



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. V. v. Minister of Employment and Social Development*, 2017 SSTGDIS 163

Tribunal File Number: GP-16-2495

BETWEEN:

T. V.

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: October 31, 2017

REASONS AND DECISION

OVERVIEW

[1] In February 2016 the Respondent cancelled the Appellant's *Canada Pension Plan* (CPP) disability pension as of March 31, 2013. The Respondent maintained this decision on reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The issue before the Tribunal was whether it is more likely than not that the Appellant ceased to be disabled and, if so, when.

[3] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The member has 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.

[4] The Tribunal has decided that the Appellant ceased to be disabled as of March 2013 for the reasons set out below.

EVIDENCE

Background

[5] The Appellant is now 54 years old. She lives in the Vancouver area.

[6] In March 2001 the Appellant applied for a CPP disability pension (GD2-43; GD2-284). At the time she had completed Grade 12 and three years towards a Bachelor of Business Administration (BBA) degree. She was working as a bookkeeper and was also taking correspondence courses to complete her degree through the British Columbia Open University.

[7] In her application the Appellant claimed that she had been disabled by small vessel heart disease and idiopathic edema since May 2000. She described numerous limitations including an inability to stand for more than 20 minutes or to sit for more than two hours. She tired easily and had interrupted sleep. Her condition made walking or even holding a pen painful; she was short of breath and light-headed; and she became nauseous and dizzy with any activity.

[8] Medical evidence from around this period supported the Appellant's application. It indicated that she took medication and needed up to four hours of bed rest each day; that her activity tolerance was significantly impaired; that she had had limited response to treatment; and that her long-standing Type 1 diabetes had become unstable.

[9] The Appellant had previously worked 30 hours per week. She went on a four-month medical leave from May to September 2000, but when she returned she was unable to keep up with the demands of her position. In January 2001 she reduced her weekly hours to half-time, but she was rarely able to fulfill her duties, and she was let go in May 2001.

[10] The Appellant's disability application was denied at first. Upon reconsideration she was determined to have become disabled as of January 2001, based on the fact that she had reduced her hours of work in that month (GD3-3; GD2-243). She began receiving a CPP disability pension which was paid to her without question for many years.

[11] The Appellant stated that her health has never improved since May 2000, and that over the years she developed additional complications. She has unpredictable, intermittent periods of blood sugar instability two to four times per week for which the cause has not been identified. During these episodes her fluctuating glucose levels cause poor focus, nausea, and increasing tremors, which slows her work capacity. Other complications include progressive peripheral neuropathy; bleeding retinas; trigger fingers; painful hand tremors; daytime fatigue caused by poor sleep; possible cardiac dysrhythmia; and increasingly debilitating episodes of depression and anxiety which do not respond to medication.

Advanced Education

[12] The Appellant stated that after she was granted CPP disability benefits she continued to work on obtaining the final five courses needed for her BBA degree. The university allowed

students to take up to six months to complete each 14-week course, with a three month extension period available. It took the Appellant almost four years to complete her degree.

[13] The Appellant then enrolled in an executive Master of Business Administration (MBA) at Royal Roads University. She stated that she was admitted in spite of not meeting the entrance requirements. The program was flexible because it was designed for individuals with limited time to devote to their studies, and the Appellant was able to complete it by April 2006.

[14] In September 2006 the Appellant enrolled in an on-line PhD program through Northcentral University (NCU) in Arizona. She stated that when she began the program the courses were 16 weeks duration with no fixed delivery dates, and extensions of time were available. Students were able to take time off between courses or take courses concurrently; although later in the program courses were to be taken one at a time and time off was limited.

[15] The Appellant stated that she was accommodated by NCU because of her depression and anxiety, which fluctuated between mild and severe. At best her symptoms had a negative impact on her ability to focus on and complete daily tasks. At worst she was unable to get out of bed or attend to daily functions such as showering and eating. On her psychiatrist's advice the duration of her courses was doubled, which was the maximum accommodation available.

[16] The Appellant stated that the standard time for completion of the PhD program was four years, up to a maximum of eight years. By July 2014 – eight years from when she enrolled in the program - she was far from completion. She was granted an extension to December 2016, and she finally completed the degree in January 2017.

