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

Citation: *P. F. v. Minister of Employment and Social Development*, 2017 SSTGDIS 130

Tribunal File Number: GP-16-1412

BETWEEN:

P. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Virginia Saunders

DATE OF DECISION: September 15, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant’s application for a *Canada Pension Plan* (CPP) disability pension on May 27, 2013. The Appellant claimed that she was disabled because of recurrent multiple sclerosis. 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, 2000; with a pro-rated date of February 2001.The MQP is explained further in the Analysis section of this decision.

[3] The appeal was originally scheduled to be heard by teleconference on August 22, 2017. It was adjourned at the Appellant’s request. The Appellant indicated that she had difficulty communicating because of her illness, and she asked for a hearing by written questions and answers or a decision on the record.

[4] The Tribunal noted that since receiving the Notice of Hearing the Appellant had filed additional medical information and both parties had filed written submissions. The appeal was therefore decided on the basis of the documents and submissions filed for the following reasons:

a) The Tribunal decided that a further hearing is not required.

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.

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

EVIDENCE

[6] The file contains over 500 pages. The Tribunal reviewed and considered all of the evidence. This decision discusses that which is most relevant to the issues in this appeal.

Background

[7] The Appellant was born in December 1963. She completed Grade 12 and has a Bachelor of Education. She worked as a teacher for several years, following which she was employed as a claims adjuster for an insurance company from about 1990 until January 1998. She lives in a small town in Alberta (GD2-58, 204-205, 336).

Diagnosis of Multiple Sclerosis

[8] In January 1997 the Appellant began to have difficulty with speaking, writing, choking and swallowing; she then developed vision problems. She was referred to neurologist Dr. N. Witt. By the time she saw Dr. Witt in April 1997 she had improved, but he suspected that she had multiple sclerosis (MS). She was cleared to return to work and was advised to see Dr. Witt again if she had further neurological problems (GD2-177-178).

[9] The Appellant returned to work in May 1997, starting at three hours per week and gradually increasing to five half days per week. Before returning to work she had an ergonomic assessment which indicated that her main issues were fatigue, soreness in her arms and legs, memory problems, and difficulty with word searching. She expressed a need to work at a pace that was productive but not fatiguing (GD2-205; 485-506).

[10] Information from Dr. Witt revealed that by October 1997 the Appellant had had another episode of MS symptoms and her diagnosis of MS was clinically definite. She did not start medication at that time. She was experiencing physical limitations including right visual dysfunction, leg heaviness, fatigue, increased right-sided reflexes, and decreased vibration sense in her legs. Dr. Witt saw no sign of cognitive problems. The Appellant was working and was feeling reasonably well. Dr. Witt stated that she was able to function under stress and engage in interpersonal relations with no limitations; and that she had moderate limitation of her functional capacity and was capable of clerical/administrative sedentary activity. He supported her

continuing to work at half-time hours as long as she was able. He did not rule out the possibility of improvement but he expected that any work would continue to be part-time (GD2-183-188, 482, 522).

January 1998 to April 1999

[11] The Appellant stopped working in January 1998 because of the stress involved and because of increasing symptoms including intermittent visual impairment, difficulty concentrating during the day, and severe fatigue after work (GD2-198, 205).

[12] After stopping work the Appellant noticed a vast improvement. In March 1998 she told her family doctor, Dr. O'Callaghan, that she was feeling quite well and wanted to stop medication. Dr. O'Callaghan thought the Appellant was by then capable of only limited interpersonal relations, and noted that she had limitations on physical activity as she became fatigued very easily (GD2-197-198).

[13] In June 1998 the Appellant had a relapse, with increased fatigue and blurred vision. She recovered after taking prednisone for a time (GD2-204).

[14] In September 1998 Dr. Witt reported that the Appellant had returned to fairly normal physical functioning but had some memory issues as well as fatigue, some slurring of speech, and a sensation of bladder fullness. These symptoms were worse in hot weather. She had taken prednisone over the summer and was now taking Symmetrel, which she felt was helping her symptoms of fatigue. She told Dr. Witt that she had quit her job but would like to return to something that was not as stressful. Dr. Witt made some suggestions for management to reduce the number of relapses, and in particular he suggested Copaxone (GD2-521).

