Citation: *R. D. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 6

Appeal No: GT-116870

BETWEEN:

R. D.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

TYPE OF DECISION: ON THE RECORD

DATE OF DECISION: February 28, 2014

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for CPP disability was date stamped by the Respondent on August 20, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The decision on this appeal was made on the basis of the documents and submissions contained in the hearing file because no further information is required to make the decision, credibility is not a prevailing issue, and there is no contradictory evidence of relevance to the issue. The Tribunal noted that the Respondent when submitting its Notice of Readiness dated November 27, 2013, took the position that the appeal can proceed in writing based on the current record.

THE LAW

[4] 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 Social Security Tribunal.

[5] 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).

[6] 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.

[7] 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

[8] The Tribunal has reviewed the Record of Earnings (ROE) and the applicable Child Rearing Dropout (CRDO) periods, and finds that the MQP date is December 31, 2014.

[9] Since this date is in the future, 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 decision.

EVIDENCE

[10] The Appellant is 42 years old, and lives with her husband and three children. She was born in India, where she completed grade 12, and moved to Canada in 1996. Her work history in Canada includes working as a packer for Kelly Services from January 15, 2001 until November 15, 2007; working as a packer for Gift Crafts Ltd from April 1, 2010 until April 23, 2010; and a second part-time job delivering the Guardian Paper from June 2, 2008 until April 30, 2010. On July 6, 2010 the Appellant underwent a craniotomy to remove a brain tumour.

[11] In her CPP disability Questionnaire which was date stamped by the Respondent on August 20, 2010, the Appellant indicated that she had stopped working in April 2010 because of a brain tumour. She claimed to be disabled as of April 23, 2010 and noted her main impairments to be headaches and visual problems; she noted her other health related conditions to be hyperthyroidism, anemia, and depression. She described her difficulties/ functional limitations as follows: only able to sit for 15-20 minutes and to stand for 5-7 minutes; only able to walk for five minutes and for ½ of a block; unable to do any lifting or carrying; unable to reach above her head; unable to bend; needs assistance with dressing and washing her hair; able to slowly use the

washroom; unable to do household work; blurred vision with a black spot; difficulty hearing and her head is bothered by loud noises; speaks slowly; poor memory and concentration; disturbed and lack of sleep; sometimes short of breath; and unable to drive or use public transportation. Her assisting devices included a bathtub rail, a shower chair, and a rollator walker.

[12] In her letter dated February 22, 2011 requesting a reconsideration of the Respondent's denial of her application, the Appellant indicated that she continued to feel extremely sick due to her headaches, dizziness, and fatigue; that she suffers from poor memory; and that she was unable to take the pressure of any kind of housework. In her appeal to the OCRT dated September 26, 2011, she indicated that she is suffering from depression, lack of concentration, memory loss, exhaustion, fatigue, and forgetfulness.

[13] A report dated July 30, 2010 from Dr. S Joshi, the Appellant's family doctor, was included with the CPP application. This report diagnosis a brain tumour (meningioma right occipital region), hypothyroidism, anemia, and depression with anxiety. The report indicates that she underwent a craniotomy on July 6, 2010 and that she was still unable to work. The prognosis was that her condition was stable.

[14] A surgical final report dated July 6, 2010 diagnosed a right occipital tumour-meningioma. A discharge summary prepared by Dr. Schutz, neurosurgeon, dated July 13, 2010 indicates that the tumour was successfully removed and that the Appellant's post-operative course was uneventful. The Appellant had been discharged on July 12th, and was to be seen at regular intervals.

[15] Dr. S Joshi submitted a further report to the CPP dated June 3, 2011. He reported that the Appellant continues to suffer from headaches mostly in the occipital region, that she has blurred vision, that she feels weak and becomes dizzy, that she is forgetful and unable to concentrate, and that she is unable to handle her household chores and to look after her three children. He further reported that she is crying most of the time; that she feels sad and depressed; that she is irritable and on one occasion children's aid was involved; that she is unable to drive a long distance; that she is unable to manage all tasks at the same time, as she did in the past; and that she is unable to sit or stand for a prolonged period. He noted that she was also suffering from

right shoulder and scapular pain. He opined that she was unable to work in the foreseeable future.

