Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. N. v. Minister of Employment and Social Development*, 2017 SSTGDIS 97

Tribunal File Number: GP-16-1262

BETWEEN:

**S. N.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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

DECISION BY: John Eberhard

HEARD ON: July 26, 2017

DATE OF DECISION: July 26, 2017

## REASONS AND DECISION

## OVERVIEW

[1] The Appellant made an application for a *Canada Pension Plan* (*CPP*) disability pension on June 19, 2015. The Appellant claimed that she was disabled because of chronic pain in the lower back and right shoulder restrictions due to a work related injury. The position of the Respondent is that the evidence does not support a determination that she is disabled within the meaning of the *CPP* on or prior to her Minimum Qualifying Period (MQP) and continuously thereafter.

[2] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2005.

[4] The appeal was heard in-person hearing, for the following reasons:

a) The Appellant will be the only party attending the hearing;

b) The issues under appeal are not complex;

c) There are no gaps in the information in the file or need for clarification; and

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.

[5] The following people attended the hearing:

S. N., the Appellant

S. M., Mother of the Appellant

There was no appearance by the Respondent.

[6] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension for the reasons set out below.

**EVIDENCE**

[7] The Appellant is 51 years of age. She has a grade 12 education and attended the International Academy of Merchandizing and Design to become a fashion designer. She then became a stay-at-home mom. She moved from X to X. The Appellant testified that in 2001 she was working full time as a press operator for Tran Industries, a division of Magna (a car parts manufacturer). It was a physically demanding job. She suffered a compensable shoulder injury in 2001 and began a rehabilitation program with the help of the Workplace Safety and Insurance Board (WSIB).

[8] During the six year program she attended an adult education program to up-grade her academic qualifications in math, science and English. She then went to a three year certificate program in Interior Design (2009) at Fanshawe College from which she graduated. In 2010 she got a job at Casey's Creative Kitchens where she expected to apply her chosen vocation. While there during on an 8 ½ month Mat leave replacement she learned an interior design computer program but was mostly assigned to customer service work. She testified that there was no work in X in which she could apply her interior design credentials and would have to go to Kitchener of Toronto if she wanted a job in that profession. She did not do that. She did seek work in X during which time she was receiving Regular EI which called for her to do so.

[9] In July 2011, she got a job at X's Bakery. She was doing line-cook work. It was hectic work but she reported no trouble in performing the requirements of the job. She testified that were it not for a motor vehicle accident (MVA) on November 13, 2011, she would likely still be working there. She stated in her application that she felt she had been unable to work since November 2011 (following the MVA) due to chronic low back pain and right shoulder restrictions. She stated that before the accident she was taking regular Tylenol for occasional flare-ups of her right shoulder pain. After the MVA, she has been on less conservative medications.

[10] She made *CPP* contributions with earnings above substantially gainful occupation (SGO) levels in 2010 ($17, 681). In 2011, her earnings were also above the monthly SGO amounts, consistent with her reported 4.5 months of work. This work activity is after the last qualified for disability benefits in December 2005.

[11] The Appellant submitted a questionnaire dated June 12, 2015 supporting her claim. In the questionnaire, she states that the impairments which prevent her from working are right shoulder restrictions (tendinitis), back problems and chronic pain. Her most recent employer was “X’s Bakery” where she worked in the kitchen from July to November 2011. She noted that she stopped activities (hobbies etc.) on November 13, 2011. She noted a work related injury in 2001 which gave rise to a claim to the WSIB. She notes functional limitations as of the June 2015 to include:

a) cannot stand or sit for more than 30 minutes

b) can walk 2-3 blocks at a slow pace

c) can carry items under 5 pounds

d) right shoulder reaching is limited (restriction)

e) limited bending

f) personal needs (eating, washing hair, dressing, etc.) undertaken with difficulty

g) bowel and bladder habits are irregular

h) she needs help with household maintenance (cooking, cleaning, shopping and similar personal activities)

i) notes pain after waking in the morning

j) does drive a car to Physiotherapy and appointments

[12] She stated that he could no longer work because of his medical condition as of November 13, 2011. Her functionality as of December 2005 was not mentioned in the questionnaire.