[15] Dr. Witt noted in November 1998 that the Appellant had had a difficult few weeks in October, with leg pain, diminished energy, and depression. She had improved over the last week but now had some numbness in her hands likely related to running out of Symmetrel, which she had just resumed taking. She otherwise had the same findings as in September. She agreed to start Copaxone (GD2-518).

[16] In November 1998 the Appellant met with a rehabilitation consultant, who also interviewed the Appellant’s new family doctor, Dr. Patterson. Her symptoms at that time were increased fatigue, memory and concentration difficulty; difficulty with slurred speech and word finding; as well as restricted mobility and increased bladder urgency. Her symptoms were made worse by stress. She reported having had several flare-ups with episodes lasting longer, and as a result she felt that her condition was getting worse. She reported having disturbed sleep and requiring a short nap in the afternoon.

[17] The Appellant’s employer had asked her to reconsider her resignation but she was waiting for approval of funding for Copaxone treatment, so she was told to return for vocational reassessment about four months after starting Copaxone in order to see how she managed with it. The Appellant was unsure if she would be able to meet the demands of her previous job, and expressed an interest in library science and perhaps working in a school library. At this time she was volunteering one day a week at her daughter’s school and she was encouraged to pursue volunteer work in a library to get a better understanding of the physical job demands (GD2-203-207; GD2-519-520).

April 1999 to December 1999

[18] The Appellant began taking Copaxone in April 1999. By July 1999 the initial side effects of the medication had resolved and she reported having increased energy, ability to read, concentration, balance, endurance, and stamina. She did not have any major new symptoms, no bowel or bladder problems, and her vision and balance seemed relatively good. Dr. Witt noted that the Appellant must have had another episode since he last saw her the previous November because she had some weakness in her left leg; however, he noted that her vision, sensation, and sensory function were better (GD2-217-218, 528).

[19] Later in the summer the Appellant had increased fatigue and other MS symptoms, which required medication for about four weeks before she recovered. In the fall she started to volunteer at school as a teaching and office assistant, for four to five hours each week. She also volunteered at an extended care home by visiting with her pet dog, and she planned to help with her daughter’s skating club for a few hours each month. She started to have difficulty managing with poor motivation and fatigue, but these improved after she began taking an anti-depressant.

Her vocational rehabilitation was placed on hold until January 2000 as the Appellant and her family were planning to move to another part of the province (GD2-219-221, 244-246).

[20] In November 1999 the Appellant saw a specialist for urinary frequency and urgency. He noted that without the aid of medication the Appellant emptied her bladder approximately once per hour. She had recently begun taking Detrol, which allowed her to venture out of the house, and she was advised to continue using it (GD2-527).

[21] The Appellant had a Functional Capacity Assessment (FCA) over two days in November 1999. At the time she reported having constant bilateral hip pain that was aggravated with movement; bilateral wrist and hand soreness; pain radiating down her legs; decreased memory; poor bladder control; intermittent speech difficulty; and intermittent blurry vision.

[22] The FCA evaluator determined that the Appellant was able to work at a medium classification except for bilateral above shoulder lifting. Medium classification was defined as manual handling of loads between 10 and 20 kg. The Appellant was found to have a workday tolerance of eight hours. Her primary limitations and restrictions were muscle or joint pain with squatting, kneeling or crawling on an occasional basis, and with sustained sitting greater than 25 minutes at a time. Her predominant mobility tolerances were standing and walking. The evaluator reported that it appeared that the Appellant was currently managing her medical condition satisfactorily with medications, and that her limitations should not prevent her from engaging in some type of gainful employment (GD2-222-243).

[23] The Appellant reported that she had been unable to participate in any activities for four days after the FCA. However, she managed well over Christmas and she inquired into distance education possibilities for studying library science. She told her rehabilitation consultant that she thought she would be able to manage a two to three hour workday if she was in a sedentary, low-stress position and she was able to take breaks. She agreed to gradually increase her volunteer activities for two to three hours per day and beyond (GD2-244-246).

January 2000 and Later

[24] The Appellant saw Dr. Witt in January 18, 2000. He noted that she had had a flare-up of her symptoms shortly after he saw her in July 1999. She lost strength and balance in her legs.

