Docket: 2018-1609(IT)I

BETWEEN:

SHERRY CONNOLLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on April 2, 2019, at Hamilton, Ontario

Before: The Honourable Gaston Jorré, Deputy Judge

Appearances:

Agent for the Appellant:	Elias Levy
Counsel for the Respondent:	Caitlin Ward

JUDGMENT

The Appellant's appeal from the Notice of Confirmation dated February 2018 is allowed and the Determination in issue is modified to recognize that the Appellant was eligible for the disability tax credit in the 2014 taxation year. With respect to the 2010, 2011, 2012 and 2013 taxation years the determination that the Appellant was not eligible will not be modified.

The appeal with respect to the 2008 and 2009 taxation years is dismissed.

There is no order as to costs.

Signed at Ottawa, Canada, this 30th day of July 2019.

"Gaston Jorré"

D.J. Jorré

Citation: 2019TCC160
Date: 20190730
Docket: 2018-1609(IT)I

BETWEEN:

SHERRY CONNOLLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Jorré D.J.

[1] This is an appeal from a Notice of Confirmation dated either the 22nd or 26th February 2016 with respect to a Determination of the Appellant's eligibility for what is commonly known as the disability tax credit (the credit for mental or physical impairment provided for under section 118.3 of the *Income Tax Act*).

[2] The Notice of Appeal and the Reply to Notice of Appeal have the two different dates for the issue of the Notice. Nothing turns on which date is the correct date.

[3] The Notice of Confirmation accepted that the Appellant was eligible for the credit in respect of the 2015 taxation year and certainly later years. I would just observe at this point that I have some difficulty with the notion of a Determination being made pursuant to the statutory provisions in respect of time periods after the date of the Determination or Confirmation.

[4] No such issue arises here given that the 2015 year and later years are not under appeal. The question of whether the Minister of National Revenue has the power to make a Determination applicable to a future period of time may arise in some other case and will have to be determined then. Unfortunately, neither the Notice of Confirmation nor the prior Determination are in evidence. I simply have the statement in paragraph 6 c) of the Reply to Notice of Appeal that: "the Notice of Confirmation determined that the Appellant was eligible for the DTC for the 2015 through 2021 taxation years:…"

[5] Without deciding the question, I would just observe the following: it would be surprising if on a proper interpretation the relevant statutory provisions gave the Minister the power to make a determination with respect to future eligibility. However, I can see nothing that would prevent the Minister from determining that the person was eligible in certain past years and informing the person that the Minister's present intention was to assume that the person would continue to be eligible for certain future years. The Minister might do this because based on current information it seemed highly likely that the person would continue to be eligible and, in order to use the Minister's limited resources efficiently and effectively, the Minister intended to use her resources in respect of other matters. The power to make decisions about the efficient use of compliance resources is implicit in the powers given to the Minister under subsection 220(1) of the *Income Tax Act*.

[6] While it does not arise in this case, I have seen a reply to Notice of Appeal in another matter where it was alleged that the Minister made a Determination that a person was not eligible with respect to a time period after the date of the Determination or Confirmation. Again, it would be very surprising if the statutory provisions should be interpreted as permitting this and creating a binding decision with respect to the future, given that circumstances change, sometimes quite quickly.

[7] As I indicated above, I have not seen the actual Notice of Confirmation and perhaps it does make clear that it does not purport to make a binding Determination with respect to the future.

[8] Turning to this appeal, the Notice of Confirmation confirmed that the appellant was not eligible for the DTC for the period including the 2010 to 2014 taxation years. The Notice of Appeal was with respect to the 2008 to 2014 taxation years.

[9] In its reply the Respondent advised that it would make a preliminary objection that the 2008 and 2009 taxation years were not properly before this court. The Appellant conceded that point and as a result only the 2010 to 2014 years are before me.

[10] There is no question that the Appellant was clearly eligible in 2015. The issue here is whether the Appellant became eligible in an earlier year.

[11] The Appellant mentioned that she qualified for a *Canada Pension Plan* (*CPP*) disability pension although the evidence does not reveal on what date she qualified. I would note that the test for a disability pension under the *CPP* is quite different from the test under the *Income Tax Act* because the *CPP* test is focused on whether there is an inability to regularly pursue "any substantial gainful employment" - see subsection 42(2) of the *CPP*.

[12] The Appellant testified as to her medical conditions and their effects on her ability to carry out basic activities of daily living. She also filed four documents three of which are forms filled out by her physician. The fourth is a letter written by her physician. She has had the same physician since 2002.

[13] Chronologically, the first document, exhibit A-4, is a letter written for the purpose of the Appellant's *CPP* application in August 2015. It describes a number of serious conditions and states for some of them the date of onset or the date that the diagnosis was confirmed. Where dates are shown the earliest is 2008. I also note that the diagnoses for rheumatoid arthritis and for fibromyalgia were confirmed in 2013 and 2015 respectively.

