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

Date : December 18, 2015

File number : GP-13-121

GENERAL DIVISION - Income Security Section

Between:

Anne-Marie Gedeon

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Antoinette Cardillo, Member, General Division - Income Security Section

Heard by teleconference on September 22 and 29, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Anne-Marie Gedeon	Appellant
Randy Slepchik	Appellant's Representative
Cara Ryan	Articling student
Lucien Cleroux	Witness (Labour Relations Representative)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 3, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was by teleconference for the following reasons:

a) the form of hearing was the most appropriate to allow for multiple participants; and

b) there were gaps in the information in the file and/or a need for clarification.

THE LAW

Disability Pension

[3] 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).

[4] 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.

[5] 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.

CPP Retirement Pension

[6] The Appellant is in receipt of the CPP retirement pension since July 2015. The requirement that an applicant not be in receipt of the CPP retirement pension is set out in subsection 70(3) of the CPP, which states that once a person starts to receive a CPP retirement pension, that person cannot apply or re-apply, at any time, for a disability pension. There is an exception to this provision and it is found in section 66.1 of the CPP.

[7] Section 66.1 of the CPP and section 46.2 of the CPP Regulations allow a beneficiary to cancel a benefit after it has started if the request to cancel the benefit is made, in writing, within six months after payment of the benefit has started.

[8] If a person does not cancel a benefit within six months after payment of the benefit has started, the only way a retirement pension can be cancelled in favour of a disability benefit is if the person is deemed to be disabled before the month the retirement pension first became payable (subsection 66.1(1.1) of the CPP).

[9] Subsection 66.1(1.1) of the CPP must be read with paragraph 42(2)(b) of the CPP, which states that the earliest a person can be deemed to be disabled is fifteen months before the date the disability application is received by the Respondent.

[10] The effect of these provisions is that the CPP does not allow the cancellation of a retirement pension in favor of the disability pension where the disability application is made

fifteen months or more after the retirement pension started to be paid. In this case, the Appellant filed her disability application before the retirement pension started to be paid.

ISSUE

[11] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[12] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

The documents

[13] Pursuant to the Questionnaire for disability benefits date stamped on July 3, 2012, the Appellant is 62 years of age. She completed grade 12 and has a diploma in nursing. She worked as a registered practical nurse from August 1987 to December 2005, she stopped working due to a workplace injury. She reports physical limitations of her daily activities as well as chronic pain and depression.

[14] There is a report on file dated October 12, 2000 from Dr. Chow of the Division of Orthopedic Surgery of the Ottawa Hospital which provided that after review of the Appellant's CT scan, he noticed that there were two left sided bulges at L4-5 and at the L5-S1. There may have also been a lateral disc herniation at LS-S1. There were no significant nerve root compression at that time, although with the positive bowstring sign she still had some signs of nerve root irritation. Dr. Chow felt that if the Appellant continued with a good daily exercise program and eventually got into work hardening, she would do very well. He felt that surgery should be avoided since most of the lateral disc herniation's eventually resolve/ with intensive exercises. He added that if the Appellant's work as an registered practical nurse assisting patients ambulate and helping patients in and out of bed has led to multiple recurrences, it would probably be best that she try to be on permanent modified duties as she was at the that time if. It would keep her active in the workforce without having flare ups all the time. If her condition deteriorated, surgical intervention would be considered.

[15] An assessment report dated May 7, 2007 from Teresa Gravelle, registered physiotherapist, provides that the Appellant is known to her from prior treatment in 2005/2006. She is essentially unchanged objectively, subjectively and functionally since that time. Physiotherapy treatment is limited by pain. Improvements are temporary in nature. Pain is lessened temporarily and function/strength improves slightly when she attends treatments, and is maintained for as long as she does not experience a flare-up. Her participation in active rehabilitation cannot be sustained due to flare-up of pain symptoms. I do not know what more we can offer her.

[16] Also, a report dated September 25, 2007 from Dr. Desjardins, orthopedist, states that the Appellant is disabled from working as a nurse but she could return to sedentary work where she could sit/stand as needed without having to walk.

[17] A report from Dr. Williams, family physician, dated April 23, 2011 indicates that there are no cognitive restraints or deficits apart from the burden of chronic pain. The Appellant reported in January 2010 that gabapentin (given for her neurological pain) was affecting (decreasing) her memory. She suffers from a herniated disc which the neurosurgeon did not want to treat with surgery at this point. Because she was worsening, he asked for another MRI of her lumbar spine. Dr. Williams states that her deficits will not disappear, they can only be improved with conservative treatments like physiotherapy rest and analgesics and anti-inflammatories. Dr. Williams also adds that the Appellant attended a program at a Rehabilitation Center. Her type of work is very demanding and not proper for a patient suffering from a herniated disc. She continues with her Flexeril and Mobicox. It helps to some extent but her pain is still present. In order to work, she would need a job with restricted hours and the ability to rest and move around gently, on a regular basis. Dr. Williams states that it seemed to him that no such position was available. Her condition is considered chronic at this point and she still finds that she is deteriorating. She will most likely not improve and get worse. He further adds that as the Appellant stays inactive, she is getting deconditioned as well. Her herniated disc will probably need surgery in the future.

