



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. M. v. Minister of Employment and Social Development*, 2016 SSTGDIS 49

Tribunal File Number: GP-14-4590

BETWEEN:

R. M.

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: July 5, 2016

DATE OF DECISION: July 6, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

R. M.: Appellant

Terry Copes: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on January 6, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on November 14, 2014.

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

- a) The Appellant will be the only party attending the hearing.
- b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.
- c) There are gaps in the information in the file and/or a need for clarification.
- d) 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 the MQP date is December 31, 2017.

[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 the hearing.

BACKGROUND

[8] The Appellant is 45 years old. She was diagnosed with breast cancer in June 2013 and completed chemotherapy and radiation therapy in January 2014. Her employment history includes working at fast food outlets such as Tim Hortons and Burger King, and for the last eight years as a baker for Superstore. She has worked part-time hours (now approximately 12 hours per week) since February 2014 and she is also receiving ODSP benefits.

APPLICATION MATERIALS

[9] In her CPP disability questionnaire, signed on December 4, 2013, the Appellant indicated that she has a grade 10 education as well as college upgrading. She indicated that she last worked as a baker from July 14, 2008 until June 8, 2013. She stated that she stopped working because she was diagnosed with breast cancer. The Appellant claimed to be disabled as of June 8, 2013 because of breast cancer. She noted that she was receiving active treatment and that the side effects include tiredness, fatigue and soreness.

[10] A report dated December 13, 2013 from Dr. Bowen, oncologist, accompanied the CPP application. The reported diagnosis breast cancer and notes that the Appellant noticed a lump in May 2013; that she underwent a lumpectomy and sentinel node biopsy on June 10, 2013; that

she underwent chemotherapy from July 18 to October 30, 2013; and that she underwent radiation from November 25, 2013 to January 8, 2014. The report indicates that there is a significant risk of relapse but hopefully the Appellant will do well.

ORAL EVIDENCE

[11] The Appellant reviewed her ongoing medical problems including chronic pain, headaches and fatigue. Her back pain started in April 2014, which was six months after she completed chemotherapy. The pain has now spread to her hips and legs. She rated her pain as level eight and stated that she is never pain free. She stated that she experiences headaches every day, and that they last all day. She is still experiencing after effects from the chemotherapy and she is often very tired ... she can only do things for an hour and then has to rest. She believes that her condition has become “a little worse” over the last few years.

[12] She returned to work in February 2014 and initially tried to work more hours. Prior to her cancer diagnosis she was working 40 hours per week, and the same hours are available to her but she can't do more than 12 hours per week. When she tried to work more she became nauseous and tired; this has been compounded by her pain. She works three four hour shifts per week. In addition, her work duties have been modified so that she doesn't cook or lift heavy items. She is not as productive as she was before, and she often calls in sick because she is tired and sore. She has a break at work every two hours but she often takes bathroom breaks because she needs a break from working.

[13] In describing her limitations she stated: she has to stand at work for two hours at a time; she can only walk a block and a half; by the end of the day her legs feel like putty; she has difficulty reaching above her head with her right arm; she is limited in bending and lifting; her memory and concentration are “not very good”; and she wakes up every hour when sleeping.

[14] She did not have a family doctor when she finished chemotherapy. She now has a family doctor, Dr. Sullivan, who she first saw a couple of weeks ago. She told him about her pain and headaches, and he prescribed Naproxen. She has an appointment to see him again. She isn't sure what investigations he will do or whether he will be making any referrals. Dr. Pitre did some scans for her back and then referred her to Dr. Sullivan. She also takes over the counter

Tylenol and Ibuprofen, but this just calms the pain down a bit. She was going to walk-in clinics every couple of months for prescriptions of Tylenol #3. She just went to have her prescriptions renewed - there was no discussion about referral to a specialist for her pain and headaches.

[15] She hasn't looked for alternative less physically demanding work or made efforts to upgrade her work skills. When asked why not, she stated she can't upgrade since she would have to sit and the only thing she is good at is baking. She doesn't have a driver's license and has limited computer skills. She can only sit at a computer for 20 minutes. She stated that she might be able to handle further schooling if she was allowed to stand and sit, but she doesn't know if she could handle an entire day because she "hasn't tried."

MEDICAL EVIDENCE

[16] 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.

[17] On June 25, 2013 Dr. Bowen noted that the Appellant had undergone a lumpectomy and sentinel node biopsy on June 10th. Dr. Bowen indicated that the Appellant has stage T2, NO, grade 3, invasive ductal cancer which is triple negative. He suggested radiation and advised the Appellant that Dr. Noble would be recommending chemotherapy.

