

Citation: *H. M. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 1

Appeal No: GT-117270

BETWEEN:

H. M.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Lucie Leduc

HEARING DATE: November 12, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: January 5, 2015

PERSONS IN ATTENDANCE

H. M., the Appellant

S. M., the Appellant's husband

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 15, 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 July 25, 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 Appellant MQP is current and therefore, the Appellant meets the MQP.

[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 hearing, since the MQP is current.

EVIDENCE

[10] The Appellant is a 54 year-old, mother of two children, suffering from multiple sclerosis.

Documents

[11] The Appellant worked at a telecommunications company from 1977 to 1992, as a customer service representative. Between 1992 and 2005, the Appellant had two children, was a stay-at-home mother and helped her husband who is self-employed. In October 2005, she started working as a lunch room supervisor for a school, where she continues to work to date. In 2005, the Appellant also took a course to become a registered Reflexologist

Practitioner. At the time, her children were getting older and she testified that she was looking for full time employment.

[12] The Appellant has a grade 12 education. She also completed a part-time course in Human Resources.

[13] An MRI done on September 12, 2008, showed mild degenerative disc disease and moderate to severe right neural stenosis at L4-5 related to a mild diffuse disc bulge.

[14] In April 2009, the Appellant saw Dr. Roussev, a neurosurgeon, complaining of leg dysfunction and a tendency for urgency incontinence. Dr. Roussev noted the Appellant's difficulty to walk, specifically on the right and her inability to tandem with closed eyes. He suggested the Appellant might have an eccentric spinal cord lesion and required further investigation. After a second visit on July 30, 2009, in a correspondence to the Appellant's family physician, Dr. Roussev opined that the Appellant presented with slow primary progressive multiple sclerosis. The Appellant's MRI examination showed multiple lesions in the brain and a couple of spinal lesions.

[15] In a report dated August 10, 2009, Dr. Hohol, a neurologist, also diagnosed the Appellant with multiple sclerosis. After a follow-up visit, on February 2, 2010, the specialist reported the Appellant had ongoing right leg weakness, stiffness and minor difficulty with tandem gait but that her condition was stable. The physician interpreted the Appellant's MRI results as showing no increase in overall lesion burden. She further noted that the Appellant's condition was stable and that she would be reassessed 6 months later.

[16] In the Service Canada, Medical Report, dated July 8, 2010, the Appellant's family physician diagnosed the Appellant with multiple sclerosis and right L4-5 foraminal stenosis from disc bulge. Dr. Magee described the Appellant's functional limitations as having limited standing and walking capacity because of her "leg weakness and tendency to give out". He prescribed the Appellant a consultation with a neurosurgeon for a trial of spinal injections and to follow up with Dr. Hohol at the Multiple Sclerosis clinic. It is noted that the Appellant at the time took Celebrex 200mg daily. The physician further wrote that most patients with multiple sclerosis gradually worsen over time.

[17] In the Service Canada questionnaire, dated July 8, 2010, the Appellant noted that she was no longer able to work since May 18, 2006. She enumerated her functional limitations as being unable to stand or walk more than 10 minutes, sitting for a maximum of 50 minutes, unable to carry or lift, suffering from incontinence, being very limited with household maintenance and having problems with her short term memory.

[18] In a letter, dated August 9, 2012, Dr. Lee, a neurologist from Sunnybrook, confirmed the Appellant's diagnosis of primary progressive multiple sclerosis. He reported that the Appellant's symptoms were predominantly fatigue, stiffness, balance and instability. All symptoms had progressively gotten worse over the past 4 years. The specialist mentions that the Appellant's physical limitations are "a problem for her" and that the Appellant said she has increasing difficulty with her work as a lunchroom supervisor. Dr. Lee stated that the Appellant used a cane for additional support but had not required a wheelchair or walker. He also stated that the Appellant was not a good candidate for a clinical trial as "her symptoms were quite stable and her functioning status relatively good".

[19] In a report, dated September 25, 2014, Dr. Lee wrote that the Appellant was suffering from primary progressive multiple sclerosis with gradual decline. He prescribed for a home safety assessment and will follow-up on an annual basis.

Oral evidence

[20] At the hearing, the Appellant described her medical condition as follows:

Her first symptom was loss of balance in 2006. At the time, her family physician, Dr. Bruce Magee, initiated his medical investigation. He first sent the Appellant for ultrasounds of her legs and advised her to do exercise. She said she went to Variety Village, a sports complex, to exercise. In 2009, after seeing no improvement, Dr. Magee sent her to Dr. Roussev, a neurologist. After doing some tests, Dr. Roussev sent the Appellant to St-Michael's Hospital to see Dr. Holol from the Multiple Sclerosis Clinic. The Appellant testified that Dr. Holol suspected some back problem and referred her to Sunnybrook Hospital. After a year of waiting for her appointment at Sunnybrook, Dr. Fazi saw the Appellant and told her she did not have back problems and needed to be referred back to a Multiple Sclerosis Clinic. The

Appellant described her medical investigation as a very long process “not knowing what was wrong with her” and included long waiting periods for appointments and seeing many different specialists. In 2012, the Appellant saw Dr. Lee, the neurosurgeon at the Sunnybrook Hospital’s Multiple Sclerosis Clinic, who is following her at the moment.

