

**Citation: *K. H. v. Minister of Employment and Social Development*, 2015 SSTGDIS 85**

**Date: August 13, 2015**

**File number: GP-13-1660**

**GENERAL DIVISION - Income Security Section**

**Between:**

**K. H.**

**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 by Teleconference on August 12, 2015**

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

K. H. – the Appellant

### INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on September 6, 2012. The Respondent denied the application initially and upon reconsideration.

[2] The hearing of this appeal was by teleconference for the following reasons:

- The Appellant will be the only party attending the hearing.
- The issues under appeal are not complex.
- There are gaps in the information in the file and/or a need for clarification.
- Credibility is not a prevailing issue.
- 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 Tribunal received an Addendum to the Submissions of the Minister on August 11, 2015 (GD9). The response period to documents filed was July 13, 2015. This document was shared with the Appellant but she would have been received it after the date of the hearing.

[4] Due to extremely late submission and the inability to share it with the Appellant in a timely manner the Tribunal determined that the documents filed late will be excluded in making the decision. The possibility that documents filed late might not be included was stated in the Notice of Hearing dated April 14, 2015. The Tribunal's decision was conveyed to the Appellant at the start of the hearing.

## **THE LAW**

[5] 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).

[6] 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.

[7] 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**

[8] The issue is whether the Appellant is allowed to cancel her retirement pension in favor of a disability pension.

[9] The Appellant started receiving a CPP retirement benefit in April 2012. As such the Appellant can cancel the retirement pension in favour of the disability benefit only if the recipient is deemed to be disabled before the month for which the retirement pension first became payable.

[10] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before March 2012.

## **EVIDENCE**

[11] The Appellant was 60 years old at the time she had to demonstrate she had a severe and prolonged disability.

[12] She obtained a certificate as a Nursing Assistant after completing Grade 10 in high school. Through the years she has worked continuously for the most part other than with the birth of her children and on occasion had to take some time off when her Multiple Sclerosis (MS) symptoms flared up. She had the first symptoms appear in 1982 and at that time a neurologist suspected that MS could cause the lack of feeling in her leg.

[13] The Appellant has worked in a hospital in a variety of wards, as a lab technician taking blood samples, in a general practitioners office and in the community. In the last 20 years she would mostly work part-time, 3-4 days a week. Her last place of employment was in the community working with specific clients doing shift work for Care Partners. This was also a part-time position approximately half time. The Appellant had a cleaning lady come in to help with the housework as she did not have the energy or strength to do both.

[14] The Appellant suffers from Multiple Sclerosis (MS) and she had her first symptom in 1983 with a confirmed diagnosis in 1989. (GT3-8) She did reasonably well on a medication until her last relapse in 2005. (GT3-57)

[15] The Appellant stated in her appeal letter that she did not know that taking an early CPP would affect an application for CPP disability benefit. She indicates that she struggled with work the last four weeks before receiving early CPP retirement benefit. (GT3-6)

[16] Optic neuritis was one condition caused by the MS that caused issues for the Appellant. Her right eye had virtually no sight for a time and went black. These symptoms did subside eventually. In the early years he symptoms were milder and did not change. But in general, over the years the Appellant describes fatigue, weakness, pain, numbness, tingling and burning in her legs, increasing difficulty with memory as well as great difficulty sleeping to be the most prominent symptoms of her condition.

[17] The Appellant was determined to continue to work and contribute and would return to work once a flare-up had subsided. The Appellant attended the MS clinic in varying frequencies but since 2010 or early was being assessed there every year or more depending if an exacerbation occurred.

[18] When she was working for Care Partners in a shift role her last client was a young man significantly disabled. He had to have pool therapy and her doctor advised her employer in 2011 that she would no longer be able to assist this patient with this therapy. The Appellant changed her hours of shift to the afternoon as she had great difficulty getting up in the morning due to a very disturbed sleep. She would feel like she was dragging herself out of bed in the morning. If the next nurse did not arrive for her shift the nurse present would have to stay. If you weren't able to attend a shift it was up to you to find a replacement. She reported that it was her practice to push through the pain and discomfort. She tried to have her shifts scheduled with some days in between as it would often take her a day or more to recover from the increased symptoms.

