Citation: ***C. W. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 52**

Date: June 1, 2015

File number: GT-119121

GENERAL DIVISION - Income Security Section

Between:

C. W.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Jeffrey Steinberg, Member, General Division - Income Security

Section Heard In person on May 12, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

C. W., the Appellant
Sheila Drohan, the Appellant's legal representative
K. R., witness
A. R., observer

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 5, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was in-person for the following reasons:

a) The form of hearing provides for the accommodations required by the parties of participants;

b) there are gaps in the information in the file and/or a need for clarification; and

c) the form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[3] 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.

[4] 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).

[5] 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.

[6] 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

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[8] 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 MQP.

EVIDENCE

Documents

[9] In her Questionnaire dated July 25, 2011, the Appellant stated she stopped working at Lindor on December 13, 2008. She explained that standing for 2 hour intervals on concrete floors in a retail environment was extremely painful. She stated she could not take pain medications 3 hours before her shifts as she had to drive to and from the workplace and be able to concentrate at work. When she returned home, she had to increase her pain medication

whichwas not “conducive” to looking after her two young children. She suffers from a paracentral focal disc protrusion at L5-S1; disc desiccation; severe bilateral facet arthropathy; depression; irritable bowel syndrome (IBS); insomnia and chronic pain. She can only sit and stand for 10-15 minute intervals and cannot lift more than 2-5 lbs. As a result of her pain medications, she has problems with memory, focus and concentration. Her chronic pain has caused insomnia and she requires a tranquillizer before bedtime. She is prescribed Cymbalta, Codeine Contin, Lenoltec 3, Sandoz-Rabeprazole, Wellbutrin, Naproxen, Quetiapine and Ferrogluc. She was scheduled for counselling at a mental health clinic.

[10] The Appellant was born in 1976 and completed Grade 12. Between November 1, 2008 and December 13, 2008, she worked in retails sales/customer service at Lindor. Between January 25, 2008 and June 13, 2011, she worked as a distributor for NSA (Juice Plus). She stopped actively working at NSA (Juice Plus) in October 2008 because her client base had collapsed and she was no longer receiving a gainful monthly income. She explained she could not drive long distances or sit at her computer for long periods of time to “drum up” a new client base due to her low back condition. She also suffered from lack of focus and concentration. Between July 6, 2008 and November 1, 2008 she worked as a financial coordinator.

[11] In a letter dated January 15, 2014, the Appellant’s legal representative stated the Appellant started working for NSA (Juice Plus) in January 2008 and stopped actively working in October 2008. Any income received after that date was “residual”.

[12] In a Medical Report dated May 30, 2011, Dr. Bourns, family physician, stated he knew the Appellant for 10 years. He diagnosed i) L5-S1; ii) OA: iii) Depression; iv) IBS; v) Insomnia; vi) Chronic back pain and vii) Pain management. He stated she was prescribed Codeine Contin which was changed to Percocet. According to Dr. Bourns, if the pain were controlled, the Appellant might be able to perform sedentary work.

[13] An October 07, 2004 CT of the lumbar spine revealed a large left posterolateral L5-S1 disc herniation or extrusion compressing the left side of the thecal sac to a moderate degree mildly displacing the left S1 nerve root.

[14] A June 22, 2007 MRI of the lumbar Spine revealed multilevel facet hypertrophy and mild spinal stenosis at L5-S1 due to moderate central disc bulge.

[15] On November 9, 2007, Dr. Izuwaka, neurosurgeon, saw the Appellant for her low back pain. He reported that she developed a L5-S1 disc herniation in 2003 and responded to conservative treatment. Five months earlier, she reinjured her back. Examination revealed a restricted range of motion, pain on extension, full straight leg raising, no root irritation or motor deficit and normal reflexes/sensation. An MRI of the lumbar spine revealed spondylosis at L5-S1 with no associated herniation or root compression. According to Dr. Izuwaka, surgery was not indicated. He recommended that the Appellant develop an exercise program and suggested physiotherapy.

[16] On April 1, 2009, Dr. Bourns reported "To Whom it May Concern" that it would be beneficial for the Appellant to live on the first floor of her housing co-operative given problems with her back.

[17] A January 27, 2011 MRI of the lumbar spine revealed a mild left paracentral focal disc protrusion at L5-S1 and multilevel facet arthropathy. According to the description on a previous MRI, this was likely improved. There was no neural foraminal or central canal stenosis.

[18] An April 7, 2011 x-ray of the SI joint, pelvis and hips was normal.

