

Citation: *H. M. v. Minister of Employment and Social Development*, 2015 SSTGDIS 58

Date: June 12, 2015

File number: GT-123925

Between: GENERAL DIVISION - Income Security Section

H. M.

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 11, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

H. M.: Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 26, 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 teleconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) There are gaps in the information in the file and/or a need for clarification;
- c) 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, 2007. This takes into account the pension credits attributed to the Appellant for the years 1995 to 2005 by reason of a division of unadjusted pensionable earnings (DUPE).

[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 38 years old on the December 31, 2007 MQP date; she is now 45 years old. She has four years of post-secondary education and her employment experience includes working in the arts department of a printing company, working as a waitress in a restaurant, working as an usher in a theatre, and lastly teaching art lessons and painting murals on a part-time basis. She has not worked since September 1997 and claims fibromyalgia, migraines, chronic pain and fatigue, and multiple chemical sensitivities as her main disabling conditions. She is receiving ODSP benefits.

APPLICATION MATERIALS

[10] In her CPP disability questionnaire, date stamped by the Respondent on July 26, 2011, the Appellant indicated that she has a grade 13 education as well as four years of post-secondary education (2 years at the University of Windsor and 2 years at St. Clair College). She

noted that she stopped working in 1995. She claimed to be disabled as of 1995 because of fibromyalgia, chronic pain, exhaustion, chronic migraines, and flu-like symptoms. She also noted that her illness also greatly affects her heart and lungs in a stressful way especially on exertion, and that it causes dizziness and shortness of breath. She also noted her other health-related conditions to include asthma, migraines, and environmental allergies; she further noted that all of her activities ceased between 1995 and 1998.

[11] The Appellant described her difficulties/functional limitations as follows: unable to sit or stand for more than 30 minutes because of pain; can walk slowly for two blocks; unable to lift, carry, or bend without pain; struggles with personal needs and tasks are done slowly; urinates up to eight times a night; struggles with pain and exhaustion when doing household maintenance; tasks are done slowly; blurred vision during migraines; speech slurred on some days; difficulties with memory and concentration; sleep disrupted by pain; breathing always laboured and worse upon exertion; only able to drive for ½ to 1 hour; and great difficulty using public transportation.

[12] A report dated July 12, 2011 from Dr. Hasspieler, the Appellant's family doctor, accompanied the CPP application. The report diagnoses fibromyalgia and migraines. The report also notes that the Appellant suffers from chronic pain and extreme fatigue. The relevant physical findings and functional limitations include depression and tender trigger points. The prognosis is that the Appellant's conditions will remain chronic.

ORAL EVIDENCE

[13] The Appellant reviewed in detail her education and employment history. She stated that she has been dealing with her symptoms her whole life. Her conditions were aggravated when they moved to a new home 1995, and they were exacerbated when she had her son in 1996. From the time she was 17, she suffered from migraines, widespread pain, and overwhelming exhaustion. She was fatigued just from climbing stairs, had trouble breathing, and her heart was pounding all of the time. She saw various doctors who diagnosed asthma and migraines and told her that these were just growing pains and that she would have to learn to deal with it.

[14] Everything became worse when they moved into a new house in 1995 because of her reaction to the new paint. She saw a neurologist for her migraines and stated that she saw “so many doctors” who diagnosed chronic fatigue, sensitivity to chemicals, and fibromyalgia but none of them were able to help her. She saw Dr. Rodriguez (a rheumatologist who is her father’s doctor) in 1996 and 1997 and the medications he prescribed didn’t work. Dr. Rodriguez made exercise suggestions and told her to join a support group. She went to support group meetings a couple of times, but found them very depressing. She also found that the exercises didn’t help.

[15] She stopped going to Dr. Rodriguez because he wasn’t helpful and she decided that this was something that she would have to struggle with her entire life, the same way in which she has seen her father struggle with his fibromyalgia. She still does light exercises on her own , but finds that doing anything more than simple stretching makes her feel worse afterwards – it feels like all her muscles have been pulled. She could barely take care of her baby son, and relied on help from her sister and mother-in-law. By the time her husband came home from work, she was so tired that she just crashed in bed. She tried doing part-time teaching at the community centre but was missing classes and experiencing bouts of vertigo; she hasn’t been able to do any work at all since September 1997. She tried to do murals “here and there”, but they took forever.

[16] She went to the hospital emergency department several times because of severe bouts of vertigo, and she saw Dr. Krop an environmental specialist. He advised her that in addition to her fibromyalgia, she was highly sensitive to chemicals. He gave her allergy shots and told her that the only solution was avoidance of the chemicals. She even went so far as having some of her teeth pulled because of the mercury in the fillings.

[17] As of December 2007 she was suffering from fibromyalgia, chronic pain and fatigue, migraines, and chemical sensitivities. She stated that her symptoms are worse today than they were in 2007. Her exhaustion is worse and the pain has spread to different places in her wrist, finger and neck. She stated that the pain is constant and that she suffers from three different kinds of pain. She stated that the pain is “everywhere, everyday, all the time.” She also stated that she has been diagnosed with many conditions but no one has been able to help her – she

has tried Cymbalta and Lyrica but they made her very dizzy. She does light exercises, but can't always do them. She still does the exercises even though they sometimes "drag her down." She tried aerobics but they made her conditions worse and she felt very exhausted. She also tried swimming.

