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

Citation: *J. Z. v Minister of Employment and Social Development*, 2017 SSTGDIS 210

Tribunal File Number: GP-14-5029

BETWEEN:

J. Z.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: September 5, 2017

DATE OF DECISION: November 24, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on August 18, 2013. The Appellant claimed that she is disabled because of chronic diffuse pain, cardiac issues, spinal stenosis, C7 radiculopathy, and S1 nerve root compression. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] This is the Appellant's third application for CPP disability.

[3] She initially applied for CPP disability in December 1990. Her application was granted in February 1991. Her disability benefits were terminated as of the end of July 1991 because she had returned to work.

[4] Her second disability application was received on September 13, 2005. This application was denied initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). Her appeal was heard by a Review Tribunal (RT) on March 21, 2007 and was dismissed on July 5, 2007. [GD2-218]

[5] The Appellant's application for leave to appeal to the *Pensions Appeal Board* (*PAB*) was dismissed in August 2007. The Appellant's appeal to the Federal Court of the *PAB* decision was denied.

[6] The Appellant's application for early retirement CPP benefits was approved on June 7, 2014 with payment starting as of June 2014. [GD1-121]

[7] On June 1, 2017 the Tribunal delivered an interlocutory decision dismissing the Appellant's apparent request that the Tribunal Member recuse himself; determining that the Appellant is precluded from raising constitutional issues during the appeal process; dismissing the Appellant's claim for breach of her privacy rights; and determining that the disability issue is to be heard by videoconference. [GD65]

[8] On June 1, 2017 the Tribunal issued a notice that the disability issue was to be heard by videoconference for the following reasons:

a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.

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.

c) This is the most cost effective and efficient manner of proceeding and is consistent with the provisions of paragraphs 2 and 3(1)(a) of the Tribunal Regulations which require the Tribunal to interpret the Regulations so as to secure the just, most expeditious, and least expensive determinations of appeals, and to conduct hearings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[9] The following people attended the hearing:

J. Z.: Appellant

Sylvie Doire: Counsel for the Respondent

Louise Filiatrault: representative of the Minister

Emma Skowron: articling student accompanying Ms. Doire

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

Test for Eligibility

[10] 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.

[11] Since the Appellant started to receive CPP retirement benefits in June 2014, to succeed on her appeal she must establish, on the balance of probabilities, that she suffered from a severe and prolonged disability in accordance with the CPP criteria on or before May 31, 2014 and continuously thereafter.

Res Judicata

[12] The RT hearing was held on March 21, 2007 and the decision was released on July 25, 2007. [GD2-218]

[13] The MQP was found to be December 2007. The Appellant filed extensive medical documentation and appeared in person before the Tribunal: she gave oral evidence and made submissions.

[14] The RT noted that the Appellant was currently 52 years old and that prior to July 14, 1999, she had worked for 25 years as a registered nurse; that although she was off work briefly in the early 1990's she generally had an excellent work and health record; that on July 14, 1999 "her life changed forever" when she was injured in a TTC bus accident which resulted in her being thrown forward and "wrapped around a pole"; and that she suffered soft tissue injuries which have imposed great hardship on her.

[15] The RT also noted that since the accident the Appellant has continued to work at various jobs because "she has to put bread on the table" and that she maintained that she works despite her disability. The Appellant testified that she was experiencing chronic pain in her back, knee, and legs; that she was limited in how long she could stand; and that she experiences pain when she sits.

[16] The RT referred to a letter dated January 9, 2007 to the OCRT from the Appellant that stated:

> On 13 December, I signed an official contract to work assisting with anaesthesia in a local periodontist's office, commencing 19 December, where I'm able to work within my medical restrictions. This job will always be on Tuesdays and Thursdays, so I request that you change my original request and not book an appeal on these days. I cannot afford to forfeit these work days...

