Citation: ***S. L. v. Minister of Employment and Social Development,*** **2015 SSTGDIS 90**

Date: August 20, 2015

File number: GT-120086

GENERAL DIVISION- Income Security Section

Between:

S. L.

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

Decided on the record on August 20, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 9, 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 made on the basis of the documents and submissions filed for the following reasons:

- There are no gaps in the information in the file and/or a need for clarification.
- Credibility is not a prevailing issue.

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.

[7] Paragraph 49(1)(b)(ii) describes when a disability benefit was considered under the late applicant provision. If the individual was able to meet the contributory requirements applicable at an earlier date he or she may establish a minimum qualifying period. It indicates that benefits are payable to a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for disability pension was actually received.

ISSUE

[8] The Tribunal finds that the MQP date is December 31, 2002.

[9] 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

[10] The Appellant was 36 years old at the time of the MQP.

[11] The Appellant is single. She has been deaf in both ears due to congenital rubella. She communicates with American Sign Language and she is also blind in her right eye.

[12] The Appellant completed Grade 12 and took several upgrading courses between 2000 and 2010. She participated in the Ontario Disability Employment Support Program in coordination with the Canadian Hearing Society from 2001 to 2007. She upgraded her computer skills, did job searches and received a certificate in Workplace Hazardous Material Information system in 2007.

[13] In the fall of 2006 the Appellant participated in a program sponsored by the Toronto District School Board. She had two work placements in 2006/2007 and in 2008 for a few months, at two different locations.

[14] She attended many job fairs looking for work. She also did regular job searches online and networking while staying current with computer programs and software. (GT1-20)

[15] Dr. Parrish, the Appellant's Family Physician, was the Appellant's doctor since 1990. He provided his clinical notes from January 2002 to 2012. The Appellant saw Dr. Parrish a couple of times in 2002. In July she was indicating she was depresses over the breakup with her boyfriend. He prescribed Elavil 10 mg twice a day for two weeks and then it was his plan to re-evaluate. She saw him again in October 2002 for a sore throat and was prescribed antibiotics. In December the Appellant had a physical that was normal. She saw Dr. Parrish infrequently in 2003 and 2004 for minor complaints. (GT1-49)

[16] In May 2011 the Appellant was found on the floor. She had sustained a spinal cord injury. She was found to have cervical spinal stenosis causing spinal cord compression. Surgery was performed the next day and then she had to have additional back surgery performed on May 15, 2011. The Appellant had indicated to her doctors that she had no previous symptoms of spinal stenosis, denying any sensation of tingling, numbness or decreased power to her extremities. (GT1-82)

[17] The Appellant indicates on the CPP questionnaire that she was no longer able to work due to her condition as of May 4, 2011. All of the functional limitations listed are related to her injury in May 2011.

[18] She was treated in Sunnybrook Hospital from May 4-25, 2011 and then was at the Lyndhurst Centre starting on May 25, 2011 and was still there at the time of her application. She had progressed as of July 2011 to walking short distances with a quad cane but still used a wheelchair for longer distances.

SUBMISSIONS

[19] The Appellant's representative submitted on her behalf that she qualifies for a disability pension because:

a) Despite a serious and prolonged disability the Appellant has, at times, been gainfully employed. This should not be evidence of her ability to secure substantially gainful

employment. It is noteworthy that despite enormous efforts on her part, she has not been able to secure work since 2000, when she was laid off from her position at Purolator.

b) Some consideration needs to be given to the Policy Directive of Income Security Programs (as it was known then) in respect of determining whether an occupation meets the threshold of substantially gainful. In 1995 the threshold or benchmark was $8,559.

c) In applying *Villani v. Canada (A.G.)*, 2001 FCA 248 to the facts of the case and in consideration of the Appellant's previous limited work experience, her significant disabilities, and the reality of the employment statistics of persons with disabilities, it is clear the Appellant's disabilities, as they existed prior to December 2002, are such that she is prevented from engaging in a substantially gainful occupation.

