

Citation: *S. C. v. Minister of Employment and Social Development*, 2016 SSTGDIS 6

Date: January 14, 2016

File number: GP-14-3599

GENERAL DIVISION - Income Security Section

Between:

S. C.

Appellant

and

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

Respondent

Decision by: Freda Shamatutu, Member, General Division - Income Security Section

Decided on the record on January 14, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 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 by On the Record for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) The issues under appeal are not complex.
- c) There are no gaps in the information in the file or need for clarification.
- d) Credibility is not a prevailing issue.
- 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.

[6] In order to qualify for a disability pension, a claimant cannot be in receipt of a retirement pension.

[7] Pursuant to subsection 66.1 (1.1) of the CPP and subsection 46.2(2) of the CPP Regulations, an individual can request a withdrawal of a retirement pension in favour of a disability pension if he or she is deemed to be disabled before the month the retirement pension became payable.

ISSUE

[8] The Appellant's MQP ends in December 2016. She began receiving a retirement pension in March 2014. In order to qualify for a disability pension, she cannot be in receipt of a retirement pension. She requested a withdrawal of a retirement pension in favour of a disability pension.

[9] To be entitled to a disability pension she must be found to be disabled within the meaning of the CPP, on or prior to February 2014 which is the month prior to the month she began receiving her retirement benefits.

[10] 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 February 28, 2014.

EVIDENCE

[11] The Appellant was 59 years of old when she applied for CPP disability pension benefits. She has a grade 13 high school education and completed two years of university. Her record of earnings shows that she has consistently worked since 1973. Her employment history includes

working as a driver/maintenance worker from April 2008 to December 14, 2010. She was on employment insurance benefits from December 20, 2010 to March 10, 2011 and from December 10, 2012 to March 3, 2013. At the time of her application, she was working full time for Steel City Surplus in Hamilton. She indicated in the Questionnaire attached to her application and dated October 2, 2013 that she worked full time, 9 hours per day for 5 days a week. Her job required lifting heavy objects and standing on concrete floors for 9 hours at a time. Due to her medical condition, she increasingly required assistance with lifting heavy objects and had increased difficulty climbing stairs and getting in and out of a van. She had minimal accommodation from her employers due to the nature of her work environment. She did not miss a lot of time from work except for the "odd day". In March 2014 she began receiving early retirement benefits. She however continued working. She stopped work in June 2014 due to severe pain and swelling of her right knee, balance issues, trouble with her knee giving out after standing for long periods of time and pain after sitting for 5 minutes. Records on file document that she lived on her own and had a dog. She is right hand dominant.

[12] The Appellant reported that the impairments that prevent her from working are osteoarthritis of the left knee for which she underwent full knee replacement surgery in December 2010 and revision surgery in December 2012. Despite the surgeries, she continues to suffer from severe pain and swelling. She has had a general deterioration in her ability to perform her duties and a marked reduction in her functional abilities. Her expectation of improvement has diminished.

[13] As a result of issues with her left knee, she loses balance frequently and her knee gives out after lengthy periods of standing. She has pain after being seated for more than 5 minutes and constant pain while standing or climbing stairs and when lifting heavy boxes. The pain and swelling in her knees increases as the day progressed. This affected her job which required a lot of standing, walking, climbing and lifting boxes weighing over 50 lbs. She attempted to maintain a level of employment consistent with her level of disability but the condition continued to worsen and to limit her ability to continue working.

[14] She reported her functional limitations as: sitting/standing 3-5 minutes before pain and swelling begin. Walking 2 city blocks on a good day. Lifting or carrying exacerbates her knee

pain. Frequent imbalance creates difficulty when reaching. She is unable to bend. She needs a grab bar in the shower and toilet. She has some difficulty with remembering (her brother and her paternal grandfather died of Alzheimer's disease). She has increasingly shortened periods of concentration of 20 minutes maximum. Her sleep is difficult due to her knee pain. She cannot sleep through the night without waking several times. She can drive for 15 minutes with pain and has difficulty getting in and getting out of a car. She can perform light minimal house work.

