

Citation: *D. W. v. Minister of Employment and Social Development*, 2015 SSTGDIS 79

Date: July 23, 2015

File number: GT-122212

Between: **GENERAL DIVISION - Income Security Section**

D. W.

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 July 21, 2015**

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. W.: Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 8, 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; and,
- b) The issues under appeal are complex.

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 having regards to the Appellant's CPP contributions as reflected on her Record of Earnings and the applicable Child Rearing Dropout (CRDO) provisions the MQP date is December 31, 2019.

[8] Since this date is in the future, 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 hearing.

APPLICATION MATERIALS

[9] In her CPP disability questionnaire, signed on November 11, 2013, the Appellant indicated that she has a grade 12 education and that she is a qualified tutor for children with learning disabilities. She noted that she last worked as a customer service representative for Bell Mobility from February 4, 2008 until August 18, 2011; she stated that she stopped working because of major anxiety, depression, and an inability to function. She further noted that she was the owner/operator of a part-time private tutoring business for children with learning disabilities from October 1, 2003 until June 30, 2006; she stopped working in the business because private tutoring had become too much work while she was working at a school. She claimed to be disabled as of August 18, 2011 and stated that the illnesses and impairments that were preventing her from working included extreme anxiety, depression, post-traumatic stress disorder (PTSD), and insomnia. She also noted that she has a hard time leaving her house because of anxiety, and that she can only stay within very close proximity to her house when alone.

[10] A report dated November 20, 2011 from Dr. Lebl, the Appellant's family doctor accompanied the CPP application. The report diagnoses severe anxiety, depression, and PTSD secondary to childhood abuse. The report notes that the Appellant experiences symptoms of disruptive anxiety to the point that she is unable to work, and that she has missed gaps of work since October 2006 and required considerable therapy. The findings include poor sleep, memory, and concentration and poor ability to complete tasks. The prognosis is good, with therapy. The report concludes that the Appellant is motivated to work and not malingering, and that she has a legitimate psychological burden of abuse as a child for which she is pursuing psychological help.

ORAL EVIDENCE

[11] The Appellant is 37 years old and has two children: a daughter who was born in June 2009 and a son who was born in February 2012. She lives with her children and husband, who has recently gone on disability for a WCB claim.

[12] She has a grade 12 education, completed a specialty course for tutoring children with disabilities, and recently completed an on-line Best Beginnings course for home day care programs. She described in detail her employment history which goes back to part-time work when she was in grade eight and in high-school. In grade 8 she worked changing signs for a community centre and from grade eight to ten she worked in children's sports programs. She was a synchronized swimming and water polo instructor. She has also worked as a hostess in a restaurant, as a sales person in a clothing store, at a cell phone centre, as a tutor for children with learning disabilities at two private schools and part-time as a self-employed tutor. She was let go from her second private school because she wasn't able to do the work due to her anxiety. She last worked as a customer service representative for Bell.

[13] Her last therapy session with Dr. Goldstein was about one year ago; she stopped going because she couldn't afford to continue and no further funding was available. She sees her family doctor on a regular basis and he has not made any further recommendations for treatment. He prescribes her medications which include Celexa (40 mg per day), trazodone (100 mg per day), and Ativan (1 mg as needed). She does not experience any side effects from

these medications other than possibly weight gain. She is not pursuing any treatments other than the medications.

[14] She initially received sick Employment Insurance benefits but has not received any benefits since they ran out. Although she was on medical leave from Bell, she wasn't receiving any benefits. She was assessed by Dr. Buchanan in January 2014 because she wanted to remain on medical leave from Bell so that she could return to work for Bell if she got better; she was not able to remain on medical leave because of her home care business. She was reluctant to take the medications recommended by Dr. Buchanan for her agoraphobia because she did not want to try medications that would make her a "zombie." The newer therapy that he recommended costs \$250 per hour and she couldn't afford this. She stated that she has upped her dosage of trazadone and has been able to arrange her life so that her conditions don't significantly affect her; she knows her boundaries and limits and stays within them. She has recently had to push her limits a bit more because of her husband's disability. She indicated that she now does some of the grocery shopping because her husband isn't able to do this, but on days when she can't do this her mother or a neighbour will help out.

