

Citation: *M. D. v. Minister of Employment and Social Development*, 2015 SSTGDIS 18

Appeal No: GT-118082

BETWEEN:

**M. D.**

Appellant

and

**Minister of Employment and Social Development  
(formerly 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: Glen Johnson

HEARING DATE: January 22, 2015

TYPE OF HEARING: In person

DATE OF DECISION: March 4, 2015

## **PERSONS IN ATTENDANCE**

M. D., Appellant

Jaspreet Janda, 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 May 31, 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 proceeded as an in-person hearing for the reasons given in the Notice of Hearing dated August 11, 2014. The Respondent elected not to appear at the Hearing.

[4] At the Hearing, the Appellant asked the Tribunal to accept into evidence a new document entitled "*Addendum to the Appellant's Submission*". Upon review of the new document, the Tribunal finds that it does not provide new evidence, but rather a reiteration of the Appellant's earlier submissions, relating to documents filed many months ago. The document will be admitted into evidence.

## **THE LAW**

[5] 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 Tribunal.

[6] 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).

[7] 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.

[8] 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**

[9] The parties agree, and the Tribunal finds that the MQP date is December 31, 2009.

[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 the date of the MQP.

## **EVIDENCE**

[11] In her Questionnaire dated November 23, 2009 and filed with the Application for a CPP Disability Benefit, the then 47 years old Appellant claimed that she was last employed in April 2008 as a full-time production worker and forklift operator at Cott Beverages working 40 hours per week, and as a part time bookkeeper working 20 hours

per week. In the Questionnaire filed with her application, she said she could no longer work because she got injured and “*couldn’t even stand up*”. She has a grade 12 education, (with GED completion), completed a bookkeeping course, and has certificates as a mobile equipment operator and for computerized drafting.

[12] At the Hearing the Appellant testified that her Questionnaire is inaccurate. She says that she did not in fact return to her employment at Cott Beverages after a lifting injury in May 2007. She testified that she has not attempted a return to work at Cott Beverages or anywhere else since 2007. She testified that she did, however, continue to perform part-time bookkeeping work for her husband’s business until about 2009.

[13] In written submissions, she claimed she had been employed operating forklifts and other machinery since 16 years old. She has performed bookkeeping work since 1988 for her husband’s tree falling business. She also performed some bookkeeping for her brother. She testified that she did not continue with her bookkeeping job because her husband’s tree falling business collapsed in 2009. She states that she has not returned to bookkeeping elsewhere because “*I don’t know enough*”. She advised that she has not attempted to upgrade her bookkeeping skills since stopping work in 2009.

[14] The Appellant testified that the job at Cott Beverages involved prolonged sitting in a forklift, using her right gas pedal foot, and on occasion some heavy physical work such as when beverages would fall off of the skid.

[15] She testified that she performed her bookkeeping job at home. She prepared paper ledgers and assembled GST and income tax documents for the accountant.

[16] In her Questionnaire, the Appellant describes her main disabling condition as right leg pain, weakness and numbness originating from a lifting incident in May 2007. Other health related conditions or impairments were listed as depression and high blood pressure. She describes having to stop activities such as portrait drawing. She could sit for one hour before her leg would fall asleep. She could tolerate standing for 10 minutes, and had difficulty with lifting, walking, reaching and bending. She reported sleeping

problems due to pain, shortness of breath, chest pain and difficulty focusing and paying attention. She gets help from her daughter and friends to perform household chores.

[17] The Appellant testified that she injured her foot while carrying a heavy crate at home in May 2007. In a written submission dated October 18, 2011, the Appellant stated that, as a result of the lifting incident in May 2007, it “*felt like I was going to faint from the pain*”, and later, “*Everything went black and I had fainted once again*”. She submitted that the hospital emergency department physician diagnosed a sprain to her foot.

[18] The Appellant’s testimony was quite animated and demonstrative. She waved her arms, pointed and got up from her seat and paced the floor on several occasions. Her evidence was replete with dramatic utterances such as “*it felt like my heel was broken*”, “*I wear wool socks in the summertime*”, “*It feels like there are worms in my foot*” and “*It seems like I’m going senile*” due to pain.

[19] The Appellant’s Questionnaire indicated that her Doctor prescribed a walking cane, but she did not use it because it is embarrassing to walk around with it. She did not use a cane at the Hearing.

[20] According to the Appellant’s Questionnaire she tried physiotherapy without relief and has consumed pain killers.

[21] The Appellant filed a written submission dated September 26, 2012 stating that since 2007 she has continued to experience chronic pain in her neck, her entire right side, her back and her hip.