[17] At the hearing which was on a Wednesday, the Appellant advised that she was at work the previous day and would be working the next day. The RT concluded as follows:

> ... It was clear she did not at this time understand the contradiction between applying for a CPP disability pension while being employed in any gainful employment. That is, her understanding of the term "severe and prolonged ... disability" was not in accord with the legislative definition. The Tribunal explained the legislation criteria in detail. That is, to qualify for a pension, one must demonstrate a severe and prolonged disability that prevents substantially gainful employment. As this Appellant is currently involved in substantially gainful employment, by definition, she does not qualify.
>
> The Appellant presented considerable evidence about the extent of her disabilities and limitations. We accept the fact that she was injured in the bus accident of July 1999 and has had great hardship ever since. The Appellant explained that she feels her injuries are severe. We understand why she thinks that. The Appellant explained that she is prevented by her injuries from working full-time. We understand that. The Tribunal wishes to acknowledge the Appellant's extensive efforts and commendable attitude in returning to employment despite her physical limitations and the hardship she is suffering. However, this Appellant, being currently employed, is not, by the definition of the Canada Pension Plan, severely and prolongedly disabled.

[18] If a matter is *res judicata* it precludes the rehearing or litigation of matters that have previously been determined. In this case, the RT determined that the Appellant was not severely disabled in accordance with the CPP requirements as of March 21, 2007.

[19] The doctrine of *res judicata* can apply if the following three pre-conditions are met:

a) the issue must be the same as the one decided in the prior decision;

b) the prior decision must have been final, and

c) the parties to both proceedings must be the same.

[20] Applying those factors to the present case:

a) The question to be decided on the Appellant's second disability application was whether she suffered from a severe disability in accordance with the CPP criteria on or before March 21, 2007. The question to be decided on the current application is whether the

Appellant suffered from a severe disability in accordance with the CPP criteria on or before May 31, 2014.

b) The RT decision was final, by virtue of subsection 84(1) of the CPP, which was in force when the previous decision was made.

c) The parties to the previous decision were the Appellant and the Minister of Social Development Canada. The Minister of Employment and Social Development, the Respondent in the present appeal, is the successor to the Minister of Social Development Canada. The parties are the same in both proceedings.

[21] The Tribunal finds that all of three pre-conditions for *res judicata* have been met with respect to whether the Appellant was severely disabled as of March 21, 2007.

Special Circumstances

[22] In *Danlyuk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 the Supreme Court of Canada held that if the three preconditions are met, the court must still determine the second step, whether as a matter of discretion, *issue estoppel* (a form of *res judicata*) ought to be applied.

[23] In *Danyluk* the Court stated that there is an open list of discretionary factors to consider when deciding whether or not to exercise the discretion. These may include:

a) the wording of the statute from which the power to issue the administrative order derives;

b) the purpose of the legislation;

c) the availability of an appeal;

d) the safeguards available to the parties in the administrative procedure;

e) the expertise of the initial decision-maker;

f) the circumstances giving rise to the first proceedings; and

g) any potential injustice.

[24] The Court stated that the objective of the exercise of discretion "is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

[25] The CPP set out a clear procedure by which the Appellant could seek review of the decision made with respect to her disability application. She filed medical documents and provided oral testimony to the RT. After her appeal was dismissed she unsuccessfully applied for leave appeal to the PAB, and then unsuccessfully appealed the denial of leave by the *PAB* to the *Federal Court*. When making its decision the RT was interpreting its enabling statute, with which it had particular familiarity, and it was with respect to the same benefit as that being sought in this case.

[26] There is nothing contained in this application or in any of the material subsequently filed by the Appellant that points to any potential injustice in preventing her from duplicating the decision-making and appeal process that she already employed on her previous application. The finality of decisions made by a Tribunal after a full and fair hearing promotes the orderly administration of justice. There is an important policy interest that there be finality with respect to decisions made by a Tribunal and that issues not be relitigated.

[27] The Tribunal finds that there are no special circumstances that would bring the appeal within the exception to the doctrine of *res judicata.*

[28] In consideration of the above, the Tribunal has decided that *res judicata* applies to the issue of severe and prolonged as of March 21, 2007 and that the Appellant must for the purposes of this appeal be considered not to have been disabled within the CPP definition as of March 21, 2007.

