



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *A. J. v. Minister of Employment and Social Development*, 2016 SSTGDIS 26

Tribunal File Number: GT-123390

BETWEEN:

**A. J.**

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: Raymond Raphael

HEARD ON: March 17, 2016

DATE OF DECISION: March 18, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

S. J.: Appellant's husband

### **INTRODUCTION**

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 13, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.

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

- a) The Appellant will be the only party attending the hearing;
- b) There are gaps in the information in the file and/or a need for clarification; and
- 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] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[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.

***Appellant must not be in receipt of retirement benefits***

[7] Paragraph 44(1)(b) of the CPP sets out that to qualify for the disability pension an applicant must not be in receipt of a CPP retirement pension.

[8] For the purposes of the CPP 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).

[9] The requirement that an applicant not be in receipt of the CPP retirement pension is also set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision and it is found in section 66.1 of the CPP.

[10] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[11] If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

[12] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[13] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made fifteen months or more after the retirement pension started to be paid.

## **ISSUES**

[14] Having regard to the Record of Earnings the Appellant's MQP extends to December 31, 2012. However, the Appellant started to receive retirement benefits in January 2010 and she did not cancel the retirement benefits within six months. Pursuant to s. 66.1(1) of the CPP the Appellant must be found disabled before the month her retirement pension first became payable.

[15] 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 December 31, 2009.

[16] The Tribunal must also decide whether the Appellant is eligible for CPP disability because she did not apply for CPP disability until July 2012 which was 30 months after she started to receive her retirement pension.

## **APPLICATION MATERIALS**

[17] In the CPP disability questionnaire the Appellant indicated that she has a grade 12 education as well as three year college production control certificate. The Appellant noted that she last worked from June 4, 1994 until February 1, 2010 as an office-shipping coordinator for Raytheon Canada. She did not indicate why she stopped working. The Appellant claimed to be disabled as of February 1, 2010 because of a left leg problem. She noted that she had been admitted to the Grand River Hospital on February 1, 2010 because of a motor vehicle accident (MVA) and discharged on February 4, 2010. She listed various physical limitations. She also listed difficulties/functional limitations with memory and concentration; she did not list any difficulties/functional limitations with seeing, hearing, or speaking.

[18] A report dated July 23, 2012 from Dr. Mourcos, the Appellant's family doctor, accompanied the CPP application. The report indicates that Dr. Mourcos started treating the Appellant for her main condition in March 2010. The report diagnosis chronic left hip and lower limb pain and swelling, and a left pelvic fracture in February 2010. The report notes that the Appellant was involved in a MVA on February 1, 2010 which resulted in a left pelvic comminuted fracture requiring hospitalization and rehabilitation therapies. The prognosis indicates that the Appellant will remain the same clinically.

### **ORAL EVIDENCE**

[19] S. J. testified that his wife was initially diagnosed with Parkinson's two years ago and that she was diagnosed with progressive supranuclear palsy (PSP) one year later. She is now in a nursing home and can't move, walk, or speak. She is able to understand. He has to sit with her for hours.

[20] She was fully functional before the MVA in February 2010 and was planning to take on part-time jobs. She fractured her pelvis which affected her left leg movement – she was in a wheel chair for a year. She was then mobile with a walker but started to fall frequently. He thinks this may have been the start of her Parkinson's. Her mental capacity was okay after the accident and he believes that she still has mental capacity but can't vocalize her thoughts - it is now almost impossible to understand her. He took over handling all of their financial matters when his wife was transferred to a nursing home in March 2015.

### **MEDICAL EVIDENCE**

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

[22] A Grand River Hospital rehabilitation admission report prepared by Dona Gill, registered nurse, on February 5, 2010 notes that the Appellant advised that she was quite healthy before the MVA and that she was only taking medication for hypertension and hyperthyroidism. The report also notes that the Appellant was oriented to person, place and time and that she was verbally fluent.

[23] On March 9, 2010 Dr. Stevens, orthopaedic surgeon, reported that the Appellant was injured in a MVA on February 1, 2010 and that she fractured her left superior and interior pubic ramus.

[24] On March 30, 2010 Dr. Stevens reported that the Appellant was doing well with minimal symptoms. The x-rays showed that the fracture had united. She was discharged from his care.

[25] On February 7, 2011 Dr. Aghamohseni, psychologist, reported on his assessment of the Appellant for emotional and psychological difficulties experienced following the February 1, 2010 MVA. The report notes that the Appellant was not working at the time of the MVA because she was enjoying some time off after accepting an early retirement package two months earlier. When asked about her plans to reenter the work force, the Appellant indicated that she would like to have a computer/IT related part-time job in addition to finding volunteer work in the community. The Appellant stated that prior to the MVA there were no issues of pain, medical health, psychological development or social in nature that inhibited her day-to-day functioning. The Appellant reported post accident pain and limitations, headaches, sleep problems, as well as various cognitive challenges including a significant decline in memory and concentration.

[26] With respect to clinical observations Dr. Aghamohseni noted that the Appellant “presented for the interview casually dressed, neatly groomed and attired...signs of self-neglect in grooming or appearance were not observed...she was able to maintain courtesy and attentiveness for most of the interview...she was pleasant, cooperative, non-defensive, and related frankly and spontaneously...her thought form and content was coherent and logical...her comprehension was adequate and she organized her thoughts well... [and] she remained oriented in person, time and place during the interview.” He concluded that the Appellant was suffering from numerous post-accident physical and mental health symptoms including issues with depression and heightened anxiety. He opined that she was in need of psychotherapeutic intervention to help her develop more effective coping mechanisms.