[18] On July 11, 2013 Dr. Noble, oncologist, recommended adjuvant chemotherapy a third generation regimen which would reduce her risk of relapse by a half. He noted that without intervention her risk of relapse in the next ten years is in the order of 43%.

[19] On August 6, 2016 Dr. Pitre, oncologist, reported that she did not believe that the breast cancer for which the Appellant was treated three years ago should have a large effect on her ability to maintain employment.

SUBMISSIONS

[20] Mr. Copes submitted that the Appellant qualifies for a disability pension because:

- a) She stopped working in June 2013 when she was diagnosed with brain cancer and she has not regained the regular capacity to pursue substantially gainful employment;

- b) When she initially returned to work her main problems were the after effects of the chemotherapy including fatigue, nausea and headaches and these problems have now been compounded by her back, hip and leg pain;
- c) He referred to Dr. Pitre's August 6, 2016 report and relied on this to support that her pain may be due to peripheral neuropathy;
- d) The medical reports are sparse because she did not have a family doctor until two weeks ago;
- e) The after effects of her chemotherapy (fatigue, nausea and headaches) are life long and she is just starting treatment for her pain so the duration of her pain problem is indefinite because it cannot be determined;
- f) The Tribunal should take into account the Appellant's limited education and lack of transferable skills as well as her memory and concentration problems which make upgrading difficult;
- g) Her earnings of approximately \$9,500 per year are less than the substantially gainful amount set out in s. 68.1 of the CPP regulations.

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

- a) Although the Appellant may experience some limitations, the evidence does not reveal any severe pathology or impairment which would prevent her from performing suitable work;
- b) In April 6, 2016 Dr. Pitre opined that the Appellant's breast cancer should not have a large effect on her ability to maintain employment;
- c) The Appellant continues to pursue gainful employment and had employment earnings of \$9,341 in 2014 and \$9,749 in 2015;

- d) As at the date of her CPP application the Appellant had completed treatment and there was no indication of any secondary or lingering effects from her chemotherapy or treatment; she was not taking any medications; she was not participating in any other treatments; and her future treatment consisted of regular monitoring for a recurrence of the disease.

ANALYSIS

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

Severe

[23] 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.

[24] The burden of proof lies upon the Appellant to establish on the balance of probabilities on or before the date of hearing she was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani 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.

[25] Not only must there be medical evidence to support a claim that disability is "severe" and "prolonged", but also evidence of efforts to obtain work and to manage his or her medical condition (*Klabouch 2008 FCA 33; Angheloni 2003 FCA 140*).

[26] *Warren vs. (A.G.) Canada, 2008, FCA 377* confirms for the Tribunal the need for objective medical evidence when it states:

In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[27] The Tribunal has carefully considered the Appellant's oral evidence and recognizes that she is suffering; however, the medical evidence does not support a severe disability. It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB).

[28] The only medical report after the Appellant's completion of treatment is Dr. Pitre's August 2016 report which opines that the breast cancer for which she was treated three years ago should not have a large effect on her ability to maintain employment. Although Dr. Pitre indicated that extensive chemotherapy can lead to lifelong issues with peripheral neuropathy, fatigue, and memory changes she did not opine that this was the case with the Appellant.

[29] She also reviewed the x-rays of the Appellant's lumbar spine and indicated that these demonstrated arthritic changes that might be the cause of her lumbar pain. She makes no comments on the severity of the Appellant's back pain and there is no discussion of treatment and/or referral for her back pain. She makes no mention of the Appellant's headaches.

[30] The Tribunal noted that Dr. Pitre commented on the Appellant having been referred to Dr. Boudreau for investigation and treatment of chronic active gastritis. Mr. Copes submitted that there have not yet been any referrals for the Appellant's pain and headaches because she did not have a family doctor; however, it would appear that her lack of a family doctor did not preclude specialist referrals and treatment. It is significant that there is no medical evidence of treatment for the Appellant's pain and headaches. As the *Warren* case, *supra*, indicates, the lack of medical evidence supports that these should not be considered to be severely disabling conditions.

[31] Although the Appellant may have limitations and difficulties with her work as a baker (which requires prolonged standing), she has made no efforts to upgrade her work skills and/or seek alternative less physically demanding employment. Although the total amount of her

earnings is less than the prescribed amount for substantially gainful employment under s. 68.1 of the CPP regulations, this does not in itself evidence a regular incapacity to pursue substantially gainful employment. That determination must be made on the basis of the entirety of the evidence including the medical evidence.

[32] The Appellant has the burden of proof and she has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP requirement.

Prolonged

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

CONCLUSION

[34] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security