



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. D. v. Minister of Employment and Social Development*, 2016 SSTGDIS 24

Tribunal File Number: GP-14-3392

BETWEEN:

**D. D.**

Appellant

and

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

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Jane Galbraith

HEARD ON: March 10, 2016

DATE OF DECISION: March 11, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

D. D. - the Appellant

Tami Cogan – the Appellant’s representative

### **INTRODUCTION**

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

- There are gaps in the information in the file and/or a need for clarification.
- 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] Paragraph 49(1)(b)(ii) describes when a disability benefit was considered under the late applicant provision. If the individual was able to meet the contributory requirements applicable at an earlier date he or she may establish a minimum qualifying period. It indicates that benefits are payable to a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for disability pension was actually received.

## **ISSUE**

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

[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**

[9] The Appellant was 50 years old at the time of the MQP. The Appellant completed Grade 12 and a 2-year Early Childhood Education program that she completed in 1980. She stayed at home with her children and also did home daycare in her home after she completed school.

[10] The Appellant's next and only other employment was as a customer service representative at Walmart from Sept 1997 to August 2007. She started as a cashier but was the lead hand at the courtesy desk when she stopped working. The reason the Appellant stopped working was because she had a heart attack that required subsequent angioplasty performed and 3 stents inserted. They replaced two of the stents in November 2007. She participated in a cardiac rehabilitation program. In follow-up to her cardiac procedures Dr. Goldman noted the

Appellant had significant fatigue and atypical chest twinges. The Appellant was to start using a CPAP machine for sleep apnea and Dr. Goldman wanted to see how she did after initiating the use of the machine. (GD2-60) The Appellant reports that she continues to use the CPAP machine.

[11] The Appellant fell down the stairs and landed on her buttocks in 2005. She broke her coccyx and was off work a couple of weeks. A chair was provided for a time when she returned to work so that she could sit down when she needed to.

[12] A CT of the lumbar spine in October 2005 showed multilevel very severe facet osteoarthritis at L4-5 and L5-S1 levels. Most severe involvement at L4-5 of an annular bulge produced impingement on neural canals bilaterally. (GD2-182)

[13] In October 2007 Dr. Harrington, orthopedic surgeon, opines that the Appellant has some type of rheumatological condition such as ankylosing spondylitis or fibromyalgia. He thinks a rheumatologist should assess the Appellant. He notes the Appellant had normal hip x-rays, full range of motion but seems to have some aggravation of back pain with movement and she walks with a cane. (GD2-64) Dr. Willans, internist, who assessed the Appellant in the same month noted she had severe pain due to osteoarthritis of her hips and takes about 4 Oxycondone a day for about 8 months. (GD2-62)

[14] Dr. Kudlak saw the Appellant in a pain management clinic in November 2007 and performed a nerve block, which the Appellant reports did not produce any lasting results or improvement in her pain. No depression was noted. He recommended a swimming program and weight loss for both her back and heart conditions. (GD2-70) The Appellant did lose weight and did attempt to use a community pool but had difficulty getting out of the pool using the ladder.

[15] The Appellant describes that she was having pain in her feet, hand, knees, shoulders, hips and knees. She was given some exercises to do at home as she was not reliable attending physiotherapy due to the fluctuating pain levels. She found the physiotherapy very painful.

[16] The Appellant requires her husband to be present when she showers for safety. She often might require some help with certain aspects of dressing and she does very little cooking or housework due to her pain.

[17] There are a few pain medications that were tried after the Oxycondone was not providing the same level of relief as it once had. She was not sure of the different medications tried but about 4 years ago she was prescribed Trazadone 300 mg instead of Oxycondone. She was tried on Lyrica and Cymbalta a few years ago but could not cope with the side effects and they were discontinued after a short duration.

