

Citation: *C. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 60

Date: June 18, 2015

File number: GP-14-3686

GENERAL DIVISION - Income Security Section

Between:

C. S.

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 Teleconference on June 16, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Deborah Hastings: Appellant's representative

The Appellant did not attend the hearing

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 4, 2007. 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).

[2] The Appeal was heard by a Review Tribunal on March 7, 2012 in the Appellant's absence. On May 14, 2012 the Review Tribunal released its reasons for decision dismissing the appeal; however, the reasons were sent to the wrong address. The reasons were not sent to the Appellant at her correct address until June 3, 2013. The Appellant applied for leave to appeal to the Appeal Division of the Social Security Tribunal (Tribunal) on July 18, 2013 which was within ninety days after the day on which the decision had been communicated to her. On May 7, 2014 the Appeal Division granted leave to appeal. The Appeal Division determined that the appeal had a reasonable chance of success on the ground that, due to possible errors in communication, the Appellant may not have been afforded a fair hearing.

[3] On June 11, 2014 the Appeal Division pursuant to a consent agreement referred this matter back to the General Division for reconsideration with appropriate directions to hold a *de novo* hearing.

[4] The *de novo* hearing was scheduled to be heard by teleconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) The form of hearing provides for the accommodations required by the parties or participants;
- 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.

Appellant not attending hearing

[5] The Tribunal Member joined the teleconference hearing at the scheduled 10 am start time. Although Ms. Hastings participated in the teleconference hearing, the Appellant did not. Ms. Hastings advised that she had seen the Appellant on May 5th and reviewed the matter with her. She also advised that the Appellant was aware of the hearing and was to attend at Ms. Hastings' office at the scheduled hearing time, but had failed to appear. Ms. Hastings further advised that she has left a voice mail message for the Appellant on June 1st, and that the Appellant had failed to respond. She also advised that she had unsuccessfully attempted to contact the Appellant on the morning of the hearing, and had left a voice mail message for her.

[6] At approximately 10:15 am, the Appellant called Ms. Hastings, on a different number in Ms. Hastings office, and advised her that she was too ill to attend the hearing. Upon Ms. Hastings advising the Tribunal of this conversation, the Tribunal advised that the Appellant could call into the telephone conference and participate from her home.

[7] When Ms. Hastings returned to the phone on which she had been speaking to the Appellant, the Appellant had hung up on her. Ms. Hastings attempted to contact the Appellant, but was not able to reach her. Ms. Hastings left a voice mail message with the Appellant asking her to call into the telephone conference and left the call-in instructions. Ms. Hastings also confirmed to the Tribunal that the Appellant had received the Notice of Hearing which provides the call-in instructions. The Tribunal Member and Ms. Hastings waited until 10:30 am; however, the Appellant did not call into the teleconference nor did she return the call from Ms. Hastings.

[8] Ms. Hastings confirmed to the Tribunal that the Notice of Hearing had been sent to the Appellant at her correct address and that the Appellant was aware of the hearing. Ms. Hastings advised the Tribunal that she had no instructions to make submissions to the Tribunal.

Proceeding in Appellant's absence

[9] A history of the proceedings before the OCRT is set out in paragraph 19 of the Appeal Division decision granting leave to appeal. The hearing was initially scheduled to be heard on October 13, 2010 and was adjourned because shortly before the hearing the Appellant provided a note from her family doctor stating that she was experiencing a flare-up of her Crohn's disease. The second Review Tribunal hearing was scheduled for May 5, 2011, and was adjourned on the ground that the Appellant intended to submit additional medical evidence and was endeavoring to retain a representative. *The Tribunal noted that the Appellant never submitted additional medical evidence and that she did not retain a representative for the Review Tribunal hearing.*

[10] The March 7, 2012 hearing, at which the Review Tribunal proceeded in the Appellant's absence, was the third date on which a hearing had been scheduled. The Appellant was not present at the hearing. The Review Tribunal contacted the OCRT and the client services officer reported that the Appellant had contacted the general telephone number for the OCRT and advised the day before, or the morning of the hearing (after hours), that she would not be able to attend the hearing since she had to attend a funeral. The Appellant also called the OCRT during business hours to confirm that her voicemail had been received, however, she did not speak with the client services officer. The Appellant does not appear to have notified the OCRT as to whose funeral she was attending, when she learned of the funeral or why she did not notify the OCRT sooner that she would not be attending the Review Tribunal hearing.

