

Citation: *K. K. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 2

Appeal No: GT-118962

BETWEEN:

K. K.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Raymond Raphael

HEARING DATE: January 5, 2015

TYPE OF HEARING: Videoconference

DATE OF DECISION: January 7, 2015

PERSONS IN ATTENDANCE

K. K.: Appellant

Andy Rady: Appellant's representative

Shawnessy Johnson: Observer, Member of the Social Security Tribunal

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 a CPP disability pension was date stamped by the Respondent on December 31, 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 hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated September 17, 2014.

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 finds that the MQP date is December 31, 2011.

[9] 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.

BACKGROUND

[10] The Appellant was 47 years old on the December 31, 2011 MQP date; she is now 50 years old. She obtained her hairdressing license in 1982; a Personal Support Worker (PSW) certificate in 2005; and a pharmacology PSW certificate in 2006. She worked as a hairstylist (manager) from August 1999 to January 2007 for K. K. She then worked as a PSW for Countryside Manor from June 2007 to June 2008, and for Country Terrace Long Term Care Home from September 2006 until she suffered injuries in a motor vehicle accident (MVA) on August 31, 2008.

[11] On August 31, 2008 the Appellant was a seat-belted passenger in a minivan driven by her boyfriend, when they were rear-ended by a city bus, which was moving at full speed. The Appellant has not returned to work since the MVA. She claims chronic pain syndrome, fibromyalgia, headaches, depression, and sleep disturbance as her main disabling conditions.

APPLICATION MATERIALS

[12] In her CPP disability questionnaire, date stamped by the Respondent on December 31, 2010, the Appellant indicated that she has a grade 12 education, as well a hairdressing license and a PSW certificate. She noted that she last worked as a PSW, and that she stopped working on August 31, 2008 because of injuries sustained in a MVA. She claimed to be disabled as of September 1, 2008 and listed her main disabling condition to be severe chronic lower back pain. She noted that she cannot stand without leaning on something, that she cannot sit in a hard chair, that she cannot sit in one spot for a long time without moving, that she cannot walk around for long, and that she cannot be bent over. She further noted that all of her activities such as power walking, biking, dancing, bowling, and golfing ceased as of September 1, 2008.

[13] When explaining her difficulties/functional limitations, the Appellant indicated that she cannot stand in one spot for more than five minutes without leaning on something; that she cannot sit in a hard chair, and that she cannot sit without being able to move around; that she can walk around for a maximum of one hour; that she cannot lift more than 10 lbs.; that reaching high causes increased lower back pain; that she cannot bend over; that she has difficulties when colouring and straightening her hair; that she has an upset stomach and acid reflux from medications; that she is limited in doing household tasks; that she leans to her right and has to use a heated pad when driving; and that she has no difficulties with seeing, hearing, speaking, remembering, and concentrating.

[14] A report dated November 18, 2010, from Dr. Vaides-Waran, the Appellant's family doctor, accompanied the CPP application. The report diagnosis back pain secondary to mechanical and degenerative factors. The listed medications include Flexeril, Ibuprofen, Wellbutrin, and Lyrica. The listed treatments include physiotherapy, pool therapy, and

massage therapy. The prognosis indicates that the Appellant's back pain is chronic and that it will likely remain the same or get worse. The report concludes that the Appellant has not been able to work as a PSW.

ORAL EVIDENCE

[15] In her oral evidence at the hearing, the Appellant stated that she is now divorced and living in X with her parents in a 4-level back split. Prior to this, she lived in X in a 4-level back split with her husband. Her parents are in their mid-eighties, are independent, and are able to take care of themselves.

