Citation: *J. M. v. Minister of Employment and Social Development*, 2015 SSTGDIS 3

Appeal No: GT-115739

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development Canada

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Michael J. Collins
HEARING DATE:	October 27, 2014
TYPE OF HEARING:	In Person
DATE OF DECISION:	January 9, 2015

PERSONS IN ATTENDANCE

Mrs. J. M., Appellant

Mr. N. M., Witness (husband of the Appellant)

No one appeared on behalf of the Respondent

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 June 28, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Social Security Tribunal.

[3] The hearing of this appeal was In Person in Kingston, Ontario, for the reasons given in the Notice of Hearing dated July 10, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the Office of the Commissioner of Review Tribunals (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 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.

[8] Subparagraph 44(1)(b)(ii) of the CPP, a provision that ensures eligibility for late applicants, can be applied where a delay in making an application prevents the individual from meeting the contributory requirements at the date of application.

[9] To benefit from the late applicant provision, the Appellant must:

a) Establish an MQP;

b) Be disabled at the time the MQP was established; and

c) Continue to be disabled.

[10] The earnings on which an applicant for a disability pension paid contributions are set out in the individual's Record of Earnings (ROE).

[11] According to s.97 of the CPP, a record of earnings "shall be conclusively presumed to be accurate and may not be called into question after four years have elapsed from the end of the year in which the entry was made." Nevertheless, the presumption is rebuttable pursuant to par. 97(2)(a) which allows for "rectification" of an erroneous record of earnings on information furnished by the employer, or employee.

ISSUES

[12] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2008; however, this date was not used by the Respondent in making the initial decision, nor at the re-consideration level (a point to which I shall return in greater detail below).

[13] 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, that is, December 31, 2008.

[14] The Tribunal must also find that the disability was continuous after December 31, 2008, to the date of hearing, that is, October 27, 2014.

EVIDENCE

Admissibility

[15] The Notice of Hearing established August 28, 2014, as the date until which the parties could file additional documents, or submissions (Filing Period), and September 29, 2014, as the date until which either party could file a response (Response Period).

[16] On August 14, 2014, the Appellant filed medical reports from 2013 and 2014. She also filed her T4 slips for 2004 and 2006. On September 8, 2014, the Respondent filed an updated record of earnings and on September 16, 2014, additional submissions, both legal and medical, addressing the calculation of the Appellant's MQP and responding to the medical reports from 2013 and 2014. There is no issue with respect to the admissibility of any of these documents as they were filed in a timely fashion.

Documents

[17] In her Questionnaire for Disability Benefits, dated June 28, 2010, the Appellant identified illnesses that prevented her from working as: Crohn's disease with bowel obstruction and inflammation, severe arthritis, lupus, endometriosis and sarcoidosis.

[18] At the time, her medications were Humira (40 mgs every two weeks), Plaquinol (200 mgs, once daily), Advil (2 to 4 daily), Pensaid diclofenac diethylamine 15% liquid gel (twice weekly), vitamin B12.

[19] The Appellant was born in 1966 and from April, 1986, until January, 2006, worked as an assistant to an optician. She performed various secretarial tasks and also other tasks such as repairing eyeglass frames.

[20] In correspondence dated November 10, 2005, Dr. Depew, a gastroenterologist, observed that the Appellant's Crohn's symptoms "… are once again dramatically increased…". He noted that she was under a lot of stress for a variety of reasons and, specifically, with regards to work he wrote: "I would be pleased to support J. M.'s need to be relieved from work duties but she is adamant that she will try and stick it out at work. I have asked her to call me if things become more intolerable."

[21] Unable to continue travelling from her home on X to her place of work in Kingston, she left her employment and took an EI medical leave of approximately 10 weeks.

