

**Citation: *T. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 56**

**Date: June 10, 2015**

**File number: GT-121452**

**GENERAL DIVISION - Income Security Section**

**Between:**

**T. S.**

**Appellant**

**and**

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

**Respondent**

**Decision by: John Eberhard, Member, General Division - Income Security Section**

**Heard in Person on June 9, 2015**

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

T. S.

Appellant

Jeff Schlemmer

Lawyer for the Appellant

### INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 5, 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 in person for the following reasons:

- a) More than one party will attend the hearing;
- b) The issues under appeal are not complex;
- c) There are gaps in the information in the file and/or a need for clarification;
- d) The form of hearing is the most appropriate to address inconsistencies in the evidence; and
- e) 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.

[3] The Appellant has made two earlier applications for CPP disability benefits. Those applications were date stamped by the Respondent in February 2006 and March 2009. They are relevant to the extent of the information contained in the application questionnaires. The benefits were denied by the Respondent and there were no appeals by the Appellant.

[4] The Appellant was 40 years old when she applied to Human Resources and Skills Development Canada (HRSDC) for a *Canada Pension Plan* (CPP) disability benefit on this application. She reported she had a grade 11 education and a one year Health Care Aide (HCA) certificate. She was employed as a HCA until she stopped work due to injuries

related to an accident. She claimed that lower back, ankle and foot pain, as well as depression render her "disabled" within the meaning of subsection 42 (2) of the *CPP*. The position of the Respondent is that the Appellant's limitations do not prevent her from doing some type of work and therefore does not meet the criteria of "severe and prolonged" within the *CPP*.

## **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 General Division of 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010. 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 submitted a questionnaire dated March 23, 2011 supporting her claim for benefits. In the questionnaire, she states that the impairments which prevent her from working include: severe lower back, ankle and foot pain resulting in depression. She was taking Oxycocet 1-2 every 4 hours, Amitriptyline. She lists functional limitations that include:

- a) cannot stand or sit for more than 20 minutes
- b) can walk about 2 blocks which takes 20 minutes
- c) carrying: maximum 10 pounds
- d) minimal bending
- e) some personal chores are “harder than others”
- f) does not sleep for long periods of time
- g) poor concentration because of depression
- h) can drive for up to 20 minutes

[11] In the first of three CPP applications (2006/02/27), the questionnaire states that she most recently worked as a Health Care Aide. The dates were not indicated but she stopped due to severe pain from an accident (3 fractured bones in her left foot and ankle). She claimed that she could no longer work because of her medical condition as of July 2001. This application also notes severe low back pain, ankle and foot pain. She can sit and stand for 20 minutes, carry 10 pounds and has difficulty bending. She takes longer to do household chores, takes Arthrotec twice daily and does physiotherapy three times weekly (12 weeks at a time) since the accident. She noted she was receptive to a vocational rehabilitation assessment.

[12] The second application of the Appellant was in March 2009. Her functionality descriptions were similar to the first but she was now taking Ibuprofen 2-3 every 4 hours

and Percocet 2 every 4 hours. No vocational assessment was noted. In each of the applications she stated she completed grade 11.

### Testimony

[13] The Appellant testified that she completed Grade 12 and is certified as a Health Care Aide. Her training to become a Personal Support Worker (PSW) was interrupted in 2001 by a motor vehicle (Motorcycle) accident (MVA). She has had three operations on her injured foot and the fusion (replacing screws) has been successful.

[14] She is now 44 years of age with 2 children living at home with her. She was able to purchase this home with the settlement funds from the law suit arising from the MVA but by 2006 needed to apply for Ontario Works support for her family. She testified that she is depressed (“frustrated”) because she could not realize her ambition to become a PSW. Her work experience has included waitressing, working on an assembly line, cleaning, and being a store clerk. She tried to work in 2008 but could not handle the physical work of stocking shelves and standing for long periods of time at the “Wine Rack” retail store. The pain in her back prompted her to quit. She has not sought any work other than this three week job from 2001 to 2015. She stated that she was told by a doctor that she could be a telephone receptionist but she never applied for that job. While a recommendation was made in the early 2000’s to have a vocational assessment done to identify possible sedentary or light physical work opportunities, she has not participated in this kind of examination. She testified that in 2010 she might have been able to do a job that allowed her stand up from time to time. She has never applied for such a job and has had no counselling or encouragement as to what kind of work she might be able to do.

