



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. M. v. Minister of Employment and Social Development*, 2017 SSTGDIS 139

Tribunal File Number: GP-16-1624

BETWEEN:

**R. M.**

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: Raymond Raphael

HEARD ON: September 26, 2017

DATE OF DECISION: September 27, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 14, 2015. The Appellant claimed that she was disabled because of a stroke. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on May 11, 2016.

[2] This is the Appellant's second application for CPP disability. The Respondent received her initial application on January 3, 2011 and denied it on June 7, 2011. The Appellant did not request reconsideration.

[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).

[4] The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds that based on the applicable last four out of six years of pensionable earnings (2012 to 2017) the Appellant's MQP is December 31, 2017. [Record of Contributions: GD3-12]

[5] Since this date is in the future, the Tribunal must determine whether the Appellant was disabled on or before the date of the hearing.

[6] The appeal was initially scheduled to be heard by videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) There are gaps in the information in the file and/or a need for clarification.
- c) 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.
- d) In her written submissions the Appellant requested an in person hearing and emphasized the importance of the Appellant's testimony. The videoconference

hearing will allow for visual contact between the Appellant and the Tribunal Member.

[7] At the Appellant's request the method of proceeding was changed to 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) 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.
- d) The Appellant has requested that the hearing proceed by teleconference.

[8] The following people attended the hearing:

R. M.: Appellant

Ken Bondy: Appellant's representative

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

## **EVIDENCE**

### ***Background***

[10] The Appellant is 60 years old. She left school while she was in grade 11. She worked for four years as an office assistant for an insurance company in Toronto but then stayed home when she had children. She moved to X in 1995. In 1997 she started working as a pizza cook for a bar and grill and in 1997 she started working as a pizza cook for Toppers. In November 2009 she was robbed at gunpoint at work: she went off work on WSIB benefits. She quit Toppers in 2010 because she didn't want to go back to work there.

[11] She worked as a cook for McDonald's from January 2012 until she suffered a stroke in May 2015. She has not returned to work since her stroke.

[12] The Appellant testified that the main reason she believes she is disabled is the pain and cramping in her left leg limits her standing to no more than 15-20 minutes. When referred to the difficulties/functional limitations in her disability questionnaire (GD2-50) she stated that these were accurate as of November 2015: she stated that her legs (more on left) are now worse and that she suffers continuous pain and cramps in the back of her left leg.

[13] She sees Dr. Siddiqui every three months and goes to the vascular clinic in X every six months for a scan. If there are concerns they call her and she goes back to see a doctor. She wasn't called back to see a doctor on her last two visits (October 2006 and April 2017). The last time she spoke to a doctor at the vascular clinic was in April 2016: the doctor told her that her arteries and legs are blocked but they did not recommend any procedure. She plans on discussing her increasing leg pain and cramping with the doctor on her next visit in October. She takes over-the-counter Advil to deal with the pain when it becomes severe (usually 3-4 times a week). She described the pain level as 7-8: it comes on 3-4 times a week – sometimes it lasts for ½ hour and sometimes it “comes and goes.” When the pain comes on she sits down on the recliner or couch and doesn't try to walk or stand.

[14] The only other continuing symptom from her stroke is his memory: it isn't “what it used to be” and she forgets a lot of things such as names or what she wanted to pick up at the grocery store. She has no continuing symptoms from the kidney injury and she no longer uses a catheter. With respect to her hypertension she can feel when it goes up and sometimes it gives her a headache: she is taking two medications for her high blood pressure and Dr. Siddiqui is continually changing the dosages. She sometimes gets flash backs from the November 2009 robbery but she hasn't seen a psychiatrist for this for a long time. She considers her blood pressure to be a severe condition because it is “way too high.”

[15] Physically other than standing she “can do everything else.” Her driver's license was never suspended. She hasn't looked for alternative work because “there is nothing in town that doesn't require standing.” She didn't approach MacDonald's for modified work because she didn't think this would have been worthwhile since they don't have any jobs that don't require

standing. She believes that she would be able to do a more sedentary type job but no such jobs are available in her area.

