



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. M. v Minister of Employment and Social Development*, 2016 SSTGDIS 108

Tribunal File Number: GP-15-1639

BETWEEN:

**M. M.**

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: July 19, 2016

DATE OF DECISION: August 1, 2016

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

M. M.: Appellant

F. M.: Appellant's representative

### **INTRODUCTION**

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 14, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on May 1, 2015.

[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) Videoconferencing is not 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, 2012. [see Record of Earnings GD2-60]

[7] 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.

## **BACKGROUND**

[8] The Appellant was 46 years old on the December 31, 2012 MQP date; she is now 50 years old. Her employment history includes working in X and as a X in Newfoundland as well as working in X and X in Alberta. She has not worked since she was injured in a workplace accident in September 2010. She bases her disability claim on a work related back injury and chronic pain syndrome.

## **APPLICATION MATERIALS**

[9] In her CPP disability questionnaire, signed by on April 9, 2014, the Appellant indicated that she has a grade six education and that she last worked in X for X in X from June 15, 2009 to September 25, 2010. She stated that she stopped working because she was hurt on the job. [GD2-107]

[10] The Appellant claimed to be disabled as of September 25, 2010. She stated that she was prevented from working because of her inability to sit or stand, her inability to walk for more than 10 minutes, and her inability to lift without severe pain. She noted that she had a bulging disc, nerve damage and arthritis, and that her disability causes concern for employers with

reference to productivity and safety in the workplace. She further noted that she had stopped all domestic activity and that home care was provided by the government.

[11] The Appellant described difficulties/functional limitations with standing, sitting, walking, lifting/carrying, reaching and bending; that she has home care and needs help with all of her personal needs; that she has bowel problems; that she cannot perform any household maintenance; that she has poor concentration depending on her pain level; that she requires sleep medication; that she can't drive; and that she needs help using public transportation. [GD2-110]

[12] A report dated May 7, 2014 from Dr. Dumka, the Appellant's family doctor, accompanied the CPP application. The report diagnosis degenerative disc disease L-S spine; multilevel L4-5 left sided disc bulge impingement on the left sided nerve root; conjoined nerve roots at L4-5; obesity; and a smoker. Dr. Dumka's prognosis for rehabilitation and recovery is "extremely poor." She stated that the Appellant does not have the capacity for re-education for another job apart from X; that she has multilevel degenerative disc degeneration of the lumbar spine with L4-5 left sided radicular pain that increases with activities involving the lumbar spine; that she is obese and a smoker; that she has had physiotherapy and counselling for smoking cessation and weight management both of which have been unsuccessful; and that she is unemployable and requires home care for herself. [GD2-99]

### ***Prior Applications***

[13] This is the Appellant's third application for CPP disability.

[14] Her initial application was date stamped by the Respondent on January 30, 2012 and denied on April 7, 2012. The Appellant did not request reconsideration.

[15] A report dated January 23, 2012 from Dr. Jansma, the Appellant's family doctor in X, accompanied the initial application. The reported diagnoses chronic low back pain. The prognosis is guarded due to delay in initial treatment and the Appellant's perceived level of disability. Dr. Jansma stated that the Appellant is very pain focused and feels that any pain is causing further damage to her back; that she was found to have a conjoined L4-L5 nerve root on the right side; that she is convinced that this of the cause of her pain and insists that she will

continue to have pain until this is corrected; and that she has declined the use of anti-depressants and psychological support. [GD2-141]

[16] The Appellant's second application for CPP disability was date stamped by the Respondent on February 26, 2013 and denied on May 26, 2013. The Appellant did not request reconsideration.

[17] A report from Dr. Dumka dated February 26, 2013 accompanied the second application. The report diagnosed chronic low back pain since 2010; osteoarthritis and degenerative changes at facet joints and intervertebral discs at multiple levels with conjoined right L4-L5 nerve roots; B12 deficiency; morbid obesity; bilateral dislocating patella; and shell fish asthma. The prognosis is poor. The report concludes as follows:

She is an honest, sincere person in a position of difficulty due to a back injury that has been denied as workplace injury by Alberta Worker's Compensation. She is uneducated and unable to access other employment and is not physically capable of working due to her limitations from her chronic back pain. She has bilateral dislocating patellae and has become obese due to inactivity and stress. She is now becoming depressed over the social circumstances. [GD2-120]

## **ORAL EVIDENCE**

[18] The Appellant reviewed her education and employment history. She stated that she quit school when she was fifteen. She then worked on X in a X until it closed down in 1992 because of the X. She then went back to school for two months and wrote her GED examinations. She has had no further education or training since then. She then worked in a X for four years until she was laid off. She then worked as a X for a year until the X closed down. In 2003 she moved to Alberta where she initially worked in X for 5-6 years. She then worked in X doing X, X, labour work and operating a X.