[18] In March 2009 Dr. Popa, Family physician, wrote a letter outlining the Appellant's condition. He indicates the Appellant has residual recurrent chest pain and disabling pain of her low back and right hip. This has significantly interfered with many activities of daily living and she has tried many different analgesics to control the pain. Fatigue is also a persisting symptom, which was initially treated with a change in medication but this approach failed. The Appellant also had recent episodes of loss of consciousness after feeling very tired. He opines the Appellant is not capable of any work no matter how light. (GD2-76)

[19] In March 2011 the Appellant continued to be monitored for her syncopal episodes by Dr. Willans. He notes the Appellant started having constant mid to left chest pain in December 2010. The episodes of more severe pain can occur 3-4 times a day and last up to an hour. Lying down relieves these. (GD2-80) The Appellant was told after diagnostic testing was completed that her syncopal episodes were mini-strokes.

[20] In December 2011 Dr. Papneja saw the Appellant due to her knee, shoulder and hand pain. He notes that she had 14/18 fibromyalgia tender points. He ordered diagnostic tests and physiotherapy. (GD2-83) The Appellant was taking Trazadone for pain by this time.

[21] In hindsight the Appellant reports that she had been feeling muscular pain all over her body for many years before being officially diagnosed with fibromyalgia. She had not been getting more than 3-4 hours of sleep each night due to the pain. Due to this she takes a nap almost daily.

[22] In September 2012 Dr. Popa wrote a letter regarding the Appellant's current condition. Her cardiac status was stable. The Appellant continues to have difficulties with activities of daily living and she has to rest between tasks. She has been receiving physiotherapy. (GD2-85) In November 2012 Dr. Popa updated in a letter that the Appellant's symptoms have been

exacerbated due to disease progression. He agrees with the diagnosis of fibromyalgia and she is limited in her ability to sit, stand and walk. She has to pace her activities. Her pain control changes on a daily basis. Medication adjustments are continuing to be tried to manage her pain. (GD2-86)

[23] In July 2013 Dr. Popa notes in the CPP medical report that the objective evidence about the Appellant's condition is overwhelming and she is incapacitated to work in any environment. His prognosis is guarded and the development of chronic pain and depression only add to her disability. (GD2-99)

[24] Dr. Popa's opinion on the Appellant's ability to work has not changed since his first CPP medical report in September 2008. He has also indicated the Appellant has been compliant with all suggested treatments and recommendations.

[25] The Appellant attended a fibromyalgia support group twice a week for approximately 8 weeks. Dr. Popa referred her and the group was held at the hospital.

## **SUBMISSIONS**

[26] The Appellant's representative submitted on her behalf that she qualifies for a disability pension because:

- a) The Appellant's Family physician knows her best and has opined in 2009, 2010 and 2013 that she is unable to work in any occupation and does not support her returning to the workforce.
- b) The Appellant has many different medical conditions preventing her from working. The Respondent did not acknowledge these conditions and focused on her cardiac condition that initially stopped her working.
- c) The Appellant should be considered as a whole person and the combination of all her medical conditions, which create constant pain and fatigue, make her condition to be permanent and prolonged.

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

- a) The medical condition that caused the Appellant to cease work is no longer a limiting factor.
- b) It is acknowledged the Appellant has various arthritic changes but none are of such severity to preclude all work. The commonly recommended intervention for fibromyalgia is to remain active and pace activity. Work is not contraindicated.
- c) The Appellant has not made any attempt to return to work.

## **ANALYSIS**

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

### **Severe**

[29] The Tribunal found the Appellant to be a credible witness. She was honest and forthright in delivering her testimony and answering questions under oath.

[30] The information on file was reviewed and contained submitted documents from this application as well as the previous files from her applications in May 2008, September 2008 and May 2010. The Tribunal considered all the documents provided.

[31] The severe criterion must be assessed by the Tribunal 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.

[32] The Appellant stopped working due to a cardiac event that required immediate treatment. Although it has stabilized the effects of her condition continue to be monitored. Prior to her heart attack the Appellant describes increasing muscular pain and fatigue. This was later diagnosed as fibromyalgia.