[16] The Appellant reviewed her education and employment history. She went to night school to learn hair dressing while she was in high school, and started working as a hairdresser immediately after completing grade 12. She stated that she worked as a hairdresser from the age of 18, and at one point she had her own salon. When she turned 40, she started taking a night course at Fanshawe College to train as a PSW. She initially worked part-time as both a PSW and as a hairdresser; but, at the time of the MVA she was working part-time as a PSW at a nursing home, and was hoping to progress to full-time hours. When describing her work as a hair-dresser, she stated that she was required to stand on her feet all day in one position. When describing her work as a PSW, she stated that this was more physically demanding since she was on her feet all day, had to lift and feed the patients, had to roll them back and forth in bed, and had to get them dressed.

[17] She described the MVA on August 31, 2008, and stated that they were rear-ended by a city bus. The bus bounced off after the initial impact, and then hit their car again. At first she was in shock, and at the police station she started to feel stiff and sore. By the next morning, she wasn't able to move at all. She saw her family doctor who prescribed muscle relaxers, physiotherapy, and pain medications. She went for five rounds of physiotherapy over the next 2-3 years. She also went for massage therapy but found this made her pain worse. She did home exercises both at a gym and at home, but she found this didn't really help her back pain. She also tried aqua fit which was easier, but she also found that if she did too much, she became very sore. In September 2013 she underwent four cortisone

injections on the recommendation of her family doctor; after this she started experiencing sciatica pain radiating all the way down her right hip and leg. She stated that she has tried numerous pain medications and found that non-narcotics didn't help her pain, and that narcotics made her sick. She now takes extra strength Ibuprofen and Tylenol for pain.

[18] She went for psychological counselling with Dr. Benn for about eight weeks to help her get through her depression. She took anti-depressants for about five years, but stopped a year ago because they weren't helping. She would still experience a big "melt-down" at least once a year, in which she would just cry for three days. She tries to avoid taking prescription medications because they hurt her stomach. She has not experienced any difference in her pain or depressive symptoms since she stopped taking the anti-depressants.

[19] The Appellant stated that her main problems are her constant low back pain (which she feels across her entire lower back); her hip and sciatica pain; and her sleep difficulties (she awakes every two hours). The back pain has been non-stop since the MVA, and she now hunches over when she walks, and can't even stand in the kitchen to cook. She stated that half her days are "good days", and half are "bad days". On "good days" she can do light things around the house and also get out of the house to go to the store or have coffee with a friend. On "bad days" she just lies on the couch all day – she does nothing other than go from her bed to the couch. Whenever she tries to do a little more walking or more things around the house, she finds that on the next day she will be totally "out of it." She stated that it is totally unpredictable as to how many "good or bad days" she might have, but in the average month 50% of her days are "bad days."

[20] She acknowledged that she has not made any efforts to pursue alternative lighter employment. When asked why not, she stated, "I don't feel that there is anything that I could do – I can't sit and I can't use a computer...the more I do, the more I hurt...I can't sit at a desk all day...I can't stand...I don't know what I could do...I am not trained for anything...I don't know how to do anything...I don't know from day to day how my back is going to be."

MEDICAL EVIDENCE

[21] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

[22] A referral note dated October 28, 2008 from Dr. Vaides-Waran to Dr. Clifford indicates that the Appellant was involved in a MVA on August 31, 2008 when she was rear-ended by a bus while stopped at a red light. The note indicates that the Appellant has suffered constant pain in her neck, back, and shoulder since the MVA.

[23] On January 19, 2009 Dr. Clifford, physiatrist, reported that the Appellant's complaints of low back pain are likely due to a combination of myofascial pain, musculoskeletal deconditioning, and mild degenerative changes involving discs and/or facets. Dr. Clifford further reported that there was no compelling clinical evidence to suggest acute myelopathy or radiculopathy, and that there was no significant intra-articular pathology within either hip.

[24] A MRI on January 29, 2009 revealed no significant pathology. There was mild facet degenerative changes suspected at L2-3 and mild to moderate changes at L3-4.