She received a course of steroids and recovered within two weeks. Since then she had done well. She was taking Celexa to help with her motivation and she was tolerating that well. She still had fatigue, for which she was taking Symmetrel, and she was still taking Detrol for bladder urgency. She also had blurred vision but no weakness and “only a little bit of pain”. The Appellant told Dr. Witt that she had learned how to deal with stress and as a result was managing her life much better. Dr. Witt described the Appellant as having an excellent state of functioning and stated that he hoped she would maintain this for quite a while. He asked her to call him if she had any problems, and to come in for review in 6 to 12 months (GD2-526).

[25] In response to written questions from the Appellant’s rehabilitation consultant, Ms. Verbeek, Dr. Witt stated in February 2000 that the Appellant’s current symptoms were fatigue with some residual weakness. He expected that even with the use of Copaxone she would have occasional relapses over time. When asked if the Appellant was medically able to manage the goal of gradually increasing her volunteer hours to 12 to 15 hours per week and then up to 20 hours per week, Dr. Witt replied “I would hope so, but MS is an unpredictable condition and certainty with respect to this prognosis is not possible”. He stated that once the Appellant was able to volunteer 20 hours per week, it might be reasonable for her to consider part-time work provided she did not experience further set-backs (GD2-441).

[26] The Appellant had a set-back during the week of February 21, 2000, with sore legs, affected vision and an increase in fatigue. She had difficulty walking and completing activities of daily living. She had also had a reaction to Copaxone, with increased heart rate and difficulty breathing on one occasion, which took 20 to 30 minutes to recover from. By March 8, 2000, she was slowly improving after the set-back. She had stopped her volunteer activities during her relapse in February, but hoped to resume them (GD2-248-250).

[27] However, rather than improving the Appellant continued to have difficulty throughout March 2000. She reported a number of symptoms including difficulties with word finding, poor memory and organizational management, increased bladder urgency, leg and low back muscle spasms, difficulties with fine motor tasks, and increased fatigue requiring her to rest frequently throughout the day. She had limited her volunteering at school for non-medical reasons; and she had not been able to resume volunteering at the extended care home because of her increased

symptoms. She had completed two 90-minute volunteer sessions mainly working at the front desk of the local library, but had missed other occasions because of increased fatigue and pain. In her volunteer work with the local skating club she felt she was forgetting tasks and was not doing all that was required of her. As a consequence of the Appellant's failure to improve significantly over the previous year, as well as the gradual increase in her symptoms and her lack of overall gains in functional abilities, Ms. Verbeek recommended in March 2000 that vocational activity be suspended and the Appellant's file closed (GD2-251-253).

[28] The Appellant applied for a CPP disability pension in March 2000 (GD2-128-131). In the questionnaire that accompanied the application, dated March 20, 2000, she stated that she had stopped working in January 1998 because it was too stressful and she needed her time and energy for her family. She indicated that MS affected her legs, eyes, and speech; and that she had difficulty with concentration and memory. She was no longer able to enjoy crafts such as sewing, cross-stitch, and reading; and she found most sports too difficult. She listed functional limitations including inability to stand or sit for extended periods; walking at a slow pace with frequent rests; and difficulty reaching and bending. She was able to put her own groceries away and do some household maintenance, and she indicated that when she was unable to she had takeout and used a cleaning lady. She had difficulty seeing, speaking, remembering and concentrating. She described an overactive bladder but stated that looking after personal needs "seems to be ok" (GD2-530-536).

[29] Dr. Patterson completed a medical report dated March 13, 2000, in support of the Appellant's disability application. She stated that the Appellant had stable MS with intermittent flare-ups with accompanying, varying debilitation, despite excellent compliance from the Appellant as well as constant input from her neurologist and surveillance by her GP. She would possibly have a new drug trial through the neurologist (GD2-512-516).

[30] In November 2000 the Appellant was having significant trouble with her bladder, with significant daytime frequency and nocturia three or four times a night. She began a trial of Flomax (GD2-254).

