Citation: ***J. P. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 143**

Date: August 24, 2015

File number: GT-125470

GENERAL DIVISION - Income Security Section

Between:

J. P.

Appellant

and

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

Respondent

Decision by: Verlyn Francis, Member, General Division - Income Security Section

Heard by Questions and answers on June 22, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 12, 2012. 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 Social Security Tribunal (Tribunal) in April 2013.

[2] On this appeal, the Appellant is represented by Queen's Legal Aid.

[3] The hearing of this appeal was by Questions and answers for the following reasons:

a) The form of hearing is most appropriate to allow for multiple participants;

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

c) The issues under appeal are not complex;

d) There are gaps in the information in the file and/or a need for clarification;

e) Credibility is not a prevailing issue; and

f) 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

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[8] At the time her application was received in March 2012, the Appellant's Record of Earnings (ROE) at that time disclosed her last contribution to be in 2011. In its submissions, the Respondent at GT9-7 provided the Appellant's updated ROE showing valid contributions up to and including 2014. Based on this updated ROE, the Appellant now had valid contributions from 1988 to 2014. In accordance with subsection 44(2)(a)(i.1) of the CPP, calculating three of the last six years with 25 years of contribution, the Tribunal finds that the Appellant's MQP date is December 31, 2017.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the Tribunal's Decision.

EVIDENCE

[10] The Appellant was 47 years old at the date of the decision, and will be 49 years of age at her MQP. She received her Ontario Secondary School Diploma in June 1998 after leaving school in Grade 10. She also undertook a 2-year Graphic Design course, a 2-year Diploma in Medical Office Administration from St. Lawrence College in April 2003, a 1-year hairstylist course and an 8-month course as a healthcare aide.

[11] She had been employed as a clerk / office assistant from October 27, 2006 to March 4, 2010. From March 16, 2011 to July 19, 2011, she was a scheduler / records and staffing clerk at Rideaucrest Nursing Home. She indicates she was terminated because she was not a "good fit". The Appellant also indicated that she received regular Employment Insurance benefits from June 27, 2010 to June 25, 2011.

[12] The Appellant indicates in the Questionnaire for Disability Benefits which she completed on April 24, 2012, that she had to do lighter or different type of work because of her condition. She indicated she was restricted to only desk work because she was unable to do any quick bending and lifting due to dizziness and vertigo. She was given a different type of position because it had access to outside light and not just fluorescent which did not agree with her.

[13] She indicates that her physician told her she can return to work when she feels well enough so she has tried. She indicates that she plans to return to work or seek work in the near future only through Frontenac County Mental Health. She has no plans to return to her former employment but indicates that she will start to look for a new job in 2012.

[14] The Appellant states that her illnesses are the following:

a) Meniere's. Symptoms are tinnitus in right ear non-stop, dizziness off and on each day, and nausea off and on each day.

b) Asperger's. Type of autism she has had all her life.

[15] She indicates that these conditions keep her from working because Meniere's gives her constant ringing in her ear and she cannot concentrate. She also has headaches, dizziness and nausea. The Appellant claims that Asperger's has caused her to lose every job she has had.

People have difficulties understanding her. She is misunderstood. She has difficulties learning. She can learn but she needs time to do this and, she claims, she is different from normal people so she tends to not get a chance to try.

[16] In addition, she has gastro-intestinal difficulties over the past five years. She claims she has to be careful what she eats and sometimes she has no idea what causes my diarrhea. Her eating habits can also suffer due to this as she is always uncertain of what she can eat.

[17] In describing what activities she had to stop, the Appellant said she did not have the stamina she used to have. She did not seem to be able to feel chipper and awake even though she got eight hours sleep. She would be afraid to go downhill skiing anymore. She had skied all her life but she stopped skiing five years ago. She was too dizzy and afraid of falling. She would love to volunteer and did so for her city for four years but just does not feel up to it.

[18] The Appellant claims that she has the following difficulties and functional limitations: She was in a major car accident and must be in an ergonomic desk and the chair to be comfortable. For walking, Meniere's goes to her knees. For Lifting and carrying, reaching and bending, the Appellant indicates, during an "attack" Meniere's, cannot do anything. Self-care drops off to nothing unless she is going to work. Suspicion of others causes trouble to develop working relationships. Loose stools seem to be a problem ever since her GI issues from about five years ago. Her household maintenance declines when she is depressed / anxious. Constant loud (extreme at times) ringing in right ear. Sometimes speck does not flow properly compared to what she is thinking. She cannot always control comments that are hurtful to others but she claims she cannot always say until it is out. She has definite issues with memory which has become worse in the last five years and she does have major difficulties with this. She has constant problems with concentration. She has to be alone without disruption, able to receive outside lighting and cannot be in a busy loud space at all. She has been on a lot of sleep meds for over 10 years. If she does not medicate, she cannot get sleep. For driving, there are concentration issues. She needs to memorize roads to be sure. As far as using public transportation, she was anxious of smells, germs, crowds, pressure from outside world for attention. Staying inside, being away from others feels more comfortable for her.

[19] She indicated that Dr. Sabina Sladic is her new family physician because her other doctor retired after 26 years.

[20] The Appellant indicates that the medications she was taking at the time of her application were: Demulen 30, 1 tablet daily; Cipralex 20 mg daily, Seroquel 25 mg nightly, Oxazapam 45 mg nightly as needed.

[21] On the question of Vocational Rehabilitation, the Appellant indicated that she was prepared to undergo an assessment but indicates she was involved with psychiatric rehabilitation at that time with Frontenac County Mental Health. She had previously been involved in a rehabilitation program for a year after she had a shoulder surgery.