[15] The Appellant describes her medical problems in 2010 as being back pain and weak ankles (which give out on her about 6 times a year). Her antidepressant medications started in 2014 as a result of her depression (described as “frustration” at not being able to do what she wanted to do: namely, to be a PSW). There has been no mental health counselling and no attendances or referrals to mental health practitioners since 2006. She saw psychologist Dr. Breiter only once. She testified that she gets headaches but recalls no treatments for them and has not been referred to any specialists on account of these

intermittent events. She stated she takes no medications for headaches. She is taking Oxycocet (5 MG 1-2 every 4 hours) and Amitriptyline for pain.

[16] Her activities of daily living in 2010 illustrate the life of a busy mother. Daily, she would make breakfast for the two children, make their lunches, do housekeeping, have a shower and dress, do exercise, make lunch for herself, have a rest and prepare for the arrival of the children from school and then make supper, do dishes and help the youngest child bath. Until 2012, she walked her dogs every day. She lost her driving license in 2010 because of an impaired driving conviction and has not been able to afford to get her van back on the road. She stated that in 2008, her back began to bother her but acknowledged that her X-Rays did not reveal any significant back problems. She rates her back and foot pain at 8-9/10 and gets some relief from her medications.

#### Medical reports

[17] The application for disability pension benefits was accompanied by an “initial medical report”. Dr. Stephen Tallon (Family Physician) filed an “initial medical” dated April 4, 2011. He diagnosed foot/ankle pain (resulting from a fracture in a motorcycle accident in July 2001) as well as mechanical back pain with reduced range of motion. He classifies the pain as chronic. He opines a poor prognosis as there has been no improvement in 10 years since the accident. He writes that she is disabled due to the inability to do physical work (sit, stand, lift or bend). The chronic pain “limits her ability to concentrate, focus or multitasks”. This physician prepared several medical up-dates to serve as information for the Provincial funding program called “Ontario Works” so as to assist the Appellant to continue to receive benefits. These reports started in 2006.

#### Additional Medical Reports

[18] On March 11, 2002, Dr. Keith Sequeira, (Physical Medicine & Rehabilitation) reported on an independent medicolegal examination related to the July 21, 2001 MVA. The Appellant reported that her left back and lateral hip pain began a short time after the MVA. She stated that in November 2001 the pain increased and it escalated in February 2002 when

she was 6 1/2 months pregnant with her second of three children. She stated that initially, the pain was intermittent in nature and has gradually become more constant.

[19] On examination, her gait was slightly antalgic with less time spent on the left than the right. She was able to walk on her toes and heels without much discomfort. Range of motion of the ankle and foot was within normal limits, including the great toe, bilaterally. There was a well-healed scar on the dorsal aspect of the left first metatarsal region. Range of motion of the back was full and slightly painful with the extreme of forward flexion, which reproduces pain in the left low back area. Reflexes were symmetric. Sensory examination was intact in the lower extremity, bilaterally. The range of motion of the hips and knees was full. Her diagnosis included abnormal walking mechanics and Gluteus medius musculoligamentous dysfunction on the left.

[20] The physician opined:

“I do feel that she has a fair prognosis. I expect that she will be able to return to some form of work in the future. It is difficult to determine, at this time, exactly what she will ultimately be able to obtain, vocationally and avocationally, based on her symptomatology and the fact that she is now pregnant with the date of confinement being in May. Based on her present symptomatology, she would have to avoid jobs that involve prolonged walking, standing, repetitive bending, twisting, lifting, heavy lifting and frequent stair climbing. She would have to function at a sedentary to light level. This may change based upon how she responds to therapy after she completes her pregnancy. A better assessment of this prognosis can be ascertained in approximately September 2002 or shortly thereafter. Based on her present situation, she will be restricted, at least for the time being (3-6 months), with respect to vocational and avocational activities that involve the previously stated tasks.”

[21] Dr. Hans Breiter (Psychologist) writes on June 6, 2006 that based on the available information, the Appellant presents as having ongoing physical problems, stemming from the MVA, that preclude her from returning to personal support work. Regarding the absence of a comprehensive post-MVA vocational or psychovocational assessment, he suggested an evaluation would be most appropriate to identify potentially suitable

vocational options. This conclusion is consistent a recommendation by Dr. Sequeira in the report of March 2002.