[25] On March 11, 2009 Dr. Clifford reported that the MRI ruled out any indication for surgical management. He did note, however, that the Appellant's moderate to marked facet degenerative changes will undoubtedly continue to progress and, as they progress, there will be persistent and increasing complaints of lower back pain. He also noted that the Appellant continues to attend physiotherapy once per week; that she attends a gym on her own several times a week; and that she reported no change in her back pain. Dr. Clifford indicated that the Appellant's ongoing vocational restrictions included prolonged stooping, squatting or standing, repetitive bending or twisting, and repetitive/heavy lifting at the waist. Dr. Clifford concluded that the Appellant would likely be unable to return to work as a PSW, and that she should begin preparing for work that would minimize her exposure to her vocational restrictions.

[26] On September 30, 2009 Dr. Death, physiatrist, reported that the Appellant's chief complaints included occasional neck and shoulder pain, resolved headaches, and constant low back pain. Dr. Death reported that although there was no demonstrable musculoskeletal impairment, the Appellant was developing a chronic pain syndrome with "discrepant disability." He recommended the assistance of a chronic pain psychologist.

[27] With respect to her limitations and restrictions preventing a return to work Dr. Death reported as follows:

There has been resolution of the minor headaches, neck pain, and shoulder girdle stiffness. There has been no resolution of the mechanical low back pain although the MRI of January 29, 2009 was reportedly normal. There is an emerging chronic pain syndrome.

Based on objective evidence, I cannot identify any limitations or restrictions preventing a return to work on the basis of the musculoskeletal system. However, coping is a problem and an emerging chronic pain syndrome is developing. This may limit the perception of the ability to return to work.

[28] An occupational assessment report dated January 8, 2010 prepared by Catherine Sydor, occupational therapist, notes that from a treatment perspective, the Appellant has had no success with physiotherapy or massage therapy; that she has undergone psychological evaluation with Dr. K. Bern and understands that recommendations will be developed for treatment around chronic pain issues; that she was initially prescribed Cyclobenzaprine and Arthrotec on September 3, 2008; that Arthrotec had no effect on her pain symptoms.; that Amitriptyline was added one month later on October 9, 2008 with a refill of Cyclobenzaprine; that only the Cyclobenzaprine has proven effective over time at managing her low back pain symptoms; that Oxycontin was tried first in January 2009 but the Appellant found the side effects disorienting and disturbing so the prescription was not renewed; and that Ratio-Codeine 15 mg (Tylenol #2) was tried but found to be ineffective at managing pain symptoms.

[29] Ms. Sydor also noted that the Appellant has not returned to work because of her low back pain; that when she considers the physical demands of the job, she does not feel that she has the ability to complete the essential tasks of her occupation without enduring severe

and debilitating pain; that she has also considered a return to hairdressing but the perspective is similar - she feels that the physical demands of the occupation are not achievable in light of her low back pain; that she remains off work and unable to identify a plan of action to return to the work force; and that Dr. Clifford concurred with her inability to return to work as a PSW with chronic back pain and degenerative changes as noted in the MRI of the lumbar spine and has advocated in his report of March 11, 2009 for a renewed vocational direction that addresses the permanent restrictions he has identified. The report further notes that in her musings, the Appellant believes that no one would hire her given the extent of her physical impediments and inability to commit to a predictable schedule of activity or work hours. When asked to consider the role of retraining programs, it was the physical challenges of being a student that concerned her, and that when speaking of her vocational future, this presented as a major issue for her.

[30] Based on her assessment, Ms. Sydor opines that the Appellant has not returned to work as a PSW, that she has counted out a return to her former career as a hairdresser, and that “she is at a complete loss to identify vocational goals given her current functional status.” The report also opines that the Appellant is primarily impaired from a “biomechanical and fear perspective” and that functionally “she has presented with a clear chronic pain syndrome that will impact her daily activities of living and impede the rehabilitation process.”