[21] The Appellant testified that she has been suffering from severe headaches, back aches, very cold hands and feet, numbness in her hands/fingers and knee pains. She also described that she has very low tolerance for heat. Under the sun, the Appellant said she feels faint instantly. She has problems with incontinence, which causes her to run to the washroom all the time. Any intake of liquid goes “right through” her. In addition, the Appellant often suffers urinary tract infections because the muscle that regulates her bladder is weak and prevents the bladder from fully emptying itself.

[22] The Appellant testified that she falls all the time, in the kitchen, bath tub, etc. To get back on her feet she needs the help of her husband. She is using a cane to walk. She is now looking into walkers because she said it would allow her to rest both of her hands. The use of the cane irritates her back and hips.

[23] When asked to describe a typical day, the Appellant said she wakes up, comes down stairs “sliding on her bum” and has coffee. She said she can still do some chores in the house but much slower than before. The Appellant said her husband helps her a lot with her activities of daily living. He works from home, thus it is very helpful. The Appellant testified that they modified their home to accommodate her limitations. For example, they installed a higher toilet, have a walk in shower on the main floor and have railings at different places in the house. When it comes to cooking and cleaning, the Appellant said her husband does most of it. Sometimes, the Appellant said she can help with cutting vegetables, but only if she is sitting down. Around lunch time, she goes to school to work as a lunchroom supervisor. She works for about 1 hour and 15 minutes. The Appellant testified that she cannot stand or sit for more than 15-20 minutes otherwise she becomes very stiff. Therefore, they have made accommodation for her. The kids bring a chair for her and she can sit down and get up intermittently during the hour. The Appellant testified she suffers from extreme fatigue at all time. She said she gets up in the morning and feels fatigued. She

described her fatigue “like a wall over my head”. The Appellant said that the last time she saw Dr. Lee, she told him all the symptoms that she has and he called it gradual decline.

[24] When asked why she applied for CPP disability benefits only in 2010, the Appellant testified that it is when her symptoms “were coming fast and furious” and that she did not feel she would be able to work anywhere. She realized then that she would not even be able to practice the job she had retrained for as a reflexologist. She said she saw the CPP disability benefits as her only option.

[25] When asked to describe how her medical condition changed her life, the Appellant testified that she used to go on vacation and cannot anymore. She also said she was used to going to conventions. She last attended a convention with her family in 2007 in Texas. She said that “the heat hit me instantly and I thought I was going to drop right on the ground. I had to sit in the lobby of the hotel while my family went to the museum.” She also said that she has missed flights because she was too slow to get around the airport and reach the departure gate. The Appellant testified that she simply “does not do much of anything”. She only socializes when she goes to work at the school. She testified that she used to go to the YMCA about 4 times a week, in the Get Fit program, but cannot anymore. The Appellant said “I was a very active person and this whole thing is an exercise in frustration”.

[26] The Appellant testified that she would love to work but she simply cannot. She said that her problems are “all day, every day”. She can barely do her current work of 1 hour and fifteen minutes a day. But she persists with going to school because it is her only chance of getting out of the house and seeing people and keeping her from staying still at home.

SUBMISSIONS

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

- a) She would like to work full-time but with all of her functional limitations, she is barely able to perform her duties as a lunch room supervisor for 1 hour and 15 minutes every day, with accommodation.

- b) She feels her condition is severe and prolonged because it is never going to end, she is suffering every day and she is only going to get worse.

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

- a) A review of her work history revealed that the Appellant has worked for 4 employers in 2011 and 2012. Capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability as it is an indication of capacity to work.
- b) There is no specialist report or medical information in the Appellant's file showing that she would be incapable of all types of suitable work on or around her MQP.
- c) According to the Respondent, the Appellant's multiple sclerosis was stable and her functional status was described as relatively good.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of the hearing.

Severe

[30] Section 42(2) (a) (i) of the CPP states that an individual must be "incapable regularly of pursuing any substantially gainful occupation" in order to qualify for disability benefits.

[31] On balance of probabilities, the Tribunal is persuaded that the Appellant was incapable regularly of pursuing any substantially gainful occupation in July, 2010, the time of her application.

[32] 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.