[15] She plan's her children's activities so that she is able to remain in what she refers to as a "happy bubble." She usually walks or drives within an area that is within a two block by seven block area from her home. Her mother's house is 10 minutes away, and the pool where she takes the children swimming is also 10 minutes away. The children's school and a shopping centre are within the "happy bubble." If she encounters someone who looks or smells like her cousin she has a panic attack and has to leave. She now has to do a little more driving because of her husband's disability. She is usually fine if she stays within the "happy bubble."

[16] In September 2012 she started an in-home day care business. They were struggling financially and she created a situation where she can make at least some money despite her issues. She described the children she is presently caring for as follows: a two year old who she takes care of once a week from seven am until five pm; a three year old who she takes care of from 5:45 am to 7:30 pm for three to seven days a month depending on the mother's

shifts; and another child who she takes care of before and after school and is now taking care of all day during the summer. She walks her daughter to and from school, and her son is with her all day. She makes on average about \$1160 per month from the in-home day care, and her accountant deducts home and other expenses when preparing her income tax return. She stated that she may not be able to continue this because it is emotionally draining and a lot of work for the amount that is earned.

[17] When asked whether she has sought other employment that she could do from home, she stated that Bell didn't have the technology to set her up at home and when she spoke to Telus, they told her that they don't do this to start with for new employees, and that they only do this after someone has shown that they could be a good employee. She then stated that she doesn't know why she hasn't looked for other work at home and that she doesn't know how to go about doing this - the day care started when the opportunity just presented itself when a neighbour asked if she would help out. She thinks that she would be able to work from home as long as she had an understanding employer who would recognize that she would need some time to recover if she became anxious after a bad call. She has looked into online courses to upgrade her skills, but can't afford to go back to school.

MEDICAL EVIDENCE

[18] 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.

[19] A report dated January 22, 2009 from Dr. Carter, from the Reproductive Mental Health Program, noted that the Appellant is currently on medical leave and that she is now 19 weeks pregnant. The Appellant described a history of depression going back for about eight years and a history of past physical and sexual abuse from a male cousin which has had a significant negative impact on her life. The report diagnoses major depression, mild to moderate; possible panic disorder; generalized anxiety disorder; and post-traumatic stress disorder.

[20] On August 5, 2012 Dr. Goldstein, psychologist, reported to the CPP that she has been providing psychological treatment intermittently to the Appellant over the last several years. The report indicates that initially the Appellant presented as being on medical leave because of

severe panic attacks and depression; and that upon further assessments and after having established trust, it became clear that that the Appellant was suffering severe PTSD as a result of physical and sexual abuse that occurred in her early childhood and persisted into later adolescence. Dr. Goldstein opined that the Appellant's psychological condition has been extremely prolonged and severe while also creating barriers to her work productivity. The report details the Appellant's childhood abuse both at home and on the school grounds.

[21] Dr. Goldsteins' report concludes as follows:

At the current time, despite working diligently in therapy, Ms. W. continues to suffer from nightmares, thought intrusion, hyper-vigilance and other symptoms of PTSD that interfere with her ability to focus on work. I do believe that Ms. W. will be capable of gainful employment within six to nine months; however, it is [sic] been because of her severe disabling psychological impairment that she has not been able to contribute [to her] financial living over the last several years.

[22] On January 21, 2014 Dr. Buchanan, occupational psychiatrist, reported to Bell Canada on his independent psychiatry medical examination of the Appellant. The report reviews in detail the Appellant's features of agoraphobia and indicates that they have been increasing since 2009, and not decreasing with her current therapy. The Appellant noted that her physician had recommended that she be allowed to work at home which she says she could accomplish with the right technology. Dr. Buchanan's Axis I diagnoses were panic disorder with agoraphobia and PTSD from childhood abuse. Dr. Buchanan assessed a Global Assessment of Functioning (GAF) of 45.

[23] Dr. Buchanan opined that the Appellant is totally disabled from working either full time, part time or on modified work as a customer service representative. He further opined that she is suffering agoraphobia and that she has no capacity to go to work or to commute at this time or with something like carpooling. Dr. Buchanan concluded his report as follows:

In my review I find that Ms. W. is in a severe situation of agoraphobia and I have only seen a few patients in my years who are more restricted than she. She is maintaining her life with severe restrictions on her movements and it is very likely that if she starts to move out of this safety zone with further treatment she is going to have more problems with panic attacks. I would trust that her physician might consider changing her medicine to the low dose of clonazepam

should this occur which will assist her move forward out of this situation which can become a chronic severe disability.