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

a) The physician clinical notes report a depressive episode, which required a single anti-depressant and not indication that treatment from a mental health professional was required.

b) It is acknowledged the Appellant sustained a significant spinal injury in May 2011, the evidence does not reveal a disability in December 2002 that prevented her from all modified employment.

c) The Appellant indicates it is May 2011 when she could no longer work due to her medical condition.

ANALYSIS

[21] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2002.

Severe

[22] The Tribunal is guided by *Dhillon vs. MHRD,* (November 16, 1998), CP 5834 (PAB) where it indicates 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.

[23] The Appellant submits that despite her disability she has been employed at times. She worked for the same company for over 13 years with her salary increasing over the years, indicating a satisfactory performance. She had limitations with her hearing and eyesight when she was hired and continued to work there for over a decade. She stopped working there for non- medical reasons.

[24] The Tribunal does not consider 13 years of employment with the same company as working at times and is not persuaded that this could be considered an insignificant length of employment.

[25] The Appellant's representative notes the enormous efforts the Appellant went through to obtain work despite her disabilities. She was capable of attending school to upgrade her skills as well as attend two work placements as part of an upgrading program. She indicates in her questionnaire that she could not work due to her condition after she injured her spinal cord. The Tribunal places weight on the opinion of the Appellant in determining when her physical limitations would have significantly interfered with her ability to regularly work.

[26] The Tribunal finds the Appellant has been very capable of maintaining employment for many years. Her physical limitations did not stop her from accomplishing this. She has demonstrated her ability to work regularly despite her difficulties with hearing and sight for many years.

[27] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[28] The Tribunal notes the Appellant has continued to look for work and upgrade her skills through the years. She has worked in placement settings. It is clear to the Tribunal that the

Appellant was confident with all her employment seeking activities, that she was quite capable of working if an employer offered her a position.

[29] The Tribunal looks for guidance from *Buckley v MHRD*, (September 20, 2001), CP 15265 (PAB) when it addresses the issue of a disability when suffering from a factor such as a hearing deficit. The decision also reflected in its decision the factors stated in *Villani v. Canada (Attorney General)*,[2001 FCA 248] when it said:

> "Being hearing-impaired is a serious limitation. It has an isolating effect on the individual and reduces the level of oral communication which can readily be undertaken, and, in the employment context, such communication is generally quite important. Technical aids can help, but they have their limitations. Nonetheless, I am not persuaded that Mrs. Buckley's level of impairment, given her age and her work experience, renders her incapable regularly of pursuing all forms of substantially gainful employment. The work place has room for the hearing-impaired and technological aids exist to help overcome the impairment. There are jobs in which the requirement for ongoing oral communication is minimal or less important, in which Mrs. Buckley could function satisfactorily."

[30] The Appellant has coped with the limitations of her hearing and vision by working at a suitable job for many years.

[31] The Appellant submits some consideration should be made about whether an occupation meets the threshold for substantially gainful as described in a Policy Directive of Income Security Programs from 1995.

[32] The Tribunal is aware that a Policy Directive of Income Security Programs is not binding on the Tribunal and as such would not be considered. The Appellant worked regularly for many years in a job that provided a substantially gainful income.

[33] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Appellant encourages the Tribunal to consider these factors.

[34] The Appellant was 36 years old at the time of her MQP. She had an impressive work history of many years with the same employer. She had made improvements on her skills in many areas, which provide her with a variety of transferable skills.

[35] The Tribunal does take into account the *Villani* personal characteristics. The Tribunal does not believe the Appellant's previous employment could be considered or described as a limited work experience. It is clear the Appellant has managed many aspects of her life with her inability to hear and reduced vision.

[36] 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).

[37] In applying *Villani* and *Inclima* the Tribunal must find that the Appellant has failed to met her burden when evidence of work capacity is present, and there is no evidence that her health condition has prevented her from obtaining or maintaining employment

[38] The Tribunal has carefully reviewed the medical reports and submissions. 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

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

CONCLUSION

[40] The appeal is dismissed.

Jane Galbraith
Member, General Division - Income Security