

**Citation: *M. B. v. Minister of Employment and Social Development*, 2015 SSTGDIS 94**

**Date: August 24, 2015**

**File number: GT-123172**

**GENERAL DIVISION - Income Security Section**

**Between:**

**M. B.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Vikki Mitchell, Member, General Division - Income Security Section**

**Heard In person on July 28, 2015, Sudbury, Ontario**

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

M. B. – Appellant

Terry Copes – Appellant’s representative

### PRELIMINARY MATTERS

[1] The Appellant had previous applications in March 1999, July 2000, and April 2002. The April 2002 application was denied at reconsideration and at the Office of the Commissioner of Review Tribunals (OCRT). Leave to appeal to the Pension Appeals Board (PAB) was granted in December 2003. The appeal was withdrawn by the Appellant in June 2006.

[2] Both the Appellant’s representative and the Respondent were asked for submissions on the issue of *res judicata* as it applied to the possible MQP date of December 31, 1997 and the possible prorated MQP date of March 31, 2002.

[3] Both parties agreed that *res judicata* applied to the MQP date of December 31, 1997 based on the OCRT decision issued on August 27, 2003. Both parties also agreed that *res judicata* did not apply to the possible prorated date of March 31, 2002.

[4] The OCRT (August 2003) in fact, found that the Appellant did not have sufficient valid contributions to establish an MQP. The OCRT used the 4/6 rule to make this finding. Based on the Respondent’s amended reply of 2006, it appears that the Appellant, using the 5/10 rule did in fact, have enough valid contributions for an MQP of December 31, 1997. Despite this error, the OCRT decision is final and binding.

[5] The OCRT decision specifically refers to earnings in 1997, 2000, and 2001. There is no reference to the 2002 earnings and it is reasonable to conclude that the OCRT was not aware of these earnings since the hearing was in May 2003 shortly after the filing deadline for 2002 income tax returns. It is therefore reasonable to find that *res judicata* does not apply to the possible prorated date of March 31, 2002.

[6] The hearing will proceed to determine whether the Appellant met the criteria for CPP disability benefits based on the prorated date of March 31, 2002.

## **INTRODUCTION**

[7] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 4, 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.

[8] The hearing of this appeal was by In person for the following reasons:

- a) The issues under appeal are complex.
- b) There are gaps in the information in the file and/or a need for clarification.

## **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.

[13] Section 19 of the CPP provides that, if a person has earnings in the year that he or she is deemed to be disabled for purposes of the CPP and certain statutory requirements are met then those earnings may be prorated to extend the minimum qualifying period.

## **ISSUE**

[14] In this case, the Tribunal must decide if it is more likely than not that the Appellant became disabled within the meaning of the CPP in 2002 by the end of March.

## **EVIDENCE**

[15] The Appellant was 43 years old at the expiration of the possible proration period. She has a limited academic background, not having completed grade 9.

## **MEDICAL INFORMATION**

[16] The CPP medical report (July 2011) was completed by Dr. Vanderbeck who had known the Appellant for 2 years. Diagnoses were: osteoarthritis (small joints of hands are worse than shoulders, spine and hips, GERD, COPD, chronic iron deficiency. The doctor noted tender joints of hands and shoulders, tender paraspinal musculature (C-spine, T- spine, L- spine), tenderness of hip joints bilaterally. In his prognosis he stated that the osteoarthritis was expected to become more symptomatic with time.

[17] In the CPP questionnaire with this application the Appellant listed the following impairments: fibromyalgia, chronic tendonitis, glaucoma, Crohn's and colitis, osteoporosis, COPD, rheumatoid arthritis, carpal tunnel, Raynaud's, epicondylitis, high blood pressure and migraine.

[18] The CPP medical report (February 2002) from an earlier application for CPP disability benefits was completed by Dr. Lum. His diagnosis included: chronic bilateral forearm

tendonitis with pain, paresthesias and weakness of both upper extremities. He noted that grip and pinch strength was weak but symmetrical. He listed a number of limitations including: “cannot operate a steering wheel to drive, cannot operate computer keyboard for more than 10 minutes, cannot hold a 1-2 lb object with right hand for more than 10 minutes, and has difficulty even using a curling iron.” She was taking Tylenol #3 twice a day with “transient partial improvement of upper limb pain.” His outlook was guarded for any improvement.

[19] In the questionnaire with the above application the Appellant stated that the impairment which prevented her from working was chronic tendonitis. She described that sitting and standing were limited to 30 minutes at a time due to hip and knee pain. Carrying groceries, cooking, cleaning and washing her hair caused difficulty because of hand, arm and shoulder pain. She could not drive more than 30 minutes.

