



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MB v Minister of Employment and Social Development*, 2015 SSTGDIS 147

Date: November 3, 2015

File number: GP-13-2946

GENERAL DIVISION - Income Security Section

Between:

M. B.

Appellant

and

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

Respondent

Decision by: Gerry McCarthy, Member, General Division - Income Security Section

Heard by Teleconference on October 15, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. B. (the Appellant)

INTRODUCTION

[1] The Appellant's application for a Canada Pension Plan (CPP) disability pension was date stamped by the Respondent on April 8, 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 initially scheduled for a videoconference for the following reasons: The Appellant will be the only party attending the hearing; videoconferencing is available within a reasonable distance of the area where the Appellant lives.

[3] On June 10, 2015, the Appellant requested that her videoconference hearing be changed to a teleconference hearing, because she could not travel. On August 26, 2015, the Appellant requested that her hearing be scheduled one-week ahead of the scheduled hearing date of October 22, 2015. The hearing scheduled for October 22, 2015, was subsequently adjourned and re-scheduled for October 15, 2015. The hearing on October 15, 2015, proceeded by way of teleconference as requested by the Appellant.

LAW

[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, 2014.

[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

Oral Evidence

Employment History, Medical Condition and Treatment

[9] The Appellant was 37-years-old on the date of the hearing. She testified she had no dexterity in her left hand and it was a pre-existing condition. She explained that in 2003 she had an accident and sustained an injury to her right side.

[10] The Appellant further indicated she had tried rehabilitation. She also indicated that she started working in 2007, but had severe problems working. She said after 2010 she tried to go back to work on Tridural and Celebrex. She said she could not work on Tridural. She indicated that the weakness in her arm was severe. She indicated she could not work. She testified that the pain was becoming worse at that point.

[11] The Appellant further indicated she had a back injury and subsequent problems with sitting. She explained that she was on the list to see a surgeon, but the procedure was “risky.” She explained that a doctor advised her to go off work. She further indicated she had problems with sleeping and anxiety.

[12] The Appellant indicated she had physiotherapy from 2006 to 2010. She said from 2010 to 2013 she had some physiotherapy on her arm. She indicated she had been diagnosed with a “labral tear.” She indicated that Dr. Reesor’s report was a full medical report. She explained that Dr. Senior’s report was based on limited medical information.

[13] The Appellant explained that after her litigation concluded she could not use her arm. She said that writing examinations was difficult. She further indicated she had pain, osteoarthritis, anxiety, and depression.

[14] The Appellant indicated that in September 2014 she could not continue at law school in England. She said she came back to Canada and stayed with her parents. She said she moved back to X in July 2015. She said she tried massage therapy. She indicated she had been on long-term disability benefits from February 2012 to August 2014. She said her arm became worse from July 2010 to February 2012. She explained that she had not done any schooling since September 2014.

[15] The Appellant said she currently took Celebrex, Tridural and Ibuprofen. She explained that she took hot baths and massage therapy for her pain. She explained that she had a high sensitivity to prescription drugs and discontinued some pain medications. She indicated she had not been to a pain clinic. She indicated that she managed her pain by stopping her activity.

[16] The Appellant testified that she first saw Dr. Reesor in August 2012 and last saw him in November 2014.

Education

[17] The Appellant described the difficulties she had at law school in X, England. She said she had difficulties writing and typing due to her cerebral palsy. She indicated she could only use

one arm. She indicated the pain in her arm was an “8” on a scale of 1-to-10. She said the pain varied with activity.

[18] The Appellant testified she finished her examinations at law school in X (England) in August 2014. She said she only successfully completed three courses, but they were not credit worthy in Canada. She said she had three courses where she finished under the required 50 percent mark. She said she was unsuccessful in two other examinations. She also indicated there were two courses that were incomplete. She said she was bedridden after she finished her examinations.

Daily Activities

[19] The Appellant testified that she did not drive. She said she had difficulties dressing and bathing. She indicated her walking was limited due to her bad back. She indicated she had limited use of the computer. She further indicated she did not travel.