[22] **MEDICAL EVIDENCE**

[23] The Appellant submitted numerous reports on her various medical conditions from 2003 to 2013. The Tribunal sets out these reports to show the extensive consultations that have been afforded to the Appellant.

[24] The notes of Dr. Joe Burley dated January 8, 2003, were submitted as evidence. They indicate that the Appellant was a 34-year old college student taking a 2-year medical office course. At the end of the course, she hoped to get a job at a hospital. Previously, she had enjoyed being a nurse at a home for the elderly. She enjoyed that relationship with the elderly and had stopped because it was not enough money and was hard on her car. The day prior to seeing Dr. Burley, a two-month relationship had ended.

[25] The Appellant was referred to Dr. Burley because of depression and reported that she had her first bout of depression in 1996 after a 10-year relationship ended. That episode of depression lasted a year and she reported she had never been the same since then. She reported her mood had not been good since October, in spite of taking Celexa and she believed that was because she increasingly recognized her life “sucks”. The Appellant indicated to Dr. Burley that she had seen a couple of mental health professionals but found them very unsuccessful and had stopped after a few sessions. She would like to have counseling. She indicated that she drank too much and she should stop drinking. She used alcohol to erase her problems and she would go to the bar most Friday nights and drink until the bar closes. She did this out of boredom and

for social interaction. She stopped smoking the previous month after smoking for 15 years. She did not have a regular exercise program.

[26] Dr. Burley's diagnosis was Depression with intermittent substance abuse, borderline personality disorder, poor interpersonal skills, and social isolation. He referred her to the Personality Disorders Service at KPH, increased Citalopram to 30 mg od for two weeks which could be increased to 40 if no response; Trazadone 50 mg qhs to help sleep and, if ineffective, try Oxazepam 30 mg for two months.

[27] Dr. S. McNevin, Psychiatrist, Personality Disorders Service, Providence Continuing Care Centre, initially assessed the Appellant on February 18, 2003. At that time she was a full-time St. Lawrence College student, completing her second year of Medical Office Administration. She was living in an apartment on her own supported by money an inheritance from her adoptive father. She was then largely isolated and had a history of depression and interpersonal difficulties. She was referred to Dr. McNevin because she was very lonely and feeling stuck and being unable to have social success.

[28] She was started on antidepressant Citalopram, initially at 20 mg. which was subsequently increased to 30 and finally 40 mg. This improved her mood. She has ongoing difficulties with her sleep and insisted on getting regular sleeping medication. She was tried on Oxazepam initially and because of caregiver concerns, she was tried on Trazodone which proved unhelpful. At the time of the assessment, she was on Oxazepam. Without this medication, she has middle and terminal insomnia. She has had longstanding suicidal ideation and has no plan or intent to act upon it but does feel in some ways that death would be a relief and she believes no one would really miss her.

[29] In addition, she had had longstanding difficulties in her speech. She has a great deal of difficulty expressing herself. She knows what she wants to say but the right words do not seem to come out. This appeared to relate to her difficulty attaining the typing speed required to finish her training program and obtain employment in the medical administration field. This was frustrating for her.

[30] At the time of her assessment, she wanted to do more about her difficulties, particularly addressing problems in interpersonal relationships. In 1982, she had been involved in family therapy for a number of months but the Appellant felt the therapy was discontinued because the therapists recognized that she did not have problems. In addition to the 1996 depressive episode set out above, she recently had another episode in October 2002, and she saw Dr. Burley in January 2003 who was providing psychiatric care under the shared care model with her family physician.

[31] Her development history, as set out by Dr. McNevin, reveals that the Appellant was born and raised in Quebec. She claims that large stretches of her life are "blank. She lived with different friends over time and eventually dropped out of school. Over the years, she subsequently managed to get her Grade 12 and at the time of the assessment, she informed Dr. McNevin she had over five years of college, usually attending programs successfully. She got a hairdressing license, worked as a health care aid for five or six years and worked in a bar while going to school.

[32] Using DSM IV, Dr. McNevin formed the following diagnostic impression of the Appellant: Axis I: major depressive disorder – recurrent, moderate severity in partial remission; Query cognitive disorder secondary to head injury; alcohol abuse. Axis II: borderline personality disorder. Axis IV: problems with primary support group and social environment, educational, occupational, economic, and access to health care problems. Axis V: GAF 52. The psychiatrist went on to say:

> "Patient describes many attributes of a personality disorder. It would appear that many of the extremes of this have been much less evident in recent years. She does continue to have a great sense of loneliness, fears of abandonment and is sensitive to the possibility of rejection…. There is a quality to her interpersonal relations which leads one to see why others may find her as someone they would like to pick on or that they would have difficulty approaching or relating to in friendship. She does tend to cast blame on others and show some evidence of idealizing and devaluing. She does complain of affective instability, now complicated by a recurrence of a major depressive episode. She has also responded well to her

current treatment. She reveals a history of alcohol abuse and remains at risk for that."

[33] Dr. McNevin recommended some screening neuropsychological testing to determine whether there was post-concussive syndrome as a result of a head trauma suffered in the motor vehicle accident at age 13. She also suggested that the Appellant be enrolled in the Managing Powerful Emotions Program and the Chrysalis Day Hospital Program while her community care providers continue their vital role in managing her care.

