

**Citation: *O. D. v. Minister of Employment and Social Development*, 2015 SSTGDIS 71**

**Date: July 14, 2015**

**File number: GT-115669**

**GENERAL DIVISION - Income Security Section**

**Between:**

**O. D.**

**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 Teleconference on June 24, 2015**

## REASONS AND DECISION

### PERSONS IN ATTENDANCE

O. D., the Appellant

Aurelio Acquaviva, the Appellant's legal representative

Mary Martino, observer from the office of the Appellant's legal representative

L. G., the Appellant's mother (witness)

### INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on June 28, 2010. 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 by Teleconference for the following reasons:

- a) The information in the file, including the nature of gaps or need for clarification in the information;
- b) The fact that the Appellant is represented
- c) The fact that there is availability of videoconference in the area where the Appellant resides<sup>1</sup>; and
- d) The requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

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<sup>1</sup> The hearing was subsequently converted to a teleconference.

## **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 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 date of the MQP.

## **EVIDENCE**

### **Documents**

[9] The Appellant was born in X and completed Grade 12. She attended college and obtain a diploma as a legal assistant.

[10] In her Questionnaire dated May 21, 2010 for CPP Disability Benefits, the Appellant advises that she stopped working on September 12, 2008 as a customer service representative at Benefits Plan Administrators Ltd (BPA). She started working there on February 4, 2008. She indicates she sustained a right eye injury at work, underwent surgery, returned to the workplace which was undergoing construction, and suffered a severe allergic reaction to dust, perfumes and paint. She was on sick leave and suffered anxiety and stress. She indicated her employer at BPA made her do some of the same type of work even after her surgery. She stated the dust was “unbearable” and the toxins tremendous on her return to work. She says she sought accommodation however the employer dismissed her without cause. She stated she stopped working due to the severity of her illness to the environment, airborne dust, chemicals, toxic paints, and perfumes, which affect her respiratory system and cause tightness in her throat. She also described severe allergy to toxic chemicals and aerosol paints and dust, which causes asthma as well as severe food allergies to peanuts, nuts, and fish. Her illnesses cause her severe rashes for which she takes Benadryl, which causes her to be dizzy and drowsy throughout the day. She also takes Graval, which causes unsafe working conditions. She indicated she cannot lift more than 20 lbs. due to right hand carpal tunnel syndrome (CTS). Her spouse assists her with household maintenance. She sometimes has a hard time with memory. Her concentration is affected in any environment where she cannot breathe. She takes Lorazepam occasionally to help her sleep. She is prescribed Lorazepam (twice week at night as required), Benadryl 2-3x weekly when in an office environment and Flovent/Ventolin as required. She stated she stopped sports due to environmental settings since October 2007, which would cause her to pass out. The Appellant states she received regular Employment Insurance benefits between November 9, 2008 and September 2009.

[11] In the May 2010 Questionnaire, the Appellant confirmed her physician told her she could return to work. She specified the time frame when she could so as “part time unknown”

but also provided a date of May 2010. She also indicated she planned to start looking for work in the future, noting: “work at home, if possible”.

[12] According to the Appellant, she previously worked at the following jobs:

- April 7, 2004 to December 16, 2004 Chicago’s part-time cook.
- December 5, 2005 to April 27, 2006 Upper Canada Teacher’s Assistant.
- January 25, 2007 to November 16, 2007 Customer Service Agent at BBH Ontario Ltd.

[13] According to correspondence dated July 22, 2014 submitted by the Appellant’s legal representative, the Appellant wished to clarify that she could no longer work because of her medical condition as of September 12, 2008. She further indicated she had other health related conditions: severe knee pain, which would require surgery, knee problems, back pain with sciatic nerve pain radiating down her leg, headaches, and dizziness with anxiety attacks and heart palpitations. Standing and walking were limited to not more than 20 minutes. She had limited reaching, could only bend above the knees and was having knee surgery on August 8, 2014. She required some help with personal needs. Her family did all the heavy cleaning. Her eye problem for which she had surgery was sore. She had poor memory and had to write everything down and could only drive a car locally. She has seen a psychologist, Dr. Mancini, for heart palpitations and anxiety attacks, an orthopedic specialist, Dr. Cameron, who would operate on her knee and Dr. Basile, neurologist, at Sunnybrook. She was previously hospitalized at Sunnybrook for knee surgery in September 2013.

[14] According to the Appellant’s legal representative, the Appellant suffered daily with contact of different environmental allergies with side effects including loss of consciousness, breathing and balance problems, dizziness, fatigue, anxiety attacks and fainting. She also suffered back pain with sciatica. She could not sleep and was taking sleeping pills. She had a severe knee condition and would require knee surgery on August 28, 2014 for the second time. She also suffered from depression, anxiety attacks and had emotional problems for which she was seeing Dr. Mancini, psychologist.

[15] In the CPP Medical Report dated May 7, 2010, Dr. Brown, the Appellant's family physician, diagnosed allergies – environmental, anxiety/panic and menorrhagia. He stated that she had increasing problems with environmental allergies leading to symptoms and subsequent inability to manage in the workplace, which made her unemployable “at this time”. He stated she had environmental allergies as well as food allergies. She also had stress secondary to her allergic response causing anxiety and panic. She had a lot of asthmatic and rhinitis symptoms throughout 2009 and 2010. She recently had urticaria. He indicated she was seeing an environmental specialist and was prescribed an EpiPen, Ventolin, Flovent and Benadryl.

[16] On October 23, 2007, Dr. Langer, pediatrics, reported the Appellant develops urticaria after eating nuts and shellfish.

[17] In a November 6, 2007 report, Dr. Grad, consultant in allergens, stated he was convinced the Appellant had a food allergy causing her hives even though her skin tests were non-conclusive. On retesting, she reacted to nuts, and other foods such as chocolate, shellfish and pepper, garlic and mustard. She was to avoid foods which caused symptoms and would be treated with antihistamine.

[18] A November 22, 2007 Pulmonary Function Test was essentially normal.

[19] In a November 10, 2008 report to the Appellant's disability insurer, Dr. Brown stated that the Appellant's diagnosis was in reaction to “workplace allergens, pollutants, irritants and “?cyst lower left eyelid related to workplace dust.” He stated:

In regards to restrictions, her symptoms relate directly to workplace pollutants and, due to combinations of above symptoms, she is unable to be in that workplace. Stress situation in workplace. I have recommended patient return to clean, non-stressful environment”.

[20] Dr. Brown stated the Appellant was awaiting the results of pulmonary function tests and would be referred to an environmental specialist. He suggested avoidance of polluted or stressful work environments and removal of her eyelid cyst. He further stated: “In regards to prognosis, suggest return to stress-free, clean, dry environment office setting, no perfumes in workplace, no ongoing drywall work, no dust, no mould”.

[21] A November 20, 2008 Pulmonary Function Test noted a normal FEV1 and borderline FEV1/FVC ratio. It was essentially unchanged compared to a previous pulmonary function study in October of 2007.

[22] In a December 23, 2008 report, Dr. Grad stated he saw the Appellant for retesting of allergies. Although he could not find any food allergies he stated that “we know that she has them and so she will be reassessed in the New Year..”

[23] In a December 30, 2008 report Dr. Langer stated he saw the Appellant who had a history of recurrent cough especially with increased symptoms during construction at work. He stated exercise caused the Appellant slight shortness of breath, that she had food intolerance and had developed urticaria with certain foods. The treatment plan was to avoid foods which cause symptoms and to carry an EpiPen.

