

Citation: *M. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 69

Date: July 8, 2015

File number: GT-119035

GENERAL DIVISION - Income Security Section

Between:

M. S.

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 by Videoconference on July 7, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. S., the Appellant

Hadeel Kamal, the Appellant's legal representative

Ritu Bhama, Punjabi/English interpreter

A. S., the Appellant's spouse (observer)

INTRODUCTION

[1] The Appellant previously applied for a CPP disability pension on March 1, 2010. (GT1- 159). She did not pursue that application. Her most recent application for a CPP disability pension was date stamped by the Respondent on March 23, 2011. 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).

[2] The hearing of this appeal was by Videoconference for the following reasons:

- a) Videoconferencing is available in the area where the Appellant lives;
- 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 is December 31, 1997¹

[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.

¹ The Appellant's legal representative stated she did not have any issues or questions about the MQP. She explained, however, she did not have a copy of the Appellant's WSIB file including the treatments she received and expressed concern that the medical reports on file relate to the Appellant's subsequent motor vehicle accidents. She asked whether this could be an issue given the earlier 1997 MQP date. The Tribunal explained it could possibly be an issue, given the significance of the MQP and stated that the case would be considered on a balance of probabilities based on the evidence adduced by the parties at the hearing. The Tribunal confirmed at the conclusion of the hearing it would consider all of the evidence before it including the medical record, the Appellant's oral testimony and the legal representative's oral submissions.

EVIDENCE

Documentary Evidence

[9] In the CPP Questionnaire dated February 24, 2010, which appears to have been submitted in support of her initial application, the Appellant indicated that she stopped working in November 1997 after she got injured. She stated that she experiences neck pain, right shoulder/right arm pain, headaches and back pain. She also has problems with blood pressure and diabetes. She can only sit, stand and walk for 20-30 minutes, cannot lift and carry anything with her right arm and has limited capacity to left with her left arm. She is unable to perform much household maintenance.

[10] In the CPP Questionnaire dated January 26, 2011 filed in support of the current application, the Appellant stated that she stopped working on November 27, 1997 due to work related injuries. She indicated she was involved in a motor vehicle accident (MVA), has major depression, is always in pain, cannot sleep and sustained a right shoulder injury. She also has high blood pressure and is diabetic. She can sit, stand and walk for 10-15 minutes, lift/carry 3-5 lbs., and requires assistance from her daughter for all household maintenance. She is prescribed Cymbalta, Remeron and Alprazolam.

[11] The Appellant completed Grade 6 and worked between 1993 and November 27, 1997 as a mushroom picker.

[12] In a CPP Medical Report dated September 9, 2009, which appears to have been submitted in support of the Appellant's initial application, Dr. Kaur, family physician, indicated he knew the Appellant for seven months and started treating her in February 2009. He diagnosed i) chronic pain, ii) severe major depression; and iii) diabetes mellitus. He stated that she was involved in an MVA in April 2006 and October 2009.² He stated she suffers from generalized pain symptoms in the neck, back, right shoulder and headache. She had physiotherapy after the first accident without relief. She also suffers from symptoms of depression and was assessed by Dr. Kakar, psychiatrist. Her appearance is sad and anxious and her speech is slow and low. Her right shoulder demonstrates a positive and painful arc sign. She

² The medical reports on file refer to an October 2008 MVA.

has paraspinal tenderness along her entire back and suffers a deficit in extension/flexion of her lumbar/sacral spine. She is prescribed a number of medications including Tylenol, Bromazepam, Flexeril, Cymbalta and Wellbutrin. She had a poor response to physiotherapy after the first accident in 2006, minimal response to analgesics and has persistent psychiatric disability despite the use of psychotropics. The prognosis for both chronic pain syndrome and major depression is poor.

[13] In the CPP Medical Report dated March 11, 2011, Dr. Kakar, psychiatrist, stated he knew the Appellant for two and one-half years and started treating her in September 2008. He diagnosed severe major depression, post-traumatic stress disorder (PTSD), chronic pain syndrome and phobia regarding driving. According to Dr. Kakar, the Appellant had poor sleep, appetite, energy, concentration and memory, nightmares and flashbacks and pain in the neck. He stated she was totally disabled and unable to do all or any work, could not do household chores and requires assistance with her activities of daily living. She is prescribed Cymbalta, Remeron and Alprazolam. She is treated with pharmacotherapy and psychotherapy. Her illness is severe and prolonged and she is compliant with treatment.

