[TRANSLATION]

Citation: *D. M. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 45

Appeal No: GT-116795

BETWEEN:

D. M.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Vikki Mitchell
HEARING DATE	November 4, 2014
TYPE OF HEARING:	In person
DATE OF DECISION:	December 22, 2014

PERSONS IN ATTENDANCE

D. M. – Appellant
Diane Larose – Appellant's representative
J. P. M. – Appellant's spouse
Dr. Bertrand Proulx – (retired) – witness

DECISION

[1] The Tribunal finds that a disability pension under the *Canada Pension Plan* (CPP) must be paid to the Appellant.

INTRODUCTION

[2] The Respondent stamped the Appellant's application for a CPP disability pension on January 24, 2011. The Respondent rejected the initial application and the request for reconsideration. The Appellant appealed from these decisions to the Office of the Commissioner of Review Tribunals (OCRT).

[3] To maintain the integrity of the documents prepared in English, some sections of this document are written in English.

[4] The first hearing in this case scheduled for September 20, 2012, was postponed.

[5] This appeal was heard at an in-person hearing for the reasons set out in the Notice of Hearing dated August 6, 2014.

PRELIMINARY ISSUE

[6] The Tribunal received a document from the Appellant on October 30, 2014, four days before the hearing. This document includes the chronology of medical appointments from March 26, 2014, to October 20, 2014, an MRI report dated August 31, 2014, and a physiotherapist's report dated September 3, 2014. The short time between the receipt of the document and the date of the hearing did not give the Respondent enough time to assess the new information. This document was relevant but did not contain significant information that would

help the Tribunal make a fair and unbiased decision in accordance with the law. The Tribunal decided not to take this document into consideration.

APPLICABLE LAW

[7] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 stipulates that any appeal filed with the OCRT before April 1, 2013, and not heard by the OCRT is deemed to have been filed with the General Division of the Social Security Tribunal.

[8] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. A disability pension shall be paid to a contributor:

(a) who has not reached sixty-five years of age;

(b) to whom no CPP retirement pension is payable;

(c) who is disabled;

(d) who has made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[9] The calculation of the MQP is important because a person must establish that he or she had a severe and prolonged disability on or before the end of the MQP.

[10] Under paragraph 42(2)(*a*) of the CPP, to be disabled, a person must have a severe and prolonged mental or physical disability. A disability is severe if the person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if the disability is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[11] There is no issue regarding the MQP date because the parties agree and the Tribunal finds that the Appellant's MQP ended on December 31, 2013.

[12] In this case, the Tribunal must determine whether the Appellant likely had a severe and prolonged disability on or before the end of the MQP.

EVIDENCE

[13] The Appellant was 61 years old on the MQP date. She originally completed Grade 10 but later finished Grade 12 at the secondary level. She lives with her husband in X, Northern Ontario.

[14] She worked for 37 years, from March 1974 to July 2010, for Columbia Forest Products in X. In this period, she worked in almost all the departments of the company and taught certain tasks to new employees. Her job was a major part of her life. She had to leave her job because she had [translation] "a large bump on her right wrist and swelling in her right shoulder." Before leaving, she performed light duties for six months.

[15] A report dated June 21, 2012, and prepared for a hearing before the WSIB describes in more detail the Appellant's history. For the last 16 years of her employment, she worked on the putty line, where she had to fill holes and cracks in plywood. It was a very physical and repetitive job. In the CPP questionnaire, the Appellant stated that her problems developed progressively over the last five years as a result of the repetitive movements that she had to do at work.

[16] In the document dated March 29, 2014, she added more details about her wrist and shoulder injuries. Normally, people worked for only one day on corstock (wood full of holes and cracks), followed by less demanding work. However, as a result of an urgent order, this rule was not followed and she worked on corstock for five days in a row. Four months prior to the Appellant's injury, the company reduced its staff and she had to do much more work than before. At the hearing, the Appellant demonstrated the method used to fill holes and carry cauldrons of putty that weighed approximately 60 pounds. After reporting her injury to her employer, she started doing modified work for four hours a day and regular work for four hours a day. In March 2009, her injury recurred. She did not work from March 9 to May 3, 2009. She returned to doing modified work until March 2010, when her injury recurred again. At the hearing, she explained that she was able to do the modified work because she could do it at her own pace. She discussed a return to modified work with her employer, but the employer could not offer her a permanent job that suited her physical restrictions. The letter written by the employer when she left noted that the Appellant was an exemplary employee who was very rarely absent in her 37 years of work.