[24] In a January 22, 2009 report, Dr. Grad confirmed that allergy retesting did not show any significant food allergies. However, he confirmed the Appellant was allergic to pollens, dust and pets and stated she was to continue avoiding foods causing symptoms.

[25] In a January 26, 2009 report, Dr. Brown sent a letter to the Appellant’s disability insurer. He stated it was obvious from her blood work that she has severe allergies and that dust is one of her significant allergens. He stated: “It is also obvious that since her workplace was under construction and “dusty”, with odours related to paint production, et cetera, that her workplace would be very detrimental to this patient. Other than dust, odours, perfumes, et cetera, in the workplace cause significant symptoms”. He further stated:

Symptoms in the workplace were severe and recurrent on a daily basis and intolerable. Symptoms of upper and lower respiratory, cystic lesions eyes, nasal headaches, sinus pain, sneezing, watery eyes, cough and shortness of breath were all present and recurrent on a daily basis and made her continuation in the workplace impossible. She was thus unfit for the workplace.

[26] According to a March 19, 2009 script of Dr. Brown: “The patient is now able to work part-time 20 hours per week with environmental consideration – fragrance free, nut free, fish free and dust free”.

[27] On May 10, 2010, Dr. Langer stated he saw the Appellant in October 2007 for recurrent urticaria and hives caused by eating nuts and shellfish. He further stated he saw her in December 2008 for cough which was increased after construction at the workplace. He indicated exercise causes shortness of breath. He recommended she avoid foods which cause symptoms and use Flovent and Ventolin. He noted her pulmonary function tests were normal.

[28] According to a May 14, 2010 anesthetic consult report, the Appellant had allergies to penicillin, latex and various foods, which she reported gives her throat swelling. The author of the report wrote: "The patient is otherwise healthy and does not have any limitation in her functional capacity". She had presented for a diagnostic video laparoscopy for chronic pelvic pain.

[29] According to a June 23, 2010 allergy office consult note, the Appellant's lab investigations for food allergies showed negative CAP testing for specific IgE for various foods. A supervised oral challenge was recommended.

[30] A February 22, 2011 chest radiograph was normal.

[31] On April 18, 2011, Dr. Vadas, Director, Division of Allergy and Clinical Immunology, St. Michael's, saw the Appellant. He stated her history was highly suggestive of vasomotor rhinitis and that she had typical vasomotor triggers. He indicated her lower airway symptoms were typical of Irritable Larynx Syndrome or vocal cord dysfunction. He referred her to see Dr. Anderson in the Voice Disorders Clinic.

[32] On October 21, 2011, Dr. Vadas saw the Appellant in follow up. He noted she saw Dr. Anderson who felt she had Irritable Larynx Syndrome. He stated she sought a letter in support of long-term disability benefits. He stated he reminded her she had no demonstrable allergies at the time of her recent testing. He noted she had vasomotor rhinitis, which he stated: "is a non-allergic condition which does not lead to disabilities". He stated that Irritable Larynx Syndrome is not an allergic condition but one triggered by exposure to irritants.

[33] On January 11, 2012, Dr. Merrick, speech language pathologist, reported the Appellant had a five year history of symptoms consistent with Irritable Larynx Syndrome in that she presents with shortness of breath, throat tightening, cough and dysphonia in response to odor



based triggers. She had additional symptoms not consistent with Irritable Larynx Syndrome including hives, headaches and dizziness in response to both odor based irritants and some ingested foods. According to Dr. Merrick, her symptoms sounded more consistent with an allergic reaction (hives). Ms. Merrick suspected the Appellant had an element of Irritable Larynx Syndrome and recommended some therapy to provide behavioral strategies to help control some of the throat based symptoms.

[34] On December 10, 2012, Dr. Brown wrote to the Appellant's legal representative. He stated the Appellant's diagnosis was "somewhat mixed". She had significant allergies: allergic rhinitis and asthma related to multiple environmental allergies including dust and also possible Irritable Larynx Syndrome, which seems to develop in response to odour-based irritants. When exposed to strong odours, she gets headaches, dizziness and the sensation her throat is tightening followed by cough and difficulty speaking. She also gets some shortness of breath and develops hives. He stated:

(The Appellant's) workplace seems to play a key role in the aggravation and increasing severity of this problem. It was noted at the time of the initiation of the problems in 2008 that her workplace was under construction and was very dusty and had significant odours related to paint fumes in the area that she was working. It was very detrimental to her and seemed to have set up this very significant environmental allergy cycle.

The patient is now very sensitive to allergens, mostly related to odours, perfumes, et cetera, also to dust. It is very difficult for her to find work in any normal environment as she would have to work in a very closed environment carefully monitored for dust and perfumes".

[35] On October 15, 2013, Dr. Basile, neurology, saw the Appellant for neck and low back pain with some radicular symptoms in the left leg. He queried cervical and/or lumbosacral radiculopathy secondary to a recent motor vehicle accident (MVA). He noted she had recent left knee surgery – osteotomy on September 5, 2013. He indicated she was not working and started a cake business and cake making at home a couple of years earlier. He stated her current problem of neck and lower back pain started many years ago. However, on August 8, 2013, she was

involved in an MVA when a tractor trailer hit her car from the side. Since then, she was complaining of more severe neck pain and lower back pain but also left arm and left leg pain and tingling. He noted she stated she could not walk due to her recent left knee injury and was walking with crutches. He further noted she had a prior history of headaches and stated: “However, these were seldom and not bothering her. Since the accident, the patient states that she is having 3-4 headaches per week with nausea...” Dr. Basile recommended physiotherapy and massage therapy.

[36] On September 22, 2014, the Appellant’s representative submitted a Patient Medical History Report. The medications span both the pre and post MQP.

[37] On October 1, 2014, the Appellant’s legal representative submitted additional documents to the Tribunal. They consisted of a psychological report dated August 16, 2010 from Dr. Keeling, registered psychologist, and an impact Statement from the Appellant and her spouse.

[38] According to Dr. Keeling, he assessed the Appellant on June 8, 2010. He noted she reported she suffered severe allergic reactions to her workplace environment in July/August 2008 and subsequently underwent surgery to her right eye in September 2008. Since then, she had complained of decreased vision and developed a number of psychological problems such as moderate depression and severe anxiety preventing her from returning to her previous level of functioning and resulting in strenuous interpersonal adjustments. She reported that her previous employer accommodated her allergy to perfumes and requested that all workers refrain from wearing perfume. In May 2008, she was informed of a building renovation. Due to her allergy to dust, she put in a request to be relocated. During the summer of 2008 renovations, her request was denied and her manager suggested she take Benadryl for her allergies. It caused her to feel drowsy and affected her cognitive abilities. As a result of her allergies, she experienced hives on a daily basis and nausea. The dust-filled air seeped through her right eye causing a burning sensation, redness and blurry vision. She continued to work for a short period of time as she was afraid of losing her job. In September 2008, she was unable to continue working as her condition became exacerbated following an additional allergic reaction to a spray used at the workplace. She underwent a right eye procedure in Septembers 2008 and mucus and dust particles were

found in her eye causing an infection. She did not return to work after September 2008 due to her ongoing allergy symptoms. In March 2009, she wanted to return to work on modified duties and showed her workplace a list of “allergy awareness changes” she would require, however they could not accommodate her, such as no cooking of shell fish/crabs in the kitchen. She reported being terminated without cause in March 2009. She indicated she was currently looking for work but was discouraged and stressed as she was unable to find a workplace that would accommodate her needs. She indicated she felt distress due to the fact she could have been “easily spared” stress in her body had her workplace been willing to accommodate her simple requests such as moving her to another floor. She stated she now believed her body was more “vulnerable” and more sensitive to allergens since being exposed to a dusty environment.

