



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. G. v. Minister of Employment and Social Development*, 2016 SSTGDIS 31

Tribunal File Number: GP-14-2201

BETWEEN:

S. G.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: By written questions and answers from January
14, 2016 to March 8, 2016

DATE OF DECISION: April 18, 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 July 15, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on May 22, 2014.

[2] The hearing of this appeal was by Questions and Answers for the following reasons:

- a) The method of proceeding provides for the accommodations required by the parties or participants; and
- b) 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.

ISSUE

[6] The Tribunal finds that based on the updated Record of Earnings (ROE) printed March 7, 2016 (GD9-2) the Appellant's MQP is December 31, 2018.

[7] Since this date is in the future, 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 this decision.

APPLICATION MATERIALS

[8] In her CPP disability questionnaire, signed on July 11, 2013, the Appellant indicated that she has a grade 13 education as well as a three year music university degree. She noted that she last worked as an itinerant music instructor for the Toronto District School Board from January 12, 1999 until December 7, 2012; she stated that she stopped working because of medical reasons that affected her singing and talking voice. She claimed to be disabled as of December 10, 2012 and stated that chronic laryngitis and an overactive neck muscle prevented her from working. She further stated that she is not able to sing at all and that she is not able to talk for extended periods without pain and without it affecting her voice. She did not list any difficulties or functional limitations. Her treatments included medications as well as a speech pathologist, a massage therapist for her neck and throat, and a voice specialist.

MEDICAL EVIDENCE

[9] A report dated July 16, 2013 from Dr. Windsor, the Appellant's family doctor, accompanied the CPP application. The report diagnosis dysphonia. Dr. Windsor described the Appellant's relevant/significant medical history as follows: the Appellant works as a music/singing teacher; she developed hoarseness and weakness of voice after a viral illness in December 2012; she was left with hoarseness which suddenly deteriorated in February 2013 with increased vocal demand at work; and her voice has not responded to speech pathology or

massage therapy. The report also notes that the Appellant is unable to talk for more than five minutes at a time. The diagnosis is unknown. The report concludes that the Appellant has not responded to any therapy and that she is unable to continue to work as a teacher.

[10] The Appellant was initially assessed by Dr. Davids, an ear, nose and throat specialist, in March 2012 due to sudden onset of a raspy speaking voice in February 2012. On March 1, 2012 Dr. Davids noted that examination of the larynx showed mild erythema (redness) of the right vocal cord with right false fold squeeze, but no obvious mass lesions. On May 7, 2013 Dr. Davids noted that the Appellant's voice had declined after a severe sinus infection in October 2012 and that her voice is "raspy, reduced range, and weak ... loss of vocal endurance i.e. weak sore voice at the end of the day." Dr. Davids opined that the Appellant's dysphonia is due to muscle tension and phonotrauma and recommended a microphone at work.

[11] An upper GI series on May 27, 2013 was normal except for some reflux.

[12] Functional abilities forms completed by Dr. Windsor from March 20, 2013 to July 11, 2013 indicate that the Appellant has chronic laryngitis, that she is unable to talk for more than five minutes, and that she is unable to sing at all. The forms note that the Appellant is off work and that she will be reviewed on a monthly basis.

OTHER DOCUMENTS

[13] On January 11, 2015 Sun Life notified the Appellant that she currently satisfies the definition of total disability for any occupation pursuant to her long term disability policy.

[14] In a letter to the Tribunal dated December 13, 2015 the Appellant advised that her chronic laryngitis has resulted in a loss of volume and projection especially in the upper register of her voice affecting both her speaking and especially singing voice; that there is still a complete loss of singing voice and a loss of upper register and endurance; and that after three years of being on disability she is still try to sing and that after five minutes, she feels pain in her neck and what used to be a joy, turns into a struggle and pain. She stated that she had seen Dr. Davids four times in 2015 and her family doctor six times, and that her voice is discussed each time she sees her doctor.

[15] Her letter also states:

My voice is non-existent for certain pitches meaning it just cuts out! There is absolutely NO SOUND that comes out - just air! There is absolutely nothing I can do and as I explained above, there is no guarantee fix for this Chronic Laryngitis. (ie - GEL or surgery) This is from years of over-use, due to my occupation as a Music Itinerant - travelling from school to school, teaching band to beginning instrumental students and the other part of my job was a Staff Development position teaching teachers how to teach vocal music to their students. I was always projecting my voice (teaching band to 45 Grade 6 students in a gym with beginning band instruments) or I was talking, or I was singing 5 days a week. This is not to put all of the blame on my job, because I, as everyone else, use my voice on a daily basis for everyday living. Music has always been part of my life, I hold a Bachelor of Musical Arts from the University of Western Ontario and I worked as a professional musician for 12 years prior to the 15 years I taught for the Toronto District School Board (1999-2012).

