Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *L. A. v. Minister of Employment and Social Development,* 2016 SSTGDIS 16

Tribunal File Number: GP-14-2118

BETWEEN:

L. A.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jeffrey Steinberg

HEARD ON: January 25, 2016

DATE OF DECISION: February 3, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. A., the Appellant

Richard Chan, student-at-law, the Appellant's legal representative

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

INTRODUCTION

[1] The Appellant previously applied for a CPP disability pension in October 1992 based on neck, right shoulder and right arm pain from a work injury. That application was granted and a date of onset of July 1991 was given. Due to unreported work activity, her CPP disability pension was terminated in July 1996.

[2] The Appellant's current application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 12, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal in May 2014.

[3] 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

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

a) be under 65 years of age;

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

c) be disabled; and

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

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

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

ISSUE

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2016.

[8] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the date of hearing, given the future MQP date.

EVIDENCE

Documentary Evidence

[9] On August 13, 2013, the Appellant completed the Questionnaire in support of her application. She stated she completed Grade 12. She had worked full-time in general labour

between March 22, 2006 and October 6, 2012 at Cargill Watson. She stopped working due to an injury. She stated she had a WSIB claim number from an earlier shoulder injury in 1989. She could no longer work due to her medical condition as of November 7, 2012. She received regular Employment Insurance Benefits between February 2, 2013 and May 14, 2013. She described back, neck and shoulder pain with movement. She stated she stopped her hobbies on October 7, 2012 due to pain. She stated she can sit/stand up to 30 minutes and must then move. She can walk slowly - maybe 10 minutes and must stop. She cannot lift/carry or reach. Bending is very limited. She cannot do her own hair and requires assistance with dressing. She is limited to light cooking. She requires assistance with shopping to lift and get product from the shelves. She has some limitations with memory and finds it difficult to concentrate and sleep. She can drive a car for very short periods of time. She is unable to use public transportation as she cannot climb stairs. She is prescribed Cymbalta, Tylenol 2 and Imovane. She has had physiotherapy for her back, neck and shoulder and massage therapy. She sometimes uses a wheel chair.

[10] On May 19, 2013, Dr. Vas, family physician, completed the CPP Medical Report. He stated he knew the Appellant for 20 years. He diagnosed low back, neck and shoulder pain. He described a "long hx of above symptoms – returned to work - slipped and fell at Walmart, has not returned to work". He noted "painful movements of the neck (ROM neck) ok and back." He referred her to Dr. Bailey, an orthopedic surgeon, and she sees Dr. Billings, pain specialist, in X. She is prescribed Tylenol 2, Flexeril, Imovane and Pensaid lotion. According to Dr. Vas, the prognosis was poor due to the length and type of injury.

[11] On October 22, 2012, E. Lau, PT, registered physiotherapist issued his initial assessment. His clinical impression was of right shoulder subluxation with whiplash associated disorder (Grade III). He reported decreased cervical spine and shoulder range of motion.

[12] An October 23, 2012 ultrasound of the right shoulder did not reveal any abnormality of the rotator cuff of the right shoulder.

[13] A November 25, 2012 MRI of the right shoulder was taken. The clinical history was noted as follows: "52 year-old female with history right shoulder injury in 1989. Recent fall. Pain not improving. Normal ultrasound. Rule out ligament tear". The MRI failed to reveal evidence of fracture cuff tear or tendinosis.

[14] A January 2, 2013 ultrasound of the right shoulder was a normal study. A June 2, 2013 right shoulder x-ray was normal.

[15] A January 23, 2013 x-ray of the SI joints and obliques and lumbosacral spine was a normal study.

[16] On March 22, 2013, Dr. Billing, Guelph General Hospital Pain Clinic, reported on his evaluation of the Appellant. He stated she had low back pain; right leg pain going up to the right ankle; bilateral neck pain, right shoulder pain, pain in the right side of the face and TMJ. The pain was getting worse for the past six months. It started 24 years earlier when she was injured at work. According to Dr. Billing, low back and right leg pain were increased by sitting, standing, walking for more than 10-15 minutes, getting in and out of the car, rolling around in bed, coughing and sneezing. Moderate neck pain was increased by neck movement; right shoulder pain was increased by overhead activities; pain on the right side of the face and TMJ was increased by chewing food. The Appellant described her pain as burning, stabbing, throbbing and sharp in nature with an intensity of 8 on a pain scale of 0-10. Her right shoulder MRI was noted to be essentially normal. It did not show any tear in the rotator cuff. On physical examination, bending backward and laterally were restricted by spasm of the paraspinal musculature in the lumbar area. In terms of neck movement, flexion, extension and rotation to the right and left were restricted and limited by tenderness and spasm of the neck muscles, including spasm and tenderness of the sternocleidomastoid muscles on both sides. She also had moderate tenderness in both sides of the neck in multiple facet joints in the cervical spine, right shoulder, right side of the face and TMJ. Dr. Billing formed the following Impression and Differential Diagnosis: Myofascial pain in the right shoulder; atypical facial pain; TMJ disorder on the right side; cervical disc disease; osteoarthritis of the cervical spine; lumbar disc disease; right sciatica and work-related injury and Chronic Pain Syndrome.

