Citation: ***A. H. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 125**

Date: November 10, 2015

File number: GP-13-3038

GENERAL DIVISION - Income Security Section

Between:

A. H.

Appellant

and

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

Respondent

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

Heard by Videoconference on October 28, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. H., the Appellant

Gordhan Ambwani, the Appellant's legal representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent in November 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.

b) There are gaps in the information in the file and/or a need for clarification.

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

THE LAW

[3] 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).

[4] 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.

[5] 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

[6] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2015.

[7] 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 hearing given the future MQP date of December 31, 2015.

EVIDENCE

[8] On November 23, 2012 the Appellant completed the Questionnaire in support of her application. She stated she completed Grade 11. She worked between February 20, 2006 and March 30, 2012 as a picker. She stopped working after she fell down at work and hit her head on a concrete floor. She received Employment Insurance (EI) Sick Benefits between May 15, 2012 and July 31, 2012. She stated she could no longer work due to her medical condition as of April 2, 2012. She described the illnesses or impairments that prevent her from working as back, shoulder and neck pain and dizziness and headaches. She indicated she cannot stand, sit, bend or stretch and takes pain medication. She also has diabetes, hypertension, high cholesterol, depression and cannot sleep. She can sit up to 30 minutes, stand 15 minutes or less, walk 15 minutes/15 meters or less, lift less than 5 kg, cannot reach above the shoulder and has limited capacity to bend. She can carry out her personal needs slowly by herself and with her husband's help. Her husband also helps out with household maintenance activities. She has difficulty with

memory, concentration and sleep. She can drive a car 30 minutes or less and has difficulty using public transportation. She is prescribed Oxycodone, Naproxen, Ratio Lenoltec No 2, Clonazepam and Cipralex. She has also received physiotherapy and massage.

[9] In her April 15, 2013 Reconsideration request, the Appellant stated she was still in a great deal of daily pain in her back, shoulders and neck, which makes it difficult for her to sit, stand and lie down, raise her arms, bend, lift and reach. She takes medication daily for pain, depression, high blood pressure, diabetes, cholesterol and her thyroid. She attends rehabilitation for physiotherapy and massage therapy for pain.

[10] On November 22, 2012, Dr. Seegobin, family physician, completed the CPP Medical Report. He stated he knew the Appellant since 2009 and started treating her for her main medical condition in March 2012. He diagnosed cervicalgia/headaches and shoulder strain. He also noted diagnoses of type 2 diabetes mellitus, hypertension, obesity, dyslipidemia and depression (November 2012). He stated the Appellant presently had no focal neurological deficit but had discomfort raising her arms above her head. She was on Janumet, Ramipril and Crestor (not related to her main medication condition), Naproxen and Percocet. On November 12, 2012, she started Cipralex for depression and Clonazepam for sleep. She has had some improvement with physiotherapy. Massage provides temporary relief. Medications provide relief when she takes them. Under Prognosis, Dr. Seegobin stated: “See neuro report “Should fade with time”.

[11] A March 29, 2012 cervical spine radiograph revealed small marginal osteophytes in C5, 6, and 7, slight narrowing of the C6-C7 disc, osteoarthritis in the facet joints at C4-C5 on the left and bony narrowing of the intervertebral foramina at C6-C7 on the left.

[12] An April 14, 2012 CT of the head was unremarkable.

[13] On June 14, 2012, Dr. Trott, neurology, assessed the Appellant. He stated she was troubled with headaches and disequilibrium after a fall at work a few months earlier. The headaches occur daily. The Appellant described them as a frontal pressure like sensation. They do not induce nausea/vomiting or awaken her from sleep. She has a four year history of diabetes. On examination, her cranial nerves were normal; strength and reflexes were intact and

symmetric in the extremities. There were no sensory deficits or Romberg sign and test of gait and coordination were normal. Dr. Trott stated the Appellant's symptoms may be post-concussional in nature in which case they should gradually fade with time. She stated the CT was normal and that she would order an MRI for completeness.