[39] During the psychological exam performed by Dr. Keeling, the Appellant described feeling overwhelmed and frustrated due to her loss of work. She felt useless and was in desperate need to find a job. She also felt drained and lacked motivation to perform her household duties. She reported she had no tolerance, lost her patience easily, reported crying and feeling discouraged. She also described anxiety related symptoms. She indicated she was currently looking for a job but was discouraged and stressed as she was unable to find a workplace that would accommodate her needs. She indicated her discouragement was due to the fact she attempted to remain an active worker at her previous job but was unable to do so due to her physical reactions. She believed she could have been spared distress had her workplace been willing to accommodate her simple request (such as being moved to another floor) She expressed the belief her body was more vulnerable and more sensitive to allergens since being exposed to a constant dusty environment. She indicated feeling tired most of the time, experiencing disruptive sleep and a feeling of general anxiety and ruminating thoughts.

[40] According to Dr. Keeling, psychological testing indicated clinically significant emotional distress. The test results were considered to be a valid and reliable measure of the Appellant’s current level of psychological functioning. On the Beck Anxiety Inventory, her profile was consistent with severe levels of anxiety impacting her mental and physical functioning. She reported being moderately bothered by numbness or tingling in her right hand, unable to relax, fearful of the worst happening, dizzy or lightheaded, terrified, nervous with hands trembling, fearful of losing control, fearful of dying, scared and faint. On the Beck

Depression Inventory – II, she attained a score in the moderate range of depression. She endorsed severe levels of feeling of punishment and moderate levels of changes in sleeping pattern and fatigue and mild levels of sadness, pessimism and loss of pressure. On the P3 scale, which identifies patients experiencing emotional distress associated with primary complaints of pain and provides information about function on 3 clinical scales: Depression, Anxiety and Somatization, the Appellant received an average Pain Patient Depression and Anxiety score. This would suggest she may often experience chronic fatigue, sadness, listlessness and appetite and sleep disturbance associated with pain, and feel intense, impatient and irritable.

[41] Dr. Keeling concluded that since her exposure to workplace allergens during the July/August 2008 building renovation, the Appellant presented with complaints of blurry vision, irritability, anhedonia, fatigue, anxiety and depression. She had trouble with her mood and experienced feelings of fear, anger, discouragement, sadness and irritability and was unable to find a placement due to her restrictions and allergy. She was constantly stressed, anxious, sad, tense and irritable, had withdrawn from most of her usual activities and would spend most of her time worrying about her vocational future. Psychological testing indicated clinically significant emotional distress. Dr. Keeling diagnosed Anxiety Disorder (NOS). Under Axis IV, he stated: “Inability to engage in employment activities. Exposure to physical stressful work environment”. He described severe environment allergies and set out a GAF of 55. He stated that diagnostically, the Appellant was experiencing anxiety and discouragement since losing her job in March 2009. The damage to her eye also caused emotional distress. He indicated that since the incident, she had been unable to work due to being unable to secure work for the past two years. As a result of her inability to work, she experienced discouragement which led to a severe loss of function. He wrote:

This work stress has caused (the Appellant) emotional distress, and she experiences several symptoms related to depression and anxiety. These symptoms do not appear to be exacerbated by a pre-existing Axis I or Axis II. There is strong evidence that both (mild) depression and anxiety are interfering with her functioning. Her gradually deepening depression and anxiety are clearly secondary to the fact that she has been unable to work since September 2008. Her adjustment and functioning prior to this work incident appears to have been

adequate. Since losing her job she has felt increased levels of insecurities, loss of hope about her future and withdrawal. It is apparent that (the Appellant) is experiencing a great deal of distress as a result of this incident. There is strong evidence that both depression and anxiety are interfering with her functioning. Her gradually deepening anxiety is clearly secondary to the incident in question.

[42] Dr. Keeling recommended 15 to 20 sessions of psychological treatment to address feelings of discouragement, anhedonia, anger and frustration. Given the Appellant's clinically significant psychological disorder, he stated psychological treatment would be necessary to reverse the psychological sequelae of her work incident of July 2008. He stated that given her awareness level, commitment to treatment, and social support network, her prognosis with treatment was likely to be fair.

[43] On October 7, 2014, Dr. Brown reported the Appellant had ongoing issues with her environmental allergies several times a week involving common triggers "even in super market, colognes, perfumes". He noted usual symptoms of choking, gasping for air. She would take Benadryl. She had an EpiPen which she did not have to use. The last time she used it was 3 years earlier in relation to an aerosol spray can. According to Dr. Brown, she was unable to function after 25mg of Benadryl due to drowsiness. She was not able to work due to severe perfume reactions. She was unable to "manage the interview" and was unable to manage gainful employment due to diversity of allergens.

### **Oral Testimony**

[44] She was born in Canada.

[45] She is 46.

[46] She stated to work at age 16. She stopped working at age 41 in September 2008.

[47] She was working at Benefit Plan Administrator as a Customer Service Representative. The workplace underwent construction. Dust seeped through, she had a severe allergic reaction and required right eye surgery (cyst). She also had an allergic reaction to spray paint. The employer did not try to accommodate her.

[48] The allergic reaction was triggered by dust and people walking through with colognes and perfumes which caused her to experience hives and respiratory problems.

[49] She started to experience allergic reactions in 2007 when she worked at the airport and was exposed to perfumes and colognes. She was told she had a respiratory problem.

[50] Her allergic condition has been the same since 2010.

[51] She saw Dr. Keeling in August 2010 due to depression which was on account of her chronic allergic reaction.

[52] Before she developed her environmental sensitivities, she used to go out, participate in family functions, go to restaurants and be active with the children. She cannot be exposed to that now. Her environment has changed dramatically.

[53] She visited her family doctor and many specialists. Dr. Vadas told her to speak to her doctor. He said her condition was severe and “unheard of”. Dr. Brown, her family doctor, and the psychologist, who knew she had anxiety and depression, told her to apply for CPP Disability benefits.

[54] She also has neck and back problems. However, her main disability is environmental. She loses consciousness, gets dizzy, and experiences stomach ache, nausea, drowsiness and hives when she gets an attack.

[55] Her doctors recommend she take Benadryl 25-50 mg, Tylenol or Advil (600 mg), and carry an EpiPen for her food allergies. She takes antidepressants, Lorazepam, medication for her nose to clear out her sinuses and Prednisone. She was taking these in 2010. She continues to take the same medication. She still sees specialists at St. Michael’s hospital.

[56] Her doctors have not told her that she can work. When she applied for jobs, she had a hard time doing interviews because people at the workplace were wearing colognes or perfumes. They stated they were “sorry this place is not for you,” told her they could not accommodate her and that she would be a liability to them. She relayed this to her doctors.

[57] She has pain on a daily basis due to her back, knees and musculoskeletal pain. She also feels tired and nauseous.

[58] Her back, knee and muscle pain started in 2010.