[31] On January 27, 2010 Dr. Benn, psychologist, reported on her psychological assessment of the Appellant. The Appellant’s presenting problems included bilateral low back pain, neck stiffness that can lead to headaches, mood difficulties, irritability/anger, disturbed sleep, and motor vehicle passenger anxiety. Dr. Benn described the Appellant’s impairments from the MVA to include chronic pain; limitation of activity due to functional limitations; adjustment difficulties with depression and anxiety; compromised self-concept/esteem; irritability/anger; and situational anxiety (automobile passenger). Dr. Benn recommended up to 18 (1.25 hour) sessions of individual psychological treatment.

[32] Dr. Benn's treatment note dated April 14, 2010 indicates that the Appellant had a "meltdown" last week and was mad, sad, angry and yelling because of her pain and limited activity.

[33] Allan Mills, M.Ed., RRP, from DMA Reability, prepared a medical legal vocational evaluation report dated May 31, 2010 for the Appellant's lawyers. The testing results indicated relatively solid language skills, and a relative modest knowledge of math fundamentals, relative to her highest attained level of education. Mr. Mills recommended upgrading in this area, and noted that the Appellant appeared to have the potential to succeed at vocational and some college level programs. Based on the testing results, Mr. Mills concluded that from a vocational perspective the Appellant's strengths included a well-developed and solid work history in the healthcare field, and noted that at the time of the MVA she was holding two jobs and hoping to progress to full-time employment.

[34] Mr. Mills, however, goes on to state that the Appellant's vocational profile is confounded by a number of factors including her significant, chronic and unrelenting back pain, which is made worse by increased activity involving sitting, standing, walking, bending, heavy lifting and low level posturing; that her medical condition precludes returning to her pre-MVA employment as either a PSW or hairstylist; that even in a sedentary environment she will require a job that affords the opportunity for pacing/flexible work schedule, accommodations in the workplace (ergonomic chair, workstation), and a benevolent employer who will forgive absences from work on 'bad days'; and that her ability to tolerate the physical demands of a retraining program is questionable, since the demands involve primarily sitting, and she would require accommodations that allow her to work at her own paced and on a reduced course load.

[35] Having regard to the Appellant's limitations Mr. Mills recommended vocational options included medical office assistant, social service worker, volunteer coordinator, and medical lab assistant. Mr. Mills also recommended that the Appellant participate in employment counselling, skill specific retraining, and a period of job search assistance once she has completed her vocational preparation. The report concludes that based on her employment and educational history, plus her tested/reported interests and her medical

status, the Appellant may be considered capable of pursuing alternative occupational goals similar to those listed above.

[36] A psychological assessment report prepared by Dr. Iezzi, psychologist, dated June 3, 2010 indicates that the Appellant developed a chronic pain condition, functional and lifestyle impairment, and emotion distress following the MVA. The report diagnosis pain disorder associated with psychological and a general medical condition (mild to moderate), and some mild clinical levels of anxiety and depressive symptoms. The report notes that her maladaptive coping style is likely to make it more difficult for the Appellant to cope with the repercussions of her chronic pain problem. The prognosis depends on the Appellant's ability to return to some type of work and is more positive if she is able to perform less physically demanding work. However, if the Appellant is not able to return to any type of work the prognosis is that she will likely experience more deterioration in her quality of life and an increase in emotional distress. The report concludes that the Appellant would likely be left with some permanent physical and psychological residual consequences of her injuries, and that it is still somewhat early in her recovery to determine the full elaboration of her injuries.

[37] On June 25, 2010 Dr. Smith, psychologist, reported to the Appellant's lawyer on his psychovocational assessment of the Appellant. The Appellant's described current residual problems were constant lower back pain, with 'cracking and grinding'; occasional stiffness in the neck and shoulder area; largely-resolved headaches; and some sleep disturbance. The Appellant denied any problems of attention, concentration, or memory. Dr. Smith noted that Dr. Death had commented on the Appellant's 'discrepant disability', i.e. the Appellant perceives herself as being more disabled than there is an objective need to be, and that Ms. Sydor's report suggests that the Appellant's tolerances were greater than those which she perceived for herself.