[19] On April 27, 2011, Dr. Marriott, psychiatrist, saw the Appellant, noting he previously saw her in 2002 for depression and adjustment reaction. Her main complaint was back pain subsequent to a fall in February 2004. He stated she had not worked since 2008 and was finding it difficult to sit or stand for prolonged periods. He reported that she showed evidence of depression although she did not admit to depression at the time of consultation. He set out a GAF of approximately 50-60. He prescribed Seroquel given her problems with sleep and being very tense, suggested Zoloft and recommended physical activity.

[20] On May 6, 2011, Dr. Schutz, neurosurgeon, saw the Appellant. He stated she was not working and indicated there were" many other personal issues at work". On examination, her power, tone, bulk, coordination, reflex, gait and sensory exam were normal and back movements were almost normal. He reported that a recent scan was the same as in 2008 revealing some

multi-level disc degeneration and mild paracentral focal disc herniation at L5-S1. He stated that surgery was not indicated and recommended a self-directed exercise program.

[21] On May 10, 2011, only four days later, Dr. Zacharias, pain management specialist, Centre for Pain Management, indicated the Appellant reported slipping in February 2004 and developing initial onset of pain which eventually diminished. In or around August 2004, she developed pain in the lower back and hips and returned to work with pain medications. In April 2007, she reinjured her back after tripping. A June 2007 MRI showed a mild left paracentral focal disc protrusion at L5-S1 with multilevel facet arthropathy. She saw Dr. Izukawa for a surgical consult who did not feel she was a surgical candidate. A January 27, 2011 MRI again showed focal disc protrusion at L51 and the Appellant was referred to Dr. Schutz, neurosurgeon. According to Dr. Zacharias, the Appellant described her low back pain as chronic with intermittent pain radiating to the left side of the pelvis and lower quadrant of the abdomen. It would occasionally radiate down the back of the leg into the ankles and into the left foot. The pain would get worse with prolonged sitting or standing. Dr. Zacharias referred to a December 2009 Functional Abilities Evaluation (FAE) which concluded the Appellant was likely capable of pursing employment in an administrative position and recommended frequent change of position throughout the workday to minimize prolonged sitting, standing and walking. Physical examination by Dr. Zacharias revealed a tender lower spine and limited straight leg raising. Dr. Zacharias stated the Appellant's injuries were suggestive of mechanical low back pain and that her pain was both nociceptive and neuropathic. He stated he would attempt a trial of paravertebral nerve blocks. Dr. Zacharias noted the Appellant carried out most of the chores around the house and would have to periodically sit for approximately 10 to 15 minutes in order to complete them. She would cook meals for her children, do the laundry and help her children with their homework. He further noted her sleep was usually interrupted most nights.

[22] On May 13, 2011, Dr. Bourns reported the Appellant had been depressed on and off for about 10 years. He stated the expected duration was difficult to estimate, however the depression was ongoing and related to the Appellant's back pain and limited her ability to address her problems. It caused loss of sleep, loss of appetite, depressed mood with suicidal thoughts, isolation, low self-confidence and self-esteem along with difficulty making decisions. She was seeing Dr. Marriott at the Halton Mental Health Clinic and attending a Chronic Back Pain clinic.

She also recently saw Dr. Schutz, neurosurgeon, who had no surgical solution to the back problem. She had a herniated disc since 2004 and had to deal with the pain since then. Dr. Bourns expressed hope that with better pain management and therapy with Dr. Marriott, the Appellant would have a better prognosis and be better able to deal with her depression.

[23] On May 17, 2011, Dr. Zacharias stated the Appellant's recent pain diary showed a daily pain score of 8-10. He stated he replaced her Tylenol 3 with Percocet, would reassess her shortly, discussed the administration of possible nerve blocks and prescribed a long- acting opioid.

[24] On September 15, 2011, Dr. Zacharias completed a Mandatory Special Necessities Benefit Request form for the Ministry of Community and Social Services, Ontario Disability Support Program (ODSP). He stated the Appellant's condition was permanent, was expected to remain stable and that since May 3, 2011, she required ongoing visits once to twice monthly to the Centre for Pain Management.

[25] On July 30, 2012, the North Halton Mental Health Clinic discharged the Appellant back to her family physician's care. The discharge assessor indicated the Appellant felt she needed service from a pain clinic that was government funded, noted her medications were Cymbalta, Elavil and Wellbutrin and recommended that Dr. Bourns continue to prescribe and monitor her medication.

[26] A February 4, 2013 MRI revealed a new disc protrusion at L5-S1 causing severe narrowing of the central canal and impinging the left S1 traversing nerve root.