[16] On October 4, 2010 Dr. Koponen, Diplomate of the American Board of Psychiatry and Neurology, reported that she had first seen the Appellant on January 17, 2010 for urgent assessment of left visual field defects and new headaches, which turned out to be occipital meningioma. She noted that the Appellant was experiencing throbbing headaches, throat discomfort with nausea, some presyncopal feeling or dizziness, and left eye pain. Dr. Koponen opined that the Appellant was not ready to return to work until she had more time to be medically optimized.

[17] On May 9, 2011 Dr. Koponen reported that the Appellant likely had pseudoementia, with some soft tissue pain and tension headaches. She noted that the Appellant's inability to work and financial problems were causing depression and more headaches.

[18] On April 12, 2011 Dr. M Joshi, general practitioner whose practice is limited to psychiatry and psychotherapy, reported on his initial assessment of the Appellant. He reviewed in detail the Appellant's symptoms which included severe headaches, feelings of nausea although she does not vomit, anxiety, inability to sleep, body shaking, vision problems especially in the left eye, and forgetfulness. He noted that it was very difficult to interview the Appellant for the mental examination, that he had to repeat himself on many occasions during the interview, that the Appellant started to cry, and that she was unable to express herself clearly. He diagnosed major depression and assessed a Global Assessment of Functioning (GAF) of 45. He opined that the Appellant was not ready to work or to join any retraining program. He stated that the Appellant had been deteriorating after surgery, and that he was reluctant to use antidepressants because they are known to trigger epileptic surgeries.

[19] On June 29, 2012 Dr. Chu, neurologist, reported to the CPP. He noted that he had first seen the Appellant on January 16, 2012 on referral from her family doctor because of visual disturbance following an occipital meningioma resection. The neurological examination in January 2012 revealed no cervical bruits and no motor sensory deficits; the visual fields showed a slight reduction in the left upper quadrant. An EEG in January 2012 revealed localization related type epileptic form of activity arising from the left parietal region. A MRI of her brain

revealed right occipital encephalomaloia secondary to her previous surgery. When the Appellant was reassessed on June 28, 2012 she continued to complain of visual disturbance and blurry vision, primarily to the left. She reported no further seizures. Examination on the day of the report revealed that the Appellant continues to have reduction for visual field testing on finger counting, particularly the left outer quadrant. She had no focal motor sensory deficits, and no significant nystagmus. He concluded that the Appellant had a previously resected right occipital parietal mengioma with left visual field dysfunction; that this was likely secondary to the area of gliosis in the operative site; and that another complication stemming from her surgery was seizure disorder with abnormal EEG. He indicated that the Appellant needed to be on Dilantin 400 mg on a daily and continuous basis.

[20] On July 6, 2012 Dr. M Joshi reported that he had seen the Appellant on multiple occasions for psychotherapy, and that she continued to have complaints similar to those detailed in his April 12, 2011 report.

[21] On July 12, 2012 Dr. Kidy, from Osler Eyecare, reported that the Appellant was experiencing cloudy vision and black spots after the removal of a tumour from the right side of her head. The report notes that the Appellant was experiencing difficulty reading because of a left homonymous quadrantanopia.

[22] On September 24, 2012 Dr. M Joshi reported to Dr. Chu asking him to reassess the Appellant to see if anything could be done to help her. He indicated that he clearly saw the Appellant in major depression manifested by sadness, crying, fatigue, inability to do much, and sitting at home crying most of the time. He noted that she had started to become psychotic, believing that somebody was touching or passing in front of her. She had not responded to Risperidone. She was now complaining of imbalance, dizziness, falling down, blurry vision, heaviness, using sunglasses because she felt she was less dizzy with them, and seeing shadows touching her eyeglasses. He further noted that her writing was deteriorating, and that both he and other family numbers were unable to make out clearly what she wrote when he gave her numbers to write. The Appellant had also started to feel shakiness of both arms and was scared to handle anything in front of other people. He stated, “It is becoming more and more difficult to help this lady from a Psychiatric point of view. She reveals signs of major depression, anxiety and

psychosis…I see her memory deteriorating on testing." He concluded as follows, " I know it's very [sic] complex case but clearly patient is severely disabled and under extreme distress and I do not believe that she will ever be able to enter the work force or join any program in future, as I have seen clear deterioration day after day in her case."