[38] The testing indicated that although the Appellant's scores were in the lower part of the average range, she is easily functionally literate and numerate, and her intellectual estimates suggested an overall intellectual functioning in the high average range. The Appellant denied any problems of cognitive functioning. The report notes that the Appellant

probably has the potential to retrain to the career college or community college levels, although she might have to have some accommodations and the ability to pace her own activities, change position, and have longer periods for examinations. Dr. Smith suggested the Appellant's vocational ambitions be directed towards areas which might allow part-time as well as full-time employment, and suggested vocational rehabilitation.

[39] On June 29, 2010 Dr. Potter, physiatrist, reported to the Appellant's lawyer with respect to his physiatric assessment of the Appellant. The Appellant's chief physical complaints were mid thoracic pain and low back pain. The report notes that the Appellant was also experiencing sleep disturbance, feelings of depression, and crying episodes. Based on his review of the medical documentation and his interview and examination of the Appellant, Dr. Potter opined that the Appellant will experience a permanent, partial disability with the following restrictions: avoidance of repetitive or sustained bending, twisting or squatting; avoidance of more than light lifting; avoidance of work overhead, given her diminished ability to extend her spine; avoidance of sustained sitting greater than fifteen minutes duration; and avoidance of sustained standing greater than fifteen minutes. With respect to the Appellant's ability to perform any type of employment, Dr. Potter opined that it is probable that any future employment will need to take these restrictions into consideration. Dr. Potter recommended vocational rehabilitation.

[40] On July 19, 2010 Dr. Yee, orthopaedic surgeon, reported on a multidisciplinary insurer's examination consisting of assessments by Dr. Yee, orthopaedic assessment, Dr. Carey, psychological assessment, Ms. Dawn Rodie and Danny Monck, Functional Abilities Evaluation, and Bruno Rositano, Vocational Evaluation. The consensus opinion was that the Appellant did not suffer from a complete inability to engage in any employment for which she is reasonably suited by education, training, or experience.

[41] On October 14, 2010 Dr. Benn noted that the Appellant's motivation and commitment to treatment have remained consistently high. Dr. Benn reported the Appellant continues to experience significant psychological symptomatology.

[42] On August 18, 2011 Dr. Kaye, neurologist, reported that MRI imaging of the Appellant's spine in March of 2011 showed either a small thoracic syrinx from T5 to T8 or a dilated central spinal canal. The maximal diameter was only 1.5 mm which is not significant. There was no significant increase in the size of the lesion compared to 2009. Dr. Kaye diagnosed chronic lumbar pain, gastroesophageal reflux disease (GERD), and depression. She did not think the MRI findings were symptomatic, and opined that they did not require treatment.

[43] Dr. Vaides-Waran's office note dated July 10, 2012 indicates that the Appellant's back pain is worse than before, that the pain is radiating down her left buttocks, that she is sore all the time, and that she cannot sleep at night secondary to pain.

[44] Dr. Vaides-Waran's office note dated July 27, 2012 indicates that the Appellant is still taking Cymbalta, that she has no side effects with it, that she gets relief with a heating pad, and that her court case is settled.

[45] Dr. Vaides-Waran's office note dated September 17, 2012 indicates that the Appellant was seen in follow up for her back pain and depression, that there has been no change in her pain, that Cymbalta helps somewhat with her depression, and that her low back pain is radiating down her legs.

[46] Dr. Vaides-Waran's January 16, 2013 office note indicates that the Appellant's ongoing back pain is worsening, and that she is very stiff for the whole day.

[47] Dr. Vaides-Waran's June 12, 2013 office note indicates that the Appellant's back issues are worsening, that she has to lean forward on her shopping cart when she is walking, and that pain is radiating down her left thigh.

[48] Dr. Vaides-Waran's office note dated September 12, 2013 indicates that a recent facet joint injection did not help, and that her pain is now worse.

