

Citation: *P. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 146

Date: September 23, 2015

File number: GT-123701

GENERAL DIVISION - Income Security Section

Between:

P. S.

Appellant

and

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

Respondent

Decision by: Angela Ryan Bourgeois, Member, General Division - Income Security Section

Heard by videoconference on July 17, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant – P. S.

Appellant's Representative – Keith Neville

INTRODUCTION

[1] The Appellant applied for a *Canada Pension Plan* (CPP) disability pension for the third time on March 14, 2012. Earlier applications were made in May 2004 and May 2007.

[2] The first application (May 2004) was denied by the Respondent and no appeal was made by the Appellant.

[3] The second application (May 2007) was denied by the Respondent initially and upon reconsideration. The Appellant appealed the matter before the Office of the Commissioner of Review Tribunals (OCRT) and a hearing was held in May 2010. The OCRT dismissed the Appellant's appeal and decided that the Appellant was not disabled on or before her minimum qualifying period of December 31, 1997. Leave to appeal to the Pensions Appeal Board was refused in April 2011.

[4] The Appellant's third application (March 2012) was denied by the Respondent initially and upon reconsideration.

[5] The Appellant appealed the reconsideration decision to the OCRT.

[6] In April 2013 this appeal was transferred to the Social Security Tribunal (Tribunal) pursuant to section 257 of the *Jobs, Growth and Long-term Prosperity Act* which 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.

[7] The hearing of this appeal was by videoconference for the following reasons:

- a) more than one person was to attend the hearing;

- b) it was an appropriate form to allow for multiple participants;
- c) videoconferencing was available where the Appellant lived;
- d) there were gaps in the information in the file and a need for clarification; and
- e) to proceed as informally and quickly as the circumstances and the considerations of fairness and natural justice permitted, as per the *Social Security Tribunal Regulations*.

THE LAW

[8] 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).

[9] 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.

[10] 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

[11] The Appellant and the Respondent agree that the Appellant's MQP date is December 31, 2001. This date is different from the MQP at the time of the 2010 OCRT decision. Upon the Appellant's application for a division of unadjusted pensionable earnings her MQP date was extended from December 31, 1997 to December 31, 2001.

[12] The Tribunal is bound by the May 2010 OCRT decision as to all findings up until December 31, 1997.

[13] The Tribunal only has jurisdiction to determine whether or not the Appellant had a severe and prolonged disability on or after January 1, 1998.

[14] Therefore, the issue before this Tribunal is whether the Appellant had a severe and prolonged disability on or after January 1, 1998 and before her MQP date of December 31, 2001, that continues until today.

EVIDENCE

[15] The Appellant is a 63 year old woman who has pain in her neck and left shoulder and arm.

[16] The Appellant has her grade 11 and one year of business college.

[17] She worked as a keypunch operator for one year. Then she took a one year training course as a CSR. She got a job in the hospital as a ward aid immediately upon completing this training.

[18] She testified that she loved her job and always wanted to go back to work.

[19] In 1994 she injured her neck at work when she lifted a tray of surgical instruments over her head.

[20] She had some physiotherapy and eventually returned to work in a porter position, which did not require lifting. She indicated that she avoided lifting at all costs because of the pain it caused her. She stated that she had pain all the time.

[21] One day, in November 2001, when she was 49 years old, she lost her grip on the wheelchair handle of a patient's wheelchair, and the chair got away from her.

[22] The Appellant was terrified that she would injure a patient and stopped working by asking for a lay-off.

[23] The Appellant states that during the summer of 2002 she called the hospital every day but was consistently told that no light duty jobs were available.

[24] She has since applied for sedentary positions but has not had any interviews.

[25] She asked worker's compensation for retraining but was refused.

[26] With respect to her functional abilities, the Appellant testified that she cannot sit for longer than 90 minutes because her neck will lock and the pain will increase.

[27] The Appellant does not drive because she stated that she is not able to turn her neck sufficiently to drive safely.

[28] The Appellant has bars in her shower, dresses without assistance, can use a computer about 20 minutes at a time, cannot sit to read and gets assistance from her son for her housework.

[29] The Appellant stated that since 1995 she is always in pain. She said that she is in the same condition now as what she was in 1995, 1997 and 2001. Her condition has not changed.