[15] The Appellant reported her other medical issues as including tendonitis in her right hand; partially torn supraspinatus in her left shoulder; varicose veins in both legs; bipolar and hypothyroid. As a result of her medical issues she stopped running in November 2010; stopped playing tennis in August 2010; stopped cycling in August 2010 and can only go on short walks of approximately 2 blocks. She also stopped volunteering at a community centre where she used to assist seniors. She has since developed problems with her right knee and was diagnosed with severe right knee osteoarthritis. She underwent total knee replacement of the right knee in January 2015.

[16] Her medical history includes cholecystectomy, appendectomy, left shoulder surgery, carpal tunnel and meniscectomy on the medial side of her left knee in 1976. She has no history of angina, myocardial, infarction hypertension, diabetes or cerebrovascular disease.

[17] Her medications include levothyroxine, venlafaxine, and divalproex and Advil one tablet as needed. She uses a cane after extended periods of sitting.

[18] The Appellant was diagnosed with advanced arthritis of the left knee in 2010. An x-ray of the left knee dated November 23, 2010 revealed tri-compartmental degenerative changes; significant joint space narrowing of the medial tibiofemoral compartment with prominent osteophytosis; marked narrowing of the lateral patellofemoral compartment joint space with lateral patellar tilt and subluxation and small knee joint effusion. Her leg lengths were noted to be symmetrical. Evidence of mild genu varus deformities bilaterally, slightly more prominent on the left side was noted. On the same day, the Appellant underwent a preoperative medical assessment to see if she was a surgical candidate. Dr. A Panju after physical examinations and reviewing her medical history approved the surgery and reported that overall she was very stable and had no cardiorespiratory problems and no cardiac symptoms.

[19] On December 13, 2010, Dr. Mitchell Winemaker an orthopedic surgeon reported that the Appellant had ongoing pain in her knee for nine months. He said she had pain with walking and stair climbing as well as night pain. He noted mechanical symptoms, swelling in her knee, varus alignment of her knee and that she walked with an antalgic gait. He said she had tried non-operative measures to deal with her symptoms including anti-inflammatories, physiotherapy, brace treatment, a previous surgery and gym exercises to control her pain and keep fit. He said she had difficulty with daily hygiene and housework, but found the tasks manageable. He said she worked in heavy maintenance. He reported that she ambulates independently and lives on her own and had a dog. He diagnosed her with advanced arthritis of the left knee. He recommended weight control, activity modification, anti-inflammatories and knee surgery.

[20] The Appellant underwent full replacement left knee surgery on December 18, 2010 and was discharged from hospital on December 23, 2010.

[21] On December 10, 2012 the Appellant underwent revision left total knee surgery. On December 13, 2012 Dr. Khan reported postoperatively that she had done well and that her pain was controlled and that she was able to ambulate.

[22] The standard medical report in support of the Appellant's disability application was completed by her family physician Dr. Jean Mullins. It is undated. Dr. Mullins reported having known the Appellant for 23 years and that she started treating her main medical condition in 2009. She reported that the Appellant had a diagnosis of hypothyroidism since her 20's and bipolar disorder since 1996. She said both conditions were stable on medications. She reported that the Appellant had been diagnosed with osteoarthritis of the left knee and had undergone replacement surgery in December 2010 and revision surgery in December 2012 but continues to suffer from severe pain and swelling of her knee and was very disabled due to ongoing knee pain. She said the Appellant was limited in her range of motion and functionally limited in standing, walking and prolonged sitting. She said her inability to stand made it difficult for her to function in her job as it involved stocking shelves. She listed her medication as Effexor, Divalproex and Levothyroxine and reported that her other treatment had included physiotherapy and home exercise with limited response. She had also attempted weight loss. She reported poor

response to the two knee surgeries and said prognosis for improvement in function was poor. She said the Appellant was motivated to improve and was medically stable from her other health conditions.

[23] On May 14, 2014 the Appellant was referred to Dr. Adili for a second opinion with respect to a proposed second left knee revision. He advised against the proposed second revision noting that she had no clinical signs of instability, mal-alignment, loosening or infection. He said she had chronic ongoing anterior soft tissue knee pain and quadriceps atrophy which was unlikely to resolve with the revision surgery. He said her pain was anteromedially based and increased with ambulating and walking. He said she had moderate night pain and that her knee gives way once every two weeks. He reported that she did not use analgesia as they affected her bipolar medications. He also noted that she had no low back pain, thigh pain, groin pain, tingling or numbness. He recommended quads exercises and a knee sleeve for proprioception. He documented that she worked in retail and that her job required heavy lifting of 50 pound loads. He also documented that she lived independently and was able to drive.