[17] An administrative clerk training program was proposed, despite the opinion of her doctor, who wrote in a letter to the WSIB (January 13, 2011) that the Appellant "develops worsening pain with any use of her right arm including writing and using a mouse at the computer. It is my professional opinion that this lady cannot perform in a school setting for medical reasons." The Appellant tried to return to school. This attempt lasted an hour and she had to leave because of the pain. The letter from the coordinator of the adult education centre (January 9, 2012) stated that the Appellant attended training twice, on January 10 and 12, 2011, but she did not return. The teacher's report noted that the Appellant tried hard but that her physical and emotional condition prevented her from being productive and she had to leave the program.

[18] She had to stop her gardening and volunteer activities. For example, she could no longer push patients in wheelchairs. She explained that she had to wear a scarf while walking to prevent her arm from moving. She no longer wears it because it irritates her neck. Now she supports her arm using the zipper of her coat. She cannot lift anything with her right arm. She is not able to cut her meat. Her husband is the one who prepares the food and does most of the household tasks. She does the small light tasks.

[19] The Appellant gave a very good description of her daily situation in her request for reconsideration letter, in the letter accompanying the additional documents submitted on March 29, 2014, and also at the hearing. She must sit crookedly in order for her right shoulder not to touch the chair. She has great difficulty carrying out household tasks and personal care because she cannot use her right arm. She has trouble sleeping and manages to sleep in only one position. She wakes up three to four times a night with a swollen arm. Some mornings she wakes up with a stiff neck and she cannot straighten up until she applies ice then heat. In the morning, she listens to mass live. She takes a walk, telephones the elderly father of a friend to make sure that everything is fine at his place, and runs short errands at the pharmacy and post office. She is able to drive but cannot fasten her seatbelt. In the winter she must start the car 30 minutes before leaving because she cannot scrape the windows. She takes Cymbalta, Elavil and Tylenol 3. She no longer takes anti-inflammatories because of the side effects. She must take medication to be able to spend her day at home. If she had to enter the job market, she would need to double the medication, which would make her very ineffective. She would function in slow-motion and she

would appear intoxicated. Her mental health is also affected. She cries often and she is very discouraged. A good friend wrote this letter on the computer because she is unable to use it.

[20] At the hearing, the Appellant stated that toward the end of 2010, she looked for work in a clothing store and at the Dollar Store. When the managers of these stores explained to her the tasks required to fill vacant positions, she realized that she would not be able to do them because she cannot do anything with her right arm.

MEDICAL REPORTS

[21] An x-ray report dated June 17, 2008, stated "moderate calcific tendinitis."

[22] In November 2008, an MRI examination of the right shoulder showed the following: "bursitis, some tendinopathy of the supraspinatus tendon and degenerative changes in the humeral head and the acromioclavicular joint." The general impression was that there were degenerative changes. An MRI examination of the cervical spine in November 2011 identified the following: "The significant finding is that this patient has multilevel moderate to advanced cervical degenerative disease. Early central canal stenosis due to a large osteochondral bar at the C4-5 level."

DR. SMITH

[23] The CPP medical report (January 2011) was completed by Dr. Smith, who had known the Appellant for 24 years. She started treating the Appellant for her main medical condition in 2008. The diagnosis was "diffuse soft tissue pathology shoulder area and rotator cuff tendonitis." She also indicated: "Prior to first visit for problem, 5 years of progressive shoulder pain made worse with increasing physical stress at work 2 years prior to presenting." She described the physical observations and functional limitations as follows: "decreased range of motion right and left shoulder and neck. Unable to perform overhead work, lift or use right arm. Difficulty writing and doing computer work." The Appellant's medications were Celebrex and Tylenol 3. The Appellant tried physiotherapy, but had no success. According to the doctor, it was unlikely that the Appellant's condition would improve.

[24] On April 27, 2012, Dr. Smith wrote a letter to the WSIB. In the letter, she summarized the Appellant's condition and noted that the Appellant was assessed at a clinic that specializes in pain conditions, but for financial reasons, she could not follow the suggested treatments. The doctor added that "Her posture has changed to adapt to her pain causing other complications including activation of trigger points resulting in intractable headaches and neck pain." The doctor opined that the Appellant's condition had progressed to "myofascial pain syndrome." She was now suffering from almost chronic headaches.