[22] In a letter dated October 20 2010, the Appellant summarized her 20 years of employment while coping with her health problems: "I had been diagnosed with Crohn's disease at the age of 12. Whilst working for this employer I had bowel surgery twice along with several hospitalizations for acute disease. I have had four bowel surgeries in total with two resections and fifteen stricto-plasties. … Basically I was often anemic, very tired, very sick and in pain. If I ate ate [*sic*] work it was impossible to work often due to pain and running to the bathroom constantly. So I often starved myself all day and ate when I got home, which often caused me to be up most of the night with pain and bathroom trips."

[23] Following her EI medical leave, she advised her employer in April, 2006, that she felt unable to return to work. She chose, instead, to operate a home business. Her reason for switching from employment to self-employment she wrote in the aforementioned letter was the following: "The last few years at this job were taking their toll on my health. It was three hours travel in car to and from work when traffic was good and I often had to make a bathroom stop or turn around in the ferry line-up to go back home and use the washroom.

Then I would have to get back in the line-up and be late for work or have work to later to make up. As I got older I found it harder to go all day without food so I would use liquid supplements but still ran to the bathroom and [,] well[,] during times of obstruction I would be vomiting a lot."

[24] The Appellant had purchased a chip truck in 2004 which she had operated part- time during the summer months; in May, 2006, she began operating it full-time. Again, from the letter of October 20, 2010, the Appellant described her rationale for self- employment: "Now I still was not ready to quit work so I had opened a summer part-time home business two years before I quit my full-time job. … I thought being at home and close to my bathroom and less stresses of work I could operate full time summers. I was never a lazy person and have always had strong work ethics… I thought I can do this…".

[25] She gave up the chip truck business in September, 2007, because, as she described in her CPP Questionnaire, she was suffering from severe joint pain, had no grip strength due to arthritis, had lost weight, was making constant bathroom trips, had pain with eating, and was unable to easily lift or move. She sold the chip truck in the spring of 2008.

[26] In May, 2008, she saw her family physician, Dr. C. Bernes, who made a referral to a specialist in gastroenterology. At the hearing, the Appellant testified that she waited more than a year for this appointment, despite going on the cancellation list to get an earlier date. Pertinent medical history noted by Dr. Bernes in her report included: endometriosis, osteopenia, and 19 bowel obstructions. Standing 5' 3 ½ inches the Appellant weighed 143 lbs.

[27] Dr. M. Ropeleski, a specialist in gastroenterology, finally saw the Appellant in September, 2009. In his report, he described the Appellant as having "a complicated history of Crohn's disease since her teenage years". He summarized the treatment history as follows: "… she has gone on multiple management strategies including Budesonide, VSL #3, Modulon, 6-MP, infliximab. Unfortunately, she was diagnosed with sarcoidosis following initiation of Infliximab. … and subsequently developed a severe serum sickness and renal failure."

[28] By this time, the Appellant was not taking any medications for her Crohn's and Dr. Ropeleski described her new baseline in the context of her change of work: "Ms. J. M. has not been seen in clinic since 2005 and she describes by finding a new job and relieving her stress factors she was able to come to an acceptable baseline status. She describes this as 6 to 15 bowel movements a day which are watery with occasional nocturnal episodes. She has a constant fluctuating low grade discomfort in her lower abdominal area with episodic abdominal pains." He goes on to say, however, that "… over the last year she has begun to develop worsening obstructive symptoms. Following 20 minutes after oral ingestion she has epigastric sharp cramping pain lasting usually around two hours accompanied with nausea and bloating. She recognizes this as her typical obstructive type symptoms she previously experienced." He summarized the Appellant's condition as follows: "Her Crohn's disease has been quite stable from 2005 to 2008 but has now decompensated."

[29] Dr. Ropeleski began investigations and reported on September 10, 2009, a colonoscopy disclosed recurrent disease at the anastomosis which was somewhat narrowed. His report of September 30th notes that he planned to treat with the drug Humira, which in fact was prescribed in early December.