[27] On February 29, 2011 Dr. Indech, orthopaedic surgeon, reported on his orthopaedic medical examination of the Appellant conducted on February 4, 2011. Dr. Indech diagnosed a

fractured left pelvis resulting in persistent left groin pain, left limb lameness, and reduced ambulatory ability and functional mobility; post-traumatic dysfunction and impairment of the left lower limb; lower back injury, including post-traumatic myofascial back pain; and residual signs of post-traumatic left lower limb deep vein thrombosis. He noted that before the MVA the Appellant was self-sufficient and independent and that she performed housekeeping and outside house maintenance activities, without any limitations or restrictions. He opined that the Appellant suffers with an inability to carry on her normal pre-accident life and that because of the MVA she could not resume her work for Raytheon. She was compelled to take early unintended retirement.

[28] On January 24, 2013 Dr. Sloka, neurologist, reported that he had been following the Appellant for that last few months for rapidly progressing parkinsonian syndrome. He reported that the Appellant was unable to work given the degree of her functional disability.

[29] On March 20, 2014 Dr. Stewart, neurologist, reported that the Appellant has a progressive neurodegenerative neurological condition known as Progressive Supranuclear Palsy (PSP); that there is no cure or effective treatment for this; that it is characterized by severe motor disability; and that the Appellant should be considered completely disabled as result of this condition.

## **SUBMISSIONS**

[30] Mr. S. J. submitted that the Appellant qualifies for a disability pension because:

- a) She has been severely disabled since the MVA in February 2010;
- b) Since there was such a short time period between her first receiving the early retirement pension in January 2010 and the MVA, the Tribunal should exercise discretion to allow her disability claim.

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

- a) The Appellant does not meet the eligibility requirements for CPP disability since she applied more than 15 months after she started to receive a CPP retirement pension;

- b) She started receiving a retirement pension in January 2010 and did not apply until July 2012 (30 months after she started to receive the retirement pension).

## **ANALYSIS**

### ***The Appellant was not disabled as of December 31, 2009***

[32] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2009.

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

[34] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2009 she was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[35] Although the evidence establishes that the Appellant was disabled following the MVA on in February 2010, it also establishes that prior to the MVA she was fully functional and planning on returning to part-time work. The Grand River rehabilitation admission report on February 4, 2010 confirms that the Appellant was quite healthy before the MVA and that she was only taking medication for hypertension and hyperthyroidism. Dr. Aghamohseni's February 2011 report indicated that the Appellant stated that prior to the MVA she had no issues of pain, medical health, psychological development or social in nature that inhibited her day-to-day functioning



[36] The evidence does not establish, on the balance of probabilities, a severe and prolonged disability on or before December 31, 2009, which was the last date on which the Appellant qualified for CPP disability.

***The Appellant is in receipt of a retirement pension***

[37] The Appellant is not eligible for CPP disability. She began to receive a CPP retirement pension in January 2010 and did not apply within six months to have this pension cancelled. She applied for CPP disability in July 2012, which was 30 months after she started to receive the retirement pension. Because the Appellant applied for CPP disability in July 2012 the earliest date that she could be deemed disabled is April 2011, which is after her retirement pension started.

***The evidence does not establish incapacity***

[38] The Tribunal has also considered whether the Appellant is able to rely upon subsections 60(8) to 60(11) of the *Canada Pension Plan*. These subsections provide that if an applicant had been incapable of forming or expressing an intention to make an application on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[39] In other words, if the Appellant was continuously incapacitated – i.e. incapable of forming or expressing an intention to make an application for benefits – from the date when she might have become incapacitated up to the date when she made her application for a Canada Pension Plan disability pension, she might qualify for a Canada Pension Plan disability pension, provided that she meets all other requirements under the *Canada Pension Plan*. In the Appellant's case, it would require a tight timeframe, as she would have had to have been continuously incapacitated between July 2010 (six months after payment of the Canada Pension Plan retirement pension had started) and July 13, 2012 when she applied for a Canada Pension Plan disability pension.

[40] Mr. S. J. testified that his wife's mental capacity was okay after the accident and that he believes she still has mental capacity but can't vocalize her thoughts. The February 5, 2010

Grand River Hospital admission report indicates that she was oriented to person, place and time and that she was verbally fluent. Dr. Aghamohseni's February 7, 2011 report indicates that her thought form and content was coherent and logical, that her comprehension was adequate, that she organized her thoughts well, and that she remained oriented in person, time and place during the interview. Dr. Sloka's January 24, 2013 report indicates that he has been following the Appellant for the last few months for rapidly progressing parkinsonian syndrome. This suggests the commencement of significant progression of the Parkinson's symptomology was in the fall of 2012, which is after the incapacity timeframe. Further, this report does not suggest that she lacked the capacity to form or express intent to apply for the CPP disability benefits.

[41] The Tribunal finds that the evidence does not establish, on the balance of probabilities, that the Appellant lacked the requisite capacity between July 2010 and July 2010.

## **CONCLUSION**

[42] This is a very sympathetic and unfortunate case. There was a very short period between January 2010 when the Appellant first received her retirement pension and the MVA in February 2010, and it is clear that she is severely disabled.

[43] The Tribunal, however, is bound by the CPP provisions. It is not empowered to exercise any form of equitable power in respect of the appeals coming before it. It is a statutory decision-maker and is required to interpret and apply the provisions as they are set out in the CPP: *MSD v Kendall* (June 7, 2004), CP 21690 (PAB). The Tribunal has no authority to make exceptions to the provisions of the CPP nor can it render decisions on the basis of fairness, compassion, or extenuating circumstances.

[44] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security