Citation: ***D. R. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 57**

Date: June 11, 2015

File number: GT-123472

GENERAL DIVISION - Income Security Section

Between:

D. R.

Appellant

and

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

Respondent

Decision by: Jane Galbraith, Member, General Division - Income Security Section

Heard In person on June 10, 2015, Brantford, Ontario

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. R. – the Appellant

Paul Hosack –the Appellant's representative

INTRODUCTION

[1] The Appellant's application for a CPP disability pension was date stamped by the Respondent on October 4, 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).

[2] The hearing of this appeal was in person for the following reasons:

- More than one party will attend the hearing.
- Videoconferencing is not available in the area where the Appellant lives.
- There are gaps in the information in the file and/or a need for clarification.
- Credibility is not a prevailing issue.
- 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2012.

[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.

EVIDENCE

[9] The Appellant was 48 years old at the date of the MQP. She completed Grade 12 and one year at a college taking Behavioral Science. She has worked in the past on a tobacco farm where she was raised. She also worked as a waitress and did some inside sales work for several companies. She started working at Lowes in November 2008 as a product service associate and was primarily involved with setting up store displays and some involvement with assisting customers.

[10] The Appellant lives with her common- law husband and her son.

[11] The Appellant was involved in a motor vehicle accident (MVA) in July 2010. She has not returned to work since the MVA. She was placed on long-term disability with Lowes and continues to receive those benefits.

[12] An MRI was done in October 2010 on the left and right knee. The left knee showed mild chrondromalacia patella, joint effusion and mild superficial bursitis. All ligaments were intact and the cartilage was normal. (GT1-48) The right knee showed the same results except there was no joint effusion noted. (GT1-49) An MRI of her left thigh in January 2011 was a normal examination. (GT1-50)

[13] The Appellant describes that she has had constant pain since the accident. She cannot sit, stand or walk for more than 20 minutes at a time before she has to change positions. She has a constant throbbing and burning pain in her left leg, which travels down the side of her leg, around her knee and down her shin. Her leg will frequently give out on her unexpectedly. She has low back pain and also gets stabbing back pains if she bends down too quickly. Her neck pain is constant and is worse on the right side. Due to this she limits her driving to short distances.

[14] The Appellant started having migraines after the accident and continues to have them on average twice a week. She suffered a severe laceration on her forehead when the accident occurred. She reports that if she is able to take medication in time she might sometimes catch its progression. If she cannot stop it from occurring she has to lie down in a dark room. Lights and weather changes are two examples of situations that will sometimes increase the chances of a migraine occurring but they are generally hard to predict.

[15] The Appellant was hopeful when she started receiving treatment after the MVA that she would be returning to her normal self. After about 9 months of some improvement from the therapy she states that her condition plateaued and has been essentially the same since. She describes her days as bad and horrible. She does what she can around the house but needs to rest and pace herself considerably.

[16] The Appellant used to participate in biking, running and was on a baseball team for 16 years. She has not been able to do any of these activities since the MVA occurred. She

has attempted to try golf unsuccessfully. Due to her pain she often will leave social situations.

[17] In June 2011 Eric Ferguson wrote to the car insurer asking that they continue to fund the Appellant's aqua therapy, Pilates and yoga classes. He reports that the Appellant has worked harder and done more for herself than any other patient he has seen. (GT1-119)

[18] The Appellant has been involved in many different types of treatment in an attempt to resume some of the functional abilities she has lost. These include aquatherapy several times a week, physiotherapy, botox injections, gym exercises, weekly massage, chiropractic treatment 3 times a week as well as involvement with an osteopath. Her Family physician, Dr. Cloete, has been very involved in her care and made the majority of the referrals to specialists and recommended different treatment modalities.

[19] The Appellant clearly suggests that without all the treatment she has had in the past and continues to have on a regular basis she would not be able to function at all. She considers all the rehabilitation treatment she is involved in to be her job and that she does this to maintain some level of function. She does some tasks around the house but with pacing and receives some help from her father who lives close by. Her husband helps out but was also injured in the MVA.

[20] Dr. Susan Goodwin, a neurologist, saw the Appellant in March 2012. She diagnosed her with vascular headaches and prescribed Maxalt to take at the onset of a headache. She could not find any motor or sensory deficit in the L4 area. If the headache medication did not help the Appellant was directed to return to see Dr. Goodwin. (GT1-83)

[21] Dr. Ghouse, a rehabilitation specialist, evaluated the Appellant in March 2012. He notes her present complaints as constant low back pain, left leg pain with throbbing and burning and a sharp pain in her back and left leg to her knee. She also is having problems with her right knee. Due to these complaints she has difficulty with prolonged sitting, bending, lifting and carrying and climbing stairs and ladders. Dr. Ghouse identifies the Appellant having multiple soft tissue injuries. He indicates she should continue her daily exercise at the gym for cardio, weight training and Pilates as well as her pool attendance three days a week. He opines

she will need assistance with heavier chores of housekeeping and home maintenance. He does not believe she will be able to return to Lowes or cleaning houses. (GT1-37)

[22] The Appellant has been affected emotionally due to her physical pain and her functional limitations. She was referred to a psychiatrist in the last couple of years and has been prescribed Cymbalta. She sees the psychiatrist regularly now. She states that she was certainly depressed in the first few years after the MVA but wasn't referred to a psychiatrist at that time.

[23] The Appellant received an orientation and evaluation at the Chronic Pain Management Unit in August 2012. Their report indicated that she provided a very frank description of what she could and could not do and her pain symptoms. She was taking 6m Hydromorphone at bedtime. It was believed the pain program would be beneficial for the Appellant and could help improve the likelihood of her managing better in a work situation. It was recommended that she be admitted to the program. (GT1-453) The Appellant testified that she was on Hydromorphone for a short time but she did not like the effects of the medication. She discontinued taking it.