[14] An August 23, 2012 MRI Brain revealed: 1. A few nonspecific scattered foci of increased T2/FLAIR signal within supratentorial white matter. While these may represent leukoencephalopathy related to mild microangiopathic change other causes for demyelination including nonhemorrhagic diffuse axonal injury (DAI) (given history) could give this imaging appearance; and 2. Minimal prominence to the pituitary gland. Correlate with serum biochemistry.

[15] According to a June 13, 2013 medical form completed by Dr. Seegobin, the Appellant was seen in follow up. She was not able to return to work. Dr. Seegobin wrote: "This letter is to confirm that (the Appellant) has been a patient at this office where she continues to receive medical attention. She is still out of work and is asking that her application for benefits be reconsidered. There has not been any change in her condition at this time".

[16] A September 16, 2013 MRI of the left shoulder and C-spine revealed the following: Left shoulder: Large partial articular sided tear of the supraspinatus tendon versus a full thickness tear. Mild tendinosis of the subscapularis tendon. Moderate degenerative changes in the acromioclavicular joint: C Spine: suspect traumatic nerve root avulsion involving right T1-T2 neural foramina. Very mild degenerative changes throughout the cervical spine. No evidence of any spinal canal or neural foraminal compromise.

[17] On November 18, 2013, Dr. Seegobin reported that the Appellant was still having pain in the shoulder, headaches and dizziness. She was on medication and would see a specialist.

[18] On December 21, 2013, Dr. El-Saidi, psychiatrist, assessed the Appellant. He indicated the family doctor referred her because of depressive symptoms perpetuated with chronic pain. He noted she was on Janumet, Crestor, Oxycodone, Cipralex, Elavil, Synthroid and Ezetimibe. He stated she showed psychomotor retardation but had good eye-to-eye contact. Her speech was slow and faint with low volume and depressed mood. Her affect was quite depressed and not

very reactive. Form of thought was slow. Dr. El-Saidi diagnosed Major Depressive Disorder, Severe. He described severe financial and occupational distress under Axis IV and a GAF of about 55. He recommended referral to a sleep study which he stated the Appellant declined (which she declined), advised her to decrease her Cipralex, to start Cymbalta and to see him in follow up the following month.

[19] On January 31, 2014, the Appellant saw Dr. El-Saidi in follow up. He stated she agreed to be referred to the sleep lab. **S**he was on Cymbalta and was not suicidal. The Appellant relayed that the orthopedic surgeon stated she required surgery however she needed to control her diabetes mellitus. Her mood was still depressed. Her sleep was decreased due to pain. He affect was better. She had no symptoms of mania or hypomania or psychosis. Her next appointment was March 17, 2014

[20] The Appellant filed a pharmacy record of her medications for the period April 2013 to July 2015.

Oral Testimony

[21] She came to Canada in 1976. [22] She is from X.

[23] She completed Grade 10/11.

[24] She did not complete any educational upgrading or skill enhancement in Canada.

[25] In 1976, she got a general labour job in a warehouse where she worked for 4-5 years. The company moved. She married, had a child and then returned to work.

[26] She worked for Club Monaca in the warehouse as a labourer for approximately 19 years and was laid off. She returned to work in 2006 as a labourer/general help in a warehouse. She did packing and picking.

[27] She never worked in skilled employment but always in general labour. She stopped working in 2012 after she fell and injured her shoulder and back. She never returned to work after that.

[28] She sustained injuries to her neck, back and shoulder, which remain in a lot of pain. She saw her family doctor, who sent her for x-rays and MRIs which found something wrong with her shoulder. He sent her to an orthopaedic specialist who recommended surgery. She is worried about proceeding with surgery as she is diabetic. The specialist said she could have cortisone injections, which she tried but they did not help. She had physiotherapy and massage therapy. She also tried acupuncture. She still has a lot of pain. She attended physiotherapy until this year. It would only help for the moment. She had three cortisone injections but still has pain. She was never referred to a pain clinic.