[27] On February 21, 2013, Dr. Schutz saw the Appellant for severe left leg pain of about 5 months duration. She was only able to ambulate with a walker. On examination, there was no back movement and no straight leg raising. The recent MRI showed a huge disc herniation at L5-S1 causing severe compression of the left S1 nerve root. Dr. Schultz recommended a laminectomy and discectomy at L5-S1, which the Appellant underwent on March 5, 2013.

[28] On April 10, 2013, Dr. Shultz reported the Appellant was doing very well and that her leg pain was "almost gone as is her back pain". He indicated the wound was well-healed and there was no neurological deficit. He suggested she take up an aqua fit program.

[29] According to Dr. Bourn's April 30, 2013 clinical note, the Appellant was **"**still disabled back pain pelvic pain arthritis."

[30] On April 30, 2013, Dr. Bourne completed a Disability Tax Credit Certificate Application. He indicated she was markedly restricted in walking, could not lift, bend or carry and was unable to sit greater than 30 minutes. Under diagnosis, he described "back injury back surgery March 2013 Chronic pain and arthritis".

[31] On May 1, 2014, Dr. Bourne completed another Disability Tax Certificate, the contents of which were similar to the earlier form he completed.

[32] On November 26, 2013, Dr. Zacharias reported the Appellant had attended the Pain Clinic every 28 days since May 2011. Since surgery on March 2013, she experienced significant pain relief, especially pain radiating down the legs. Her pain was now primarily in her back. During her last visit, she stated her worst pain during the previous week was 9/10, the least pain was 6/10 and average pain was 7-8/10. She indicated her pain was reduced by 30% to 40% with medication. On October 8, 2013, her pain disability index score was 57/70. According to Dr. Zacharias, the Appellant was significantly limited by her back pain from performing activities of daily living including cleaning, walking, prolonged standing and household chores. He stated she had extremely limited capacity for regular gainful employment and wrote: "Her challenges with sitting, standing, walking, as well as her pain would make it impossible for her to work full-time". He indicated the prognosis was guarded and that there were many factors that could determine how she would respond over time. However she was making every effort to improve and manage her pain.

[33] On August 20, 2014, the Canada Revenue Agency wrote to the Appellant advising that she was eligible for the Disability Tax Credit for the 2007-2019 tax years.

[34] On or about September 9, 2014, Dr. Zacharias signed an application form on behalf of the Appellant for medical marihuana given her mechanical low back and neuropathic pain.

Oral Testimony

[35] She is age 38 and completed Grade 12. She completed some administrative education courses at college but never obtained a diploma.

[36] She resides with her two children: her son age 18 and daughter age 15. She has lived in the same co-op building since 2003/2004. Her mother lives on the third floor of the same building with her spouse (the Appellant's step-father).

[37] She previously worked in restaurants, gas stations, a video store, a daycare and fitness organizations,

[38] In February, 2004, she slipped on a patch of ice on the way to work and injured her back. At the time, she was working at Curves for Women. By August 2004, her back went into spasm. She had physiotherapy and massage therapy. She was off work until the spring of 2005. She returned to another fitness organization called True Star for Women as assistant to the regional manager. Her back had improved to the point she could maintain a job but could not perform any physical aspects of the job, i.e., teaching weight or circuit training. She worked there for approximately 3-4 months. However, she had to travel long distances to various club locations and sit for long hours which bothered her back. Therefore, she quit the job.

[39] In or around April 2007, she had another back injury. She tripped on an exposed gas pipe, fell, hurt her leg and "jolted" her back. Her back went into spasm. Treatment for her back consisted of medication. At the time, she was working at EZ Rect performing administrative/clerical work. She recalls taking two medical leaves: one on account of back spasm and another on account of her IBS. She worked there approximately 14 months.

[40] She subsequently worked as a cashier at a Dollar Store for one-two months. She worked four hours daily standing which affected her back.

[41] Between November 2008 and December 2008, she worked at Lindor selling clothing. She would have to stand four hours on a concrete floor. The standing "killed" her back.

[42] Between January 2008 and June 2011, she performed a home based sales job for Juice Plus. She would sell pills containing juice to family and friends. She did this actively for about three months. If family and friends sold the product, she would get a percentage of their sales, i.e., residual income. She did not pursue this line of work as she could not do the networking required to generate sales, e.g., "pounding the pavement", putting up flyers in grocery stores and holding home parties. She had problems with her focus and could not "heave and hoe" products. The residual income stopped by June 2011 as there were no ongoing sales to generate an ongoing income stream.