[20] A neurology report from September 1999 stated that the Appellant was seen for pain in the fingers of both hands. After examination the doctor found no obvious sensory disturbance and felt that it may be a recurrence of carpal tunnel or possibly an additional component of Raynaud’s. She was advised to quit smoking and Adalat was suggested to improve circulation.

[21] A Workplace Safety and Insurance Board (WSIB) report completed by Dr. Lum on May 23, 2001 stated that the Appellant could not use her hands in any meaningful way. The Appellant had previously been awarded a non-economic loss benefit of 10% based on an October 1994 accident.

[22] A clinic note from Dr. Dittmer in on November 8, 2001 noted that the Appellant had had surgery on both her hands in 1997. X-rays of both hands were normal and a bone scan showed no skeletal abnormality that would account for her symptoms. An EMG showed no evidence for carpal tunnel. Dr. Dittmer felt the Appellant had chronic forearm tendonitis and recommended physiotherapy and massage therapy. Since the Appellant was moving back to Timmins, Dr. Dittmer gave her a note for a rehab clinic in Timmins and since she indicated that she wanted to upgrade her education he gave her a note for the Ministry of Education to take the General Educational Development (GED) test with accommodations. At the hearing she stated that she had not pursued any retraining and did not take the GED test. She also stated that the doctor had not given her a note for rehab.

[23] Clinical notes from Dr. Lum close to the prorated period note the following:

August 29, 2001 – uncertain how to proceed with employment future. Recommend to get vocational assessment through WSIB or Dep't of Labour

October 25, 2001 – has some pain in elbows, “knocking”

February 8, 2002 – pain around right ankle started while working in Shoppers last year, right knee feels like it will twist and give out.

April 25, 2002 – requesting copy of her chart for WSIB, referral re menorrhagia, can't find family physician in Timmins

July 30, 2002 – phone call from ER in Kenora re refill of Tylenol#3

[24] An ophthalmic report from Dr. Golesic dated February 5, 2004 indicated a diagnosis of open angle glaucoma for which the Appellant had been prescribed Betoptic. A follow-up visit showed good results.

[25] A chest x-ray in July 2011 was normal and an x-ray of the hands and shoulders showed mild osteoarthritis in the hands. The x-ray of the shoulders was unremarkable.

[26] A report from Dr. Bergersen, psychologist, dated July 23, 2012 stated that the Appellant was referred in March 2011 by her family physician. There had only been 2 counselling sessions due to her extensive health issues and her limited financial resources. Dr. Bergersen found her despondent and exhibiting signs of depression. He stated that her difficulty in gripping and lifting would be problematic in commercial kitchens where she had worked previously. He felt she was deserving of CPP disability.

[27] At the hearing the Appellant stated that she had had further surgery on her elbow by Dr. Hendel approximately 2 years ago but he could not provide any relief to her symptoms.

## EMPLOYMENT

[28] An earlier CPP questionnaire indicated that the Appellant had worked as a cook/waitress/cashier from September 1994 to March 1995 and as a deli clerk from May 1997 to November 1997. She worked as a cashier in a drug store from August 22, 2000 until April 10, 2001. In the questionnaire she stated she was dismissed from this job. An employer questionnaire stated that the Appellant had worked 30 hours per week as a cashier. There was no indication that her medical condition affected her work and no reason was given for her leaving this job. At the hearing she explained that the employer felt she was no longer capable of doing the job. She received regular Employment Insurance benefits from April to October 2001.

[29] A questionnaire from another employer showed that the Appellant worked as a short order cook from June 19, 2002 until June 30, 2002. She worked 4.5 to 5.5 hours per day. They could not provide an assessment of the Appellant's work or the effect of her medical condition given the short time she was there. They indicated that she quit this job. A doctor's note of October 7, 2002 indicated that she was working at Canadian Tire. At the hearing she stated that she worked at Canadian Tire in late 2002 but could not remember if it was for a couple of weeks or a couple of months. She stated that in the summer of 2002, she was living with her husband in a camp in Kenora, Ontario where he was working. She wasn't sure of the exact time they spent there but thought that it was about six months.

[30] In the CPP questionnaire the Appellant stated that she last worked from December 10, 2010 until February 5, 2011 as a front end clerk at Food Basics. She had worked at Walmart from December 2, 2009 until December 25, 2009 and at Winners from September 18, 2007 until December 24, 2007. She stated that the last day that she could work because of her medical condition was February 7, 2011. At the hearing the Appellant also stated that she had worked for the Red Cross in September 2010 in their housekeeping program. She could not remember how long she worked but noted that she had difficulty driving to the clients' homes and was also afraid of possibly contracting an illness from bacteria in their homes. She had also worked for Tim Horton's for a few days in 2007.

## **SUBMISSIONS**

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

- a) Her family doctor advised her to stop working in 2002.
- b) She has tried a number of jobs since 2002 but has not been able to maintain them due to her medical condition.