[24] The Appellant attended the Chronic Pain Program for a month and reports that it was a tremendous help. She learned how to pace activities, accept her new "normal", learning how to ask for help when she needs it and help with her attitude about the situation. She continues to use the strategies and techniques including meditation regularly.

[25] Two years ago the Appellant moved to X, which was closer to her aqua therapy and her family. She was driving a longer distance than she could tolerate to get to her therapy and her family lived in the area. Her father can now help out with heavier tasks. Her husband works but as he was also injured in the MVA cannot do all tasks. Her son helps by cutting the lawn.

[26] An MRI of the cervical area in January 2013 showed minor multilevel degenerative changes with no evidence of neural compromise. (GT1-86)

[27] In March 2013 Dr. Ghouse evaluated the Appellant again. He assessed that she has residual chronic pain and has reached her maximum medical recovery. He recommended a

psychovocational assessment to identify her skills and aptitudes and potential job opportunities. (GT1-68)

SUBMISSIONS

[28] The Appellant's representative submitted on her behalf that she qualifies for a disability pension because:

a) The Appellant is not competitively employable. It is unrealistic to think that there would be an employer that would be able to accommodate her to the extent that she would need.

b) She takes the entire day filled with different therapies to maintain her limited function.

c) All attempts at different therapies have failed to improve her level of functioning.

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

a) There is no evidence the Appellant attended a multidisciplinary pain program which which is generally recommended for persistent pain symptoms and provides education regarding pain management.

b) The physiatrist explains the Appellant had multiple soft tissue injuries and recommends conservative treatment.

c) Investigations have not been submitted to demonstrate any significant pathology in the Appellant's back, right hip, wrists or shoulders.

d) She is young with a good education and the available information does not reveal a severe and prolonged disability, which would have precluded her from performing all types of work including light or modified duties.

ANALYSIS

[30] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

Severe

[31] The Appellant was impressive, providing what the Tribunal thought was sincere and credible testimony. She provided details of the history of her symptoms, medical conditions, treatments, including past and current limitations. She appeared to the Tribunal to be honest and forthright in delivering her testimony and answering questions under oath.

[32] The Tribunal notes and is guided by the decision, *G.B. v MHRSD,* (May 27, 2010) CP 26475 (PAB) which addresses chronic pain when it states:

> Chronic pain cannot be proven by objective evidence and there is no medical test that can measure pain or take a picture of pain, and the main evidence that must be relied on is subjective evidence or the claimant's verbal description of pain. The statutory criteria for a disability claim do not require proof to the level of objective medical evidence.

[33] The Respondent submits the Appellant did not provide evidence of attending a multidisciplinary pain program. An initial assessment report in August 2012 recommended the Appellant for admittance to a chronic pain program. The Appellant testified that she did attend the program for a month and was very impressed with the strategies she learned and continues to apply them.

[34] The Tribunal finds the Appellant did participate in a program to deal with her pain as well as many other recommended treatments. She continues to participate in many of those which started in 2010, with no intention to discontinue her involvement. She describes attending her rehabilitation treatments as her job to maintain her current functional level.

[35] The Tribunal is guided by the case of *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB), where the Review Board pointed out that it is not the diagnosis of a condition of a disease that automatically precludes one from working. It is the effect of the disease or condition on the person that must be considered. This issue is confirmed for the Tribunal in *Ferreira v. AGC* 2013 FCA 81 when it indicates the key question in these cases is not the

nature or name of the medical condition, but its functional effect on the claimants' ability to work.

[36] The Appellant has suffered soft tissue injuries, which have caused her constant pain since the accident. It is clear she is not able to participate in any of the pleasurable or social activities she once enjoyed. Her functional limitations have an effect on everything she does and she has to pace herself with all activities. She has been praised from several health professionals about her determination to do what is required to try to improve her function.

[37] The Tribunal finds the Appellant's functional limitations have had a significant effect on all her activities. This includes social and any possible work activities. Without her ongoing treatment she would not be able to function in the limited way that has become normal for her. It is clear to the Tribunal that her inability to function since the MVA made her incapable regularly to be employed in any substantially gainful occupation at the time of her MQP.

[38] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[39] Based on the totality of the written and oral evidence, and the unquestioned credibility of the Appellant's testimony, the Tribunal finds that the Appellant was so functionally limited by pain that she did not have any work capacity after the MVA.

[40] The Tribunal has carefully reviewed the medical reports and listened attentively to the evidence of the Appellant. The Tribunal finds that the Appellant has satisfied the Tribunal that on a balance of probabilities the Appellant does have a severe disability within the meaning of the Act at the time of her MQP.

Prolonged

[41] For the Appellant to qualify for a disability benefit, the Tribunal must be satisfied not only that the mental or physical disability is "severe", but also that it is "prolonged." To make such a finding, there must be sufficient evidence to establish that the disability is both "long continued" and "of indefinite duration", or is likely to result in death.

[42] The Appellant continues to participate in aqua therapy, chiropractic treatments, exercise at a gym and regular massage appointments.

[43] There is no written medical evidence to suggest that the Appellant will improve in a significant way. The Appellant's oral evidence is that her condition has plateaued and her inability to function has been the same for several years. She does not see improvements in her condition, but maintains her level of functioning. The pain program she attended has helped her only manage her pain. This has been identified as a chronic condition.

[44] Therefore the Tribunal agrees that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[45] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2010, when she stopped working due to the injuries caused by a MVA. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of November 2010.

[46] The appeal is allowed.

Jane Galbraith
Member, General Division - Income Security