Citation: ***M. T. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 72**

Date: July 14, 2015

File number: GT-112607

GENERAL DIVISION - Income Security Section

Between:

M. T.

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 July 14, 2015, Hamilton, 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 January 27, 2010. 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 Appellant had an adjournment granted in September 2011 to obtain an MRI report. In February 2012 another adjournment was granted to obtain MRI and specialist reports. When the Appellant obtained a new representative an adjournment was granted in July 2012.

[3] This appeal was transferred to the Tribunal from OCRT in April 2013.

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

- More than one party will attend the hearing.
- The form of hearing is most appropriate to allow for multiple participants.
- 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.

[5] The Appellant did not appear for the in person hearing. There was evidence on file that the Appellant's Notice of Hearing and file had been signed for by the Appellant. The Appellant indicated she had a representative but the Tribunal never received an Authorization to Disclose document for this purpose. On June 25, 2015 a reminder call was made and a voicemail message left indicating the Appellant should call the SST staff and a direct line

number was provided. The Appellant did not request an adjournment after receiving the Notice of Hearing.

[6] The Tribunal Member reviewed the SST file to determine if a recent message had been left concerning an inability to participate in the hearing. The Member called the SST office to determine if the Appellant had called on the day of the hearing. The Member was informed that had not called the SST indicating they would not be attending the hearing. The Tribunal Member waited 30 minutes to see if the Appellant would arrive.

[7] A call was placed to the Appellant from the SST office at the request of the Tribunal Member. The SST staff was advised by a man, identifying himself as the Appellant's son, that the Appellant was not available. When asked where the Appellant was he reported she had been out of the country on vacation since the end of May and isn't expected to return for 3 months. He indicated that the Appellant had to leave on an emergency basis and the Tribunal should contact her representative.

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

THE LAW

[9] 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.

[10] 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).

[11] 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.

[12] 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

[13] The Tribunal finds that the MQP date is December 31, 2010.

[14] 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

[15] The Appellant was 50 years old at the time of her MQP. She indicates on the CPP questionnaire that she had a Grade 8 education. She worked for Dover Industries from 1986 to 2009 when the company closed. She was doing modified work at the time the company closed. She was provided with 22 weeks of severance pay.

[16] The Appellant had a workplace injury in March 2005, which involved her neck and left shoulder. She also had a subsequent workplace injury in January 2007. In 2007 the Appellant was having difficulty having the employer provide suitable modified work.

[17] She was seen for her injury by Dr. Bobba in 2007 and also had a multi-disciplinary assessment that thought it was prudent to put the Appellant on permanent restrictions. Physiotherapy and anti-inflammatory medications were the main treatments prescribed. Cortisone injections were also suggested. (GT1-126)

[18] An EMG was done in September 2007 which was abnormal showing mild to moderate chronic table left C7 radiculopathy with no evidence of denervation. It was recommended

that the Appellant avoid sustained and repetitive elbow flexion postures as well as leaning on the elbow. (GT1-53) Dr. Bobba reviewed the results and prescribed Mobicox as she had responded to it in the past. (GT1-54)

[19] In March 2008 an MRI of the cervical spine showed an asymmetric disc protrusion at C5- C6 with mild bilateral neural foramen narrowing slightly more on the right. (GT1-55)

[20] The Appellant returned to modified duties in early March 2009. She had complaints that this modified work did not suit her restrictions and it was causing her harm. Her representative asked her physician if the modified duties were appropriate as the company was closing at the end of April and if she continued to work WSIB would not consider her eligible for loss of earnings as of May 1, 2009. (GT1-160)

[21] In a previous adjournment it was noted that the Appellant did a labour market re-entry program with WSIB around the time of the MQP but there was no information in the file. The Appellant's representative on August 2009 wrote to the WSIB requesting support and also suggested that a labour market reentry service would be appropriate for the Appellant.

[22] Dr. Kean reviewed the Appellant and requested an ultrasound of her left shoulder as well as a consult with Dr. Kumbhare and an EMG.