[11] The hearing before this Tribunal was initially scheduled to be heard on May 14, 2015 and was adjourned to this date at the request of the Appellant's representative because the representative was not available on the initially scheduled date. The Notice of Hearing granting the adjournment sets out the following:

If you are the party who requested the adjournment and your situation changes where you are no longer available for the hearing on the date specified above, you may request a second adjournment request if there are exceptional circumstances. An adjournment request must be sent to the Tribunal **in writing** and explain why a new hearing date is required. The Tribunal Member will decide whether to grant the adjournment request. If the request is granted, a new hearing date will be scheduled considering your availability. If the request is refused, the hearing will proceed as scheduled.

[12] S. 11(2) of the Tribunal Regulations provides that if the Tribunal grants an adjournment or postponement at the request of a party, the Tribunal **must not** (*emphasis added*) grant the party a subsequent adjournment or postponement unless the party establishes that it is justified by exceptional circumstances.

[13] S. 12(1) of the Tribunal Regulations provides that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received the Notice of Hearing. In this case, the Tribunal is satisfied that the Appellant received the Notice of Hearing.

[14] S. 12(2) of the Tribunal Regulations provides that if a party fails the Tribunal **must** (*emphasis added*) proceed in a party's absence if the Tribunal previously granted an adjournment or postponement at the request of the party and the party received notice of the hearing.

[15] This is the fifth scheduled hearing date for this matter. All previous scheduled hearings were adjourned at the Appellant's request, except for the March 2012 hearing which proceeded in her absence. The Appellant failed to notify her lawyer prior to this hearing that she could not attend and only contacted her lawyer in response to a voice mail message 15 minutes after the scheduled start time. She has provided no details of her illness or any explanation as to why she could not participate by teleconference (from her home if necessary). There is no evidence of efforts by her to contact the Tribunal to advise of her inability to attend.

[16] Having regard to the circumstances set out above and the applicable provisions of the Tribunal Regulations, the Tribunal decided to proceed in the Appellant's absence and to make its determination on the basis of the documents and submissions contained in the hearing file.

THE LAW

[17] 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).

[18] 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.

[19] 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

[20] The Tribunal finds that the MQP date is December 1998. This takes into consideration the Appellant's pensionable earnings and the CRDO provisions relating to the Appellant's son who was born in July 1992.

[21] The Appellant also had earnings in 1999 which when taken into account make her potentially eligible for disability using proration if she became disabled in 1999 and she is found to be disabled before July 31, 1999.

[22] 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 July 31, 1999.

APPLICATION MATERIALS

[23] In her CPP disability application, date stamped by the Respondent on July 5, 2007, the Appellant indicated that she has a grade 12 education and that she last worked in 1989. She did not indicate why she stopped working. The Appellant claimed to be disabled as of 1992 and stated the illnesses and impairments that prevented her from working to be as follows: Crohn's disease with vomiting, stomach cramps, and diarrhea; body infections,

fissures, and fistulas; bowel blockage; migraines; corneal abrasions; osteoarthritis; sore and achy bones; and depression.

[24] A report dated May 23, 2007 from Dr. Lau, the Appellant's family doctor, accompanied the CPP application. The report diagnosis severe Crohn's disease with recurrent diarrhea, abdominal pain, abscess formation, anal fissure, and depression. The report describes the relevant physical findings and functional limitations as recurrent, frequent and severe diarrhea; abdominal pain; recurrent infection with bowel abscess formation and anal fissure; recurrent dry eye; depressed and anxious; tired; fatigue; poor appetite and sleep; and unable to concentrate. The prognosis for Crohn's was poor and for depression was fair.

[25] The report concludes: "This lady has well documented Crohn's for many years and suffering from various complications like abscess and infection despite multiple specialists and medication. She is chronically depressed and weak ... with recurrent abdominal pain and fatigue." The report indicates that Dr. Lau started treating the Appellant in May 2003.

MEDICAL EVIDENCE

[26] 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.

[27] A consultation note dated June 23, 2000 from Dr. Rootman, ophthalmologist, notes the Appellant's main complaints to include recurrent eye erosions for many years, blurred vision, redness, very sensitive to wind, photophobic, and awakens with pain every morning. The symptoms began with a finger nail scratch from the Appellant's son about seven years ago. Dr. Rootman diagnosed recurrent erosion syndrome.

[28] A note from Dr. Lau dated March 30, 2007 indicates that the Appellant has severe Crohn's disease and that she recently injured herself causing neck and back pain. He advised the Appellant not to attend court on April 7th.