[30] On September 30, 2009, Dr. Bernes referred the Appellant to a specialist in rheumatology, Dr. Joneja, who saw the Appellant on January 18, 2010, and noted that the Appellant had some clinical signs of lupus; Dr. Joneja ordered further tests. On January 18, 2010, Dr. Joneja reported x-rays were positive for mild osteoarthritis at several distal interphalangeal joints, pelvis and right hip. On March 5, 2010, she reported beginning investigations for lupus given that the Appellant showed double stranded DNA antibodies and elevated ANA. There was some concern expressed that the lupus symptoms were resulting from the Humira; however, Dr. Joneja was reluctant to stop the Humira as it was providing some benefit for her Crohn's and the Appellant had gotten no relief from multiple Crohn's medications. She noted that she planned to consult with the Appellant's specialist in gastroenterology with respect to a treatment plan.

[31] A month later, on April 7, 2010, Dr. Joneja had narrowed her diagnosis to inflammatory arthritis with features of lupus, or lupus. She began treating the Appellant with plaquenil.

[32] The Appellant saw Dr. Ropeleski again on September 1, 2010, who by this time was aware of the diagnosis of inflammatory arthritis and possible lupus. He noted that the Appellant continued to suffer from fatigue and that she was scheduled for investigations for gynaecologic problems.

[33] Dr. Ropeleski addressed correspondence to the Respondent on December 9, 2010, specifically, with respect to her Crohn's disease. He wrote: "She has had this for many years since teenagehood and has undergone significant amounts of surgery and multiple morbidities due to the refractory disease." He described her as suffering from "a debilitating bowel habit" and that it had "a significant impact on her ability to function because of pain and unpredictable diarrhea." With respect to her treatment history, Dr. Ropeleski wrote: "Despite some intermittent responsiveness to therapy, residual components of Crohn's related symptoms are magnified and compound her severe disability from underlying lupus."

[34] Dr. Joneja saw the Appellant in September, 2010 and again on January 10, 2011, at which time she reported "inflammatory bowel disease and systemic lupus." She also described the Appellant as "… suffering with a great deal of joint pain", notably in her hands and feet.

[35] In January, 2011, Dr. Jamieson performed a hysteroscopy, with D and C, and polyp (possibly fibroid) removal.

[36] Dr. Ropeleski saw the Appellant on February 23, 2011, reviewed her medications, her symptoms, blood work and CT scan. His concluding comments were as follows: "We will continue to manage things expectantly and I think, still, compared to where we started from, we are deriving a benefit from Humira. We know there are 12 cm of narrowed, inflamed neoterminal ileum and we obviously want to avoid further surgeries in her case at all cost, thus we would be left with a short bowel syndrome."

[37] Dr. Joneja, following an examination of the Appellant on April 18, 2011, reported that a trial of Celebrex for 10 days to relieve joint pain caused bleed from the bowels for days. She also wrote of the Appellant: “She is clearly very frustrated with the chronicity and severity of this pain.”

[38] Particularly noteworthy is a report printed on July 6, 2011, by the rheumatologist, Dr. Joneja, that was originally dictated by Dr. Dwosh, also a rheumatologist, *on October 22, 2003*. Dr. Dwosh described the Appellant as having “an extremely complicated medical picture”, including Crohn’s, sarcoidosis, episodic pain and swelling that might be due to palindromic rheumatism, and symptoms that could be indicative of developing lupus. He ordered a long list of blood tests, a chest x-ray and hand x-rays.

[39] In February, 2012, Dr. Depew saw the Appellant and reported: “It appeared that there was a 10cm stricture, proximal to the neoterminal ileum.” He increased the frequency of Humira from bi-weekly to weekly to dampen inflammation and he speculated about a surgical intervention.

[40] In June, 2012, Dr. Ropeleski reported to Dr. Bernes that treatment was continuing “… without any gross improvement or deterioration.” He reiterated his previously expressed comment that he wanted to avoid surgery.

