

Citation: *M. W. v. Minister of Employment and Social Development*, 2015 SSTGDIS 112

Date: October 7, 2015

File number: GP-13-2332

Between: GENERAL DIVISION - Income Security Section

M. W.

Appellant

and

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

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by Videoconference on October 6, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. W.: Appellant

Angelo Consiglio: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on December 24, 2007. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) in October 2013.

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

- a) The Appellant will be the only party attending the hearing;
- b) The method of proceeding is most appropriate to allow for multiple participants;
- c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;
- d) The issues under appeal are complex; and
- e) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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).

[4] 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.

[5] 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

[6] The Tribunal finds that the MQP date is December 31, 2006.

[7] 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.

BACKGROUND

[8] The Appellant was 51 years old on her December 31, 2006 MQP date; she is now 60 years old. Her employment history includes working as a supply teacher in Winnipeg for six years, a contract position teaching grade six to First Nations, teaching for various school boards in southern Ontario both as a supply teacher and on a permanent basis, teaching English Second Language (ESL), and home based tutoring. She was injured in six falls prior to December 2006 and has been injured in numerous falls since then. She was diagnosed with breast cancer in July 2007 and underwent two surgical procedures as well as extensive chemotherapy and radiation. Other than for a brief period in 2004, she has not been able to work on a full-time basis since 2002.

APPLICATION MATERIALS

[9] In her CPP disability questionnaire, date stamped by the Respondent on December 31, 2007, the Appellant indicated that she has a grade 12 education as well as a five year Bachelor of Education Degree (1998-1993) and a two year post-graduate certificate in Teaching English

Second Language (TESL) (2005-2007). She indicated that she last worked as a summer ESL high school teacher for international high school students from July 9, 2007 until July 24, 2007. She noted that she stopped working because of breast cancer. She stated that she was hired for full-time at Bronte College but was only able to teach in the morning because she was fatigued and in pain due to her cancer.

[10] She also noted that her other work in the last five years included: ESL peer mentor from September 1, 2000 to December 30, 2005; supply teacher from September 1, 2003 to December 7, 2003 and from March 20, 2004 to June 30, 2005; Education Quality and Accountability (EQAO) marker from July 4, 2006 to July 14, 2006; and Statistics Canada enumerator from May 26, 2006 until July 1, 2007.

[11] The Appellant claimed to be disabled as of July 25, 2007 and stated that the illnesses and impairments that prevented her from working included invasive right breast cancer; lymphedema in her right arm, shoulder, neck and right side of her back; chronic right eye tear duct blockage causing tearing and blurriness; and low immune system affected by chemotherapy causing infections. In describing how the illnesses or impairments prevented her from working she noted: extreme fatigue; nausea; bowel irregularities; painful headaches; dizziness; severe debilitating right arm and shoulder pain extending to the neck and right side of the back; and unable to do anything for long periods of time including grooming, dressing, eating, computer work, writing etc.

[12] She listed her other health-related conditions or impairment to include: active 18 points fibromyalgia diagnosed in June 2002; hypothyroidism diagnosed in 2006; osteoarthritis in her neck and back; and asthma. She described numerous physical functional difficulties/limitations as well as difficulties/limitations in seeing, hearing, speaking, remembering, concentrating, and sleeping. Her list of treating medical practitioners included Dr. Dzever, her family doctor, Dr. Leong, surgical oncologist, Dr. Rajagopal, oncologist, Dr. Mody, rheumatologist, as well as an eye surgeon, a chiropractor, a podiatrist, an endocrinologist, three gynecologists, a general practitioner, and an otolaryngologist.

[13] A report dated October 8, 2007 from Dr. Dzever, the Appellant's family doctor, accompanied the CPP application. The report diagnosis right node breast cancer, right axillary

lymph node dissection and right arm lymphedema. The prognosis is that the Appellant is unable to work for the next 18 months to two years, and that it is hoped she will recover. The report also notes that the Appellant has other medical conditions including fibromyalgia, osteoarthritis, right eye tear duct blockage, abdominal pain, and bowel irregularities.