[49] Dr. Vaides-Waran's office note dated October 2, 2013 indicates that the Appellant's back pain is worsening since the cortisone injection, that pain is shooting down her right leg,

that her right foot is always tingling, and that she experiences sharp stabbing pains in the back and thigh.

[50] Dr. Vaides-Waran's October 28, 2013 office note indicates that the Appellant's right foot tingles all the time, that pain radiates to her thigh and right foot, that she experiences constant pain in her right leg and thigh, that she is okay putting around the home, and that she tosses and turns and does not sleep well at night.

[51] In a Health Status Report dated March 3, 2014 in support of the Appellant's ODSP application, Dr. Vaides-Waran noted that the Appellant's conditions include mechanical lower back pain secondary to degenerative disc disease, fibromyalgia (chronic pain), and GERD. The report notes that the Appellant is unable to sit, stand or walk for more than 15 minutes. The report indicates that treatment modalities including physiotherapy, massage, acupuncture, and cortisone injections and several medications including Cymbalta, Neurontin, nortriptyline, Lyrica, Flexeril, Wellbutrin, and Percocet have been tried and not helped her back pain. The report further notes that the chronic pain has drained the Appellant physically, mentally and emotionally. The report also indicates that the chronic pain has left the Appellant disabled and unable to carry out her activities of daily living and home chores, and unable to work as a Personal Support Worker, hairdresser, or any other job involving sitting, standing, lifting or reaching.

[52] On April 7, 2014, Dr. Harth, from the Central Health & Wellness Centre reported to Dr. Vaides-Warren. The report indicates that the Appellant has severe low back pain following the MVA, and that there are a limited choice of treatment options. Dr. Harth made medication suggestions, and mentioned radiofrequency neurotomy as another potential treatment.

SUBMISSIONS

[53] Mr. Rady submitted that the Appellant qualifies for a disability pension because:

- a) Her physical and psychological impairments, coupled with her chronic pain, prevent her from returning to any form of gainful employment in a "real world" context.

- b) He submitted that the Appellant has developed a chronic pain syndrome which is rooted in her back pain, and that the Tribunal should take into account what he referred to as “her physical pain, wrapped in with psychological issues including her being pain focused and unable to cope”;
- c) He described the Appellant as being in a vicious cycle in which her pain leads to depression, anxiety, and poor coping mechanisms, which in turn leads to increased pain, which in turn leads to increased depression, and so on;
- d) The clinical notes from Dr. Vaides-Warren from September 2008 through to October 2013 confirm the Appellant’s longstanding chronic pain symptoms and that she has pursued extensive treatment modalities without success;
- e) The reports from Dr. Clifford, Dr. Potter, and the occupational and vocational assessments by Catherine Sydor and Allan Mills, confirm the Appellant’s limitations, her limited transferable skills, and that she would not be competitively employable;
- f) The Appellant’s employment history demonstrates a strong work ethic, and the medical reports confirm her strong motivation to get better and her compliance with treatment recommendations.

[54] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) Although the Appellant’s physical limitations preclude the Appellant from returning to her pre-MVA employment as a PSW or hairstylist, the occupational and vocational assessments recommend suitable alternative occupations;
- b) The Appellant has made no efforts to pursue alternative less physical demanding employment;

- c) Although the medical evidence supports limitations, it does not establish a severe disability that precludes all forms of gainful employment;
- d) The Appellant was only 44 years old at the time of the MVA, and she has a good education and work history. Accordingly, she has the residual capacity to pursue alternative employment and has failed to make any efforts to do so.

ANALYSIS

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

Severe

[56] 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.

Guiding Principles

[57] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[58] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2011 she was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[59] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: *Inclima v Canada* (Attorney General), 2003 FCA 117.

[60] 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 him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[61] There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real: *Nova Scotia (Worker's Compensation Board) v Martin* [2003] SCC 54.