[41] Following examination of the Appellant on July 16, 2012, Dr. Joneja described her medications as Humira 40 mg weekly, Plaquenil 400 mgs qhs and Ibuprofen 4 times daily. She observed that the Appellant was having difficulty making a fist with both her right and left hands. She ordered repeat x-rays to look for progressive damage in the Appellant’s joints.

[42] On January 29, 2013, Dr. Joneja reported that Humira appeared to be increasingly less effective and that the Appellant “… had increased frequency of bowel movements and decreased appetite as well as weight loss.” She also observed arthritic inflammation and decreased range of motion with respect to some joints.

[43] Dr. Ropeleski on February 22, 2013, confirmed the Appellant's weight loss, reporting a weight of 54.6 kgs (120 lbs.) He described her as "… plagued with fatigue and arthritis symptoms which are worse…". He said: "She is reporting symptoms of feeling dizzy with blurred vision, but no focal neurological symptoms otherwise." He speculated about drug studies that the Appellant might consider enrolling in and planned to consult with Dr. Joneja about the Appellant's care as he believed that they were at "… somewhat of a crossroads in J. M.'s care."

[44] Following an examination of the Appellant on March 30, 2013, Dr. Joneja noted that her patient was going to take plaquenil and low dose prednisone between visits, in addition to Humira and other medications. She requisitioned x-rays of her hands and wrists and a bone scan to check for sites of enthesitis.

[45] An imaging report of April 8, 2013, confirmed the presence of a thyroid nodule and the radiologist, Dr. Scott, recommended a biopsy.

[46] On May 31, 2013, Dr. Ropeleski saw the Appellant and summarized her medications as follows: "Humira 40 mg every 2 weeks, Plaquenil 200 mg b.i.d., Zantac b.i.d., ibuprofen when her enthesitis pain is very severe, multivitamins and vitamin D."

[47] Dr. Joneja re-evaluated he Appellant on August 8, 2013, noting "significant joint pain in her wrists, hips and ankles and was thought that this was likely multifactorial."

[48] The Appellant was seen at the General Surgery Clinic of the Hotel Dieu General on August 23, 2013, following which Dr. Walker reported that a biopsy of the thyroid was negative for cancer, although he arranged for a repeat ultra-sound as the cell sample was insufficient to be completely diagnostic.

[49] Dr. Joneja diagnosed the Appellant as suffering from fibromyalgia, in addition to her other conditions, following an examination on Oct.28, 2013, and prescribed Lyrica. In particular she reported: "She also feels pain and stiffness in her knees and her shoulders and exquisite tenderness in many of her joints, including her elbows when they are resting on the arms of chair."

[50] Dr. MacSween, a dermatologist, reported on November 22, 2013 that the Appellant had a basal cell carcinoma removed from the left preauriclar area and that there was no sign of recurrence. However, he did remove "a number" of actinic keratosis with cryotherapy. Owing to the use of a biological therapy, Humira, he confirmed that she was "at somewhat high risk for non-melanoma skin cancer".

[51] The most recent report on file from Dr. Joneja confirms all of the existing conditions noted to date following examination on May 23, 2014, and notes that the Appellant "… looked like she had lost weight".

[52] Apart from an extensive and up-to-date medical file, the Appellant filed her T-4 from 2004 showing total income of $29,020.64 as well as CPP contributions of $1,256.70.

TESTIMONY

[53] In her testimony, the Appellant hued closely to the chronology of her medical examinations by her physician, Dr. Bernes, and the various specialists who have treated her, principally, Drs. Ropeleski and Joneja.

[54] She referred several times to specific reports about her Crohn's disease and lupus. She stated quite matter of factly: "I know my guts."

[55] She testified that she arrived to the hearing not having eaten anything in order to minimize her abdominal pain and in an effort to avoid having to use the washroom; nevertheless, a brief recess was provided for her to use the washroom approximately 45 minutes into the hearing. She testified that she often walked with a cane, wore a splint on her left forearm, and that she now weighed just 105 pounds, the lowest in her adult life.