[22] A Health Status report by Dr. Tallon of April 26, 2010 notes restrictions of lifting, walking, concentration and energy with the prognosis being “guarded”. Her analgesics at this time consisted of Ibuprophen, Ratio-Oxycocet and Elavil (APO Amitriptyline). He reported a head injury from the door of a bus on which she was riding. This accident generated headaches from July 2010. He reports (contrary to the memory of the Appellant) that she took Advil to address this issue. There are no other reports of other treatment or referral for headaches.

[23] A Health Status report by Dr. Tallon of April 4, 2011 notes restrictions: cannot sit/stand for long periods of time; cannot lift or bend; can walk less than one block. “There has been no improvement despite multiple surgeries on her foot and physiotherapy”. She receives moderate relief from the use of analgesics. Secondary depression limits her focus and concentration.

[24] “London X-Ray Associated” provided a lumbar spine report dated August 2014. It noted osseous structures are normal in their alignment and density with no evidence of fracture, dislocation or subluxation. There was no evidence of spondylolisthesis or spondylolysls. Minimal anterior osleophytic lipping was seen at the multiple levels with no significant joint space loss. The neural foramina and sacroiliac joints are within normal limits. The impression concluded degenerative change.

[25] In September 2014, Dr. Tallon reported the Appellant had left foot and ankle pain (following surgical intervention in July 2001), as well as mechanical low back pain. He documented she walked with a limp and was unable to walk for more than 3 blocks before having to stop. Dr. Tallon also noted she had difficulty standing for any length of time and was incapable of heavy or repetitive light lifting. He indicated there were supportive documents in the form of x-rays, specialist's reports and discharge summaries; however, the only report submitted was an x-ray of her lumbar spine which showed only minimal degenerative changes.



[26] There are no mental health reports relevant to the MQP and she has not been referred to a Psychiatrist. Her symptoms are unchanged in 8 years. Her surgery is reported to be successful although there is continuing pain and very occasional falls due to the weak ankle. The only other therapy at the time of the MQP was the use of NSAIDs. Physiotherapy was undertaken in 2007. According to the Physical Medicine and Rehabilitation report of 2002-03, the Appellant had attended physiotherapy three times per week. She did not attend physiotherapy at that time when she was pregnant. At the time of these reports, she was apparently physically and mentally active and enjoying recreational activities as well as caring for two young children and two dogs. She was not using any medication. Her pain was intermittent and aggravated by weight-bearing activities. This specialist recommended a return to physiotherapy to learn proper walking patterns as well as lumbar & buttock stabilization, following the birth of her child. He also recommended reassessment following four months of physiotherapy. There are no follow-up reports on these recommendations.

## **SUBMISSIONS**

[27] The Appellant's Counsel submitted that the Appellant qualifies for a disability pension because:

- a) She continued to have back and ankle pain in 2010
- b) She was suffering a depression
- c) She has sleep problems

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

- a) According to imaging of the back done in 2003, a bone scan did not show any activity and an x-ray showed some loss of the normal curve of the low back which was opined to be caused by muscle spasm.
- b) Despite the complaints of severe low back, ankle and foot pain with feelings of depression she has not seen any specialists in the past two years. She does not receive any treatments, only analgesics.
- c) The left foot is tender to touch but has good range of motion and no muscle wasting. She has mechanical low back pain with reduced range of motion but no neurological symptoms.

- d) With some post-secondary education she should be able to retrain for a position suitable to her limitations.
- e) Headaches have not required imaging of the head or a referral to a specialist. A higher dose or alternative medication to Advil has not been tried
- f) A 2004 report from Dr. Sequeira, physiatrist, recommended a thorough vocational assessment. No report has been provided that shows her to be unable to do all types of 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 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.

[31] The Appellant had not quite finished her PSW course work when she suffered the motorcycle accident. She had worked in a nursing home as a health care assistant. Her language proficiency is good. She has past work and life experience but her chosen career was cut short by the accident. The Tribunal accepts her evidence that her back and ankle pain is chronic and has resulted in self-described mental health issues (depression). The Tribunal also accepts that her frustrations relate to her inability to work as a PSW. She did not seem the least motivated to attempt some other form of lighter work or retrain and seek a job that was more sedentary. Her past work experience and the suggestion of a physician to seek work as a telephone operator did not prompt a back to work attempt.