[14] On September 27, 2006, Dr. Boudreau, D.C., assessed the Appellant in relation to her April 2006 MVA. He noted she reported she worked in 1997, at which time she fell in a mushroom picking job and injured her left thigh. She stated she never recovered from the injury and as a result, she not been able to work since 1997

[15] On October 27, 2006, A Moon, O.T. completed an Occupational Therapy Home Visit Assessment. Under Summary of Conclusions and Recommendations, Ms. Moon indicated the Appellant was involved in an MVA on April 22, 2006, sustained injuries in her right shoulder/arm, neck, back and experienced headaches. She had struggled with high levels of pain resulting in emotional difficulties. She had experienced functional limitations with daily activities such as self-care, housekeeping, yard maintenance and social/leisure. Ms. Moon recommended two occupational treatment sessions and a psychological assessment to determine the need for treatment to address depressive symptoms and pain management issues.

[16] According to a January 12, 2007 Functional Abilities Evaluation (FAE) completed by Phil Towsley, OT Reg, the Appellant presented with inconsistent performance and did not put

forth a maximum effort. Performance during testing did not appear to reflect actual maximum capacity. Symptom exaggeration was demonstrated, non-organic signs were present and pain behaviours did not match the reported pain ratings. Sitting tolerance was determined to be frequent; standing and walking tolerance was determined to be occasional; squatting was found to be infrequent; forward reaching was found to be infrequent; overhead reaching (left hand) was found to be infrequent; and climbing stairs was found to be infrequent. In terms of medical history, the Appellant indicated that she sustained a work injury to her left leg 7 to 8 years earlier when she was working at a mushroom farm. She indicated she pain since then and that her leg would swell on occasion. She also indicated that her left leg had limited her ability to walk prior to the accident.

[17] According to Mr. Towsley, the Appellant was able to work at the sedentary physical demand level for an eight hour day according to the Dictionary of Occupational Titles, US Dept of Labour, 1991.

[18] In an orthopaedic Insurer Examination Report dated January 11, 2007. Dr. Weinberg, Orthopaedic Surgeon, reported that the Appellant sustained soft tissue injuries in an MVA on April 22, 2007. According to Dr. Weinberg, the Appellant reported she was in good health before the MVA, but noted she took medication for diabetes and hypertension. She indicated she used to work in a mushroom farm seven or eight years earlier but did not seek further employment since then. Following the MVA, she sustained a strain of the neck, back and right shoulder. According to Dr. Weinberg, the Appellant demonstrated exaggerated pain behavior and signs suggestive of symptom magnification including non-anatomical sensory deficit, discrepancy in straight leg raising and aggravation of pain by simulated rotation. He suspected that non-physical factors were impeding progress as soft tissue injuries of the nature at hand would be expected to resolve within this time frame. He noted there might be some tendinitis in the right shoulder. From a physical perspective, the prognosis was full recovery. Dr. Weinberg stated he expected that the soft tissue injuries would have healed. He stated there was no objective evidence of musculoskeletal pathology to account for the Appellant's reported symptoms and lack of progress. In Dr. Weinberg's opinion, from an orthopaedic perspective, the Appellant did not suffer a complete inability to carry on a normal life and did not suffer a substantial inability to perform her pre-accident housekeeping and home maintenance activities.

He believed she could resume her activities of normal life without the need for modification, assistive devices or functional restrictions and that she was capable of taking public transportation. He stated she did not require further treatment from an orthopaedic perspective.