Work

[17] The Appellant's Record of Earnings indicated that she had no income after 2001 until 2008, when she earned \$11,015.00. From 2009 to 2014 she earned, respectively, \$12,017.00; \$13039.00; \$17,437.00; \$19468.00, \$22,530.00; and \$28,108.00 (GD2-50).

[18] The Appellant stated that this was income from her position as a tutor or Open Learning Faculty Member (OLFM) with Thompson Rivers University (TRU). She began this work in April 2008 and she continues to do it. She works from home, with flexible working conditions.

She is able to choose the day, time of day, and the number of hours in each day that she works. She completes her work as and when she is able to, depending on her physical and mental health. She stated that her workload is less than one work day per week, and she is allowed more than twice the usual turnaround time of three business days for marking assignments.

[19] The Appellant did not agree that the amounts attributed to her as income reflected payment for work actually performed. Her TRU income included compensation intended to cover the cost of working at home; vacation pay; and OLFM base pay. She described the latter as a fee of approximately \$33.00 per student that is paid to her under the collective agreement whenever a student registers and is assigned to her. She is not required to do any work to receive this amount. It is paid to her in the expectation that she will be available to do marking as needed for the duration of the student's registration in the course.

[20] The Appellant stated that the work she actually performs is marking assignments and exams; and participating in some on-line activities and telephone meetings. She stated that her pay for these activities is substantially lower than the income shown in her Record of Earnings, as described below.

[21] The Appellant stated that on some days she is able to work a few hours; on other days she cannot work at all. She does not know from one day to the next how much work she will be able to do. Over the course of a year she averages six to eight hours of work per week. She stated that she is accommodated by TRU in that she is given extra time to complete tasks, and others have been assigned to perform her work when she is unable to.

Reassessment of the Appellant's Disability Status 2009

[22] In 2009 the Respondent inquired about the Appellant's 2008 income (GD2-228-229). The Appellant completed a Return to Work Report and a Disability Reassessment Questionnaire, both dated December 9, 2009 (GD2-218-225).

[23] In these documents the Appellant described her position at TRU as piece work performed at home. She was paid \$29.75 per assignment marked, and she earned from \$400.00 to \$900.00 per month. She stated that she continued to be disabled because of lack of stamina, shortness of breath, joint pain, and diabetes; and that she had also developed rheumatoid arthritis and high cholesterol. She advised that she was working towards an on-line PhD in

marketing from NCU and she estimated that she was about two years away from completing the degree.

[24] In a letter accompanying these forms, the Appellant explained that actual earnings for work completed by her consisted of pay she received for marking assignments and exams, and attending a telephone meeting. These added up to \$5,966.22. The rest of her reported income was for statutory pay, vacation pay, compensation for the use of her computer, and a one-time retainer payment (the OLFM base pay described above) (GD2-212-213).

[25] The Respondent's records indicated that it accepted that the retainer payment and computer-use compensation should not be included in the allowable level of earnings it used to decide if a person was pursuing substantially gainful employment. It determined that the Appellant was working about 16 hours per month and so her work was not substantially gainful (GD2-207-211).

[26] In a letter of December 21, 2009, the Respondent advised the Appellant that her disability benefits would continue. She was told that she must report her information in the spring of each year to keep her file up to date and prevent potential overpayments; that she was to advise if her hours of work or income from work increased, or if her health improved (GD2-28-29). An information sheet was enclosed with the letter. It stated that the Appellant was to advise if she earned \$4600.00 or more in gross income before taxes (GD2-30).

Reassessment of the Appellant's Disability Status 2012

[27] In May 2012 the Respondent contacted the Appellant to inquire about her activities and income from January 1, 2010, to the present (GD2-204-206; Record of Earnings at GD2-50).