[59] Her medical condition has impacted on her family and friends. She cannot attend family functions. They will not refrain from wearing perfumes and colognes and cannot quite comprehend what she is going through unless they witness her undergoing an episode such as anaphylactic shock.

[60] She can be in a confined area like a “bubble” where she is not exposed to triggers.

[61] Her condition is “life-threatening” and cannot be cured. She has passed out and it is very frustrating that someone has to die until someone understands her situation.

[62] She did not attend the May 2015 hearing date because she was exposed to cologne the night before. Her son’s friend came to the door, which she opened. He was wearing cologne or lotion and was standing only two feet in front of her. Seconds later, she passed out on the floor. The smell was so strong it choked her. She had run out of Benadryl. She went to the hospital. A trigger can take mere minutes for the esophagus to close.

[63] She is also depressed. Her life makes her very sad. She cannot do the things as she used to do. On prompting from her legal representative, the Appellant read excerpts from Dr. Keeling’s August 2010 psychology report, which describe the impact of her medical condition on her psychological state.

[64] She did not describe her psychological state in the Questionnaire. No one told her how to complete it. She completed it to the best of her ability.

[65] She is not working right now. She last worked in 2008.

[66] Between September 2008 and August 2010, she tried to find other work. She went to interviews, some of which she could not conduct due to colognes in the environment.

[67] Between August 2010 and December 31, 2010, she did not look for work. She was depressed and anxious, having been told she would be a liability for prospective employers.

[68] During a typical day, she wakes up, makes some breakfast and takes her medication which makes her drowsy. Her mother helps out.

[69] She has a husband and three children.

[70] Her mother does the housework. Her son cuts the grass and shovels snow.

[71] She never operated a cake baking and decorating business from her house. She went to a supply store to buy food supplies which accommodate her food allergies. The supplier does not sell directly to the public and told her she had to obtain a Master Business License in order to purchase supplies. She explained her allergies and intention to bake solely for herself. The supplier told her to contact the Canada Revenue Agency (CRA) to explain her situation. She did so, explained her allergies, and was told by CRA she did not have to apply for a GST number since she was not profiting and was buying supplies for self-use. She did not register a GST or business number. She only has a gas oven (not convection). She has never sold to the public or earned any income from her registered business. She has also never had any problems with the CRA concerning her income tax returns. They did not indicate she was self-employed or earned income from a business.

[72] She had a motor vehicle accident (MVA) in 2013. Her environmental allergies have no bearing on her recovery from the MVA. Her main disabling condition is her chronic environmental allergies to perfumes, colognes and aerosol sprays.

[73] She has remained disabled since 2010 even though she recovered from the MVA.

[74] She applied for CPP Disability benefits due to her environmental illness. Her condition is very serious. Her application was denied because her disability was not taken seriously. She requires medication. Her condition will not go away. She has triggers in stores/aisles and has to wear a mask. She cannot continue in any work environment. She has to be put in a room and accommodated. There is no such job. Even hospitals can only put up a sign asking people to refrain from wearing scents but cannot guarantee that people will do so. Her immune system is



very weak. She wishes there is a pill she could take to fix her condition. She is also very depressed. Her condition has impacted her family.

[75] The Tribunal confirmed with the Appellant that she read Dr. Keeling's report and that she agreed with its contents.

[76] The Tribunal had some questions for the Appellant concerning the apparent discrepancy between the information she provided in her Questionnaire where she said she had eye surgery and returned to work and Dr. Keeling's August 2010 report in which he stated she had eye surgery in September 2008 and never returned to work.

[77] According to the Appellant, she returned to work after the surgery for one or two days and was told by the employer that they could not accommodate her.

[78] She applied for regular EI benefits between November 2008 and September 2009. She does not agree with her legal representative's assertion in his submission (GT2-1) that she could not work as of September 2008. The legal representative reminded the Tribunal that between 2008 and 2010, the Appellant was looking for work.

[79] The Tribunal reminded the Appellant she stated in her Questionnaire that she might start looking for work in May 2010 including working out of her home if possible, and asked her whether she acquired a business license in May 2010 for this reason. She reiterated she acquired the business license solely to buy product from a supplier and did not sell baked goods to the public.

[80] She stated the problems with her environmental illness stated when she was working at an airport job in 2007 at which time she was exposed to perfumes, colognes, aerosols, etc.

[81] She never filed a complaint with the Human Rights Ontario Tribunal of Ontario against her former employer, BPA, for discriminating against her on the basis of disability and failing to accommodate her. She also never sued BPA for wrongful dismissal. When they dismissed her, they never put anything in her file and simply indicated they could not accommodate her. Her position was not unionized.

[82] The Tribunal reminded the Appellant that her legal representative indicated in his submission that she saw a psychologist, Dr. Mancini, and asked her when she started to see Dr. Mancini. At first she could not recall. She subsequently recalled seeing Dr. Mancini between January 2014 and July 2014. She did not have to pay out of pocket to see Dr. Mancini. The services were covered by OHIP on referral from the family doctor. She discontinued seeing Dr. Mancini after she had surgery. The legal representative confirmed there was no report from Dr. Mancini filed into evidence.

[83] The Tribunal asked the Appellant about GT10-4, the report of Dr. Basile, neurologist, who stated under Social History that the Appellant started a cake business and cake making at home a couple of years ago. The Appellant states she told him she was baking for herself at home, registered a business for herself and had to go to a supplier. She believes he must have misunderstood her.

[84] The Tribunal asked the Appellant, whether, when she looked for jobs between September 2009 and August 2010, she pursued home based work. She stated she conducted many interviews, asked about working from home and indicated she had a computer at home. The interviewers indicated they had no jobs which involved working from home. The Appellant explained she is not an accident insurance adjuster who could work out of the home. The Tribunal asked the Appellant whether she would have been able to work out of the home, if she were offered such work. She indicated she did not believe she would be able to do so, stating she would still have to go into the office. The Tribunal asked the Appellant whether she could perform such work if she were not required to attend at the employer's office, e.g. assignments downloaded by computer. She stated she is not that computer literate.

[85] The Tribunal asked the Appellant whether she completed 15-20 treatment sessions with Dr. Keeling as recommended. She stated she did not pursue sessions with Dr. Keeling as she would have to pay out of pocket. She waited until she was referred to another specialist, i.e., Dr. Mancini, whose services were covered by the Ontario Health Insurance Plan.

[86] In December 2010, she was living with her spouse and 3 children, currently ages 19, 14 and 13.

[87] In December 2010, her mother and son would do the cooking. Her medications would make her tired, affect her stomach and give her side-effects. Her mother did the baking, cleaning, dishes, laundry and vacuuming.

[88] Her husband and son would do the grocery shopping. She might go on occasion to fill her prescriptions since she had to provide identification. She agreed with her legal representative's submission that she would go grocery shopping occasionally but had to be careful what aisles she would go down due to smells from foods or cleaning supplies.

[89] In December 2010, she was not driving. She currently does not drive. The Tribunal asked the Appellant to comment on her legal representative's submission in which he stated she drives occasionally with someone accompanying her. She stated that was correct. She gave the example of driving to get her medication with someone accompanying her.

[90] In December 2010, she did not attend parent-teacher interviews for her daughters. Her husband would go.

[91] She did not take her children to community centers, appointments or play dates. Her husband would take them.

[92] She renews her driver's license by going to a small Ministry of Transportation office in X.