[19] According to psychological insurer examination dated January 9 and 24, 2007 prepared by Dr. Machry, Ph.D., C. Psych, the Appellant produced psychometric test results that failed to support the reported psychological impairments and symptoms she attributed to the 2006 MVA. According to Dr. Machry, the Appellant's test results were consistent with her "over displaying and excessive verbalizations she made of pain behaviours during this assessment. Her invalid test profiles were significantly due to symptom magnification and symptom over-reporting which is consistent with the exhibiting of pain behaviours and the over-verbalization of them during the interview and the test administration." According to Dr. Machry, from a psychological perspective, the Appellant did not have a complete inability to carry on a normal life. Dr. Machry wrote: "the reported impact of the described psychological symptoms are not supported by objective observations or by the test results the claimant produced during my assessment". Dr. Machry reported that the psychometric test data did not support the Appellant having any transportation needs or accommodation as a result of sustaining accident related psychological impairments. He stated: "My opinions and conclusions based largely on the psychometric test data the claimant produced at this assessment, indicate that there is no psychological treatment or rehabilitation that is reasonable or necessary to permit the claimant to engage in employment or shorten the duration of the benefit paying period".

[20] A January 26, 2007 MRI of the Cervical spine revealed C5-6 mild to moderate right- sided neural foraminal stenosis with no further significant abnormality demonstrated and a normal cord.

[21] According to a February 2, 2007 Executive Summary report completed by Dr. Weinberg, orthopaedic specialist, (GT1-372) Dr. Weinberg assessed the Appellant on January 11, 2007, Dr. Machry psychologically assessed her on January 9 and 24, 2007 and Phil Towsley conduct an FAE on January 12, 2007. According to Dr. Weinberg: "The multidisciplinary assessments were consistent in that (the Appellant) was noted to demonstrate signs suggestive of symptom magnification and exaggerated pain behavior. The reported symptoms were out of proportion to the findings on examination. There was no objective

evidence of physical or psychological impairment to support the reported symptoms. On the basis of the multidisciplinary assessment, (the Appellant) does not suffer a substantial inability to perform her pre-accident activities daily living including personal care, housekeeping and home maintenance. She does not suffer a substantial inability to carry on a normal life”.

[22] On March 27, 2007, Dr. Martin, orthopaedic surgeon, assessed the presence of any physical impairments and limitations that might impact the Appellant’s function secondary to the 2006 MVA. Dr. Martin diagnosed myofascial strain of the cervical spine superimposed on C5/6 disc degeneration and facet joint arthritis with foraminal stenosis, myofascial strain of lumbar spine, cervicogenic brachialgia of right arm, possible tendonitis of right shoulder, non-organic hypoesthesia of the entire right upper quadrant and headaches. He stated that in the absence of pre-accident complaints, the Appellant’s current complaints and impairments were attributable to the MVA. He stated her impairments were due to neck and right upper limb pain, headaches and low back and right lower limb pain. Due to her pain, she had limited ability in terms of various household activities and self-care. In terms of past medical history, Dr. Martin reported that records indicated she had a work injury to leg seven or eight years earlier while working on a mushroom farm. She had leg pain after that and never returned to work since that injury.

[23] An April 12, 2007 MRI of the right shoulder revealed minor degenerative cystic changes in the humeral medulla deep to the enthesis of the supraspinatus tendon consistent with chronic degenerative enthesopathy.

[24] According to a May 13, 2007 In-Home Assessment, M. Rafieian Koupaie, RPT evaluated the Appellant’s functional abilities for the normal tasks of daily living, including housekeeping, childcare, etc. According Mr. Koupaie, the Appellant demonstrated difficulty with basic housekeeping tasks. She displayed painful range of motion in her neck, bilateral shoulders and lower back. She was able to sit for 10-15 minutes, stand for 5-10 minutes and walk for 5 minutes, all limited by neck and lower back pain. She required assistance with housekeeping. Mr. Koupaie indicated that the Appellant should be able to gradually resume her home management activities with increased independence and efficiency. In the meantime, he

recommended housekeeping services to assist the Appellant with bed making, meal preparation, etc., and a reassessment in approximately six weeks.

[25] According to a July 4, 2007 Insurer Examination In-Home Assessment, the Appellant was assessed by Sara Macrae, O.T. in relation to her functional abilities to perform her pre- accident self-care, housekeeping and home maintenance activities. During the assessment, the Appellant demonstrated the following functional limitations: general deconditioning, decreased tolerance for standing, walking, lifting and carrying and decreased ROM in right shoulder (may be self-limiting). Ms. Macrae indicated the Appellant's efforts appeared, at times, to be self- limiting and noted there were inconsistencies during formal and functional testing. According to Ms. Macrae, the Appellant was at "great risk of developing a chronic pain condition." She felt the Appellant could benefit from a reactivation program to assist her in resuming her pre- MVA activities.

