Citation: ***T. R. v. Minister of Employment and Social Development,*** **2015 SSTGDIS 53**

Date: June 2, 2015

File number: GT-123088

GENERAL DIVISION - Income Security Section

Between:

T. R.

Appellant

and

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

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security

Section Heard by Videoconference on June 1, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. R.: Appellant

Cheryl Chrysdale: Appellant's representative

Allison Schmidt : Observer

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 7, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by Videoconference for the following reasons:

a) Videoconferencing is available in the area where the Appellant lives;

b) The issues under appeal are not complex;

c) There are gaps in the information in the file and/or a need for clarification; and

d) 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

[3] 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 Tribunal.

[4] 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).

[5] 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.

[6] 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

[7] The Tribunal finds that the MQP date is December 31, 2010.

[8] 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.

BACKGROUND

[9] The Appellant was 36 years old on the December 31, 2010 MQP date; she is now 41 years old. After graduating from grade 12 she worked as cleaner for a couple of years and then worked in property management for ten years – she started as a site administrator and worked her way up to property manager for three apartment buildings. She has not worked since December 2008 and is receiving Long Term Disability (LTD) from Industrial Alliance.

APPLICATION MATERIALS

[10] In her CPP disability questionnaire, date stamped by the Respondent on November 7, 2011, the Appellant indicated that she has a grade 12 education and that she last worked as a

property manager for DMS Property Management Ltd. from October 2005 until December 2008; she noted that she stopped working because of illness. She claimed to be disabled as of December 2008 because of rheumatoid arthritis in both hands.

[11] A report dated October 4, 2011 from Dr. Moquin, the Appellant's family doctor, accompanied the CPP application. The report diagnosis rheumatoid arthritis and hypothyroidism. The findings include significant ongoing inflammatory changes at the interphalangeal (IP) and metacarpophalangeal (MCP) joints of both hands despite aggressive medical treatment by joint injections with steroids; chronic pain; chronic fatigue; and limited fine motor skills secondary to deformity of the hands due to rheumatoid arthritis. The report notes that the medications have controlled the pain and inflammation, and that steroid injections in the joints have been of no benefit. The prognosis indicates that no improvement of the joint deformities is anticipated, that some worsening of the deformity is anticipated, and that there will be limitations of function with time since rheumatoid arthritis often "flares."

ORAL EVIDENCE

[12] The Appellant reviewed her education and employment history. Her work as a property manager involved managing three residential high-rise buildings. This involved clerical work and inspections. She did the paper work, collected the rents, sent notices, and did building inspections. On her 30th birthday she experienced her first symptoms – her hands were swollen by lunch and they had to cut her rings off - she couldn't even grasp a plate. She was diagnosed with rheumatoid arthritis and osteoarthritis and initially experienced symptoms in her hands, wrists, feet and shoulder.

[13] She stopped working in 2008 because of chronic pain, chronic fatigue, swelling, numbness, and tingling in her hands and wrists. She was having trouble getting to work on time and staying the whole day…she was physically and mentally exhausted…she was crying all the time…on some mornings she wasn't even able to brush her teeth. She had no proper hand and finger movement; her hands became swollen, achy and numb after keyboarding for 5-10 minutes; she couldn't write for very long; she had to use the speaker phone except for confidential conversations; and she had difficulty picking up and filing papers; sometimes she had to leave work early because she was in severe pain and fatigued.

Dr. Moquin, her family doctor, told her that she should stop working because of her chronic pain and fatigue.

[14] She started seeing Dr. Collins, a rheumatologist, in 2007. Ms. Chrysdale referred the Tribunal to Dr. Collins' November 26, 2008 report which refers to "failure of program." The Appellant testified that this refers to the methotrexate harming her liver and to the Plaquenil having no beneficial effect. Dr. Collins tried different medications, but they never worked. Ms. Chrysdale also referred the Tribunal to Dr. Collins' December 16, 2009 report which refers to the Appellant being tired, experiencing swelling, and being tearful. Ms. Chrysdale also referred the Tribunal to Dr. Moquin's September 17, 2010 report which states, "Ms. R. has deforming and active rheumatoid arthritis. Her hands are those joints which are primarily affected. She experiences marked pain with swelling which is worse in the morning and with increased humidity. She described a constant, burning pain with rates 8/10 on the pain scale. She also has significant pain in her wrist. Constant pain has contributed to fatigue with diminished energy." The Appellant stated that she is always physically and mentally tired, and that because of her constant chronic pain and fatigue she has to "space out and limit" her daily chores and activities. She stated, " the pain is unbearable and exhausting…it is terrible…sometime I don't have proper feeling in my fingers and I use hot water to try and get the feel back…I can't sleep properly…sometimes I can't even fold up the sheets."