## **MEDICAL AND DOCUMENTARY EVIDENCE**

[16] The Tribunal has carefully reviewed all of the medical and documentary evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

### ***Disability Questionnaire***

[17] In her CPP disability questionnaire, signed on November 12, 2015, the Appellant noted that she has a grade 10 education and that she last worked as a cook for McDonald's from January 7, 2012 to May 16, 2015; she stated that she stopped working because of a stroke. She claimed to be disabled as of May 16, 2015 and stated that the illnesses or impairments that prevented her from working include headaches, a weak right leg, inability to stand for long periods of time, and slow response. [Disability Questionnaire: GD2-47 to 49]

### ***Limitations***

[18] She described difficulties/functional limitations with sitting/standing for more than 20-30 minutes (legs get sore and tight); walking for more than 10-15 minutes; bringing grocery bags in from car; bending (legs hurt and cramp); short term memory; concentration; and sleeping. She did not describe any difficulties/limitations with reaching, personal needs, household maintenance, seeing, hearing, speaking, or breathing. She drives for short trips to the store. [GD2-50]

### ***Disability Questionnaire on First Application***

[19] In her disability questionnaire, signed on January 7, 2011 in support of her initial disability application, the Appellant indicated that she had last worked as a cook for Toppers Pizza from June 10, 2003 to December 5, 2009, and that she stopped working because she had been robbed at knifepoint. She claimed to be disabled as of December 5, 2010 because of stress, anxiety, and trouble sleeping. [First Disability Questionnaire: GD2-87 to 89]

***Medical Reports***

***Dr. McClean, former family doctor***

[20] On December 18, 2010 Dr. McClean, the Appellant's then family doctor, completed the initial medical report in support of the Appellant first disability application. The report diagnosed post-traumatic stress syndrome after being robbed at knife point. The prognosis was fair. Dr. McClean hoped that the Appellant would be able to return to work with a protected and safe working environment. [GD2-83 to 86]

***Dr. Siddiqui, family doctor***

[21] In a May 26, 2015 hospital discharge summary Dr. Siddiqui noted that the Appellant had been admitted to X Hospital on May 16, 2015 because of a sudden loss of control of the right side of her leg. She was discharged on May 26, 2015 and was to be followed at the Stroke Rehab Centre in X. [GD4-16]

[22] In a June 24, 2015 hospital discharge summary Dr. Siddiqui noted that the Appellant was admitted on June 1, 2015 because of an acute onset of right lower extremity weakness along with bladder symptoms and mild right upper extremity weakness. She was seen by Dr. Harmon due to acute kidney injury for which she improved after one week. She was discharged on June 24, 2015 with NECCAC supervision and follow up with three specialists: Dr. Gupta, Dr. Moskalyk, and Dr. Harmon. The most responsible diagnosis was cerebrovascular accident and she was also diagnosed with a urinary tract infection. [GD4-17]

[23] On November 2, 2015 Dr. Siddiqui completed the initial report in support of this disability application. She diagnosed a stroke and hypertension. She stated that the Appellant was compliant and that she was not sure about her prognosis. [GD2-41]

[24] On May 20, 2016 Dr. Siddiqui reported to the X Community Legal Clinic that the Appellant's diagnoses included acute kidney injury, peripheral arterial disease, hypertension, and cerebrovascular accident. She noted that the Appellant has been admitted to the hospital on a few occasions and that she has seen numerous specialists. She opined that the Appellant is a disabled

person; that her disabilities are both severe and prolonged; and that she is incapable of pursuing any gainful employment. [GD4-15]

*Specialists*

[25] On August 7, 2015 Dr. Willoughby, vascular surgeon, noted that the Appellant sustained a left hemispheric stroke in May of that year; that she presented with right lower extremity weakness and mild right upper extremity weakness; that she was admitted to the hospital and underwent rehab; and that her deficits are now resolved. [GD4-50]

[26] On August 10, 2015 Dr. Gupta, neurologist, noted that since her discharge the Appellant has been doing well; that her weakness has improved; and that her bladder symptoms have also improved. [GD2-45]

[27] On December 10, 2015 Dr. Harmon, nephrologist, noted that the Appellant's acute kidney injury was completely resolved and that her current main issue is significant hypertension for which she is being monitored and medication is being titrated. [GD4-36]

