



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. J. v. Minister of Employment and Social Development*, 2017 SSTGDIS 113

Tribunal File Number: GP-15-3695

BETWEEN:

**S. J.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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

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DECISION BY: Adam Picotte

HEARD ON: August 11, 2017

DATE OF DECISION: August 16, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on April 23, 2014. The Appellant claimed that she was disabled because of spinal stenosis and complications from a stroke. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] 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, 2013.

[3] This appeal was heard by Teleconference for the following reasons:

- a) The method of proceeding is most appropriate to allow for multiple participants.
- b) The method of proceeding provides for the accommodations required by the parties or participants.
- c) There are gaps in the information in the file and/or a need for clarification.
- d) Credibility is not a prevailing issue.
- e) 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.

[4] The Appellant attended the hearing along with her representative Allison Schmidt.

[5] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

## **EVIDENCE**

### **Questionnaire for CPP disability benefits**

[6] On November 18, 2014 the Appellant submitted responses to a questionnaire for CPP disability benefits. The Appellant provided information in respect of both her personal and medical history.

#### *Personal History*

[7] The Appellant detailed that she was born in 1969. She had a grade 10 education and no university or additional job training. She had most recently been employed full-time as a custodial and maintenance worker from 1997 to October 2011. She indicated that she had stopped working due to severe pain from spinal stenosis and a cyst on her spine.

#### *Medical History*

[8] The Appellant indicated that she could no longer work as of October 2011 due to a spinal stenosis and complications from a stroke.

[9] She indicated that because of her spine condition she could not walk, sit, or stand for more than 20 minutes to 30 minutes. She also noted that she continued to lack the full function of her left side.

[10] The Appellant endorsed the following functional limitations:

- Sitting and standing for 20 – 30 minutes;
- Walking for 10 – 30 minutes;
- Unable to lift or carry;
- Difficulties with reaching;
- Difficulties with bending;
- Challenges with taking care of personal needs;

- Significant limitations with household maintenance;
- Driving for only 10 minutes at a time;
- Severe insomnia; and
- Difficulties with memory and concentration as a result of her stroke.

[11] The Appellant indicated that she had tried physiotherapy but did not find it of assistance. She also indicated that she used a cane for walking.

[12] The Appellant indicated that she took a number of medications including the following:

- Tylenol 3;
- Effexor;
- Flexural;
- Ramipril;
- Amlodipine; and
- Gabapentin.

### **Medical report for CPP disability benefits**

[13] On April 23, 2014 Dr. Weisgerber submitted a medical report in support of the Appellant's CPP disability benefit application. Dr. Weisgerber detailed that the Appellant had a diagnosis of spinal stenosis.

[14] He indicated that he had known the Appellant for 4 years and commenced treating the Appellant for her medical condition in October 2012.

[15] In respect of the Appellant's level of function, Dr. Weisgerber indicated that she had reduced mobility, pain, stiffness, and muscle spasms.

[16] Dr. Weisgerger noted that the Appellant had only an ability to complete her activities of daily living. He indicated that the Appellant was expected to have improvement post-surgery.

[17] On April 1, 2015 Dr. Weisgerber submitted an additional medical report. This report was similar to the previous with report save for some additional relevant information.

[18] Dr. Weisgerber noted that the Appellant had significant debilitating back pain and had a left sided stroke in August 2012.

[19] Dr. Weisgerber also noted that the Appellant was waitlisted with a pain clinic for facet joint blocks to assist with pain.

[20] Finally, Dr. Weisgerber noted that the Appellant's prognosis was guarded as she had not improved in several years and had gotten worse.

#### **Additional evidence**

[21] Chart Notes from Dr. Weisgerber from 2011 to 2017 detail a progressive history of back pain and complications arising from same. The Chart notes confirm the medical information provided by Dr. Weisgerber in his medical reports detailed above.

[22] On December 1, 2011 Dustin Robin, physiotherapist recommended 12 sessions of physiotherapy to accompany an impending graduated return to work.

[23] On February 23, 2012, Andrea Fowler, a kinesiologist employed by CBI Health Group, conducted a work capacity evaluation. The evaluation indicated minimal tolerance for most activities including walking, sitting, standing, and carrying.

[24] On October 16, 2013 Lisa Marginson Rehabilitation consultant completed a vocational assessment. Ms. Marginson detailed that the Appellant presented as significantly disabled due to her limited mobility, fatigue, and chronic pain. She concluded that the Appellant's prognosis for being able to become gainfully employed was extremely guarded.

[25] On November 22, 2013 a consultant with Marginson Rehabilitation Consulting Inc. contacted Dr. Weisgerber to obtain an opinion in respect of a return to work for the Appellant.