[93] When she goes to the doctor/dentist, they are aware of her condition and place her in a small segregated waiting area. When she first enters the office, she wears a mask.

[94] She goes shoe/clothes shopping in small local stores in the X area and wears a mask.

[95] She last attended Church probably in 2010. She once attended services, smelled cologne and walked right out.

[96] Her husband does the banking.

[97] She cannot go to restaurants due to her severe allergies.

[98] The Tribunal asked the Appellant to clarify the circumstances which occurred at the first adjourned appeal hearing where she encountered a strong cleaning smell from the hotel lobby bathroom and suffered an adverse reaction. The Tribunal reminded the Appellant that when she subsequently entered the hearing room, she asked the Member and her legal representative whether someone was wearing cologne and that her legal representative indicated he put on cologne that morning. The Tribunal asked the Appellant whether her adverse reaction was due to the bathroom cleaning smell, her legal representative's cologne or a mixture of the two. She stated it was a mixture of the two. She stated there was a toxic strong smell in the bathroom (she wore a mask going in) and noted she never encountered anything like it before. She stated she thought someone did that intentionally. She stated her legal representative was wearing an after shave lotion which she could smell even though he applied it much earlier that morning.

[99] The Tribunal advised the Appellant that before that hearing began, the Member recalled seeing her and her legal representative sitting together in the hotel lobby outside the hearing room, indicated she did not seem to have any kind of reaction at that time, and asked her to provide an explanation. She stated she was a few feet away from him. After she walked into the washroom, it triggered a reaction. If she had not taken Benadryl, she would have had to go to the hospital. After she entered the hearing room, she then smelled the after shave that her legal representative was wearing, which also affected her. She confirmed that since she was sitting a few feet away from him in the hotel lobby, the after shave did not affect her. However, after she smelled the cleaning product in the bathroom and then smelled the after shave in the hearing room, it affected her.

[100] The Appellant's mother testified. Much of her evidence was in Italian and it appears that the Appellant's legal representative was translating for her. The Tribunal has given her testimony less weight as her evidence was not translated through an impartial accredited interpreter.

[101] She is the Appellant's mother.

[102] She is aware of the Appellant's medical condition. She knows the Appellant is sick. She has been sick since 2010. Between then and now, she looks after the Appellant. She does everything for her including cleaning and hopes one day the Appellant will feel better.

[103] She does the cooking and cleaning. She does everything as the Appellant is sick. She started to help out in 2010. The Appellant's sickness has affected her and the family. They all suffer as a result of the Appellant's disability. The Appellant cannot participate in family reunions, birthdays or any other important events.

[104] She does not believe the Appellant can return to work. Since 2010, she has not seen any change in the Appellant.

[105] The Appellant cannot spend Christmas with the family.

## **SUBMISSIONS**

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

- a) Her allergies are so powerful that any type of smell will trigger an allergic reaction which closes down her throat such that she cannot breathe.
- b) She cannot return to a workplace environment where there are constant and different smells.
- c) No one will hire her. No employer will put up with constant absences and health problems. It is evident she would be a burden and hindrance to any employer.
- d) Her condition forced her to stop working in 2008.
- e) Her disability prevents her from working and affects her daily life;
- f) At the October 2014 hearing she experienced an allergic reaction to smells in the washroom. The impact was so significant she did not recover enough to continue with the hearing. It is environmental and debilitating triggered by any irritant.
- g) In 2008, her condition manifested when her employer engaged in office renovations. There was dust, smell, aerosol, paints and other irritants. This triggered her condition. She asked to be reallocated within the building. This did

not happen. She was sick and absent from work. Her employer terminated her because she was no longer a reliable healthy productive individual. She tried to seek employment with other employers but found no employer to accommodate an enclosed environment or guarantee there will be no smells or irritants in the workplace.

- h) Her situation is prolonged. She will not have any gainful employment. She suffers from severe significant environmental allergies in the form of allergic rhinitis and asthma, which causes headaches, dizziness, hives, sinus, upset stomach and cough. She has rhinorrhea and nasal congestion made worse by exposure to strong fumes, spicy foods, irritants. She has abrupt onset of constriction in her throat.
- i) She also suffers from depression (Dr. Keeling's report). Her GAF is 55.
- j) Her drug profile shows she has consumed heavy dosages of different medications with different side effects. She is required to see various specialists.
- k) She is totally disabled from performing any tasks including socializing, attending family functions, going to the local supermarket.
- l) The medical record confirms she has conditions which are prolonged and severe as of December 31, 2010.
- m) She requires an environment completely free of all irritants. This is not a normal environment which can be offered by any employer. In the "real world", an employer will not hire her. She is a risk to the employer and danger to co-workers. She cannot function realistically in the "real world".
- n) The Appellant's representative made an opening statement and detailed closing submissions, which the Tribunal has also carefully considered. He reiterated she has had a severe and prolonged disability at the MQP which is ongoing. Since 2008, she not worked. She cannot work in any regular job based on her medical condition.
- o) She takes medications (GT5-10) and has many medical conditions as set out in the

medical record. She also has medical limitations. She experiences side-effects from medication which affect driving and carrying out household activities, which her mother and other family members perform.

- p) The medical record supports the existence of a severe and prolonged disability. The legal representative highlighted a series of reports found in the medical record.
- q) Her testimony shows she has suffered since December 2010. Her medical condition has “destroyed” her life and that of her family. She has a chronic severe environmental allergy. It got worse in 2008. By 2010 she was completely disabled. She tried to seek employment but could not do it. She is depressed and does not feel good. She has a severe problem. There is no job she can do at home. She cannot even do family chores. Her life is confined in the home 24/7. She has numerous conditions, functional restrictions and depression. Her drug profile shows she consumes a lot of medication. Her evidence establishes she is incapable of returning to any work.
- r) The Appellant’s mother testified she hopes one day her daughter will be okay. However, that is not the case. The medical evidence supports a finding she has a severe and prolonged condition.
- s) The legal representative referred to case law which he filed, which he submitted supports the Appellant’s appeal.
- t) The evidence supports a finding she had no self-employed income. She had no problems with CRA when she reported no business income.
- u) The *Villani* case requires one to take a “real-world” approach. She has met that standard of proof. She cannot find a job in the real world. The legal representative employs other people. What employer will pay an employee if they cannot speak with her unless they build a cage around her? The legal representative likes wearing cologne. He could not wear any if he had an employee such as the Appellant. What employer would give that up?

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

- a) She stated on her application her doctor told her she could return to part-time work and that she planned to do that in May 2010. She indicated she made no attempts to find alternate work due to her medical condition. She indicated she collected regular EI benefits between November 2008 and September 2009.
- b) In his December 2008 report, Dr. Grad indicated he could not find significant food allergies.
- c) In his January 2009 report, the family doctor indicated she had a severe allergy to dust. He noted her workplace was under construction and dusty with odors related to paint production. Other than dust, he stated that other odours from perfumes in the workplace cause symptoms. He added her symptoms (upper/lower respiratory, cystic eye lesions, nasal headaches, sinus pain, sneezing, watery eyes and shortness of breath) were all present on a daily basis making her unfit for the workplace).
- d) The Pulmonary Function Test dated November 2008 showed FEV was normal. The FEV.FVC ratio was borderline. Methacholine challenge test in November 2007 was negative.
- e) According to the family doctor, her symptoms were directly related to workplace pollutants. The combination of her symptoms prevented her from working at “that” workplace. GT1-98.
- f) Investigations have not identified any serious pathology that would prevent her from pursuing work suitable to her limitations in a different workplace.
- g) In terms of GT2 (reporting severe knee pain requiring surgery, back pain with sciatica, headaches, dizziness, anxiety attacks and heart palpitations), she had knee surgery in 2013. Additional surgery was required in August 2014. This is after the MQP. Also, neither the Appellant nor her family doctor mentioned issues



or limitations pertaining to knee or back pain when she applied for CPP disability benefits.