[31] In November 2000 the Respondent's medical adjudicator spoke by telephone with the Appellant, who reported that she had not seen Dr. Witt since January but had been speaking with

him on the phone in the past two weeks because of increased symptoms in her hands and feet. He had prescribed Neurontin but she had not started taking it yet. She had a flare-up the previous February which had taken about one and a half months to recover from, but since then she had been “good”. She described her day as taking her daughter to school, returning to bed until 10 or 11 a.m., getting dressed and then doing household and volunteer activities. She did her own housework but it took her longer than usual. She was looking for work between 8:30 and 4:00 when her daughter was at school, but she thought she would be unreliable and she noted that part-time opportunities were scarce in her community. She noted that she was essentially raising her daughter herself because her husband was frequently out of town, and that her family came first (GD2-420).

[32] In December 2000 Dr. Witt reported that he saw the Appellant for the first time in almost a year, although they had spoken by phone a few times. He stated “she told me that since she was on Copaxone she has done very well without any flare-ups of neurologic symptoms.” She had had trouble with fatigue and had been on Symmetrel for that. She had also had sharp pains in various extremities. She reported that she was taking Flomax for her bladder. Dr. Witt stated that the Appellant “is doing very well” and should continue on Copaxone as well as symptomatic measures if she wished to have relief from her problems of bladder urgency, fatigue, pain, depression, and others. The Appellant was to call Dr. Witt if she had problems, and to otherwise come in for review in 8 to 12 months (GD2-255).

[33] In May 2001 the Appellant reported a problem with pain and numbness about six weeks earlier. She was slowly getting better but did not yet feel back to normal. She was exercising and playing golf; she was tolerating the Copaxone well and Flomax seemed to be helping her bladder. Dr. Witt felt that the Appellant had returned to a fairly stable baseline state, similar to the way she was a year ago. He anticipated that many of her residual symptoms would improve. She was reluctant to take medication for symptom control because of allergic reactions she had experienced, and Dr. Witt felt that if she could tolerate her symptoms without medication “that is all the better” (GD2-256).

[34] In January 2002 Dr. Witt reported that the Appellant had decided to discontinue Copaxone and all other medications and instead rely on traditional, non-pharmacological

management techniques for her MS. He noted that since stopping Copaxone the previous month the Appellant had a marked improvement in all of her symptoms. She did not even have much fatigue. Dr. Witt found that because of the many variables with MS this decision was logical although he felt the Appellant might decide to resume Copaxone later (GD2-293).

[35] In July 2002 the Appellant saw a psychologist at Alberta Mental Health for depression worsening in the past six months. She reported that exacerbations of her condition were distressing as she felt she was not in control any more. She stated that her daily routine was to get up at 7 a.m., get her daughter to school by 8 a.m., volunteer at school from 8:30 to noon; return home to nap; and then get up at 3:30 to get the house organized and get supper ready. In the evenings she and her husband would go for a walk. She enjoyed reading and had done a lot of research about her illness (GD2-264-266; 287).

[36] Dr. Witt's medical report for the present application is dated April 29, 2013. He reported that he began treating her for MS in March 1997. Relevant physical findings and functional limitations were weakness, sphincter dysfunction, ataxia and fatigue which interfered with normal activities. The Appellant had not had attacks while taking Tysabri for the past five years, but her underlying deficits had not changed. He stated that the Appellant's MS was likely to progress over time (GD2-173-176).

SUBMISSIONS

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

a) In the real world she would not be hired with the limitations she displayed from 1997 through 2001 and since that time.

b) With her limitations she would be unable to commit to a predictable work schedule.

c) The evaluator who performed the FCA was in contact with the Appellant for only two days, and her opinion as to the Appellant's abilities should not be preferred over that of the family physician and Dr. Witt, who are more familiar with the Appellant's conditions and her abilities.

d) The totality of the evidence indicates that the Appellant’s condition was severe and prolonged by February 2001.

[38] The Respondent submitted that the Appellant does not qualify for a disability pension because there is no evidence that she was disabled from working on or before February 2001.

ANALYSIS

Minimum Qualifying Period

[39] The Tribunal finds that the MQP is December 31, 2000. Section 19 of the CPP provides that when an appellant’s earnings and contributions for a calendar year are below that year’s basic exemption, their earnings and contributions can be prorated if they became disabled during the prorated period. In this case, the prorated period is from January 1, 2001, to February 28, 2001.