[28] In June 2012 the Appellant submitted another Return to Work Report and a Disability Reassessment Questionnaire, as well as an explanatory letter and a printout of her earnings history for 2010 and 2011. She stated that she continued to work for TRU and that she worked for two hours a day, three days a week. She earned between \$29 and \$32 per hour and an average of \$759.00 per month over 24 months. She noted that the usual turnaround time for marking was three business days, but that her employer allowed her seven working days to return assignments. She stated that chronic depression interfered with her ability to complete

her duties on a regular schedule. She stated that her gross wages for work actually performed – marking assignments and exams, attending telephone meetings, and an on-line performance review - was \$8343.24 for 2010 and \$9878.37 in 2011 (GD2-188-200).

[29] In the Disability Reassessment Questionnaire the Appellant stated that her chief medical complaints were small vessel disease, idiopathic cyclic edema, chronic depression, Type 1 diabetes, retinopathy and high cholesterol. She noted that she was seeing a psychiatrist and she provided evidence of new medication (GD2-195-197).

[30] The Respondent decided to continue the Appellant's disability benefits. Its notes indicated that the decision was made because the Appellant's base pay and hourly wage scale were negated by the fact that she worked on average six hours per week. The notes stated that the Appellant was advised in a phone call that she was to contact CPP each year that she received above the allowable level of earnings (GD2-181).

[31] In a letter of July 16, 2012, the Respondent advised the Appellant of its decision. The letter noted that the Appellant was working six hours per week, earning \$29 to \$32 per hour. She was reminded again to report if her hours of work or income from work increased, or if her health improved (GD2-26-27). The letter referred to further information that was enclosed outlining the circumstances in which the Appellant was to contact CPP. This enclosure is not in the file; presumably it was similar to the one sent with the letter in 2009.

Reassessment of the Appellant's Disability Status 2015

[32] The Respondent contacted the Appellant in August and October 2015 for further information about her income from 2012 to 2014 (GD2-176-179; Record of Earnings at GD2-50).

[33] The Appellant completed a Return to Work Report in November 2015, in which she stated that she was working for TRU as an OLFM one to two hours per day, four to five days per week, earning \$33 to \$37 per hour. She stated that her pay for actual work performed – marking assignments and exams, and reviews and revisions - was \$4,922.65 for July to December 2012, \$13,006.51 for 2013, and \$16,994.72 for 2014.

[34] The Appellant also provided her earnings history from TRU and indicated that she had averaged 6.2 hours of work per week in 2012, 7.4 hours per week in 2013, and 10 hours per week in 2014. She noted that she had lost time due to multiple medical issues and that although she had previously been tolerating the demands of her job, since August 2015 she had been unable to maintain focus and she had difficulties related to her depression. She noted that her employer allowed her additional time to complete her marking tasks (GD2-159-175).

[35] The Appellant stated as well that she had been unable to sustain a pace of 10 hours per week, and that she had been on sick leave since August 2015. She stated that in 2015 she had been paid \$9,053.75 for actual work performed to date (November 8, 2015) (GD2-160-161).

[36] An Employer Questionnaire was completed in December 2015 by a human resources consultant at TRU. It indicated that the Appellant's work as an OLFM was part-time because that was all the work that was available; that the Appellant did not work irregular, part-time, or casual hours; that she was paid by course, marks and students; that her attendance was good and she had no absences for medical reasons; that her work was satisfactory; and that she worked independently and did not need special arrangements or help from her co-workers (GD2-96-98).

Medical Information

[37] As part of its 2015 review the Respondent obtained further information from the Appellant's doctors. This indicated among other things that she had proliferative diabetic retinopathy which had required laser treatment in July 2013 but was now stable; in 2015 she was diagnosed with obstructive sleep apnea and began CPAP therapy; and that she had several instances of trigger finger beginning in late 2011 and requiring surgery (GD2-124-151).

[38] In June 2014 the Appellant was reviewed by endocrinologist Dr. Wallace who stated that the Appellant looked well but had increasing neuropathic pain over her feet. She was noted to have depression (GD2-126-127).

[39] Clinic notes from the Appellant's family doctor, Dr. Pattinson, indicated that between February and December 2012 the Appellant saw her for a number of medical issues including diabetic control, psoriasis, colonoscopy screening, trigger finger, and knee pain. From January to December 2013 she saw Dr. Pattinson for diabetes control, fatigue, neuropathy, neck pain,

tremors, and tingling and numbness in both hands. She stopped seeing a psychiatrist in May of that year. She described difficulties with her eating and exercise patterns, and was noted to have a challenging daily routine in which her work was desk restricted and she was also working on her on-line PhD.

