



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *H B. v. Minister of Employment and Social Development*, 2017 SSTGDIS 195

Tribunal File Number: GP-15-2211

BETWEEN:

**H. B.**

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: Anne S. Clark

HEARD ON: November 23, 2017

DATE OF DECISION: December 12, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on June 30, 2014. The Appellant claimed that she was disabled because she was unable to work due to ovarian cancer. 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. I find the end of the Appellant's MQP is December 31, 2013.

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

- a) The parties expressed no preference for a method of proceeding.
- b) A teleconference would allow the Appellant to give her testimony about her health conditions and the impact on her ability to work.

[4] The Appellant attended the hearing and represented herself.

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

## PRELIMINARY ISSUES

[6] During a teleconference on February 23, 2017 the Appellant raised potential constitutional and charter issues. The Tribunal notified the Appellant that in order to pursue a constitutional challenge she must file a notice in accordance with section 20 of the *Social Security Tribunal Regulations* (SST Regulations).

[7] On April 7, 2017 [GD7] the Appellant filed a response to the request for a section 20 notice. In particular she advised that she felt the CPP disability provisions violated her human dignity. The Appellant's submission did not satisfy the requirements of section 20.

[8] The Appellant's response explained that she felt her disability appeal should be allowed but her explanation did not comply with the requirements section 20 of the SST Regulations. It did not identify any provisions of the applicable statutes or regulations she challenged or make submissions in support of her challenge. The Appellant was given until April 21, 2017 to file a notice that that complies with the requirements of section 20 of the SST Regulations. That date was extended to April 30, 2017 at the Appellant's request.

[9] On April 30, 2017 [GD11] the Appellant filed a document intended to be her notice under section 20 of the SST Regulations.

[10] On May 4, 2017 [GD13] the Respondent submitted that the Appellant's notice was insufficient and the appeal should proceed as a regular appeal.

[11] A dispute resolution and pre-hearing conference was held by teleconference on June 6, 2017. Both parties participated and made submissions regarding the requirements of section 20 and the length of time the Appellant should have to meet the requirements.

[12] On September 6, 2017 the Appellant filed her notice under section 20 of the SST Regulations.

[13] In her oral submissions at the pre-hearing conference the Appellant did not identify any provisions of the CPP that she was challenging. She took the position that her right to fundamental justice and international human rights had been violated by the Minister when her

application for CPP disability was denied. In her written submissions the Appellant raised specific incidents to illustrate her position as follows:

- a) The Ministry denied her application after a teleconference only and did not send an adjudicator to her home to assess her condition.
- b) The Ministry placed no importance on the evidence of the Appellant's doctor and, instead relied on the opinion of a nurse who was an employee of the Ministry.
- c) She should, at least, be entitled to the money she was forced to pay into the CPP through her payroll deductions.

[14] The Appellant's submissions included general discussion of the Charter and excerpts from papers regarding constitutional and human rights but did not raise any constitutional or charter issues. She did not challenge any provisions of the CPP legislation and her focus was on her dissatisfaction with the decision by the Minister to disallow her disability appeal and what she perceives to be errors made by the Minister in denying her application.

[15] The Appellant failed to comply with the requirements of section 20 of the SST Regulations and the appeal proceeded as a regular appeal with no opportunity to raise constitutional issues during the appeal process.

[16] The parties were given an opportunity to make submissions on the method of proceeding. Neither party made submissions on the method of proceeding. A teleconference was scheduled for November 23, 2017 at 9:00am (Central). The Appellant was not able to connect to the teleconference and contacted the Tribunal directly. The teleconference was rescheduled for later that day. The Appellant again had trouble making the call and I was able to contact her directly and establish a connection for the hearing.

[17] The Appellant confirmed that she had her file information and was prepared to proceed with the hearing. She confirmed that she did not require the services of an Interpreter and would represent herself. The Appellant became quite upset during the hearing and I asked her if she wanted to contact someone such as her husband or daughter who both helped her with her appeal previously. She declined and said she would proceed on her own.

[18] From time to time I was concerned that the Appellant was becoming distraught and might not be able to continue with her testimony and submissions. However she said she could proceed and demonstrated that she was able to recall and describe the important events related to her health, treatment and work. When she discussed her conditions and her inability to work she became upset but she remained able to respond to my questions, locate information in her file, discuss the legal test relevant to her appeal and explain why she felt she was unable to work. I was satisfied that the fact that she was upset at times could be accommodated during the hearing and she was able to participate fully and represent her interests during the hearing. At the end of the hearing she confirmed that she discussed all of the points she wanted to raise and had no other items to discuss.

