

Citation: *L. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 99

Date: September 2, 2015

File number: GP-13-3147

GENERAL DIVISION - Income Security Section

Between:

L. S.

Appellant

and

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

Respondent

Decision by: Judy Daniels, Member, General Division - Income Security Section

Heard by Teleconference on August 10, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. S., the Appellant

J. S., witness for Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 14, 2013. 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.
- b) The method of proceeding provides for the accommodations required by the parties or participants.
- c) The issues under appeal are complex.
- d) There are gaps in the information in the file and/or a need for clarification.

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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2012.

[8] 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

[9] The Appellant applied for disability pension under the *Canada Pension Plan Act* (CPP) on March 21, 2013. The Appellant's date of birth is X X, 1970, making her 45 years of age at the time of the hearing. In the CPP questionnaire completed on March 21, 2013 by the Appellant, it was written that the Appellant had a high school diploma and a six month office administration course. She stopped working in September 2010 as an assistant manager in a woman's clothing retail store. The illnesses or impairments that prevented her from working were: hemochromatosis, celiac disease, chronic pain, irritable bowel syndrome, cluster migraines, hypoglycemia, reflux, back, neck and shoulder injuries, nausea, fibromyalgia, joint problems, allergies, fatigue, insomnia, and chronic ear infections. She also has pain, inflammation and stiffness in her hand, wrists and joints.

[10] The Appellant has been treated by a number of medical professionals and several medical reports were presented by the Appellant, all of which the Tribunal has read and considered.

However, the references in this decision will only refer to the pertinent reports.

[11] In the CPP medical report date-stamped April 8, 2013 Dr. Christy MacAulay, her family doctor indicated that the Appellant's medical conditions were: chronic arthralgia (joint pain) NYD, celiac disease and hemochromatosis (a condition wherein too much iron from food is absorbed by the body). She indicated that the Appellant "has recurrent problems with recurrent migrating arthralgia. This has been worsening in the past several months." Further, the prognosis was "unknown and still being investigated." She had difficulty with lifting or any regular physical activity." The medications listed were: Cymbalta (to aid with pain symptoms or fibromyalgia) and Ativan (anti-anxiety medication).

[12] In a medical report dated January 25, 2013, by Dr. Jose Ferraz, a gastroenterologist, it stated that the Appellant was doing "quite well with respect to her celiac disease." She has some associated symptoms of bloating and gas which were related to lactose intolerance and as well as carbohydrate intolerance but was able to manage that intolerance successfully with dietary interventions. It was also noted that the Appellant was being followed for hemochromatosis and she had been able to keep her ferritin levels at reasonable levels. No other complications from the hemochromatosis were noted at that time.

[13] In March, 2013, Dr. C. MacAulay, the Appellant's family doctor stated that the Appellant was experiencing migrating arthralgia that had been worsening in the previous few months and was currently under investigation.

[14] In a note dated July 29, 2013, Dr. C. MacAulay wrote that the Appellant has been diagnosed with fibromyalgia.

[15] In September 2013, Dr. Lambert, Internal Medicine Specialist, indicated that the Appellant had not been diagnosed with any particular rheumatologic syndrome but felt that the Appellant's overall diagnosis was fibromyalgia. Dr. Lambert indicated that the Appellant was unable to do heavy manual work or work requiring her to be on her feet for much of the

day. Dr. Lambert also indicated that keyboarding would be difficult due to pain. The Appellant was also noted to have widespread joint pains affecting most of her joints from time to time, particularly her back and shoulders, and had stiff swollen hands and extreme fatigue. Dr. Lambert did not list any treatment options.

[16] In a letter dated September 13, 2013, by Dr. Christy MacAulay, it was stated that the Appellant had been a patient in her clinic since 2009 and more recently had been investigated and treated for chronic severe pain affecting her muscles and joints. The pain was still an ongoing concern and had been very difficult to manage. She went on to add that as a result of the pain the Appellant was currently unable to work or train for a job in any capacity.

[17] In a report by physiotherapist Marc Simard dated October 17, 2013, it was noted that he believed the Appellant may have an underlying systemic problem that persists and seems to complicate any overlying injuries. He had been looking at a model and neuropathic pain in association with the more acute orthopedic injuries. He was of the view that the Appellant would benefit greatly from a multidisciplinary approach to pain management that could incorporate some other medical disciplines such as physiatry, occupational therapy and pharmacology. He recommended the Chronic Pain Center as a resource for symptom management.

[18] In a report dated April 14, 2014, Dr. MacAulay stated that the Appellant was being investigated and treated for chronic severe pain and persistent and debilitating fatigue which had been difficult to manage. The Appellant was being followed by the Chronic Pain Clinic by attending group sessions but was waiting for an initial appointment with a physician. Dr. MacAulay stated that due to the Appellant's pain she was unable to work or retrain at that point in time.