- h) In terms of GT5 (pharmaceutical print out), this information does not support a severe disability which would preclude all types of work in December 2010. No additional evidence has been received to support severe organic pathology or deficits in any areas in 2010 precluding work.
- i) In terms of Dr. Keeling's June 2010 report, he did not describe mental status examination findings suggestive of a severely disabling condition. He indicated most of her anxiety stemmed from perceived mistreatment and failure to be accommodated by her previous employer. Psychotherapy (15-20 sessions) was recommended. To date, it is unknown if she underwent such treatment. Also, at the date of application, neither the Appellant nor her family doctor described anxiety as a factor precluding her from work. It is interesting to note that Dr. Keeling stated in his June 2010 report she was currently looking for work (the same month she applied for CPP). While she underwent a one-time assessment at the request of her legal representative, there is no indication her mental health condition is of such severity to warrant referral to or treatment by a psychiatrist.
- j) She left work due to an increase in her allergy symptoms related to construction and increased dust in the workplace. While she reports having reactions to some food products, testing has failed to confirm this. In any event, the treatment would be avoidance of these foods.
- k) It was revealed in 2013 that she had been operating a cake business and decorating business from her home for a couple of years.
- l) Her main symptom with exposure to irritants is nasal congestion for which she obtains symptomatic relief with nasal spray. Antihistamine makes her sleepy.
- m) She has been driving, going to the supermarket and attending appointments at various clinics. However, Dr. Brown revealed in October 2014 she did not require a visit to the Emergency Department since being exposed to aerosol paint in 2008

and she has not used her EpiPen for an acute allergic reaction for 3 years. The evidence indicates her condition has not resulted in significant restrictions in her ability to participate in activities outside the home.

- n) She was injured in an August 2013 MVA which is post-MQP.
- o) She has been able to drive, go shopping and attend various appointments without experiencing any acute allergic symptoms since 2008.
- p) She operated a home based cake making and decorating business until her 2013 accident.

## **ANALYSIS**

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

### **Severe**

#### **Menorrhagia**

[109] The family doctor listed menorrhagia as one of the Appellant's conditions but did not provide any additional reports elaborating on the nature and severity of this condition. In her Questionnaire, the Appellant did not refer to this condition or indicate she had to stop work on account of it. Based on the evidence, the Tribunal is not satisfied this condition was severe on or before the MQP.

#### **Carpal Tunnel Syndrome**

[110] In her Questionnaire, the Appellant indicated she is unable to lift more than 20 lbs. due to right hand Carpal Tunnel Syndrome. Significantly, her family doctor did not refer to this condition. The Appellant previously worked with this condition and reported she was unable to

continue her last job due to allergens/pollutants/irritants in the workplace. The Tribunal is not satisfied this condition was severe as defined in the CPP on or before the MQP.

### **Knee pain/Back pain/Headaches**

[111] In correspondence provided by her legal representative, the Appellant indicated she suffers from severe knee pain for which she would require surgery on August 8, 2014, back pain with sciatic nerve pain radiating down her leg, headaches and dizziness, with anxiety attacks and heart palpitations. According to the legal representative, she was previously hospitalized for knee surgery in September 2013. She cannot stand or walk more than 20 minutes and is limited in reaching and bending. Her spouse and children perform all heavy housecleaning and she performs light duties only. Her eye, for which she previously had surgery, is sore. She is also forgetful and drives a car only locally. She sees a psychiatrist, Dr. Mancini on a regular basis.

[112] In her May 2010 Questionnaire, the Appellant did not refer to knee pain, back pain or headaches. Neither did Dr. Brown in the May 2010 CPP Medical Report. However, the Appellant's legal representative first mentioned these conditions in his July 22, 2014 correspondence (GT2-1) which he related back to the MQP.

[113] The Tribunal has considered the additional medical reports which the Appellant subsequently submitted to determine the status of these above mentioned conditions on or before the MQP.

[114] Notably, Dr. Basile, neurology saw the Appellant in October 2013 well after the MQP for neck and low back pain with some radicular symptoms in the left leg. Although he indicated her current problem of neck and low back pain started many years earlier, he stated she was involved in a motor vehicle accident (MVA) in August 2013 and since then was complaining of more severe neck and lower back pain as well as left arm pain. He also noted she had a prior history of headaches and stated: "However, these were seldom and not bothering her. Since the accident, the patient states that she is having 3-4 headaches per week with nausea".

[115] Based on the evidence, the Tribunal is not satisfied that the Appellant's neck and lower back pain or headaches were severely disabling as defined in the CPP on or before the MQP.

## **Anxiety/Depression**

[116] In her May 2010 Questionnaire, the Appellant indicated her concentration is affected when she is in an environment where she cannot breathe. She also indicated she occasionally takes Lorazepam to help assist with sleep. Under Medications, she indicated she took 1 mg Lorazepam twice a week at night as required. In his May 2010 Medical Report, Dr. Brown listed Anxiety Panic as a condition. He stated she had stress secondary to allergic response causing anxiety and panic.

[117] In his August 2010 report, Dr. Keeling, registered psychologist, diagnosed Anxiety Disorder and a GAF of 55. Under Axis IV, he stated: "Inability to engage in employment activities. Exposure to physically stressful work environment. Severe environment allergies". He stated in the body of the report there was "strong evidence that both (mild) depression and anxiety are interfering with her functioning."

[118] Although Dr. Keeling's reports constitutes medical evidence which may support a finding of a severe disability as defined in the CPP prior to the MQP, the Tribunal is not satisfied, on balance, that this condition was prolonged at the MQP and continuously afterward.

[119] Although Dr. Keeling recommended 15-20 sessions of psychological treatment, the Appellant testified she could not afford to pay Dr. Keeling for treatment. Therefore, she waited to be referred to see another specialist, Dr. Mancini, psychologist, whom she recalled seeing in 2014. According to the Appellant, she stopped seeing Dr. Mancini in 2014 after she underwent surgery. She did not provide any explanation why she did not resume treatment after surgery and never filed a report from Dr. Mancini describing the outcome of treatment.

[120] Given Dr. Keeling's statement: "Given (the Appellant's) awareness level, commitment to treatment, and social support network, her prognosis with treatment is likely to be fair", the Tribunal is not prepared to find that the Appellant's psychological disability is prolonged, given the absence of any report from Dr. Mancini attesting to the outcome of treatment combined with the fact the Appellant never resumed treatment after surgery.

[121] The Tribunal has also reviewed the Appellant's pharmaceutical list of medications at GT5-10. Although it reveals some use of Lorazepam in June 2010, Ativan in January 2009, December

2008 and October 2008, and Venlafaxine in November 2008, it does not disclose ongoing usage of anti-depressants and anti-anxiolytics at the MQP and on a continuous basis thereafter.