Other Applications

Initial Application

[14] This is the Appellant's second application for disability. Her initial application was date stamped by the Respondent on October 3, 2002 and denied on November 6, 2002. The Appellant did not request a reconsideration of that decision.

[15] In her CPP disability questionnaire in support of her first CPP application the Appellant indicated that she last worked as an elementary school teacher from September 1, 2001 until May 28, 2002; she noted that she stopped working because of fibromyalgia due to an accident at school compounded by stress and anxiety. She claimed to be disabled as of May 29, 2002 and stated that the illnesses or impairments that prevented her from working included fibromyalgia; an injured ankle; sprained back, hips, legs, neck and shoulders; depression; anxiety; and stress.

[16] A report dated September 15, 2002 from Dr. Toman, the Appellant's then family doctor, accompanied the application. This report diagnosed fibromyalgia, bilateral ankle inversion injury, and anxiety/depression. The report notes that the Appellant has undergone physiotherapy, chiropractic treatment, and massage therapy with no significant improvement and that she remains very restricted. The prognosis was problematic.

Third Application

[17] The Appellant's third application for CPP disability was date stamped by the Respondent on March 28, 2013. Since this application was made after March 1, 2008 and the Appellant has 25 years of pensionable earnings, her MQP for the third application is December 31, 2007 (as opposed to the December 31, 2006 MQP for the subject application). The third application was denied by the Respondent on December 16, 2013 even though by letter dated

June 27, 2013 the Respondent had notified the Appellant that the application will be held in abeyance until the subject application has been completed and all appeal periods have expired.

[18] In her CPP disability questionnaire in support of the third application the Appellant indicated that she last worked as supply adult ESL instructor from October 2008 until June 30, 2009 and that she stopped working because of fibromyalgia; right arm and hand lymphedema; and a severely torn right shoulder tendon. The Appellant also indicated that she was self-employed in a home based tutoring business from January 6, 2012 to June 11, 2012. She stated that she was the director/administrator and occasional tutor for students in her house, that she interviewed clients and tutors, and that she set up tutoring programs. She stopped working in the business because her fibromyalgia, severely torn right shoulder tendon, herniated lumbar disc, and lymphedema were causing constant severe pain and exhaustion.

[19] She claimed to be disabled as of June 30, 2009 and stated that the illnesses or impairments that prevented her from working include fibromyalgia; severe osteoarthritis; rheumatoid arthritis; lymphedema; herniated L2-3 disc; severely torn right shoulder tendon from falls in May 2009 and August 2011. She noted that she has had ten serious falls since November 2008 due to mobility issues related to fibromyalgia. She also noted numerous other health related conditions including irritable bowel syndrome, diabetes, hypothyroidism, sleep disturbance, asthma, severe anxiety, migraine headaches, chronic blurring and tearing of her right eye; acid reflux; allergies; depression; and stress causing chest pain.

[20] A report from Dr. Mody, rheumatologist, incorrectly dated August 30, 2002 [sic...should be Aug 30, 2012] accompanied the third application. Dr. Mody noted that he started treating the Appellant in December 2005 and that he last treated her on May 31, 2012. The report diagnosis fibromyalgia, osteoarthritis, spine degenerative arthritis, and significant worsening of pain after surgery and therapy. The prognosis indicates severe fibromyalgia and that the Appellant's condition is severe and prolonged.

[21] Dr. Mody concluded his report as follows:

This is one patient who in my opinion has made honest efforts to get back into the workforce repeatedly. I just don't think she can do it. She has changed her (illegible),

her hours, [and] her qualifications. She really wants to work but I don't think she can. At this point in time she is truly disabled.

ORAL EVIDENCE

[22] The Appellant reviewed in detail her education and employment history. In April 2001 she fell on black ice at school and injured her back, neck, legs, shoulders, arms, and Achilles tendon. In September 2001 she fell in a classroom and sprained her ankle. In October 2001 she fell on the ramp in a portable and injured her back and sprained her other ankle. In 2002 she lost her footing while on yard duty and reinjured both of her ankles. She stated that she was injured in six falls prior to December 2006.