[26] A September 18, 2007 bilateral shoulder ultrasound revealed calcifications in the right rotator cuff suggesting calcific tendinosis in the supraspinatus tendon.

[27] On March 19, 2008, the Appellant was assessed by Dr. Verratti, DC. He referred to the April 2006 MVA in which the Appellant was a front seat passenger of a pickup truck driven by her husband, which was stopped at a traffic light and rear-ended by a moving truck. Dr. Verratti noted the Appellant reported another MVA 10 years earlier and tripping over some boards in a mushroom farm 10 years earlier, in which she fell and landed on her left hip. According to Dr. Verratti, "She recovered fully from that and there has been no subsequent injury since that time up until this motor vehicle accident" – referring to the April 2006 MVA. Dr. Verratti formed the impression the Appellant was probably suffering from pain of non-organic origin along with possible symptom magnification behaviours. He was unable to identify any "true pattern" of ongoing MVA related impairment.

[28] On August 1, 2008, the Appellant was assessed by Dr. Dancyger, C. Psych. In terms of past medical history, the Appellant mentioned she was in an MVA about 15 years earlier, but was not badly hurt and thought she had physiotherapy for a brief period of time. She reported she had "fully recovered" by the April 2006 MVA. She stated she had no significant health

problems in the past, indicated she developed diabetes about three years earlier and was being treated for diabetes and high blood pressure at the time of the accident. According to Dr. Dancyger, the Appellant's validity scales on the Personality Assessment Inventory (PAI) showed that she attempted to portray herself in an especially negative manner. The test results were invalid and no clinical interpretation was possible. Her Pain Patient Profile (P3) was also invalid, suggesting that she was possibly responding randomly or magnifying her symptoms. Other tests further revealed a strong possibility of symptom magnification or poor effort and exaggeration of her cognitive difficulties. According to Dr. Dancyger, the Appellant showed significant distortion of her symptoms with consistent findings of symptom magnification. He stated that the issue of secondary gain must be considered seriously. Dr. Dancyger wrote: "This assessment could not find any objectively confirmable psychological problems which would prevent (the Appellant) from leading a normal life as she had prior to the motor vehicle accident of April 22, 2006".

[29] On August 7, 2008, the Appellant was assessed by Dr. H. Platnick, who conducted an Insurer's Examination. Dr. Platnick referred to the April 22, 2006 MVA and Appellant's subsequent reporting of neck and back pain and headache. He noted she reported a "remote motor vehicle accident without injury" and that she "denied a past history of neck pain or back pain/injury." Dr. Platnick concluded that the Appellant sustained soft tissue injuries to her neck - cervical and myofascial strain - and back myofascial strain - as a direct result of the April 22, 2006 MVA. He noted that during the physical exam, there were no valid indicators to support ongoing musculoskeletal, neurological or orthopaedic accident-related injury or impairment. There were, however, numerous inconsistencies and evidence of pain focused behavior. He concluded that her soft tissue injuries as a result of the accident had resolved.

[30] On November 23, 2008, Dr. Kakar reported he had been seeing the Appellant since September 16, 2008. She was referred by her family doctor given her emotional reaction to an MVA. He prescribed medication and diagnosed severe major depression, psychotic phobia of traveling by car and a GAF of 35. He stated that she suffered a severe MVA which left her with not only physical trauma but also an emotional reaction that developed into a severe depression. He stated she yet had to recover sufficiently to be able to return to her previous

place of employment and was not cleared to return to any type of work. Dr. Kakar wrote that as a result of the MVA, the Appellant “now suffers from a severe and prolonged psychiatric condition of major depression for which she is incapable of regularly pursuing any substantially gainful occupation for which she is qualified considering her age and vocational profile”.

