

Citation: *M. P. v. Minister of Employment and Social Development*, 2015 SSTGDIS 61

Date: June 18, 2015

File number: GT-123874

GENERAL DIVISION - Income Security Section

Between:

M. P.

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 18, 2015, Brantford, Ontario

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 23, 2012. 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 (SST) in April 2013.

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

- Videoconferencing is not available in the area where the Appellant lives.
- The issues under appeal are not complex.
- There are gaps in the information in the file and/or a need for clarification.
- 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 Notice of Hearing was sent by courier to the Appellant and was returned to the SST as unclaimed on March 5, 2015. It was then resent to the Appellant on March 6, 2015 by regular mail and this was not returned to the SST.

[4] As is indicated in the Notice of Hearing the Tribunal may proceed in the absence of the party if they are satisfied the party has received the Notice of Hearing. The Appellant did not have a phone number listed so there was no way to confirm her attendance through this method of communication. The Appellant did not attend the hearing. The Tribunal Member waited for 40 minutes at the hearing location and contacted the staff at the SST to ensure there were no messages left by the Appellant.

[5] The Tribunal Member is satisfied in this case that the Notice of Hearing was received and will proceed in the absence of the party.

THE LAW

[6] 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.

[7] 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).

[8] 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.

[9] 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

[10] The Tribunal finds that the MQP date is December 31, 2011.

[11] 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

[12] The Appellant was 56 years old at the time of the MQP. The Appellant reports in the questionnaire as having a Grade 11 education.

[13] The Appellant's last job was from January 2005 to September 2008 working as a cashier and photo technician at Zehrs. Her record of earnings show earnings of at least 50% of what she earned in previous years. The amount of earnings was variable from \$9683 to \$14,148 during her employment at Zehrs.

[14] Dr. DaBreo, internist, diagnosed the Appellant with essential hypertension. He also discussed weight loss and aggressive treatment of her cholesterol. He requested she reduce her salt intake. (GT1-69)

[15] An Echocardiogram performed by Dr. DaBreo in October 2010 showing evidence of left ventricular diastolic dysfunction. He reported that it showed mild reversible ischaemia. He prescribed a low dose beta-blocker. (GT1-70)

[16] When Dr. DaBreo saw the Appellant again in May 2011 she had not been taking the medication prescribed due to financial restraints. He provided her with some samples. He reinforced his recommendations to lose weight and stay on a low lipid and low salt diet. He notes the Appellant has major cardiovascular risk factors. (GT1-72) The Appellant's situation was the same in another visit in November 2011.

[17] In February 2012 Dr. Leslie, Family Physician listed the following diagnosis:

- Chronic back pain – myofascial strain
- Hypertension
- Mild coronary artery disease
- Obesity
- Social isolation
- Hyperlipidemia
- Hypothyroidism
- Non-specific hepatomegaly

- Uterine Fibroids
- Cholelithiasis

[18] Dr. Leslie reported that the physical findings showed limitations of flexion and extension of her back because of pain. He described that the Appellant exhibited a slow, careful, uncomfortable gait. He indicated the Appellant had limited mobility due to chronic back pain and obesity. He also advised that her chronic myofascial back pain, obesity, unsustainable hypertension control, mild angina pectoris and social isolation all contribute to his opinion that the Appellant was permanently unemployable. He also commented on her limited financial resources and lack of a drug plan. (GT1-62)

[19] The Appellant wrote to Service Canada on July 6, 2012 indicating that she had not worked since 2008 due to her perpetual pain and cramps. She states her limitations are difficulties with prolonged sitting, standing and walking. She is unable to drive and has shortness of breath on exertion and heart palpitations. She reports she needs help with activities of daily living and uses a cane and walker. (GT1-17)

[20] The Appellant also indicated in her CPP questionnaire that she is having difficulty with her memory and concentration. She has friends help with grocery shopping and she often has meals from cans. She also reports she gave up driving. She described herself as almost a shut in due to her functional limitations.

[21] In November 2012 the Appellant reported that she had been diagnosed with a paralyzed diaphragm so she cannot exert herself in anyway and it was also contributing to her chronic lethargy. She also stated that this condition had added to her depression. She reports her physician continues to say that she is permanently disabled. (GT1-52)

SUBMISSIONS

[22] The Appellant submits in a letter sent to the Respondent that she qualifies for a disability pension because:

- a) She meets the definition of severe and prolonged, which was indicated in her doctor's medical report, which says she is permanently disabled.
- b) She is constant pain and cannot walk any distance or sit or stand for very long. She has had to resort to canned food, as she is not able to stand long enough to cook. She has difficulty sleeping and doing some personal care.
- c) Her mood disorder makes her cry and is depressed most of the time.