[19] Dr. Majeed's report dated January 30, 2015, stated that the Appellant was permanently disabled from fibromyalgia and was a Chronic Pain Clinic client. The Appellant was participating in a program to acquire self-management skills and coping strategies for her condition.

[20] The Appellant wrote a letter to the Tribunal on March 18, 2015 advising that she had been accepted by Alberta's Assured Income for the Severely Handicapped (AISH) and requested that the Tribunal consider that information in her appeal. As the AISH test for disability benefit is a different test than the CPP disability pension, the Tribunal is unable to give any weight to this information as that is irrelevant information in this appeal.

[21] The Appellant's letter of July 20, 2015 stated that she had "tried employment options including volunteer positions and have been refused for both due to my condition".

Testimony

[22] The Appellant testified she has had ongoing medical problems since she was a teenager. She has weak ankles and pain. She has tried every type of job such as waitressing, cashier, and data entry positions. She suffers from constant stress and nonstop injury pain. For example for the last three days she has been unable to shower due to pain. She is tired due to lack of sleep. During the period of 1996 to 2009 she had no family doctor and instead relied on medical clinics for assistance. She was on the waiting list for the Chronic Pain Center for a very long time. She is limited to only receiving treatment there until December 31, 2015.

[23] The Appellant testified that she has allergies to several medications which may alleviate some of her symptoms. For example she is allergic to Naproxen, Gabapentin, Lyrica, Cymbalta, Celebrex and Oxyneo. Her current medications are Benadryl, Advil, extra strength Tylenol, Percocet (for pain) and sleeping pills. The Appellant testified that she continues to have difficulty sleeping due to her ongoing pain.

[24] The Appellant testified that she has attempted numerous ways to deal with her medical issues including such things as: physiotherapy, massage, ear seeding, seeing a psychologist, acupuncture, attending a wellness group, naturopath, cognitive behaviour therapy and a chiropractor. She said that she has done everything suggested to try to help herself. The Appellant testified that she is stressed, anxious, depressed and she cries a lot. She is unable to cook or clean or open bottles. She once locked herself in her house because she was unable to open the door knobs as her hand was cramped up. Her right hand is like a claw

as it will not open or close properly. She has since changed the doorknobs. She has hemochromatosis which is a condition that stores too much iron in her body. That condition is partially addressed by bloodletting and donating blood which she will have to do for the remainder of her life. She has celiac disease but it is under control.

[25] The Appellant testified that the side effects of the fibromyalgia are that her whole body has tightness and she cannot stay in one position for too long. Laying down hurts her back, she has pain in her shoulders, bright lights are a problem for her vision, she has temperature sensitivity to cold and rain, and she has anxiety and depression.

[26] J. S. the Appellant's husband testified that he has known the Appellant 16 or 17 years. She has fibromyalgia and is barely able to function around the house. She is unable to hold a job due to being in constant pain. She rarely gets any sleep. She cannot even go for coffee with a friend. She is isolated in her house. His research found that fibromyalgia can be caused by emotional trauma and when the Appellant was a child she almost lost her right leg and he thinks that may have caused her fibromyalgia.

[27] The Appellant testified that she is not on antidepressant medication due to the side effects. When she took Lyrica her throat swelled, and Cymbalta increase the pain in her body. It was a very long process of elimination before any doctor could finally confirm that she had fibromyalgia.

[28] She had attempted to volunteer with her local church to provide for flood relief, however when she advised them of her limitations they indicated that they were unable to use her services. She remains tired, fatigued and stressed and so it is difficult to find a job. She has testified that she has foggy brain and troubles with memory which are side effects to autoimmune disease and she is groggy due to the medications that she is taking. She has been recently diagnosed with osteoarthritis. She referred to document number GD-9 wherein Dr. Majeed confirmed that nothing can be done to help her condition.

SUBMISSIONS

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

- a) She has been dealing with pain issues since age 13 years and it has progressed to where she feels pain constantly throughout the day; and
- b) She is constantly trying to find relief for her joint pain, which is ongoing; and
- c) Her pain is both severe and prolonged and she has been told that there is no cure.

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

- a) The evidence before the Tribunal does not support a determination that the Appellant was disabled with the meaning of the CPP on or prior to her MQP and continuously thereafter;
- b) The Appellant remains in active treatment for her visual symptoms and her cardiac status is stable; and
- c) While recognizing that the Appellant's visual symptoms impose some limitations, they are not of such magnitude, so as to prevent the performance of all types of work.

ANALYSIS

[31] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

Severe

[32] 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.