[29] This, however, is not determinative of whether the Appellant was severely disabled as of May 31, 2014, and the Tribunal must determine whether the Appellant became severely disabled during the window period between March 21, 2007 and May 31, 2014 (the window period).

[30] Accordingly, the onus is on the Appellant to establish, on the balance of probabilities, that during the window period between March 21, 2007 and May 31, 2014 there was a material change and deterioration in her condition to establish that, although she was not severely disabled as of March 21, 2007, she was severely disabled as of May 31, 2014.

DOCUMENTARY EVIDENCE

[31] The Tribunal has carefully reviewed the voluminous documentary evidence in the hearing file [GD1 to GD73]. In view of the application of *res judicata* the Tribunal has placed particular emphasis on the documents relating to the window period. Set out below are those excerpts the Tribunal found most pertinent.

Appellant's Correspondence

[32] In a letter to the OCRT dated July 21, 2007 the Appellant stated that since October 2006, she had been undergoing further medical investigations and that a recent ECG on July 4, 2007 showed "right bundle branch block" which is a new finding. She also stated that she feels that the Panel Members at the March 21, 2007 hearing "were extremely perceptive and fair in their assessment of her situation, though their decision does not address her ongoing reality of permanent work restrictions and disability... that she eventually recovered her job with one of her pre-illness employers, however, sustained ongoing financial difficulties... and that "No one should ever have to go through what she has incurred, due to the rigidity of the laws that exist or their failure to provide a bridge to enable people to recover from their illness or injury." [GD1-15]

[33] In a letter to Service Canada dated August 10, 2013 the Appellant enclosed a copy of a report dated November 5, 2007 from Dr. Spears, neurosurgeon, which she had not been allowed to submit in the appeal proceedings with respect to the RT decision. [GD1-166]

[34] In a letter to Service Canada dated March 19, 2014 the Appellant stated that she works freelance, mostly assisting with anaesthesia "as needed" because in those offices she is able to sit down intermittently to do her work, within her restrictions; that she works in seven different offices, who are her own contacts and who she invoices directly; that she sources her own work but has difficulty finding and keeping work due to her injuries and permanent prescribed

physical restrictions; that she works half days, full days, and on occasion extended hours; and that long hours exacerbate her pain. [GD1-149]

[35] In response to an inquiry letter dated June 13, 2014 from Service Canada the Appellant noted that she was working within her prescribed limitations on a mostly "as needed" basis; that she worked from 0 to 15 hours per week, dependent on patient bookings; that she continues to assist dentists and oral surgeons with anaesthesia "as needed"; and that her shifts vary from two to the usual maximum of six hours, and very occasionally more than six hours. [GD1-97]

[36] In a letter to the Tribunal dated December 6, 2014 which accompanied her appeal, the Appellant stated that the decisions denying her second disability application were rendered despite the fact that as far back as 2001 her injuries from the TTC accident were deemed permanent and that a partial disability has existed for several years; that the Minister when denying the Appellant's request had relied on information from a June 2014 consultation report from Dr. Alleyne that was "untrue" and a misrepresentation of her injury status and her personally; that in a February 2014 fall she had re-injured her right knee, leg and hip; that she was having ongoing increased difficulty walking; that the stress of her litigation with the bank and the bank's interference with her property ownership will interfere with the only work which she is able to do which is mostly "as needed" freelance self-employment work as a Registered Nurse where she can work "3 to 6 hours a day as able, within the prescribed restrictions, assisting dentists and oral surgeons with anaesthesia"; and that the added burden of standing long hours waiting to file documents at the Ontario Superior Court of Justice, and the four months she has to travel to Brampton to do so, has exacerbated her chronic pain and injuries. [GD1-1]

[37] In a letter to the Tribunal dated October 10, 2015 the Appellant stated that the onset of her current disability is July 14, 1999 when she incurred permanent injuries and permanent partial disability in a TTC accident; that new information is the injuries she sustained in the February 2014 fall and the requirement that she drive routinely to Brampton because of her litigation with the bank which aggravated her back and leg and contributed to her stress-related health concerns. She also stated:

> I continue to have work limitations and as an example only worked nine hours in the previous week, as that is all that was available to me, within my prescribed work restrictions of no heavy lifting, no prolonged standing and no prolonged walking. Fatigue and chronic pain continue to interfere with the amount and type of work I am able to do, as well as other contributing factors. At present there is no change in my work activity and as shifts are available, which consist of from two (2) hour shifts to six (6) hour shifts on average, I remain limited to assisting dentists and oral surgeons with anaesthesia, where I am able to sit down and do my work for the most. All other work activity is on hold at this time, and has been interfered with by self-representation in court proceedings that have gone on for three years now. I have spent hours of my time preparing documents, filing documents, seeking advice via Pro-bona counsel and sitting for extended periods of time waiting to file documents, trying to obtain fairness and justice, access to justice and transparency in proceedings. [GD4-1]

[38] In a letter to the Tribunal dated June 11, 2017 the Appellant stated that on May 1 and 2, 2017 she sustained a potentially life-threatening event when her systolic blood pressure exceeded 200 and peaked at 230/177 in the St. Michael's Hospital emergency department. Her doctor had sent her to the emergency department asking that they rule out a transient ischemic attack or other possible causes. She stated that she had similar emergency incidents in 2001 and 2014. [GD66-2]

[39] In a letter to the Tribunal dated August 3, 2017 the Appellant provided a medical update and stated that she sources all of her work from home; that she remains self-employed with no significant change to her situation; that she works "as needed"; that she has been hired to assist with flu clinics from October to the end of December; that the contract clearly states that there are no guaranteed hours; that in completing the paper work she was required to disclose her disability status; that she continues to outsource for more work; and that there have been no major changes in her ability to find work within her prescribed limitations. [GD67]

[40] In a post-hearing letter to the Tribunal dated September 12, 2017 the Appellant enclosed additional medical documentation including progress reports dated June 6, 2017 and July 19, 2017 from Dr. Gilbert, cardiologist. The June 6, 2017 progress report [GD71-8] indicates that when he last saw the Appellant she was stable although her nuclear scan did show mild lateral ischemia, and that since the 1999 accident she has had major pains in her legs, neck, shoulders, and back. He described the incident on May 1st and stated that she appears to be stable at the

present time. The July 9, 2017 progress report [GD71-6] indicates that “from a cardiac point of view she is quite stable.”

[41] In a post-hearing letter to the Tribunal dated October 3, 2017 the Appellant enclosed a sonogram of her right knee taken September 26, 2017 which revealed a small anteromedial meniscal cyst in the right knee that could be due to an underlying meniscal tear, there was no other sonographic abnormality in the right knee. The Appellant stated that this was relevant because there remains evidence of meniscal cysts which exacerbates her pain when walking and standing, and this relates to her February 17, 2014 re-injury which required emergency department treatment. [GD73]

Disability Questionnaire

[42] In her disability questionnaire, signed on August 5, 2013, the Appellant indicated that she has a university degree as well as post-degree diplomas. She stated that she was self-employed and that she was working two to three days a week for between three to eight hours per day. She also stated that she had stopped working as Registered Nurse assisting dentists and surgeons on August 2, 2013 because of a permanent injury arising from an accident in 1999. She claimed to be disabled as of July 14, 1999. [Disability Questionnaire: GD2-193 to 195]

[43] She explained her difficulties and functional limitations to be as follows: only able to sit/stand for ½ hour and prolonged standing is painful; fast walking aggravates her pain and when walking slowly she usually has to sit down after ½ hour; avoids carrying heavy items because this aggravates her pain; has to use caution when reaches; limited flexion in her right hip; some difficulties with personal needs; needs more time for household maintenance because of restrictions; occasional forgetfulness and trouble concentrating when fatigued; must do Pilates or other exercise before sleeping or will be too uncomfortable lying down; occasional swallowing difficulties; must use back support when driving; and not able to use the subway because she is not able to walk up stairs so she uses buses and streetcars instead of the subway, if possible. [GD2-196]