[34] On February 20, 2003, Dr. McNevin reported to Dr. Joe Burley, copied to Dr. Elizabeth DuBois, following the initial assessment of the Appellant. The psychiatrist noted that the Appellant presented more intact than many of the clients who attended the Chrysalis Day Hospital Program. The Appellant indicated that it was her desire to return to full-time paid work as soon as possible. While they considered this a worthy goal and not something to interfere with they thought she may still benefit from some of the services they had to offer, in particular, the Managing Powerful Emotions group which began that September. Other recommendations they made was an urgent consideration of the possibility that there was some cognitive deficits which are contributing to some of the Appellant's problems. The psychiatrist noted that some minor cognitive impairments are common in individuals with personality disorders and being aware of them can often be helpful in both therapy and work accommodation and placement. It was also noted that the Appellant was having considerable difficulty cracking the 55 word per minute minimum requirement for employment at that time. Since the Centre offered only group programs, Dr. McNevin declined to take her as his own patient and suggested that another physician should manage the Appellant's care.

[35] Dr. Lawrence Hookey and Dr. Eric Raddatz , Gastrointestinal (GI) Division of the Hotel Dieu Hospital, saw the Appellant on November 7, 2007, on referral from her family doctor in regard to an episode of diarrhea. She had had an approximately 6-week episode of diarrhea during June and July. After taking a history from the Appellant, she was examined and appeared well. Her abdomen was soft, non-tender with no palpable masses. Bowel sounds were present and there was no hepatosplenomegaly. The doctors concluded that this had been an acute episode of diarrhea which had since resolved. The explanation they thought was most likely

viral gastro with some elements of post-infectious irritable bowel. She was feeling better although her bowel movements had not completely returned to normal. They ordered blood works and liver function tests to rule out other pathologies and indicated they would follow up four months thereafter.

[36] On December 3, 2007, Dr. Russell Hollins, ear nose and throat specialist, saw the Appellant on referral from Dr. Robert Bryson for sudden change in her hearing. After falling on the knees and wrist while walking, the following day she complained of buzzing in her right ear and a sensation of decreased hearing. She had no vertigo. She was otherwise healthy. Physical examination revealed normal looking ears bilaterally. Cranial nerve examination was normal. Cerebellar testing was normal. An audiogram confirmed the presence of a mostly low frequency sensory neural hearing loss affecting the right ear with an average loss of about 20 decibels but maintaining good discrimination. The middle ear function was normal. Dr. Hollins diagnosed a mild sudden sensory neural hearing loss from which he expected spontaneous recovery within two to four weeks. He explained to the patient there was no specific therapy and offered Prednisone by mouth which she refused.

[37] On January 2, 2008, Dr. R. Hollins saw the Appellant for vertigo. She reported three episodes of vertigo which lasted about three hours and left her feeling unwell the next day. They were true vertigo spells associated with nausea and vomiting. She had been prescribed Diazepam to control the episodes but was unsure whether they were helping. She felt her hearing had improved from her previous visit. On examination, Dr. Hollins noted that the ear looked normal and there was no evidence of any nystagmus and all the cranial nerves seemed to be functioning normally. An audiogram done that day showed a significant improvement in the hearing in the right ear and was within 5 decibels of normal. The doctor opined that the history and findings was consistent with Meniere's disease.

[38] Dr. L. Hookey of the GI Division, Hotel Dieu Hospital, reviewed the Appellant on February 27, 2008, for diarrhea. She was on medication of Meniere's disease that she felt was helping her but was reducing her appetite and leading to some weight loss. She therefore did not want to discontinue that medication. Dr. Hookey suggested Dronabinol s.5 mg bid to stimulate her appetite or, reluctantly, Megestrol acetate 800 mg a day.

[39] In a letter to the family physician dated June 9, 2009, the Manager and Registered physiotherapist at the Queen`s University Physical Therapy Clinic indicated that they had been treating the Appellant since November 10, 2008, for injuries secondary to a motor vehicle accident. He reported that, overall, she had progressed very well. She did continue to have constant aching pain in her right shoulder. They found positive tests for biceps and supraspinatus irritation. As a result of that finding, he referred the Appellant back to the family doctor for a diagnostic ultrasound or specialist referral.

[40] The audiologist at Canada Hearing Centre reported on July 24, 2009, that they had seen the Appellant for an audiological assessment. At that time she was being investigated by an Ear Nose and throat specialist for a diagnosis of Ménière`s disease. Her complaint at that time was constant ringing tinnitus in her right ear. She reported that it was difficult to concentrate on tasks at her desk in her then workplace as she found great effort was required to ignore tinnitus and the speech noise in her workplace. She reported that the increased effort to focus on her work and not on the tinnitus and background noise causes her to experience anxiety and stress. At that time, she felt should benefit from some type of noise reduction device to reduce the background noise in her workplace.

[41] On July 24, 2009, on referral from the family doctor, Dr. Allison De La Lis, audiologist, at Canada Hearing Centre, conducted an audiological assessment with audiogram and hearing aid evaluation which she interpreted as follows: Hearing thresholds were essentially within normal limits on the day of testing for both ears; impedance audiometry consistent with normal middle ear function; word recognition excellent right and left at 80 dB presentation level. She recommended and the Appellant consider the following: 1. Continued care by ENT re possible diagnosis of Meniere`s disease. 2. Evaluation of anxiety and stress reportedly caused at workplace by family physician or other healthcare professional, as arranged by family physician. 3. Discussed various coping mechanisms and treatments for tinnitus, including TRT program.