[19] The Appellant was not able to do many of the activities she had enjoyed in the past such as camping in a tent and long walks outdoors. She had help with activities around the home such as vacuuming, laundry and grocery shopping. Her overwhelming fatigue at times and weakness were the main factors in her inability to accomplish certain tasks. She found she made copious notes to be able to remember things.

[20] There were times the Appellant was not able to attend her shift. Due to the lack of staff when she worked she put all of the energy she had into her work, which left almost no energy for any other personal, or leisure activities.

[21] In the fall of 2011 the Appellant was noticing more difficulty walking, increased pain in her neck and shoulders, difficulty focusing and the issues with her memory difficulties were increasing. She had an overall achiness and constant physical discomfort.

[22] In December 2011 the Appellant was referred back to the MS clinic and was seen in February 2012. She described fatigue and her decreased walking ability to be major issues. She also felt that multitasking was becoming more difficult. She decreased her hours at work,

has not been able to do all tasks required at her job and has been taking the evening shifts as it is too difficult for her to get up in the morning. She reports she has given up all social activities due to fatigue. Dr. Morrow discussed with the Appellant that her opinion was that she was entering into the secondary progressive phase of her MS. There are no medications but other strategies for managing her symptoms were discussed. (GT3-77)

[23] The Appellant would have stopped working in February 2012 after her visit at the MS clinic but due to the shortage of staff and her commendable work ethic and commitment to her patient she provided her employer with at least a month's notice in March 2012 to find a replacement for her shifts. It was her clear intention at the time to stop working. She applied for CPP early retirement pension in March 2012 as that was the month she turned 60 years old.

[24] The Appellant was referred to physiotherapy in February 2012 and she reported an increased difficulty with walking over the preceding three months. Physiotherapy continued until July 2012 and there was some improvement noted in her balance. They suggested the Appellant continue with strengthening exercises at home. (GT3-72)

[25] The Appellant described to Dr. McEwan that in the summer of 2012 she was having more difficulty with walking and increased limb heaviness and a staggering gait. She was having difficulty ambulating around the house and her husband obtained a cane for her. (GT3-57)

[26] Dr. Wilkinson, her Family physician, completed the CPP medical report in July 2012. He indicated that the Appellant was being managed with an exacerbation of her MS symptoms. He cited increased difficulty with walking, decreased endurance, left scapular neck discomfort and was easily fatigued. He expected continued deterioration. (GT3-67)

[27] In May 2013, Dr. McEwan saw the Appellant in the MS clinic. The Appellant had neurocognitive testing done recently and it showed she had severe problems with processing speed and memory tests. If she is doing any type of activity she cannot have distractions. She has suffered from depression on and off over the years and it was recently worse due to her

mother's death. (GT3-10) The Appellant told the doctor that she was hesitant to return to work doing clerical tasks due to the issues identified in the testing.

[28] Dr. Kremenchutzky, Director of the London MS clinic reported in May 2014 that the Appellant's disabling, neurological worsening began in early 2011. Despite work modifications with reduced hours, she was no longer able to maintain employment. Unfortunately formal neurocognitive testing was not undertaken in 2012 at the time of her cognitive complaints. Given her complaints it is more than likely similar results would have been noted. (GD7-9)

[29] The Appellant's mother passed away in March 2013, which increased her stress. She experiences difficulties with walking including pins and needles sensations, weakness and unsteadiness. She describes extreme fatigue, loss of concentration and mood swings.

## **SUBMISSIONS**

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

- a) The Appellant's symptoms of overwhelming fatigue, pain, inability to focus did not allow her to work regularly. Her cognitive issues were present long before formal testing confirmed her cognitive decline. She recognized her inability to continue to work when she was assessed in February 2012.
- b) The Appellant experienced exacerbations of her symptoms that could not be predicted.
- c) Her family physician expected continued deterioration of her condition.