SUBMISSIONS

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

- a) She suffers from severe restrictions and limitations because of her PTSD and agoraphobia;
- b) She wants to get better and be a good employee, but she doesn't have the mental capacity to do so;
- c) She does not have the financial ability to pursue further therapy, and it would be unfair to her family for her to go into debt to further her education through on-line courses.

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

- a) The Appellant is undergoing treatment and with expected improvement that would allow her to return to work in the foreseeable future;
- b) Dr. Lebl's November 2011 report indicates that the Appellant's prognosis is good with continued therapy and in August 2012 Dr. Goldstein indicated that the Appellant would be capable of gainful employment within six to nine months;
- c) CPP disability benefits are not intended for a short term disability or for a closed period of illness where the applicant's condition is expected to improve and allow a return to gainful employment;
- d) The Appellant had earnings of \$7,025 in 2014;
- e) The Appellant was unwilling to follow Dr. Buchanan's treatment recommendation of a change in her medications which could result in an improvement in her condition. An Appellant who unreasonably refuses to undergo recommended treatment may not be eligible to receive CPP disability.

ANALYSIS

[26] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of hearing.

Severe

[27] 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

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

[29] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of hearing 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.

[30] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he 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).

[31] The measure of whether a disability is “severe” is not whether the Appellant suffers from severe impairments, but whether her disability “prevents her from earning a living”: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703. It is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD)*, [2008] FCA 33.

[32] The determination of the severity of the Appellant's disability is not premised upon her inability to perform her regular job, but rather on her inability to perform any work, i.e. “any substantially gainful occupation.” *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34.

[33] The mere fact that someone continues to work should not automatically preclude them from entitlement to a disability pension. Applicants with disabilities, who continue to work should be commended, not discouraged, for making an effort to remain financially self-supporting. In the end, what must be decided, where they do work, is whether they have, in fact, the capacity to regularly pursue substantially gainful employment: *Stanziano v MHRD* (November, 2002) CP 17296 (PAB).

[34] The amount of substantially gainful employment cannot be decided by a one-size-fits-all figure, particularly one that coincided with the current maximum retirement benefit. Comments describing substantial as “having substance, actually existing not illusory, of real importance or value, practical” and gainful as “lucrative, remunerative paid employment” are of some assistance in determining what amounts to a substantially gainful occupation, but this ultimately requires a judgmental assessment, which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the Appellant: *MSD v Nicholson* (April 17, 2007), CP 24143 (PAB).

Application of Guiding Principles

[35] Although the Tribunal recognizes that the Appellant is suffering hardship and that she is very restricted because of her PTSD and agoraphobia, she has not established that she is disabled within the CPP criteria. While the Appellant cannot successfully work outside her home, the Tribunal is satisfied that she retains the capacity to pursue substantially gainful employment at her home.

[36] The Appellant has, in fact, been doing this since September 2012 by operating an in-home day care business. She earns between \$13,000 and \$14,000 per year gross, and takes care of three different children in addition to caring for her two young children. She also manages to attend to her household duties, and has recently been able to increase her functioning due to her husband's disability. The Tribunal is satisfied that this meets the test for substantially gainful employment as set out in the *Stanziano* and *Nicholson* decisions, *supra*.

[37] The Appellant is only 37 years old, has a good education, and has significant transferable skills. The Tribunal's impression is that she is an intelligent and resourceful person. In today's economy, there are numerous jobs which are home based, where the employee requires a phone and/or computer to operate and is not required regularly to attend the employer's office. Although the Appellant acknowledged in her oral evidence that she would be able to work for an employer in a home based environment, she has made minimal efforts to pursue this type of work.

Accordingly, she has failed to meet the test set out in the *Inclima* decision, *supra*.

[38] The Tribunal also noted that the medical evidence does not support a severe disability. Dr. Lebl's November 2011 report indicated that with therapy the prognosis is good. Dr. Goldstein's August 2012 indicates that the Appellant will be capable of gainful employment within six to nine months. Although Dr. Buchanan's January 2014 report indicated that the Appellant is precluded from working as a customer service representative or commuting to work, the report does not preclude home based employment. Dr. Buchanan's report noted that the Appellant's physician had recommended that she be

allowed to work at home, which the Appellant indicated she could accomplish with the right technology.

[39] The Appellant has the burden of proof and the Tribunal has determined that she has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION:

[41] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security