[42] Dr. Edmund Jones saw the Appellant on October 2, 2009, on referral from her family doctor. In his report, he indicated that the Appellant was referred with a history of Meniere's disease, and she was having significant difficulty with concentration and fatigue and loss of attention. The question for Dr. Jones was whether this "brain fog" could be associated with

Meniere's disease. Prior to the appointment, she had been taking Ritalin and that had essentially eliminated the "brain fog". She had had a few acute episodes of vertigo in December 2007 and some milder episodes in January of 2009 but none since. She reported that her hearing was normal but she did have ongoing tinnitus. She was taking Hydrochlorothiazide 25 mg po qd. On examination, the doctor found the tympanic membranes normal. Nasal examination revealed a moderate deviation of the nasal septum towards the right. The oral, pharyngeal and neck examinations were unremarkable.

[43] He recommended decreasing the dosage of Hydrochlorothiazide for a couple of months but if there was recurrence of the vertigo, he recommended reinstating the Hydrochlorothiazide. He did not think that the "brain fog" the Appellant experienced earlier in the year was related to her Meniere's disease. Dr. Jones felt that the hearing loss with subsequent recovery and the episodes of vertigo that she described were entirely in keeping with Meniere's disease. He noted that Meniere's disease is highly variable and some patients experience very long periods when the disease is quiescent, which he felt was the case with the Appellant.

[44] In his report dated November 19, 2009, Dr. Ryan Bicknell reported that he saw the Appellant in Clinic regarding right shoulder pain. She had been involved in a MVA in October 2008 and since then, had constant shoulder pain. She had done extensive physiotherapy which helped somewhat but was still problematic with overhead activities as well as night pain. On exam, she had full range of motion of her shoulder although pain with forward elevation and localized tenderness over her long headed biceps anteriorly. The doctor diagnosed a partial thickness cuff tear and more significantly long headed biceps tendonopathy. He discussed cortical steroid injection and arthroscopy and biceps tenodesis with potential rotator cuff repair. The Appellant selected to have the arthroscopy.

[45] On March 9, 2010, the Appellant was seen by Dr. Ryan Bicknell in the Orthopaedics Clinic at Hotel Dieu Hospital. She was then two months post arthroscopic right should debridement surgery with mid-lateral humerus pain. She reported pain at night and she then had a reduced range of motion. On examination, the doctor noted she was a healthy 41-year old. There was no muscle wasting. Her right shoulder was not tender, there was no swelling and the surgical wound had healed nicely. There was reduction in both internal and external rotation in

the right shoulder compared to the left, with internal rotation reduced more significantly than external rotation. There was also slight reduction in right shoulder power due to pain. The doctor prescribed ongoing physiotherapy to release a tight right posterior shoulder capsule, and recommended follow-up in three months.

[46] Dr. Edmund Jones reported on June 10, 2010 that he had seen the Appellant for audiometric assessment after she complained of worsening episodes of vertigo, secondary to Meniere's disease. She had been prescribed Hydrochlorothiazide and Flonase but reported no benefit from Flonase. She was under stress from being laid off from Queen's due to restructuring. Some of her symptoms were difficult to reconcile with Meniere's disease such as forgetfulness and always in a fog. She reported pain in the right ear with the recent attacks, she sometimes falls, and she could not tolerate loud noises. Since she had not responded to the therapy, he prescribed Propranolol 40mg po qd.

[47] Dr. Ryan Bicknell saw the Appellant on July 13, 2010, in the Orthopaedic Clinic after a right should diagnostic arthroscopy in December 2009. They found no abnormalities other than a bit of subacromial bursitis which was resected. She was fully recovered from the surgery but had not had a big change in her symptoms. She was quite happy that there was nothing that required surgical treatment.

[48] On July 14, 2010, Dr. Edmund Jones saw the Appellant in follow up for vertigo. She reported that Propranolol did not help and she had an attack the previous week where she was vomiting. She felt better that day but did report fullness and ringing nonstop, very loud. She felt nauseated and "pops Gravol like candy on a daily basis". Dr. Jones had nothing further to suggest and was referring her to Dr. Schramm for a second opinion. He was perplexed because she had failed all attempts at medical therapy. He noted that the Appellant had carried out internet research and wondered whether she would be a candidate for Meniett which the doctor said was very expensive and not clear whether it was effective. Dr. Jones noted that in her 2008 MRI, although not done specifically to rule out retrocochlear pathology, the posterior fossae were clearly visualized and reported as clear without evidence of posterior fossae abnormality. He then requisitioned a VNG and ABR.

[49] On August 17, 2010, Vestibular Lab at Hotel Dieu Hospital patient Report –VNG found that the gaze study showed no gaze nystagmus, Saccade was normal, Tracking was normal, Optokinetic was normal. There was unilateral weakness of 33% in the right ear.

[50] On August 18, 2010, the Appellant was seen in follow by Dr. Edmund Jones at Hotel Dieu Hospital. The doctor did not note any evidence of retrocochlear pathology. There was a unilateral caloric weakness of 33% in the right ear. The gaze, saccade, tracking and optokinetic tests were within normal limits. There was no positional nystagmus. At that time, she was applying for disability. The Appellant reported to the doctor that she had good and bad days but she could not rely on having sufficient good days to allow her to get comfortably into any new job. She found the tinnitus more pronounced on the right side. Her last attack was in July when she indicated it was so bad, she had to be physically escorted from her vehicle. Prior to that, she had an attack at home in June when she took an ambulance to the hospital so the attack could be documented. Dr. Edmund concluded that although, although Meniere's disease remains a possibility, she failed a trial of Hydrochlorothiazide and Serc. He referred her to Dr. David Schramm in Ottawa to see if he had any suggestions to offer regarding improving her symptom control.

[51] An Auditory Brainstem Response (ABR) Report dated August 18, 2010 was normal.