[29] She also has diabetes, high blood pressure, high cholesterol and thyroid problems, for which she takes medication.

[30] She has psychological issues and problems concentrating and remembering things. She saw a psychologist last year. He gave her medication and after a couple of months, he said there was nothing he could do and he sent her back to the family doctor. The medication did not help very much.

[31] Currently, she sees her family doctor. She no longer sees the psychologist, who sent her back to the family doctor. The family doctor provides medication for her psychiatric problems.

[32] Her family doctor says they tried everything and there is nothing he can do. She should just take her medication. The family doctor says she cannot return to work. She has problems concentrating and remembering. Her physical problems prevent her from doing very much. She cannot stretch, reach, bend, crouch to the ground, raise her hand high. She relies on her husband to do things around the house.

[33] She takes the following medications: Tylenol extra strength over the counter. She takes two tablets twice daily periodically when she has a headache; Crestor 10 mg; Synthroid 135 mg; Ramipril 10 mg; Oxycodone/Acetaminophen (Percocet) 1 tablet twice daily – 5 mg/325 mg; Advil extra strength over the counter (she takes two if she has a headache and will alternate between Advil and Tylenol); Ezetimbe 10 mg 1 tablet daily; Metformin/Sitagliptin 1000/50 mg (Janumet) 1 tablet 2x daily.

[34] She sleeps when she takes her medication. Her sleep is a little bit disturbed.

[35] She relies on her spouse to do household chores. She cannot do cleaning or laundry. She cannot do grocery shopping. Her spouse helps her when she washes her hair.

[36] During a typical day, she wakes up; her spouse makes breakfast; she takes her medication; watches television; lies down; tries to concentrate on reading the newspaper however she does not understand what she is reading. She is not involved in social activities.

[37] In response to questions from the Tribunal, the Appellant clarified that when she fell, she injured not only her shoulder, back and neck but also the back of her head.

[38] She cannot recall exactly when she saw the orthopedic specialist. The family doctor referred her. She cannot remember the specialist's name. She saw him for her left shoulder and neck. He recommended surgery or cortisone injections. She was skeptical about surgery and sought a second opinion. The surgeon knew she had diabetes but still recommended that she have surgery. She raised her concerns with the surgeon who told her there was some risk, to think about it and decide what she wanted to do.

[39] She saw another orthopaedic surgeon, Dr. Paipich, who gave her 3 cortisone injections in November 2014, January 2015 and March 2015. She advised him that the first surgeon recommended surgery. Dr. Paipich stated she could try the cortisone injections which are not a cure. The injections did not really help. He told her she could return for more injections but she does not have the income to pay for them. Also, the injections are painful and did not provide much relief. She still has pain.

[40] She remains afraid of having surgery. She never discussed her concerns about having surgery with the family doctor. She heard that if one is diabetic, one does not heal properly and has other complications.

[41] She attended physiotherapy in 2012, 2013, 2014, and up until June or July of 2015. Her spouse's insurance used to pay the cost of treatment up front. Her spouse changed his insurer and now she has to pay the cost of physiotherapy up front. She does not have the money to pay up front for treatment and wait to be reimbursed by the insurer.

[42] In terms of GD6-58, the CPP Medical Report, in which the family physician states that medications provide relief when the Appellant takes them, the Appellant testified that she takes her medications as prescribed. She does not know why the family physician wrote that.

[43] In terms of GD2-2, the January 31, 2014 report of Dr. El-Saidi, psychiatrist, the Tribunal asked the Appellant whether she was ever referred to a sleep lab as recommended by Dr. El-Saidi. The Appellant stated she went to the sleep lab in October 2014, had a sleep study and was told to get a mask that costs a lot of money. She could not expressly confirm whether she was diagnosed with sleep apnea. The mask was very expensive in the range of $600.00 plus. She stated her spouse's insurance did not cover much of the cost. She stated she did not know how much his insurance would cost as she did not call them. He also did not call. When asked how she knew what the insurance covered, she stated she thought she called but could not recall how much they covered or whether they covered a good amount of the cost.