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

- a) Many of the conditions the Appellant has can be controlled with medication if she took it regularly. It is acknowledged that finances are an issue with compliance but there is not evidence that drug programs have been applied for to provide the medication.
- b) The Appellant has not provided test results to support the findings of a paralyzed diaphragm or depression. There is no treatment prescribed for either condition.
- c) While the doctor indicates the Appellant is unemployable, it remains that the objective medical evidence shows she is able to do some type of light or sedentary work.

ANALYSIS

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

Severe

[25] The Appellant did not attend the hearing to testify but did write several letters that explained her medical situation and functional difficulties around the time of the MQP. The Tribunal has no reason not to accept this information as fact and would view it in a similar fashion to oral testimony. This assumption of the Tribunal is supported by the fact that her doctor's CPP medical report and other physician's reports endorse many of the claims the Appellant makes in her letters as well as many other diagnoses.

[26] The Respondent submits that the objective medical evidence shows the Appellant is able to do some light or sedentary work.

[27] The Tribunal takes guidance from *G.B. v MHRSD*, (May 27, 2010) CP 26475 (PAB) where 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.

[28] The Family Physician has described the many diagnoses facing the Appellant and has opined that the combination of all of these has rendered her permanently unemployable. He has also described physical findings of his examination. The Appellant has provided specific information about what she is able to do and not do.

[29] The combination of Dr. Leslie's physical findings and the descriptions by the Appellant of her functional limitations has persuaded the Tribunal that her functional limitations are a great barrier for her to be capable regularly of employment.

[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 has a Grade 11 education and was 56 years old at the time of her MQP. The record show that the Appellant has worked for over 25 years. The record of earnings shows a decline and yearly fluctuation of the amount of earnings in the last few earning years.

[32] The last job the Appellant held was as a cashier and a photo technician. From the amount of education reported by the Appellant and her earnings, the Tribunal feels it would be a reasonable assumption that the Appellant has not worked in many high paying sedentary positions throughout her life.

[33] The Tribunal has taken into account the Villani personal characteristics and the Appellant's employability. It has placed substantial weight on the consideration of the factors listed in *Villani* in making a determination if the Appellant meets the test for severe criteria. The Tribunal concludes that with her education combined with current condition at the MQP it is not realistic or reasonable that the Appellant would be able to retrain at her age. It is also clear to the Tribunal that the Appellant would not be able to work at any job that would be substantially gainful employment.

[34] 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).

[35] The Tribunal is confident that the Appellant has chronic pain. From all the documentary evidence provided it is apparent that pain has significantly impacted the Appellant's functioning in a negative way. The Tribunal finds that the Appellant's condition was severe.

[36] The Tribunal notes the submission of the Respondent that her conditions could be controlled with medication and there was no documentation of depression in the file. The Tribunal agrees that this documentation has not been provided.

[37] From the reports it appears to the Tribunal that the opinion of the Appellant's treating physicians is that the main reason the Appellant is not able to work is chronic pain and immobility due to her obesity. It is also mentioned that due to this she is almost a shut in. It is clear to the Tribunal that the issues submitted by the Respondent were not the primary reason for the inability of the Appellant to work. These contribute to her overall health but are not the major reasons for her inability to work. The Tribunal finds the Appellant's chronic pain, obesity and the combination of all the other diagnoses prevented her from any employment.

[38] The evidence on file has satisfied the Tribunal that on a balance of probabilities it is more likely than not that she had a severe disability as defined in the Canada Pension Plan at the time of her MQP.

Prolonged

[39] 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.

[40] Dr. Leslie wrote the CPP medical report after the Appellant’s MQP. There did not appear to be any optimism on his part that the Appellant’s condition would be improved. He used the words permanently unemployable.

[41] The Appellant reports that she has been hampered further and had deterioration in her condition due to her paralyzed diaphragm. Although her letter is the only document reporting this there is no reason for the Tribunal to doubt her report.

[42] 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

[43] The Tribunal finds that the Appellant had a severe and prolonged disability in September 2008 when she could no longer work. 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 March 2012; therefore the Appellant is deemed disabled in December 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2011.

[44] The appeal is allowed.

Jane Galbraith
Member, General Division - Income Security