[43] Between July 2008 and November 2008, she worked at Manheim, a vehicle auction company located in Milton, ON, in an administrative position. She could get up and down and did not have to stay in her chair all day. However, she continued to experience back pain. She cannot recall if she was taking prescription or over the counter medication at the time. She worked long hours and experienced stress which affected her IBS.

[44] Since she last worked, she has received Ontario Works (OW) and Ontario Disability Support Program (ODSP) ODSP income support.

[45] In December 2010, her conditions were "terrible." Her family doctor had prescribed medication. Her pain was between 8-10 on a pain scale with 10 being the worst pain. Her pain is located at L5-S1. It radiates across the hips and into her lower left abdomen. The pain started to travel down into the legs after she started seeing Dr. Zacharias in 2011. After surgery, her leg pain improved in terms of chronicity however she still experiences throbbing pain at times such as in the heel of her foot. Surgery did not relieve her back pain.

[46] She current takes Gabapentin 300 mg 1 pill in the morning, 1 at bedtime, and 2 at 3:00 pm; Rabeprazole 1x daily; OxyNeo 40 mg 2 pills 3x daily; Topirimate 25 mg 2 pills 2x day (to assist with appetite suppression due to her weight gain); Cymbalta 1x daily for depression and neuropathic pain; Senokot for constipation; Sof-lax for constipation; Hydromorphone 4 mg 1 tablet 4x daily. Medication prevents the pain from getting worse. If it is at an 8, it will stay at an 8. She suffers side-effects such as nausea, constipation, dizziness and blurred vision. She has to nap in the afternoon.

[47] She rarely drives. When she does, she does not take her medication. Her 18 year old son now drives. Her boyfriend drove her to the hearing. She can manage driving approximately 15 minutes. She will only drive if she has to, e.g., to pick up her child. Her stepfather drives her to the pain clinic. She sends her son with cash or her bank card to the grocery store. Her boyfriend also helps out. In the course of a month, she may drive once monthly.

[48] She started attending the pain clinic in May 2011. Her family doctor referred her there in November or December of 2010. She used to attend once weekly or bi-weekly. Now she attends once monthly. Dr. Zacharias offered injections for her pain. She declined the offer. She had fears of contracting spinal meningitis given the volume of patients Dr. Zacharias sees. She discussed her decision with Dr. Zacharias, who has never pressured her to have the injections. He also discussed the risks of injections, which include infection and missing the nerve. He also informed her that the benefits may last for only a short period of time. She may have recently had a "change of heart" about pursuing injections due to her ongoing pain. However, Dr. Zacharias told her she is not a good candidate because she had "failed back surgery." During appointments, they discuss medication and their side-effects, what she has managed to do that month, e.g., she has recently started taking small walks, and her emotional and mental state. She completes two Questionnaires every time she Dr. Zacharias.

[49] In December 2010, her emotional state was poor. She saw Dr. Marriott, psychiatrist, in April 2011. He told her she needed to "vet her problems" and referred her to North Halton Mental Health Clinic (the "Clinic"), where she saw a mental health nurse who told her to take vitamins. The Appellant saw the nurse monthly. The Clinic eventually discharged the Appellant in July 2012. She did not derive any benefit from seeing the mental health nurse. She preferred to pursue treatment at the pain clinic. She was on medication for depression at the time and was discussing her mental state with Dr. Zacharias.

[50] Her family doctor has had her on medication for depression "off and on" for a long time. She currently takes Cymbalta. She previously was on other medication for depression such as Wellbutrin. She currently has "good and bad" days in terms of her depression. Some days she wants to take her walker and "drive it off a cliff." She feels useless since she cannot go hiking with her children and feels bad she cannot do things with her daughter.

[51] Her family provides support. Her step-father and son drive her places and her boyfriend "picks up a lot of the slack".

[52] Her IPad has three pre-set alarms: 10:30 am, 3:30 pm and 10:30 pm at which times she takes her medication. She stretches upon waking up in the morning. It takes her 15-20 minutes to get out of bed. She waits for the clock to "tick down" for her medication. If she wakes up before 10:30 am, she is in so much pain all she can think about is taking her medication. Once she takes her medication, all she can think about is it "kicking in". This can take up to one hour. Once the medication takes effect, her day begins. She does small chores around the house, e.g. small load of dishes or laundry.