[24] On June 13, 2014 Dr. Winemaker the Appellant's orthopedic surgeon wrote in support of her CPP application. He reported that she had ongoing knee problems that prevented her from maintaining substantial gainful employment due to her symptoms and functional limitations and that he did not anticipate her condition to change significantly in the foreseeable future. He said she had undergone a left total knee arthroplasty on December 13, 2010 and complete revision of the total knee arthroplasty in 2012 in an attempt to correct flexion instability and to treat a debonded tibial implant. He said postoperatively clinically the knee was stable and that she had recovered well and had achieved good range of motion but continued to have persistent swelling and pain in the knee. He said she had appropriate physiotherapy postoperatively but continued to have functional limitations. Her sitting/ standing tolerance was 1-2 minutes, walking tolerance of half a block, pain with any attempt at lifting of objects, inability to bend or kneel and that her sleep was affected by pain. He said she required use of a grab bar in the shower and toilet. She was able to perform minimal light household activities and could drive although she had pain while driving and experienced difficulty getting in and out of a car. He said anti-inflammatories and pain medications had only modest effect. He concluded that it was unrealistic to expect her to return to gainful employment.

[25] On June 17, 2014 Brian W Lisson the Appellant's former legal representative reported that the Appellant had worsening and deteriorating condition and had resigned from her employment.

[26] On January 27, 2015 Dr. D. K. Punthakee reported that the Appellant had undergone a right total knee replacement for severe right knee osteoarthritis.

SUBMISSIONS

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

- a) She had severe and advanced osteoarthritis and symptoms in both her right and left knee and required total knee replacement. The left knee replacement was done in 2010 and 2012 and the right knee surgery was done in January 2015.
- b) She was unable to perform any meaningful and substantially gainful employment prior to February 2014 by virtue of her left knee disability. All indications were that her disability would be prolonged with an uncertain recovery of function.
- c) Dr. Winemaker opined in June 2014 that he believed "her ongoing knee problems prevent her from maintaining substantial gainful employment and that he did not see her condition changing in the foreseeable future". He also indicated that it was "unrealistic to expect her to return to gainful employment".
- d) Dr. Winemaker reported that she had long standing knee problems since her original surgery in 2010. The fact that he gave this opinion in June 2014 does not diminish its probative value.
- e) She remained working from November 2013 when she filed her application to June 2014 only under extreme difficulty. Her continuing to work is not proof that she did not have serious issues with both knees prior to June 2014.
- f) She continued working despite her pain because of financial difficulties. She had no viable alternative. Her stoic determination to remain in the in the workforce should not be used against her.

- g) Her physical limitations are well documented. She had a severe and prolonged disability as of February 2014 and was unable to continue to work in any substantially gainful occupation.
- h) Her disability is confirmed by both her family physician and her orthopedic surgeon.
- i) She also has other medical issues and although these conditions have been documented as stable with medication, it does not mean that she is symptom free.
- j) Her request to cancel her retirement pension in favour of a disability pension should be granted. She meets the test of severe and prolonged disability and is unable to perform substantially gainful occupation.

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

- a) Her MQP is December 31, 2016 however as she began receiving a retirement pension in March 2014, she must be found to be disabled, within the meaning of the CPP, on or prior to February 2014.
- b) Her diagnosis includes hypothyroidism and bipolar disorder. These conditions are stable on medication.
- c) She was diagnosed with osteoarthritis of her left knee and underwent left knee replacement in December 2010 followed by a revision in December 2012. Despite the two surgeries she continued to experience pain and effusion (swelling).
- d) While the significance of her left knee issues are understood, to qualify for CPP disability benefits, she must have been determined to be disabled from all work the month prior to the month she started receiving her early retirement benefits. That is by February 2014.
- e) She worked full time until June 2014, thereby demonstrating capacity to work subsequent to the commencement of her CPP retirement pension.

- f) While she may not have had the anticipated outcome from her left knee surgeries, and despite her pain and functional limitations, she continued working full time until June 2014 which is several months after she last qualified for CPP disability pension benefits.
- g) She therefore cannot be determined to have been disabled as of February 2014 the month prior to commencement of her CPP retirement pension
- h) The evidence does not support a determination that she was disabled within the meaning of the CPP on or prior to when she last qualified in February 2014 and continuously thereafter.