Initial Medical Report

[13] The application for disability pension benefits was accompanied by an “initial medical report” dated May 25, 2015. Dr. Bhooma Bhayana, (family physician) listed the Appellant's diagnosis as a severe chronic pain condition which onset with a WSIB injury related to her shoulder (static restriction) in 2001 which precludes her from lifting or repetitive work with her upper limbs. This was followed by a motor vehicle accident (MVA) injury to her lower back in 2011 with post-traumatic headaches. The physician notes that his patient has very limited range of motion of the lumbar spine, tenderness of her facet joints and at paraspinal of her neck and upper back. She has had inability to stand or sit for more than 30 minutes. She is restricted from any repetitive bending or lifting. Her shoulder prevents her from doing lifting or repetitive work with her upper limbs. She cannot do any housework such as vacuuming and laundry and pain limits her ability to engage in self-care. She receives ongoing pain clinic treatments including facet joint injections for her back. She is prescribed medications for pain control and anti-inflammatory medications. She has ongoing physiotherapy. His prognosis is that she has a chronic pain syndrome and is unlikely to get better over time. She will likely continue to have chronic, permanent limitations and thus be unable to return to any gainful employment. The report does not segregate functionality and work capacity in the pre-MVA period.

Additional Medical Reports**:**

[14] The Appellant has been seen by several specialists regarding her complaints of low back pain due to a car accident which occurred on November 13, 2011. There are few medical reports or objective findings reported between 2001 and 2011 related to her shoulder WSIB injury. Dr. Mendonca, a neurologist, [June 2012, GD1-10 to 11] assessed her regarding complaints of left leg numbness and pain. Dr. Mendonca reported that examination findings were essentially normal and EMG testing revealed normal findings. He concluded that no neurological process was identified.

[15] Dr. Karnath, a general practitioner, saw the Appellant [November 2012] for an assessment in a pain clinic. He noted that she had been working as a line cook, which was described as a fast paced job, until she was involved in the MVA. She reported to the physician that she had been unable to return to work since then due to pain and limitations in the back. Dr.

Karnath observed that her pain was neuropathic in nature and he suggested a trail of medication and perhaps injections.

[16] The Appellant was also assessed by Dr. Wong, a physiatrist at the request of her insurance company and lawyer. Again, Dr. Wong noted she was involved in a MVA. She was seen at hospital and released and since then had been involved with treatments including physiotherapy. Her pain had been improving, until her insurance benefits were stopped. Prior to this accident, Dr. Wong stated that she had right shoulder pain and limitations but she stated she required no medication for it as it was mild. He reported her pre-accident activities outside of work to include running for 20 minutes per day, dancing, swimming, and social activities. Her application questionnaire stated that she stopped these activities in 2011 (after the MVA). Examination findings revealed some reduced range of motion of the cervical, thoracic and lumbar spine due to stiffness and pain. No neurological findings were reported. He felt she had moderate myofascial pain, cervicogenic headaches, mild left sided costochondritis (inflammation of the cartilage connecting a rib to the sternum), some post traumatic insomnia and a degree of anxiety; all of which were due to her MVA of November 2011.

[17] Treatment with injections had been performed by Dr. Bhardwaj, a physiatrist, who reported [November 2014, GD1-28] that the Appellant reported that she had been off work for a period of time following her 2001 workplace shoulder injury. When she did return to work she could not do her work. As a result she stopped working in 2001. She recalls having had cortisone injection in the shoulder for relief of pain and having had physiotherapy and she was given permanent restrictions for right shoulder with no work over the shoulder level or repetitive work and no heavy lifting. Following the MVA he diagnosed mechanical lower back pain and myofascial pain in the cervical and thoracic spine. He recommended injections to L3-L4 and L4- L5. She reported the last set, given October 21, 2014, resulted in about 1 day of exacerbation of pain; however following that she felt much better and was able to do much more activity. Pain medication is required only on occasion between injections.

[18] On March 14, 2016 the family physician filed a supportive letter indicating his patient is unable to return to work. He writes that she suffered a work shoulder injury in 2001. She subsequently developed chronic pain and initially tried to work but was unable. She then made

an attempt to return in 2010 but had a further accident that then caused back pain, neck pain and shoulder pain. She has made valiant attempts to return but has found this very difficulty with her current level of pain. She continues to receive facet joint injections for chronic pain. She is not able to return to work due to her pain. He supports her appeal to CPP.