[33] This Tribunal finds that the Appellant is a credible witness. She testified in a straight forward and honest manner. Her testimony was consistent with what she had written in her

CPP application. She did not appear to be evasive in any respect. The Tribunal accepts her evidence as to her physical and mental state.

[34] The Appellant has several medical conditions. She has hemocromatis and this condition is managed by blood-letting and donating blood. She has celiac disease but this condition is managed with dietary restrictions.

[35] There is objective evidence in the medical record to indicate that the Appellant has fibromyalgia and this condition was diagnosed in July 2013 by Dr. MacAulay, her family doctor. Regarding the Respondent's submission that the Appellant's condition was not diagnosed by Dr. Majeed as of the MQP, the very nature of fibromyalgia is that it does not appear on diagnostic tests. The Tribunal notes that the fibromyalgia diagnosis was also six months after the MQP, but that is not determinative of the issue. However, being diagnosed with fibromyalgia is not in and of itself sufficient to satisfy a finding of a severe condition, the Tribunal is guided by the *Klabouch* decision (2006 FCA 33, para 14) which reads: "It is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability".

[36] In 2013 Dr. Lambert indicated that the Appellant was unable to do heavy manual work or work requiring her to be on her feet for much of the day. Dr. Lambert indicated that keyboarding would be difficult due to pain. The Appellant was also noted to have widespread joint pains affecting most of her joints from time to time, particularly her back and shoulders, and had stiff swollen hands and extreme fatigue.

[37] In 2013, the Appellant's family doctor Dr. MacAulay stated that as a result of the pain the Appellant was currently unable to work or train for a job in any capacity. In 2014 Dr. MacAulay confirmed that due to the Appellant's pain she was unable to work or retrain at that point in time.

[38] In 2015, Dr. Majeed reported that the Appellant was permanently disabled from fibromyalgia and was in a program to learn self-management skills and to learn coping mechanisms.

[39] Conditions such as fibromyalgia affect individuals differently and have a strong subjective component to them. The Tribunal must focus on the effect of the condition on the Appellant, and consider not only the medical evidence, but the Appellant's assessment of her condition (*Thawer v. MHRD* 2003 CP 18204 (PAB)).

[40] In this case, the Appellant has been largely home-bound since her last employment in 2010. The Appellant testified that she is in chronic pain and has had this pain for several years, including prior to her MQP. Additionally, the pain affects her ability to sleep and she is rarely able to sleep. She has allergies to several medications. The Appellant testified that she is stressed, anxious, depressed and she cries a lot. She is unable to cook or clean or open bottles. The Appellant testified that the side effects of the fibromyalgia are that her whole body has tightness and she cannot stay in one position for too long. Laying down hurts her back, she has pain in her shoulders, bright lights are a problem for her vision, she has temperature sensitivity to cold and rain, and she has anxiety and depression. Her husband testified that he believes that the Appellant has been unable to keep a job due to being in constant pain. The Tribunal does not attach significant weight to his testimony given that he is the Appellant's husband and advocate, nonetheless his testimony does corroborate the Appellant's testimony regarding her constant pain.

[41] Dr. Lambert did not list any treatment options but the Respondent noted that it was reasonable to expect treatment would result in some reduction of symptoms with measures taken to manage her condition. With respect, the Tribunal does not agree with the Respondent's assumption. The Appellant testified that she has attempted numerous ways to deal with her medical issues including such things as: physiotherapy, massage, ear seeding, various medications, seeing a psychologist, acupuncture, attending a wellness group, naturopath, cognitive behaviour therapy, attending the Chronic Pain Centre and a chiropractor.

[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 Appellant testified that she has tried various jobs, but was unable to keep any of them due to her chronic pain. She attempted to volunteer with her church for a flood

relief project, however when she advised the church of her limitations they were unable to accommodate her limitations.

[44] Based on the medical evidence and the Appellant's testimony, the Tribunal finds that the Appellant has extensive limitations. When those extensive limitations are considered in a "real world" context pursuant to Villani, the Tribunal is satisfied on a balance of probabilities that the Appellant has a severe disability as defined in the [*Canada Pension Plan*](#) at the time of the her MQP.

Prolonged

[45] The Tribunal finds that the Appellant's disability is long continued. The Appellant testified that she has had chronic pain since she was a teenager and various medical reports corroborate that she has fibromyalgia; that her symptoms has not been alleviated and she struggles with debilitating chronic pain. The Appellant's condition appears to be of indefinite duration as it is difficult to see how the fibromyalgia can significantly improve at this late date, given the extensive and varied attempts that she has made to alleviate her condition.

CONCLUSION

[46] The Tribunal finds that the Appellant had a severe and prolonged disability in September 2010, her last day of work. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in March 2013; therefore the Appellant is deemed disabled in December 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2012.

[47] The appeal is allowed.

Judy Daniels
Member, General Division - Income Security