ANALYSIS

[29] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before February 28, 2014 the month before she began receiving her CPP retirement pension.

Severe

[30] According to Subsection 42(2)(a) of the CPP, a person has a severe disability if that person is incapable regularly of pursuing any substantially gainful occupation. In *Villani v. Canada (A.G.)*, 2001 FCA 248, the court indicated that a severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment. The court went on to say that “this restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a “serious and prolonged disability” that renders them “incapable regularly of pursuing any substantially gainful occupation”. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[31] According to *Villani*, The severe criterion must be assessed in a real world context. 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.

[32] According to the case law, a person cannot receive retirement and disability benefits at the same time. Subsection 66.1(1.1) of the CPP and section 46.2(2) of the CPP Regulations, allows an individual to request the cancellation of a retirement pension in favour of a disability pension if he or she is deemed to have become disabled before the month the retirement pension became payable. The Federal Court in *Attorney General of Canada v Zakaria*, 2011 FC 136, at paragraphs 20, 40 and 43-44, affirmed that a person who is in receipt of a retirement pension is ineligible to receive a disability benefit unless he or she could be deemed to have become disabled before the month in which the retirement pension became payable.

[33] The Appellant was 59 years old with a university education when she applied for CPP disability pension benefits. At the time of her application, she was working full time. In March 2014 she began receiving her CPP retirement pension benefits. She stopped working in June 2014 due to worsening of her left knee pain. According to the legislation, an appellant has to be found disabled on or prior to her MQP. The Appellant's MQP is 2016. However as she began receiving her CPP retirement pension benefit in March 2014, the legislation requires that she has to be found disabled the month prior to the month when she began receiving her retirement pension. This means that in this case, the Appellant has to be found disabled by February 2014. The Tribunal is mindful that not everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension.

[34] The Appellant indicated that the impairments that prevent her from working are advanced arthritis of the left knee for which she underwent total left knee replacement surgery in December 2010. Issues with the knee however persisted and resulted in revision surgery in December 2012. She however did not have the anticipated outcome from this surgery and continued to suffer from severe pain and swelling, balance issues, trouble with her knee giving out after standing for long periods of time and pain after sitting for 5 minutes. As a result of her knee issues, she has limited tolerances for standing, walking, prolonged sitting and lifting/carrying. In 2014 she was diagnosed with severe right knee osteoarthritis and underwent right knee replacement surgery to the right knee in January 2015.

[35] The Appellant's other medical issues include hypothyroidism and bipolar disorder both of which her family physician Dr. Mullins indicated in the medical report in support of the

Appellant's application are stable on medication. The Tribunal accepts that the fact that these conditions are reported to be stable does not mean that the Appellant is symptom free. It does however mean, that the conditions are not disabling to the extent that she is unable to work. It is noted that the Appellant was diagnosed with hypothyroidism in her 20's and with bipolar disorder in 1996 and that she worked consistently for many years with these conditions. This confirms that the two conditions do not affect the Appellant's ability to work.

[36] A disability is "severe" only if a person is incapable regularly of pursuing any substantially gainful occupation. It is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the CPP. It is noted that a disability is not based upon an applicant's incapacity to perform his or her usual job, but rather any substantially gainful occupation: *Inclima v. Canada (Attorney General)*, 2003 FCA 117, at para 3; *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, at para 7; *Villani* at para 50; *Klabouch v. Canada (Minister of Social Development)*, 2008 FCA 33, at paras 14-17.

[37] The Appellant indicated in her Questionnaire dated November 8, 2013, that at the time of her application, she was working full time for 9 hours a day, 5 days a week. Her work required standing on concrete floors for prolonged periods of time. According to her family physician Dr. Mullins, her work was in "retail and involved stocking of shelves". According to her orthopedic surgeon Dr. Winemaker in his report dated December 2010, her job involved "heavy maintenance" work and according to her consultant Dr. Adili in May 2014, her work "required heavy lifting of 50 pound loads".