[31] According to a April 8, 2009 Insurer Examination Rebuttal Response Dr. Badhwar, Chiropractor, reported that from a chiropractic perspective, there were no findings of ongoing impairment that would warrant continued passive or active chiropractic. The Appellant had achieved maximum medical recovery.

[32] On March 31, 2010 the Appellant was assessed by Dr. Csumrik, D.C., for an attendant care needs assessment. He noted the past history of an MVA in 2006 and 2008 in which “Only soft tissue injuries were sustained, which she (the Appellant) reported she subsequently healed from”. He stated the Appellant was involved in another MVA on March 19, 2010 in which the car in which she was a passenger swerved to avoid hitting another car and hit a hydro pole. She was jolted in her seat. She reported experiencing neck, right shoulder and upper back pain. She reported that lifting, bending, prolonged sitting and reaching aggravated her symptoms causing her pain to become sharp in character. She also reported experiencing headaches and right and left knee pain. She also related feelings of depression and reported decreased energy, increased fatigue and feelings of stress and anxiety. According to Dr. Csumrik, the Appellant claimed to be in good physical health and self-sufficient with respect to her activities of daily living prior to the MVA. Since the accident, she was unable to independently perform certain aspects without aggravating her injuries. Dr. Csumrik recommended attendant care benefits, an in-home assessment, an FAE and a psychological assessment.

[33] The Appellant underwent a psychological assessment on April 13, 2010 performed by Dr. Pilowsky, C. Psy and Ali Gholipour, psychotherapist, to determine the extent to which she was suffering from psychological difficulties as a direct consequence of an MVA which occurred on October 14, 2008. The Appellant reported she was travelling with her spouse and son; their vehicle was fully stopped at a red light and was rear-ended by a truck which caused their car to strike a van in front of them. Under the heading Post-Accident Impact Profile, Dr.

Pilowsky and Dr. Ghalipour stated the Appellant's life had significantly changed since the October 14, 2008 MVA. They wrote: "At the time of the subject MVA, (the Appellant) enjoyed her duties as a full-time housewife. She had recently recovered from her previous accident. However, after the subject collision, she was completely unable to resume her usual duties at home, and now requires assistance with household tasks". Dr. Pilowsky diagnosed an Adjustment Disorder with Mixed Anxiety and Depressed Mood, and a current GAF of 60. She stated: "The prognosis for (the Appellant) is severe at the present time due to the extent of her physical injuries and because it has been over two years since her accident. .."

[34] The Appellant underwent a Functional Abilities Evaluation (FAE) on May 28, 2010 conducted by Daniela Fuliere, Reg. PT. Ms. Fuliere indicated that the Appellant was referred for the FAE following the March 19, 2010 MVA. According to Ms. Fuliere, the Appellant displayed limited cervical spine, right shoulder and lumbar spine ranges of motion, decreased neck, right shoulder and low back strength and endurance, limitations with bending, crouching, reaching overhead, squatting and lifting and carrying any weight. Ms. Fuliere recommended continued participation in an active rehabilitation program.

[35] On August 12, 2013, Dr. Kakar wrote to the CPP Medical Adjudicator. He stated he first saw the Appellant on September 6, 2008 and saw her repeatedly since then with the last visit on July 19, 2013. He stated her diagnosis remained severe major depression, chronic pain disorder, PTSD and phobia for travelling by car. Dr. Kakar referred to two MVAs: one in April 2006 and the other in October 2008. He stated the Appellant injured her neck, back and hand. She is afraid to sit in a car, has nightmares and flashbacks and has become depressed. She reported symptoms consistent with panic attacks occurring up to one attack a day. According to Dr. Kakar, "She has always been emotionally stable prior to the first MVA in April 22, 2006. She has never been diagnosed with psychiatric problems prior to this. She has never been treated for psychiatric problems. She has never been hospitalized for psychiatric illness". Dr. Kakar diagnosed severe major depression, PTSD, Chronic Pain Disorder, psychotic phobia of travelling by car and a GAF of 35. According to Dr. Kakar, the two MVAs left the Appellant with physical trauma and an emotional reaction that developed into a severe depression. He stated the two MVAs caused her to lose her specific occupation. She had not yet recovered sufficiently to be able to return to her previous place of employment and was not cleared to

return to any type of work. As a result of her depression, chronic pain and PTSD, she “now suffers from a severe and prolonged psychiatric condition of major depression for which she is incapable of regularly pursuing any substantially gainful occupation for which she is qualified, considering her age and vocational profile”.