[19] She did not have any significant medical conditions prior to September 2010. She described the circumstances when she hurt her back. She stated that she was operating a broken X and by the end of the day was suffering from back pain spreading from her lower back up to her neck and also down her right leg. This happened on a Saturday, and she called in sick on the following Monday. On the following Wednesday she went to the hospital. She saw the company

doctor the following morning and he took her off work. She has not returned to work since her back injury.

[20] She was on medication and then went for rehabilitation and therapy through the union insurer Sun Life. She was on Alberta Worker's Compensation for one month but it then cut her off and took the position that she was not entitled to Worker's Compensation Board (WCB) benefits. Sun Life discontinued her LTD benefits in January 2012 because the term of the policy had expired. She then went on Alberta Income Support.

[21] The Appellant stated that she applied for alternative work in Alberta including working in a X, working as a X, working at a X, and working at X. She went for interviews but when she told people that she had a back problem no one would hire her. The Appellant stated that she didn't know if she would have been able to do any of these jobs if she had been hired. She had asked her union for light duties, but they wouldn't take her back. She filed a grievance and was denied. The union arranged for her to go through the union insurance program with Sun Life.

[22] She moved back to Newfoundland in September 2012 because she didn't have a job in Alberta and wanted to be with her family. When she first moved back to Newfoundland she looked around to see if she could find a job, but there were no jobs available in Newfoundland.

[23] Her condition had deteriorated by December 2012 and she now has home care which does all of her household work, cooking, and helps her dress and shower. She lives alone in a house apartment and isn't able to do any cooking, housework etc. She spends most of her day watching television or napping – sometimes she goes out in the yard for a “little” walk. She uses a cane when she walks.

[24] She was initially seeing Dr. Dumka on a monthly basis after her return to Newfoundland. She stated that the doctors have given her a lot of medications but none of the medications work. When referred to Dr. Dumka's April 11, 2013 clinical note the Appellant stated that she refused to take Lyrica because this had caused serious side-effects when she was in Alberta. She denies asking for OxyContin or narcotic analgesics and stated that her disagreement with Dr. Dumka was because Dr. Dumka wanted her to take Lyrica. The Appellant stated that after her argument with Dr. Dumka about medication she switched to Dr. Elliot. Dr. Elliot has been her family

doctor since April 2015 and she usually sees her every six weeks. Dr. Elliot prescribes her medications but Newfoundland Social Services won't pay for all of her medications.

[25] When referred to Dr. Jansma's January 2012 report which indicates that she has declined the use of anti-depressants and psychological support, the Appellant stated that this only referred to her refusing to take Lyrica and that Dr. Jansma never recommended an anti-depressant. She also denied refusing psychological treatment and stated that she was put on a list but was never called back. She then stated that she couldn't have gone for psychological treatment because she couldn't have afforded it. She is still smoking a pack of cigarettes a day, and stated that she will never give up smoking because it relaxes her. She stated that she is on a special diet and is trying to lose weight on her own.

[26] The Appellant stated that she has been unable to work since September 2010 because of her chronic pain. She stated that she is in pain all of the time...that some days are worse than others...on 3-4 days a week she is unable to even get out of bed...the pain goes from the top of her head right down to her feet ...she even has pain in her ears...she is always stressed and wants to cry. She stated that she has had constant pain all over her body since September 2010, and that it has been getting worse.

### **Additional Documents**

[27] After the oral evidence was completed the Tribunal administratively adjourned the hearing on the following terms:

1. The Appellant is to file copies of the Alberta WCB documents and Sun Life letters with the Tribunal by July 25, 2016.
2. These documents are to be shared with the Respondent and the Respondent shall have until August 25, 2016 to file additional submissions in response to these documents, if so advised.
3. Once the documents and the additional submissions, if any, are received the Tribunal will determine if a further hearing is required.
4. If no further hearing is required, the Tribunal will deliver its reasons for decision.