[38] The Appellant is reported to have confirmed to the Respondent that she continued to work at her full job until June 2014 when she stopped work due to continued pain and mobility issues. This means that the Appellant worked 4 months after the date on which the legislation requires her to be found disabled by (that is February 2014). It is noted that not only did she work four months past February 2014, she worked at a physically demanding job which not only involved stocking shelves but required lifting of heavy loads, standing on concrete floors for prolonged periods of time of up to 9 hours a day and performed heavy maintenance work.

[39] The Federal Court of Appeal, in *Atkinson v. AGC*, 2014 FCA 187 recognized that individuals who experience significant and prolonged health challenges may not qualify for a disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation.

[40] It is acknowledged that the Appellant may have had difficulties performing the duties of her job due to her functional limitations and ongoing pain symptoms. It is however noted that she nonetheless stoically continued to work at a physically demanding job and for the period between January and June 2014, received earnings of \$12,514 (please refer to the Record of Earnings). These earnings, as well as the fact that she continued to work full time hours for five days a week with only an odd day of none attendance and with no accommodation for light duties by her employers, demonstrates that for the period up to June 2014 the Appellant had capacity to be gainfully and substantially employed on a full time basis despite her pain and functional limitations. As noted earlier, a disability is severe only if a claimant is incapable regularly of pursuing any substantially gainful occupation.

[41] In June 2014, the Appellant's orthopedic surgeon Dr. Winemaker opined that it was unrealistic to expect the Appellant to return to gainful employment due to her ongoing pain and functional limitations. It is however noted that this prognosis was made four months after she began receiving her early retirement benefits. By continuing to work full time after February 2014, the Appellant had demonstrated capacity to work as of the month she is required to be found disabled by under the CPP. The Tribunal notes that evidence of work activity will normally establish a capacity to work. Furthermore, capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability as it is an indication of capacity to work. In this case the Appellant worked full time hours at a heavy maintenance job that required lifting of heavy loads and standing for prolonged periods all of which contradict her orthopedic surgeon's assertions at least for the period February to June 2014.

[42] The Appellant indicated that she continued working despite her pain because of financial difficulties and while waiting for a determination of her CPP disability benefits. The Tribunal acknowledges that her stoic determination to remain in the workforce should not be

used against her. However, the Tribunal is aware that financial hardship or the suffering of an appellant is not an element upon which the test of “disability” rests. Under the CPP, an appellant has to demonstrate that he or she suffers from a disability which, in a ‘real world’ sense, renders him or her incapable regularly of pursuing any substantially gainful occupation.

[43] Records on file show that the Appellant had the capacity to work full time in a substantially gainful occupation in the month prior to the month she began receiving her retirement benefits (March 2014) and continued to work until June 2014. It is hard to conclude that her ability to work was due to her being stoic as opposed to her having some capacity to work. As noted earlier not only did she work at a full time job, her work was physically demanding and required heavy lifting. She worked at her job without missing much time from work and only taking an occasional “odd” day off. Furthermore, the Appellant was never accommodated by her employers with light work. She continued to perform her hard demanding physical work past February 2014.

[44] The Tribunal is aware that the severity of a disability is not based upon an appellant’s inability to perform her regular job, but rather, any substantially gainful occupation. According to case law, where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person’s health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). After the Appellant stopped work in June 2014, there is no evidence that she has tried any form of work such as light work suitable to her limitations or attempted to retrain. There is also no evidence that since June 2014 she has failed to obtain or maintain employment by virtue of her health condition.

[45] The evidence before the Tribunal demonstrates that the Appellant worked and was capable of working at her job for some months after she began receiving her CPP early retirement pension. This means that she did not have a severe and prolonged medical condition as of February 2014 the month prior to March 2014 when she began receiving her retirement pension. Therefore, by virtue of the legal test for disability under the CPP, the statutory exclusions, and the medical and documentary evidence, the Appellant cannot cancel her CPP retirement pension in favour of CPP disability pension benefits.

[46] Taking the *Villani* factors into consideration, the Tribunal finds that the Appellant is well educated and has had some university education. She is proficient in English and has work experience dating back to 1972. She should be able to work in a job suitable to her limitations or to retrain.

[47] On the totality of all of the evidence, the Appellant did not have a severe disability that made her incapable regularly of pursuing any substantially gainful occupation as at the end of February 2014 and continuing.

Prolonged

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

CONCLUSION

[49] The appeal is dismissed.

Freda Shamatutu
Member, General Division - Income Security