[33] In the case at hand, the Appellant's work experience has been in customer service. Although she trained to become a registered reflexologist, the Appellant testified that she has never been able to work in that field due to her physical limitations. The Tribunal finds that the Appellant demonstrated that in a real world context, she would not be able to meet the expectations of a workplace that fit her experience and education, such as a customer service job. The fact that she cannot sit or stand for more than 15 minutes, combined with her severe headaches, fatigue, dizziness and the constant need to run to the bathroom satisfied the Tribunal that the Appellant is incapable regularly of pursuing any substantially gainful occupation. The Tribunal also finds that even if the Appellant would like to pursue her career as a reflexologist, the above-mentioned limitations would not allow her to offer 1-hour sessions as required by the profession. The medical evidence on file clearly indicates that the Appellant's condition of multiple sclerosis is permanent, not curable and will decline with time.

[34] The Tribunal gives significant weight to the Appellant's testimony. The testimony was credible and the Tribunal sees no reason to doubt it. The Appellant's condition is permanent and, as such, she will always have symptoms and limitations. In accordance with the principles established in *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB), the Tribunal finds that there is a credible evidentiary foundation to establish that the Appellant is precluded from engaging regularly in any substantially gainful occupation. Furthermore, the Tribunal accepts the argument from the Appellant that if she was to be employed in any type of employment, she would be unable to meet the expectations of even the most reasonable and accommodating employer.

[35] The Respondent argues that the Appellant is not disabled because she is currently employed as a lunch room supervisor. While it is true that capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability as it is an indication of capacity to work, the Tribunal finds it not to be the case for the Appellant. The Tribunal is of the view that the Appellant's job as a lunch room

supervisor does not constitute substantially gainful occupation. In an ongoing effort to contribute to the family income, the Appellant testified that, in 2005, when her kids were getting older, she was preparing to return to the labour market from being a full time mother. Corroboration of her testimony is found in her training to become a reflexologist in 2005 and in her debut as a lunch room supervisor for the school. The Appellant testified that her work as a lunch room supervisor was only the beginning as she was aiming to return to work on a full-time basis. However, her debilitating health condition prevented her plan from materializing. It is in that context that the Appellant started her employment with the school. In the Pension Appeals Board decision of *MSD v. Schuurmans* (January 15, 2007) CP 23478 (PAB), although not binding but persuasive, it was recognized that an individual who is prevented from attending work regularly due to intermittent and unpredictable flare-ups of a chronic disease may be considered disabled. “Regularly” was defined in *Chandler* as being capable of going to work as often as is necessary with predictability being the essence. In the case at hand, the Appellant requires a high degree of accommodation due to her physical impairments. Even with the accommodation, which is being provided by her last employer, the Appellant is struggling to stay at work for one hour and fifteen minutes. It is therefore difficult to imagine that she could perform any “gainful” employment.

[36] Although, the Appellant wrote in her application that she became disabled in 2006, the Tribunal finds that she became disabled within the meaning of the CPP legislation in July 2010. The objective medical evidence, along with the Appellant’s testimony demonstrate that prior to the time of her application, the Appellant did not meet the burden to prove her disability and exhibited some capacity to pursue some substantially gainful occupation. Even though evidence shows that her multiple sclerosis began on or about 2006, The Tribunal accepts the Appellant’s testimony that it was only in July 2010, when the Appellant decided to apply for CPP benefits, that her condition deteriorated to the point that she was no longer employable. This finding is supported by the Appellant’s testimony and the Service Canada, Medical Report filed by her family physician.

[37] Based on the Appellant’s functional limitations from her multiple sclerosis condition, the Tribunal finds that that she is “incapable regularly of pursuing any substantially gainful occupation” in accordance with section 42(2) (a) (i) of the CPP.

Prolonged

[38] The CPP, at section 42(2) (a) (ii) states that a disability is prolonged if it “is likely to be long continued and of indefinite duration or is likely to result in death.” As set out in *MHRD v. Scott* (July 10, 1998), CP 5741 (PAB), the focus of inquiry is not an expected time of recovery, but rather an expectation of not being able to return to work that must be adjudicated.

[39] The Appellant’s testimony, which was supported by the medical evidence, is that she began to suffer from symptoms related to multiple sclerosis in 2006 and it has substantially deteriorated since that time. Multiple Sclerosis is not curable and patients with this condition only deteriorate with time. For these reasons, the Tribunal finds that the Appellant’s disability is of indefinite duration, continuous and there is no expectation of recovery.

[40] Therefore, the Tribunal concludes that the Appellant’s disability is “prolonged” in accordance with the statutory definition.

CONCLUSION

[41] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2010, when she applied for CPP disability benefits. For payment purposes, according to section 69 of the CPP, payments start four months after the deemed date of disability. Therefore payments will start as of November 2010.

[42] The appeal is allowed.

Lucie Leduc

Member, General Division