[17] Dr. Billing recommended epidural block, epidural steroid injections and nerve blocks. He stated the Appellant's chances of getting better were 50% and that improvement could be temporary. If long lasting, the pain could return. He warned the Appellant about the risks. She decided to proceed with the treatment. Dr. Billing reported he performed lumbar epidural block

and lumbar epidural steroid injection. Before the Appellant left the Pain Clinic, she reported her pain decreased to a level zero on the scale of 0-10 and complained of some leg weakness.

[18] On December 19, 2013, Dr. Pilowsky, Psychologist, reported on her December 19, 2013 psychological assessment of the Appellant. She noted the Appellant was born in Portugal on February 2, 1960 and came to Canada in 1980 to reunite with her spouse. She was employed full-time at Cargill Watson Foods, a meat factory, where she worked as a general labourer and machine operator from 2006 until 2012 when she had the slip and fall accident. After the slip and fall, she was motivated to return to work on modified duties. The employer indicated that since the accident did not occur at the workplace, they were unable to provide modified duties and that unless she returned “one-hundred percent”, there was no work available for her. According to Dr. Pilowsky: “Thus, this began the deterioration of (the Appellant’s) emotional well-being.” She described the October 7, 2012 slip and fall which occurred when the Appellant was shopping at Walmart and she slipped on oil and fell backwards placing most of the impact on her right shoulder and leg. She was taken to the hospital for several hours. An x-ray revealed she sprained her arm. She wore a brace for about two weeks. She attended physiotherapy for about 3 weeks in 2012, which offered temporary pain relief. She was unable to keep going without insurance coverage. However, the Appellant restarted treatment for another three weeks, which ended about one week before Dr. Pilowsky saw her. During her last round of treatment, she also had massage therapy which she found helpful. She also received several pain injections in the shoulder and one in the lower back, which caused negative side effects, which resulted in her being “on the sofa for five days”. At present, she was complaining of constant pain in the right shoulder joint, right side and back of neck and lower back radiating to the right leg and foot causing her to limp. Due to elevated and chronic levels of pain, she was unable to sit/stand for prolonged periods of time and found it very difficult to climb/descend stairs. She felt her feet were numb upon awakening in the mornings. On a self-report pain scale, she rated her pain between 9-10 on a bad day and 7-8 on a good day. She noted her hands shake and tremble frequently and that she experiences numbness in her right hand at night. She was prescribed Tylenol with Codeine daily, almost every four hours, Cymbalta (60 mg) once per day and Cyclobenzaprine 10 mg. Under Current Psychological Functioning, Dr. Pilowsky reported the Appellant stated she was significantly depressed and stressed. She noted the Appellant’s hair had been falling out. According to Dr. Pilowsky, the Appellant was frustrated with her limitations

and was finding it increasingly difficult to cope. She was also isolating herself from others. She found herself disinterested in self-grooming tasks and was experiencing cosmetic anxiety in the presence of others. She would cry daily and admitted to passive suicidal ideation. She had become anhedonic and was experiencing a significant sense of uselessness and worthlessness as a mother, wife and grandmother. She had decreased appetite, diminished self-esteem and confidence. She would also become easily irritable and angered. Her memory and concentration were also affected. She had difficulty making decisions and tended to second-guess herself. She also had difficulty multitasking. The Appellant described getting four hours of non-restorative sleep at night, waking frequently due to pain and headaches and suffering from daytime exhaustion. She also described having nightmares of the slip and fall approximately twice weekly. She was also plagued with intrusive thoughts of the accident during the day. She was also experiencing high levels of anxiety including shortness of breath, dizziness, trembling hands, stomach discomfort, flushed face and perspiration. She developed a sense of dread and fear of re-injuring herself and preferred to remain at home, especially in the winter. She no longer socialized and would go out only if absolutely necessary.

