Citation: *M. A. v. Minister of Employment and Social Development*, 2015 SSTGDIS 98

Appeal No: GT-121200

BETWEEN:

M. A.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Michael Beauchesne
HEARING DATE:	February 26, 2015
TYPE OF HEARING:	In person
DATE OF DECISION:	March 25, 2015

PERSONS IN ATTENDANCE

- M. A. (Appellant)
- A. S. (friend of 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 August 8, 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 personal appearance for the below-listed reasons given in the Notice of Hearing dated November 17, 2014:

a) The issues under appeal are not complex; and

b) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

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, 2011.

[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 is 59 years old with a grade 8 education. Her 31-year employment history involves mostly factory work. She obtained her first job in 1977 on an assembly line and remained employed in this role for 31 years until leaving in March 2008 due to the mental health issues that form part of the basis of her disability claim. The Appellant claims

that, upon leaving this position, she was refused Employment Insurance sickness benefits, but did receive regular Employment Insurance benefits for four months. She then obtained a three-month contract position (also involving assembly-line work) with a different employer between October and December 2008. She started her most recent job (which similarly required her to stand for prolonged periods) in September 2009, but lasted just one day into her first shift because of the problems with her left leg that also form part of the basis of her disability claim.

[11] The Appellant's first job was with the same employer as her husband. She submits her workplace became too emotionally difficult to endure after her husband passed away from cancer in December 2007, and that this caused the anxiety, depression and panic attacks that led her to voluntarily leave her job. There is a note from Dr. Araghi (family physician) on file (dated March 31, 2008) that confirms the Appellant became unable to work in March 2008 for these reasons. No treatment was recommended or pursued for her condition at that time.

[12] Although the Appellant maintains she did not leave her first job because of any physical difficulties in her left leg or otherwise, she claims she discussed pain in her left leg with Dr. Araghi at that time. The Appellant added that Dr. Araghi thought this pain might be sciatica-related and recommended she rest her leg. A subsequent imaging scan showed mild to moderate arthritic changes were present in her lower back. No treatment or further investigation was recommended as a result of this finding. In April 2008, an x- ray of her chest failed to identify any active pulmonary disease and Dr. Araghi subsequently produced a letter indicating the Appellant was fit to start new employment immediately.

[13] The Appellant submits she returned to work with a new employer in October 2008 after her Employment Insurance regular benefits had ended. Like her former job, this position involved assembly-line duties with prolonged periods of standing. The Appellant testified the work was physically manageable for her and solely credited her involuntary departure to a shortage of work at the end of her contract period in December 2008.

[14] In February 2009, the Appellant claims she made diet changes and became more active to improve her general health. She started taking walks to get exercise, but later decided to instead use stationary bikes because they did not involve standing. In May 2009, Dr. Araghi prescribed medication (Celexa) to treat the Appellant's depressed emotional state, which she attributed to bad news about a family member. Evidence in the file indicates she did not take this medication because she was fearful of side-effects; she instead obtained a puppy to help cheer her up. The Appellant's recollection of her experience with this medication was inconsistent, although she agreed the only reason she would have not taken it (or stopped taking it) would be related to side-effects because, by her account, the puppy actually worsened her emotional state.

[15] In September 2009, the Appellant started a new full-time job that required her to stand eight hours per day. The Appellant testified that something "snapped or pinched" that caused "excruciating" pain in her left leg during her first day on the job. She added she was barely able to endure the pain and make it to end of her shift. She did not return to work.

[16] The only medical evidence pertaining to the Appellant's left leg for this period is a visit with Dr. Araghi on September 10, 2009, which involved a consultation for numbness in her left upper thigh. Physiotherapy was recommended, but not pursued, because the Appellant's health benefits did not adequately cover the cost. The Appellant testified that her mental health did not play a role in her decision to leave this job and there is no medical evidence to indicate she was seen or treated for a depressed emotional state until about 10 months later.

[17] In March 2010, Dr. Araghi made an entry about achilles tendinitis in her medical log. Advil and orthotics were recommended to treat this condition. The evidence is unclear about whether this condition affected one or both of the Appellant's legs and the Appellant was unable to recall this part of her medical history (although she was certain she never had orthotics).