[23] On June 26, 2013 Dr. M Joshi reported that he had seen the Appellant on many occasions in psychotherapy, and that her complaints continued. He noted that the Appellant drives her car very carefully but isn't able to do much at home. He again diagnosed major depression, and noted that although she had seen a neurologist on many occasions there has been no improvement in her severe headaches. He assessed a current GAF of 40. The report concludes, "I followed this patient at my office…subjectively and objectively she continues to deteriorate, psychologically and physically ... She has marked life disruption…physical and psychological functioning is deteriorating…It is clear to me that the above condition is permanent…I believe she will continue this way until she dies."

[24] On August 14, 2013 Dr. Kidy, reported on the Appellant's six months follow up visit. He notes that the Appellant was experiencing sharp eye pain, which would come on for a few days and then go away for a week or so. He also noted that the Appellant was having trouble reading. His impression was that the Appellant's homonymous quadrantanopia was unchanged; that half of her lower field is gone and that she will always have difficulty with reading and close work; and that no further recovery is expected.

SUBMISSIONS

[25] The Appellant's submissions:

a) The Appellant's submissions are set out in her letter dated February 22, 2011 requesting reconsideration and her appeal letter dated September 26, 2011.

b) She regularly visits Dr. M Joshi and Dr. Koponen, but there has been no improvement in her conditions.

[26] The Respondent submitted that:

a) The Appellant continues to drive, an activity which requires good cognitive function. Since she continues to drive it can be presumed that she has not had any seizures, and her visual impairment is not significant.

b) The Appellant's neurological examinations have consistently been normal, and there is no formal testing to substantiate her reported cognitive and memory difficulties.

c) Although the Appellant may have some limitations, she is young with a good education, and retains the capacity to pursue suitable alternative employment.

ANALYSIS

[27] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of the decision.

Severe

[28] 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.

[29] The severe disability criterion must be assessed in a real world context (*Villani v Canada (A.G.),* 2001 FCE 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[30] It is the Appellant's capacity to work and not the diagnosis of her disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD)*, [2008] FCA 33. An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate her disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for her to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[31] Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD,* (January 17, 2001) CP 15058 (PAB). All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada* (Attorney General), 2011 FCA 47.

[32] The medical evidence in this case is compelling and strongly supportive of the Appellant's disability claim. The most significant reports are those from Dr. M Joshi which detail her numerous disabling psychiatric conditions which unfortunately have been deteriorating. Dr. M Joshi assessed a GAF of 40 in June 2013, and emphatically stated that she is disabled from any form of work, and that her conditions are permanent. There are detailed supporting reports from two treating neurologists Dr. Koponen and Dr. Chu. In August 2013 Dr. Kidy confirmed permanent left eye visual dysfunction. The reports from Dr. S Joshi, the Appellant's family doctor, are also strongly supportive.

[33] The reports from the numerous treating specialists are entirely consistent with each other and with the position that the Appellant has put forward in her questionnaire and subsequent documentation as set out in paragraphs 11 and 12 hereof. There is no suggestion in any of the reports that the Appellant is any way feigning or exaggerating her symptoms, or that she has not been totally compliant with all treatment recommendations.

[34] The Tribunal recognizes that the Appellant is young and seems to have good work skills as submitted by the Respondent; however, these factors are only significant if the Appellant retains a capacity to pursue alternative employment. Having regard to the totality of the

Appellant's disabling conditions as detailed in the extensive medical documentation, the Tribunal is satisfied that she retains no such capacity.

[35] The Tribunal does not attribute much significance to the fact that the Appellant continues to drive. Her driving appears to be only on a very limited basis, and this in itself does not detract from the clear diagnoses and opinions expressed by the treating specialists.

[36] Having regard to the clear and compelling medical evidence, the Tribunal is satisfied on the balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[37] Having found that the Appellant's disability is severe, it is also necessary to make a determination on the prolonged criteria.

[38] The Appellant's disabling conditions have continued since her surgery in July 2010, and despite extensive and ongoing treatment by numerous specialists they have unfortunately been deteriorating. The treating specialists have reported that her visual dysfunction and psychological conditions are permanent. The Appellant's disability is long continued and likely to continue for an indefinite period.

CONCLUSION

[39] The Tribunal finds that the Appellant had a severe and prolonged disability in April 2010, when she last worked. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of August 2010.

[40] The appeal is allowed.

Raymond Raphael
Member, General Division