[29] A report from Dr. Campbell, internist, dated April 4, 2007 indicates that the Appellant is currently on Long Term Disability (LTD) because of her inflammatory bowel disease, and that she has a long history of Crohn's disease. The report describes the Appellant's long history

of Crohn's disease and its multiple symptoms which started when the Appellant was 19. The Appellant underwent a laparotomy at the age of 19 and Dr. Campbell commented that "she never appears to have come to terms with the 'trauma' that she apparently suffered at the time of the surgery. Dr. Campbell opined that the Appellant seems to have had some degree of psychological trauma with her disease to the point that it has made her something of a social recluse; that she clearly has problems with ongoing significant abdominal pain, diarrhea and on occasions symptoms of semi-obstruction; that she has been under excellent ongoing care and has received a second opinion from St. Michael's Hospital; and that she should return to her primary physicians and/or return to the Tertiary Centre at St. Michael's Hospital and follow through with their recommendations and suggestions.

[30] A Scarborough Hospital nursing discharge record dated July 12, 2007 indicates that the Appellant was hospitalized for Crohn's disease.

[31] On October 13, 2010 Dr. Lau noted that the Appellant was unable to attend the Review Tribunal hearing due to a flare up of her Crohn's diseases.

[32] On May 4, 2011 Dr. Lau noted that the Appellant was unable to attend the Review Tribunal hearing because she had sinusitis and fissure infection.

Employer Questionnaire

[33] An Employer Questionnaire signed November 15, 2007 on behalf Beauty Systems Group indicated that the Appellant worked as a part-time sales associate from May 27, 2001 until she was dismissed on January 25, 2003. The questionnaire indicates that the Appellant worked approximately 20 hours per week or less, and that the Appellant missed some time due to stomach problems but usually had doctors' notes to back up these absences. The Appellant's Record of Earning (ROE) indicates employment earnings of \$2,176 in 2001, \$6,896 in 2002, and \$675 in 2003.

[34] In a July 29, 2008 telephone conversation with Service Canada the Appellant indicated that she did not work for Beauty Systems Group and that she has not worked since 1991 due to her medical condition. She stated that her Social Insurance card had been stolen,

that someone else must have used her Social Insurance number, and that her stolen card was replaced with a new card but not a new number.

[35] Service Canada called the employer and spoke with the HR Manager Ms., J. N. Ms. N. was able to validate employment time frames, social insurance number, and birth date. However, she advised of a discrepancy in the client's name. The employee was hired under the name of L. S. not C. S. Ms, N. was unable to verify the same mailing address or telephone number as the client's.

SUBMISSIONS

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

- a) No submissions were made on behalf of the Appellant at the hearing;
- b) In her notice of appeal to the OCRT the Appellant stated that she lives every day with Crohn's disease which is a bowel and intestinal disease/disorder which makes every day living difficult;
- c) She also stated that she suffers mentally and emotionally, is not able to work, and feels worthless as a human and as a mother;
- d) She further stated that she isn't able to go places without scoping areas where there are bathrooms and that there are other symptoms which come with her disease including aches in the joints, fevers, headaches, feeling disoriented, nausea, and having eye problems.

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

- a) No reports have been provided to show that the Appellant was under the care of a gastroenterologist at the time of her MQP, and there are no investigative reports to substantiate the severity of her Crohn's at that time;

- b) Her weight is stable and she has not required further bowel surgery or a colostomy. The frequency of flare-ups of her condition is not clear and there is no indication that she has required hospitalization for aggressive nutritional replacement and steroid agents;
- c) Her visual impairments have not resulted in suspension of her driver's license;
- d) She is not under the care of a mental health professional and there is no indication that she has required more aggressive pharmacotherapy;
- e) The Appellant has a long history of Crohn's and has shown capacity to work with her condition in the past.

ANALYSIS

[38] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or July 31, 1999.

Severe

[39] 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.

[40] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before July 31, 1999 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.

[41] The medical evidence and the Appellant's application support that she suffers from long standing Crohn's disease and related symptoms. There is, however, no medical evidence

that speaks to the Appellant's conditions, and their severity, as of the pro-rated July 1999 MQP. Dr. Rootman's July 2000 report confirms complaints of recurrent eye erosions and other eye symptoms, but there is not suggestion in the report that those issues were of such severity as to preclude all gainful employment. The other reports speak to the Appellant's conditions as of 2007 and 2008; they do not speak to her conditions as of July 1999.

[42] The Tribunal also noted that the Appellant was only 32 years old as of the potential pro-rated MQP and there appears to be some evidence, although denied by the Appellant, that she was able to work as a sales representative from 2001 to 2003.

[43] The Tribunal has determined that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[45] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security