Documentary Evidence

[20] In a Questionnaire for Disability Benefits (dated April 8, 2013) the Appellant indicated she had a Bachelor’s degree (Honours) in Criminology and Law. She reported that she was a courtroom clerk for the “X” from March 20, 2007, to February 11, 2012. She explained that her health deteriorated in July 2010 and doctors recommended accommodations at work, but they were not followed. She indicated that her overall health became weaker. She indicated she was receiving benefits from “X.” She explained that she had a right shoulder, back, and neck injury that resulted from a fall on November 8, 2003. She indicated she had chronic pain due to her injury and it was complicated by cerebral palsy. She indicated she could not sit for long periods of time due to pain. She explained that she had no fine motor or dexterity skills in her left hand. She indicated she took Celebrex, Tridural, and Ibuprofen. She indicated she had attended massage therapy. She further indicated she had reduced her physiotherapy sessions due to financial constraints.

[21] In a CPP Medical Report (dated stamped on April 12, 2013) Dr. Neil Rogers diagnosed the Appellant with right shoulder chronic pain from a previous accident. He further indicated the Appellant had cervical spine osteoarthritis and cerebral palsy. He referred to the Appellant’s

lower back chronic injury. He further indicated the Appellant had attended physiotherapy and massage therapy. He wrote that the Appellant had chronic pain in the right shoulder and spine.

[22] On May 14, 2013, Dr. M.S. Acharya (Physical Medicine and Rehabilitation) reported the Appellant had persistent supportive tissue origin pain involving the right upper extremity, cervical and paracervical structures as well as pectoral and parascapular structures on the right side (following a trip and fall accident on November 8, 2003). He further explained the Appellant had overuse phenomena with occupational as well as day-to-day life activities, because she did not have a functional upper extremity on the left side with previous history of cerebral palsy. He further indicated the Appellant had associated impairment of sleep, activity tolerance, and possibly mood because of a recent litigation trial conclusion which had been awaited for at least for the last couple of months.

[23] On July 30, 2013, Dr. Acharya reported that the Appellant had persistent supportive tissue area pain involving her right upper extremity, cervical and paracervical structures, along with symptoms in the pectoral and parascapular structures on the right side. He indicated the Appellant had a trip and fall accident on November 8, 2003. He further wrote that the Appellant had overuse phenomena with her occupational as well as her day-to-day life activities. He explained that the Appellant had impairment of her sleep, activity tolerance and possibly her mood which compounded her overall pain experience and produced limitations in her ability to attend work and perform her daily activities. He further indicated the Appellant had moderate physical restrictions and her impairment was partial, but not complete.

[24] In a report from the X Assessment Centre (dated November 12, 2013) it was confirmed that the Appellant was enrolled in a full-time post-graduate law course at the University of X in England which started in September 2013.

[25] On June 2, 2014, Dr. Jackie Senior (Consultant Occupational Health Physician Occupational Health Physician in X, England) reported that because of the chronic nature of the Appellant's injury and her underlying cerebral palsy it was likely that she would have difficulty with regular attendance. She reported that the Appellant would difficulty with prolonged sitting and lifting objects repetitively of greater than 2 kilograms. She further explained that the

Appellant would also have difficulty working with her right arm for prolonged or sustained periods above shoulder height.

[26] On January 23, 2015, Dr. K. Reesor (Psychologist) wrote that “DSM 5” diagnosed the Appellant with major depressive disorder, adjustment disorder with anxiety, and somatic symptom disorder with predominant pain (persistent). He wrote that the Appellant’s disorders were in the setting of congenital left hemiparesis (mild) an injury resulting in a Grade 1 right acromioclavicular joint separation, cervical strain, discogenic changes, cervical spine, cervical and thoracic spine dysfunction, chronic soft tissue problems right shoulder and myofascial pain syndrome. He reported that the Appellant’s impairments had resulted in a repeated inability to maintain or sustain any type of successful occupational or academic endeavors despite accommodations and attempts to pursue productive activity. He wrote that the Appellant had severe restrictions, limitations, and activity intolerance that despite her own efforts and intent prevented her from doing her work as a court room clerk, successfully undertaking and completing academic work, and doing any other job that would be commensurate with her education, training, and experience. He wrote that he could not envision any viable, feasible, or practical accommodations that could be put in place that would enable the Appellant to return to her work as a courtroom clerk or to be able to be successful in returning to her educational pursuits. He further wrote that “very clearly” the Appellant’s physical/ functional and psychological disabilities, restrictions, limitations, and impairments were of a chronic and persistent nature.