Oral Testimony

[36] She is age 58. She came to Canada in 1993. Upon arrival, she started in work in a car parts factory placing car parts in boxes. She believes she worked between one to two years at a mushroom farm cutting mushrooms. She then moved to Vancouver at some unspecified time where she worked in a mattress factory. She eventually returned to Ontario and resumed working at the mushroom farm for more than one year.

[37] In November 1997, she was injured while working full-time at the mushroom farm. She had climbed some stairs, slipped and fell on some wooden planks, and injured the left side of her hip. Since the injury, she cannot stand for a long time. The upper portion of the left leg gets swollen and “stuck”. She never returned to work. She reported the injury. She is uncertain whether she had a Workplace Safety and Insurance Board (WSIB) claim. She received medical therapy for a short period of time but did not feel much different afterward. Her doctor prescribed Tylenol.

[38] Between the November 1997 workplace accident and 2006 MVA, her condition got more severe. She did not look for work between 1997 and 2006. She had discomfort in her leg and could not stand or sit for a prolonged period of time. After the 1997 workplace accident, she had discomfort and pain in the left side of the upper leg. After the 2006 MVA, she had severe tension in the right side of the shoulder, the whole back and neck area. During the 2006 MVA, her seat belt stretched and hurt her back. An ambulance was called and she was taken to the hospital. They took x-rays and gave her Tylenol. The insurance company paid for exercise therapy which including massage and heat.

[39] She was involved in a second MVA in 2008. She was sitting in a car that was hit from behind. An ambulance was called and she was taken to the hospital due to severe pain in

her neck, back and whole body. They gave her an injection. She could not recall why or where it was administered.

[40] She has been affected in various ways involving pain, headaches, and thyroid problems that required surgery. Her eyes also became affected.

[41] She received two to three different medications for her eyes, which caused her to develop sugar problems. She also developed problems with depression. She cries all the time. She cannot stand and is in pain all the time.

[42] The Appellant's legal representative advised the Tribunal that the Appellant is currently prescribed Naproxen, which she was first prescribed quite a while ago. She also takes Oxycodone, Cymbalta and Nortriptyline. She takes other medications for her thyroid and high blood pressure.

[43] She takes medication for depression and pain daily. When she takes them, her body becomes numb for a while and she has no sense of anything.

[44] Her family doctor referred her to see Dr. Kakar, whom she sees monthly for medication and therapy. She also sees her family doctor, who previously sent her to see other doctors. The treatments she has received did not provide specific relief. She feels the effects for a while and returns to her normal situation.

[45] After the 1997 workplace accident, she had a hard time "passing her days" at home. She used to work. The fact she could no longer work or do anything at home affected her and her whole family life.

[46] She cannot do chores around the house. After the 1997 accident, she would still try to do household work and sometimes would stand. Later on she started to have pain in her right arm and shoulder, could not move her hand or do any household work.

[47] She can do her own personal care and take a shower. Her children assist her with other activities. Her family life changed since her accident. Her daughter stopped going to work and now takes care of her. Her daughter-in-law also stays at home to look after her.

[48] Since the 2006 MVA, her social life no longer exists. Her body became “incapable”. She cannot always ask her children to take her out. She has become isolated and homebound.

[49] She used to have many interests but no longer. She was fond of going to work and liked to cook and clean. She used to do everything by herself. Now, she is so upset.

[50] She does not drive.

[51] She does not believe she could have worked at any job since she last worked in 1997. She could not stand for a long time and did not have the courage to do any kind of work. She asked who would give her a job.

[52] The Tribunal sought clarification on several matters. The Appellant confirmed she came to Canada in 1993. She came from Punjab. She completed Grade 4 or 5. She did not study English. She never attended ESL in Canada.

[53] In terms of the 1997 workplace accident, she went up some stairs, walked on some wooden planks, slipped and fell.