The Questions

[16] In the notice of hearing dated January 14, 2016 the Tribunal asked the Appellant the following questions:

Please set out in detail why you are not able to pursue alternative work (involving minimal/and or no speaking) suitable to your limitations.

Please advise as to what steps, if any, you have taken to retrain for/and or pursue alternative work suitable to your limitations. If you have not taken such steps, please advise why not?

Please advise as to the details of your earnings of \$51,098 in 2013. Do these represent employment earnings? Please also advise if you have earnings in 2014 and 2015, and if so, the details of same.

[17] The Appellant responded on January 29, 2016. She stated that due to the continuous and uninterrupted nature of her disability she is unable to do any substantially gainful occupation and that she is unable to do any type of work, not just her normal job. She attached the letter dated January 11, 2015 from Sun Life stating that she currently satisfies the definition of total disability for any occupation. She also stated that she has been concentrating on her health and trying to improve her voice by following medical orders and seeking medical advice. She further stated that there are no signs that her voice is getting better despite minimal use by her being at home, that her inability to use her voice precludes her from working at her own job or at any other job, and that she is not pursuing a job. She stated, "My disability has been

persistent for over three continuous years without interruption. There is still a complete loss of singing voice and a loss of upper register and endurance. Still after over 3 years, any attempt at singing results in pain. I am not able to project my voice and talking for any extended length of time, is extremely difficult, even after over 3 years of minimal use.”

[18] In her response she also stated that none of her earnings in 2013, 2014 and 2015 represented employment earnings. She attached documentation confirming that all of these earnings represented disability payments.

SUBMISSIONS

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

- a) She has been off work since December 2012 and she is still experiencing pain in her neck due to an overactive muscle which limits the amount she can speak and does not allow her to sing at all;
- b) She has chronic laryngitis and the muscle in the side of her neck is causing pain and prolonged voice problems;
- c) Her disability is severe and prolonged.

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

- a) While the Appellant may not be able to perform her usual work as an itinerant music instructor, the medical evidence does not show any serious pathology of impairment that would prevent her from doing suitable work within her limitations;
- b) The Appellant has an excellent education and transferable skills and she has not attempted alternate work within her capacities;

- c) The fact that the Appellant is currently receiving disability benefits from her insurer is not relevant since the criteria for entitlement to CPP disability is significantly different.

ANALYSIS

[21] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of the decision.

Severe

[22] 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.

[23] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of this decision 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.

[24] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, she must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: *Inclima v Canada (Attorney General)*, 2003 FCA 117. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[25] It is clear that because of her chronic laryngitis the Appellant is unable to return to her previous employment as an itinerant music instructor. However, in order to satisfy the criteria

for CPP disability the Appellant must not only be unable to return to her previous employment, she must also be regularly unable to pursue any alternative gainful employment.

[26] The Appellant has acknowledged that she has made no efforts to pursue alternative employment. She was 55 years old when she last worked, and we agree with the Respondent that she has an excellent education and significant transferable skills. The Tribunal also noted that in her CPP disability questionnaire the Appellant indicated that she has no difficulties or functional limitations other than her voice impairment.

[27] There is no question that the limited use of her voice limits the Appellant's employability. However the Tribunal is not persuaded that given her education and work experience, her impairment renders her regularly incapable of pursuing all forms of substantially gainful employment. The Tribunal is satisfied that there are jobs in which the requirement for ongoing oral communication is minimal and less important, and in which the Appellant could function satisfactorily.

[28] The Tribunal recognizes that the Appellant has been approved for long term disability by her disability insurer and that her insurer has determined that she currently satisfies the definition of total disability for any occupation pursuant to her long term disability policy. The Tribunal, however, agrees with the Respondent that this is not relevant since the criteria for entitlement to CPP disability is different. Further, it is the responsibility of the Tribunal to make its own determination of severe disability based on the evidence before it.

[29] The Appellant has the burden of proof and the Tribunal has determined that she has failed to establish, on the balance of probabilities, that she suffers from a severe disability in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[31] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security