[56] Of the various medical reports that the Appellant addressed, the one she emphasized most was the 2003 report of Dr. Dwosh. She testified that she was told nothing of his concerns and that none of the blood tests, or x-rays were ever ordered. She did not follow-up with him because by all indications he had found her examination unremarkable and she found him "unhelpful". Indeed, she was more than a little surprised to learn from Dr. Joneja

in 2011, after Dr. Joneja had delved into the Appellant's medical history, that in 2003 Dr. Dwosh had suspected she was suffering from lupus.

[57] The Appellant described the period from 2005 to 2008, during which she was not seeing any specialists for her Crohn's disease, arthritis, or lupus as a time when she was simply determined to get on with her life. She knew that she was not a candidate for surgery and that multiple medications for the treatment of her Crohn's had failed. Nevertheless, she said that, had she known of the concerns of Dr. Dwosh, she likely would have proceeded differently with respect to medical investigations and treatment, particularly as regards developing lupus.

[58] The Appellant said that Humira, which has been the only medication to provide even a moderate benefit with respect to her Crohn's, was slowly having less effect. She emphasized that surgery was simply not an option because that was likely to result in "short bowel syndrome".

[59] She testified that she had considered re-training, possibly working from home at a computer related task; however, she was unable to open her hands and move her fingers sufficiently to be able to use a keyboard. She could not sit for very long and even to rest her forearms on the armrests of a chair was painful. Moreover, joint and abdominal pain was often so severe and chronic that she found herself in a "fog" and unable to concentrate.

[60] She described herself as unable to perform many ordinary household tasks such as doing laundry, hanging out clothes to dry, going to the grocery store and doing errands.

[61] Mr. N. M. attended the hearing for moral support and to assist his wife. He works approximately 60 hours weekly building homes in the Kingston area.

[62] Though clearly concerned for her, he struggled to talk about his wife's condition and his testimony was brief. He confirmed that he does many household chores, including such things as carrying laundry baskets for his wife because "I'm afraid she will fall." He said that he felt overwhelmed by all the tasks he needed to perform at home over and above the demands of his job.

SUBMISSIONS

[63] The Appellant submitted that she qualifies for a disability pension because she suffers from:

a) Crohn's disease;

b) lupus;

c) inflammatory arthritis; and

d) fibromyalgia.

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

a) Her Crohn's was stable from 2005 – 2008; and

b) She did not see a rheumatologist until January, 2010.

ANALYSIS

[65] Before dealing with the principal issues of whether the Appellant suffered from a severe and prolonged disability by her MQP and, if so, whether it was continuous thereafter to the date of hearing, I turn to the calculation of the Appellant's MQP. As noted above, the MQP date used in this appeal was two years beyond the date used at the initial consideration and re-consideration by the Respondent of the application for disability benefits.

[66] The original calculation of the Appellant's MQP (December 31, 2006) was based on the Appellant's ROE prepared by the Respondent, which incorrectly showed no income for the tax year 2004. Upon being provided with a copy of her ROE in preparation for her appeal to the SST, the Appellant noticed the error and filed her T4 slip showing income in 2004 of 29,020.64.

[67] Section 97 of the CPP created a legal presumption that the 2004 entry on the Appellant's ROE was, after 4 years, "conclusively presumed to be accurate". Nevertheless, the T4 slip was precisely the sort of evidence upon which the Respondent "could cause the Record of Earnings to be rectified" pursuant to paragraph 97(2)(a).

[68] The Respondent filed a rectified ROE on September 16, 2014, and submitted that the re-calculation of the MQP, which was now based upon unadjusted pensionable earnings of $28,888 for 2004, had resulted in an MQP of December 31, 2008, which was not disputed by the Appellant.