Post March 21, 2007 medical documents

[44] On November 5, 2007 Dr. Spears, neurosurgeon, noted that the Appellant was self-employed and worked with a periodontist as an anaesthesia assistant. He summarized that the Appellant suffers from mild-to-moderate lumbar spondylosis for which surgical intervention would not be appropriate: he recommended chronic pain and further conservative measures. [GD1-171]

[45] On January 23, 2009 Dr. So, the Appellant's family doctor, reported on his assessment of the Appellant prior to travel. He stated that she has two pre-existing conditions 1) right bundle branch block which has been stable for more than one year and 2) chronic pain which is stable without significant change. He felt that the Appellant was fit to travel without any concerns. [GD1-59]

[46] On May 22, 2009 Dr. Gilbert, cardiologist, reported that the Appellant was self-employed as an anaesthesia assistant in a periodontal clinic; that she has no cardiac symptomology; and that she is in constant pain. He stated that she may or may not have coronary disease but in any event she was quite stable and did not want to find out for certain. [GD1-109]

[47] On September 11, 2011 with respect to an application by the Appellant to the City of Toronto to reduce taxes because of sickness Dr. So indicated that the Appellant has had restricted work ability since January 30, 2000; that she has ongoing muscular restrictions with work due to a TTC accident in 1999; that she is not unable to work because of sickness; and that she can work within her prescribed restrictions. [GD35-36]

[48] On August 6, 2013 Dr. So completed the initial medical report in support of the current disability application. He diagnosed chronic pain and indicated that the prognosis was "poor to fair." He stated that she has permanent work restrictions of light duties. [GD2-175]

[49] A January 7, 2014 note from Dr. So states that the Appellant has chronic pain which has been exacerbated by her having to appear in court in Brampton. [GD4-33]

[50] A February 17, 2014 x-ray of the Appellant's right knee found no evidence of fracture. [GD2-94]

[51] A March 31, 2014 sonogram of the Appellant's right knee indicated mild right deep infrapatellar bursitis and a small right popliteal fossa cyst. [GD4-25]

[52] On May 23 2014, Dr. So referred the Appellant to the Toronto Rehabilitation Institute for assessment of right knee pain with a diagnosis of infrapatellar bursitis. The referral notes that the Appellant has pain in the right knee after a slip and fall. [GD1-102]

[53] On June 4, 2014 Dr. Alleyne, from the Toronto Rehabilitation Institute, reported to Dr. So that the Appellant incurred a fall on February 17, 2014 which she states may have been a syncope incident; that she fell on both knees injuring more significantly her right knee; that over the last three and one half months she has found that her new onset symptoms have improved; that she stated that this has aggravated her pre-existing chronic pain condition; that the pain in her back, right hip, and buttock have been aggravated since her fall; and that she stated that she walks short frequent doses all daylong and continues to abide by her pre-existing restrictions which were no prolonged walking and walking as tolerated. She encouraged the Appellant to continue with her activities including exercise and Pilates. [GD2-89]

[54] On August 27, 2014 the Appellant wrote to Dr. Alleyne expressing her disagreement with Dr. Alleyne's assessment and the denial of coverage for physiotherapy. She also pointed out what she believes to be misrepresentations in Dr. Alleyne's report. [GD1-16]

[55] A June 5, 2015 sonogram of the Appellant's right knee indicated mild right deep infrapatellar bursitis, not significantly changed in comparison with a March 1, 2014 sonogram; small right anteromedial para meniscal cyst that could be due to an underlying meniscal tear; no definite sonographic evidence of a popliteal fossa cyst; and early bicompartmental osteoarthritis in the right knee. [GD4-23]

[56] A September 8, 2015 requisition for a right knee MRI indicates right knee pain and possible meniscal tear. [GD4-8]

[57] A fax from the Appellant to the St. Michael's Hospital MRI Department dated October 5, 2015 indicates that she must be at her office by 7:30 am on October 19 since she is booked to work until 4 pm. [GD4-20]

[58] There are subsequent reports filed by the Appellant most of which relate to high blood pressure, cardiac, and glaucoma issues; however, these are long after May 31, 2014, which is the last date the Appellant qualified for CPP disability, and they are not relevant unless the Appellant establishes a severe disability as of May 31, 2014.