[44] The Tribunal asked the Appellant why her pharmaceutical print out did not show she was taking Cymbalta from January 2014 onward, even though Dr. El-Saidi prescribed Cymbalta and recommended she take it. At first, the Appellant stated that the Cymbalta was filled at another pharmacy which would explain why it was not on the pharmaceutical record of medications filed by her lawyer. The Tribunal reminded the Appellant her lawyer had just read into the record her current medications off the pill container labels and that Cymbalta was not listed as one of her current medications. She then stated she stopped taking Cymbalta for the past couple of months. She then clarified that she last took Cymbalta in February 2014. She explained she had to take so much medication each morning and that she was trying to cut herself off some of them. When the Tribunal asked the Appellant if her earlier statement that she takes her medications as prescribed is correct, she stated she takes her other medications, just not Cymbalta.

[45] The Tribunal noted that Dr. El-Saidi scheduled another appointment for March 17, 2014 and asked the Appellant why she did not file a report from that date and whether she kept that appointment. She stated that Dr. El-Saidi told her she could return to her other doctor. She said she showed up at all her appointments. The Tribunal asked the Appellant whether she decided

to discontinue her Cymbalta and stop seeing Dr. El-Saidi. She stated that was not possible. She could not explain why she did not file a report from her March 17, 2014 appointment with Dr. El-Saidi.

[47] She can drive a car and still has a valid driver's license. She may go to the bank or hairdresser. She may drive up to twice a week.

[48] She resides with her spouse. She has adult children and grandchildren but does not babysit the grandchildren.

[49] She does not know how to use a computer.

[50] Her spouse drove her to the hearing.

[51] Since she lasted worked, she has not explored the possibility of retraining. Due to her concentration and memory, she has not done so. She also has problem with sitting. On a day to day basis, she may watch the new or something on television and not understand what she is watching. She may read the newspaper and not understand or remember what she has read. She has difficulty remembering day-to-day stuff.

[52] She can sit for 10-15 minutes. When reminded that she stated in her Questionnaire that she can sit for up to 30 minutes and drive for up to 30 minutes and asked why she can now sit for only 10-15 minutes, she stated she gets pain in her side.

[53] There is no job she thinks she could do since she last worked due to problems with her concentration and physical condition including sitting or standing for too long.

[54] The Appellant's legal representative asked her if she remembered seeing Dr. Chan at W. O. Hospital or Dr. Throh in X. She was not sure what kinds of doctors they were.

[55] She did not recall whether she ever discussed the risks of surgery with her family doctor.

[56] Despite attending physiotherapy for 2-3 years, it provided only temporary relief.

[57] She saw Dr. El-Saidi 3 or four times. At the last visit, he stated she could go back to her family doctor. She stated she thought the last visit was earlier this year.

SUBMISSIONS

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

a) She suffers from back, shoulder and neck pain. She feels dizzy and has constant headaches. She also suffers from lack of concentration, shortness of memory, anxiety and depression. She has other medical issues such as diabetes, hypertension, high cholesterol and sleeplessness. There are medical reports on file which confirm these conditions. They refer to ongoing problems, confirm the conditions are still present and that she still has problems after so many years of becoming disabled. They conclude she would not be able to return to any work not only because of her psychiatric problems but also due to her co-morbidities, which aggravate her ability to stand, walk and sit for greater than a few minutes and to lift any weight or reach, which severely limits her ability to work. Also, shortness of memory and lack of concentration coupled with depression and anxiety make it worse for her.

b) She has been under the constant treatment of her family doctor and specialists. She has taken medication for many years without any significant improvement. Therefore, she is unable to return to any kind of employment for substantial gain. Her medications up to and including July 2015 confirm she is disabled and that the disability is continuous and uninterrupted.

c) In terms of the Appellant's personal characteristics, (see *Villani*), she is almost 58 years old and completed Grade 11. She has worked mostly in basic jobs and does not possess transferable skills. Her chances of becoming gainfully employed are very difficult.

