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

Date: June 19, 2015

File number: GT-121123

GENERAL DIVISION - Income Security Section

Between:

Denise Pouliot

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 In person on March 26, 2015, Ottawa, Ontario

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Denise Pouliot	Appellant
Randy Slepchick	Representative
Allison Vanek	Student-at-law

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 22, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was conducted in person for the following reasons:

a) The form of hearing is most appropriate to allow for multiple participants; and

b) There are gaps in the information in the file and/or a need for clarification.

THE LAW

[3] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[4] 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).

[5] 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.

[6] 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.

ISSUE

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2011.

[8] 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

[9] The Appellant is 60 years of age with a college diploma in secretarial studies. She was an administrative assistant and stopped working on January 2, 2009 due to illness, more precisely widespread pain and cognitive problems. In the Questionnaire for disability benefits date stamped August 22, 2011, the Appellant lists the following illnesses that prevent her from working: fibromyalgia, osteoarthritis /rheumatoid arthritis, degenerative disc disease and allergies.

[10] A report from Andrew Campbell, Registered Physical Therapist, dated March 26, 2008 provides that the Appellant has had a history of more than eight (8) years of neck and lower back pain. The analysis section of the report indicates that there is severe muscular imbalances causing pain in neck, jaw, low back and SI joints on right side. In the pain section, the report

indicates that the Appellant experiences pain with any prolonged static activity, decreases with motion.

[11] On January 15, 2009, Dr. Quach, the Appellant's family physician writes a medical note that the Appellant is unable to work for an undetermined amount of time due to medical reasons. There is also another medical note from Dr. Quach dated September 15, 2009 stating that the Appellant continues to have symptoms related to her degenerative disc disease and osteoarthritis, causing her pain, difficulty with heavy lifting, sitting, bending, or walking. As a result, she is still unable to work.

[12] On May 1, 2009, Dr. François Racine, Physiatrist, indicates in a report that there is unexplained cervical and lumbar regional myofascial pains, with associated degenerative changes that are not severe and associated with sensory or motor deficits. He adds that it "does not sound like a neuropathic pain".

[13] A report dated May 27, 2010 from Dr. William Robinson of the Fisher Heights Chiropractic Clinic states that the Appellant has been under care for her condition at the clinic since November 13, 2009. The Appellant has been having pain in the neck and low back since 2001. The episodes she has affect the motor control and sensation in her extremities, and last a short duration followed by normal function after the episode. The sensation changes are a feeling of warmness or numbness in her extremities and the motor loss is a mild to complete loss of strength in the extremities (most often her right leg). The episodes last from 30 seconds to a few minutes and leave her with decreased strength in her extremities. These episodes are becoming less intense than they were originally, and light cervical traction helps to reverse the effects. There is a fair amount of discomfort for one or two days after an episode, often involving severe low back, left anterior rib pain and/or upper neck pain. The pain and the episodes of motor dysfunction are affecting her ability to perform her work and activities of daily living. The Appellant has also been diagnosed by her doctor with fibromyalgia since care has begun. The Appellant's improvement both subjectively and objectively is about 30% compared with the initial examination.

[14] An MRI of the cervical, thoracic and lumbar spine dated March 11, 2010 provides that the Appellant has multilevel degenerative changes of the cervical spine. There is no significant

central spinal stenosis. However, there is multilevel bilateral neural foramina narrowing, most pronounced at CS-6 bilaterally and C6-7 on the left.

[15] On November 9, 2010, Dr. Quach sends a letter to the Appellant's union stating that the Appellant's prognosis to return to work is poor. He further indicates that she continues to experience symptoms related to her disability which are difficult to treat. Shortly thereafter, the union sends the Appellant a termination letter dated November 15, 2010.

[16] There is another report on file dated December 10, 2010 from Dr. William Robinson of the Fisher Heights Chiropractic Clinic which indicates that radiographs were performed of the cervical (AP and lateral) and lumbar (AP and lateral) spine and showed results consistent with the Appellant's previous diagnosis of degenerative disc disease. The recommended trial of care is that she be treated 18 times in 6 weeks (3 times a week for 6 weeks). These visits would include chiropractic adjustments, Active Release Technique, Post Isometric Relaxation and a strengthening and stability exercise program. The goal of these treatments is to alleviate pain and restore proper motion to the affected areas.