[32] It is accepted that the Appellant has physical limitations from the injuries she sustained in 2001. She was 30 years old at that time. The orthopaedic surgeon, Dr. Sanders (in August 28, 2003) said she had excellent range of motion and a "fairly mobile mid-foot" following fusion of her left ankle. As well, x-rays of her lumbar spine (September 22, 2003) and the above noted bone scan did not reveal any significant findings. She continues on analgesic

medications. Psychiatrist Dr. Sequeira (March 31, 2002) was of the opinion she would be able to return to some type of work in the future. She did work at the “Wine Rack” for 3 weeks in January 2008. However retail stores generally require prolonged standing and heavy lifting. It is clear that she is not able to do physically demanding work. However she is young with a college education and the Respondent submits that this does not substantiate a severe medical condition which would prevent her from performing a more suitable type of work, or retraining for more sedentary work.

[33] Dr. Tallon indicated there were supportive documents in the form of x-rays, specialist's reports and discharge summaries. These reports have not been produced to the Tribunal. There certainly are reports and assessments dated years past the Appellant's MQP but are not retrospective and bear no impact on the issue of a severe medical condition as of December 2010.

[34] Although Dr. Tallon stated the Appellant had increased her medications by 2014 the question for the Tribunal is whether her condition prevented her from all work as of December 31, 2010 and continuously since. She must establish a severe and prolonged disability at her MQP. It is irrelevant that her condition may have deteriorated after that time. It is her capacity to work as of December 31, 2010 that the Tribunal must address.

[35] It is regrettable that there are no physiotherapy discharge summaries on file. There is no indication the Appellant has required hospitalization, out-patient therapy or consultation with any Specialist in the past two years leading up to her MQP. She has not had any referrals nor are there any reports that substantiate a depression that would affect her functionality or work capacity. The Tribunal needs place considerable weight on her own descriptions of functionality as of the MQP.

[36] While she may not be able to do work that requires stress or strain to her left foot or back, she appears to have the capacity to do alternate work as suggested by the psychologist and Dr. Sequeira. Her activities of daily living which she described in December 2010 certainly indicate functionality that could well be applied to light or sedentary work. It does not assist the Appellant that she did not make any attempt to retrain for other forms of work or submit to a vocational assessment.

[37] Counsel for the Appellant argues his client has testified that she suffers from a depression, has sleep problems that back and ankle pain in 2010 prevented her from working. There is no abnormality found on X-Rays of the lumbosacral spine, pelvis or hip pathology. The bonding of the bones in the feet has been found to be complete.

[38] The very nature and credibility of subjective evidence can outweigh the absence of any objective clinical medical evidence (*Smallwood v. MHRD* (July 1999), CP 9274, PAB and *MHRD v. Chase* (November 1998), CP 6540, PAB). This is not such a case. The Tribunal did not find the Appellant's evidence sufficiently compelling to overcome the lack of medical information in this appeal.

[39] 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).

[40] The Appellant has been quite candid in stating that with the exception of a work trial for three weeks in 2008 (outside of the limitations suggested by her doctors) she has not applied for any other work within her physical limitations since that time. She opined herself in her testimony that she would be able to work so long as the job could accommodate her requirements to stand from time to time from a sitting position. The Tribunal is of the view that such jobs exist. The problem is that the Appellant has not tried to find one.

[41] While the Appellant may not be able to perform work which requires prolonged standing or walking, her medical condition does not preclude her from all types of work. She has not required any acute psychiatric care for her depressive complaints. She is relatively young. There is an expectation that if properly motivated she would be able to retrain because of her work experience and the educational skills she already possesses. While it may be frustrating to not be able to do the work of a PSW, the Tribunal has concluded that she should have been able to do some type of light or sedentary work as of her MQP.

[42] In the result, given the onus upon the Appellant to demonstrate her incapacity regularly to pursue any substantially gainful occupation, her medical conditions cannot be considered, by CPP definition, to be "severe".

**Prolonged**

[43] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

**CONCLUSION**

[44] The appeal is dismissed.

John Eberhard  
Member, General Division - Income Security