[22] In a report dated August 27, 2007, Dr. Shahid, orthopedic surgeon, confirms the onset of right foot pain and weakness on May 20, 2007, as a result of carrying a heavy crate. By August, the doctor says her complaint was weakness, but not pain in the foot. X-rays of the right foot were normal, however, Dr. Shahid states: “*For some reason, this patient has developed lateral sciatic neuropathy currently at the level of the fibular neck resulting in weakness of dorsiflexion of the ankle*”. A referral to a neurologist was recommended.

[23] On December 17, 2007, the Appellant was examined by Dr. Medvedev, neurologist. He found that nerve conduction studies and a CT scan were essentially normal. He suggested that pain complaints may originate from a soft tissue injury or possibly knee arthritis. In a follow-up examination on December 17, 2007, he states that it is possible that her right lower leg symptoms of pain and weakness are related to a fiber radiculopathy.

[24] On May 20, 2008, the Appellant was seen by podiatrist, Dr. Chalmers. His report states that X-rays and an ultrasound were negative, but suggests that she “*may have sustained a mild nerve injury*”. He recommended physiotherapy. The Appellant testified that she went to physiotherapy without lasting benefit. Physiotherapy records were not filed with this appeal.

[25] X-rays of the cervical, thoracic and lumbar vertebra were performed on June 2, 2009, and were unremarkable.

[26] On June 30, 2010, Dr. Walter, family physician wrote a report to CPP. Dr. Walter was the Appellant’s physician since February 2010. Although the prognosis is described as “*poor*”, there is no elaboration of the reasons for that opinion. No further specific consultations were listed for the Appellant’s right foot problems.

[27] The Appellant testified that a form was completed by Dr. Walter on April 7, 2011 for a federal disability tax credit. In the form, Dr. Walter provides a diagnosis of mechanical back pain, with walking problems.

[28] The Appellant attended a chiropractor, Dr. Stuart on September 23, 2011. She complained of right low back pain, neck pain and right heel and foot pain with limited walking ability for 3 months. He mentions degenerative discs at the cervical vertebrae, but does not indicate the foundation for that opinion.

[29] Dr. Walter referred the Appellant to a psychiatrist, Dr. Ellis. In a report dated January 23, 2012, Dr. Ellis states that the Appellant has a chronic pain syndrome and is “*somatically focused*”. She may have a mild form of ADHD, and states that he has no explanation as to why her pain seems out of proportion to her injuries.

[30] The Appellant had a thoracic spine x-ray on November 12, 2013, which was normal. An MRI of the lumbar spine dated January 23, 2014 showed no abnormality, except a “*mild*” disc bulge at L-4-5, with no foraminal narrowing.

[31] A report dated April 8, 2014 was prepared by Dr. Bhatt, family physician. The Appellant testified that she changed to Dr. Bhatt from Dr. Walter in about 2011 because she had a loud disagreement with Dr. Walter about his treatment measures. She testified that he “*didn’t like my attitude*”. Dr. Bhatt writes that the Appellant has degeneration in her neck, osteoporosis, hypertension and sciatica in the right leg, and she is “*not suitable for work currently*”. The Appellant testified that Dr. Bhatt filled in a form prepared by the Appellant’s representative on September 22, 2014. Dr. Bhatt checked off every box on the form. The boxes listed various household, personal care and activities of daily living which are “*directly and significantly affected*” by the Appellant’s disability, and will continue to do so for at least 2 more years.

## **SUBMISSIONS**

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

- a. Her medical condition is both severe and prolonged within the meaning of the CPP legislation;
- b. Simple tasks cause her to become easily exhausted and her severe pain levels have debilitated her since 2008;
- c. She is unable to return to her former employment, retrain or to work at any other position, such as part time or light duty work because she is unable to stand and sit continuously due to chronic pain;
- d. Her medical condition has continued to deteriorate since her application for CPP disability benefits. Since there has been no medical opinion to confirm her ability to return to work, it can only be concluded that her disability is of indefinite duration.

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

- a) The Appellant does not meet the severe and prolonged criteria set out in the CPP. The Appellant's condition is not so severe as to preclude all types of work continuously since the MQP on December 31, 2009;
- b) While the Appellant may have chronic pain and limitations related to her condition, but the Appellant has not established that she suffered from a severe and prolonged disability by the expiry of the MQP, and continuously thereafter. It is irrelevant whether the Appellant's condition deteriorated after that time;
- c) Although the Appellant may have been precluded from returning to her former employment due to her medical condition, the medical information does not support a condition of such severity as to have precluded lighter or more sedentary work more suitable to her condition;
- d) The Appellant has not provided information to suggest she attempted alternate work.