Answers to Questions

[59] At the hearing the Appellant confirmed that her answers to questions from the Tribunal at GD55 and GD56 were true and accurate to the best of her knowledge.

[60] In her answers the Appellant stated that July 14, 1999 (the date of the TTC accident) is the disability date that she is claiming and that February 14, 2014 (the date she fell and re-injured herself) is the secondary date. She listed and described her disabling conditions to include migraines, whiplash, lumbar injury and pain; right leg weakness and injury; right hip pain and limited range of motion; cardiac concerns; dental concerns related to facial muscle tightness; post-traumatic stress and anxiety; vision concerns under current investigation; and gynaecological concerns.

[61] She stated that the most significant material change and deterioration in her condition between March 21, 2007 and May 31, 2014 was the re-injury of her right knee, leg, and hip when she fell on February 17, 2014, and that the other most significant change is the diagnosis of right bundle branch block in 2007. She stated that her ongoing treatment includes physiotherapy, massage therapy, chiropractic, pedicures including foot and lower leg massage, and facials. Her assisting devices include a special back support air pillow for distance driving, a right knee patellar stabilizer, and right knee stretch supports.

[62] She stated that she is self-employed primarily working freelance “as needed” and that she works at three different offices. She also stated that she has permanent restrictions of no heavy lifting, no prolonged standing, and no prolonged walking, and that she is able to function as part of a team although she is fatigued at the end of longer shifts and needs rest breaks. She stated, “I try to work within my abilities to have a meaningful experience and share my skills where I am able.”

Appellant's oral evidence

[63] She testified that she has had permanent restrictions going back to 2000: her permanent restrictions are no heavy lifting, no prolonged walking, and no prolonged standing. She described the 1999 TTC accident in which the bus driver slammed on his brakes while pulling around a stopped truck which caused her to twist and fall: her right leg, hip, and pelvis were driven into a pole. She has had no strength and permanent weakness in her right leg since two weeks after the accident.

[64] Prior to the accident she had been working as a registered nurse and she didn't have any restrictions. After the accident she was no longer able to work as a registered nurse and as of 2002 she became a dental assistant because it allows her to sit. She has been working "as needed" for 3 - 4 hours a day, and sometimes up to six hours a day. She stated " I can't live on this."

[65] She referred to her new cardiac diagnosis of right bundle branch block in 2007; nerve conduction studies done of her right leg in 2007 which revealed radiculopathy; and Dr. Spear's assessment in November 2007 which ruled out surgery. She stated that right bundle branch block may have been a factor in the May 2017 incident when her blood pressure spiked, and that it may have contributed to the February 2014 fall since she may have experienced syncope. She also described the "tremendous" stress she was under because of the litigation with the bank which exacerbated her pain. She stated that as she ages "she does her best to exercise and be active" and that although she has spent over 12 thousand dollars pursuing treatment she has gone to work in pain for 17 years and this has been "an ongoing daily battle."

[66] She goes to work and does what she is able to do within in her restrictions. As of May 2014 she was able to do occasional work: she worked mostly "as needed" and her hours fluctuated. She doesn't feel that she could take on more than what she is doing: she always pushed herself to the limit. She stated that for the first six months of this year she has only made a gross income of approximately $6,000 which is approximately 160 hours based on her hourly rate. In 2014 her gross income was $26,387 which is approximately 703 hours: this works out to 13.5 hours a week using $37.50 as her hourly rate.