[18] No one has ever offered her anything that has helped – and she has just accepted her conditions. She is now trying to get into a medical cannabis clinic. She doesn't see any point in a referral to another rheumatologist - a doctor at the walk-in clinic prescribes medications for diabetes, migraines, and asthma

[19] She has difficulty sleeping because she can't get comfortable – she sleeps on a sofa because it is soft; she tosses and turns all night. Sometimes she has to take a couple of Tylenol just to get moving in the morning, and she will just lie in bed for ½ hour. On some days she doesn't even wash her hair or take a shower because she finds taking a shower to be exhausting. She always feels like she has the flu. She stated, " I don't do anything...I just sit or go on the computer...I clean the house as best I can...I rarely go out and usually just for medical appointments or for grocery shopping with my son...sometimes I visit my father or sister who live nearby... My energy goes to whatever housework I can do...I sleep a lot... I watch movies...I like to write but I forget things and get very frustrated... I drive when I have to if I can, and if I can't drive to an appointment my father will take me."

[20] She stated that since 1997 she tried working for herself painting murals but she couldn't keep up. She couldn't even hold a part-time job because every day has become a nightmare. She has "bad days" and "worse days." She never has good days and can't remember what it is like to not have pain.

MEDICAL EVIDENCE

[21] 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.

[22] The clinical notes from Dr. Makinde, the Appellant's previous family doctor, covering the period from July 2006 until December 2010 are included in the hearing file. The notes are mostly illegible and indicate visits on July 24 and December 13, 2006, April 14,

May 22, July 7 in 2007, and February 6 and June 10, 2008. The notes indicate that the Appellant was suffering from multiple symptoms.

[23] A report dated February 26, 2008 from Dr. Hellyer, respirologist, notes that the Appellant has been self-employed since 1994 as an artist painting murals. The Appellant related a history of multiple chemical sensitivities going back to 1995. The report notes that a pulmonary function study revealed mild non-reversible air flow obstruction and evidence of hyperinflation, air trapping, and reduced diffusion capacity. Dr. Hellyer indicated that the Appellant's asthma was not under ideal control.

[24] On September 4, 2008 Dr. Hellyer noted that the Appellant has been treated for migraines for the last 17 years; that she has muscle aches; that she has been diagnosed with multiple chemical sensitivities; and that she has been tested in the past with positive reactions to phenols.

SUBMISSIONS

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

- a) She suffers from multiple disabling conditions including fibromyalgia, chronic pain and fatigue, migraines, and sensitivity to chemicals;
- b) She has seen numerous doctors but none of their recommendations have been helpful;
- c) She would like to work but has not been able to pursue any form of gainful employment since 1997.

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

- a) The evidence does not show active participation in treatment for fibromyalgia and the medication is modest;
- b) Although the Appellant claims dizziness and cognitive problems she continues to drive a vehicle;

- c) She is very young, has a post-secondary education, and would not have been precluded from all types of suitable work as of the December 31, 2007 MQP.

ANALYSIS

[27] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2007.

Severe

[28] 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

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

[30] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2007 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.

[31] 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).

[32] 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).

[33] 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 him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[34] The Tribunal has an obligation to consider both the oral and the documentary evidence: *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB). Although it may be particularly useful to the Tribunal to have available to it some degree of corroborative medical evidence, this may not always be necessary. Equally important, and, indeed, possibly overriding, may well be any oral evidence adduced by the Appellant, personally or on her behalf. The very nature and credibility of the Appellant's oral evidence may be of sufficient probative value to outweigh the absence of any objective clinical medical evidence: *Smallwood v. MHRD* (July 20, 1999) CP 9274 (PAB).

Application of Guiding Principles

[35] Notwithstanding its reservations concerning the limited nature of the medical evidence in the hearing file, the Tribunal found the Appellant's oral evidence to be compelling. She gave her evidence in a straightforward and credible manner, and described in detail the multiple

conditions and symptoms that she has suffered from since she was 17 years old. The Tribunal accepts her evidence that she has seen many doctors and attempted to best of her ability to follow their recommendations, but unfortunately none of the recommendations have been helpful.

[36] The Appellant was able to pursue her education to four years of post-secondary education and to work until September 1997. Unfortunately her symptoms were exacerbated by her sensitivity to the chemicals in her new home in 1995 and the birth of her son in 1996. She attempted to continue working on a part-time basis, but wasn't able to continue after September 1997.

[37] The Tribunal has noted the Appellant's multiple conditions including fibromyalgia, chronic pain and fatigue, asthma, migraines, and sensitivities to chemicals. She has only "bad days" and "worse days." The Tribunal recognizes that the Appellant is young and well-educated; however, because of her multiple conditions she lacks the regular capacity to pursue any form of gainful employment. She could not be a regular and predictable employee.

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

Prolonged

[39] The Appellant's disabling conditions have persisted for many years and no medical recommendations have been helpful in alleviating her symptoms. Unfortunately, her condition appears to have been worsening.

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

CONCLUSION

[41] The Tribunal finds that the Appellant had a severe and prolonged disability in September, 1997 when she last worked. For payment purposes, paragraph 55.2 (9) of the CPP provides that the earliest payment date for an Appellant who satisfies the MQP only by reason

of a DUPE is the month the payments were attributed, which is the month after the DUPE application was received. The DUPE application was received in July 2011; therefore, the Appellant's payments start in August 2011.

[42] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security