[54] She believed her daughter-in-law started to look after her approximately two years ago. However, her daughter stopped working to look after her before that. Initially, she stated she thought her daughter stopped working to look after her following the 1997 workplace accident. When asked if her daughter might have started to look after her at the time of the 2006 MVA, she stated she was not certain.

SUBMISSIONS

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

- a) She stopped working before the MQP when she injured her left leg and hip. The first MVA in 2006 caused her condition to deteriorate followed by a second MVA in 2008.
- b) Her condition should be taken seriously at the MQP.

- c) The medical reports confirm she has a severe and chronic condition: Chronic Pain, Major Depression and PTSD.
- d) The medical record contains different opinions including those from the insurance examinations which state she can work. However, it also contains reports from the family doctor who treated her since 1997 as well as Dr. Kakar, who was not hired by the Appellant's lawyer or the insurance company. He saw her on referral from the family doctor.
- e) She has a left leg/hip injury (1997), MVA injuries affecting the neck, back shoulders (2006), a psychological condition (treated by Dr. Kakar in 2008) and injuries from a subsequent MVA in 2008 causing further deterioration.
- f) She came to Canada in 1993. She worked strictly in manual labour where she did not require English language skills. She worked up until her first injury. She has chronic pain and a psychological condition. She is now age 58 although she was younger at the MQP.
- g) Since the 1997 workplace accident, her condition was severe and prolonged. The two MVAs made her conditions worse.
- h) She has pursued recommended treatments and has been on medication on an ongoing basis.

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

- a) Her psychiatrist indicated he started treating her in September 2008, which is well after the MQP.
- b) Numerous reports indicate that prior to her MVAs, she had no significant medical or psychological history. According to the psychiatrist's report, she was emotionally stable prior to the MVAs.

- c) The reports prior to 2006 did not indicate any severe condition that would preclude all types of work;
- d) She did not have a continuously severe condition at the MQP.

ANALYSIS

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

Severe

[58] The Tribunal is not satisfied that the Appellant's disability was severe as defined in the CPP on or before the MQP.

[59] Although the Appellant indicated she stopped working in November 1997 after she got injured, she did not provide any medical reports from that time describing the nature, extent and severity of her injury, any treatment received and chronicling the continuous and prolonged nature of her disability.

[60] The Appellant submitted two CPP Medical Reports: one completed by Dr. Kaur, family physician, who only started treating her in February 2009; and the other completed by Dr. Kakar, psychiatrist, who started treating her in September 2008. Neither Dr. Kaur nor Dr. Kakar referred to a November 1997 workplace injury or indicated that injuries sustained from that event prevented her from working on a continuous basis since then. The focus of Dr. Kaur's reports was the April 2006 and October 2009 (presumably he meant 2008) MVAs. He referred to chronic pain, severe major depression and diabetes mellitus. He specifically referred to pain symptoms in the neck, back, right shoulder and headache but did not mention any leg/hip pain arising from a 1997 workplace injury. He linked the Appellant's current pain to the MVAs and noted she had physiotherapy after the first accident without relief. Dr. Kakar diagnosed psychiatric conditions in his March 2011 CPP Medical Report. Although he did not specify an onset date or expressly link the Appellant's disability to the MVAs, he did so in subsequent reports. For example in his August 12, 2013 letter to the Medical Adjudicator, Dr. Kakar stated that the Appellant injured her neck, back and hand in the MVAs of April 2006 and October

2008. Interestingly, he did not even refer to the 2010 MVA mentioned in the medical record. He indicated that since the MVAs, the Appellant had become extremely depressed. He also noted that she never previously saw a psychiatrist, had been emotionally stable prior to the 2006 MVA and had never been diagnosed, treated or hospitalized for psychiatric illness. He also stated that it was the two MVAs that caused her to lose her specific occupation, although it is not clear what job he was referring to since the Appellant indicates she has not worked since November 1997.