[52] On October 7, 2010, the Appellant was seen at the Hotel Dieu Hospital Clinic by Dr. Edmund Jones who reported that ABR and VNG were done on August 17th and she was being seen in follow up. The ABR was normal. She had an appointment to see Dr. Schramm in Ottawa in January. She had had a couple of dizzy days in the past week; otherwise she has not been bothered very much by dizziness. She did have ringing in the right ear then. She told the doctor that she been hired at Queen's and only lasted one week and was laid off again. She was unsure why she had been laid off, but she was able to work the entire week so absence from work due to illness was not a factor this time at least.

[53] On October 27, 2011, the Appellant saw Dr. Francis J. Jarrett, Associate Professor of Psychiatry, for a consultation regarding possibility of Asperger's Syndrome. The Appellant told him that she had had a disability all of her life, she had lost many jobs, had been bullied and picked on, and had no idea why. She told the doctor that she has been unable to understand social

cues and had some problems with learning disabilities. She observed that she was unable to type quickly, being repetitive and having poor memory. She indicated she could not learn under stress and when asked by the doctor, replied that she could not understand other people's emotions and has trouble developing empathy. She believed that these characteristics were getting worse. On direct questioning by the doctor, she said that she occasionally finds her speech is "garbled", and when she was at school, she was frequently bullied because she was "different".

[54] The Appellant told Dr. Jarrett that she suffered a bout of depression in 1996 which was characterized by poor sleep, depressed mood, lack of confidence in herself, and feelings of hopelessness. At that time she was working in a bar and began drinking heavily and since then, she has become abstinent. She does not remember major episodes of depression prior to 1996 but since then, she has often felt depressed, although not to the same extent as then. During this consultation with Dr. Jarrett in 2011, the Appellant reported that she felt depressed almost to the point of hopelessness, although she has never come near to harming herself. Her appetite was poor and, without Oxazepam, she thought she would be unable to sleep. Her energy varies but she sometimes can motivate herself and then become quite energetic. Her concentration is good and she said she was able to focus and get things done.

[55] In 2011, she was frustrated because she was unemployed and could not find work. She had a number of jobs but held two jobs for five years each: one as a health care aid and the other working in clinical trials at Queen's University. Her last job at that time was as a clerk at City Hall but she was let go two weeks before her probation period ended. The reason given was that she did not "fit in". She said had no idea what that meant but it happened to her all her life.

[56] She did not complete high school, although she later went back to college to get her Grade 12. At the college level, she qualified as a health care aid and completed a course in graphic design. Dr. Jarrett reported that the Appellant was of the view that she was quite intelligent, and she believes she will be able to attend university at some point.

[57] The Appellant reported to Dr. Jarrett that she was born in Montreal and adopted at five weeks of age. She outlined moving to Ontario when she was eight years after her adopted parents separated and her difficult relationship with her mother which resulted in her leaving home at fifteen. In 2011, she was living in her own condominium but, because she was unemployed, she

was not sure how long that would continue. She had some friends but contact was mostly by telephone.

[58] Dr. Jarrett noted that the Appellant's day consisted of sleeping in, and eventually getting up to walk her three dogs. She prepares her own meals, watches television, cleans and tidies her condominium. She was applying for jobs but did not feel she would achieve anything.

[59] The Appellant's history of her health was that she suffered from an episode of Meniere 's disease in 2008 and has chronic tinnitus following that. Two or three years prior, she had a bout of diarrhea which was never explained and left her with minor bowel problems. She had had a head injury as a child which resulted in her being in a coma for two days. She does not smoke, had not had a drink of alcohol in three years, never used street drugs. Her medication at that time was Citalopram 20 mg daily, Oxazepam 45 mg at night and she had been on oral contraceptive for thirty years.

[60] As far as her personality, she recognized that people see her as "different", and she did not get along well with men. She finds it difficult to tolerate some people and is lacking in trust. She had recently been in touch with Frontenac Community Mental Health Services and had met with a counsellor a couple of times. She thought that was helpful and was going to continue.

[61] As far as presentation, Dr. Jarrett observed that he did not notice stereotype movements, repetitive movements, abnormalities of speech, or any difficulties in maintaining eye contact. In his assessment, Dr. Jarrett indicates that, after a specific enquiry from the Appellant, there is no question that some of the characteristics of Asperger's Syndrome are present, but it seems mild. In view of her traumatic upbringing, and the disappointments that she has suffered, it might very well be that she never had the opportunity, in a secure environment, to learn adaptive social skills. It would be advisable to have psychological testing with a view to determining whether or not the Appellant has specific cognitive deficits. There is no need to change her medication which seemed to have afforded the Appellant some relief from her depressed mood. She would benefit from therapy directed at her view of herself and she would also benefit from learning and practicing social skills.

[62] The Frontenac Community Mental Health & Addiction Services Vocational Coordinator wrote a report on January 26, 2012, supporting the Appellant`s application for Ontario Disability Support Program (ODSP). She indicated that the Appellant has been experiencing severe mental health symptoms, specifically depression and anxiety, for most of her adult life. She has tried to work but struggled in employment situations because of her inability to work with other people around and to communicate in a manner that will allow her to keep her job. At the time of the report, the Appellant was on Ontario Works after losing a job at Queen`s after only a few hours. She was then receiving mental health support and vocational rehabilitation services in a cognitive rehabilitation program at Frontenac Community Mental Health and Addiction Services to her help her to be more successful in managing employment. The program included subjects such as reducing impulsivity, increasing problem solving and improving emotional control. Although the Coordinator felt that this program would increase the Appellant`s ability to maintain employment, she felt the Appellant would have to gradually test those skills in the workplace in order to anchor changes she was learning. The Coordinator concluded that the Appellant`s psychiatric conditions have caused her a depth of disability that has not allowed her to move forward with employment successfully.