[40] Dr. Pattinson's notes indicated that in February 2014 the Appellant reported having started a gluten-free diet and that "she looks and feels great". Throughout that year she continued to see Dr. Pattinson for diabetic and other issues. She reported being "close to another nervous breakdown" in August 2014 because her thesis was lost; but she was "OK now" and was to contact mental health care at Surrey Memorial Hospital. She remained on medication for diabetes and for depression and anxiety (GD2-104-118).

SUBMISSIONS

[41] The Appellant submitted that she continues to be disabled. In particular:

- a) She complied with subsection 69(1) of the *CPP Regulations*.
- b) Her income does not accurately represent remuneration for work performed.
- c) Any earnings she had were not substantially gainful.
- d) She did not have regular work capacity.
- e) Her employment conditions did not change after she was last determined to be disabled.
- f) Her condition continues to be severe and prolonged.

[42] The Respondent submitted that the Appellant ceased to be disabled in March 2013 because she had an ongoing regular capacity for substantially gainful work at that time.

ANALYSIS

The Appellant Ceased To Be Disabled In March 2013

[43] Subsection 70(1) of the CPP provides that a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled.

[44] The Tribunal finds that although the Appellant continued to be challenged by multiple conditions, she was nevertheless capable regularly of pursuing a substantially gainful occupation by March 2013 and she ceased to be disabled at that time.

The Onus of Proof is on the Respondent

[45] 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 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.

[46] After the initial granting of disability benefits in 2001 the Respondent decided two more times that the Appellant was disabled. Those decisions must be dealt with as having been correct, up to the last determination to continue benefits that was made on July 16, 2012 (*Kinney v. Canada (Attorney General)* 2009 FCA 158).

[47] The onus is on the Respondent to prove on a balance of probabilities that the Appellant ceased to be disabled because the requirements of paragraph 42(2)(a) were no longer met at the time her benefits were terminated (*Atkinson v. Canada (Attorney General)* 2014 FCA 187). In order to do so the Respondent must show that the conditions upon which disability payments were made had improved such that the Appellant no longer qualified (*Boudreau v. MHRD* 2000 CP 11626).

Requirement to Report Work Activity

[48] The Respondent submitted that the Appellant was required to report her work activity, because she was advised to do so in the decision letters and because section 70.1 of the CPP Regulations requires a person who returns to work to inform the Minister without delay.

[49] The Respondent has known since 2009 that the Appellant is working. The Appellant believed that she did not have to report further unless her income minus expenses and what she regarded as non-work compensation exceeded the levels indicated by the Respondent.

[50] This was a reasonable position to take. Although it is apparent from the Respondent's notes in the file that it was the Appellant's hours of actual work rather than her income that was

the determining factor in the decisions of 2009 and 2012, that was not adequately conveyed to the Appellant in the decision letters.

[51] The Respondent also quoted subsection 69(1) of the *CPP Regulations*, which spells out a more specific requirement to provide the Minister with information upon request and allows the Minister to determine that a person who fails to do so has ceased to be disabled. A person may be excused from this requirement only for good cause, which is defined as a significant risk to her life or health.

[52] Although the Respondent cited this provision, it did not set out any evidence or submissions to indicate that it was relying on this provision to support its decision. In any case, the Tribunal finds that there is no evidence that a request was made under subsection 69(1) which the Appellant did not comply with.

Evidence of Improvement

[53] The Respondent has presented no convincing evidence that the Appellant's medical condition has improved significantly since July 2012.

[54] The Appellant continues to have a number of symptoms and limitations that impair her lifestyle and her ability to work. However, 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. It is the capacity to work and not the diagnosis of a disease that determines the severity of the disability under the *CPP* (*Klabouch v. MSD* 2008 FCA 33).

[55] The Respondent has shown that, in spite of the Appellant's medical condition, her capacity to work had improved by early 2013.

[56] The Tribunal does not consider that the Appellant's work on her PhD is evidence of this. The Respondent was aware of this activity when it decided in 2009 and 2012 that the Appellant continued to be disabled.