[18] In July 2010, Dr. Dumitrescu (family physician) noted the Appellant was feeling increased stress about her husband's death two years earlier. It appears she was prescribed medication (Lorazepam) around that time to calm her anxiety and help her sleep as there is a

note in her file the following month that references a renewal of this prescription. The Appellant again sought medical help for a depressed emotional state in September 2010. During that visit with Dr. Mascan (family physician), the Appellant was again prescribed Celexa to treat this condition. A follow-up session was completed two weeks later with Dr. Dumitrescu and the dose was increased at that time. The evidence indicates the Appellant continued to take this medication until at least October 21, 2010, at which time she observed that her mood had still not improved, although she was crying less. The Appellant testified that she attended one or two bereavement support groups during this time, but did not open up to others about her feelings and did not derive a benefit from listening to others speak about their experiences. During this period, the Appellant was also part of a social group that knitted together for two hours each week and she testified that she presently continues to do so. She added that the note in her file about her bowling on Mondays in 2010 was incorrect and attributed this error to simply telling her doctor what she wanted to hear.

[19] In July 2011, the Appellant saw Dr. Kalyniuk (family physician) about pain in her left leg. The entry made by that doctor indicates a history of sciatica and also that the pain had started within the past year, did not occur during the night and had not radiated to other parts of her body. Dr. Kalyniuk observed the Appellant's range of motion to be normal and a subsequent x-ray of the Appellant's left knee, femur and hip showed no abnormalities. The Appellant was then prescribed pain medication (Lyrica), which Dr. Kalyniuk credited with helping reduce her symptoms within a month's time. Although the notes in the Appellant's medical log indicate this medication was discontinued because it was not covered by the Appellant's health benefits, the Appellant testified that she stopped taking it because it did not help reduce her pain and, in fact, increased the severity of the pain she was experiencing.

[20] The Appellant was referred for more imaging in September 2011. These tests showed a mild disc protrusion in her lower back that could be impinging on a nerve root. Dr. Kalyniuk had prescribed a new medication (Cymbalta) a month earlier that was credited with drastically diminishing her pain. Also noted, was that her mood affect was good. The Appellant's testimony was consistent with this evidence, although she added that the mood changes observed by Dr. Kalyniuk and others in her social circle were not apparent to her

because she continued to feel depressed. Unfortunately, a serious side- effect developed within a couple years of starting this medication and ultimately caused her to discontinue its use in October 2013, at which time she was prescribed Wellbutrin.

[21] In March 2012, the Appellant visited Dr. Kalyniuk about pain in her lower back that became worse when standing. She also complained of intermittent numbness in her hands that became worse while knitting. On inspection, her hands appeared normal and a subsequent examination by a neurological specialist (Dr. Baryshnik) two months later determined the symptoms in her hands were benign and positional in nature (in that they were associated with knitting). No treatments or follow-up appointments were recommended for her hands and there is no evidence that the back pain was further addressed at that time.

[22] The Appellant was assessed by a social worker (Sandy Passarelli) in January 2013 because she was presenting with worsening depressed mood that was negatively affecting her motivation to participate in medical treatment and remain engaged in her social relationships and activities. A psychiatric referral was made and the Appellant elected to not participate in the short-term counselling and group therapy that was made available to her in the interim. The evidence indicates she continued to take her prescribed antidepressants during this period.

[23] In September 2013, an imaging scan of the Appellant's back showed mild degenerative changes at all levels; the body of her spine and disk heights were preserved with no spinal stenosis, narrowing or disc herniation at any level. The Appellant acknowledged the discord between the latter finding and an earlier imaging scan (performed in September 2011) that indicated a disc bulge existed, but received no explanation from her doctors to reconcile these two different results.

[24] The Appellant had her initial psychiatric assessment completed on November 4, 2013 by Dr. Ahmad (psychiatrist). She was subsequently seen for a follow-up later that month and then again on December 9, 2013. Dr. Ahmad noted the Appellant did not meet the criteria for any anxiety disorders, but has struggled with major depressive disorder since her husband passed away in 2007. The evidence further indicates the Appellant was still

having difficulty sleeping despite remaining on the Lorazepam that had initially been prescribed more than three years ago in July 2010. As such, Dr. Ahmad discontinued the Lorazepam and started her on Trazadone. Given that the Appellant was continuing to endorse depressive symptoms while taking increased doses of Wellbutrin, Dr. Ahmad changed her antidepressant to Cipralex. In her final report (dated December 10, 2013), Dr. Ahmad remarked on the Appellant's positive response to these changes in medication and notably her "brighter affect." Dr. Ahmad requested blood testing to rule out medical causes for the Appellant's depression and referred her to a therapy clinic. The Appellant testified that she attended the clinic for about six months, at which time they discharged her on the basis that she was stable and no longer required their assistance. She added that she feels she has since regressed and has difficulty seeing the improvements that others notice in her.