[15] She has been seeing Dr. Samadi, rheumatologist, since 2013. She sees Dr. Samadi every three to four months who does her blood work, takes x-rays, and gives her prescriptions. She is now taking prednisone and sulfasalazine. The prednisone helps with her inflammation but there are serious side effects if the dosage is too high. She takes 5 mg every day, and sometimes Dr. Samadi increases the dosage to 15 or 20 mg if she has a "flare up", but Dr. Samadi then has to wean the dosage back down to 5 mg. She experiences flare ups on average once a month – her hands get so hot they feel like her skin is going to rip. This will last for a couple of days to a week. Severe pain is always present in her hands and wrists.

[16] The Appellant stated that her condition has stayed the same since 2010, and that there hasn't been an improvement with any of the drugs. The doctors are concerned about giving her biologics because there is a history of muscular sclerosis in her family. She was sent to a

surgeon who told that she was not a surgical candidate. Ms. Chrysdale referred the Tribunal to Dr. Thorne's October 26, 2010 report which states that the Appellant may be available for non- physical labour in the new year. The Appellant stated that she doesn't know what Dr. Thorne might have been thinking, and that Dr. Thorne wanted to inject her with methotrexate but her family doctor advised again this because methotrexate harmed her liver, and injections would make this worse. The Appellant stated that she wasn't able to go back to work because nothing improved.

[17] The Appellant testified that both of her wrists are similar; however, her right is more swollen – she is right handed. On a good day she will be able to use fine motor skills with her hands for 10-15 minutes. She is very limited in writing and keyboarding; she can't do zippers or buttons; and she has difficulty doing her hair, holding a book, and putting socks on. Sometime she needs to use two hands to pour a cup of coffee; she has to avoid shoelaces and has difficulty putting her bra on. She is always dropping things and stated that the previous night she dropped and broke a glass when she was trying to fill it – she has dropped dishes, a water bottle, books, and even a Kleenex. On bad days (which are five days a week) she lies in bed longer, she can't brush her teeth when she gets up, she can't squeeze the toothpaste, and she can't pull up the sheets. She stated, "I have tried ice and heat, ointments, Tylenol, aspirin…nothing helps." She suffers from morning stiffness and some days she can't even move her hands in the morning. Recently her shoulder pain has started to be more significant and the pain in her feet has is becoming worse.

[18] When asked why she could not pursue work closer to her home, the Appellant stated, "I couldn't be a reliable or dependable employee…I have flare ups and suffer from constant chronic pain and fatigue…I am not able to say how I will be ten minutes from now…sometimes I can't even get up in the morning and dress myself or brush my teeth."

MEDICAL EVIDENCE

[19] 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.

[20] There are reports from Dr. Collins from November 26, 2008 to April 26, 2011. The report dated November 26, 2008 notes her problems as inflammatory arthritis, ANA (antinuclear antibodies) 1:640, RF (rheumatoid factor) positive, osteoarthritis, and methotrexate transaminase increase. The report dated November 17, 2010 indicates: the Appellant has had many therapeutic attempts, the sulfasalazine being the best to date, increasing the dose, joint injections of no benefit, discussed gold injections or biologics, deferred. The report dated April 26, 2011 indicates that there have been no changes in the Appellant's general health or medications.

[21] On January 13, 2009 Dr. Tebbut, internist, reported that a sleep study reveals a very mild degree of underlying sleep disordered breathing which he suspected was unrelated to her polycythemia.

[22] On January 30, 2009 Dr. Nay, hematologist, reported that the Appellant's polycythemia is not due to a primary hematologic abnormally and is presumably secondary and may be aggravated by her smoking. He further reported that she does not have primary polycythemia.

[23] On September 17, 2010 Dr. Moquin reported to Industrial Alliance that the Appellant has deforming and active rheumatoid arthritis, and that her hands are the joints which are primarily affected. Dr. Moquin further reported as follows:

> Please note that most limitations are confined to the use of her hands. This patient is unable to open jars. She is experiencing difficulty brushing her teeth and her hair and using utensils. She is unable to grip the steering wheel of her car without a lot of pain and stiffness. She has difficulty pulling the bed sheets up over her shoulders. She has markedly reduced tolerance to perform both of the activities of daily living and general housekeeping around her home. In addition to pain and stiffness this young woman is increasingly frustrated with her active joint disease. She sleeps poorly and reports ongoing chronic and persistent fatigue. Until her active joint disease has settled with effective therapy, my patient is not able to continue to work at any employment. I am unable to prognosticate regarding the duration of her disabling symptoms. Certainly a treatment plan from Dr. Carter Thorne, following his assessment in October, may speak to this.

[24] On October 7, 2010 Dr. Thorne, internal medicine and rheumatology, assessed the Appellant for atypical arthritis. Dr. Thorne opined that the Appellant presented with an

unusual arthritis; and that she has hypertrophic changes about the inflamed joints as one might see with a seronegative variant arthritis as opposed to seropositive arthritis. On October 20, 2010 Dr. Thorne reported that he was going to start the Appellant on methotrexate.

[25] On October 26, 2010 Dr. Thorne reported that the Appellant had persistent inflammatory arthritis which limits her ability to return to work. Dr. Thorne indicated that he was not sure what the Appellant's duties as a property manager entailed, and that she may be available for non- physical labour in the new year.