[53] She has a bath bench for showering, a commode which her son brings into the bedroom at night and transfers to the bathroom in the morning and a grabber/reacher to do the laundry. She can no longer vacuum. Her children do a lot of the cleaning around the house. She will water the plants with a small container. She occupies her time until she next takes her medication at 3:30 pm. She talks with her children when they get home from school. She lies down until around 5:30-6:00 pm. The children and/or her boyfriend help prepare dinner. She may take a small walk after dinner. She next takes her medication at 10:30 pm. Between 11:00 pm when she goes to bed and the time she wakes up in the morning, she experiences poor sleep. She may get two hours sleep at a time. She can be awake between one to three hours depending on the pain. She cannot lie on her right or left hip, flat on her back or on her stomach. She cannot find a comfortable position.

[54] She used to live on the second floor of her building. She moved to the ground floor due to the fact there is no elevator in the building and she had difficulty with stairs.

[55] She applied for and has received medical marihuana. It helps a little but it is just a "panacea". It only provides temporary relief.

[56] She has gone from 140-150 to 228 lbs. She can only walk a short distance with frequent breaks. She has had a walker for 2-3 years. It was prescribed for her by an occupational therapist, who also got her couch lifts and a commode. She tried a cane but someone told her it would make her "lopsided" and hurt her hips even more.

[57] Since she stopped working, her IBS has been under better control. She has less flare ups, but she still experiences approximately one to three flare ups a month. She had one recently which lasted four days. She takes stool softeners and knows which foods to avoid.

[58] The Tribunal sought clarification from the Appellant concerning the Functional Abilities Evaluation (FAE) referred to by Dr. Zacharias in his May 2011 report. The FAE report concluded she could perform work in an administrative position but suggested frequent change of position during the day to minimize prolonged sitting, standing and walking. The Appellant could not recall how the FAE referral was made. She believed it may have been arranged through VPI, an employment agency that assists individuals with disabilities. She was interested in seeing if she could do something. She does not recall anyone discussing the report recommendations with her. She does not feel she could work in 2009 or at the MQP as suggested by the FAE. She attended VPI to try to get help as a disabled person. She takes medication throughout the course of the day and has to lie down during the day.

[59] She believes the referral to Dr. Marriot was made shortly before she first saw him in April 2011. She was probably already on Wellbutrin by the time she saw him. She cannot state with certainly if she was already on Wellbutrin in December 2010. However, she recalls feeling as though she wanted to "slit her wrists" in December 2010.

[60] She has no recollection of telling Dr. Marriott she did not feel depressed at the time of her consultation.

[61] Dr. Zacharias never expressed an opinion about her being able to attempt part-time work.

[62] In terms of Dr. Zacharias' May 2011 report in which he stated she carried out most of the chores around the house, would have to periodically sit for approximately 10 to 15 minutes in order to complete them, would cook meals for her children, do the laundry and help her children with their homework, the Appellant stated that was a fair reflection of her capacity to perform her activities of daily living at that time.

[63] Since December 2010, she does not believe she could work or pursue retraining. Given her job history, she has tried everything. She is on strong medication and cannot "endure" work.

She cannot work from home due to her focus issues. She is “all over the map” in her brain. She feels useless to her children and “has “dropped the ball” in terms of school issues and their growing up.

[64] The Appellant’s mother testified. She has retinitis pigmentosa and is currently age 63. Her sight was better at the MQP than it is today. She has lived in the same building as the Appellant since 2004. She used to spend more time with the Appellant when the Appellant’s children (her grandchildren) were younger. She takes the Appellant to all doctors' appointments. They speak by telephone daily.

[65] In December 2010, the Appellant was on a lot of codeine and lived for her next round of pain killing drugs. She was depressed and on medication for depression. A couple of times, the witness was concerned the Appellant would take her own life due to the fact she was not being given the proper diagnosis, did not know how to fix her condition, had two small children and was not getting any support from her ex-spouse. The Appellant felt nobody believed her in terms of the degree of pain she was experiencing and she was at her “wits end”. The children were getting older and managing a lot by themselves. However, the witness was on call and would provide assistance. Big Brother was also involved with the Appellant’s son.

[66] Before her injuries, the Appellant she had a good work ethic. She was smart, articulate, a “go-getter” and vital. After the 2004 back injury, she was off work. By August 2004, her back went into spasm and she could not lift herself off the floor. When she returned to work, she was in pain all the time. At times, she could not sustain the pain and had to take time off. The second back injury aggravated her condition. She did what she could when she could.

[67] Juice Plus was a home job that the Appellant performed for about 3 months. She could not “hustle” after she ran out of sales to family and friends. She was unable to go out and demonstrate the product or have people come into the home. She could not work given the amount of medication she was taking. Her brainpower was considerably diminished and she was always in pain.