[25] In January 2014, the Appellant saw a rheumatologist (Dr. Samadi) about her back pain. The report indicates the Appellant was taking only over-the-counter medication for pain at that time. The Appellant denied experiencing any numbness in her extremities (such as her hands), but did complain about sleeping difficulties and resulting fatigue. A physical exam showed the Appellant could perform a straight leg raise without any problem and raised no concerns about joint effusion. There was, however, tenderness observed in all four quadrants of her body. Dr. Samadi suggested a trial of narcotic- based painkillers if the Cipralex prescribed a month earlier did not help with her symptoms. He also indicated he was going to send the Appellant to classes for fibromyalgia, osteoarthritis and exercise.

[26] In August 2014, the Appellant had a follow-up psychiatric consultation with Dr. Katz (psychiatrist). Dr. Katz noted the Appellant appeared to be suffering from a chronic major depressive disorder that began with the death of her husband and was complicated by ongoing health issues that include sciatica, gastro esophageal reflux disease (GERD), hypothyroidism, hypercholesterolemia, hypertension, type 2 diabetes and large uterine fibroids that required a hysterectomy. He added, however, that the Appellant's depression was now primarily driven by the functional impairments resulting from leg pain that he believed to be neuropathic in nature. Dr. Katz suggested a trial of Gabapentin to treat the pain, which the Appellant described as constant and particularly pronounced when she stood or walked. He also noted that while the Appellant was able to sleep when taking a quarter-

tablet of Trazadone, she described herself as waking unrefreshed; the psychiatrist recommended a sleep study be conducted to rule out sleep apnea and the Appellant testified she has not yet done this. Dr. Katz made no changes to the Appellant's anti-depressant medication (Cipralex) at that time because he wanted to further evaluate her, although, he added the Appellant's function and activity had increased since starting it earlier in the year – at the time of her consultation, the Appellant indicated she was regularly attending church as well as a support group for cancer survivors, the therapy clinic that she was earlier referred to and her knitting classes. Dr. Katz concluded his report by noting the Appellant was unable to work due to a combination of multiple physical issues, including diabetes, neuropathic pain and depression. He predicted the Appellant's mood should improve if the pain is adequately controlled.

[27] In September 2014, the Appellant had a follow-up consultation with Dr. Samadi, the rheumatologist she had last seen eight months earlier. At this time, the Appellant was taking Dilaudid – for pain associated with a hysterectomy – which Dr. Samadi credited with controlling her symptoms and the Appellant described as "great for her legs." A physical exam showed the Appellant could perform a straight leg raise without any problem and raised no concerns about joint effusion. The Appellant received a refill of her Dilaudid prescription, although the Appellant testified that her family doctor (Dr. Grewal) has since taken her off this medication due to concerns about narcotic dependence. She added that she is now prescribed Gabapentin – which is consistent with the 2014 prescription list that forms part of the evidence – and that it is "working pretty good now" at reducing her pain.

[28] The Appellant testified that sometime in late 2013 or perhaps early 2014, she began participating in a 45-minute meditation class every Friday and has since been attending these classes regularly. She explained that during these sessions, she discovered that placing a cushion under her leg allows her to sit comfortably for up to three hours before needing to walk around for usually five to 10 minutes (and sometimes up to 30 minutes). After these stretching breaks, she can resume sitting comfortably (with the help of the pillow) for another several hours.

SUBMISSIONS

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

a) Since September 2009, she has not been able to stand for any predictable length of time due to pain and intermittent weakness in her right leg that causes it to "give out;" and

b) She has suffered continuously from depression since March 2008. She maintains that this condition causes her to need several naps to get through each day and that "no one will pay her to sleep on the job."

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

a) Objective medical reports do not support a finding of disability; and

b) Her medical condition is not severe.