SUBMISSIONS

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

- a) More weight should be placed on Dr. Reesor’s report, because he accessed all her medical documents.
- b) Dr. Reesor’s report addressed what she was dealing with now.
- c) Dr. Senior’s report was limited and she was not a treating physician.
- d) She had no fine motor or dexterity skills in her left hand.

- e) She had chronic pain and anxiety.
- f) She had difficulty sitting.

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

- a) The Appellant's right shoulder impairment had been deemed a moderate impairment and not a full one according to Dr. Acharya.
- b) The Appellant submitted an extensive evaluation from X University in England where she had been accepted into a full-time law degree program scheduled to begin in the Fall of 2013. Not only was the Appellant capable of suitable work based on her clinical findings, she was capable of full-time university which in itself was indicative of capacity and equivalent to the commitment required for full-time work. This very young, highly educated claimant was not disabled under the terms of the CPP disability program.
- c) The Appellant bears the onus of proving she suffered from a severe and prolonged disability prior to the expiration of her MQP. However, this has not been achieved as capacity to attend full-time university in X England following the demanding and autonomous curriculum of law school was indicative of capacity to work.
- d) The partial impairment of a hand or limb by a person who was otherwise an able bodied person did not prevent that person from seeking and obtaining employment especially when considering age, education, and level of transferable skills.
- e) It was acknowledged Dr. Reesor was supportive of the Appellant, but the examination findings did not show that she suffered from a severe psychological condition which would preclude her from suitable work.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2014.

Severe

[30] 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.

[31] In order to analyze the Appellant's capacity to work, the Tribunal will look at the Appellant's circumstances and her medical condition. The Tribunal wishes to emphasize that the severe criterion refers to the capacity to work and not to the diagnosis of the disease or medical condition (*Klabouch v. Canada [MSD]*, 2008 FCA 33).

[32] The Tribunal finds the Appellant worked as a courtroom clerk for the "Ministry of the Attorney General" from March 20, 2007, to February 11, 2012. The Tribunal recognizes the Appellant went on long-term disability benefits starting in February 2012. The Tribunal finds the Appellant enrolled at law school in X (England) and started her studies in September 2013. The Tribunal finds the Appellant wrote her examinations in August 2014 at law school in X (England) and then returned home to Canada in September 2014. Tribunal realizes the Appellant only completed three courses successfully at the law school in X (England). The Tribunal further recognizes the Appellant did not return to law school in England and has not done any schooling since September 2014. The Tribunal realizes the Appellant has submitted she cannot work and has chronic pain and anxiety.

[33] The Tribunal recognizes several key reports in the Appeal file on the Appellant's medical condition. First: On April 12, 2013, Dr. Rogers diagnosed the Appellant with right shoulder chronic pain from a previous accident. He further indicated the Appellant had cervical spine osteoarthritis and cerebral palsy. He referred to the Appellant's lower back chronic injury. He further indicated the Appellant had attended physiotherapy and massage therapy. He wrote that the Appellant had chronic pain in the right shoulder and spine. The Tribunal places some weight

on this report, because it provided a detailed diagnosis of the Appellant's medical condition approximately 14-months after she stopped working as a courtroom clerk in February 2012.

