pain to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. It is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

[43] The Tribunal recognizes that Appellant has significant limitations because of her knee pain, and that she was not able to continue her previous employment which required her to climb up and down ladders. The Tribunal is not satisfied, however, on the balance of probabilities, that the Appellant lacks the residual capacity to pursue alternative less physically demanding employment.

[44] The Appellant has failed to meet the test set out in *Inclima* (supra). She did not ask for modified duties, and she has not made any efforts to pursue alternative lighter employment or taken any steps to upgrade her employment skills. When describing her limitations in her CPP disability questionnaire, she indicated that she can sit for 30 minutes to one hour, and that she has no limitations with seeing, hearing, speaking, remembering, or concentrating. These limitations do not preclude alternative less

physically demanding sedentary employment. As the *Densmore* case, supra, indicates, it is not sufficient for chronic pain to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation.

[45] The Tribunal is also troubled by the failure of the Appellant to provide the medical records relating to her treatment after October 2011. The Appellant acknowledged that these records are readily available from her family doctor, and she refused the Tribunal's offer of an adjournment to enable her to provide copies of these records. The Appellant has the burden of proof, and her failure to provide the medical records for the three year period after October 2011 was a significant factor in the Tribunal's determination that the Appellant had not met her burden of proof. It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB).

[46] After a careful review of the totality of the evidence, the Tribunal has determined that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[47] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criteria.

CONCLUSION

[48] The appeal is dismissed.

Raymond Raphael
Member, General Division