Citation: ***T. F. v. Minister of Employment and Social Development,*** **2015 SSTGDIS 117**

Date of Amended Decision: October 30, 2015

File number: GP-14-609

GENERAL DIVISION - Income Security Section

Between:

T. F.

Appellant

and

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

Respondent

Amended Decision by: Heather Trojek, Member, General Division - Income Security Section

Heard by Videoconference on October 20, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

T. F.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on January 18, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.

b) There are gaps in the information in the file and/or a need for clarification.

c) 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.

BACKGROUND

[6] The Appellant was born on X X, X; she was 46 years old on her MQP date.

[7] In her CPP disability questionnaire dated December 12, 2012, the Appellant states that she worked as a correctional officer from October 1997 to March 2006. She stopped working because of stress and pain and because she settled a grievance with her employer. She received long term disability up until September 2008. She has severe arthritis and needs both knees and hips replaced. She is in constant pain. She had carpel tunnel surgery on her right hand in the fall of 2012. She has a left hip replacement booked for May 30, 2012. She has macular degeneration in both eyes. She has no issues with remembering or concentrating. She can walk for one block. Sitting and standing make her knees and hips cramp up. She can do nothing that requires lifting and bending. After she settled her grievance with her former employer she was not able to seek employment because she was in terrible and constant pain. She states that she was no longer able to work as a result of her medical condition as of July 7, 2007 (GD3-83-89).

ISSUE

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[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.

ORAL EVIDENCE

[10] At the hearing, the Appellant confirmed that she graduated from high school and completed a two-year diploma in Law and Security Administration at Mohawk College in 1984.

[11] After graduating from college, she worked as a dispatcher at a truck company, in the money room at Brinks, and as a cashier at Tim Horton's.

[12] In 1997, she became employed as a corrections officer with the government of Ontario. Initially, she worked at the X Detention Centre before being transferred to the X Detention Centre. As a corrections officer, she conducted searches of the inmates and of the building, transported inmates to and from appointments and prepared incident reports relating to misconduct.

[13] Due to a shoulder injury, she sustained in 2001, she was off work for a year and a half. When she returned, she worked at the front door of the jail and was responsible for admitting visitors, police officers and parole officers. She logged these events and, if needed, completed incidence reports.

[14] She stopped working in 2006, due to anxiety and posttraumatic stress syndrome. She went on long term disability and never returned to work. She began taking Celexa for depression in 2005 and she stopped in 2008 or 2009. In 2008, she also began taking Lorazepam 1 mg a night to help her sleep. She continues to take this medication. Between 2006 and 2008 she participated in psychotherapy.

[15] She testified that the pain in her knees, started around 2004. She was referred to Dr. Benson, for pain, in 2004 or 2005; he began giving her cortisone injections in her knees and hips. Her pain continued to get worse. By 2007, her knees were extremely painful. If she needed to get a cortisone injection, she would go to Dr. Benson's quick shot clinic. In terms of medication, she initially took Vioxx; when this was taken off the market Dr. Benson replaced it with Celebrex.

[16] The first time she was referred to the Regional Joint Pain Clinic with Hamilton Health Sciences was in 2007. At that time, she was told that she was too young for a knee replacement. She was encouraged to lose weight and exercise.

[17] In 2008, her mother moved in to her house because she had no place to live. In addition to her mother, she lived with her husband, biological son and stepdaughter who were both in their late teens.

[18] In 2009, Dr. Benson prescribed Tramacet for pain relief. She was taking eight pills a day. He did not want her to take any other pain medication because she was young and he was concerned with addiction and possible long-term side effects.

[19] In January 2009, she was referred back to the Regional Joint Assessment clinic. Again, she was told that she was too young to have a knee replacement. At this point in time she was having difficulty walking, standing and sitting.

[20] She had Durolane injections at the Joint Assessment Clinic; these injections cost $350 each. They were similar to cortisone injections but were supposed to last longer. Some of her injections were paid for under her husband's insurance company, but others she had to pay for out of her own pocket. The team recommended that she lose weight, participate in physiotherapy and start swimming.

[21] In 2009, she went to a doctor for weight loss for seven months. She could not remember his name, but knew that his treatment was covered by OHIP. She was put on a low-calorie diet and was able to lose thirty pounds. Despite her weight loss, she continued to experience pain in her knees and hips.

[22] She went to physiotherapy but it really did not help. She started swimming in her pool and local recreation centre, and continues to do so.