[23] As a result of her injuries she underwent extensive treatment prior to December 2006 including physiotherapy, chiropractic, acupuncture, massage therapy, cortisone injections, and use of a TENS machine at home. She was diagnosed with fibromyalgia in 2002. She attended a 10 week Arthritis Society program for fibromyalgia in 2003 and joined a fibromyalgia support group in 2005. She has pursued all treatments recommended by her doctors. She also did home exercises as recommended by her physiotherapist.

[24] The Appellant listed her disabling conditions as of December 2006 to include fibromyalgia, osteoarthritis, degenerative disc disease, sleep difficulties, asthma, bronchitis, acid reflux, right eye tear duct blockage, tinnitus, depression (she gained weight after starting anti-depressants in 2003), and anxiety.

[25] She stated, "I have had no life at all since fibromyalgia took over ...I haven't been able to visit family in Winnipeg...I haven't been able to do household work...my husband is exhausted from being my caregiver...I have tried everything ...I have exhausted all efforts." She also stated, "I have made sporadic attempts to go back to work but was only able to work for short periods of times on a part-time basis ...I did everything I could in order to be able to continue working."

[26] During 2005 she worked part-time as an on call supply teacher. She was only called 2-3 times a month and on many occasions she couldn't take the job because she was in too much pain. She found that she couldn't do the bending and low sitting required to work with small

children, and decided that it would be better if she could work with adults. In December 2005 she started a Teaching English Second Language (TESL) course at Humber College. Two weeks into the course she was exhausted all of the time and wanted to quit. This was supposed to be an eight month program and they offered to accommodate her by spreading the course over two years. She went part-time (two days a week for three hours); she was given double the time to write her examinations; she was allowed to write her examinations at the student centre because she couldn't concentrate in the examination room; she was given double the time to write her examinations; and she was allowed to tape record classes. By April 2006 she felt noxious, was exhausted and sick all of the time, and was suffering from severe debilitating pain. By September 2006 she was only able to be at school for two weeks, was missing classes, and was continually getting infections. She was able to change the examination to a written assignment. She finished in April 2007 (graduated in September 2007) and stated that she wouldn't have been able to do the course without the accommodations.

[27] She was diagnosed with cancer in July 2007 but she believes she was suffering from the effects of the breast cancer prior to December 2006. Her breast cancer was aggressive and went quickly from stage I to stage III; she underwent two surgeries and extensive chemotherapy and radiation. She still wanted to teach and persevered through her pain. In the summer of 2007 she was offered a job at Bronte College (working only in the mornings) but she was only able to work for three weeks. In September 2008 she tried to pursue a Masters of Education Degree but was only able to last for two classes. She then tried to work as a supply adult ESL instructor but was only called to teach once or twice a month, and sometimes wasn't able to teach when called. When she did teach it was only for 2-3 hours. She then tried to operate a home based tutoring business in which her husband was the tutor. She did the administrative and financial work; tutored one student for a month; and went with her husband to meet clients. She only worked 2-3 hours a week. She has not been able to take any courses or do any work at all since 2012. She stated, "I wanted to keep trying to work...but I kept getting injured and sick."

MEDICAL EVIDENCE

[28] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[29] On June 10, 2002 Dr. Chow, rheumatologist, noted that the Appellant had recently moved to a new school and that she has had three accidents. In the first, she tripped in school and sprained her right ankle; while in recovery she fell off a ramp in the portable and sprained both ankles; she was off work for ten days in November; in January she slowly increased back to full time but had a flare up of her back pain and needed to go on sick leave from January to March when she returned gradually; in May she fell and twisted her right ankle again which resulted in pain in her neck, back, hips and legs; she had been off work since May 28th. He recommended that she be provided with an ergonomic chair and a seat stand stool.

[30] On July 24, 2002 Dr. Czok, physiatrist, diagnosed myofascial pain syndrome; an inversion injury to both ankles; and possible sacroiliac right joint dysfunction. She recommended a gradual return to work with modified hours.