[18] The medical report from Dr. Williams in support of the Appellant's disability application date stamped on May 17, 2012, provides a diagnosis of multilevel DOD (degenerative disc disease) of the cervical spine, herniated disc at L5-S1, and headaches. He adds that her functional limitations are: chronic left leg pain since 2005 post-crush injury, antalgic gart, decreased reflexes to left lower limb, cannot lift more than 10 lbs, cannot stand for more than 10 minutes, no prolonged sitting, difficulty getting up from sitting position, complete movement, normal, cervical spine, left quadriceps atrophy, decreased ROM of the lumbar spine. He further adds that following treatment, she did not improved and that she performed modified duties at work but her condition was getting worse and her pain increasing.

[19] There is also on file an affidavit from the Appellant's Labour Relations Representative dated April 8, 2013 which states that employment opportunities with the City of Ottawa are diverse and range from intense physical positions such as, for example, Forestry Technician, Labourer or Registered Practical Nurse. There are also many sedentary positions such as Administrative Assistant, Data Entry Clerk and many jobs that would typically be referred to as "white-collar work". The City of Ottawa offers employment in both full-time and part-time capacities, as well as in both official languages. When an employee with the City of Ottawa suffers a disability which prevents them from continuing to work in their own position, the employee is typically placed on the City of Ottawa's Priority Placement Program. The Priority Placement program is the program whereby the City of Ottawa assesses job opportunities in light of the employee's medical limitations and restrictions, as well as their skills and education. He has been working with the Appellant for many years in the hopes of having her placed in employment with the City of Ottawa following her injury of October, 2005. Around January 2008, the Appellant attempted to return to work in some capacity for the City of Ottawa, via the Priority Placement Program. As the assigned labour representative, he has been following the City of Ottawa's efforts to accommodate the Appellant. The City of Ottawa posts hundreds of vacancies each year, all of which the Appellant would have been eligible for as an internal candidate via the Priority Placement program. Despite the diversity of jobs available and the volume of postings which would have occurred in the four (4) year period during which the City sought to accommodate the Appellant, the City of Ottawa was not able to identify a single

suitable accommodated position for her. On March 27, 2012 the City of Ottawa terminated the Appellant's employment on the basis that she could not provide them with productive work.

Testimonies and submissions during hearing

[20] The Appellant testified that in October 2005, she was working as a nurse and a patient with Alzheimer fell on her. She had difficulty walking after the incident. She had a prior injury in 1999. She had to stop working in December 2005 due to back pain. She had 12 sessions of physiotherapy in 2006 but had no response to the treatment.

[21] The Appellant's representative submitted that the Appellant has no skills to do sedentary work given her education, her lack of computer skills and her limited language skills, the Appellant does not speak English.

[22] The Appellant's Representative also submitted that the Appellant's biggest issues are pain and concentration. He added that with a great deal of accommodation, the Appellant did manage to work for a period of time into 2009, but she was not physically able to continue. By 2009, she was almost sixty and was constantly in severe pain with significant limitations. The Appellant's former employer, the City of Ottawa, formally terminated her employment on March 27, 2012 after a comprehensive but failed effort to place her into any other occupation (the "Priority Placement Program"). The City of Ottawa terminated the Appellant's employment on the basis that she was not employable and had not been for an extended period of time. Despite the Appellant's cooperation and the best efforts of both the Union and the Appellant's employer, she was not found to be capable of performing any occupation from the selection of possible job classifications within the City of Ottawa.

[23] The Labour Relations Representative of the Appellant also testified at the hearing and he corroborated the statements in his affidavit on file dated April 8, 2013.

SUBMISSIONS

[24] The Appellant's Representative submitted that the Appellant qualifies for a disability pension because of her inability to perform remunerative work for many years and certainly as of 2009. As of 2009 she met and she continues to meet the severe and prolonged standard.

[25] The Respondent submitted that the Appellant does not qualify for a disability pension because although it is acknowledged that she is not capable of returning to her former employment due to the physical nature of the job, the medical evidence does not show any serious pathology of impairment which would prevent her from doing suitable work. The Appellant's treatment has remained very conservative with documented improvement in her general functioning. In addition, multiple reports on her file, including an independent medical examination, concluded she retained the ability to work in a suitable capacity at her last qualifying date of December 2009, and continuously thereafter. The fact that her employer was unable to accommodate her work restrictions is inadequate to support her inability to work in any capacity. Where there is evidence of work capacity, a claimant is required to show that he/she attempted to obtain employment and that those efforts have been unsuccessful because of her/his health condition. The Appellant however has not attempted alternate work within her capacities which precludes a finding of disability.

ANALYSIS

[26] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2009.

Severe

[27] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[28] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does suffer a severe disability before December 31, 2009. There is strong evidence in the medical reports of severe back pain.