[23] In 2009, her family fostered a six month old baby from the Children's Aid Society. She, her husband and her mother had all previously been approved as foster parents. They were not paid a salary but received payment for room and board. Her husband was designated as the primary caregiver and the cheques from the Children's Aid Society were made payable to him. Her mother was designated as the second caregiver. Her mother had previously been a foster parent.

[24] After the first child left, they took in three more foster children. In 2010, they took in a baby girl, when she left they took in another baby. They never had more than one foster child in the home.

[25] When asked why she would take on this responsibility of being a foster parent when she was in too much pain to work, she testified that she and her husband hoped to adopt a boy named L who had previously been fostered by her mother. They believed staying in the foster care system would increase the probability of them being able to adopt L. They were informed in 2011, that L was not adoptable.

[26] She also testified that she was not solely responsible for taking care of the children. There were four adults who lived in the house and they all that took care of the child. Her husband worked from home and was able to do most of the work. She was able to change a diaper and watch the child in the baby swing while she lay down on the couch. Someone else would have to lift the baby in and out of the swing.

[27] Her husband did all the cooking and the grocery shopping. She would try to do laundry, but her husband would have to take the laundry basket up and down the stairs for her.

[28] By 2010, she had experienced constant pain in her knees and legs. Her knees became swollen to twice their regular size. She was unable to sleep through the night because her knees would seize up; she also got leg cramps and would have to get up two or three times a night. The pain was so bad it would wake her up even though she had taken Lorazepam.

[29] She tried to sleep during the day but she couldn't because her legs would cramp up. She would try and lie down on the couch and sleep for twenty minutes but would have to get up again because she was in pain. She also had pain in her groin which she thought was from her knees; Dr. Wimser told her, later, that it was caused by the arthritis she had in her hips.

[30] In 2010, she also has stabbing pain in her knees; they got so sore that the pain would make her cry. She also felt depressed because her mobility was limited. She had and continues to do everything slowly. Since 2007, she has put ice on her knees or goes in the hot tub to relieve her pain. She also had massage therapy on her knees, but nothing really seems to help, even pain medication.

[31] When asked if she has looked for employment, she testified that she did not look for work because things hurt too much. She did not consider retraining because she could only sit, stand or walk for very short periods of time. She thinks no one would hire her because she has too many problems that needed to be fixed. In 2010, she could not even take care of a baby on her own. As a result, she knew she would be unable to work. Working would put too much stress on her joints.

[32] When asked, if she could perform a sedentary job, she testified that even after her hip replacements, sitting still causes her pain. She cannot sit in one place too long; she is constantly shifting and moving when she sits, because she gets pain in her knees and hips.

[33] In 2012, she had both her hips replaced by Dr. Wismer; he is the only doctor that is willing to do surgery on her. All the other doctors felt she was too young. After her hip surgeries, she participated in extensive physiotherapy. Although she obtained more mobility in her hips, she still experiences pain and finds it difficult to walk, sit and stand.

[34] Dr. Wismer recommended that she have her hip surgery before her knee surgery. She was supposed to have knee replacement surgery on both of her knees this year but her son passed away and it has been postponed.

[35] Dr. Wismer told her that there is no guarantee that things will improve significantly after her knee surgery; and she will likely need additional knee replacements in the future. She hopes that knee surgery will help, but she does not expect that it will help enough that she will be able to go back to work.

[36] She testified that "I wish that I could work. I can barely function. It always hurts. I'm not able to do anything."

[37] At the end of the hearing she said that when asked Dr. Benson to write her a letter for CPP disability claim; she explained to him that the time period in dispute was prior to the end of 2010. He told her that he did not believe that she would have been able to work at any job before or after 2010 and he did not believe that anyone would hire her in her condition.

MEDICAL EVIDENCE

[38] An x-ray of the Appellant's knees conducted on February 12, 2007 revealed severe bilateral medial and lateral compartment degenerative narrowing with subchondral sclerosis (GD1-7).

[39] An x-ray of the right knee conducted on January 6, 2009 revealed degenerative changes in the medial and patellofemoral compartment and osteophytes in the femur, tibia and patella (GD1A-5)

[40] The Appellant was assessed by Regional Joint Assessment Centre which is part of Hamilton Health Sciences on January 6, 2009. According to a report prepared by Ms. Sampa Samanta, physiotherapist, the Appellant reported that her knee pain had been worsening over the last year. She rated her pain at an 8/10 on the numeric pain scale in both knees. The pain in her left knee is sharp and in the right knee is aching in nature. She has pain at night and in the morning. Her knees lock up, swell and give away. Her symptoms are aggravated by weight bearing activities such as walking, stairs and standing. The impression of the team is that the Appellant has bilateral moderate to severe knee osteoarthritis. Due to her age, she was not considered to be an ideal candidate for joint replacement surgery at that time. Dr. Elliott gave her a Durolane injection in the left knee which was most symptomatic; weight loss, physiotherapy and additional injections were recommended (GD3-38-39).