[17] A neuropsychology consultation report from Dr. Breau dated December 24, 2010 provides that the Appellant has been unable to work for the past two years due to pain, fatigue and cognitive changes. She provides a good effort on testing but she is easily overwhelmed by task demands to the point of disengaging and becoming tearful. Her performance on neuropsychological testing reveals very limited attentional capacity, slowed set shifting and problems with response inhibition. However, in spite of these low scores, core problems with attention are not seen on measures of problem solving, language or spatial processing. Memory performance is variable but when anxiety is managed she demonstrates functional encoding and preserved storage abilities. There are no problems with praxis or in executing alternating motor programs. The Appellant's poor scores on attentional measures appear to be a function of her being easily overwhelmed by some task demands. As noted above, if there were a true limitation in this realm one would expect an attenuating effect across cognitive domains, which is not the case. There is no evidence of accelerated forgetting and language abilities are strong which argues against the presence of a primary memory disorder.

[18] The Appellant's experience of cognitive changes appears to be of the type seen in the context of pain conditions, fatigue and emotional factors. Given this, one would expect some improvement in cognition along with gains in other realms. While she denies feeling depressed or anxious she does show increased emotional reactivity and changes in sleep and appetite. There is also the reality that she has had to cope with multiple losses and stressors over the last few years. At
this point she does not feel the need for any support in this regard but I would suggest that her mood be monitored.

[19] The cognitive profile suggests reasonably preserved abilities but the Appellant's emotional response to increased processing demands would suggest that she would have difficulty in coping with the demands of the workplace at this point. While neuropsychological tests do not predict driving ability, skills important to driving are measured. In the Appellant's case, the results are equivocal at most.

[20] A report dated May 2, 2011 from Dr. Keravel, Clinical Psychologist, provides that he saw the Appellant for psychotherapy for 12 sessions from June 2009 to January 2010. During those sessions, the Appellant mentioned how her severe back pain was impacting her daily living. The pain caused significant distress and impairment in social, occupational and in important areas of her functioning. Dr. Keravel states that the sessions were helpful in helping her grieve and accept what her new life was, as compared to what she was able to do before her multiple medical issues. Handicapped, she feared people's judgement on her; her self-esteem was quite negatively affected. She had to accept the new limits imposed by her constant pain. Concentration and attention were also greatly compromised by the sharp pain she experienced at times. Because of all those limitations, it was not possible for her to work, even on a part time basis. It was impossible to predict what her next day would be about. From hour to hour, she never knew what her level of pain would be and therefore, what she would be able to do in terms of activities. She had to sell her house because she could not take care of it anymore. She had to stop doing the activities that brought pleasure in her life due to the increased pain. She had to lie down several times a day to try to relieve her pain. The pain caused some depressive symptoms that were addressed in the course of the sessions. Her GAF was 45.

[21] A Rheumatology report dated November 8, 2011 from Dr. Jovaisas states that the Appellant does have early findings of osteoarthritis. The most striking finding according to Dr. Jovaisas was diffuse soft tissue tènderness present in the posterior aspect of neck, shoulders, anterior chest wall, low back, trochanteric regions, distal to lateral epicondyles and distal to anserine bursal regions all in a pattern consistent with the diagnosis of fibromyalgia. Range of movement in her back do show limitation both flexion and extension. Dr. Jovaisas' assessment of the Appellant is that she does have a clinical diagnosis of fibromyalgia. She has diffuse pain, and nonrestorative sleep pattern and typical tender points. She does have degenerative disc disease and some findings of osteoarthritis as expected.

Testimony

[22] The Appellant has a college degree in secretarial studies from Cambrian College in 1980 and attended University in early 2000 but could not complete her degree as she could not sit in the classroom due to her physical condition.

[23] The Appellant testified that her symptoms began in 2001. She continued working until 2009 and hoped to return to work. However, her employer sent her a letter of termination in 2010.

[24] She was an administrative assistant. Her duties consisted in filing, preparing correspondence, answering the phone, organization meetings and preparing documents for grievances.

[25] She testified that she struggled while she was working to complete her tasks. She stated that she was in severe pain and had trouble getting through the day. She explained that she could not sit or stand for too long. She was behind one year in her filing. She initially tried to hide her inability to cope with her everyday tasks. She took measures to try to keep working and stay on top of her duties. For example, she went to work after hours to attempt to advance in her filing and do it at her own pace. She also brought a night table with wheels from home to be able to move items around more easily as she could not lift too high or bend too low. She requested devices to assist her in her daily routine such as a hands free headset to answer the phone. She explained that one of her many challenges was to put her chin/head down to be able to answer

the phone. When she put her chin/head down, her vision would start to blur. Taking notes in meetings also became an issue for two (2) reasons. First, she could not remember how to use short hand to quickly take notes and second, she could not sit in meetings for the entire duration. She added that she use to have to lie down during lunch hour. Between 2007 to 2009, she took a lot of time off from work, the pain was increasing. She also took medication which made her drowsy as well as light headed and made it more difficult to effectively function at her job. The medications were prescribed by her family doctor and her rheumatologist.