[31] On November 7, 2005 Dr. Mody reported that the Appellant was diagnosed with fibromyalgia in 2002 by Dr. Chow; that she has a 20-year history of multiple accidents, falls, [and] trauma which periodically have aggravated this condition; that she was doing quite well this summer and decided to go for a demanding, full-time teaching course; and that this unfortunately added to her stress; and that in September she was doing very poorly and had to change to a part-time course. Her concurrent medical history was positive for mild arthritis in her neck and back, heart murmur, asthma, and tendonitis in both elbows. He encouraged the Appellant to work at her own pace; take time out for aerobic exercise; and to go back to physiotherapy that is not only massage and stretching. Dr. Mody diagnosed fibromyalgia and recommended that the Appellant should return to work at half-time modified work.

[32] A pathology consultation report on August 27, 2007 diagnosed invasive right breast duct carcinoma.

[33] On July 4, 2008 Dr. Rajagopal, oncologist, reported to Service Canada that the Appellant was initially assessed with a TICNIM0 breast cancer with 1/17 positive lymph nodes in October of 2007. She was treated with chemotherapy receiving her first treatment on October 25th 2007 with subsequent treatments on November 20th, December 11th, January 2nd, 23rd, and her final treatment February 13th, 2008. She had a number of side effects from treatment and quite severe nausea, malaise, fatigue, alopecia, joint aches and other systemic side effects

which necessitated significant symptom control measures being initiated. She had radiation treatment starting March 17th and completed April 15th, 2008. She was started on ARIMIDEX therapy on April 17, 2008 and has side effects which consist of headache, dizziness, extreme fatigue and no energy. She has ongoing great emotional distress from her cancer diagnosis and treatment and has had a great deal of difficulty recovering emotionally in this regard. Due to this she has had symptoms of exhaustion and inability to return to work. The Appellant was presumed to be cured from her breast cancer and was going on adjuvant management with ARIMIDEX.

[34] On May 31, 2012 Dr. Mody reported that the Appellant has suffered repeated setbacks in her attempts to return to work; that her latest setback has been ongoing for the last 10 months; that she has tried to work from home by home tutoring and tried to go through a course so that she can work from home with no avail; and that at this point she cannot work part time or full time in any capacity.

[35] On May 2, 2013 Dr. Modi reported that the Appellant couldn't go back to any kind of part time or full time work and that she has for some time been severely and permanently disabled.

[36] On November 25, 2014 Dr. Mody reported that she has been seeing the Appellant since 2005; that the Appellant has made multiple attempts to go back to work and has sustained setbacks such as injury, breast cancer diagnosis, and treatment; that overtime her fibromyalgia symptoms have become more severe; and that her functional difficulty has progressed to the point that she has difficulties with Activities of Daily Living (ADLs).

[37] Dr. Mody opined that the Appellant has been close to completely disabled since 2005; that she struggled to get back to work numerous times and has had repeated setbacks; and that the only reason her disability although extensive was not profound between 2006-2012 was because there was this small hope that she would get better and the setbacks in the form of injuries, illnesses including serious infections would cease at some point. Dr. Mody stated, "However, during this period of time-she needed her husband to drive her to work, she had to cut back on her classes as she could not sit for more than a few hrs in the chair, fell a few times

with tears of the rotator cuff, was diagnosed, treated for breast cancer and subsequently developed more issues with pain because of the antiestrogen therapy.

[38] Mr. Consiglio submitted that the Appellant qualifies for a disability pension because:

- a) She has suffered from progressively worsening fibromyalgia since 2002 and has only been able to work on a sporadic basis since 2004;
- b) She was injured in six falls between 2001 and 2006 and as of December 2006 was suffering from severe fibromyalgia and multiple other disabling conditions including osteoarthritis, degenerative disc disease, sleep difficulties, asthma, bronchitis, acid reflux right eye tear duct blockage, tinnitus, depression and anxiety.
- c) Even though her breast cancer was not diagnosed until July 2007 she was suffering from its effects as of December 2006;
- d) She has done everything she can do to resolve her condition and exhausted all efforts in attempting to continue working including completed a TESL program with special accommodations;
- e) The evidence establishes that she has suffered from a severe and prolonged disability as of the December 31 2006 MQP, and continuously thereafter.

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

- a) The evidence does not reveal any serious pathology or impairment that would have prevented the Appellant from performing suitable work as of the December 31, 2006 MQP;
- b) The diagnosis of breast cancer was subsequent to the MQP;
- c) Other issues such as a rotator cuff tear, irritable bowel syndrome, diabetes, headaches, and depression came into play after the MQP;
- d) It is irrelevant that her condition deteriorated after the MQP.