[19] Dr. Pilowsky reported on her Objective Findings. She stated the Appellant scored 48 on the Beck Depression Inventory-II (BDI-II0) which is consistent with severe levels of depression. She scored 46 on the Beck Anxiety Inventory (BAI) which reflects a severe level of anxiety. In her professional opinion, the Appellant currently met the DSM-IV diagnostic criteria for the following: Axis 1: Major Depressive Disorder, Severe without Psychotic Features; Pain Disorder Associated with Both Psychological Factors and a General Medical Condition; Axis IV: Unemployment, inadequate finances, social isolation; and Axis V: Current GAF 40-45. According to Dr. Pilowsky, the Appellant's life was significantly impacted by her disability and ensuing psychological condition, which prevents her from working. She stated: "From a psychological perspective, this woman is considered completely disabled from any type of employment. (The Appellant) has a severe and prolonged disability and she is incapable or (sic) pursuing any substantial gainful employment. In my opinion, this disability is likely to continue for an indefinite period of time". Dr. Pilowsky observed there had not been any recovery despite psychotropic medication and physiotherapy for pain. She concluded that the prognosis for recovery was poor and stated she believed the Appellant would not be able to work in the future. She stated that the Appellant's psychological problems were in themselves incapacitating and

that she would most likely would not improve. She stated she supported the Appellant's application for CPP benefits.

[20] An April 6, 2014 MRI spine revealed degenerative disease of the lumbar spine with mild compromise of the left exiting nerve root at L5-S1.

[21] On May 13, 2014, the Appellant was prescribed Senakot, Tecta, Flexeril, Cymbalta and Tylenol 2.

[22] The Appellant provided a copy of her physiotherapy schedule for May and June 2014.

[23] On May 29, 2014, Dr. Frisina, D.C., reported on his review of the Appellant's condition. He stated she sought treatment for her lumbar, hip, leg, neck and shoulder pain. She was noted to have been involved in a slip and fall on October 7, 2012 in which she injured her neck, back, legs and shoulders and started to experience headaches. Orthopedic/neurological examination of the lumbar spine revealed decreased ranges of motion in all planes with pain at the end ranges. She had restrictions in extension and right and left rotation. Flexion also produced pain in the knees bilaterally. The Appellant had associated muscular hyper tonicity and inflammation around the right and left hip, leg and foot and spinal joint fixations at L4-5, S1 causing paraspinal muscle guarding and spasms. She further had hyper tonicity and positive SI compression tests at L5, S1 levels. She also had cervical spine and shoulder pain with cervical degenerative disc disease present with limited movement in all planes. Examination revealed inflammation of the cervical facet joints specifically C3-4 and C5-C6. She had limited movement in forward flexion/extension, and internal and external rotation of the right shoulder. She had chronic myofascial pain in the above areas. Her chronic musculoskeletal condition also caused her frustration and depression. Thoracic spine examination revealed marked hyper tonicity in the rhomboid and trapezius muscles and joint restrictions in the areas of T6, 7 and 8 and T11-12. Examination of the legs revealed weakness of the right leg. She had muscle wasting and plantar fasciitis. She had marked altered gait attributed to her neuralgic pain. X-rays of the cervical and lumbar spine revealed marked osteoarthritis and degenerative disc disease. She had a recent MRI on April 6, 2014. It showed L2-L3, L3-L4, L4-L5, L5-S1 posterior disc bulges with nerve root irritation.

[24] In Dr. Frisina's clinical impression, the Appellant was suffering from the above conditions, which combined had altered her activities of daily living drastically and rendered her unable to work. She had signs of chronic pain syndrome, which also included marked depression and anxiety. He noted such findings were outside the scope of his practice but stated the Appellant required ongoing treatment from other health care providers to address her difficulties. Treatment at his office included soft tissue therapy, spinal manipulative therapy, mobilization and modalities. He noted she previously received nerve injections along with trigger point injections around the neck and back at a pain clinic and had received psychological treatment with Dr. Pilowsky, psychologist. Dr. Frisina stated: "In my opinion progress is poor. Although treatments are beneficial for her condition, they are temporary in nature and she has slowly deteriorated over the years". He noted she continued to have difficulty at home with her activities and was very limited. She was not able to secure any employment due to her ongoing debilitating pain which occurs daily. He stated: "In my opinion, she is significantly, totally disabled as the result of the above findings and how they affect her activities of daily living. Her symptoms and findings cause difficulties to the point where her acute flare ups limit her in sustaining any activity for prolonged periods of time. As a result of her limitations, she cannot perform duties of any gainful employment indefinitely". He concluded by stating: "In my opinion, from a physical musculoskeletal point of view, she has reached a functional plateau and is in fact, deteriorating. Due to these circumstances, she is definitely not fit to work any longer and should be considered as functionally permanently disabled. I fully support this pleasant and co-operative patient for CPP benefits".

[25] A June 12, 2014 cervical spine ap, lateral and obliques x-ray revealed some loss of normal cervical lordosis, some minimal narrowing of the disc space at C6-7 with some early anterior osteophytes and some very early localized developing cervical spondylosis.