[28] On July 25, 2016 the Appellant filed the following additional documents:

1. A letter from Sun Life Financial dated July 8, 2011 to the Appellant advising that she did not meet the definition of total disability from any commensurate occupation and therefore she would not be eligible for benefits beyond January 22, 2012. [GD8-2]
2. A decision by the Worker's Compensation Board of Alberta Dispute Resolution Review Body dated January 13, 2011 which determined on the basis of the medical evidence and employer information that the Appellant's claim of a workplace related accident could not be attributed to her employment. [GD8-4]
3. A decision of the Appeals Commission of the Worker's Compensation Board of Alberta dated August 14, 2013 denying the Appellant's request for reconsideration because it did not comply with the conditions of reconsideration as established by the Appeal Rules of the WCB. [GD8-11]
4. A decision of the Appeals Commission of the Worker's Compensation Board of Alberta dated February 15, 2015 upholding the decision denying the request for reconsideration. [GD8-17]

[29] On July 26, 2016 the Respondent filed its addendum to submissions [GD9] and took the position that the additional evidence does not support a determination that the Appellant was disabled within the meaning of the CPP on or prior to the December 2012 MQP and continuously thereafter. The Respondent submitted that the Appellant's assertion that she sustained a disabling back injury in 2010 that precludes her from all work has not been substantiated following a thorough review of the evidence by the Worker's Compensation Board of Alberta and by Sun Life Financial. The Respondent relied on the objective evidence that the Appellant retained the capacity for lighter work.

### **MEDICAL EVIDENCE**

[30] 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.

### ***Pre-MQP***



[31] On February 19, 2002 Dr. Nofall, orthopaedic surgeon, reported that the Appellant has bilateral dislocating patella, worse on the left side. Dr. Nofall stated that this is not going to get better without surgery.[GD2-124]

[32] On February 19, 2002 Dr. Duguid, respirologist, reviewed the Appellant's coughing and wheezing symptoms while working in the X and concluded that it sounds as if there is something in the X that is affecting her airways. [GD2-125]

[33] A MRI on October 22, 2010 of the lumbar spine revealed mild lumbar scoliosis to the left; preserved disc spaces; minor mid lumbar spondylotic change; but no other significant bone or joint abnormality. [GD2-127]

[34] An interdisciplinary assessment by Life Mark Health Institute (Life Mark) on April 11, 2011 recommended that the Appellant participate in an active interdisciplinary program over eight weeks. [GD2-147]

[35] A progress report from Life Mark on May 27, 2011 indicated that the Appellant is currently functioning at a light National Occupational Classification (NOC) level. The treatment team had worked with the Appellant to create a resume to forward to potential employers and the Appellant had been directed to Employment Canada and other potential vocational sites to assist in searching for suitable employment. The report notes that the Appellant stated that upon discharge she will be ready to return to the workforce and her goal was to return as a X. [GD2-154]

[36] X-rays of the cervical, thoracic and lumbar spine on June 28, 2011 were normal. [GD2-55]

[37] On September 22, 2011 Dr. Naidu, physiatrist, reported that on examination the Appellant had significant pain behaviour and non-organic findings. He diagnosed chronic pain syndrome. He opined that from a purely physical perspective, she is safe to do sedentary to light duties on an ongoing basis and that the best balance of work would be in a job where she alternates sitting and standing. He recommended that she be treated as having non-organic chronic pain syndrome; that she needs significant psychological support; that she needs a review of her pharmacological medications because she is taking too much Tylenol #3; and that she

needs to do an active exercise and rehabilitation program. Dr. Naidu's prognosis was that "due to her pain focused behaviour, her prognosis for full return to work duties would be guarded. However, this is not due to her physical injury. This is due to the psychological aspects of her chronic pain syndrome." [GD3-62]

[38] A physiotherapy note from CBI Health Group on January 12, 2012 indicates that there appears to be a psychosocial underlay to the Appellant's symptoms and that the prognosis is highly guarded since she will require an interdisciplinary treatment program. [GD2-59]