[61] The Tribunal has also considered the Appellant's Questionnaires to see what she herself had to say about the November 1997 workplace accident and its aftermath. In the January 26, 2011 Questionnaire, she stated she stopped working due to a work related injury with her last day being November 27, 1997. However, when asked to specify the illness or impairments that prevent her from working she responded as follows: "I was involved in a motor vehicle accident. I have major depression always in pain cannot sleep, right shoulder injury". She did not elaborate whatsoever upon the November 1997 workplace accident. In her February 24, 2010 Questionnaire, she stated that she got injured and that her last day on the job was November 1997. When asked to state the illness and impairments that prevent her from working, she specified "Neck pain, right shoulder and right arm pain, headaches and low? back pain". The Tribunal notes that these are symptoms described in the medical reports associated with injuries sustained in the post-MQP MVAs.

[62] The Tribunal has also considered whether the medical record sheds light on the severity of the Appellant's medical condition at the MQP. The Tribunal concludes that a review of the medical record does not support the existence of a severe disability at that time.

[63] In the January 12, 2007 FAE report, the Appellant indicated that she sustained a work injury to her left leg 7 to 8 years earlier at the mushroom farm. She indicated the pain had continued since then and that her leg still swelled on occasion. She also indicated that her left leg had limited her ability to walk before the accident. Although the Appellant's description might suggest a limitation in relation to physical or ambulatory work, she did not describe symptomatology or restrictions which would have precluded all physical work and certainly not have prevented sedentary work. In any event, she did not uniformly report the same

information to other assessors. For example, in the January 11, 2007 Orthopaedic Insurer Examination Report, Dr. Weinberg indicated the Appellant reported that before the MVA, she was in good health and took medication for diabetes and hypertension. She stated she attended to housekeeping and caregiving. She also stated she used to work in a mushroom farm but did not seek further employment since then. Dr. Weinberg did not report that the Appellant mentioned any aftermath to a mushroom farm accident or ongoing problems with her leg and hip.

[64] On March 19, 2008, Dr. Verratti reported that the Appellant mentioned an MVA 10 years earlier and tripping over some boards in a mushroom farm 10 years earlier in which she fell and landed on her left hip. According to Dr. Verratti: “She recovered fully from that and there has been no subsequent injury since that time up until this motor vehicle accident”.

[65] The Appellant also described her past medical history to Dr. Dancyger who indicated in his August 1, 2008 report that the Appellant mentioned an MVA 15 years earlier in which she was not badly hurt. The Tribunal notes the Appellant did not appear to even mention the workplace accident at the mushroom farm.

[66] The Tribunal has also considered the comments of Dr. Platnick, who noted in his August 7, 2008 report that the Appellant reported a “remote motor vehicle accident without injury” and that she “denied a past history of neck pain or back pain/injury”. He did not indicate that the Appellant reported a workplace accident with ongoing problems affecting her leg/hip.

[67] Although the Appellant testified she had problems with standing and with prolonged sitting after the 1997 workplace injury, the Tribunal has not been presented with any medical evidence at or around the time of the MQP substantiating the nature of her injury and the extent to which it affected standing and prolonged sitting.

[68] Given the passage of time between the Tribunal hearing held in July 2015 and the MQP of December 31, 1997 and the Appellant’s reportedly poor memory resulting from the 2006 and 2008 MVAs, which was evident from her inability throughout the hearing to

remember details of dates and events, the Tribunal is not satisfied that the Appellant's recollection of her functional limitations in 1997 is entirely reliable.

[69] The Tribunal is not satisfied the Appellant's testimony provides a sufficient basis upon which to conclude she suffered from a severe disability on or before the MQP. This is especially the case given: i) the complete absence of contemporaneous medical reports concerning the November 1997 workplace accident to the left hip/leg, addressing diagnosis, assessment of functional impairment, treatment efforts, outcome and prognosis; and ii) the conflicting information on file described above concerning the aftermath of the 1997 workplace accident. For example, Dr. Boudreau reported the Appellant stated she never recovered from the injury and as a result, had not been able to work since 1997. However, Dr. Verratti stated: "She recovered fully from that and there has been no subsequent injury since that time up until this motor vehicle accident".

[70] In conclusion, the Appellant has not satisfied the Tribunal on a balance of probabilities that she suffered from a severe disability on or before the MQP.

Prolonged

[71] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criterion.

CONCLUSION

[72] The appeal is dismissed.

Jeffrey Steinberg
Member, General Division - Income Security