[28] On April 25, 2016 Dr. Pudakkam, vascular surgeon, noted that the Appellant acknowledged difficulties with lower extremity claudication mainly in the right lower extremity which has been present for years; that she is managing; that she can walk 15-20 minutes before noticing weakness and discomfort; and that with rest the discomfort is relieved within a few minutes. He concluded that she has significant carotid disease as well as lower extremity occlusive disease; that there is no evidence of limb threatening ischemia; that she has had no further neurological events; and that they will continue to manage her medically. [GD3-48]

[29] On May 16, 2016 Dr. Hatch, family medicine, noted that the Appellant has ongoing leg claudication that has been stable and that she has a history of severe refractory hypertension. [GD4]

## **SUBMISSIONS**

[30] Mr. Bondy submitted that the Appellant qualifies for a disability pension because:

- a) Her medical condition, when considered in the context of her personal characteristics and the subjective lived experience of her disability, prevent her from performing any type of gainful employment;
- b) The medical conditions referred to by Dr. Siddiqui are the result of a severe stroke and related complications and cause her to become angry, frustrated, depressed, irritable, and unable to regularly pursue substantial gainful employment: despite appropriate treatment these conditions will not go away;
- c) The most significant reports are from Dr. Siddiqui;
- d) She could not work in a “real world” context since the only type of job that she could do does not exist in the X area.

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

- a) Although the Appellant feels she cannot return to her usual physical work as a cook due to her medical condition, she has not attempted to return to any alternate lighter work;
- b) The medical evidence does not show any serious pathology of impairment which would result in her being categorized as disabled and unemployable in all occupations;
- c) From a neurological perspective, no physical or cognitive deficits have been identified that would suggest the Appellant cease all activity including employment.

## **ANALYSIS**

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

[32] 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 date of hearing.



[33] 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).

[34] 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.

[35] The Tribunal has found that the MQP is December 31, 2017 and that the Appellant must establish that she was disabled on or before the date of hearing.

### **Severe**

[36] 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.

[37] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of hearing she was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani 2001 FCA 248*). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[38] 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 v. Canada (MSD)*, [2008] FCA 33.

[39] The severity requirement relates to the capability of the individual to regularly pursue any substantially gainful occupation, and not to labour market conditions or other socio-economic factors. Socio-economic factors such as labour market conditions are irrelevant in a determination of whether an individual is disabled. CPP disability provisions are not a supplementary employment insurance scheme: *Minister of Human Resources Development v. Rice*, 2002 F.C.A. 47

[40] The Tribunal is satisfied that the Appellant has significant limitations and that she cannot return to her previous work as a cook which requires prolonged standing. However, the Tribunal is not satisfied, on the balance of probabilities, that she lacks the regular capacity to pursue alternative suitable employment.

[41] The Appellant's functional limitations as described in her disability questionnaire and in her oral evidence (paragraphs 12 and 17, above) do not preclude sedentary type employment. Further, in her oral evidence the Appellant acknowledged that she believes that she could do sedentary type work but no such work is available in her area. The absence of such work may be true although this is to a certain extent speculative since the Appellant has not made any efforts to find this type of work; however, the unavailability of work in her area is irrelevant and does not detract from her acknowledged regular capacity to pursue alternative sedentary type work: *Rice*, above.

[42] It is the Tribunal's task to come to its own conclusion based on the whole of the evidence before it including the oral evidence. The Tribunal would not be properly fulfilling its function if it were to merely rubber stamp, without a careful analysis, opinions expressed in the medical reports from the treating physicians.

[43] The Tribunal is mindful of and has given careful consideration to Dr. Siddiqui's May 2016 report (paragraph 24, above) which opines that the Appellant is incapable of pursuing gainful employment; however, other than setting out diagnoses there is no analysis as to why the

Appellant lacks this capacity. It is the Appellant's capacity to work and not the diagnosis that determines the severity of the disability under the CPP: *Klabouch*, above.

[44] The Appellant has the burden of proof and the Tribunal finds that she has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP requirements.

**Prolonged**

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

**CONCLUSION**

[46] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security