SUBMISSIONS

[67] The Appellant's submissions:

a) She relies on her answers set out in GD55 and GD56, as well as her other written submissions in the hearing file;

b) Revenue Canada has approved a tax disability credit for her going back to 2009 and she is concerned that there are inconsistent policies between government departments;

c) The combination of her medical disability and the law suit by the bank has caused her to lose her home which was an affordable place for her to live, and the stress of having to sell her property has contributed to her health problems;

d) There were significant medical changes during the window period, some of which are irreversible, which contributed to her most recent medical emergency which involved extreme hypertension;

e) She has a permanent partial disability and she doesn't accept that a government program is not available to meet her needs.

[68] Ms. Dorie's submissions on behalf of the Respondent:

a) She relies on the submissions set out in GD6, 38, 43, and 58;

b) The Revenue Canada decision with respect to the disability tax credit is based on totally different criteria that CPP disability and is not binding on the Tribunal;

c) Her gross income should be considered because the amount of hours that she worked clearly demonstrated a regular capacity to pursue to substantially gainful employment: earnings and the hours of work are a good indication of capacity to work and a very low net income with high gross income and personal benefits that accrue to an individual through deductions can indicate involvement in a substantially gainful business;

d) She has "great compassion" for the Appellant's condition and does not dispute her limitations and physical challenges: however, the evidence establishes that she had the

regular capacity to pursue substantially gainful employment during the window period, even though she wasn't able to pursue a full-time job.

ANALYSIS

[69] The Appellant must prove, on a balance of probabilities, or that it is more likely than not, that she became severely disabled as defined in the CPP during the window period between March 21, 2007 and May 31, 2014.

[70] 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.

Severe

[71] The Appellant was a credible witness and her evidence was consistent with the voluminous documentary evidence. It is not disputed that the Appellant suffered significant injuries in the 1999 TTC accident and that as a result of those injuries she has permanent limitations: she suffers from chronic pain in her back, right knee, leg, and hip; permanent weakness in her right leg; and permanent prescribed limitations of no heavy lifting, no prolonged standing, and no prolonged walking. Prior to the TTC accident she worked as registered nurse without any restrictions. It would appear that she unsuccessfully attempted to continue working as a registered nurse for a short period after the accident, and that she then started to work on a self-employed part-time basis as a dental assistant since this work allows her to sit while she is working. She continues to work in this capacity.

[72] It is not sufficient for chronic pain to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). The primary issue in this case is whether notwithstanding her chronic pain and other conditions the Appellant continued to be regularly

capable of pursuing a substantially gainful occupation. The Tribunal must focus on May 31, 2014 which is the last date that the Appellant qualified for CPP disability.

[73] In addition to her chronic pain the Appellant relies on her 2007 diagnosis of right bundle branch block as a significant condition which arose during the window period. The evidence, however, establishes that this condition is not symptomatic and accordingly it did not affect the Appellant's capacity to work. It is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of her disability under the CPP: *Klabouch v. Canada* (MSD), [2008] FCA 33. In his May 2009 report (paragraph 46, above) Dr. Gilbert stated that the Appellant has no cardiac symptomology and in his July 2017 report (paragraph 40, above) he stated that from a cardiac point of view she is quite stable.

[74] The Tribunal is satisfied that there was some progression of the Appellant's chronic pain during the window period. This was caused by the aggravation of her pain in the February 2014 fall; the natural progression of her condition as she aged; and the stress arising from her protracted litigation with the bank. However, for the reasons set out below the Tribunal is not satisfied that this progression reached the level of severe in accordance with the CPP criteria as of May 2014.

[75] The evidence establishes that throughout the window period the Appellant continued to work on a freelance basis as a dental assistant on a part-time basis within her restrictions. In her August 2013 disability application (paragraph 42, above) she stated that she was self-employed and that she was working two to three days a week for between three to eight hours per day. In her June 2014 letter (paragraph 35, above) she stated that she was working within her prescribed limitations on a mostly "as needed" basis; that she worked from 0 to 15 hours per week depending on patient bookings; that she continues to assist dentists and oral surgeons with anaesthesia "as needed"; and that her shifts vary from two to the usual maximum of six hours, and very occasionally more than six hours. This letter coincides with the May 31, 2014 date when she last qualified for CPP disability. In her August 2017 letter (paragraph 39, above) she stated that she remains self-employed with no significant change to her situation and that there have been no major changes to her ability to find work within her prescribed limitations.