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

- a) She showed capacity for work after the possible prorated date of March 31, 2002. She worked between September 18, 2007 and December 24, 2007, between December 2, 2009 and December 25, 2009 and between December 10, 2010 and February 5, 2011.
- b) She stated that she could not work because of her medical condition as of February 7, 2011.

## **ANALYSIS**

[33] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability in 2002 before March 31.

### **Severe**

[34] A recent decision (AD-14-253) by the Appeal Division of the SST reiterated that “Section 19 of the Canada Pension Plan stipulates that proration is only available upon the occurrence of a triggering event, which in this case would be the onset of disability.” The onus is therefore on the Appellant to establish that the onset of disability occurred between January 1, 2002 and March 31, 2002.

[35] The Appellant worked from August 2000 until April 2001 and then collected regular EI until October 2001. This would indicate a capacity for work during this period. Medical notes in November 2001 indicate that x-rays, a bone scan and an EMG showed no abnormality. The doctor recommended physiotherapy and massage therapy for chronic tendonitis. There is no indication that the Appellant followed up on these recommendations. The Appellant stated at



the hearing that Dr. Dittmer did not give her a note for rehabilitation. The Tribunal prefers the written report of Dr. Dittmer since the Appellant's recollection of this period is vague.

[36] There are 5 clinical notes from Dr. Lum from October 2001 to July 2002. These show elbow pain and knee and ankle pain. There is no indication of follow-up regarding knee and hip pain.

[37] The Appellant's representative argued that the CPP medical report dated February 2002 and the Appellant's CPP questionnaire dated April 2002 support a finding that the Appellant became disabled as defined by the CPP in 2002 by the end of March. The medical report lists a number of limitations. There is no indication that he advised her to stop all work. There is no indication of therapy beyond Tylenol #3. The Appellant's questionnaire describes her difficulties relating to pain in hips and knees. Dr. Lum's medical report to CPP does not mention diagnoses or limitations with respect to knees and hips. She had problems carrying groceries, cooking, cleaning and washing her hair because of pain in her hands, arms and shoulders.

[38] After reviewing Dr. Dittmer's report and Dr. Lum's report, the Tribunal finds that there is insufficient objective medical documentation to establish a finding that the Appellant became disabled within the meaning of the CPP between January 1, 2002 and March 31, 2002.

[39] The Appellant's representative argued that the Appellant has shown a desire to return to work but each attempt failed due to her medical condition.

[40] The Tribunal refers to *Monk v. Canada* (Attorney General), 2010 FC48. In this case Justice Harrington stated, "It is not necessary, and it would inappropriate for me to attempt to draw a firm demarcation line, which in any event would have to be dependent on the facts of particular cases. No doubt a return to work which only lasted a few days would be a failed attempt. However, two years of earnings consistent with what had been earned before cannot be a failed attempt."

[41] In analyzing the particular facts of the case before it, the Tribunal has reviewed the Appellant's previous work history. From 1986 to 1992, the Appellant held 3 jobs lasting

approximately 2 years each. Closer to the possible proration period, the Appellant's employment history shows employment periods of 5 months in 1994-1995, 5 1/2 months in 1997 and 7 1/2 months in 2000-2001. Following the possible proration period the Appellant held at least 7 different jobs varying from a few days at Tim Horton's to 3 months at Winners. The Tribunal finds that the Appellant's pattern of employment was one of short term jobs and although the tenure of jobs was shorter after March 31, 2002, the Tribunal finds that the Appellant's employment after March 31, 2002 cannot be considered as failed work attempts.

[42] 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).

[43] The employer questionnaire from the last job the Appellant held prior to the possible proration period stated that her medical condition did not affect her ability to handle the demands of the job. The Appellant received regular EI benefits until October 2001 indicating a capacity for work. There is no indication in the file of an inability to work between October 2001 and December 2001. A specialist report in this period advised physiotherapy and massage therapy. There is no indication of follow-up on this advice. The CPP medical report of February 2002 noted the Appellant's limitations but did not rule out all possibility of employment. There is some evidence of effort at obtaining work in 2002 but the Appellant's recollection of this period is vague. There is no further evidence of effort at obtaining work until 2007 where her experience seemed to follow her earlier pattern of short term employment. The Tribunal concludes that the Appellant showed the capacity for work during and after the possible proration period and that her failure to maintain employment was more a reflection of her employment pattern than by reason of her health condition.

[44] The Appellant has not satisfied the Tribunal that on a balance of probabilities she had a severe disability as defined in the CPP in 2002 by the end of March.

### **Prolonged**

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

[46] The appeal is dismissed.

Vikki Mitchell  
Member, General Division - Income Security