## **ANALYSIS**

[34] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2009.

### **Severe**

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

[36] However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must

be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[37] The Appellant is now 52 years old, and had been employed as a production worker and forklift operator for many years. She had also worked as a bookkeeper from 1988 to 2009. The Respondent acknowledges, and the Tribunal agrees, that the Appellant may not be able to return to her former physical job as a production worker and forklift operator, or any other physically demanding job. However, the Appellant acknowledges that she has not tried to return to any employment or retrain since stopping work in May 2007 due to a lifting injury at home.

[38] The Tribunal agrees with the Respondent's argument that the Appellant has not shown that she is incapable of returning to some employment suitable to her limitations. The evidence does not support that the Appellant cannot function in a sedentary job, if only on a part-time basis. The Appellant has some training and experience as a bookkeeper. Unfortunately, the Appellant has not attempted to return to a bookkeeping job, or attempted skills upgrading. She acknowledged in testimony that she did not continue with bookkeeping due to the collapse of her husband's tree falling business, and her skills were insufficient. She did not testify that she hasn't returned to bookkeeping because of her medical condition.

[39] The evidence filed in this appeal fails to show the Appellant's residual level of functioning. There is no functional capacity evaluation, vocational report or evidence of a failed attempt to become re-employed, or retrain for a more suitable job. Leading up to the MQP of December 31, 2009, the medical information does not support significant physical limitations which may affect work capacity. Even reports dated after the MQP do not support a significant disabling condition, or offer an objective basis for such a condition.

[40] In 2007, Dr. Shahid states that a right foot X-ray was normal and noted that the Appellant did not complain of pain, just weakness. He expresses some skepticism in the

Appellant's complaints when he says that "*for some reason*" she has developed sciatica. Dr. Medvedev found nerve conduction studies and a CT scan to be normal. There was a "*possibility*" of a right leg radiculopathy. Neither Doctor specifically commented on any physical restrictions related to her employability. They did not comment on the Appellant's residual level of functioning or tolerances for sitting, standing or walking. They also failed to comment on her options for re-employment or retraining.

[41] In 2008, Dr. Chalmers states that there may be a "*mild*" nerve injury, but does not comment on how this affects the Appellant's work capacity. This medical information does not support a severe disability.

[42] An X-ray of the whole spine in June 2009 was essentially normal.

[43] In June 2010, about 6 months after the MQP, Dr. Walter states that the main disabling condition is right leg pain, with a poor prognosis. However, Dr. Walter did not elaborate on the reasons for his prognosis, or the physical findings upon which the opinion is based.

[44] Back pain is first mentioned in reports in 2011 from Drs. Walter and Stuart, which follows the MQP by more than a year.

[45] Dr. Ellis' psychological assessment finds that the Appellant is somatically focused, and he has no explanation for the reported pain being out of proportion to the Appellant's injuries. The Tribunal is skeptical of the written submissions of the Appellant, in which she says that she "*can't even stand up*" and "*Everything went black and I had fainted once again*", and of her dramatic testimony and behavior during the Hearing, when there is a lack of objective medical findings to support a significant injury by the MQP. It is apparent that the Appellant's "*attitude*" was the cause of an undoing of her relationship with Dr. Walter.

[46] The Appellant started seeing Dr. Bhatt some years after the MQP, therefore the reports from Dr. Bhatt dated in 2014, which are sympathetic to the Appellant's claim of significant daily activity limitations, are of minimal value. In any event, the Tribunal is skeptical of the form of report where the doctor has merely checked off all boxes which

describe an activity limitation, on a form prepared by the Appellant's representative, without having the doctor use his or her own words.

[47] The Appellant claims that she was prevented from performing even part-time or light duty work since stopping work in May 2007, but this is not supported by the medical evidence, or by any attempts to return to work or retrain. The Appellant has performed bookkeeping at home for her husband's business for over 20 years. She has a proven aptitude and has portable skills, which she can upgrade.

[48] The Tribunal disagrees with the Appellant's submission that since there has been no medical opinion to confirm her ability to return to work, it can only be concluded that her disability is of indefinite duration. The onus lies upon the Appellant to prove on a balance of probabilities that she is disabled within the meaning of the CPP. The Tribunal is guided by the decision of *Dhillon v. MHRD* (November 16, 1998), CP 5834 (PAB).

[49] The Tribunal is not satisfied on a balance of probabilities that the Appellant suffered from a severe disability within the meaning of the CPP on or before the MQP.

### **Prolonged**

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

### **CONCLUSION**

[51] The appeal is dismissed.

*Glen Johnson*

Member, General Division