[68] The witness accompanies the Appellant to the pain clinic. Dr. Zacharias mentioned to them he did not consider it likely she could be gainfully employed full-time. He stated it would

be “iffy” whether she could be employed part-time since she does not have capacity mentally to sustain it. According to the witness, the Appellant has to cater to her back, lie down in the afternoon, cannot stand or sit upright and has to change position. Her medication diminishes her mind. The witness accompanies the Appellant to her medical appointments because the Appellant cannot recall what the doctors tell her.

[69] The Appellant is not the daughter she once knew. Her vitality is gone. She used to be in good shape. Her temperament was such that she could take a joke. For the better part of 11 years, the witness has had her head “bit off” due to the fact the Appellant cannot sustain a conversation without sniping due to pain. She is entirely a different person.

[70] In terms of Dr. Zacharias May 2011 report in which he described the Appellant’s activities of daily living, the witness stated the Appellant was probably performing those activities on most days but would also rely on her children. She was likely not napping yet during days as the medications Dr. Bourns prescribed did not cause fatigue but instead “muddied” up her mind. Once Dr. Zacharias started to see her, he gradually took her off codeine.

[71] In December 2010, the Appellant’s IBS was complicated given her intake of codeine. If she got uptight or nervous, her IBS would further be affected. Her sleep was poor and depression was also a factor.

[72] The witness did not attend appointments with the Appellant at the Mental Health Clinic. However, she knows the Appellant did not feel the counselling was helping.

[73] Dr. Zacharias has been helpful. He prescribes an antidepressant, asks the Appellant questions and explains what he can and cannot do for her. The Appellant expressed fear that injections which might exacerbate her spinal condition. Dr. Zacharias explained that injections might provide relief for only an hour or two. The Appellant was also concerned about contracting meningitis from injections. According to the witness, Dr. Zacharias was fine with the Appellant’s decision not to proceed with injections.

[74] Although surgery helped with the sciatic pain, it has not resolved the Appellant’s back or hip pain, IBS or depression. Dr. Zacharias stated if he can get the pain down to 5 on the pain scale, treatment will have been a success. There has been no discussion of an end date to

treatment. The Appellant has infrequently reached 5 on the pain scale during some months in the summer. However, her average pain level is 8-10.

SUBMISSIONS

[75] The Appellant submitted that she qualifies for a disability pension because:

a) She is incapable of performing any substantially gainful occupation as a result of her physical and mental conditions.

b) Both she and her witness provided credible and compelling testimony.

c) She does not have capacity to perform part-time work. She may have capacity on a good day to do a couple of hours "here and there" but does not have capacity regularly to work. She attempted to do modified work and still had challenges.

d) In terms of the FAE, it does not state how often she has to alternate between sitting and standing. She had challenges in other jobs. She also has problems with depression, side -effects of medication, IBS and back pain. There is "too much" to be accommodated and she would require an accommodating employer.

e) Her depression relates to her pain. She saw a mental health counsellor and did not benefit. However, the main object is to treat and manage her pain. Nothing will change until the pain changes.

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

a) The family physician stated she may be able to perform sedentary employment if her pain was controlled.

b) According to the pain specialist's report, she has mechanical back pain. Conservative treatment measures were recommended.

c) Her described daily activities do not reflect a severe loss of function such that all forms of employment would be prohibited continuously since December 2010.

d) The MRI did not indicate spinal cord or nerve involvement. Diagnostic test results did not describe severe pathology that would support severe disability preventing all work,

e) The GAF of 50 –60 suggested moderate symptoms/difficulty in functioning. The psychiatric assessment did not document symptoms and limitations so severe as to lead to a conclusion of total disability that would prevent the pursuit of all types of employment in the foreseeable future.

f) It is recognized she has some physical and psychological limitations and may not be able to perform her previous job. However, she is young with Grade 12 education. Light or sedentary work cannot be precluded.

ANALYSIS

[77] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2010.

Severe

[78] The Tribunal is satisfied that the Appellant last worked in December 2008 as a result of pain which affected her ability to perform prolonged standing in a retail environment at Lindor.

[79] Although she provided information in her Questionnaire which indicated she continued to work at Juice Plus until 2011, the Appellant clarified in her testimony that she only actively worked for approximately three months following her start date. Her reference to work ending in 2011 was intended to refer to cessation of residual earnings and not active employment.

[80] The Tribunal is satisfied the medical reports created shortly after the MQP, on balance, support the existence of a severe disability as defined in the CPP on or before the MQP.