ANALYSIS

[31] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

Severe

[32] In the view of the Tribunal, the Appellant does not have a severe disability. This is because the evidence failed to persuade the Tribunal that the Appellant's left leg pain and mental health issues make her incapable regularly of pursuing any gainful occupation. The rationale for this finding follows in the next five paragraphs.

[33] With regard to the Appellant's left leg, the medical evidence establishes only that mild to moderate arthritic changes have been present in the Appellant's back since March 2008. This condition did not cause the Appellant to leave her job of 31 years, nor did it

preclude Dr. Araghi from declaring her fit for employment in April 2008. From that point forward, and up to her MQP, there are no further medical opinions or recommendations regarding the impact of her left leg pain on her employability. Within six months of being cleared to work – and upon her Employment Insurance benefits ending – the Appellant was again employed on an assembly line that involved prolonged periods of standing; the Appellant testified this job was physically manageable and confirmed that a shortage of work was the only reason she was unable to continue in this position. Following this job, the Appellant was able to engage in physical exercise from at least a sitting position and she testified that she can presently sit comfortably for up to three hours at a time with the aid of a pillow under her leg and given stretching breaks that usually last up to 10 minutes. These features, in the Tribunal's view, are not consistent with a person who is incapable regularly of pursuing any substantially gainful occupation.

[34] The Appellant's claim of leaving her third job in September 2009 because of excruciating pain in her left leg is not consistent with the medical evidence for this period, which describes complaints only of numbness in her left upper thigh – a condition that was deemed appropriate for physiotherapy, but evidently not so painful as to require any prescription medications. In fact, the Appellant's leg pain did not warrant prescription medication until July 2011, although the concurrent physical exam (and subsequent imaging tests) all produced normal results and failed to provide any physical explanation for the pain. Later that year, and several months before the Appellant's MQP, her prescription was changed to Cymbalta – both the Appellant and Dr. Kalyniuk credit this medication with drastically reducing her leg pain up to October 2013 (22 months past her MQP) when, through no fault of her own, she had to discontinue its use. From then on, there is no evidence of the Appellant's leg pain increasing to the point of needing any further prescriptions until she received a refill for Dilaudid (which was initially prescribed to treat post-surgical pain for an unrelated condition) nearly a year later in September 2014. The Appellant is now prescribed Gabapentin and she testified she was getting good results (i.e. the pain was tolerable and no longer constant) from this medication.

[35] In light of the analysis in the preceding two paragraphs, the Tribunal concluded the Appellant has not demonstrated that her leg pain qualifies as severe (within the meaning of

the CPP) during the relevant period and continuously thereafter. The Tribunal certainly accepts the Appellant is experiencing chronic pain of varying degrees in her left leg, and that this condition may put limits on the type of work activities she can perform and particularly roles that involve prolonged periods of standing. However, the evidence indicates this pain was mitigated (at the time of her MQP and at the time of her hearing) to manageable levels by prescription medications.

[36] The medical evidence pertaining to the Appellant's mental health – and specifically the depression – establishes it did not warrant any treatment (including medication) at onset or preclude her doctors from determining she was fit to work during the relevant period. In fact, there is no evidence to substantiate that her depression has prevented her from obtaining and sustaining employment since March 2008 (as she claims) and up to December 31, 2011. The Appellant was not referred to a mental health specialist (such as a psychologist of psychiatrist) during the relevant period, as would be expected if the symptoms of her depression were concerning to those involved in her medical care. That the Appellant was sporadically prescribed anti-depressants up to her MQP does not, in and of itself, establish her depression as severe within the meaning of the CPP.

[37] The Tribunal considered the Appellant's submission about depression-related fatigue, which causes her to believe she is unemployable because she needs to nap several times a day. There is little to no evidence about this condition during the relevant period. The Tribunal notes two references to the Appellant feeling "tired" and "very tired" in a couple of July 2010 medical log entries. She was subsequently prescribed medication to help her sleep and reduce her anxiety – the next complaints of sleeping problems occur several years later in December 2013, when her prescription was changed. No further mention of fatigue or being tired appears in the evidence around the Appellant's MQP and she testified she did not leave any jobs because she was too tired to perform her duties. As such, the Tribunal concluded that the Appellant's fatigue did not qualify as disability that is severe within in the meaning of the CPP.

Prolonged

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

CONCLUSION

[39] The appeal is dismissed.

Michael Beauchesne
Member, General Division