[69] I turn now to the principal issues of this appeal, namely, whether the Appellant suffered from a severe and prolonged disability by December 31, 2008, and, if so, whether, that disability persisted to the date of hearing.

Severe

[70] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when assessing whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[71] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.),* 2003 FCA 117).

[72] When one looks at the trajectory of the Appellant's work history from November, 2005, to September, 2007, it is clear that she was slowly losing and eventually lost her capacity to maintain a position within the labour force. It is also clear that she made every effort to continue to work despite a severe and debilitating bowel condition. In November, 2005, Dr. Depew raised the possibility of the Appellant going on an EI sick leave, which she initially resisted, but then took beginning in January, 2006. Unable to return to a position she had held for twenty years, she resigned in April and began operating a chip truck. She chose self-employment, not because she expected it to be more rewarding personally or financially, but because it would better accommodate her health problems. Less than

eighteen months later, that is, by September of 2007, her health forced her to close the business and the chip truck was sold.

[73] I accept the Appellant's description of her medical condition in the Fall of 2005 as set out in her letter of October 20, 2010, namely, that often times she was anemic, sick, tired and in pain. Her gastroenterologist at the time, Dr. Depew, described a similar picture in his report of November 10, 2005. This state of affairs led to the EI medical leave in early 2006.

[74] The Appellant throughout her testimony in no way exaggerated the severity of her condition; indeed, she gave every impression of having struggled to continue to work despite the cumulative effect of years of having suffered from Crohn's disease. I note, for example, Dr. Depew's unsolicited comment in his report following his examination of his patient in November, 2005, that "… she is adamant that she will try and stick it out at work."

[75] With respect to the Respondent's submission that the Appellant's Crohn's disease was "stable" from 2005 to 2008, a period of time that spans her gradual exit from the work force, it is important to put this description into its proper context, since looked at in isolation it fails to convey the gravity of the Appellant's situation. Dr. Ropeleski, a specialist in gastroenterology, did indeed describe the Appellant's Crohn's disease in September, 2009, as "quite stable" from 2005 to 2008; but, in the same report he went on to describe his patient's "baseline status" as follows: 6 to 15 watery bowel movements daily with occasional nocturnal episodes and episodic pain. This was against a backdrop of an inoperable condition for fear of short bowel syndrome and multiple failed drug treatments.

[76] Therefore, I reject the bare description of "stable" as being accurate of the Appellant's condition at the relevant time. It is by no means sufficient to seize upon a phrase in a medical report and, apart from the medical findings that underlie those words, hold them out as conclusive of the fact that there was not a severe disability that prevented gainful employment. Sub-paragraph 68(1)(a)(ii) of the CPP Regulations requires that the actual "findings upon which the diagnosis and prognosis were made" be supplied by an individual applying for the CPP disability benefit. This the Appellant has done, amply so,

and those findings persuade me that her Crohn's disease, while "stable" in the opinion of her gastroenterologist, nonetheless left her "incapable regularly of pursuing any substantially gainful occupation" (sub-par. 42(2)(a)(i)), CPP).

[77] With respect to the question of whether the Appellant suffered from lupus and inflammatory arthritis before her 2008 MQP, I accept the documentary evidence and supporting testimony of the Appellant concerning the failed 2003 investigation into both these conditions.

[78] In July, 2011, Dr. Joneja, the Appellant's current rheumatologist, having delved into the Appellant's medical history, found a 2003 report from Dr. Dwosh, also a rheumatologist, who, after examining the Appellant, suspected palindromic rheumatism and noted symptoms indicative of developing lupus. This warranted blood tests plus chest and hand x-rays.

[79] I accept the Appellant's testimony when she says that the concerns expressed by Dr. Dwosh in his report were not communicated to her and that none of the diagnostic work was ever undertaken. Her conversation with him at the time left her with the impression that he found her symptomology unremarkable, and she heard nothing further from his office.