[40] The Appellant must therefore 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 December 31, 2000; or that she became disabled in 2001 and was disabled by the end of February of that year.

Test for a Disability Pension

[41] 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.

[42] 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

[43] The Tribunal finds that the Appellant's condition was not severe on or before February 2001.

[44] 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, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[45] 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.

[46] The Appellant's condition, her progress and her set-backs are well-documented throughout this large file. The Tribunal reviewed all the documentation carefully. The Tribunal accepts that as a result of her MS the Appellant has experienced difficulty since January 1997, and that her condition has deteriorated over time. She has suffered from fatigue, pain, cognitive issues and other loss of function. In spite of these she has been an eager participant in her medical care and her vocational rehabilitation.

[47] While the Appellant struggled in 1998 after she stopped working, her condition stabilized and her symptoms improved after she began taking Copaxone in April 1999. She had a relapse of fatigue and other symptoms a few months later, but recovered within a matter of weeks. Her bladder symptoms were reasonably well-controlled with medication. In the fall of 1999 she began volunteering for several hours each week. The FCA in November 1999 concluded that despite her multiple symptoms the Appellant had a workday tolerance of eight hours and was able to engage in gainful employment.

[48] The Appellant reported being unable to do much for four days after this assessment. She submitted that the evaluator's assessment of her abilities should not be preferred over the opinions of the doctors who were more familiar with her case. However, the reports during this period confirm the conclusions of the FCA. They indicate that the Appellant was generally doing quite well. In February 2000 Dr. Witt indicated that the Appellant was medically able to manage increasing her volunteer hours up to 20 per week and at that time could consider part-time work.

[49] The Tribunal notes that in her summary of this information, Ms. Verbeek stated that Dr. Witt indicated that it was not possible for the Appellant to increase her volunteer hours to 20 hours within four to six months (GD2-249). A careful reading of Dr. Witt's letter (GD2-441) indicates that he stated that "certainty" was not possible. The only reservation he had about his statement as to the Appellant's ability was that MS was unpredictable and she might have another relapse.

[50] The Appellant did have a relapse that month; which resulted in her giving up her volunteer activities for a time, and her vocational rehabilitation file was closed. However, she improved after about six weeks and then remained well for quite some time. She did not return to see Dr. Witt nor did she speak with him until near the end of the year when she contacted him about hand pain, which he treated with medication. The "typical" day she described to the medical adjudicator in November 2000 was a functional and active one. Her reservations about working were not so much related to her health as to her family's requirements and the opportunities available in her community.

[51] As of May 2001 the Appellant continued to be well except for a setback six weeks earlier from which she was recovering. She was exercising and playing golf. She continued to tolerate Copaxone, and Flomax had improved her bladder issues. She was well enough that she considered not taking medication for her symptoms, and in fact by the end of 2001 she had discontinued Copaxone and other medications and was relying on other management techniques.

[52] In 1998 the Appellant struggled with two relapses of several weeks each. The evidence from April 1999 when the Appellant began taking Copaxone indicates that she was then generally well up to and beyond February 2001. She had relapses of several weeks in July 1999 and February 2000, but she recovered. Except for those, there is no evidence in this two year

period that she was regularly unable to attend to activities. In July 2002 - over a year after the end of the MQP - she continued to have a daily routine that would have accommodated at least part-time work. With her level of education and her work experience, the Appellant had transferable skills that would have been appropriate for remunerative work at least on a part-time basis.

[53] The Appellant submitted that in the real world she would not be hired except by a benevolent employer who was prepared to accommodate her limitations. She submitted that she would not be able to commit to a regular or predictable work schedule.

[54] A careful review of the evidence indicates that up to at least February 2001 this would not have been the case. The Tribunal acknowledges that the Appellant has an unpredictable disease, that she benefitted from ergonomic equipment, and that she had and continues to have periods during which she was likely unable to go to work. However, the evidence is that up to February 2001 and for a significant time after that, the frequency of her relapses and the functional limitations caused by her daily symptoms were not so onerous that they would not have been tolerated except by a benevolent employer. They were not such that she was incapable regularly of pursuing any substantially gainful occupation. Her condition was not “severe’ as that term is defined in the CPP.

Prolonged

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

CONCLUSION

[56] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security