[26] On November 14, 2014, Dr. Cole, psychologist, reported on his assessment of the Appellant. He stated that testing identified very elevated levels of anxiety, depression and stress. He diagnosed Major Depressive Disorder, Severe, chronic, Generalized Anxiety Disorder with Panic, moderate –severe chronic and Pain Disorder with a General Pain Condition and Psychological Factors chronic. He indicated the prognosis, given the entrenchment of her symptoms (both physical and psychological) was rather poor. According to Dr. Cole, the

Appellant's psychological conditions were causally related to the October 7, 2012 slip and fall accident. She appeared to have developed some significant physical injuries which impaired her sleep, prevented her from returning to full-time employment and resulted in significant levels of depression and anxiety. Dr. Cole stated that the Appellant's impairments substantially interfere with her pre-accident employment activities. Her depression and anxiety would substantially interfere with her ability to work at this time. Based on his observation, she was very limited in her ability to sit and appeared to be in a significant level of physical discomfort. Her stated: " In my opinion, (the Appellant) will not be able to return to her pre-accident position working full-time given her level of psychological disability with her depression and anxiety and also her chronic pain condition". He queried a trial of Gabapentin or Lyrica and wondered, whether she needed to be assessed for Complex Regional Pain Syndrome.

[27] On November 26, 2014, Dr. Ko, physiatry, and Dr. Lawson, chiropractor, reported on the outcome of their Functional and Soft Tissue Evaluation Centre Independent Medical Assessment. The Appellant had presenting complaints of severe headaches; severe facial pain; excruciating neck pain; excruciating pain on the right forearm, wrist and hand; excruciating spinal pain; poor sleep and psychosocial factors including increased anxiety and decreased concentration. They stated that although the physical examination was not reliable due to inconsistencies (they found non-organic signs, Waddell's signs, inconsistency of effort, and self-limited range of motion) nevertheless, the Appellant's impairments were found to be a significant factor. Doctors Ko and Lawson made the following diagnoses: 1. Bilateral sacroiliac joint dysfunction; 2. Cervical strain and sprain; 3. lumbar strain and sprain; 4. Possible carpal tunnel syndrome; 5. Possible right carpometacarpal joint osteoarthritis; 6. Possible thoracic outlet syndrome; 7. Postural compensations with anterior centre of gravity and forward carriage of the head; 8. General deconditioning due to inactivity; and 9. Diffuse chronic neuropathic pain syndrome with 17 out of 18 fibromyalgia tender points. They stated their examination findings were suggestive of significant musculoskeletal impairment that was incident related. They recommended, among other things, 1. a sleep study and neuropsychiatric consultation; 2. referral to Dr. Shulman for diagnostic cervical and lumbar facet blocks and sacroiliac joint blocks under fluoroscopy; 3. Ultrasound study of the wrists to assess for cubital and/or CTS and Doppler evaluation for thoracic outlet compression; 4. Total body scan to assess for bony or inflammatory pathology; 5. Electrodiagnostic evaluation of the right arm; 6. Referral to Dr. Karmy for medical

management of her fibromyalgia; and 7. Screening fasting blood work for hormonal deficiencies. They stated the prognosis from a physical perspective was guarded. It was 24 months since the slip and fall accident and the Appellant continued to have ongoing symptoms and impairments. The injuries and ongoing pain and limitations prevented her from continuing her previous activities of daily living. They stated: "(The Appellant) has sustained a complete and continuous incapacity which wholly prevents her from performing the duties of any occupation for which she is or may become reasonably suited by training, education or experience. She has a Grade 8 education and has worked in a physical capacity but is not able to perform these duties".

[28] According to a December 11, 2014 clinical note the Appellant had pain in the lower back, 8/10 radiating from sciatic area to hip, "sometimes pins and needles sometimes burning" especially while walking, cervical pain (8/10), lack of sleep, now approaching two years. She was very stressed recently due to job loss and lack of sleep. Pain continues but pain meds working okay. "Fell down at Wallmart – was working 60 hr week".

[29] A December 23, 2014 right hip x-ray revealed a normal right hip.

[30] On February 13, 2015, David Cohen, completed a Vocational Evaluation and Transferable Skills Analysis Report. He noted that at the time of evaluation, the Appellant continued to complain of a range of musculoskeletal complaints not limited to but including headaches, neck pain, constant right shoulder pain, right hand pain, low back pain, right hip pain, right leg pain, disrupted sleep pattern and emotional and cognitive inefficiencies. The Appellant further reported some ongoing tinnitus and stated her headaches could occur daily or intermittently. She also described posterior right neck pain on a constant basis aggravated by range of motion occasionally accompanied by dizziness, difficulty with writing and above and below shoulder reaching. The Appellant indicated she wears a right hand splint and with pain at the base of her palm and wrist and stated the right hand shakes when she tries to write. She further described low back pain aggravated by walking, right foot numbness and occasional numbness in her buttocks. She also described right hip pain aggravated by walking and general activity. She reported feeling depressed, being isolated and having difficulty with memory. She was observed to stand and sit frequently throughout the interview and assessment. She had difficulty with all English language subtests given her lack of ESL training and also was unable