[80] Thus, there is objective medical corroboration, if not actual diagnosis, of the symptoms of lupus and arthritis five years before the Appellant's MQP. Both these conditions were eventually diagnosed by Dr. Joneja, albeit not until 2010, and treatment commenced. That the actual diagnosis did not occur until well after the Appellant's MQP is by no means fatal to her claim that, by reason of lupus and arthritis, she suffers a severe disability.

[81] Accordingly, I reject the Respondent's submission that, because the Appellant did not see a rheumatologist until January, 2010, there are no grounds for claiming a severe disability by reason of lupus and arthritis.

[82] With respect to the claim concerning fibromyalgia, this particular head of diagnosis was not raised by Dr. Joneja until 2013, at which time treatment with Lyrica was begun. On the basis of the record before me, both documentary and oral, it is not clear that the preponderance of evidence favours drawing the conclusion that the Appellant was severely

disabled by reason of fibromyalgia. This is not to say that the present diagnosis is incorrect, nor is it to minimize the Appellant's suffering, but only to say that I cannot find sufficient basis in fibromyalgia prior to December, 2008, to ground a disability claim.

[83] Accordingly, I find that the Appellant's disability is severe.

Prolonged

[84] With respect to the other branch of the test for disability set out in the statute, namely, whether the disability is "long continued and of indefinite duration" (sub-parag. 44(2(a)(ii)), the evidence shows that the Appellant's Crohn's disease dates back to her teenage years. Her lupus and arthritis, likewise, date to at least 2003, if not earlier. All of these conditions are chronic and, regrettably for the Appellant, without any prospect of resolution.

Late Application

[85] Because the Appellant is a late applicant, that is to say, because she did not meet the CPP contributory requirements at the date of application for the disability benefit, it is also necessary to consider whether she meets the requirement set out in sub-paragraph 44(1)(b)(ii) of the legislation [see parags. 8 & 9 herein].

[86] The Respondent took the position that, because the Appellant had not established that she suffered from a severe and prolonged disability prior to her MQP, the post MQP evidence was not relevant. Clearly, however, in light of the foregoing analysis, that evidence is relevant, at least insofar as it deals with the arthritis, lupus and Crohn's disease. Therefore, I will not deal with the reports from Drs. Watkins, MacSween and Jamieson; however, I will deal briefly with post MQP reports from Drs. Joneja and Ropeleski.

[87] The documentary evidence shows that the Appellant continued under the care of Dr. Ropeleski from 2009 on through at least 2013. A July, 2013, report signed by Dr. Ropeleski states that "meal-related bowel movements continue at 10 to 15 a day". Although his patient was still getting some beneficial response to Humira, he speculated about the Appellant

obtaining a compassionate release of the drug, golimumab, which although approved for arthritis treatment, was not optimized for Crohn's. Another option was to enter a drug study.

[88] The most recent correspondence from Dr. Joneja, is dated April 22, 2014. After confirming the diagnosis of systemic lupus erythematosus, Crohn's disease and inflammatory arthritis, Dr. Joneja writes with respect to the Appellant: "Her joint pain is constant and has been progressive over the years. Her hands, wrists and hip joints are particularly affected. She cannot use her hands repetitively or for any prolonged period of time. She cannot stand or sit or walk for any prolonged period of time."

[89] Here I think it timely to reference the testimony of the Appellant's husband. He confirmed that she is unable to undertake, much less complete many ordinary tasks of daily living.

[90] Therefore, I cannot but conclude that the conditions leading to a severe and prolonged disability by December, 2008, have continued to the date of the hearing of this appeal.

CONCLUSION

[91] The Tribunal finds that the Appellant had a severe and prolonged disability in September, 2007, when the Appellant was unable to continue in self-employment. 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 June, 2010; therefore, the Appellant is deemed disabled in March, 2009. According to section 69 of the CPP, payments begin four months after the deemed date of disability. Payments will begin as of July, 2009.

[92] The appeal is allowed.

Michael J. Collins
Member, General Division