### **Allergies – Environmental**

[122] The Tribunal has considered the fact that after the Appellant was terminated from her job, she received regular EI benefits between November 2008 and September 2009. Receipt of regular EI benefits would have required the Appellant to be ready, available and looking for work. Although not determinative of the severity of her disability at the MQP, receipt of regular EI benefits would place the Appellant's credibility in issue to the extent she asserts that her disability was severe during the above time frame. In any event, this is not an issue given the Appellant's position she was not severely disabled during this time frame and that she was looking for work between November 2008 and August 2010.

[123] The Tribunal accepts, based on the Appellant's evidence and the weight of the medical record, that she was unable to continue working at her last place of employment which was under construction and where she was exposed to significant dust and paint fumes.

[124] The medical evidence clearly supports a connection between exposure to workplace allergens/pollutants/irritants and an adverse reaction by the Appellant. For example, in his November 10, 2008 report to the disability insurer, Dr. Brown stated that his diagnosis was "reaction to workplace allergens/pollutants/irritants and ?cyst lower left eyelid related to workplace dust." In his December 30, 2008 report, Dr. Langer described the problem/history as: "Recurrent cough especially with increased dust during construction at work." In his January 26, 2009 report, Dr. Brown stated that it was obvious that dust is one of the Appellant's significant allergens and that it was further obvious that since her workplace was under construction and "dusty" with odors related to paint production, et cetera, the workplace would also be very "detrimental" to her.

[125] The Tribunal is not convinced based on the evidence that perfume, as opposed to significant dust and paint fumes, was among the chief triggers which rendered the Appellant's last workplace unfit for her. In her Questionnaire, the Appellant stated the following in response to the question 'Why did you stop working': "I got injured at work on my right eye. Had surgery

returned to work and construction was ongoing .I was severely allergic to dust, perfumes to (illegible) paints in that office was on sick leave and suffered anxiety attacks”. In another section of the Questionnaire, she stated: “Dust was unbearable, toxins were tremendous up upon returning to work”. In his November 2008 report, Dr. Brown diagnosed “reaction to workplace allergens/pollutants/ irritants and ?cyst lower left eyelid related to workplace dust”. In his January 26, 2009 report, Dr. Brown stated: “it is also obvious from her allergy assessment that dust is one of her significant allergens. It is also obvious that since her workplace was under construction and “dusty”, with odours related to paint production, et cetera, that her workplace would be very detrimental to this patient. Other than dust, odors, perfumes, et cetera, in the workplace cause significant perfumes.”

[126] In his August 2010 report, Dr. Keeling noted that prior to renovations, the employer had been willing to accommodate the Appellant’s allergy to perfumes and had requested that all workers refrain from wearing perfume. He stated that before construction began, the Appellant asked to be relocated given her awareness of her dust allergy. He says the employer refused the request stating: “She reports that as the weeks of dust-filled air continued, this dust seeped through her right eye, causing a burning sensation, redness, and a blurry vision. She further states that the dust was affecting her lungs”. Dr. Keeling further indicated the Appellant wanted to return to work on modified duties in March 2009. She demanded the kitchen not cook shell fish and crabs. He says she notes that “even prior to the renovation/ reconstruction she had difficulties with the cooking of fish in the kitchen”.

[127] Based on the evidence, the Tribunal is not persuaded that exposure to perfume was the trigger which caused the Appellant to suffer symptomatology which eventually caused her to go off work. Rather, it was primarily dust and toxic or noxious fumes arising from construction. Although the Appellant had some issue with smells from cooking of shell fish and crabs in the kitchen, the Tribunal finds that neither these nor perfume were the reason she eventually went off work. This finding, however, does not mean the Tribunal has concluded that the Appellant is not susceptible to an adverse reaction should she become exposed to perfumes or smells of certain foods, which she cannot tolerate. The finding is simply to the effect she factually left her job in September 2008 primarily on account of significant exposure to dust and toxic fumes in a construction zone.

[128] This leaves the question whether the Appellant is incapable regularly of pursuing any substantially gainful occupation in any other workplace.

[129] As a starting point, the Tribunal is satisfied that the Appellant is incapable regularly of pursuing any substantially gainful occupation where she is exposed to certain environmental triggers such dust or perfumes or specific food odours due to her food allergies as described in the medical record.

[130] The Tribunal finds it significant that before the Appellant's last employer refused her request to relocate the Appellant after she became informed of the pending renovation, she had been working at the workplace since February 4, 2008. According to Dr. Keeling's report, the employer "had been reasonably attentive in trying to accommodate to her allergies" (GT6- 3) before the construction started. According to Dr. Keeling, whose report the Appellant indicated she read and agreed with, the employer refused to accommodate the Appellant's request to be relocated once the construction began. According to the Appellant, the renovation took place 10 feet from her office and she recalled sand seeping into her desk as of the first day. Dr. Keeling indicates the Appellant reported wanting to return to work in March 2009 on modified duties: one demand was that the kitchen not cook shell fish and crabs. She indicated she felt significantly distressed by the fact her workplace was so unwilling to help her through her allergies. Dr. Keeling wrote: "It is her belief that she could have been easily spared this stress in her body, had her work place been willing to accommodate her simply requests (such as moving her to another floor)" (GT6-5).

[131] The Tribunal is satisfied that the Appellant is capable of working in a workplace environment where her environmental allergies are accommodated. An example would be her previous workplace, which, on the evidence had been "reasonably attentive" in trying to accommodate her allergies, at least until the construction started at which point the employer refused to relocate her.

[132] The fact the Appellant possessed residual capacity to work in a workplace which accommodated her environmental allergies, is supported by the fact that in March 2009, she wanted to return to work on modified duties (GT6-4). She also expressed the belief to Dr.

Keeling that “had her workplace been willing to accommodate her simple requests (such as moving her to another floor”), she could have been “spared stress” in her body. (GT6-5).

[133] The Tribunal further accepts the Appellant’s evidence as set out in Dr. Keeling’s August 2010 report that the Appellant attended many interviews to find other work. Dr. Keeling wrote: “She (the Appellant) notes that in the past two years she has had many interviews, but adds that all of these work places state that they cannot accommodate to her allergies”. Although the Appellant testified that she encountered problems at many interviews due to people wearing colognes or perfumes, it does not appear she reported this to Dr. Keeling. If she did, he did not mention this in his otherwise thorough report. In any event, the Appellant did not testify that she encountered difficulties at every single interview due to individuals wearing colognes or perfumes. Rather she testified that none of the prospective employers could accommodate her to ensure the workplace would be irritant and trigger free.

[134] The Tribunal is instructed by the Federal Court of Appeal in the decision of *Canada (MHRD) v. Rice*, 2002 FCA 47, in which the Court stated that socio-economic factors such as labour market conditions are irrelevant in a determination of whether an individual is disabled and that the focus should be on any substantially gainful occupation having regard to the Applicant’s personal circumstances and not on whether real jobs are available in the labour market.

[135] The fact the Appellant was unable to find accommodated work within her restrictions does not result in the conclusion she was incapable regularly of pursuing such work had it been made available.

[136] The Appellant’s legal representative argued that from a *Villani* based “real-world” perspective, no employer would hire the Appellant or accommodate her disability. In his closing oral submission, he noted he likes to wear colognes and sprays and asked rhetorically, what employer would give that up or interact with the Appellant, who would have to be segregated.