[63] Dr. Sabina Sladic, Family physician, completed the Medical Report section of the Application on February 21, 2012. Dr. Sladic reported that she had known the Appellant since August 19, 2003 and started treating her for her main condition in August 2006. The last visit prior to the completion of the Report was February 14, 2012. The doctor`s diagnoses are:

a) Asperger`s syndrome

b) Meniere's

c) Depression

d) Irritable Bowel.

[64] Relevant medical history indicates: Asperger's lifelong although only recently recognized, causing impairment in social functioning. Meniere's causing debilitating attacks of vertigo and vomiting with daily tinnitus. The Appellant had not been admitted to hospital in the past two years.

[65] In describing the relevant physical findings and functional limitations, Dr. Sladic indicated:

a) Asperger`s: social cues and interpersonal recognition are affected. This causes significant difficulty interacting with others. As a result she is frequently singled out as not fitting in and is picked on.

b) Meniere's causes sudden unpredictable attacks of vertigo and nausea which causes the Appellant to be off balance. This can happen daily or monthly. She has daily, almost constant ringing in the ear. The result is difficulty concentrating, clouded thought, makes it harder to learn new material.

c) Depression: Medications help but not completely put her in remission. She has poor concentration, poor memory, easily tearful.

d) With IBS, the Appellant has unpredictable diarrhea with stomach pain.

As of February 2012, there were no further consultations or medical investigations planned for these conditions. Her medications at that time were Cipralex 20mg, Seroquel 25 mg qhs, and Oxazepam 45 mg qhs prn. The Treatment consisted of counselling, vocational guidance for people with mental health issues, and "Ready, get, go" program.

[66] Dr. Sladic`s prognosis was: Asperger`s was lifelong and not likely to change; Ménière`s would wax and wane throughout her life; Depression was chronic since her teens and not likely to change; and the IBS would wax and wane through her life. Dr. Sladic noted that the Appellant is incredibly determined to work and has repeatedly picked herself up from employment problems. The doctor suggested to her many times since 2003 to consider provincial disability but she persevered.

[67] On May 24, 2013, Jacqueline Stoneman, Vocational Coordinator, wrote a letter indicating that the Appellant has struggled with employment for most of her adult life as a result of challenges of mental illness as well as Meniere's disease. After a period of rehabilitation, the Appellant was working part-time as a hairdresser and getting along well with the owner. She was working shorter shifts and working independently of other people so she is not faced with too

many people at once. The Appellant had come to realize that it was better to accept her limitations and be happy. She no longer tried to match her employment expectations with her education and training instead of with her emotional capacity. This would restrict her earning capacity but she accepted that it will help her to stay mentally well.

[68] Dr. Carolyn Borins, covering for Dr. Sladic, family physician, wrote on April 23, 2013, that the Appellant suffers from depression, ADHD and Meniere's disease which make it difficult for her to regularly pursue substantially gainful occupation. Stressors in the workplace can trigger her Meniere's disease and worsen her depression and ADHD. At that time, the Appellant had not undertaken any recent testing and not seeing any specialists.

SUBMISSIONS

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

a) Her numerous medical conditions cumulatively constitute a severe and prolonged disability rendering her unable to regularly pursue any substantially gainful occupation. She suffers from a number of medical conditions including depression, ADHD, irritable bowel syndrome (IBS), Meniere's disease and Asperger's syndrome. She suffers from a long history of depression dating back to her teenage years and experienced her most serious depression in 2006. Since 2008, she has experienced daily dizziness and nausea and constant ringing in the right ear.

b) These conditions are life-long and make it extremely difficult for the Appellant to pursue and maintain substantial meaningful employment. Although her family doctor commented that she is incredibly determined to work and has repeatedly picked herself up from employment problems, her medical conditions are made more severe by workplace stressors which trigger the symptoms of Meniere's disease and worsen both her depression and ADHD. The Vocational Coordinator of Frontenac Community Mental Health & Addiction Services has commented that the Appellant's condition are complex and over time, her psychiatric conditions have caused her a depth of disability that has not allowed her to move forward in her employment successfully.

c) Her medical conditions have continued for longer than one and since the onset of her Meniere's disease in 2008 and, based on her medical records, her conditions are continuous and lifelong. They are, therefore, prolonged.

d) In August 2012, the Appellant succeeded in her application for income support through the Ontario Disability Support Program (ODSP).

e) The fact that the Appellant returned to work part-time as a hair dresser in June 2012 and continues to work in that capacity should not preclude a finding of disability. Section 68.1(1) of the Regulations provides that an occupation is substantially gainful if it provides a salary or wages equal to or greater than the maximum annual amount a person receives as a disability pension. The Quarterly Reports of Canada Pension Plan Monthly Amounts for monthly amounts from October to December 2013 and 2014 reveal that the maximum annual amount a person could receive as a disability pension was $14,554.80 in 2013 and $14,836.20 in 2014. This is more than the $8,458 in 2013 and $7,852 in 2014 that the Appellant earned from her part-time work as a hair dresser.