ANALYSIS

[40] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2006.

Severe

[41] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[42] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[43] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2006 she was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[44] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation: *Villani v Canada (Attorney General)*, 2001 FCA 248.

[45] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada*

(*Attorney General*), 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[46] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for her to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[47] It is a question of fact as to when a disability begins and when it becomes severe. In some cases the severity may occur in an instant. In other cases, it may take months or years for the disability to become severe as defined by the CPP. Further, a person may have a severe disability and not realize it because they are immobilized by other causes: *Forrester v MHRD* (November 3, 2003) CP 20789 (PAB).

[48] It is not the purpose of the CPP to provide financial assistance to those undertaking or terminating a course of study. Full-time attendance at an educational institution amounts to a persuasive indication of a capacity to work. However, other factors must be considered, such as the degree of incapacity, the study load, and the difficulty in attendance and participation in the program. Persons suffering from a disability do not remain static. They must occupy themselves, try to improve their lot, and be active. Such activity does not necessarily indicate capacity for regular employment: *Elwood v. MEI* (June 23, 1994) CP 2781 CEB & PG 8541).

Application of Guiding Principles

[49] The Appellant gave compelling evidence of her long-standing multiple disabling conditions as well as her exhaustive efforts at treatment and attempts to keep working. Her evidence is consistent with and supported by the extensive medical documentation in the hearing file. The Tribunal accepts the Appellant's oral evidence without reservation.

[50] It is clear that the Appellant is now severely disabled and the crucial issue is whether her disability had progressed to severe as of the December 31, 2006 MQP (see *Forrester*, supra). The Tribunal is satisfied that it had and that the Appellant is entitled to CPP disability.

[51] The Appellant was diagnosed with fibromyalgia in 2002 and by December 2006 had injured, and reinjured, herself in six falls. She was suffering from multiple conditions including severe fibromyalgia, osteoarthritis, degenerative disc disease, sleep difficulties, asthma, bronchitis, acid reflux, right eye tear duct blockage, tinnitus, depression and anxiety. The Tribunal has considered the cumulative effect of all of her disabling conditions (see *Bungay and Barata*, supra.).

[52] As of December 2006 she had pursued and exhausted extensive treatments including physiotherapy, chiropractic, acupuncture, massage therapy, cortisone injections, and use of a TENS machine at home. She had seen numerous specialists. She had participated in an Arthritis Society fibromyalgia program and had joined a fibromyalgia support group. She was suffering from exhaustion, fatigue, and disabling pain which she believes to have been the effects of the breast cancer which was diagnosed in July 2007. Whether or not these symptoms were the result of her breast cancer, they were real and disabling as of December 2006.

[53] After 2004 the Appellant was only able to work on a sporadic unpredictable basis and her earnings in all years after 2004 were either nil or below the \$3,500 yearly basic exemption. She commendably continued to make efforts to return to gainful employment. Despite her best efforts, she has been unable to pursue with “consistent frequency any truly remunerative occupation” (see *Villani*, supra).

[54] She attempted to upgrade her skills by taking a course in TESL but required two years and special accommodations to complete the course. In view of the required special accommodations, the Appellant’s completion of the post-graduate program between 2005 and 2007 does not indicate capacity for regular employment. She was commendably attempting to improve her lot and stay active (see *Elwood*, supra).

[55] The Tribunal finds, on the balance of probabilities, that the Appellant suffered from a severe disability in accordance with the CPP criteria as of the December 31, 2006 MQP and continuously thereafter.

Prolonged

[56] The Appellant was diagnosed with fibromyalgia in 2002 and her multiple disabling conditions have been extant for many years. Even though the Appellant has diligently complied with and exhausted all treatment modalities her condition has deteriorated.

[57] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[58] The Tribunal finds that the Appellant had a severe and prolonged disability as of 2004, after which time she has only been able to work on a sporadic unpredictable basis. 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 December 2007; therefore, the Appellant is deemed disabled in September 2006. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of January 2007.

[59] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security