[30] The Appellant does not sleep well because of the pain.

[31] The Appellant does not currently have a family doctor and uses walk-in-clinics.

[32] The Appellant tried physiotherapy in 1994, 1995 and 1996 but has not gone to physiotherapy since then but she does do a few of the neck exercises that Dr. Maharage, Neurologist, recommended. She does not find that they help.

[33] She has not been referred to a chronic pain clinic.

[34] The Appellant's family doctor's notes are on file. The following excerpts from entries are of note:

- a) December 2000 – neck muscle spasm;
- b) January 2001 – neck pain and left arm pain with lifting; injury in '94; limited range of motion on neck;

- c) March 2001 – left side of neck and shoulder pain after heavy lifting on job on March 14, 2001; mild tenderness, muscle tenderness; Naproxen was prescribed;
- d) June 2001 – bilateral shoulder weakness and soreness; off work for 1 week; to get a spine and shoulder x-ray;
- e) March 2002 - complained of neck and shoulder pain when lifting; she was laid off in November 2001;
- f) May 2002 – complained of neck and shoulder pain; unable to go back to work since November 2001; chronic neck and shoulder pain;
- g) September 2002 – complained of shoulder/arm pain; unable to lift which is required in her job; off work for 4 weeks; chronic neck and shoulder pain; Naproxen refill;
- h) May 2006 – very anxious today; wants to go back to work and asking me to give a note; she could not pass assessment for job requirements; I have advised her to speak with social worker and get some kind of retraining or education;
- i) April 2007 – pain in neck that increases with doing any significant activity.

[35] In January 2001, Dr. Zhang, Family Physician, wrote that the Appellant had a previous Neck Muscular Sprain from a work related injury in 1994 which co-existed with Degenerative Cervical Disease. She recommended anti-inflammatory pain medication and a muscle relaxant, both as needed. She wrote:

She reports that the neck and left arm pain is not as bad if she doesn't have to do heavy lifting but insists she will have neck pain and left arm numbness again if she has to lift heavy objects.

[36] Also in January 2001, Dr. Shaw, a doctor with Workers' Compensation Board of Nova Scotia, stated that the Appellant has had intermittent pain in her shoulder with some tingling in her fingers since a workplace injury in 1994. He stated that there were significant physical findings in the Appellant's x-rays which showed cervical disc disease, a previous history of a whiplash injury, a decreased range of motion and periodic tingling in her hand.

[37] In August 2001, Dr. Zhang stated that the Appellant reported flare ups of neck and shoulder pain in March and June. She was treated with anti-inflammatories and was off work for a short period of time.

[38] In June 2002, Dr. Collicott, Orthopaedic Surgeon, indicated in his five page report that the Appellant reported having missed 3-4 days a month in 2001 because of neck and arm pain. He stated that she had activity related neck and shoulder girdle pain, that she said she has trouble with prolonged periods of sitting and difficulty with lifting. She took Tylenol and Advil on an as needed basis for pain and used hot packs. He found that she had a soft tissue injury from the 1994 work injury that had been ignored. He stated that she had degenerative arthritis in her neck and that from the x-rays it was clear that the arthritic disease had been well established in 1994.

[39] In April 2004, Dr. Khalid. M. Jat, Family Physician, wrote:

Due to her neck and arm pain I do not think that Ms. P. S. is able [sic] of working in the hospital as either a Ward Aid or a Porter as both require lifting and using both arms and neck muscles.

[40] In March 2005 the Appellant had a functional capacity test. She was found to be unable to perform all of the essential tasks of her occupation as hospital porter. She did, however, demonstrate the ability to perform a full day of general activities at a sedentary to light workload level. She showed significant abilities with gripping, forward reaching, low-level positions and lumbar spinal rotation and balancing. She had moderate deficits with prolonged standing, prolonged neck positions, cervical spinal rotation, bending and manual dexterity. She had significant limitations with above the shoulder work. Further, the test found some minor inconsistencies as to the reliability and accuracy of the Appellant's subjective reports of her pain and limitations. The Appellant was able to do more than she stated at that time. The report continued to state that the Appellant's subjective reports should not be disregarded, but should be considered within the context of their findings.