[34] Second: On July 30, 2013, Dr. Acharya reported that the Appellant had persistent supportive tissue area pain involving her right upper extremity, cervical and paracervical structures, along with symptoms in the pectoral and parascapular structures on the right side. He indicated the Appellant had a trip and fall accident on November 8, 2003. He further wrote that the Appellant had overuse phenomena with her occupational as well as her day to day life activities. He explained that the Appellant had impairment of her sleep, activity tolerance and possibly her mood that compound her overall pain experience and produced limitations in her ability to attend work and perform her daily activities. He further indicated the Appellant had moderate physical restrictions and her impairment was partial, but not complete. The Tribunal places some weight on this report, because it was forthright and detailed about the Appellant's functional limitations.

[35] Third: On January 23, 2015, Dr. Reesor (Psychologist) wrote that "DSM 5" diagnosed the Appellant with major depressive disorder, adjustment disorder with anxiety, and somatic symptom disorder with predominant pain (persistent). He wrote that the Appellant's disorders were in the setting of congenital left hemiparesis (mild) an injury resulting in a Grade 1 right acromioclavicular joint separation, cervical strain, discogenic changes, cervical spine, cervical and thoracic spine dysfunction, chronic soft tissue problems right shoulder and myofascial pain syndrome. He reported that the Appellant's impairments had resulted in a repeated inability to maintain or sustain any type of successful occupational or academic endeavors despite accommodations and attempts to pursue productive activity. He wrote that the Appellant had severe restrictions, limitations, and activity intolerance that despite her own efforts and intent prevented her from doing her work as a court room clerk, successfully undertaking and completing academic work, and doing any other job that would be commensurate with her education, training, and experience. He further wrote that he could not envision any viable, feasible, or practical accommodations that could be put in place that would enable the Appellant to return to her work as a courtroom clerk or to be able to be successful in returning to her educational pursuits. He also wrote that "very clearly" the Appellant's physical/ functional and psychological disabilities, restrictions, limitations, and impairments were of a chronic and

persistent nature. The Tribunal recognizes this report was dated several weeks after the Appellant's MQP date. Nevertheless, the report was based on an assessment of the Appellant from November 2014 which was before her MQP date. The Tribunal places considerable weight on this report, because it was forthright that the Appellant's physical/ functional and psychological disabilities, restrictions, limitations, and impairments were of a "chronic and persistent nature."

[36] The Tribunal does realize the Appellant testified at length about her chronic pain, anxiety and significant limitations. Was the Appellant's testimony credible? The Tribunal accepts that the Appellant's testimony was credible since it was exceptionally detailed and forthright. On this point, the Tribunal relies for guidance on *Pettit v. MHRD* (April 1998), CP 4855 & PG 8711, where it was explained that the oral testimony of the applicant can be, and very often is, material to the resolution of the matter. In that decision, it was explained that if deemed credible the applicant's testimony is entitled to due weight and serious consideration. The Tribunal further relies for guidance on *Chase v. MHRD* (November 5, 1998) CP 6540, where it was explained that the subjective experiences of the applicant in regard to the pathology, with resulting consequences on his or her ability to engage in regularly substantially gainful occupation, are important considerations

[37] The Tribunal accepts that the Appellant could not return to her job as a courtroom clerk. The Tribunal further accepts that the Appellant could no longer pursue her studies at law school in England. Still, the question remains: Was the Appellant incapable regularly of pursuing any gainful occupation on or before her MQP date of December 31, 2014? In order to make this assessment, the Tribunal must look at the Appellant's circumstances in a "real world" context (*Villani v. Canada (A.G.)*, 2001 FCA 248)

[38] The Tribunal finds the Appellant was only 37-years-old on her MQP date. The Tribunal further recognizes the Appellant has a good education. Nevertheless, the Appellant's life experience with cerebral palsy, chronic pain, anxiety, and a major depressive disorder are important considerations in assessing her capacity to work. Was the Appellant incapable regularly of pursuing any gainful occupation on or before her MQP date? The Tribunal finds that on a balance of probabilities the Appellant was incapable regularly of pursuing any gainful

occupation on or before her MQP date in light of her failed attempt at law school, significant physical limitations, chronic pain, anxiety and major depressive disorder.