[81] Only one month after the December 31, 2010 MQP, Dr. Bourns, family physician, confirmed a diagnosis which included depression, chronic back pain and insomnia. Although he stated she might be able to perform sedentary employment if her pain were controlled, the Tribunal interprets Dr. Bourn's statement to mean the Appellant's pain was not yet sufficiently controlled and that she was unable to perform sedentary work at that time.

[82] The January 27, 2011 MRI confirmed mild left paracentral focal disc protrusion at L5-S1 and multilevel facet arthropathy.

[83] Although the May 6, 2011 report of Dr. Schutz, neurosurgeon, does not support significant findings on examination, only four days later on May 10, 2011, Dr. Zacharias, a physician who specializes in the assessment and management of pain, described a tender lower spine and limited straight leg raising on examination. He stated the Appellant's findings were suggestive of mechanic low back pain and that her pain was both nociceptive and neuropathic.

[84] Based on the totality of evidence, the Tribunal is satisfied the Appellant suffered from serious and significant low back pain on or before the MQP which was severe as defined in the CPP. The seriousness and protracted nature of her pain has necessitated referral to a pain clinic, the prescription of strong opioid painkillers such as Codeine Contin, Lenoltec, Percocet and Hydromorphone.

[85] As a result of the severity of her back pain, the Tribunal is satisfied the Appellant could not realistically perform any of her previous jobs or any physical job given her restrictions affecting ambulation and standing.

[86] This leaves the question whether the Appellant possessed residual capacity to perform light sedentary work on or before the MQP.

[87] Given her restrictions involving prolonged sitting and additional problems with depression and to a lesser extent, IBS, the Tribunal is satisfied the Appellant did not possess residual capacity regularly to perform light sedentary work in a competitive work environment.

[88] In arriving at this conclusion, the Tribunal has considered Dr. Zacharias' recount of the 2009 FAE, which indicated the Appellant was likely capable of pursing employment in an

administrative position with frequent change of position throughout the workday to minimize prolonged sitting, standing and walking.

[89] Given the Appellant's need to frequently change position throughout the day to minimize prolonged sitting, standing and walking and her evidence as to the side-effects of medication, the Tribunal is satisfied that realistically, the Appellant could not perform light sedentary work at the MQP. She was preoccupied by severe pain and could not sit for prolonged periods of time. This would realistically make sedentary work highly unrealistic if not impossible. She was also placed on medications shortly after the MQP by Dr. Zacharias, which make her tired. She has to nap each afternoon.

[90] The Tribunal finds that the Appellant would require an employer who would be willing to make accommodations for her given her pain and functional restrictions, by creating a flexible work environment to enable her to function in sedentary work. This is particularly the case given her requirement to frequently change position to minimize prolonged sitting and nap during the day. The Tribunal is satisfied that the accommodations required by the Appellant, i.e., frequent change of position and day-time napping, are not suggestive of work in a meaningful and competitive environment (*L.F. v. MHRSD* (October 5, 2010) CP 26809 (PAB).

[91] In addition to suffering from severe pain necessitating strong opioid analgesics and an inability to sit for prolonged periods of time, the Appellant also suffers from depression. As previously noted, Dr. Bourns diagnosed depression in the January 21, 2011 Medical Report which he completed shortly after the MQP. Although he did not indicate whether he prescribed any antidepressants on or before the MQP, the Tribunal notes he referred the Appellant to a psychiatrist, Dr. Marriott, whom she saw shortly after the MQP date in April 2011. Although Dr. Marriott indicated that the Appellant's main complaint was that of back pain, he also stated she showed evidence of depression, provided a GAF of 50-60, and prescribed Seroquel, noting that she was already taking Wellbutrin.

[92] The Tribunal considers the Appellant's depression another factor which would impede her capacity regularly to pursue any substantially gainful occupation including light work on or before the MQP. The Tribunal is mindful of Dr. Bourn's description of her symptoms. For example, he described loss of sleep, loss of appetite, depressed mood with suicidal thoughts,

isolation, low self-confidence and self-esteem along with trouble making decisions. Both the Appellant and her witness testified as to the Appellant's troubled mental state at the MQP.

[93] Although Dr. Marriott indicated the Appellant did not feel depressed at the time he saw her, he did note she expressed feeling awkward in social gatherings, at times not wanting to go out and having difficulty sleeping.