to work at the pace necessary to demonstrate competitive behavior. She had difficulty concentrating and focusing and appeared preoccupied with her pain complaints. According to Mr .Cohen, the Appellant was illiterate in the English language. Her test scores were not indicative of being able to hold other sedentary employment. He stated her functional test results clearly indicated she did not present with the required worker traits to return to her pre-accident level of employment. Her presentation throughout the assessment was one of an individual suffering from a great deal of pain. Throughout the assessment she was barely able to function. Her concentration, focus, energy levels and general coherence was poor. Based on the test results including a review of the file from a medical and psychological and functional perspective, Mr. Cohen opined the Appellant could not return to her pre-accident employment or any other employment for which she may be suited by way of education, training and/or experience. He also stated she was at a significant loss of competitive advantage in the marketplace. Her major skill was her physical prowess and ability to problem solve and work repetitively on the job. Without those major elements, she was unemployable. Mr. Cohen stated that the Appellant's prior training, education in Portugal, impoverished English language skills, lack of computer knowledge, and lack of Canadian and/or Ontario education, clearly suggested that her loss of competitive advantage was significant. She was age 55. Given her age, deficits and lack of recovery, the degree of loss of competitive advantage was significant. Her transferable skills were essentially non-existent for any other form of competitive employment. She had only performed general labour/packaging work in a factory, which requires physically demanding skills involving being able to stand, bend, reach, lift, move and stop as demanded by the job. She no longer had such transferable skills as they had been displaced by the effects of her slip and fall. Her lack of transferability to other jobs based on her language deficits, computer deficits, lack of job variability and poor education, did not augur well for her re-employment. She was not employable in any other capacity at this point in her life. Mr. Cohen described a 55 year old lady who was generally uneducated, who does not have computer proficiency and is physically unable to perform at her pre-accident level based on the sequelae from her slip and fall that affected her both physically and psychologically. A Functional Ability Evaluation noted she has deficits in mobility, standing and walking, upper extremity, neck and back function and general stamina with substantial barriers in performing her work. Mr. Cohen concluded the Appellant was not employable either on a full or part-time basis.

[31] A June 5, 2015 MRI of the bilateral hips and pelvis revealed minimal degenerative arthritis of bilateral hips joints; mild adductor tendinosis with minimal bone marrow edema in the bilateral pubic bodies at the attachment of the adductor tendons; and bilateral tendinosis of the hamstrings.

Oral Testimony

[32] She was born in Portugal and came to Canada in 1980. She completed high school in Portugal but did not complete further studies. She worked on a farm in Portugal.

[33] She did not study English in Portugal or upon arrival in Canada.

[34] She started working in Canada picking mushrooms in 1980 for seven months, then picking flowers in greenhouses for 3 years and then working in a candy factory between 1983 and 1989.

[35] After 1989, she took a disability leave for her shoulder. She re-entered the workforce in March 2006 at Cargill. She worked until October 2012 as a machine operator and general labourer packing hamburgers. At the time of her accident, she was working a 60 hour week, 10 hours a day.

[36] She had an accident in October 2012. Since then, she has not been able to return to work due to pain upon movement. She has lower back pain, hip pain, right knee pain which goes down to her right foot, right leg swelling, right shoulder pain, right sided neck pain, headaches and right wrist pain. She wears a brace and gets swelling in her right hand (she appeared to describe the thenar eminence). She shakes all the time.

[37] Without medication, her pain is 10 on a pain scale of 0-10; with medication, it is 7, 8 or 9. She takes Tylenol 2 every five hours.

[38] She presently takes the following medications: Cymbalta 60 mg 1 capsule once daily; Mylan-Pantoprazole t 40 mg 1 tablet 2x daily; Mylan-Cyclobenzaprine 10 mg at bed when needed; PMS Zopiclone 7.5 mg 1 tablet at bed when needed; Senokot 8.6 mg 1-2 once daily; Ratio Oxycocet 1 tablet 3x daily when needed; and Lenoltec No. 2 15 mg 1-2 every 4-6 hours when needed.

[39] Sometimes she goes to the hospital emergency room for Cortisone or Morphine. She has visited the ER approximately 7-9 times. She visited frequently in 2013.

[40] She constantly experiences pain. It is really bad at night and affects her sleep. She gets approximately two hours sleep. She has broken sleep. The pain keeps her up. Her husband has to help her turn in bed.