**SUBMISSIONS**

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

> a) she continues to have flare-ups of her work related shoulder pain and dysfunction
>
> b) since her MVA, she has not been able to look for work. Were it not for the MVA, she would probably still be working.
>
> c) her mother has verified her current level of disability

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

> a) the medical findings are not indicative of an inability to work since the expiry of her MQP in December 2005.
>
> b) she was retrained through WSIB and graduated in 2008. This indicates capacity to do some type of work with these restrictions. This was after the date she qualified for the benefit in 2005. Then there was an MVA in 2011 which created new medical problems.
>
> c) her activities following her MQP support the fact that while she may have some residual right shoulder limitations, she had clearly adapted well and was not significantly impaired by them.
>
> d) she earned substantially gainful earnings-in 2010 and gainful earnings in 2011. Her work following her MQP is indicative of work capacity thus precluding a disability pension

**ISSUE**

[21] The issue before the Tribunal in this appeal is whether the Appellant has established a disability within the meaning of the *CPP* on or prior to her MQP of December 31, 2005 and continuously thereafter.

## ANALYSIS

### Test for a Disability Pension

[22] The Appellant must prove on a balance of probabilities or that it is more likely than not, that she was disabled as defined in the CPP on or before the end of the MQP.

[23] 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 MQP.

[24] 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.

### Minimum Qualifying Period

[25] The Tribunal finds that the MQP is December 31, 2005.

#### Severe

[26] In 2005 (as now) the Appellant was still in an employment period of her life. She acquired new skills in a WSIB retraining program. That led to her to gainful employment following her MQP. Her English language skills are very proficient. At the time of her MVA, she had a number of transferable skills. She has advanced vocational training with upgraded academic competence as a result of her WSIB training. While her past work and life experiences have been limited, she has professional skills in her chosen vocation and experience in customer relations which were applied in her post-MQP employment. The severe criterion must be assessed 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.

[27] The measure of whether a disability is “severe” is not whether the person suffers from severe impairments, but whether her disability prevents her from earning a living. The determination of the severity of the disability is not premised upon a person’s inability to perform her regular job, but rather on her inability to perform any work, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development*), 2008 FCA 33). The Appellant has testified that she is limited in most physical activities of daily living, and was only able to drive to appointments and physiotherapy. She was prescribed a muscle relaxant, Tylenol #3 (narcotic pain reliever) and Trazodone (an antidepressant also used to help with sleep). She reported she had attended physiotherapy, acupuncture, aquafit, ultrasound and electric stimulation as well as had facet injections. According to Dr. Bhayal [May 2015] she had been diagnosed with a "severe chronic pain disorder" which began as a right shoulder injury, leaving her with permanent restrictions. He noted she had been involved in a motor vehicle accident in 2011 that left her with chronic neck, upper and lower back pain and post traumatic headaches. It was the MVA that changed her life.

[28] She had been receiving ongoing pain clinic treatments and was being considered for more. After her work place injuries in 2001 she retrained and graduating from her academic and vocational training program. This supports some capacity for work after the date she last qualified. Furthermore she has had gainful and substantially gainful earning reported after the date she last qualified. 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). In compliance with this requirement, she did in fact find gainful employment at Casey’s and X’s and indicates that she would still be working were it not for the MVA.

[29] A claimant’s condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General),* 2011 FCA 47).The information on file supports that MVA in 2011 that has left her with low back pain as well as buttock, knees, neck and upper back pain and

post traumatic headaches. These disabilities relate to the accident in 2011 not her former shoulder disability. These occurred 6 years after she last qualified for the benefit and did not prevent work in December 2005.

[30] The Tribunal must consider whether a claimant has proven that she suffers from a severe and prolonged disability by the expiry of her MQP, and continuously thereafter. Notwithstanding the very articulate testimony of the Appellant and caring support from her mother, the Tribunal is not persuaded. Unfortunately, it is irrelevant that her condition deteriorated after her MQP. The Appellant has been assessed and treated for injuries sustained in the MVA on November 13, 2011. She has claimed that she has been unable to work since that time. Therefore, her MVA injuries are not relevant. This is corroborated by evidence of her gainful work activity of 2010 and 2011.