[76] The amount of substantially gainful employment cannot be decided by a one-size-fits-all figure. Comments describing substantial as "having substance, actually existing not illusory, of real importance or value, practical" and gainful as "lucrative, remunerative paid employment" are of some assistance in determining what amounts to a substantially gainful occupation, but this ultimately requires a judgmental assessment, which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the Appellant: *MSD v Nicholson* (April 17, 2007), CP 24143 (PAB).

[77] In *Miceli-Riggins v. Attorney General of Canada* 2013 FCA 158 the Federal Court of Appeal stated at paragraphs 14 and 15:

> As is well-known, the test under paragraph 42(2)(*a*) of the *Plan* is difficult to meet. A disability is "severe" only if the person is not regularly able to pursue any substantially gainful employment. The severity is judged not by the severity of the disease or ailment afflicting the claimant. Rather, it is judged according to whether the claimant is unable to work.
>
> And the "unable to work" standard is most difficult to meet. In order to meet it, the claimant must demonstrate more than just an inability to perform his or her former job. Instead, the claimant must show that he or she cannot engage in "substantially gainful employment." This includes modified activities at the claimant's usual workplace, any part-time work whether at the claimant's usual workplace or elsewhere, or sedentary jobs.

[78] When this legal principle is applied to the facts of this case, the Tribunal believes that the Appellant's gross income is a useful guide to indicate that her disability is not severe because she is able to work and is engaged in substantially gainful employment. Her level of income, regardless of net profitability, is a good indicator of her level or work activity.

[79] During the window period her gross income as confirmed by Revenue Canada [GD36-2] for the years 2007 to 2014 was as follows:

- 2007 - $33,777;
- 2008 - $34,348;
- 2009 - $30, 294;
- 2010 - $21,650;
- 2011 - $27, 449;

- 2012 - $32,725;
- 2013 - $28,503;
- 2014 - $26, 397.

[80] In her oral evidence the Appellant stated that her average hourly rate is $37.50. The $37.50 hourly rate is consistent with the Appellant working between 12-15 hours per week. Her 2014 gross income of $26,387 amounts to approximately 703 hours using $37.50 as her hourly rate; this works out to 13.5 hours per week.

[81] The Tribunal is satisfied that the Appellant's employment during the window period and most significantly during 2014, meets the test of substantially gainful employment even though it was part-time. The Appellant was able to regularly attend for work on an "as needed" basis and her work was both productive and profitable.

[82] The Tribunal has also considered section 68.1 of the CPP *Regulations* which states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. For the year 2014 this amount was $14,836.

[83] The ultimate issue is whether the Appellant had the regular capacity to pursue substantially gainful employment as of May 2014: this issue is not fully addressed by section 68.1 of the *Regulations.* The determination of this issue requires a global assessment of the Appellant's particular circumstances, for which section 68.1 of the *Regulations* is but one tool that is used. In this case, the Tribunal believes that because the Appellant is self-employed her $26,387 gross income and her 13.5 hours worked per week is a useful indication of her regular capacity to pursue substantially gainful employment in 2014.

[84] 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.

[85] The Appellant was 60 years old when she last qualified for CPP disability. She is very well educated and has successfully completed post university diplomas. It is clear that she has

excellent oral and written communication skills. Despite her limitations, she was able to transition from working as a Registered Nurse to regular albeit part-time self-employment as a dental anaesthesia assistant. She is to be commended for this; however, the fact she continued to pursue substantially gainful employment is the best evidence of her regular capacity to do so.

[86] The Appellant has the burden of proof and although she is suffering hardship by reason of her chronic pain she has not established, on the balance of probabilities, that she is disabled in accordance with the CPP criteria.

Prolonged

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

CONCLUSION

[88] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security