[29] In particular, there is the assessment report dated May 7, 2007 from Teresa Gravelle, registered physiotherapist, providing that the Appellant is known to her from prior treatment in 2005/2006. She is essentially unchanged objectively, subjectively and functionally since that time. Physiotherapy treatment is limited by pain. Improvements are temporary in nature. Pain is lessened temporarily and function/strength improves slightly when she attends treatments, and is maintained for as long as she does not experience a flare-up. Her participation in active rehabilitation cannot be sustained due to flare-up of pain symptoms.

[30] There is also the medical report in support of the Appellant's disability application date stamped on May 17, 2012, from Dr. Williams, family physician, providing a diagnosis of multilevel DOD (degenerative disc disease) of the cervical spine, herniated disc at L5-S1, and headaches. He adds that the Appellant's functional limitations are: chronic left leg pain since 2005 post-crush injury, antalgic gart, decreased reflexes to left lower limb, cannot lift more than 10 lbs, cannot stand for more than 10 minutes, no prolonged sitting, difficulty getting up from sitting position, decreased ROM of the lumbar spine. He further adds that following treatment, she did not improve and she performed modified duties at work but her condition was getting worse and her pain increased.

[31] The Tribunal recognizes that a previous report from Dr. Williams dated April 23, 2011provided that there were no cognitive restraints or deficits apart from the burden of chronic pain. However, in the same report, Dr. Williams states that the Appellant suffers from a herniated disc and that since she was worsening, he asked for another MRI of her lumbar spine. Her deficits will not disappear. They can only be improved with conservative treatments like physiotherapy rest and analgesics and anti-inflammatories. Her type of work is very demanding and not proper for a patient suffering from a herniated disc. In order to work, she would need a job with restricted hours and the ability to rest and move around gently, on a regular basis. He

adds that this was addressed previously and no such position was available. Her condition is considered chronic at this point and she will most likely not improve but get worse.

[32] The Tribunal also recognizes that a report dated September 25, 2007 from Dr. Desjardins, orthopedist states that the Appellant is disabled from working as a nurse but she could return to sedentary work where she could sit/stand as needed without having to walk.

[33] However, as provided by the evidence, the Appellant attempted to return to work for a period of time in 2008/2009, but she was not physically able to continue. She was in constantly in severe pain with significant limitations. The Appellant's former employer, the City of Ottawa, formally terminated her employment on March 27, 2012 after a failed effort to place her into any other occupation (the "Priority Placement Program"). The City of Ottawa terminated the Appellant's employment on the basis that she was not employable and had not been for an extended period of time. Despite the Appellant's cooperation and the best efforts of both the Union and her employer, she was not found to be capable of performing any occupation from the selection of possible job classifications within the City of Ottawa.

[34] The Tribunal put weight on the affidavit and the testimony of the Labour Relations Representative stating that he had been working with the Appellant for many years in the hopes of having her placed in employment with the City of Ottawa following her injury in October, 2005. Around January 2008, the Appellant attempted to return to work in some capacity for the City of Ottawa, via the Priority Placement Program, however, she could not continue. Despite the diversity of jobs available and the volume of postings which would have occurred in the four (4) year period during which the City sought to accommodate the Appellant, the City of Ottawa was not able to identify a single suitable accommodated position for her.

[35] The question arises, then, whether the Appellant was capable of some alternative type of work that might have accommodated her pain. Applying the Villani criteria, the Tribunal was hard pressed to imagine what else the Appellant could do, given her age, her attempt to return to work and life experience with her symptoms, her education level and her lack of proficiency in English as well as her lack of computer skills. It would be difficult given her age to acquire new,

marketable skills. Further, the Appellant's difficulty concentrating and the constant back pain would significantly limit her ability to function in a vocational setting.

[36] In the opinion of the Tribunal, the Appellant's ongoing symptoms of back pain, as well as and concentration issues are adequately supported by the medical evidence and render her unfit for any sort of employment. Given her limitations, when considered in a "real world" context (*Villani v. Canada (A.G.), 2001 FCA 248*), the Tribunal is satisfied that the Appellant's disability is severe since December 2005.

Prolonged

[37] The Tribunal found that the Appellant's disability is long continued. The Appellant's testimony and the medical reports on file indicate that the Appellant has had back pain since 2000. The Appellant's condition would also appear to be of indefinite duration, as it is difficult to see how her condition can significantly improve given Dr. Williams' report May 17, 2012 providing a diagnosis of multilevel DOD (degenerative disc disease) of the cervical spine, herniated disc at L5-S1, and headaches. He adds that the Appellant's functional limitations are: chronic left leg pain since 2005 post-crush injury, antalgic gart, decreased reflexes to left lower limb, cannot lift more than 10 lbs, cannot stand for more than 10 minutes, no prolonged sitting, difficulty getting up from sitting position, decreased ROM of the lumbar spine. He further adds that following treatment, she did not improve and she performed modified duties at work but her condition was getting worse and her pain increased. For these reasons, the Tribunal concluded the Appellant's disability was indeed "prolonged" in accordance with the statutory definition.

CONCLUSION

[38] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2005, when she left her employment. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in July 2012; therefore the Appellant is

deemed disabled in April 2011. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of August 2012.

[39] The appeal is allowed.

Antoinette Cardillo
Member, General Division - Income Security