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

a) The Appellant was 43 years of age at the time she applied for CPP disability benefit and she has a college education. It was reported that she had difficulties working with others, but she worked full-time as an office assistant form October 2006 to March 2010 and worked twenty-two to thirty hours a week from March 2011 to July 2011 as a scheduler/staffing clerk and stopped working for non-medical reasons. She completed vocational rehab training and has worked regularly part-time since June 2012.

b) The Appellant returned to work part-time as a hair dresser in June 2012 and she continues to work in this capacity. Her latest Record of Earnings indicates that she had earnings of $8,458 in 2013 and $7,852 in 2014. These earnings were with three salons. And suggests that the Applicant has returned to work. Additional medical evidence provided in support of her appeal does not support her incapacity for all work. This changes her MQP from December 31, 2014 to December 31, 2017.

c) While she may have limitations, and works generally less than 24 hours a week with an average shift of four hours, this shows she has capacity to perform part-time work, modified activities, sedentary occupations or attend school. This precludes a finding of disability within the meaning of the CPP as it is an indication of capacity to work.

d) Dr. Slade indicates in her report that the Appellant's conditions of depression, ADHD and Meniere's disease are life-long and she opined that these health problems would make it difficult for the Appellant to pursue substantially gainful employment, no testing, treatment or specialist involvement supported this opinion. While stress may exacerbate the Appellant's symptoms, no additional evidence was provided to support a severe disability that prevents her from performing all types of suitable work or retraining. In fact, she returned to alternate part-time work.

e) Even though the Appellant explained that she had limitations, her limitations would not preclude all type of work. It is a reasonable option that she continues to do some type of work even if part-time.

f) In response to the Appellant's submission that her work as a hair dresser is not substantially gainful, she is self-employed and her posted T1 earnings may not be a true reflection of her earning capacity. For CPP purposes, the capacity to perform part-time work modified activity, or sedentary work may preclude a finding of disability as it is an indication of capacity to work.

g) The medical evidence provided does not support any severe and prolonged medical condition which would render the Appellant incapable of all work prior to her MQP of December 31, 2017. Accordingly, she is not eligible for disability benefits under the CPP and her appeal should be dismissed.

ANALYSIS

[71] Since her MQP is in the future, December 31, 2017, the Appellant must prove on a balance of probabilities that she had a severe and prolonged disability as of the date of this decision.

Severe

[72] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A person with a severe disability must not only be unable to do their usual job, but also unable to do any job they might be reasonably expected to do. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Guiding Principles

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

[74] In addition to his background, all of the Appellant's impairments that affect employability are to be considered, not just the biggest or the main impairment (*Bungay v. Canada (A.G.*), 2011 FCA 47).

[75] It is the applicant's capacity to work and not the diagnosis of her disease that determines whether the disability is "severe" under the CPP (*Klabouch v. Canada (MSD)*, 2008 FCA 33.

[76] Where an appellant argued that his medical condition prevented him from devoting enough time to his business to make it successful, the Court found capacity and stated that profitability of a business venture is not necessarily an indicator of capacity (*Kiriakidis v. Canada (A.G)*, 2011 FCA 316).

[77] The determination of "substantially gainful" cannot be decided by one-size-fits-all figure particularly one that coincides with the current maximum retirement benefit. It requires a judgmental assessment which could involve considering local income levels and cost of living, as well as other factors specific to the circumstances of the individual (*MSD v. Nicholson* (April 17, 2007) CP 24143 (PAB).

[78] 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).

Application of the Guiding Principles

[79] In assessing the severe criterion in a real world context as required by *Villani*, the Tribunal takes into consideration that the Appellant is 47 years old. She received her Ontario Secondary School Diploma in June 1998 after leaving school in Grade 10. She received a diploma from a 1-year hairstylist course in 1998, and she attended an 8-month course as a healthcare aide. She also undertook a 2-year Graphic Design course and a 2-year Diploma in Medical Office Administration from St. Lawrence College in April 2003. She was employed as a clerk / office assistant from October 2006 to March 2010. When she stopped working on July 19, 2011, she was a scheduler / records and staffing clerk at Rideaucrest Nursing Home. She had started that employment on March 16, 2011, and was terminated because she was not a "good fit". The Tribunal finds that, based on her evidence, the Appellant did not leave her employment in March 2011 because of a medical condition.

[80] The Appellant indicated in her Questionnaire which accompanied her application in March 2012, that she suffers from Meniere's disease which keeps her from working because of constant ringing in her ear and she cannot concentrate. She also had dizziness and nausea. In addition, she loses every job she has because of her Asperger's which cause people to have difficulties understanding her. She needs time to learn things and people tend not to give her the opportunity. She also described having gastro-intestinal difficulties over the past five years. The voluminous medical evidence indicates that the Appellant has suffered from depression along with the other conditions she set out. It chronicles a car accident at age 13 with possible head

injury, her first bout of depression in 1996, interpersonal difficulties, alcohol abuse, another depressive episode in October 2002.

[81] By 2003, Dr. McNevin diagnosed the Appellant as having major depressive disorder, recurrent, moderate severity in partial remission; and borderline personality disorder. In February 2003 when he saw her a second time, Dr. McNevin noted the Appellant presented more intact than many clients who attended the Chrysalis Day Hospital Program and, importantly, she expressed a desire to return to full-time paid work as soon as possible. While he thought it was worthy goal, they were of the opinion that the Appellant might still benefit from some of their services. In December 2007, Dr. Hollins diagnosed a mild sudden sensory neural hearing loss form which he expected spontaneous recovery within two to four weeks. He offered the appellant Prednisone by mouth but she refused. When the Appellant saw Dr. Hollins in January 2008 complaining of vertigo spells associated with nausea and vomiting, he noted she showed a significant improvement in the hearing in the right ear and the ear looked normal, there was no evidence of any nystagmus and all cranial nerves seemed to be functioning normally. He indicated the history and findings were consistent with Meniere's disease. After several consultations for hearing difficulties, Dr. De La Lis concluded after testing that her hearing thresholds were essentially normal limits and normal middle ear function. In October 2009, she reported having "brain fog" and saw Dr. Jones to determine whether it was associated with Meniere's disease. He concluded that the brain fog was related to Meniere's but that her hearing loss and recovery and episodes of vertigo were in keeping with the disease. In August 2010 the Appellant told Dr. Jones that she had good and bad days but she could not rely on having sufficient good days to allow her to get comfortably into any new job and he referred her to Dr. Schramm for suggestions on improving symptom control for her Meniere's disease.