[41] The Appellant's family doctor, Dr. Shehzad, completed the Appellant's CPP 2007 medical report. He indicates that he first started treating the Appellant for her main medical condition in July 2004. Dr. Shehzad diagnosed the Appellant with Thoracic Outlet Syndrome,

left side, and Degenerative Disease of the neck. He said that the Appellant had longstanding complaints around her neck, left shoulder and arm and that she had had a few workplace injuries. He continued that the Appellant had decreased range of motion at her left shoulder and her left hand grip was weaker. He stated “*She can only perform light duties. She is unable to work as hospital porter*” and that no improvement was expected.

[42] In 2010, Dr. Maharaj, Neurologist, stated that the Appellant has musculo-skeletal pain from a repetitive strain injury and a slightly abnormal sitting posture with elevation of her left trapezius. He found no evidence of Thoracic Outlet Syndrome. He thought that she should respond to self-imposed physiotherapy. No further investigation was required.

[43] The Appellant did not submit a new medical report with her 2012 Application.

SUBMISSIONS

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

- a) her injury is severe and prolonged; and
- b) her doctor stated that she could not work because of a neck and cervical disease and this should not be able to be overturned by an R.N.

[45] The Respondent submitted that the Appellant does not qualify for a disability pension because she did not have a severe or prolonged condition when she last qualified for benefits from December 1997 to December 2001 and continuously thereafter.

ANALYSIS

[46] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2001 that arose on or after January 1, 1998.

Severe

[47] The Appellant claims to have a severe medical condition that has prevented her from working since November 2001 when she asked to be laid off from her job because she had accidentally let go of a wheelchair when transporting a patient.

[48] The Appellant claims that her doctors have told her that she cannot work. With all due respect to the Appellant's interpretation of her medical reports, the medical evidence on file indicates that her family doctors support her not working as a porter, but they do not indicate or support a finding that she could not do any work.

[49] In 2005, one family doctor said that she could not work as a Ward Aid or a Porter, not that she could not work.

[50] The Functional Capacity Test in 2005 indicated that she could do a full day of activities at sedentary to light workload level.

[51] In May 2006 her family doctor suggested she look into retraining, clearly believing she was capable of other work.

[52] In 2007 her family doctor wrote that she could only perform light duties, not that she could not do any work.

[53] None of these reports indicate that the Appellant could not work and some specifically say that she can do sedentary or light work, and these reports are years after the Appellant's MQP date with no evidence on file that the Appellant's condition was worse in 2001 than it was in 2005, 2006 or 2007.

[54] The Appellant herself stated that her pain has remained the same since 1994.

[55] With respect to the severity of the Appellant's medical condition from January 1998 to December 2001, the various medical reports paint a picture of someone who has intermittent pain that is caused by heavy lifting. She had "flare ups" which is not indicative of a chronic condition that would regularly prevent someone from employment. She missed a few days but was not off work consistently.

[56] The Appellant had and continues to have pain in her neck and her left shoulder and arm, however, at the relevant times, from 1998 to 2001, the Appellant's pain was not steady and it should not have prevented her from working in a position that did not require heavy lifting, which apparently triggers the Appellant's pain.

[57] While the Tribunal acknowledges that the Appellant may not have been able to continue in her job as a hospital porter, as was set out in the 2005 Functional Capacity Assessment, the Appellant should have been able to do a sedentary or light duty job, which would have been within her physical limitations.

[58] The CPP requires mitigation by all claimants, which means that when an Appellant cannot do one job but has work capacity, the Appellant is obligated to show that she tried to obtain and maintain employment suitable to her abilities *and* that these efforts were unsuccessful because of the person's health condition. (See *Inclima v. Canada* (A.G.), 2003 FCA 117).

[59] In the Appellant's case, she stated that she applied for other employment positions but did not receive an interview. This is not evidence that the Appellant could not work because of her health condition and does not satisfy the requirements set out in *Inclima*.

[60] The Tribunal finds that the Appellant's medical condition does not support a finding of a severe disability pursuant to the CPP. The Appellant was not incapable of regularly pursuing any substantially gainful occupation on or before December 2001, her MQP date.

Prolonged

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

CONCLUSION

[62] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division - Income Security