d) Her condition is prolonged. She has had her medical conditions for many years and takes regular medication. She has been under the treatment of her family doctor and specialists without any considerable improvement. There is no suggestion in the medical reports as to when she can return to work, if at all. They support the fact that her medical

condition is not likely going to improve in the foreseeable future and that she is not likely to return to any gainful employment in the future.

e) In oral submissions, the Appellant's legal representative submitted the following: the Appellant came to Canada in 1976 with little education. She did not upgrade her education or take skills retraining. She started working in 1976 and worked until 2012. She stopped working due to her injuries. She has neck, back and shoulder pain: see GD6- 55, GD6-59 and GD6-63. She cannot sit, stand or walk for a long period, bend or reach. She also has hypertension and diabetes. She also started suffering psychological issues including problems with concentration and memory: see GD2-3, GD2-4 and GD2-2. She also has a sleep problem. Cumulatively, considering the physical and psychiatric issues, her condition is severe. It is also prolonged. She has had treatment, seen specialists and received physiotherapy for 2-3 years. She has taken medication: see pharmaceutical print-outs) between 2012 and 2015. Her disability is prolonged. She has had treatment for more than 3 years with no improvement. Also, see her "real world" factors. She was 55 at the date of application and is now age 58. She has limited education and no transferable skills. She has worked only in labour jobs. Her disability is severe and prolonged.

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

a) She stopped working in March 2012 due to a fall at work where she reportedly struck her head on the concrete floor and subsequently experienced a lot of pain. There has been no information submitted to show any severe underlying pathology regarding her head, neck or shoulder. She is managed with medications. She lists her other health related conditions as diabetes, hypertension, depression and poor sleep. However treatment is conservative with medication and it does not appear she requires regular ongoing follow up of specialists.

b) Her March 2012 fall is recognized. However, an x-ray of the cervical spine showed no fracture and only degenerative changes with joint disease. There is no indication of any severe findings or nerve root involvement. A CT of the head was unremarkable and follow-up MRI of the brain revealed only mild to minimal findings.

c) A September 16, 2013 MRI of the left shoulder revealed mild degenerative changes, a large partial tear of the supraspinatus tendon and mild tendinosis (damage to a tendon). There is no indication she has required aggressive treatment.

d) A September 2013 MRI scan of her cervical spine revealed "very mild" degenerative changes with no evidence of any spinal canal or neural foraminal compromise. A nerve root avulsion (detachment) was suspected and clinical correlation was advised, however no further diagnostic testing was provided.

e) In June 2012, Dr. Trott, neurologist, relayed that the Appellant experienced headaches and disequilibrium since her fall. He indicated that the headaches did not induce nausea, vomiting or wake her from her sleep. He opined that the symptoms may be post-concussional in nature which "should gradually fade with time". He detected no sensory deficits. The Appellant's cranial nerves, strength, gait and coordination were all normal. There is no indication of any formal cognitive testing which supports any severe impairment.

f) The purpose of the CPP is to provide a pension where a disability forces a claimant to leave the workforce on a long-term basis and not to tide a claimant over for a temporary period during which a medical condition prevents the claimant from working.

g) Dr. Seegobin opined in his June 13, 2013 that the Appellant's condition had not changed and that she was unable to return to work. While his assertion is recognized, he provided no corroborative information to confirm inability for all work.

h) In December 2013, Dr. El-Saidi, psychiatrist, relayed that the Appellant had depressive symptoms perpetuated with chronic pain. On examination, she displayed evidence of a depressed mood and affect. However she was alert and orientated with good eye contact

and no abnormal thought content or suicidal ideation. He diagnosed her with a severe major depressive disorder and recorded her GAF as 55, indicative of only moderate symptomatology. While his diagnosis is acknowledged, modest treatment in the form of a single anti-depressant was advised at the initial dose. In January 2014, Dr. El-Saidi documented she experienced no side-effects from the medication and recommended the same dosage. He observed that her affect was better and that she had no symptoms of mania, hypomania or psychosis.