[57] The Appellant did increase the number of hours she was able to work for TRU. In 2012 she worked an average of 6.2 hours per week. In 2013 this had increased to 7.4 hours. As discussed below, this increased work capacity meant that the Appellant was no longer disabled.

The Appellant's Work Was Substantially Gainful

[58] The Respondent's determination of what is substantially gainful, or the allowable earnings or ALLE it referred to in its communications with the Appellant, reflects departmental policy only and is not binding on the Tribunal.

[59] Subsection 68.1(1.1) of the *CPP Regulations* defines "substantially gainful" as the maximum annual amount that a person could receive as a disability pension, which during the period in question was about \$14,000.00 annually. This provision did not come into force until 2014, and so does not apply to the Appellant's employment before then.

[60] Previously, case law determined that in order to be substantially gainful the employment had to be real and remunerative, the person must have been performing a useful function, and the compensation must have reflected an appropriate award for the nature of the work performed (*Minister of Social Development v. Nicholson* (2007), CP 241430; *Boles v. Minister of Employment and Immigration* (1994), CP 2794 (PAB)).

[61] The Appellant submitted that her only true work activity was marking assignments and exams; performing on-line reviews; and participating in telephone meetings. She argued that any income she received above the amounts payable for those activities should not have been included in a determination of whether her employment was substantially gainful.

[62] The Tribunal does not accept this position. While compensation for using a home office and related equipment does not indicate a capacity to work, all of the other amounts paid to the Appellant were remuneration for her employment. She was required to make herself available, and to perform services when necessary. That describes almost every occupation. It is reasonable to assume that if the Appellant only accepted students and collected her base pay, but refused or was unable to mark their assignments and exams, her employment would not have continued.

[63] The Tribunal finds that the Employer Questionnaire did not accurately describe the Appellant's working conditions. It was obviously completed by someone who took little time if any to inquire about the Appellant's particular circumstances, as it failed to even mention the Appellant's four month long medical leave which had ended only a few days before the questionnaire was completed.

[64] The Tribunal acknowledges that the Appellant works with difficulty, that she is given longer than normal to complete her tasks, and that students have lodged complaints about this. However, her employer continues to see value in retaining her and making accommodations. Her employment is arm's-length and in a competitive workplace. It has continued for almost ten years. Her hourly wage has not been reduced because of the length of time it takes her to do her work.

[65] The Appellant's remuneration for her work at TRU in 2013 was approximately \$21,000.00 as outlined on page GD2-173. This is in keeping with her reported earnings from pensionable employment in that year of \$22,530.00. This is well above minimum wage and well above the maximum disability amount for that year. It was an appropriate award for someone with the Appellant's skill level to make herself available and perform services for about 7.4 hours per week.

[66] The Tribunal finds that the Appellant's work at TRU became substantially gainful in 2013.

The Appellant Was Capable Regularly Of Pursuing Employment

[67] Besides finding that the Appellant's employment was substantially gainful, the Tribunal must also find that she was capable regularly of pursuing it.

[68] Dr. Pattinson's clinical notes showed that in 2012 and 2013 the Appellant expressed little to no concern about her health interfering with her ability to perform her duties. While she may not have been able to predict from one day to the next how much she would be able to accomplish and when, she was able to pursue work with consistent frequency such that she remained gainfully employed.

[69] The Tribunal finds that by March 2013 the Appellant was capable regularly of pursuing a substantially gainful occupation.

CONCLUSION

[70] The Tribunal acknowledges that the Appellant was likely able to work only because she found a job in which the hours and the working conditions were extremely accommodating to

her situation while still paying her a remunerative salary. This was, however, a job in the “real world” where the Appellant was allowed flexibility but was still expected to perform at a competitive level.

[71] A person’s condition must be both severe and prolonged in order to meet the test for disability. The Respondent has proven that the Appellant’s condition was no longer severe in March 2013. It is not required to also show that the condition had ceased to be prolonged.

[72] Having decided that the Appellant ceased to be disabled in March 2013, the Tribunal does not have jurisdiction to decide if she became disabled again at a later date.

[73] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security