DR. GRAHAM

[25] On September 23, 2008, the Appellant was given a multidisciplinary assessment by Dr. Graham, a physiatrist. Dr. Graham's multidisciplinary report described the Appellant's type of work as follows: "she has been exposed to increased work demands puttying, patching and turning plywood sheets." The report stated that the wrist problem greatly improved with physiotherapy but that the shoulder pain was ongoing. The doctor clarified that "Her pain is localized mostly in the scapula, however, rather than the shoulder tip. She really does not have any neck pain." She could not lie down on her shoulder or lift her right arm. He recommended other examinations, several physical restrictions and a continuation of physiotherapy.

DR. McKEE

[26] The Appellant visited the shoulder and elbow specialty clinic at Sunnybrook Health Sciences Centre three times to see the orthopedist Dr. McKee. On June 4, 2009, Dr. McKee diagnosed "rotator cuff tendinopathy in the right shoulder. I do think that in the absence of any obvious tearing or defects she would be a reasonable candidate for non-operative treatment. I am recommending an aggressive course of strengthening for her shoulder which I do think was helping her significantly." He wanted to see her again in six months to assess the success of the treatment program. He listed several physical restrictions: "In the meantime, restrictions would include no overhead work, no repetitive resisted flexion/extension of the shoulder and no heavy lifting."

[27] On January 14, 2010, Dr. McKee noted that the Appellant's condition was more or less the same and that she continued to have the same fairly diffuse symptoms. That is why he

considered that the surgery would have a fairly low success rate. He recommended that she continue carrying out the modified tasks and that she continue an exercise program at home. He wanted to see her again in six months.

[28] At the appointment on May 20, 2010, the Appellant told Dr. McKee that her pain was so severe that she had had to visit the hospital emergency room. She was advised to stop working. Dr. McKee stated that her issue is chronic and quite difficult. His diagnosis was "diffuse soft tissue pathology in and around the shoulder with a probable underlying mild to moderate degree of rotator cuff tendinosis." He opined that surgery would not help her because her symptoms are very diffuse and because the situation has lasted for a long time. He believed that a return to her previous job was unlikely because she was not able to handle even very light tasks. He recommended training for light work with permanent physical restrictions for her right shoulder.

[29] In a document prepared by the Appellant at the request of her representative, the Appellant summarized her own impressions of her three visits with Dr. McKee. At the first consultation, on June 4, 2009, a physiotherapist had her do exercises for about twenty minutes. The doctor asked the physiotherapist questions in English with no translation. He did not speak to the Appellant. The examination lasted no more than five minutes. He wanted to see her again in six months.

[30] At the second consultation, on January 14, 2010, she was not made to do exercises. He asked her how she was doing. When she answered [translation] "not well," he told her to continue with the physiotherapy. She responded that the physiotherapists had decided that she should stop the physiotherapy because there was no progress. He tapped her shoulder and told her to continue the exercises at home and that he would send a new series of exercises to the physiotherapist. He did not ask questions about the exercises proposed at the last appointment. The Appellant explained that these exercises caused her a great deal of pain and that she had to stop this therapy. The doctor told her to return in six months if her situation did not improve. The visit lasted 10 minutes. She was very frustrated because she had travelled a long distance (over 900 km) for a 10-minute appointment. She also explained that her husband had to miss work to accompany her.

[31] The third consultation was on May 20, 2010. The physiotherapist asked her questions about the physiotherapy in X. She asked these questions in the hallway, which made the Appellant

uncomfortable. In the office, the doctor told her [translation] "I have nothing more that I can do with you. I do not recommend the operation. You are 58 years old and your "light duty" is too hard. The swelling is not going down. I will write a report to Columbia and to your doctor. You will not hear anything for 15 days. Good day and good luck." The visit lasted about five minutes.

[32] Dr. Smith wrote a letter to Dr. McKee on January 19, 2011, to explain the negative result obtained by the Appellant despite the Appellant's effort to attend the courses. She asked him to help her explain the Appellant's situation to the WSIB.