[41] At times, she wants to die. She cries every day. Her family tries not to cry or feel sad, but she sees how they feel.

[42] She can sit for 15-20 minutes and then has to get up.

[43] She cannot climb/descend stairs by herself. She is scared of falling and has to have someone beside her.

[44] She can stand for approximately 10 minutes.

[45] She finds walking the most painful. She can walk 10-15 minutes, starts shaking and has to sit. She uses a cane.

[46] In her factory job, she was always moving around and never sat. She did not have a problem in her leg, shoulder or back prior to the fall. When she fell, she hit her shoulder and the pain started again in her shoulder and neck. She is unable to return to her previous factory work.

[47] She needs to ask her family doctor for assistance get a wheelchair for outside the home. She has used a cane since the start of 2014.

[48] She has trouble picking things up with her right hand. Her fingers are numb. She cannot carry even 5 lbs. She cannot write much.

[49] She needs help getting dressed, especially with her pants, socks, jacket and boots. She does not drive in the winter. She does not take public transportation. Her family members drive her places.

[50] She cannot push a grocery cart in the shopping centre. She cannot use her right hand to keyboard.

[51] She has poor memory and has to make lists to remember appointments. She wants to go to sleep and not wake up when she experiences stress. She used to like to go out and be with people. Now she is embarrassed to go out. She is stuck in her home and likes to be by herself. If she stays home, she does not change out of her pajamas. She takes medication for anxiety and depression. She feels sad all the time.

[52] She has received various treatments including massage therapy. She saw Dr. Marinko one hour each week for six months. She listens to a CD to relax. She sees her family doctor once a month. If she cannot see him right away, she goes to the ER department. She has seen a lot of doctors. She saw a psychologist.

[53] Currently, she is waiting to see Dr. Jalali, because she had bleeding in her stomach which started in 2015. On December 10, 2015, she was referred to have blood work with a follow up in early February 2016 and a subsequent appointment in March 2016. Following the bloodwork, she will see Dr. Jalali in March 2016, at which time he will tell her when she will go for a stomach biopsy. She has already had three stomach biopsies.

[54] Most of the time, she is crooked and cannot stand straight.

[55] On January 4, 2016, she was referred to a pain clinic by Dr. Vas for chronic pain syndrome with anxiety. She will see Dr. J. Ennis.

[56] During a typical day, her husband helps her to get out of bed and go down the stairs. He helps her to dress, and take a hot bath. She stays on the first floor and lies down on the sofa. She watches some television or listens to a CD to relax. She needs help to shower, wash, dry and comb her hair.

[57] Her husband does all the cooking. She can make a sandwich. Her daughter comes once a week to clean and her spouse does the vacuuming. Her husband and son do the dishes. She can wash one or two dishes and dust. Her husband does the laundry. She can do some folding. Her son shovels the snow. Her husband does the grocery shopping. After walking 10-15 minutes, she goes to sit in the car.

[58] The Tribunal had some questions for the Appellant. She clarified that the source of her income in 2013 ($11,774.00) was on account of three months Employment Insurance sick benefits and the balance was on account of Sun Life disability benefits. She also receives some money from WSIB for her shoulder ($200.00 monthly). Her $15,515.00 income reported in 2014 was entirely on account of Sun Life disability benefits. She never worked in 2013 or 2014 and earned money. She currently receives disability benefits from Sun Life.

[59] In her Questionnaire, although she stated she stopped working after her injury on October 6, 2012 and further indicated she could no longer work due to her medical condition as of November 7, 2012, she might have provided this latter date based on what her family doctor stated. She received assistance in completing the Questionnaire. She clarified she was not able to work after the October 7, 2012 accident. Also, although she indicated in her Questionnaire that she received 3 months EI regular benefits, she actually received EI sick benefits. Also, although she wrote in her Questionnaire she sometimes uses a wheel chair, but testified she is waiting to get one, she explained she uses a wheelchair when she goes to hospitals.

[60] In non-winter months, she would drive a car for very short distances, e.g., five minutes to visit her daughter. She might drive approximately twice weekly. She was scared to drive and last drove in or around the summer of 2015. She was in pain and did not want to get into an accident. Also, she could not park the car and was only able to drive straight.

[61] She does not recall being referred to see Dr. Bailey, orthopedic surgeon (as noted by Dr. Vas in his May 2013 CPP Medical Report).

[62] She saw Dr. Billing who administered needles to her shoulders and low back. After he administered the needles to her low back, she could not feel her legs or walk for 3 days. She obtained some pain relief for two weeks in the shoulders. When she returned to see Dr. Billing, she told him about the problems with her legs. He told her he would not administer any further injections and recommended she see Dr. Vas and get referred to another doctor.