[39] At this point, the Tribunal wishes to emphasize the guidance provided by the Pension Appeals Board in *MNHW v. McDonald* (October 1988), CP 1527 CEB & PG 8564. In that decision, it was explained that the scope of section 42 (2) (a) of the CPP is not restricted solely to mental disability or to physical disability, but includes a disability resulting from a cumulative combination of both mental and physical aspects. The Tribunal accepts that in Appellant's case she has a disability resulting from a cumulative combination of both mental and physical aspects.

[40] The Tribunal does recognize the Appellant has been diagnosed with numerous medical impairments, including a major depressive disorder, adjustment disorder with anxiety, and somatic symptom disorder with predominant pain. Also: Dr. Reesor described the Appellant's disorders were in the setting of congenital left hemiparesis (mild) an injury resulting in a Grade 1 right acromioclavicular joint separation, cervical strain, discogenic changes, cervical spine, cervical and thoracic spine dysfunction, chronic soft tissue problems right shoulder and myofascial pain syndrome. On this point, the Tribunal further relies for guidance on *Bungay v. Attorney General of Canada* (2011, FCA 47) where it was explained that the applicant's condition must be assessed in its "totality." In that decision, the Federal Court of Appeal (FCA) wrote that: "All of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment."

[41] The Tribunal must also address the question of whether the Appellant has tried to mitigate her medical condition with treatment. The Tribunal recognizes the Appellant has attempted physiotherapy and consulted with numerous doctors. The Tribunal further recognizes the Appellant explained that she reduced her physiotherapy sessions due to financial constraints. The Tribunal recognizes this as a reasonable explanation. Under the circumstances, The Tribunal accepts that the Appellant has attempted to mitigate her medical condition with treatment.

[42] The Tribunal does realize the Respondent submitted that the Appellant attended full-time university at law school in X (England) and this was indicative of a capacity to work. However, the Tribunal has assessed the Appellant's personal circumstances and determined that the Appellant's attendance at law school in X (England) was a failed attempt at schooling.

Furthermore: The Tribunal has assessed the Appellant's capacity to work in a "real world" context and determined that on a balance of probabilities the Appellant was incapable regularly of pursuing any substantially gainful occupation on or before her MQP date in light of her experience with cerebral palsy, chronic pain, depression and anxiety.

[43] After considering all the evidence, the Tribunal finds it more likely than not that the Appellant had a severe and prolonged disability in November 2014 which was before her MQP of December 31, 2014. The Tribunal makes this finding in light of the report from Dr. Reesor that the Appellant's physical/ functional and psychological disabilities were of a chronic and persistent nature.

[44] In short: The Tribunal finds that on a balance of probabilities the Appellant was incapable regularly of pursuing any substantially gainful occupation as of November 2104. The Tribunal makes this finding based on the medical report from Dr. Reesor. The Tribunal also makes this finding based on the Appellant's oral testimony about her functional limitations and chronic pain.

Prolonged

[45] The Appellant must demonstrate that her disability is prolonged. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. The Tribunal has considered all the medical reports in the Appeal file and places considerable weight on the report from Dr. Reesor. The Tribunal particularly wishes to emphasize that Dr. Reesor wrote that "very clearly" the Appellant's physical/ functional and psychological disabilities, restrictions, limitations, and impairments were of a "chronic and persistent nature." The Tribunal also places considerable weight on the Appellant's oral testimony about her functional limitations, anxiety, depression and chronic pain. Based on the report cited above (and the Appellant's oral testimony) the Tribunal finds it is more likely than not that the Appellant's disability is prolonged.

[46] In the final analysis, the Tribunal accepts there is little likelihood of the Appellant's condition improving and finds the Appellant's disability is long continued and of indefinite duration.

CONCLUSION

[47] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2014 when Dr. Reesor reported that the Appellant's physical/ functional and psychological disabilities were of a chronic and persistent nature. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of March 2015.

[48] The appeal is allowed.

Gerry McCarthy

Member, General Division - Income Security