[33] In response to Dr. Smith's letter, Dr. McKee wrote as follows:

> I have reviewed your letter of January 19, 2011 regarding the above named patient. While I agree with you that she does feel significant pain, I am unable to find any objective diagnosis which would preclude her, for example, from using a computer mouse *or* keyboard. She has little objective evidence of an anatomic or physiological problem in or around her shoulder or neck that would support the degree of disability that she is reporting. I do think that, rather than being completely disabled for anything (school or work), she is capable of light physical activities I have outlined in my previous notes.

[34] In a letter dated November 28, 2012, Dr. Smith listed several criticisms of the Appellant's three consultations at the clinic in Sunnybrook. According to Dr. Smith, Dr. McKee spent very little time with the Appellant, never examined her physically and failed to ask several relevant questions about her limitations. According to Dr. Smith, the Appellant's condition was the result of repetitive work strain. She opined that the Appellant would not be able to train for another type of work. She cannot use a computer, write, or remain seated for long periods.

DR. SIMON

[35] On April 5, 2011, the Appellant saw Dr. Simon at the specialty clinic in Hearst. During the appointment, the Appellant was very emotional. While crying, she described the pain in her shoulder, neck and arm down to her fingers. "There is nothing particularly localizing about her descriptions." The doctor noted "I do again note generalized tenderness, in fact probably hypersensitivity to touch throughout the right proximity particularly around the shoulder region. She has restricted active range of motion in all planes." In the report, he stated that he did not believe that the Appellant made a full effort during the examination and that is why the results were not completely accurate. He examined the MRI from 2008 and he did not see anything during his examination that would indicate a change since that time. According to his report,

they discussed the risks and benefits of a Depo-Medrol injection and she accepted the injection. Her own description of the visit is a little different. According to her, she told him that she did not have pain on her shoulder tip, but he gave her an injection there anyway. This made her angry and frustrated, and the injection did not [translation] “have any effect afterward.”

DR. MAUGUIN

[36] Dr. Smith recommended that she see a counsellor at Hearst Counselling Services. After five sessions, her counsellor, Stéphane Larose, suggested an appointment with a psychiatrist.

[37] The Appellant met with Dr. Mauguin, a consulting psychiatrist, in October 2011 for a reason that she did not wish to discuss with her counsellor Stéphane Larose. She described her pain, her problems sleeping and the pain of having been rejected by “compensation.” He found that the Appellant was very frustrated with her efforts to obtain “compensation” and that [translation] “she therefore had a tendency to dramatize and look for ways to obtain benefits that she claimed to need to live comfortably.” The doctor recommended an increase in Cymbalta and Elavil.

[38] In his report dated May 8, 2012, Dr. Mauguin stated that the Appellant had been having trouble sleeping for some time, which affected her mood, among other things. The Appellant had difficulty accepting her limitations and she was even ashamed because before she was very functional and independent. He also noted that she took great pleasure in volunteering at the Foyer des Pionniers, where she went twice a week to read to patients. He determined that she should increase her Elavil, continue with Cymbalta and also [translation] “assert herself much more with respect to things that are asked of her and that are not always reasonable and that she must also work on accepting her new limitations.”

DR. REMUS

[39] In December 2011, the Appellant visited Dr. Remus, a specialist in orthopedic surgery. Dr. Remus took into consideration the reports of Dr. Simon and Dr. McKee. He accepted most of the specialists’ opinions, but did not agree with Dr. McKee’s recommendation regarding the Appellant’s ability to participate in a training program aimed at a return to work. Dr. Remus believed that the Appellant’s age and physical restrictions did not enable such a return.

[40] Dr. Remus wrote a letter (February 1, 2013) to Dr. Smith describing an appointment with the Appellant on December 5, 2012. He repeated Dr. McKee's opinion and added that the Appellant was now depressed and seeing a psychiatrist. He opined that the depression was based on financial issues. He suggested that she submit a claim to the WSIB for other benefits, that she retire or that she ask her psychiatrist to help prove her eligibility for a CPP disability pension.

[41] On June 6, 2013, Dr. Remus saw the Appellant, along with Dr. Proulx (retired) who acted as an interpreter. Dr. Proulx asked whether Dr. Remus thought that the Appellant would be eligible for CPP benefits. Dr. Remus responded as follows:

> but I have advised him and the patient that to be eligible for Canada Disability Pension Benefits, medical documentation must prove that mentally and physically the person is so significantly disabled that they cannot look after themselves or their family, cannot participate in community activities, cannot obtain gainful employment and that likely their condition will lead to death.