[63] In terms of Dr. Ko and Dr. Lawson’s November 26, 2014 report recommendations, she does not recall if she saw Dr. Appleton for a sleep study. She believes she saw a doctor in X or X who stated he would send a report to Dr. Vas. However, she did not attend an overnight sleep

study. She cannot recall if she saw Dr. Shulman for diagnostic cervical and lumbar facet blocks/sacroiliac joint blocks under fluoroscopy. She also cannot recall if she saw Dr. Karmy for management of her fibromyalgia. She believes Dr. Ghouse sent her in or around December 2015 for an ultrasound for her shoulder and hands and that she underwent a nerve test with needles.

[64] If her doctors send her to appointments, she attends. Currently, she is waiting to see Dr. Ennis at the pain clinic. She will also have blood work and then see Dr. Jalali to arrange a stomach biopsy.

[65] She talked to her family doctor, who said it was okay for her to go see Marinko, a psychotherapist. Her lawyer may have paid for the treatment. She saw him once a week for six months. They discussed her stress.

[66] Since she last worked, she does not think she could work at any job. She cannot dress herself, cannot sleep and cannot be beside other people. When she is in pain, she wants to be by herself. For the same reasons, she could not go back to school to improve her education in order to find other work.

SUBMISSIONS

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

a) The medical record supports the case. The Appellant's legal representative read extensively from the reports of Dr. Pilowsky, Dr. Frisina, Drs. Ko and Lawson and Dr. Cole. He also read from the Vocational Evaluation of David Cohen, which gives a "real world" context for the Appellant's situation. Her capacity to work is virtually non-existent.

b) Considering the medical reports, testimony and vocational assessment, the Appellant meets the definition of severe and prolonged. Taking into account her "real world" context, i.e. age, experience level of education, language proficiency and capacity for retraining, she did not have capacity regularly to pursue any substantially gainful occupation since October 2012. She is currently age 55; only worked in menial labour; never worked in sedentary or a computer based environment; completed high school in

Portugal in Portuguese; never held gainful employment in Portugal; has basic English language proficiency but had difficulty making herself understood at the hearing; has difficulty reading and writing English and needed help to have her CPP forms completed; and has diminished mental functioning. It is not foreseeable she could retrain for a physically less demanding job, which would require computer skills and more polished English language skills. She should be classified as disabled. Her disability is severe and prolonged

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

a) She bases her disability claim on back, neck and shoulder pain. She stopped working in October 2012. While she may not be able to return to her former job as general labourer, she has not attempted to return to any alternative light work. The medical evidence does not show any serious pathology of impairment, which would result in her being categorized as disabled and unemployable in all occupations considering her age and education. The objective investigations concerning her physical complaints show no abnormalities on x-ray, MRI or ultrasound. She is not being followed by psychiatry, psychology or pain management. Many treatment options commonly used in chronic pain situations have not been utilized to date. Pursuit of suitable occupations is not contraindicated.

b) A right shoulder MRI (November 2012) following a history of a right shoulder injury in 1989 and which worsened after a recent fall, revealed no significant abnormalities or acute injury. Similarly, an ultrasound and x-ray of the shoulder (January 2013) were normal. X-ray findings of the SI joints, AP obliques and lumbosacral spine (January 2013) detected no disease or injury. An April 2014 MRI of the spine revealed degenerative changes with a mild degree of nerve root contact from a small disc bulge at L5-S1. From an objective standpoint, she does not have any serious disease or injury identified as the result of her recent fall that would interfere with her ability to work in any occupation.

c) According to the CPP Medical Report (Dr. Vas, May 19, 2013), the diagnosis of low back, neck and shoulder pain was provided which worsened after a fall at Walmart. She has not returned to work since then. Treatment consisted of medication with follow up by pain management and orthopaedics.

d) Dr. Pilowsky assessed the Appellant′s psychological function after the Appellant fell in Walmart and landed on her right side. The Appellant reported chronic pain of the neck, shoulder and back as well as depression and stress. Dr. Pilowsky was clearly supportive of finding the Appellant completely and indefinitely, despite the fact she did not make any further follow up recommendations and the Appellant did not refer to any psychological issues in her Questionnaire.

e) It is not sufficient for CPP purposes to support the presence of a medical disability based on a one-time assessment in the absence of more than one clinical presentation, treatment recommendations and referral to specialists and associated programs. With the severity of symptoms described, it would be reasonable to expect referral to psychiatry where at least one medication trial can be explored, especially when no previous history or treatment has been undertaken. With compliance, improvement is sure to follow. At this time, the severe and prolonged criteria have not been satisfied as no such treatment has been initiated.

f) Although the former employer was unable to provide modified duties unless the Appellant returned to her job 100%, the severity of disability is not based on her inability to return to her usual occupation: it is based on her ability to work in any job. Since no physical or psychological evidence has been provided to suggest otherwise, she has the capability to pursue appropriate work activity.