[82] By November 2011, the Appellant reported to Dr. Jarrett that her concentration was good and she was able to focus and get things done. The Appellant reported that she was frustrated because she had not been able to find employment but felt she was quite intelligent and would return to university at some point. She recognized that counselling at Frontenac Community Mental Health Services was helping her interpersonal difficulties and she intended to continue.

[83] Based on the totality of the evidence, the Tribunal finds that the Appellant does suffer from depression, Meniere's disease, Asperger's and gastro-intestinal issues. Looking at the Appellant's background and all her impairments, as required by *Bungay*, the question is whether these conditions render the Appellant incapable regularly of pursuing any substantially gainful occupation. The Tribunal finds that they do not.

[84] In January 2012, the Vocational Coordinator at Frontenac Community Mental Health & Addition Services reported that the Appellant struggled in employment situations because of her inability to work with other people around and to communicate in a manner that will allow her to keep her job. The Appellant also discussed her interpersonal difficulties with several professionals. However, in January 2012, she was receiving mental health support and vocational rehabilitation services in a cognitive rehabilitation program to help her to be more successful in managing employment. The Coordinator felt that this program would increase the Appellant's ability to maintain employment. By May 2013, Ms. Stoneman, Vocational Coordinator, wrote that accommodation had been made so that the Appellant was working part-time as a hairdresser and getting along well with the owner. The Appellant's representative also confirmed in their submission dated June 2015 that the Appellant continues to work part-time as a hair dresser. Ms. Stoneman noted that the Appellant had come to realize that it was better to accept her limitations and be happy. She no longer tried to match her employment expectations with just her education and training. Through counselling, the Appellant had learned to obtain and maintain employment by also matching her employment expectations with her emotional capacity. Ms. Stoneman reported that while this would restrict her earning capacity, the Appellant accepted that it will help her to stay mentally well.

[85] The Tribunal accepts that, once the Appellant understood through counselling that she had to find employment that matched her emotional capacity and not just her education, she was able to obtain and maintain employment. Based on all the evidence, the Tribunal finds that although the Appellant has Meniere's disease, Asperger, depression and gastro-intestinal problems, she does have the capacity to work. To her credit, she has demonstrated that capacity by working as a hairdresser part-time since June 2012 (*Klabouch).*

[86] Is the Appellant's part-time hairdressing job substantially gainful occupation? In deciding this question, the Tribunal keeps in mind that the Federal Court of Appeal stated in *Kiriakidis* that capacity to work is based on all the evidence and that profitability of a business venture is not necessarily an indicator of capacity.

[87] The Respondent submits the Tribunal should find that the earnings figures submitted by the Appellant are lower than her actual income because she is self-employed. As there is no evidence to support it, the Tribunal declines to make such a finding.

[88] The Appellant and her representative state that she has been working approximately 24 hours a week in four-hour shifts as a hairdresser since June 2012 and continues to do so. She argues that since her earnings are less than the maximum annual amount a person could receive as a disability pension, her employment should be found to be not substantially gainful. The Tribunal notes that this submission relies on subsection 68.1(1) of the *CPP Regulations* which came into effect on May 29, 2014 and applies to decisions made by the Respondent after that date. In this case, the initial decision was made on July 3, 2012 and the reconsideration decision is dated December 7, 2012. This provision can, therefore, not be applied to the Appellant in this case. While not bound by the principle set out in *Nicholson*, the Tribunal agrees that the determination for "substantially gainful" cannot be decided by a one-size-fits-all figure, particularly one that coincides with the current maximum disability pension benefit.

[89] The Appellant's Record of Earnings (ROE) dated May 2015 and filed at GT13-4 shows that her earnings surpassed the year's basic exemption (YBE) in every year from 1988 to 2014. Her part-time earnings for 2011, 2012, 2013 and 2014 were $13,421, $5,174, $8,458, and $8,793 respectively. These are lower than the $23,715 to $37,279 she made between 2006 and 2010 when she worked full-time in one position as a clerk/office assistant. However, her 2011 - 2014 earnings are similar to her earnings between 2002 and 2005 when her earnings were $5,484, $9,566, $15,421 and $3,836 respectively. Capacity to work is based on all the evidence and profitability of a business venture is not necessarily an indicator of capacity (*Kiriakidis).* The Tribunal accepts the evidence of Ms. Stoneman, her Vocational Coordinator, that after undergoing cognitive rehabilitation, the Appellant came to the decision that she would stay mentally well by matching the type of employment she undertakes to her emotional capacity.

The Appellant is to be commended for gaining this insight. However, the fact that she has chosen to limit herself to part-time work in her chosen occupation does not mean that she has proven that she has a severe disability. Based on a review of all the evidence, the Tribunal finds that the Appellant has made the personal decision to work the number of hours she is now working. This decision to suppress her working hours and, therefore, her earning capacity is not based on her current medical condition.

[90] Taking into consideration the totality of the evidence before it, the Tribunal is not satisfied on a balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[91] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[92] The appeal is dismissed.

Verlyn Francis
Member, General Division - Income Security