[41] The clinical notes from the Joint Assessment Clinic confirm that Appellant had bi-lateral knee injections in January/February 2010, which lasted five months. She had a third injection in her right knee in August 2010 (GD3-53).

[42] An x-ray of the right knee conducted on September 7, 2010 revealed narrowing of the medial compartment of the knee joint on both sides with bony sclerosis and spur formation; osteoarthritis was found in both knees (GD1-A-6).

[43] An MRI of right knee conducted on May 17, 2011 revealed severe tri-compartmental degenerative change; complex and essentially macerated appearance to the posterior horn of the medial meniscus was reported (GD1-64).

[44] Dr. Sadler, orthopedic surgeon, states in November 2011, that the standing films show severe arthritis on the left and complete obliteration of the medical joint space on the right. He advised the Appellant to have a right sided unicompartmental arthroplasty on the right side rather than a full or partial knee replacement at this time (GD3-77).

[45] An MRI of the right knee conducted on July 15, 2012, revealed marked medial compartment osteoarthritic with grade 4 articular cartilage loss, prominent osteophytes and posterior horn meniscal tear, mild lateral compartment osteoarthritis, moderate patellofemoral osteoarthritis with prominent osteophytes and some patellar cartilage loss (GD1A-7).

[46] An MRI of the left knee conducted on July 15, 2012 revealed extensive grade 4 articular cartilage loss in the femur and the tibia, degenerative radial tear adjacent in the medial meniscus, prominent anterior femoral, tibial oeteophytes and subchondral sclerosis (GD1A-8).

[47] Bi-lateral knee x-ray conducted on August 17, 2012 revealed bilateral tri-compartmental osteoarthritis, severe osteoarthritis of the right knee and moderate osteoarthritis of the left knee (GD1A-9).

[48] In August 2012, the Appellant was assessed by Dr. Wismer, orthopaedic surgeon, at the Regional Joint Assessment Program regarding bi-lateral knee pain. The Appellant advised him that she tried cortisone injections in the past as well as Durolane; but they stopped working. He confirms that he saw the Appellant at the Regional Joint Assessment Program in 2007 at which time her knees had better mobility than she demonstrated currently. He concludes that she has advanced osteoarthritis of both knees with the right side being worse than the left. She also has moderately advanced osteoarthritis of the hips which is impacting her quality of life and function. The Appellant agreed to proceed with right knee replacement (GD3-81).

[49] Dr. Lorin Gilbert Harding, family doctor, in a CPP disability report dated January 26, 2013, confirms that he has known the Appellant since November 26, 2007. He diagnoses the Appellant with osteoarthritis, carpal tunnel syndrome, BMI 41, premature menopause and hypothyroid. In terms of functional limitations he indicates that the Appellant has difficulty ambulating and performing routine chores. Her treatment regime includes physiotherapy, medication, weight loss and pending surgery. His prognosis for her recovery is guarded (DG3-72-75).

[50] Dr. William Bensen, rheumatologist, in a letter dated August 26, 2013, states he has seen the Appellant regarding her osteoarthritis and significant soft tissue pain during the period in which her disability is in dispute. He states that "during this period we saw her on multiple occasions and believe it is likely that any sort of work for which she would be trained would be impossible." He believes she was and continues to be functionally disabled (GD1-6).

SUBMISSIONS

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

a) The medical evidence she submitted including x-rays of her knees and the report of her rheumatologist, Dr. Benson, support her claim;

b) She has medical conditions which prevent her from doing all types of work including sedentary employment;

c) She is in constant pain and therefore has not attempted to return to work.

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

a) The medical evidence which was produced prior to her MQP does not support that she was unable to perform suitable work prior to her MQP;

b) There is no evidence that she has attempted to perform suitable alternative type work;

c) She will likely regain a capacity to work after her knee surgery; her condition can therefore not be found to be prolonged.

ANALYSIS

[53] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2010.

Severe

[54] In order to establish entitlement to a disability pension an Appellant must submit objective medical evidence to support his or her claim. When an Appellant has an illness or

condition which is progressive in nature, the Tribunal must determine if, at the time of the MQP, it met the severity test as defined by the CPP. This is a difficult task.