[42] Dr. Remus continued as follows:

> no further activities by WSIB are indicated as she finds these to be very anxious and stressful. Indeed she may have a degree of chronic pain disorder, but of course this would be a psychiatric diagnosis. I am sure that she has been thoroughly investigated when she was at the Sunnybrook Surgical treatment assessment program.

DR. SHAPERO

[43] On January 23, 2012, the Appellant consulted Dr. Shapero, a specialist in pain issues and headaches. She told him that she had severe headaches five times a week and that she was taking up to four Tylenol 3 a day to relieve the pain. She also described the pain in her neck and shoulder. He gave his thoughts:

> Cervical myofascial pain syndrome secondary to degenerative changes in her cervical spine query facet joint mediated pain. Chronic migraine headaches. Adhesive capsulitis right shoulder …It is my opinion she would benefit from cervical and or lumbar facet joint testing.

[44] On May 7, 2012, he added the following:

> She completed her cervical facet joint diagnostic investigations as described above and had a negative response. Based on this it is my opinion she would not be a good candidate for percutaneous radiofrequency rhizotomy as described above and I would suggest a short trial therapeutic myofascial trigger point injections and/or occipital nerve

> blocks which could either be done in this office or in some place closer to where she lives.

[45] At the hearing, the Appellant stated that she had four injections a day for three days in a row, for which she paid $4,000. These injections helped somewhat with her headaches.

PHYSIOTHERAPY

[46] The final report dated December 1, 2009, from the physiotherapist at the Notre Dame hospital summarized the treatments and results for the Appellant. She visited the clinic twice a week for 11 weeks. The report stated as follows:

> Treatment included a home exercise program, in clinic exercises, mobilizations, release of trigger points, ultrasound and interferrential current. Improvements were noted in range of motion and strength although restrictions are still noted in flexion, abduction and internal rotation. … has reached a plateau in her physical recovery, and is not at a level to allow her to safely return to her previous job.

[47] In a letter dated December 21, 2010, the physiotherapist summarized the history of the consultations with the Appellant. The Appellant consulted the physiotherapist in August 2008 and continued with treatments for her right shoulder until February 2009. She started again in September 2009 and continued until November 2009. In this period, the Appellant did the strengthening movements suggested by Dr. McKee. According to the Appellant, this process made her condition worse. According to the physiotherapist, the Appellant regularly attended sessions and was motivated. Unfortunately, she did not have much success. The Appellant continued to have "limited shoulder range of motion, pain, weakness in the shoulder joint ascending to the cervical area as well as the scapular area." Since she is right-handed, she had difficulty with her work tasks and also with her daily activities. According to the physiotherapist, the Appellant was not physically capable of returning to any gainful employment that requires the use of her upper right extremity.

[48] The record contains a note written by the physiotherapist at the Notre Dame physiotherapy clinic in Hearst. On May 9, 2012, she wrote that the Appellant had pain in the right shoulder, but especially in the scapular area. She had a rounded shoulder and seemed to be suffering from "myofascial syndrome to several different muscles of the shoulder, neck and scapular areas." She recommended massage therapy.

MASSAGE THERAPY

[49] The massage therapist wrote a letter on May 5, 2011, and another letter on December 22, 2011, describing her treatments and her impressions of the Appellant. On February 25, 2010, she noted that the right scapula area was too sensitive and that she had to touch her very gently. On September 27, 2010, the Appellant was very emotional because she had so many restrictions and she had to rely on her spouse to carry out household tasks. On January 28, 2011, the massage therapist noted the same sensitivity in the scapula area and also noted a change in posture. Her back had started curving forward. On March 22, 2011, the Appellant often cried and expressed a great deal of frustration because [translation] "some people do not believe that she is in pain, which is persistent." On May 31, 2011, she noted redness in the right scapula area. On August 2, 2011, the right side was stiff as a result of the pain. On October 17, 2011, the Appellant expressed her frustration and discouragement. On December 13, 2011, the massage therapist noted redness when she massaged the affected region and a swollen bump directly on the right scapula. According to her, the Appellant was suffering from a great deal of [translation] "pain."

DR. PROULX'S REPORT

[50] In his report dated March 29, 2014, Dr. Proulx, a retired doctor, stated that the goal of the report was to help the Appellant in her efforts to have the Respondent recognize that she has a severe and prolonged disability within the meaning of the CPP. He looked at the medical reports and submitted his comments on the reports in writing and orally at the hearing.