i) According to the information submitted, she sustained no severe injuries from the fall. Diagnostic testing failed to reveal the presence of any significant findings and she is managed conservatively with medication and therapy. She may have some restrictions regarding her medical conditions and may be limited in her occupational choices; however, she retains the capacity for suitable work.

j) The additional evidence submitted by the Appellant's legal representative does not support a determination she was disabled prior to the December 31, 2015 MQP and continuously thereafter. The computer generated pharmacy list of medications between April 2013 and July 2015, while informative, does not include any clinical findings, diagnostic testing or specialist's reports to substantiate a severe and prolonged disability which would preclude her from all work.

ANALYSIS

[60] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before the date of hearing given the future MQP date of December 31, 2015.

Severe

[61] The Tribunal is not persuaded that the Appellant's disability is severe for a variety of reasons as set out below. While no one reason may be determinative, the individual factors as a whole, on balance, support a finding that the Appellant's disability is not severe as defined in the CPP.

[62] Firstly, the Tribunal is not satisfied that the Appellant has reasonably mitigated her circumstances by failing to follow through with left shoulder surgery, which she states was recommended by an orthopaedic surgeon. She has not filed any medical reports setting out the risks of surgery given her status as a diabetic and indicating that the risks outweigh the benefits. Although she testified that she discussed her concerns with the first orthopaedic surgeon she saw, she also indicated that he still recommended that she proceed with surgery. Although she states the surgeon told her there was some risk, she did not explain what he told her. She could not recall whether she ever discussed her concerns about surgery with the family doctor. She states she heard that if one is diabetic, one does not heal properly and encounters other complications. Absent a medical report from either the family doctor or the specialist, the Tribunal is not satisfied, on balance, that the Appellant's unwillingness to pursue surgery was reasonable given her testimony that the first orthopaedic surgeon recommended that she pursue surgery. Absent such evidence, the Tribunal cannot be satisfied that the Appellant's left shoulder condition could not be ameliorated or even successfully treated with surgery.

[63] Secondly, the Tribunal is not satisfied that the Appellant has taken her medications as prescribed. In the CPP Medical Report, Dr. Seegobin stated that medications provide relief when the Appellant takes them. This indicates to the Tribunal that she does not always take her medications as prescribed. Her prescription of Cymbalta for depression is a case in point. Although Dr. El-Saidi had her discontinue Cipralex and start Cymbalta in or around December 2013 and further indicated in his January 2014 report that she was to continue with Cymbalta, the evidence shows that the Appellant discontinued taking Cymbalta on her own initiative in February 2014. Initially, she testified that she did take Cymbalta as prescribed and that the sole reason it was not listed on the pharmaceutical list of medications filed with the Tribunal by her lawyer was because she had the prescription filled at a different pharmacy. However, when reminded by the Tribunal that her lawyer just read into the record a list of her current medications off the bottle labels, she revised her testimony and stated she stopped taking it in February 2014. This revision in testimony calls into question either the Appellant's candor with the Tribunal or the reliability of her evidence. The fact she unilaterally discontinued taking her Cymbalta is also consistent with Dr. Seegobin's assertion that the Appellant's medications provide relief when she takes them, which suggests that she does not always take them.

[64] Thirdly, the Tribunal is not satisfied that the Appellant's depression, which she associates with problems with mood, concentration and memory, is not treatable with medication and therapy. The Tribunal finds that the Appellant has failed to pursue recommended treatment by unilaterally discontinuing her Cymbalta. Although she stated she discontinued this medication as she was already on a lot of different medications, the Tribunal does not accept this as a reasonable explanation, particularly in light of Dr. El-Saidi's very clear recommendation that she take Cymbalta.