## **EVIDENCE**

[19] The Appellant was 53 years old when she last worked and at the end of her MQP. She completed Grade seven and a certificate as a food handler. She last worked as a cleaner/orderly. She stopped work in November 2013. While she was off work she developed ovarian abscesses in March 2014 and in November 2014 required surgery. Tests performed after the surgery revealed cancer in her ovaries and she required chemotherapy that left her with ongoing symptoms including pain and numbness in her hands and feet.

[20] When she applied for disability benefits the Appellant attributed her inability to work to ovarian cancer. In her written submissions and testimony she explained that other conditions also contribute to her inability to work. Her testimony was that she can no longer work because of symptoms including depression, leg pain, hand pain and numbness, headaches and arthritis. Her depression, leg pain, hand pain and numbness began after she had chemotherapy. She takes medication for depression and sees her doctor for prescription refills. She takes over the counter pain medicine and vitamins to help with pain and attends physiotherapy once a week.

[21] In November 2013 the Appellant broke a bone in her ankle and had to stop work. Her family Physician Dr. Roy Smith reported in June 2014 (GD2-73) that the Appellant fractured her right lateral malleolus on November 21, 2013. Test results also showed she had a brain lesion that was not growing or changing and an ovarian abscess in April 2014. Dr. Smith felt the

Appellant's main disability was her ankle and he expected full recovery and return to work. The file contains chart or progress notes that document the injury and treatment (GD2-77 to 83).

[22] The Appellant explained that she was still off work in March 2014 when she saw Dr. Smith for a checkup regarding her ankle. At that time she was feeling very unwell with extreme pain in her abdomen. Dr. Smith advised her to go directly to the hospital as she needed emergency care. She was admitted to the hospital and treated for abscesses on her ovaries. She remained in hospital for two weeks and was treated with antibiotics.

[23] Gynecologist, Dr. Michael Helewa's Discharge Summary in April 2014 (GD2-87) confirmed that the Appellant had tubo-ovarian abscesses that were treated with antibiotics. Dr. Helewa consulted with Dr. Robert John Lotocki, Gynecologist to rule out malignancy. Dr. Helewa reported that Dr. Lotocki was of the opinion the Appellant did not require surgery and should be treated conservatively with antibiotics.

[24] The Appellant experienced another infection about six weeks later and Dr. Lotocki reported in April 2014 (GD2-91) that the Appellant was diagnosed with tubo-ovarian abscesses and showed marked improvement with antibiotics.

[25] The Appellant had another infection in September 2014. Dr. C. Robinson of Cancer Care reported in September 2014 (GD2-14) that the Appellant was unable to work due to complications from her condition. She would have surgery in October and would require six to eight weeks to recover.

[26] The Appellant explained that she had a complete hysterectomy in November 2014 and approximately six weeks later she learned that tests showed she had ovarian cancer and she required chemotherapy. Dr. A. Altman, Cancer Care (GD2-21) reported on November 24, 2014 that the Appellant would be away from work indefinitely for medical reasons.

[27] The Appellant gave a summary of her surgery and subsequent treatment in 2014 and 2015. Her written submissions in GD5 and GD7 confirm that she was seeking benefits for the time she remained off work to recover from her surgery and treatment. At that time she described her condition as temporary.

[28] In her testimony the Appellant explained that her ankle injury had resolved leaving her with some discomfort if she stands too long. She had problems with her vision but had surgery for cataracts and her vision problems are resolved. The pain and sickness from the ovarian abscesses were addressed and resolved with surgery. She attributes her current inability to return to work to symptoms caused by chemotherapy and to depression that began after she learned she had cancer.

[29] The Appellant discussed her health before the end of the MQP, December 31, 2013. She said she was healthy and strong. She would only go to the doctor for serious illness and that did not happen often. She recalled that she had a fever in July 2013 that lasted three days. She did not seek medical attention and continued working. She had medical treatment for her fractured ankle in November 2013 with follow up care. As noted above, it was during a follow up visit for her ankle in March 2014 that Dr. Smith noted she was ill and he recommended she go to the hospital. She said she was surprised in March 2014 when she woke with stomach pain. She was treated in March and again in April 2014 for abscesses. When the abscesses came back a third time she underwent a hysterectomy. She tested positive for ovarian cancer and underwent treatment in late 2014 and 2015. She had six chemotherapy treatments and attributes her disabling symptoms to the effects of cancer and the required treatment. She also has headaches and arthritis.

[30] In summary the Appellant testified that she stopped work due to her ankle injury but could not return to work after it healed because of infections, symptoms of ovarian cancer and nerve damage caused by chemotherapy.

## **SUBMISSIONS**

[31] The Appellant submitted that she qualifies for a disability pension because she is unable to return to work due to depression and symptoms and limitations caused by cancer and chemotherapy.

[32] The Respondent submitted that the Appellant does not qualify for a disability pension because the evidence does not support a finding that the Appellant has a severe disability that began on or before the end of her MQP.