[51] The record contains a document dated November 12, 2012, written by Dr. Proulx. Dr. Proulx first gave his explanation for the Appellant's pain. He explained that the Appellant's pain and inability to lift her right arm is the result of scapular issues. Dr. Proulx stated that Dr. Graham's report noted the same symptoms: "Tenderness over the right interscapular muscles and she withdraws to palpation."

[52] He gave a very detailed description (with photos) of the Appellant's work to explain his theory on the cause of the Appellant's physical issues.

[53] He also gave his opinion on the Appellant's assessment at the clinic in Sunnybrook. Dr. Proulx was of the view that Dr. McKee did not spend enough time with the Appellant to fully assess her situation and recognize the physical limitations caused by her chronic pain. According to Dr. Proulx, the lack of interpretation resulted in some misunderstandings between Dr. McKee and the Appellant. For example, Dr. McKee stated that the Appellant "had some physiotherapy which seemed to have a good effect, but apparently this has been stopped." In fact, the Appellant participated in 69 treatment sessions (August 2008 to February 2009) and had no improvement with respect to pain or physical ability.

[54] He included in his report a comment on the Appellant's visit to the emergency room on February 26, 2009. The assessment stated "pain in the back of right shoulder blade, pain radiating from shoulder up to neck right side, unable to hold or raise arm higher than 90 …repetitive work strain." Dr. Proulx made the following comment:

> A medical student was able to obtain an accurate history despite being busy in an Emergency Room. This medical student grasped the location of (Appellant's) main complaint (scapular region) and the fact that … cannot raise her right arm above 90°. Naturally, it is normal to expect at least the same from Physio/McKee.

[55] Dr. Proulx also criticized Dr. McKee's interpretation of the MRI. The radiologist wrote in his report "some tendinopathy," while Dr. McKee wrote "significant tendinopathy." According to Dr. Proulx, this false interpretation resulted in Dr. McKee treating the Appellant for a condition that was not significant.

[56] During the second visit, Dr. McKee stated "She is working full time although it is only on light duties." He did not ask for a description of her tasks, so he did not know that there were several tasks that she was unable to carry out regularly, such as writing, typing, and using the computer with the help of the mouse. He did not ask the Appellant about the exercises provided during the first visit, so he did not know that she could not tolerate them.

[57] The Appellant lost confidence in Dr. McKee and wanted to see Dr. Graham again, but WSIB refused because he had already assessed her in September 2008.

[58] Dr. Proulx wrote a list of 34 questions that, according to him, Dr. McKee should have asked the Appellant. He questioned the credibility of Dr. McKee's opinion on how the Appellant's

condition affects her ability to function. He cited Dr. McKee: "I think she has the physical capability for performing the duties that I have outlined in my previous notes." Dr. Proulx continued as follows:

> With all due respect to Dr. McKee, a reputed orthopedic surgeon, he has **NEVER** outlined in his previous notes **ANY** physical capabilities of D… nor, for that matter, her incapacities, i.e. activities that she is unable to do because of her scapular pain going into the right arm, on motion of her right arm. There is no mention of these capabilities in his previous notes.

OBSERVATIONS

[59] The Appellant's representative argued that the Appellant is eligible for a disability pension for the following reasons:

(a) The Appellant is right-handed but she is unable to use her right arm.

(b) She followed the WSIB's recommendation and tried a program to acquire skills to return to a suitable job, but was unsuccessful.

(c) She participated in physiotherapy programs for a long time without her condition improving.

(d) She worked for 37 years for the same company and her employer stated that she was an exemplary employee. She would not have left if she had not been in extreme pain.

(e) As a result of language issues and the short amount of time spent with the Appellant, she believes that Dr. McKee misdiagnosed the Appellant's physical condition and consequently made unsuitable recommendations.

[60] The Respondent argued that the Appellant is not eligible for a disability pension for the following reasons:

(a) Her medications have not changed since April 2011, which indicates that the medications can control the Appellant's symptoms.

(b) After taking into consideration Dr. Proulx's reports, the Respondent suggested that the Tribunal should give more weight to the reports of specialists such as Dr. McKee, whose specialty is shoulders and elbows.

(c) The assessments of specialists determined that the Appellant is able to hold a suitable job.