***Dr. Dumka's clinical notes***

[39] Dr. Dumka's clinical notes from October 1, 2012 to December 31, 2013 were included with the Minister's submissions dated June 28, 2016. The notes reveal 26 visits during this period including four visits in October 2012; one in November 2012; two in December 2012; two in January 2013; and three in February 2013. [GD6-16 to GD6-27] The note dated April 11, 2013 indicates that the Appellant refused Lyrica because of severe adverse effects from it in Alberta, that the orthopaedic consult had advised that the Appellant was not a surgical candidate, and that Dr. Dumka declined to prescribe narcotic analgesics.[GD6-20] The note dated December 21, 2012 indicates that the Appellant has chronic pain in the low back; that she pops too many Atasols on a bad day; and that Dr. Dumka declined to prescribe Oxycontin despite the Appellant's request for it. (GD6-24] The note dated July 9, 2013 indicates that the Appellant suffers from chronic low back pain; that a bone scan was normal; that the Appellant was advised that there is no physical evidence to support referral to a chronic pain clinic; and that the Appellant stated, "I don't understand it I know if I got pain." [GD6-19]

***Post-MQP***

[40] A CT of the lumbar spine on November 29, 2013 revealed multilevel degenerative changes of the spine and disc; disc bulge with slight eccentricity towards the left side at L4-L5; and multiple punctuate sclerotic foci which likely represent bone islands. [GD2-106]

[41] On December 4, 2013 J. H., Manager, Supportive Services for Eastern Health confirmed that the Appellant had been approved for 35 hours per week of home support services. [GD3-70]

[42] On September 16, 2014 Sharon Benson, nurse consultant for Eastern Health confirmed that after an annual review approval was given for continuation of the Appellant's home support services at the current level of 35 hours per week. [GD3-71]

[43] On December 9, 2014 Dr. Engelbrecht, neurosurgeon, reported that the Appellant has been suffering from severe back pain for approximately four years and that she had undergone physiotherapy and several pain medication trials without success. In addition to her back pain, the Appellant stated that the pain extends all the way up her spine into her head and into her ears often with arm and finger pain. The Appellant also reported bilateral leg pain. On examination the Appellant tested positive for Waddell's signs and reported excruciating pain with any movement. He noted that the CT scan from 2013 was relatively unremarkable. He concluded that there was nothing that he could provide from neurosurgical perspective and recommended referral to a pain clinic. [GD2-82]

## **SUBMISSIONS**

[44] F. M. submitted that the Appellant qualifies for a disability pension because:

- a) She has been regularly incapable of pursuing gainful employment since her workplace accident on September 25, 2010;
- b) The Alberta WCB occupational injury reports show the Appellant as being not fit for any work;
- c) The Appellant was diagnosed with chronic pain syndrome in September 2011 and Dr. Naidu's September 2011 report indicates that the prognosis for her full return to work duties is guarded due to the psychological aspects of her chronic pain syndrome;
- d) In December 2013 the Appellant qualified for 35 hours per week of homecare services under an Eastern Health program which provides personal care, light housework, meal preparation, cleaning, administration of medications as well as other duties;
- e) The Tribunal should take a "real world" approach in assessing the Appellant's disability;
- f) The Appellant's condition is severe and prolonged and is worsening;

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

- a) Although the Appellant may not be able to perform her usual work in the construction industry due to her subjective chronic pain, she has not tried alternate lighter work;
- b) The medical evidence does not show any serious pathology of impairment that would prevent the Appellant from doing suitable work within her limitations;
- c) The Appellant declined the use of anti-depressants as well as psychological support; she has failed to follow standard physician recommendations for chronic pain syndrome which have the potential to improve her functionality;
- d) The Appellant was 46 years old on the MQP date; while she may have limited post-secondary education she has a good work history and many transferable skills for seeking alternative lighter employment options.

## **ANALYSIS**

[46] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

### **Severe**

[47] 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.

[48] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2012 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.

[49] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch* 2008 FCA 33).

[50] In this case it is important to focus on the December 2012 MQP date.