[33] The Tribunal is aware that 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. The Tribunal focus is on how all her medical conditions affect her at the relevant time.

[34] In this case the Tribunal is reminded of *Thawed v MHRD* (December 3, 2003), CP 18204 (PAB), where it is written:

Chronic pain, chronic fatigue syndrome, and fibromyalgia are all conditions with a strong subjective component. These conditions affect each individual differently. The focus of the inquiry should be on the effect of the condition(s) on the particular individual in question.

[35] The Tribunal has been convinced the Appellant's pain which started even before she stopped work, has had an effect on performing basic activities of daily living. Her testimony is very credible and the significant amount of pain medication prescribed by her physician validates his belief that she was experiencing severe pain.

[36] The Tribunal places significant weight on the report of Dr. Popa as he has known her for many years and is supportive of her not being capable of returning to work. He has described the progression of her condition and prognosis. The Tribunal notes the very credible testimony of the Appellant and considers it important information.

[37] The oral and written evidence describe a condition that started slowly prior to 2007 and progressed to a point that it interfered with the Appellant's ability to function in all aspects of her life. Fatigue is a major factor in the Appellant's inability to maintain any type of work. Her widespread pain is also a factor and is increased with an increase in activity.

[38] The Tribunal looks to *Hildebrandt v. MHRD* (August 14, 2000), CP 7641 (PAB) when discussing an Appellant's credible testimony in relation to a diagnosis of fibromyalgia. It states:

To say that there is no corroborating medical evidence directly on the point of inability to work is tantamount to questioning whether the disease which has come to be known as "fibromyalgia" in fact exists. The medical opinion expressed in this application leaves no doubt that the condition exists. All that remains is to attempt to identify the cause and the ramifications. But in making their diagnosis the doctors have come to the conclusion that Mrs. Hildebrandt suffers from the disease based largely on what she tells them.



[39] It is recognized that the Respondent did not have the benefit of the Appellant's testimony that addressed all her medical conditions and the effect they had on her functional abilities. The focus of their decision was on the heart condition that stopped her from working. The Tribunal finds the Appellant has demonstrated significant functional limitations caused by pain, which clearly indicate she meets the test of severe as defined by the legislation.

[40] 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).

[41] The Appellant has not worked initially due to her heart attack but since then her arthritis and fibromyalgia pain have increased and has not relented. She has difficulty with personal care and household chores. She has received nerve block injections that did not produce any real benefit to her and has constantly been on narcotic pain medication to try to manage her pain.

[42] The Tribunal finds the Appellant did not demonstrate any work capacity at the time of her MQP and as such does not have to show an effort at obtaining or maintaining employment.

[43] The Tribunal has carefully reviewed the medical reports and listened attentively to the evidence of the Appellant. The Tribunal finds that the Appellant has satisfied the Tribunal that on a balance of probabilities the Appellant does have a severe disability within the meaning of the Act at the time of her MQP.

### **Prolonged**

[44] For the Appellant to qualify for a disability benefit, the Tribunal must be satisfied not only that the mental or physical disability is "severe", but also that it is "prolonged." To make such a finding, there must be sufficient evidence to establish that the disability is both "long continued" and "of indefinite duration", or is likely to result in death.

[45] The Appellant reports that the episodes of syncope she has experienced after her MQP were diagnosed as mini-strokes.

[46] Dr. Popa continues to opine in 2013 that the Appellant remains incapable of doing any type of occupation. He has tried several different medications but has not been successful in finding one that could significantly improve her functioning.

[47] Therefore the Tribunal agrees that there is little likelihood of the Appellant's condition improving in the foreseeable future and accepts that the Appellant's disability is long continued and of indefinite duration.

## **CONCLUSION**

[48] The Tribunal finds that the Appellant had a severe and prolonged disability in August 2007 when she stopped working when she had a heart attack. 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 March 2013; therefore the Appellant is deemed disabled in December 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2012.

[49] The appeal is allowed.

Jane Galbraith  
Member, General Division - Income Security