[26] A report dated September 8, 2014 from Dr. Moquin accompanied a second disability application made on November 27, 2014, which is being held in abeyance. This report diagnosis rheumatoid arthritis and Hashimoto's thyroiditis. The relevant findings include chronic pain and fatigue, significant arthritis to joints of hands compromising fine motor skills and grip, and recurrent flares of active arthritis. The prognosis indicates that no change in the erosive joint deterioration of the hands is expected, and that recurrent flares with worsening joint deformity are expected.

SUBMISSIONS

[27] Ms. Chrysdale submitted that the Appellant qualifies for a disability pension because:

a) Her rheumatoid arthritic deformities are permanent and painful and make it impossible for her to pursue any gainful occupation;

b) She suffers from longstanding disabling conditions including severe chronic pain and swelling and chronic fatigue;

c) The simplest tasks take inordinate effort and she could not be a regular and predictable employee;

d) Although she is young and has transferable skills, her medical conditions preclude her from using those skills.

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

a) Although the Appellant has some arthritic changes in her hands she has good grip strength, and only mild joint involvement is noted on the x-rays;

b) She is young with a high school education and it is reasonable to expect that she could do some type of suitable work, either full or part time;

c) Although the Appellant has a chronic disease which may be marked by periods of remission and exacerbation and requires long term treatment, the evidence does not preclude all work.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2010.

Severe

[30] 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.

Guiding Principles

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

[32] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2010 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.

[33] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada (Attorney General)*, 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[34] 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. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[35] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her 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 her to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

Application of Guiding Principles

[36] The Appellant gave credible and straightforward evidence describing her disabling conditions and about how they have affected her life and capacity to work. She was an accurate historian and did not appear to exaggerate or overstate her symptoms in anyway. Significantly, her oral evidence was consistent with and supported by the extensive medical evidence which confirms the longstanding nature of her conditions and that they have been

refractory to treatment. It is clear from the medical evidence that the Appellant has been compliant with and diligently explored all reasonable treatment options.

[37] The Appellant's primary disability relates to the limitations in the use of both of her hands. These limitations create difficulty with basic day to day tasks as well as simple office skills. In this regard the Tribunal relied not only on the Appellant's oral testimony and but also on the medical reports from Dr. Moquin dated September 17, 2010 (see paragraphs 14 and 23, supra), Dr. Collins (see paragraph 20, supra) and Dr. Thorne (see paragraphs 24-25, supra) which confirm that her disabling conditions were severe prior to the MQP. The reports from Dr. Moquin dated October 4, 2011 (see paragraph 11, supra) and September 8, 2014 (see paragraph 26, supra) confirm that there has been no improvement.

[38] The Tribunal also considered the cumulative effect of all of the Appellant's conditions which include chronic pain and fatigue, numbness and swelling, limited fine motor skills in both hands, sleep difficulties, and poor concentration as well as the side effects of the significant medication that the Appellant is required to take in order to manage her pain. As the *Bungay* and *Barata* decisions, supra, indicate, the cumulative effect of all of the Appellant's conditions should be considered. The Tribunal also considered the unpredictable nature of the Appellant's symptoms and agrees with Ms. Chrysdale that the Appellant could not be a regular and predictable employee. As the *Bennett* decision, supra, indicates "predictability is the essence of regularity."

[39] The Tribunal was guided by the decision of the Pension Appeals Board (PAB) in *Giakoumatos v MHRD* (September 26, 2000), CP 08884 (PAB). In that decision, the PAB determined that a 43 year old former cook suffered from a severe disability based primarily on his having very limited use of both hands.

[40] In that case the Appellant who suffered carpal tunnel syndrome and pronator problems "stated that his wife ties his necktie, buttons his collar and sleeves as he cannot do these simple things. He cannot wash his hair and he frequently drops cups from his hands because of his disabilities…He also stated that it took him ten days to paint a garage door. He says he cannot write more than two or three cheques at a time. He concluded by stating he could not do any kind of work."

[41] The Tribunal recognizes that each case must be determined own its own facts and that PAB decisions are of guidance and not binding; however, the Tribunal found the limitations of the Appellant in the *Giakoumatos* case to be similar to those in this case, and derived guidance from that decision.

[42] The Tribunal recognizes that the Appellant is very young and that she has transferable skills; however, she was not able to pursue her previous non-physically demanding employment as a property manager because of her chronic pain and fatigue. The Tribunal agrees with Ms. Chrysdale that the Appellant's medical conditions preclude her from using her skills in any form of substantially gainful employment.

[43] The Tribunal has determined, on the balance of probabilities, that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[44] Having found that the Appellant's disability is severe, the Tribunal must also make a determination on the prolonged criteria.

[45] The Appellant's disabling conditions have persisted for many years and despite extensive and ongoing treatment, they have been refractory to treatment.

[46] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[47] The Tribunal finds that the Appellant had a severe and prolonged disability in December, 2008 when she was no longer able to continue working. 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 2011; therefore, the Appellant is deemed disabled in August 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of December 2010.

[48] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security