[23] In January 2010 Dr. Ng indicated the diagnosis causing the Appellant's disability was disc protrusion, tendonitis and painful neck and left shoulder. (GT1-41)

[24] In March 2010 the Appellant's representative asked WSIB to provide retraining opportunities to the Appellant as well as medical services. (GT1-163)

[25] In July 2010 WSIB wrote the Appellant indicating their decision about the loss of earnings benefit and provided a list of occupations that they felt were within the Appellant's current limitations. A handwritten note from the Appellant's representative asks the Appellant's son, Michael, what jobs on the list of occupations he thought the Appellant would be able to do if she had some training and upgrading of her English. (GT1-171)

[26] Dr. Kumbhare reassessed the Appellant in May 2011 after the ultrasound was completed. The ultrasound showed mild supraspinatus tendinosis and mild AC joint degenerative changes but no tear was seen in the rotator cuff. The medication she was taking at the time was Aleve and Tylenol as needed. He recommended a cortisone injection of her left shoulder, trigger point injections of her upper trapezius muscle and for the Appellant to attend physiotherapy to increase her range of motion in her left shoulder. (GT1-112)

[27] Dr. Upadhye reported in January 2012 that the Appellant had been receiving nerve blocks and trigger point injections every 3-4 weeks and she has had good relief from them. The daily occipital headaches she experiences are helped by the injections. She still had pain despite the injections and it was suggested that an occupational therapy assessment might be of benefit. (GT1-115)

SUBMISSIONS

[28] The Appellant did not provide either written or oral submissions.

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

a) It is recognized that the Appellant has limitations and may not be able to do certain jobs due to her medical condition.

b) Investigations have not identified any serious pathology that would prevent the Appellant from pursuing work suitable to her limitations.

c) No further reports from specialists have been received as indicated in a letter dated May 26, 2010 from the Appellant's representative.

ANALYSIS

[30] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2010.

[31] The Tribunal has a requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

The Appellant has had many opportunities since her application to provide additional medical evidence. The Appellant had not requested an adjournment for this hearing or advised the Tribunal that she would not be available due to an emergency situation. She had also had two previous adjournments of scheduled hearings with OCRT to provide more medical documents. The Tribunal found it a reasonable decision to due to the above factors to proceed without the Appellant in this appeal.

Severe

[32] The onus of satisfying the Tribunal that the Appellant's disability, physical or mental, meets the deemed definition in the CPP legislation lies squarely on the Appellant, see Dhillon vs. MHRD, (November 16, 1998), CP 5834 (PAB)

[33] The Tribunal confirms the need for objective medical evidence when reviewing *Warren vs. (A.G.) Canada, 2008, FCA 377* where it states:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[34] The medical reports showed mild results in the MRI of her cervical spine. In 2011 an ultrasound showed mild supraspinatus tendinosis and mild AC joint degeneration changes but no tear in the rotator cuff. Cortisone shots and physiotherapy were recommended. The Appellant was taking over the counter pain and anti-inflammatory medication. In January 2012 Dr. Upadhye indicated the nerve blocks and trigger point injections given to the Appellant every 3-4 weeks had provided her with good relief.

[35] The Tribunal notes the Appellant has recognized limitations and will require some restrictions when obtaining employment. It agrees with the Respondent's submission that investigations have not identified any serious pathology that would prevent the Appellant from pursuing all work suitable to her limitations.

[36] The Tribunal does not view the evidence provided as adequate to support a finding of severe.

[37] 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).

[38] The Appellant's representative made reference to a labour market reentry program as being appropriate for the Appellant. He continued to ask WSIB for this type of program at the time of her MQP. He requested the opinion of the Appellant's son with respect to which positions he believed his mother could do with training. The Appellant was on modified duties when the company closed and she stopped working. The Tribunal has no evidence that other alternate work has been obtained or tried.

[39] The Tribunal is not persuaded that there is enough evidence either of efforts to mitigate her condition, or that such efforts would be fruitless, to conclude that the test of severity has been met. It appears from the documents that the Appellant's representative believed the Appellant had capacity for some type of work. It is clear to the Tribunal from the evidence that the Appellant had the capacity to work at the time of her MQP.

[40] The Tribunal has carefully reviewed the medical reports. The Tribunal finds that, on a balance of probabilities, it has not been persuaded that the Appellant has a severe disability within the meaning of the Act.

Prolonged

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

CONCLUSION

[42] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security