[51] The progress report from Life Mark dated May 27, 2011 (see paragraph 35, supra) indicates that the Appellant is currently functioning at a light NOC level and that she had been directed to Employment Canada and other vocational sites to assist in searching for suitable employment. This suggests that the Appellant had the physical capacity to pursue alternative employment suitable to her limitations. In his September 22, 2011 report Dr. Naidu (see paragraph 37, supra) opined that the Appellant had significant pain and non-organic findings, and noted that the Appellant needs significant psychological support. He opined that from a physical perspective the Appellant is safe to do sedentary to light duties and that the prognosis for full return to work duties was guarded due to the psychological aspects of her chronic pain syndrome.

[52] Although the Appellant could not return to her previous physical demanding employment, the medical reports suggest that she retained the physical capacity to pursue lighter alternative employment suitable to her condition. The primary roadblock precluding return to employment appears to have been the psychological component of her chronic pain syndrome. The Appellant, however, refused to follow reasonable conservative medical recommendations for psychological treatment. In her January 2012 report in support of the initial CPP disability application Dr. Jansma (see paragraph 15, supra) indicated that the Appellant had declined the use of anti-depressants and psychological support. There is no evidence in the hearing file of the Appellant having pursued efforts to address the psychological aspects of her chronic pain syndrome.

[53] 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).

[54] By failing to take steps to address her psychological condition, the Appellant has failed to make reasonable efforts to manage her medical condition. In her oral evidence, the Appellant testified that the refusal to take anti-depressants referred to by the Dr. Jansma was her refusal to take Lyrica, that she did agree to psychological treatment, and that she was placed on a waiting list. The Tribunal, however, does not find this credible in view of the clear and unambiguous statement by Dr. Jansma. The Tribunal also noted that there is no evidence of the Appellant ever having taken anti-depressants or pursued psychological treatment.

[55] The Appellant testified that while she was still in Alberta she looked for alternative work such as working in a X, working as a X, working at a X and working at X, but no one would hire her when she told them that she had a back problem. The medical reports support that she has the physical capacity to pursue alternative suitable work, and her oral evidence concerning her efforts to find such work is indicative that she also had the psychological capacity to do so. It would appear that by putting an emphasis on her limitations in employment interviews, which she is not legally obligated to do, the Appellant was significantly impairing her employment prospects at the interview stage. The inability to find alternative work is not equivalent to a regular lack of capacity to pursue alternative work

[56] The Appellant moved back to Newfoundland in September 2012 because she did not have a job in Alberta and wanted to be with her family. She testified that she had continued to look for work in Alberta right up until then; and that when she first moved back to Newfoundland she looked around to see if she could find a job, but there were no jobs available. Socio-economic factors such as labour market conditions, however, are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Rice*, 2002 FCA 47). This evidence suggests that the Appellant continued to retain the capacity to pursue alternative work when she returned to Newfoundland in September 2012.

[57] It is a question of fact as to when a disability begins and when it becomes severe. In some cases the severity may occur in an instant. In other cases, it may take months or years for the

disability to become severe as defined by the CPP: *Forrester v MHRD* (November 3, 2003) CP 20789 (PAB).

[58] It appears that the Appellant's condition deteriorated after she returned to Newfoundland and that as of the April 2014 date of the CPP application her disability had progressed to the point that she was dependant on provincial supportive home support services for 35 hours per week. This is confirmed by the letters dated December 4, 2013 and September 16, 2014 from Eastern Health (see paragraphs 41 & 42, supra) as well as Dr. Dumka's May 2014 report (see paragraph 12, supra) which indicates that the prognosis for rehabilitation and recovery is extremely poor, that the Appellant is unemployable, and that she requires home care for herself. A deterioration of the Appellant's condition after the MQP, however, does not establish a severe disability as of the MQP.

[59] The Tribunal also noted that the Appellant was only 46 years old on the MQP (she was 44 when she last worked), that she has appears to have achieved a reasonable level of education, and that she has a varied work history in X, as a X and in X and X which suggests the ability to adapt to and retrain for alternative employment.

[60] The Appellant has the burden of proof and the Tribunal has determined that she has failed to establish, on the balanced of probabilities, a severe disability in accordance with the CPP criteria as of the December 2012 MQP.

### **Prolonged**

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

### **CONCLUSION**

[62] The appeal is dismissed.

Raymond Raphael

Member, General Division - Income Security