[55] The Tribunal carefully reviewed and was persuaded by the medical evidence submitted by the Appellant. The pre-MQP x-rays and the 2009 report of the Regional Joint Assessment Centre, in the Tribunal's opinion, clearly establish that the Appellant had significant pathology in both her knees. This is evidenced further in the MRI of the Appellant's right knee, which was conducted in May 2011, less than six months after her MQP, which revealed "severe" tri-compartmental degenerative change; and described the appearance of the posterior horn of the medial meniscus as "essentially macerated" in appearance.

[56] The Tribunal also found the Appellant to be a credible witness and put significant weight on the evidence she gave at the hearing. The Appellant's testimony was detailed, straightforward, believable and consistent with the medical evidence contained in her file. At the hearing the Appellant testified that in 2010 she was in constant pain and experienced difficulty walking, standing, sitting and sleeping because of arthritis in both her knees. According to the 2009 report of the Regional Joint Assessment Centre, which was written almost two years prior to her MQP, the Appellant was already experiencing pain on a level of eight out of ten on the numeric pain scale.

[57] In addition to having aching and stabbing pain in her knees, the Appellant testified that she also had severe pain in her hips. This was confirmed by Dr. Benson who stated in his letter dated August 26, 2013, that during the time period in dispute, the Appellant had significant capsulitis and bursitis over her hips requiring injections; and by the fact that Dr. Wismer reported in August 2012, less than two years after the MQP date, that the Appellant had moderately advanced osteoarthritis in both hips.

[58] Based on the medical evidence and the testimony of the Appellant, the Tribunal finds, on a balance of probabilities, that the Appellant had arthritis in her knees and hips, which was significant enough that it prevented her from regularly participating in substantially gainful employment.

[59] The Tribunal did consider whether or not the Appellant's involvement in foster parenting prior to her MQP was evidence that she had some capacity to work prior to her MQP

and concluded that it did not. At the hearing the Appellant explained that although she assisted, she was not the primary caregiver, for the foster children who were cared for in her home. In addition to the Appellant, four other adults including her mother lived in the house and contributed to caring for the infants. The Appellant testified that she sometimes changed a diaper and could monitor a child in a baby swing while she lay on the coach. This does not, however, in the Tribunal's opinion, equate to a capacity to perform duties in a competitive marketplace. The Tribunal, as a result, found no evidence that the Appellant had any capacity to work prior to her MQP; by virtue of this, she is exempt from establishing that she made reasonable efforts to obtain suitable alternative employment.

[60] The Tribunal acknowledges that the Appellant is young, well-educated and has transferrable skills which would assist her in finding employment in today's market place (*Villani v. Canada (A.G.)*, 2001 FCA 248). These are however, pieces of evidence which must be weighed in light of all the other evidence, including the limitations caused by the Appellant's medical conditions. The Appellant testified that when she sits she gets pain in her hips and knees; she is unable to sit without pain and/or without constantly moving and changing positions.

[61] Based on the totality of the evidence the Tribunal finds, that despite her age and work experience, the Appellant's medical condition prevent her from regularly participating in any form of employment including part-time sedentary type work.

[62] In order to be entitled to a disability pension an Appellant must also demonstrate that he or she has actively participated in recommended treatment. The medical evidence confirms that the Appellant consulted with numerous specialists, underwent diagnostic imaging, took prescription medication and had injections for pain relief in her knees and hips. At the hearing the Appellant testified that she swims, participated in physiotherapy and lost weight. The Tribunal finds that the Appellant has, on a balance of probabilities, been compliant with treatment and has satisfied this component of the severity test.

Prolonged

[63] In addition to finding that the Appellant's disability is severe, the Tribunal must also determine whether it is prolonged.

[64] The Appellant's disabling condition has persisted since January 2009. Despite her participation in treatment including two hip replacements her condition has not improved significantly.

[65] The Respondent submits that after her knee replacement surgery, it is likely that the Appellant will regain a capacity to work. The Tribunal does not, however, agree. Although the Appellant's condition has improved after her hip surgery, her mobility is still restricted and she continues to feel pain. The Tribunal finds no evidence to conclude that after having both hips and both knees replaced that the Appellant will likely be able to return to the workforce and be able to participate in substantially gainful employment.

[66] In the Tribunal's opinion, the Appellant's disability is therefore long continued and of indefinite duration.

CONCLUSION

[67] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2009 when she was assessed at the Regional Joint Assessment Centre. 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 ~~January 2014~~ January 2013; therefore the Appellant is deemed disabled in ~~October 2010~~ October 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of ~~February 2011~~ February 2012.

[68] The appeal is allowed.

Heather Trojek
Member, General Division - Income Security