## **ANALYSIS**

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

[33] The Appellant must prove on a balance of probabilities or that it is more likely than not, that she was disabled as defined in the CPP on or before the end of the MQP and continuously since.

[34] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for a CPP disability pension. To qualify for a disability pension, an applicant must:

- a) be under 65 years of age;
- b) not be in receipt of a CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the MQP.

[35] 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**

[36] The Appellant was 53 years old when she last worked. Before the end of her MQP she stopped working due to an ankle injury. After the end of her MQP, while she was off work and recovering from her injury, she developed infections caused by tubo-ovarian abscesses. She was treated with antibiotics on two occasions and after her third infection she underwent a hysterectomy. Testing after her surgery was positive for cancer and she required chemotherapy. Following the diagnosis of cancer the Appellant developed symptoms of depression. Chemotherapy caused leg pain, pain in her hands and feet and numbness in her hands. She continues to have some discomfort from her ankle injury and is treated for depression with medication. She has routine checkups at the cancer clinic every six months and has physiotherapy that is mainly to help with the pain, numbness and poor mobility in her hands.



[37] The severe criterion must be assessed in a real world context (*Villani v. Canada (Attorney General)*, 2001 FCA 248). This means that when deciding whether the Appellant has a severe disability, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Appellant was 53 years old at the end of the MQP. She completed Grade seven and obtained a certificate as a food handler. There was no evidence of any language or learning impediments. The Appellant's work history and education may limit her efforts to find work in the competitive workforce. I will keep these in mind as I determine whether she has a severe disability.

[38] To be entitled to a disability pension the Appellant must demonstrate that she has a condition which renders her incapable of work. The definition of disability in the CPP is inextricably linked to the capacity to work. In addition, eligibility is based on contributions which are made to the Plan. Based on these contributions, the Appellant establishes a Minimum Qualifying Period (MQP). The Appellant must prove not only that she was disabled, but that this disability existed prior to the expiry of the MQP as well as continuously thereafter. *Canada (Attorney General) v. Zakaria*, 2011 FC 136.

[39] The evidence shows that, when the Appellant stopped work in November 2013 it was because she fell and fractured her ankle. The medical evidence and the Appellant's testimony is that she recovered from that injury and could have returned to work. The ankle injury does not meet the definition of severe disability under the CPP.

[40] In March 2014, after the end of the MQP, the Appellant experienced a medical emergency that required antibiotic treatment, surgery and, eventually chemotherapy. She described ongoing symptoms that include depression, pain and numbness in her hands, pain in her feet, headaches and arthritis. In order to meet the definition of severe disability under the CPP these conditions, either individually or in combination, must have made the Appellant incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2013. In short, the evidence would have to show that the condition or conditions that were identified after the end of the MQP likely caused her to be severely disabled on or before the end of the MQP.

[41] The Appellant thought a fever she had in July 2013 might have been early symptoms of cancer. However, there is no medical evidence about that illness and the Appellant continued to work through and beyond that time. Since she continued to work it is not likely that the fever, or the condition that caused it, met the definition of disability under the CPP. By definition a condition must make a person incapable regularly of pursuing any substantially gainful occupation. There is very little evidence about her cancer and not enough to support a conclusion that it made her disabled on or before the end of December 2013.

[42] I must consider the effect the Appellant's condition or conditions had on her ability to work on or before the end of her MQP. The evidence leads me to conclude that she stopped work for an ankle injury and would have been able to return to work after she recovered from the injury. The conditions that now affect her ability to work did not affect her ability on or before December 31, 2013.

[43] Given Dr. Smith's opinion and the Appellant's testimony I am reasonably satisfied that the health conditions she experienced on or before the end of her MQP did not meet the definition of disability under the CPP.

[44] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). Prior to the end of her MQP the Appellant had an ankle injury and brain lesion. Dr. Smith reported that the main disabling condition was her ankle injury from which she was expected to recover. The Appellant's testimony was that she recovered from that injury and is left with discomfort if she stands too long. There is no evidence of the effect the brain lesion may have on the Appellant's ability to work and Dr. Smith and the Appellant did not describe it as a condition that affected her ability to work.

[45] In fact, with the exception of arthritis and headaches for which there is no medical evidence upon which I can reasonably draw conclusions. The Appellant's description of her health conditions relate to her cancer diagnosis and leading to symptoms and treatment that took place after the end of the MQP.

[46] I find that the evidence does not prove it is more likely than not that the Appellant has a severe disability that existed on or before December 31, 2013 and continuously thereafter.

**Prolonged**

[47] Paragraph 42(2)(a) requires a disability to be both severe and prolonged. As I found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

**CONCLUSION**

[48] The appeal is dismissed.

Anne S. Clark  
Member, General Division - Income Security