Dr. Weisgerber indicated that a return to her own employment was unlikely and recommended that the Appellant aim for a goal of a sedentary light position.

[26] A June 30, 2014 consultation report from Dr. Sahjpaul, neurosurgeon, indicated that the Appellant had no L4-L5 root or cauda compression and therefore recommended facet blocks as opposed to a formal decompression and fusion.

[27] In an October 20, 2015 consultation report Dr. Johnson detailed that the Appellant had four years of persistent low back pain. Dr. Johnson indicated that the low back pain was bilateral and constant. When it gets worse it prevents her from doing anything, including walking, sitting, twisting, and cleaning.

[28] Dr. Johnson further noted that she wakes up frequently at night and needs to use a lateral sleeping pillow to fall asleep.

[29] He further detailed that the Appellant was bipolar and that coupled with her chronic pain she had chronic dysthymia.

[30] Dr. Johnson noted that the Appellant had a reasonable functionality and offered her facet joint blocks.

[31] In an application for a disability tax credit Dr. Weisgerber indicated that the Appellant was markedly restricted in walking and dressing herself.

### **Testimony of the Appellant**

#### *Appellant background*

[32] The Appellant stated that she was born in Vancouver and raised in Prince George. She was the middle child of 7 and had a grade 10 education. She stated she stopped school at age 16 because she was expecting a child. She had her first child at age 17. She was a single mother at that time. She had a second child at age 20.

[33] The Appellant stated that to support herself and her children she cleaned houses and babysat other children.

[34] The Appellant stated that as her children got older she ended up taking an industrial janitorial course. She completed the course at age 25. The Appellant eventually started working at the school board as a janitor.

[35] The Appellant worked a casual position cleaning for the school board until she bid on a permanent position with the school board.

[36] The Appellant stated that her job duties consisted of ordering cleaning products, cleaning desks, floors, and garbage. She basically had to clean up after 350 children.

[37] The Appellant stated that her hours were 2:30pm to 11:00pm.

#### *Pre-disability*

[38] The Appellant stated that she had a good work ethic prior to becoming disabled. She had lots of energy. She stated that she had to avoid people because she was bipolar and was very aggressive. She stated that it was hard to be out in the real world.

[39] She stated that because of her bipolar condition she was aggressive with people including family members. She had to get counselling for parenting skills.

[40] Her bipolar condition makes her aggressive when people do not understand her. Difficult situations make her want to shake people. If there are too many people in a particular setting she cannot go into the setting.

[41] The Appellant stated that if she has stressors her medication does not assist her with difficult situations.

[42] The Appellant stated that prior to becoming disabled she was able to fully function at work.

#### *Extent of Disability*

[43] The Appellant stated that in October 2011 she fell and injured her back. She stated that she then attempted to return to work. She would go back to work for a few days but then her back would seize up and she would be unable to continue working.

[44] She stayed off work for approximately 2 months. She did some physiotherapy and then attempted a graduated return to work. Her graduated return to work lasted 1.5 weeks. After that her pain started to act up again. She was unable to bend over or run machines at work. As a result her family doctor took her off work.

[45] She then attempted addition active rehabilitation for approximately 8 sessions.

[46] The Appellant was off work for three weeks and then attempted another graduated return to work. She was able to complete only two of three weeks. She stated that her mobility was depleted and she was in a lot of pain. As a result her physician took her off work again.

[47] The Appellant attempted a third graduated return to work but that too failed.

[48] The Appellant stated that no accommodations were explored at the school district because of her medical conditions.

[49] The Appellant stated that her back would flare up when she operated machines, carried garbage, or completed mopping.

[50] The Appellant stated that she has looked into alternative employment. She looked into being a cashier and a salesperson. However, because of her functional limitations neither of the jobs was functionally available for her.

[51] The Appellant stated that she required assistance from her mom to help her with her activities of daily living, including dressing and cleaning. She stated that she has difficulties with bending and relies upon her mom for cooking and housecleaning.

[52] The Appellant stated that she experiences exhaustion and fatigue and as a result she rarely changes into clothing for the day. Instead she wears her night dresses during the day.

[53] The Appellant stated that in the summer of 2012 she had a stroke. The Appellant stated that during a bout of double pneumonia she had a stroke. She went through rehabilitation and was advised her ability to function may be delayed by two years.



[54] The Appellant stated that she continues to be impacted by symptoms flowing from her stroke. She stated that she now has nerve pain that she takes gabapentin for. She stated that she has a difficult time using her left upper extremity.