[94] The Tribunal will address the Respondent's contention that the Appellant's condition deteriorated only after the MQP. The Tribunal accepts that the Appellant suffered significant deterioration in pain as set out in the medical record commencing sometime in or around January 2013. An MRI taken at the time revealed a new disc protrusion in the low back causing impingement of the nerves at one level. The Tribunal is not satisfied, however, that the post-MQP deterioration in the Appellant's low back pain radiating to her limb, precludes a finding that she was severely disabled as defined in the CPP on or before the MQP. For the reasons described above, the Tribunal remains satisfied that on or before the MQP, the Appellant was incapable regularly of pursuing any substantially gainful occupation including light sedentary work, given the cumulative effect of her back pain with related functional restrictions and depression.

[95] The Tribunal will also address the Respondent's contention that the Appellant's low back condition resolved following surgery in March 2013 under the heading of Prolonged.

[96] Although the Respondent contends that the Appellant's described daily activities do not reflect a severe loss of function such that all forms of employment would be prohibited continuously since the MQP, the Tribunal disagrees. Although Dr. Zacharias described the Appellant's activities of daily living in his May 2011 report, the Tribunal does not accept that the performance of household chores that can generally be carried out at one's own convenience, is to be equated to capacity to perform light duties in the commercial marketplace (see *Morley v. MEI* (November 1995), CP 03296 CEB & PG 8592). In any event, Dr. Zacharias indicated the Appellant would have to sit periodically for approximately 10-15 minutes in order to do most of her activities.

[97] The Tribunal is satisfied the Appellant has been compliant with treatment. Although she declined nerve block injections and explained her reasons for doing so, she provided unchallenged credible testimony that Dr. Zacharias did not question her decision and instead focused his efforts on pharmacotherapy to manage her pain.

[98] The Tribunal is satisfied that the onset date of the Appellant's severe disability is best established as of the MQP at or around which time the family doctor referred her to a pain clinic given the serious nature of her pain and shortly after which he referred her to see a psychiatrist for depression.

Prolonged

[99] Although Dr. Bourns stated in the January 2011 CPP Medical Report that the Appellant might be able to perform sedentary employment if her pain were controlled, the Tribunal is satisfied based on the medical record and Appellant's testimony that her pain has not yet been satisfactorily controlled.

[100] On September 15, 2011, Dr. Zacharias reported that the Appellant's condition was permanent and that she required ongoing visits to the Center for Pain Management. On September 9, 2014, he completed an application form for medical marihuana on account of her back and neuropathic pain attesting to the Appellant's ongoing pain.

[101] In terms of the Respondent's contention the Appellant's back pain resolved following surgery, the Tribunal has considered Dr. Schutz's post-surgical comment on April 10, 2013 that the Appellant was doing very well and that her leg pain was "almost gone as is her back pain." Although this comment would suggest the Appellant's condition had resolved and therefore was not prolonged, the medical record, on balance, suggests otherwise. As previously indicated, in his April 30, 2013 clinical note, Dr. Bourns stated: "Still disabled back pain pelvic pain arthritic." In April 2013 and May 2014, Dr. Bourns completed Disability Tax Certificates indicating ongoing chronic pain, marked restriction in walking and limited sitting no greater than 30 minutes. On November 26, 2013, Dr. Zacharias reported the Appellant had continued to attend the pain clinic every 28 days since May 2011.

[102] Although the March 2013 surgery provided significant pain relief, especially in relation to her leg, the medical record supports a finding that the Appellant's back pain subsequently was primarily located in her back. According to Dr. Zacharias, the Appellant continued to be significantly limited by back pain and she had extremely limited capacity for regular gainful employment.

[103] Based on the medical record and credible testimony of the Appellant and her witness concerning the Appellant's pain and functional limitations, the Tribunal is satisfied that the Appellant's low back pain is prolonged.

[104] In terms of depression, Dr. Bourns described a history on and off of depression of approximately 10 years. He referred the Appellant to a psychiatrist shortly after the MQP. She attended a mental health clinic until July 2012. She continues to be prescribed an anti-depressant and discusses how she feels with her pain clinic specialist whom she sees on an ongoing basis. The Tribunal is satisfied the Appellant continues to experience depression which is prolonged, and which cumulatively, along with her back pain, renders her incapable regularly of pursuing any substantially gainful occupation.

CONCLUSION

[105] The Tribunal finds that the Appellant suffered from a severe and prolonged disability commencing in December 2010 at which time she was incapable regularly of pursuing any substantially gainful occupation given the cumulative impact of her low back pain and depression. According to section 69 of the CPP, payments start four months after the date of disability. Payments will start as of April 2011.

[106] The appeal is allowed.

Jeffrey Steinberg
Member, General Division - Income Security