[26] At her family doctor's recommendation, she stopped working. The Appellant asked her employer to change job and work in the mail room. However, given the type of physical demands of the mail room duties, moving and lifting boxes and the amount of walking required, the Appellant could not perform those tasks.

[27] After she stopped working, she saw a chiropractor for about one (1) year for her neck pain, fibromyalgia, osteoarthritis and degenerative disc disease. The Appellant explained that the treatments were very painful, she stated that they were paralyzing, she had to stay at the chiropractor's office at times up to one hour after the session before she could move and go home.

[28] She also struggled emotionally with not being able to work. She saw a psychologist for approximately a one year period. She found it beneficial as it helped her to accept her physical condition. She had to stop due to the cost.

[29] The Appellant stated that she is in pain 100% of the time, what changes is the degree of the pain.

[30] The Appellant also added that she tried physiotherapy, acupuncture, massage therapy and Tai Chi. She emotionally explained that none of these therapies helped, they triggered other issues and the effects were too great.

[31] The Appellant testified that sleeping is very difficult, she has a lot of pain at night. Although lying down provides some relief, it is difficult to stay lying down and to sleep. She wakes up at different times during the night and walks around. Previously, she use to read but

she can no longer hold books. She can no longer do any of the activities that she use to such as dancing, running and aerobics.

[32] In terms of her self-care, she can cook and does little tasks. She explained that she starts a lot of different tasks but needs to stop and then gets back to them, she cannot complete the tasks all at once. Getting dressed is also a challenge. She cannot make her bed, vacuum or lift items. She has help from a friend who takes her grocery shopping and helps her with her bags. She has stopped driving many years ago. She was not driving when she was working.

[33] The Appellant explained that every day around 14hr she needs to get some rest for approximately two (2) hours. She also needs to lie down after supper.

[34] She explained that she currently sees her family doctor once every two weeks, he manages her illnesses and she continues to take medication. Her doctor is attempting to change the dosage of some of the medications. She explained that some medication gave her side effects and had to stop taking them.

[35] The Appellant explained that after 2009, there was no period of time when her condition got better, in fact she stated that her condition is getting worse with time. Even if she wanted to attempt to get back to work, even on a part time basis, she cannot do any sedentary jobs, she cannot sit, walk or stand for more than 10 minutes. Her memory and concentration problems are also impairment to returning and maintaining employment.

SUBMISSIONS

[36] The Appellant's Representative submitted that the Appellant qualifies for a disability pension.

[37] The Respondent submitted that the Appellant does not qualify for a disability pension because aalthough it is acknowledged that the Appellant may have limitations in the work she is able to perform; however, specialist reports do not describe any severe physical or mental condition which would prevent her from performing suitable work on at least a part-time basis. In addition, treatment measures have not been exhaustive and it is reasonable to expect further improvement in her conditions and symptoms with ongoing treatment and support.

ANALYSIS

[38] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31st, 2011.

Severe

[39] 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.

[40] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does suffer a severe disability before her MQP of December 31, 2011. There is evidence in the medical records dating back to 2008 that the Appellant suffers from neck, shoulder and lower back pain.

[41] More precisely, there is a report from Andrew Campbell, Registered Physical Therapist, dated March 26, 2008 which provides that the Appellant has had a history of more than eight (8) years of neck and lower back pain. The analysis section of the report indicates that there is severe muscular imbalances causing pain in neck, jaw, low back and SI joints on right side. In the pain section, the report indicates that the Appellant experiences pain with any prolonged static activity, decreases with motion. Then there is a report dated May 27, 2010 from Dr. William Robinson of the Fisher Heights Chiropractic Clinic stating that the Appellant has been under care for her condition at the clinic since November 13, 2009. The Appellant has been having pain in the neck and low back since 2001. The episodes she has affect the motor control and sensation in her extremities, and last a short duration followed by normal function after the episode. The episodes last from 30 seconds to a few minutes and leave her with decreased strength in her extremities. These episodes are becoming less intense than they were originally, and light cervical traction helps to reverse the effects. However, there is a fair amount of discomfort for one or two days after an episode, often involving severe low back, left anterior rib pain and/or upper neck pain. The pain and the episodes of motor dysfunction are affecting her