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

- a) The Appellant worked with her condition after her MQP as of March 2012, working as an RPN on a part-time basis, 8 hours a day, 2-3 days per week.

- b) The Appellant bears the onus of proving she suffers from a severe and prolonged disability prior to the expiration of her MQP.
- c) The Appellant has not established a severe and prolonged disability within the meaning of the *CPP* on or prior to her MQP.

## **ANALYSIS**

[32] The Appellant started receiving a CPP retirement benefit in April 2012. As such the Appellant can cancel the retirement pension in favour of the disability benefit only if the recipient is deemed to be disabled before the month for which the retirement pension first became payable.

[33] 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 March 2012.

### **Severe**

[34] The Appellant was exceptionally good at providing the Tribunal the details of her symptoms, medical conditions, and past and current limitations. She offered sincere and credible testimony. To the Tribunal she presented as honest and forthright while delivering her testimony and answering questions under oath.

[35] The Tribunal gave weight to the Appellant's work history, which included more than 25 continuous years of earnings. She provided her employer more notice of her intent to leave the workforce than was required despite the increased symptoms continuing to work caused her to experience. The Tribunal concludes that the Appellant had a demonstrated work ethic and would not have left her employment unless there was some significant underlying cause.

[36] Modifications to her schedule were made as well as the elimination of tasks required of her job because of her inability to perform them. The Tribunal accepts the Appellant's statement that all her energy at the relevant time was used to complete her work with little left to be able to do other activities of daily living or leisure activities.



[37] The Appellant had symptoms that affected her physically and mentally which clearly interfered with her ability to work in the expected manner. The Tribunal has no doubt that the Appellant provided her best but it is doubtful in other circumstances that this would have been adequate. The MS clinic confirms that the cognitive symptoms that were confirmed later in 2012 would have affected the Appellant's abilities in March 2012.

[38] It appears to the Tribunal that the evaluation at the MS clinic spurred the Appellant to be more realistic about her abilities in the workplace. By the end of February reports that she had the intention to stop working, as she could no longer tolerate the overwhelming fatigue and pain. The Tribunal is impressed at the dedication the Appellant showed to give ample notice to assist her employer and not compromise the wellbeing of her patient.

[39] The Tribunal is guided by the case of *Petrozza v. MSD* (October 27, 2004), CP 12106 (PAB), where the Review Board pointed out that it is not the diagnosis of a condition of a disease that automatically precludes one from working. It is the effect of the disease or condition on the person that must be considered. This issue if confirmed for the Tribunal in *Ferreira v.*

AGC 2013 FCA 81 when it indicates the key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimants' ability to work.

[40] The Tribunal finds the oral and written evidence demonstrates a slow progression and deterioration of symptoms but clearly shows her functional limitations and her incapacity to work in March 2012.

[41] The Tribunal has carefully reviewed the medical reports and listened attentively to the testimony of the Appellant. The Tribunal places significant weight on the unquestioned credibility of the oral evidence provided by the Appellant. The Tribunal finds that the Appellant has satisfied the Tribunal that on a balance of probabilities she did have a severe disability within the meaning of the Act at the time of her MQP.

## **Prolonged**

[42] 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.

[43] The Appellant symptoms have not improved. She continues to be seen and assessed at the MS clinic in London regularly. Testing has confirmed that she has cognitive impairments that would affect her ability to perform many work related tasks as well as interfere with other activities of daily living. She continues to have symptoms and they have worsened over time.

[44] Her Family Physician indicated in his prognosis that he expected continued deterioration.

[45] 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**

[46] The Tribunal finds that the Appellant had a severe and prolonged disability in March 2012 when her MS symptoms made it too difficult for her to work and she gave her notice to her employer. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of July 2012.

[47] The appeal is allowed.

Jane Galbraith  
Member, General Division - Income Security