[14] In September 2015 the Appellant's physician filled out a disability tax credit form that has been filed as exhibit A-1. The form indicates that there were two basic activities of daily living where the Appellant was significantly restricted and that cumulatively the effect of these restrictions was the same as being markedly restricted in one basic activity of daily living. The form also indicates that the time when the cumulative effect of the restrictions became equivalent to being markedly restricted in one activity was 2014.

[15] Subsequently the Appellant's physician filled out a new disability tax credit certificate in June 2017; this is exhibit A-2. The information provided in this form is quite different from the information provided in the 2015 form. The Appellant's physician indicated in the 2017 form that the Appellant was markedly restricted with respect to two basic activities of daily living starting in 2009 and 2008 respectively and that in addition the Appellant was significantly restricted in two additional basic activities of daily living.

[16] I have no difficulty, when reading the two disability tax credit certificate forms, with accepting that the Appellant's medical conditions were getting worse over time. However, I do have difficulty in understanding how a certificate completed 22 months after the first certificate indicates that the Appellant's conditions had reached the point where they became marked restrictions prior to

2010 when the first certificate indicated that collectively two significant restrictions had become equivalent to a marked restriction of one activity in 2014. There is nothing in evidence to explain the discrepancy.

[17] Finally the fourth document in evidence, exhibit A-3, is a questionnaire sent by the CRA to the Appellant's physician and signed by the physician at the beginning of January 2018. This questionnaire is consistent with the second disability tax credit certificate.

[18] Under the Act a person qualifies for the DTC in a particular year where the person is either markedly restricted in respect of one basic activity of daily living or where the person is significantly restricted with respect to more than one activity and the cumulative effect of those restrictions is equivalent to having a marked restriction with respect to one basic activity.

[19] The Appellant was the only person to testify and she testified at some length as to her conditions and the restrictions on her ability to carry out certain activities of daily living. I have no doubt that she is markedly restricted now and that many movements are quite difficult for her and quite painful with, for example, the consequence of slowing her down dramatically when she prepares food.

[20] Where I have difficulty with the Appellant's evidence is that for the most part it sounded as if she was always at the same very high level of restriction and the same level of pain throughout the period starting from 2010 until the time of the hearing.

[21] I do not accept that her conditions were always the same and I am satisfied that over time her conditions and her restrictions were getting worse.

[22] My reason for this conclusion is that when I read the documents as a whole they are more consistent with the Appellant's medical conditions getting worse over time. In particular, with respect to timing of the onset of restrictions, I give more weight to the disability tax credit certificate completed in 2015 then to the one completed in 2017; because the 2015 form was filled closer in time to the years that concern us, it is likely to be more accurate as to the timing of the onset of restrictions than a form completed in 2017.

[23] Further, some of the physical restrictions described by the Appellant are hard to reconcile with the fact that the Appellant was doing physical labour in factories during much of the 2010 to 2014. In 2010 and 2011 the Appellant worked

at a car parts factory where she had to lift fluid lines and put them into a device where she had to attach them, test them and then put the fluid lines into boxes. In 2012 she worked for only part of the year at another car plant where she assembled cabinets. In 2013 she began work at a print factory in the hand binding section. Her supervisor said that she was not meeting expectations at that job but she did work at the print factory for a number of years. When she was working these were full-time jobs.

[24] The Appellant had to take a significant amount of pain medication while working at these factory jobs.

[25] It is important in applying the statutory tests to bear in mind that under subsection 118.4(1) the test requires that the restriction be assessed when the individual is using available therapy and appropriate devices or medication. Thus, for example, if an individual who would otherwise be markedly restricted is not markedly restricted through the use of medication, for example, then the individual would not meet the marked restriction test.

[26] As a result, the appellant has not persuaded me that she is eligible throughout the 2010 to 2014.

[27] However, considering that her physician was satisfied that there was the equivalent to a marked restriction in performing a basic activity in 2014 and given that I see nothing in the evidence to distinguish 2015 from 2014, I am satisfied that the Appellant became eligible starting in 2014.

[28] The determination will be modified accordingly and judgment will be issued accordingly.

Signed at Ottawa, Canada, this 30th day of July 2019.

"Gaston Jorré"

D.J. Jorré

CITATION:	2019TCC160
COURT FILE NO.:	2018-1609(IT)I
STYLE OF CAUSE:	SHERRY CONNOLLY AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Hamilton, Ontario
DATE OF HEARING:	April 2, 2019
TRANSCRIPT RECEIVED :	May 31, 2019
REASONS FOR JUDGMENT BY:	The Honourable Gaston Jorré, Deputy Judge
DATE OF JUDGMENT:	July 30, 2019

APPEARANCES:

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