[137] The import of the decision of *Villani v. Attorney General of Canada* (2001), 205 D.L.R. (4th) 58 F.C.A. is not lost on the Tribunal. Isaac J.A. stated that subparagraph 42(2)(a)(i) should be given a generous construction and that the severity requirement should be applied in a “real



world” context. The Court clarified this meant that “the hypothetical occupation which a decision maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, proficiency and past work and life experience (paragraph 38)”.

[138] The Tribunal is not satisfied the Appellant is severely disabled from a “real-world” perspective. She previously demonstrated capacity regularly to work in a job at a workplace which accommodated her disability. There is no evidence before the Tribunal that she suffered from a severe and prolonged disability on or before the MQP, which rendered her incapable regularly of pursuing a substantially gainful occupation in other workplaces where her disability would be similarly accommodated.

### **Self-Employment**

[139] The Tribunal notes the Appellant indicated in her May 2010 Questionnaire that her physician told her she could return to work in May 2010 and that she planned to return to work or seek work in the near future at home if possible. The Tribunal further notes the Appellant registered a business in her name on May 5, 2010 named: Sweets Made Just 4 You. She received a business license for a sole proprietorship issued on May 3, 2010. The Business Name Registration was effective for the period May 3 2010 and May 2, 2015. The Respondent takes the position the Appellant ran a cake business out of her home post-MQP. The Appellant denies this. She filed an unsworn Affidavit dated December 1, 2014 (GT20-13) in which she states she registered a business name to purchase baked items for her own personal use. She provided copies of her income tax returns to support the position she did not earn income from a business and stated: “I solemnly swear I do not sell any of my baked goods for resale to anyone else but myself to its entirety” (GT20-13).

[140] The Tribunal agrees with the Respondent’s submission there is some question as to why someone would register a business in order to cook for themselves in their own home. The Appellant testified that the bakery supplier did not sell retail to the public and required that she obtain a Master Business License in order to sell to her. The Appellant’s explanation is not entirely implausible and was not challenged by the Respondent at the hearing. The Tribunal accepts there is no evidence that the Appellant earned any income from her registered business.

Based on the evidence, on balance, the Tribunal is unable to conclude the Appellant ran and operated a home business on or after the MQP, which evidenced a capacity to work.

### **Activities of Daily Living**

[141] The Tribunal is not satisfied that the Appellant's limitations in the community or in terms of her activities of daily living reflect a severe disability as defined in the CPP on or before the MQP and continuously afterwards.

[142] The Appellant testified as to her functional limitations at the hearing. Her mother provided corroborative testimony.

[143] In the Appellant's submission date-stamped received by the Tribunal on January 20, 2015 (GT-20), the Appellant's legal representative stated she drives locally approximately once a week if that. She also drives about one-half hour to and from her home for medical appointments. She is accompanied by a family member to the supermarket. She is cautious not to go down aisles with cleaning solutions or foods which have smells or irritants.

[144] The Appellant testified she shops for clothes/shoes locally and goes to the local/small Ministry of Transportation Office to renew her driver's license.

[145] The Tribunal is not persuaded that the Appellant is strictly housebound or shut-in, which might render her severely disabled as defined in the CPP. She is able to go grocery shopping or other places in the community, albeit with precautions, such as wearing a mask and avoiding certain aisles in the supermarket and can drive.

### **Previously Adjourned Hearings**

[146] The Appellant testified she became sick prior to the first scheduled hearing of her appeal after she was exposed to toxic fumes in the hotel washroom of the building in which the hearing was being held. She indicated this was the strongest smell she ever came across in a public bathroom and questioned whether it was set up or manufactured. She further confirmed that when she entered the hearing room, she smelled a scent, which her legal representative acknowledged he applied earlier that morning.

[147] The Tribunal had an opportunity to witness the Appellant's reaction and does not question its veracity. Clearly, if the Appellant is exposed to a very strong scent, as she indicates she experienced in the hotel bathroom, she will experience a serious adverse reaction. However, the Appellant also indicated she was not bothered by her legal representative's after-shave when she was sitting near him outside the hearing room prior to the start of the hearing (albeit not as close as she was to him in the hearing room). It was only after she was sensitized to the odour in the bathroom, that she was disturbed by his after shave.

[148] Based on the evidence, the Tribunal is not satisfied, on balance, that the Appellant would have been prevented from proceeding with the hearing, if she were not exposed to the strong cleaning scent in the hotel bathroom, which she herself described as one of the strongest smells she encountered in a public bathroom.

[149] The Tribunal has also considered the Appellant's oral testimony and written explanation of the circumstances resulting in the second adjournment of her appeal. The Appellant explained that the evening before the return date of her hearing, one of her son's friends came to the house. He was wearing cologne. She had an adverse reaction and had to go to the hospital. She filed medical reports from the hospital which corroborated her testimony.

[150] Once again, the Tribunal does not question that if the Appellant is exposed to a strong cologne or perfume, she may experience an adverse reaction, such as the one she experienced the evening before the May 2015 hearing. The Tribunal is further satisfied if the Appellant were exposed to cologne or perfume in the workplace, this could trigger adverse reactions and render the workplace unfit for her.

[151] The Tribunal finds it interesting that apart from her 2008 workplace exposure to dust and aerosol sprays, for which she required surgery due to a cyst on her eye, the medical record is bereft of ongoing reports evidencing emergency hospital visits due to exposure to triggers, apart from the May 2015 hospital report. Despite the Appellant's evidence that she goes out in the community to buy shoes, clothes, goes grocery shopping (albeit with precautions) and drives, she has not encountered severe reactions of the type she did in 2015, almost four and one-half years after the MQP. The Tribunal also notes she testified she had many interviews with prospective employers between September 2008 and August 2010. Although she testified that some

prospective employers wore perfumes or colognes and that she could not continue some interviews, she did not describe any incidents where she suffered an adverse reaction of the type that occurred in May 2015 including having to attend the hospital.

[152] In conclusion on this point, the Tribunal is not satisfied that the circumstances resulting in the two previous adjourned hearings, reflected a severe disability as defined in the CPP on or before the MQP in the context of a workplace that would accommodate the Appellant's disability.

### **Work Inside the Home**

[153] Finally, if the Tribunal is mistaken in its view that the Appellant was not severely disabled as defined in the CPP on or before the MQP since she could pursue work in the competitive environment at a place of employment, which accommodated her disability up to the point of undue hardship, the Tribunal finds that the Appellant retained residual capacity to work inside the home.

[154] In order to qualify for CPP benefits, an applicant must show they are incapable regularly of pursuing any substantially gainful occupation including full-time, part-time and seasonal work as well as work other than one's previous occupation. The Appellant completed Grade 12, attended college and obtained a diploma as a legal assistant. She had worked as a customer service representative.

[155] 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).

[156] Although the Appellant indicated she was unable to find a job where she could work from inside the home, the Tribunal is satisfied the Appellant had residual capacity to work at home, where she would not be exposed to noxious fumes or irritants and could reasonably control her environment. In today's economy, there are numerous jobs which are home based, where the employee requires a phone and/or computer to operate and is not required regularly to attend the employer's head office.

[157] The question before the Tribunal is whether the Appellant possessed residual capacity regularly to pursue such work and not whether she was successful in finding such work. She has not presented evidence to the satisfaction of the Tribunal that she would be unsuccessful in terms of obtaining and maintaining such employment by reason of her health condition.

**Prolonged**

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

**CONCLUSION**

[159] The appeal is dismissed.

Jeffrey Steinberg  
Member, General Division - Income Security