Application of Guiding Principles

[62] The Appellant gave credible and straightforward evidence about her physical and emotional conditions, and about how they have affected her life and capacity to work. She was an accurate historian and her evidence was consistent with and confirmed by the extensive medical documentation in the hearing file. She did not attempt to overstate or exaggerate her symptoms. Despite the lack of significant objective findings, she suffers from severe chronic pain syndrome and the Tribunal is satisfied that "she is suffering and in distress" and that the disability that she is experiencing is "real." (see *Martin*, supra).

[63] The evidence establishes that the Appellant has been compliant with treatment recommendations and that she has diligently pursued numerous treatment modalities including physiotherapy, massage therapy, acupuncture, and cortisone injections; that she has tried numerous pain and anti-depressive medications despite significant adverse side effects; that she has pursued a home and gym exercise program and aqua fit to the best of her ability; and that she has undergone numerous specialist consultations and investigations. Unfortunately all of these efforts have been unsuccessful in relieving the Appellant's severe chronic back pain, and she continues to suffer from the disabling physical and emotional symptoms of chronic pain syndrome. The evidenced also establishes that because of her physical limitations. the Appellant is unable to return to her previous physically demanding employment either as a PSW or as a hair-stylist.

[64] The primary issue that the Tribunal must determine is whether the Appellant has failed to meet her obligation to pursue alternative less physically demanding employment in accordance with the *Inclima* decision, supra. The Respondent takes the position that the Appellant was only 44 years old on the date of the MVA (47 on the MQP date), that she is well educated and has significant work skills, and that the occupational and vocational assessments support that she has the residual capacity to pursue vocational training and alternative employment. Mr. Rady takes the position that when considering the combined effect of the Appellant's physical and psychological conditions, her chronic pain syndrome, and the limitations and barriers set out in medical reports and occupational and vocational assessments, the Appellant lack the residual capacity to pursue alternative employment in a "real world" context."

[65] In this case, the Tribunal is satisfied that because of the cumulative effect of the Appellant's physical and psychological limitations, she lacks the residual capacity to pursue alternative employment on a regular or consistent basis. The evidence establishes that the Appellant would be an unreliable employee, who experiences numerous "bad days" during which she is unable to do anything more than move from her bed to her couch. She has significant physical limitations with sitting, standing, or walking which preclude her from being able to successfully pursue upgrading or sedentary employment. The occupational and assessment reports establish that alternative employment would require a flexible and

benevolent employer who would be prepared to accommodate the Appellant's limitations and frequent absences. (see Catherine Sydor's occupational assessment, paragraphs 29 & 30, supra, and Allan Mills' vocational assessment, paragraph 34, supra.) The *Bennet* decision, supra, establishes that an Appellant is not expected to find such an employer, and that the capacity to pursue substantially gainful employment is predicated on an Appellant being able "to come to the place of employment whenever and as often as is necessary" and that "predictability is the essence of regularity." This is something that the Appellant is clearly incapable of doing.

[66] The Tribunal also noted that the Appellant has an impressive work history and that she has demonstrated a strong work ethic and motivation by upgrading her work skills by taking night courses, while continuing day time school and/or employment. She is the type of person who would have continued working, if she were in any way able to do so.

[67] Having regard to the totality of the evidence, the Tribunal is satisfied on the balance of probabilities, that the Appellant suffers from a severe disability in accordance with the CPP principles.

Prolonged

[68] Having found that the Appellant's disability is severe, the Tribunal must also make a determination on the prolonged criteria.

[69] The Appellant's disabling conditions have persisted since the MVA in August 2008, and despite extensive treatment there has been no improvement. Unfortunately, the Appellant's condition appears to be deteriorating.

[70] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[71] The Tribunal finds that the Appellant had a severe and prolonged disability in August 2008, when she suffered injuries in the MVA. 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 December 2010; therefore the Appellant is deemed disabled in September 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of January 2010.

[72] The appeal is allowed.

Raymond Raphael
Member, General Division