ability to perform her work and activities of daily living. The Appellant has also been diagnosed by her doctor with fibromyalgia since care has begun. The Appellant's improvement both subjectively and objectively is about 30% compared with the initial examination. There is another report on file dated December 10, 2010 from Dr. Robinson which indicates that radiographs were performed of the cervical (AP and lateral) and lumbar (AP and lateral) spine and showed results consistent with the Appellant's previous diagnosis of degenerative disc disease. There is also a report from Dr. Breau dated December 24, 2010 which provides that the Appellant's cognitive profile suggests reasonably preserved abilities but the Appellant's emotional response to increased processing demands would suggest that she would have difficulty in coping with the demands of the workplace at this point. A report from Dr. Keravel dated May 2, 2011 indicates that the Appellant's GAF was 45. Finally, a Rheumatology report dated November 8, 2011 from Dr. Jovaisas states that the Appellant does have early findings of osteoarthritis. The most striking finding according to Dr. Jovaisas was diffuse soft tissue tenderness present in the posterior aspect of neck, shoulders, anterior chest wall, low back, trochanteric regions, distal to lateral epicondyles and distal to anserine bursal regions all in a pattern consistent with the diagnosis of fibromyalgia. Range of movement in her back do show limitation both flexion and extension. Dr. Jovaisas' assessment of the Appellant is that she does have a clinical diagnosis of fibromyalgia. She has diffuse pain, and nonrestorative sleep pattern and typical tender points. She does have degenerative disc disease and some findings of osteoarthritis.

[42] The Appellant's testimony also conveyed forthrightness and her description of her symptoms and their effect on her ability to function in a vocational setting were credible.

[43] She testified that she struggled while she was working to complete her tasks. She stated that she was in severe pain and had trouble getting through the day. She explained that she could not sit or stand for too long. She was behind one year in her filing. She initially tried to hide her inability to cope with her everyday tasks. She took measures to try to keep working and stay on top of her duties. For example, she went to work after hours to attempt to advance in her filing and do it at her own pace. She also brought a night table with wheels from home to be able to move items around more easily as she could not lift too high or bend too low. She requested devices to assist her in her daily routine such as a hands free headset to answer the phone. She

explained that one of her many challenges was to put her chin/head down to be able to answer the phone. When she put her chin/head down, her vision would start to blur. Taking notes in meetings also became an issue for two (2) reasons. First, she could not remember how to use short hand to quickly take notes and second, she could not sit in meetings for the entire duration. She added that she use to have to lie down during lunch hour. Between 2007 to 2009, she took a lot of time off from work, the pain was increasing. She also took medication which made her drowsy as well as light headed and made it more difficult to effectively function at her job.

[44] Further, it was apparent to the Tribunal during the Appellant's testimony that she had difficulty to concentrate during the hearing, she would forget the questions asked by her Representative and it was also apparent to the Tribunal that the Appellant was in a certain degree of pain, she had to stop several times to walk around the room and also to take a break and leave the room.

[45] 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 the fact that she is 60 years of age and her work and life experience with her symptoms. 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 she left work in January 2009.

Prolonged

[46] The Tribunal found that the Appellant's disability is long continued. The medical reports indicate that the Appellant has had neck and low back pain since 2001. More precisely, there is a report from Andrew Campbell, Registered Physical Therapist, dated March 26, 2008 which provides that the Appellant has had a history of more than eight (8) years of neck and lower back pain. Also, there is a report dated May 27, 2010 from Dr. William Robinson of the Fisher Heights Chiropractic Clinic stating that the Appellant has been under care for her condition at the clinic since November 13, 2009. The Appellant has been having pain in the neck and low back since 2001. 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 that she continues to suffer from neck, shoulder and back pain as provided in the medical reports until 2011. A

Rheumatology report dated November 8, 2011 from Dr. Jovaisas states that the Appellant does have early findings of osteoarthritis. The most striking finding according to Dr. Jovaisas was diffuse soft tissue tenderness present in the posterior aspect of neck, shoulders, anterior chest wall, low back, trochanteric regions, distal to lateral epicondyles and distal to anserine bursal regions all in a pattern consistent with the diagnosis of fibromyalgia. Range of movement in her back do show limitation both flexion and extension. Dr. Jovaisas' assessment of the Appellant is that she does have a clinical diagnosis of fibromyalgia. She has diffuse pain, and nonrestorative sleep pattern and typical tender points. She does have degenerative disc disease and some findings of osteoarthritis. For these reasons, the Tribunal concluded the Appellant's disability was indeed "prolonged" in accordance with the statutory definition.

CONCLUSION

[47] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2009, when she stopped working. 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 August 2011; therefore the Appellant is deemed disabled in May 2010. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of September 2010.

[48] The appeal is allowed.

Antoinette Cardillo
Member, General Division - Income Security