ANALYSIS

[61] The Appellant must show, on a balance of probabilities, that she had a severe and prolonged disability on or before December 31, 2013.

Severe

[62] The severity of the disability must be assessed in a "real world" context (*Villani v. Canada (A.G.)*, 2001 FCA 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.

[63] The Appellant was 61 years old on her MQP date. She worked for 37 years for Columbia Forest Products. She worked in almost all the sections of the company and finished her career working on the putty line, where the tasks were very physically demanding. Her first language is French and she has a fairly weak understanding of English. She completed Grade 12 at the secondary level. At the age of 61, it would be very difficult for the Appellant to take courses in another field of work, but she did try to return to school. She was unsuccessful because her pain prevented her from continuing. The Tribunal is of the view that, according to the criteria set out in *Villani,* the Appellant is incapable regularly of pursuing any substantially gainful occupation.

[64] *MNHW v. Densmore* (June 2, 1993) CP2389 (PAB) addresses the issue of chronic pain and the Tribunal refers to it for information. On page 4, the Pension Appeal Board wrote as follows:

> The issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, the judgment call, made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of. It is the Board's view, often expressed in the cases, that it is not sufficient for chronic

> pain syndrome to be found to exist. The pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation.

[65] The Tribunal finds that, given the description of her daily life, the loyalty that she showed to her employer, her effort to find another job and her effort to return to school, the Appellant would not have stopped working if she had not been suffering from intense pain.

[66] The Respondent suggested that the Tribunal give more weight to the opinions of specialists such as Dr. McKee. The Tribunal accepts the Appellant's explanation in her testimony that the appointments with Dr. McKee lasted only five to ten minutes, that he did not examine her himself, that he did not ask her questions about the effect of the exercises that he had suggested and that the conversations between Dr. McKee and the physiotherapist that took place in the Appellant's presence were in English, without interpretation. The Tribunal also notes that Dr. Graham, who is also a specialist, noted that the Appellant's pain is in the scapular area, not in the shoulder tip. Dr. Remus, another specialist, agreed with most of Dr. McKee's opinions, but did not agree that the Appellant would be able to participate in a program aimed at a return to work. The Appellant's family doctor has known her for 24 years and she was not satisfied with either the procedure or the results of the consultations with Dr. McKee. The Tribunal gives more weight to the opinion of the family doctor and accepts that the Appellant is incapable regularly of pursuing any substantially gainful occupation.

[67] The Tribunal noted that the medical practitioners did not all agree on the diagnosis. "The key question in these cases is not the nature or name of the medical condition, but its functional effect on the claimant's ability to work" (*Ferreira v. Canada (Attorney General)*, 2013 FCA 81). Dr. McKee diagnosed "rotator cuff tendinopathy." Dr. Graham stated that "Her pain is localized mostly in the scapula." The Tribunal accepts that, even though the Appellant's symptoms led to different findings, she is incapable of pursuing any substantially gainful occupation.

[68] The Tribunal accepts that the purpose of Dr. Proulx's testimony and documents was to support the Appellant's argument. However, Dr. Proulx questioned Dr. McKee's diagnosis in great detail and used photos to show his theory on the cause of the injury and its effect on the Appellant's daily life. The Tribunal finds that his testimony is important in order to fully understand the Appellant's abilities.

[69] The Respondent stated that, since the Appellant's medications have not changed since 2011, they are enough to control her pain. The Tribunal does not give any weight to this argument and accepts that the medications give the Appellant the ability to spend the day at home and to function at her own pace.

[70] The Tribunal finds that, on a balance of probabilities, the Appellant had a severe disability in July 2010 when she had to leave her work.

Prolonged

[71] The Appellant's family doctor started treating her shoulder pain in 2008. The Appellant continued to work until July 2010. She was assessed by several specialists and underwent several physiotherapy and massage therapy programs. None of the treatments that she tried successfully reduced her pain. Her family doctor did not foresee any improvement to her condition.

[72] The Tribunal agrees that the Appellant's condition is long continued and of indefinite duration.

CONCLUSION

[73] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2010 when she left her employment at Columbia Forest Products. According to section 69 of the CPP, the disability pension is payable commencing with the fourth month following the month in which the applicant became disabled. The payments will start in November 2010.

[74] The appeal is allowed.

Vikki Mitchell
Member, General Division