[65] Fourth, the Tribunal is not satisfied, on balance, that the Appellant pursued all scheduled treatment sessions with Dr. El-Saidi. In his January 31, 2014 report, he scheduled another appointment for March 17, 2014. Although the Appellant testified that she attended all appointments, the Tribunal is not satisfied absent a confirmatory report from Dr. El-Saidi that she attended the March 17, 2014 report, especially given either her lack of candour and/or the unreliability of her testimony when she incorrectly initially told the Tribunal that she was taking Cymbalta as prescribed by Dr. El-Saidi.

[66] Fifth, Dr. El-Saidi referred the Appellant to a sleep study. According to the Appellant she underwent a sleep study. She did not file a copy of the report with the Tribunal. She states she was told to purchase a mask. This would suggest she was diagnosed with sleep apnea and told to purchase a CPAP mask. Although the Appellant stated that her spouse's insurance did not cover much of the cost, she also testified she did not actually know how much his insurance would cover as she did not call them. Her spouse also did not contact the insurer. She subsequently testified that she thought she called the insurer but could not recall how much they covered or whether they covered a good portion of the cost. Given the Appellant's uncertain testimony on this point, the Tribunal is not satisfied the Appellant made reasonable efforts to pursue funding for the cost of a CPAP mask.

[67] Sixth, to the extent the Appellant states that her concentration and memory significantly affect her ability to pursue retraining, the Tribunal notes that in her Questionnaire, the Appellant stated that she can drive for up to 30 minutes. During her oral testimony, she stated she can drive up to twice a week to such venues as the bank or hairdresser. Given the cognitive skills inherent in driving, the Tribunal is not satisfied, absent an update report from Dr. El-Saidi close

in time to the MQP or least following her alleged March 17, 2014 appointment, that the Appellant's concentration and memory are so significantly impaired that they would impede her capacity to pursue retraining for work within her physical restriction.

[68] Seventh, the Appellant testified that she cannot work or pursue retraining not only because of her problems with memory and concentration but also due to her physical problems. Paramount among her restrictions are limitations affecting prolonged sitting and standing. When asked at the hearing how long she could sit at one time, she stated 10-15 minutes. The Tribunal notes that the Appellant did not stand up every 10-15 minutes even though the Member advised her at the onset of the hearing that she could stand without seeking prior permission if she felt the need to do so. Also, in her Questionnaire, she stated she could sit up to 30 minutes and drive a car up to 30 minutes. The Appellant did not file any medical reports that would explain a significant deterioration in her capacity to sit between the time she completed the Questionnaire and the date of hearing. The Tribunal also notes that in his CPP Medical Report, Dr. Seegobin described the relevant physical findings and functional limitations as follows: "She has discomfort raising her arms above head". He did not even mention sitting as a restriction. Consequently, the Tribunal is not satisfied, on balance, that the Appellant could not pursue sedentary work as falling within her physical restrictions, even if only on a part-time basis.

[69] Eighth, the Appellant did not focus on her headaches or dizziness in terms of explaining her disability to the Tribunal and why she could not pursue retraining or other work. She stressed problems with concentration, memory and prolonged sitting and standing as major factors affecting retraining and working. The Tribunal is not satisfied that her headaches and dizziness would have prevented her regularly from pursuing retraining or work within her restrictions as of the date of hearing.

[70] Ninth, although the Appellant has diabetes and high blood pressure, she did not stop working because of these conditions and the medical evidence does not support a finding that these conditions are not treatable with medication.

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

[72] Given the reasons set out above, the Tribunal is not persuaded that the Appellant did not possess residual capacity as of the date of hearing to pursue sedentary work even if only on a part-time basis only and that her effort at obtaining and maintaining employment has been unsuccessful by reason of her health condition.

[73] The severe criterion must also 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] Although the Appellant would likely require retraining given her narrow work history and limited education, the Tribunal is not persuaded from a real world perspective, that retraining is beyond her reach merely because she is almost age 58. She has English language proficiency and is capable of retraining for suitable work within her limitations.

Prolonged

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

CONCLUSION

[76] The appeal is dismissed.

Jeffrey Steinberg
Member, General Division - Income Security