[31] There is relevant case law supporting a finding that the Appellant did not have a sever disability as of her MQP. In *Stratton v. MSD* (October 17, 2006), CP 24370 (PAB), the Pension Appeals Board determined Mr. Stratton's attendance at school for two years is an indication that he is capable of sedentary and/or light work. Indeed, the Appellant, after her retraining, was capable of less physical work within her restrictions. In *Butler v. MSD* (April 27, 2007), CP 21630 (PAB), the Pension Appeals Board considered an appeal by Mrs. Spencer who suffered from chronic neck, shoulder, and back pain. The Pension Appeals Board stated: "As the Board has often found in the past, chronic pain or fibromyalgia are not of themselves so debilitating that such diagnoses preclude any work. Indeed as has often been found, the vast majority of such sufferers are able to continue working, managing their pain through medication, passive treatment, and active regular exercise and in some cases pain counseling". This appears to be the case with this Appellant up to the time with she unfortunately acquired additional injuries from the MVA (after her MQP).

[32] This observation is shared by this Tribunal as to the condition of the Appellant prior to her MVA. She had work capacity as a result of her retraining and determination to get back to work. Something that she successfully did in 2010. There are no medical reports contemporaneous to the Appellant's MQP of December 31, 2005 which suggest the Appellant was at that time incapable regularly of pursuing any substantially gainful occupation. The Appellant's family physician's report in December 2016 is supportive of a finding of disability.

He did not comment on her work capacity as of 2005. By the time of the family physician's report, the Appellant had successfully completed a three year retraining program. There is no evidence in the family physician's report that the Appellant was then suffering from back pain, neck pain or headaches. The issue before the Tribunal is not whether the Appellant currently has a severe and prolonged disability, or whether she became disabled after her MQP of December 31, 2005. The issue is whether the Appellant had a severe and prolonged disability before the end of her MQP. The Tribunal regards a number of factors to support its view: the successful completion of a three year retraining program subsequent to the end of the Appellant's MQP, the absence of any investigative reports indicating any severe pathology contemporaneous to her MQP; the conservative nature of the Appellant's treatment contemporaneous to her MQP; the Appellant's evidence that her medical condition did not preclude her from working until 2011; and, the Appellant's evidence that her condition worsened significantly subsequent to the end of her MQP and concurrently with the injuries suffered in the MVA.

[33] There is relevant case law. *Sharon Miller v. Attorney General of Canada*, 2007 FCA, 237 was an application for judicial review with respect to a decision of the Pension Appeals Board rendered October 7, 2005. The Board confirmed the decision of the Review Tribunal issued May 27, 2004 finding that Ms. Miller did not meet the definition of disability when she last qualified in late 2000.

[34] The evidence before the Board indicated that Ms. Miller had returned to employment and reported earnings of some $10,000.00 and $38,000.00 for the years 2003 and 2004. The Board reached the following conclusion:

> "Under the circumstances, the Board is unable to conclude that her physical limitation caused by the fibromyalgia and chronic fatigue syndrome rendered her incapable regularly of engaging in reasonably remunerative employment for a long and undetermined period of time.
>
> The legislation in these circumstances precludes a disability determination.
>
> The capacity to regularly engage in remunerative employment is the very antithesis of a severe and prolonged disability, as set out in the legislation."

[35] This Tribunal adopts the reasons of the Miller decision. Section 68.1 of the CPP *Regulations* states that "substantially gainful", in respect of an occupation, describes an

occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.

[36] The Tribunal is satisfied that she had work capacity after her MQP and the employment was a result of a successful return to work. Regrettably, the MVA intervened. This does not assist in meeting the test for CPP disability qualification as or December 2005. All of this leads to the conclusion by the Tribunal. The onus is on the Appellant to establish, on the balance of probabilities, her entitlement to CPP disability benefits. The Appellant failed to establish she was incapable regularly of pursuing any substantially gainful occupation on or before the end of her MQP of December 31, 2005. The Tribunal finds the Appellant did not have a severe disability on or before her MQP.

**Prolonged**

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

**CONCLUSION**

[38] The appeal is dismissed.

John Eberhard
Member, General Division - Income Security