[55] The Appellant stated that she is able to do many of her household chores currently. However, she can only do a single chore a day as more than this will cause her pain symptoms to flare up and leave her incapacitated.

[56] The Appellant stated that she has daily back pain. She stated that she always has a low grade lower back pain. She detailed that too much standing or sitting causes pain flare-ups. So too does cleaning her house.

[57] The Appellant stated that she has significant problems with her left hand because of her stroke. She has difficulties with writing, using a mouse and any other regular use of the hand.

[58] The Appellant stated that her mood depends on her nights.

[59] The Appellant stated that she has never been able to find an online course that she was able to complete. She stated that she looked into a number of different courses but nothing appeared within her capacity to complete.

[60] The Appellant confirmed that she obtained facet joint injections. However these did not assist her at all. She stated that the injection did not even touch the pain.

## **SUBMISSIONS**

[61] The representative submitted that the Appellant's back pain has been long standing. The Appellant has residual symptoms from her stroke as well. The Appellant has to pace her activities throughout the day and has significant fatigue from doing basic tasks.

[62] The Respondent submitted that the Appellant does not qualify for a disability pension because she did not have a severe and prolonged disability on or before her MQP.

## **ANALYSIS**

### **Test for a Disability Pension**

[63] 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.

[64] 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.

[65] 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.

### **Severe**

[66] For the reasons that follow the Tribunal finds that the Appellant has a severe disability within the meaning of the CPP.

[67] The starting point for any adjudication is whether there is sufficient medical evidence to support a finding of severe within the meaning of the CPP. In this case the Tribunal is satisfied that there is.

[68] Here, the most persuasive evidence comes from the Appellant's family physician. Dr. Weisgerber has had continuity of care as demonstrated through a significant amount of chart notes. Importantly, Dr. Weisgerber was treating the Appellant prior to and after her indicated date of disability. It is evidence from both the chart notes and the medical reports that Dr. Weisgerber considered the Appellant to have significant functional impairments arising out of

her spinal stenosis. The medical reports indicate that the Appellant's back pain was significant and debilitating. It was also noted that the Appellant was limited to performing activities of daily living and that she had a reduced mobility, pain, stiffness, and muscle spasms. This medical evidence is indicative of a severe disability within the meaning of the CPP.

[69] The Tribunal also finds that the evidence of Ms. Marginson, Rehabilitation Consultant is also persuasive. Ms. Marginson opined that the Appellant presented as significantly disabled due to limited mobility and chronic pain. Ms. Marginson opined that it was unlikely given the Appellant's functional capacity that she would again become gainfully employed.

[70] The evidence of the Appellant also persuades of a severe disability. The Appellant indicated that her spinal stenosis had resulted in significant functional impairments. The Appellant noted that she had a limited capacity to sit, stand, walk, challenges with personal care and household maintenance. These all evidence a finding of severe within the meaning of the CPP.

[71] The Tribunal is also persuaded by the amount of physical intervention and attempted returns to work taken on by the Appellant.

[72] The Appellant completed physiotherapy, active rehabilitation, and facet block injections. Although none of these resulted in positive benefit for her spinal stenosis the attempted interventions evidence to treat her disability.

[73] 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).

[74] The Appellant attempted three graduated returns to work. Although these were not successful, if there was any suggestion of work capacity here failed graduated returns to work satisfy the test set out in *Inclima*. Moreover, the Appellant has looked into alternative employment but none have been within her limitations.

[75] 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.

[76] In this case the Appellant has a grade 10 education, has no job or university training outside of custodial training. She stopped high school at the age of 15 and had two children. She was 42 years old at the time of her disability from spinal stenosis and had a diagnosed behavioural disorder that made her unable to function with the public.

[77] The Appellant's lack of training, significant functional limitations and behavior disorder when taken into the contest of her disability lead to a conclusion that within a real world context she has a severe disability.

### **Prolonged**

[78] Dr. Weisgerber opined that the Appellant's spinal stenosis was guarded given that she had not improved in several years. Indeed her date of disability was indicated as October 2011 when she stopped working due to the onset of pain from her spinal stenosis. This is further supported by Ms. Marginson who opined that it was extremely guarded that the Appellant could ever again become gainfully employed.

[79] Moreover, it has been almost 6 years since the Appellant went off work and she has had no significant change in her medical condition.

[80] These facts support a finding of severe within the meaning of the CPP.

### **CONCLUSION**

[81] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2011 when she initially went off of work for pain arising from her spinal stenosis. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) of the CPP). The application was received in April 2014. The Appellant is deemed disabled in January 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2013.

[82] The appeal is allowed.

Adam Picotte  
Member, General Division - Income Security