g) Dr. Billing completed a pain assessment (March 22, 2013). On examination, she had no problems walking on heel and toes but demonstrated some range of motion restrictions with the neck and bending backward with moderate tenderness. Chronic pain was diagnosed and injections offered. To date, no further follow up or participation in any pain management program has been pursued. Similarly, while a one-time chiropractic report supports disability, there is a clear lack of utilization of consistent treatment and

follow up, which is a minimal expectation when determining indefinite employability based on a severe and prolonged medical condition.

h) The Respondent does not disagree there are range of motion restrictions. However, the evidence does not describe a severely disabling medical disability whereby any and all work activity would be exempted.

i) All objective investigations with respect to her physical complaints show no abnormalities on x-ray, MRI or ultrasound. She is not being followed by psychiatry, psychology or pain management and many treatment options commonly utilized in chronic pain situations have not been utilized to date.

j) In its Addendum Submission, the Respondent stated the Appellant had new earnings in 2014 of $15,515.00, which extended the MQP from December 2015 to December 2016. The family physician commented in December 2014 that she was very stressed due to job loss and fell at work at Wall Mart and was "working 60 hr. per week".

k) Investigative reports were normal or did not reveal any severe pathology.

l) The family doctor provided his clinical notes and copies of investigations and reports already on file from Dr. Billing and Dr. Frisina. There were no further reports from the chiropractor or pain specialist. Investigative reports did not reveal severe pathology. Office visit notes indicate she was seen primarily for assessment of her chronic pain and issues such as epigastric pain, stress, insomnia and occasional swelling and numbness in her hands and feet. There was no indication she had severe pathology or that she required any aggressive medical interventions.

m) Information indicates she was working and had earnings in 2014, after she claimed to have stopped working in October 2012. The medical evidence did not reveal severe pathology. The additional medical evidence does not support an incapacity for all work.

n) In a further Addendum Submission (December 10, 2015) the Respondent states it reviewed a large volume of additional medical evidence inclusive of several duplicate reports previously reviewed.

o) In October 2014, she was seen for an independent medical assessment at the request of her legal representative. While found to have subjective complaints of pain such that she would be unable to perform the duties of any occupation for which she may become reasonably suited by training, education or experience, there were other factors identified as significant. They included non-organic signs or inappropriate responses in the physical examination such as 4/5 Waddell′s behavioral signs. Consistency of effort was not found throughout the examination and it identified that her range of motion appeared to be self- limited (at other times during the examination, she could move to a further extent with a reduced indication of pain). The physical examination was not reliable because of the inconsistencies identified. Treatment has been very limited and conservative, including basic physical therapy interventions, one series of injections and medication. All modalities of treatment have not been exhausted.

p) In clinical notes, Dr. Vas commented that the pain medications were working okay. They were the same pain medications she had been prescribed for several months, suggesting efficacy.

q) Dr. Cole, clinical psychologist, was supportive of finding the Appellant disabled. However he only saw her for the sole purpose of preparing a medical-legal report at the request of her legal representative. While she has experienced difficulties arising from her slip and fall in October 2012 and resulting in symptoms of depression and anxiety, the information submitted does not support that she required intensive psychiatric consultation, intervention and monitoring as one would expect with a severe psychiatric condition. She has been maintained on Cymbalta since January 2013, suggesting it is providing some benefit in controlling her symptoms. The information contained in the report does not describe severe examination findings or limitations supportive of a severe psychiatric medical condition preventing all work.

r) She has been diagnosed with low back, neck and shoulder pain since the October 2012 slip and fall. Diagnostic testing has shown only mild degenerative changes consistent with the normal aging process. Additional medical reports include medical-legal reports related to a law suit and requested by the Appellant’s representative. There are no

> reports submitted to indicate severe impairments requiring follow up or consistent treatment by neurologic, orthopedic, physiatrist or pain specialists. Although she complains of pain in her neck, right shoulder and lower back, clinical investigations findings have not demonstrated significant pathology or severe functional deficits.

ANALYSIS

[69] 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, 2016

Severe

[70] 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.

[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] The Tribunal is satisfied the Appellant suffered from a severe and prolonged disability on or before the date of hearing.

[73] The medical record supports a finding that the Appellant suffers from ongoing low back, neck and shoulder pain with painful movements of the neck and back. According to Dr. Billing, pain specialist, in his March 2013 report issued only five months after the Appellant stopped working, the Appellant's low back and right leg pain were increased by sitting, standing and walking for more than 10-15 minutes, getting in and out of the car, rolling around in bed, and coughing/sneezing. Moderate neck pain was increased by neck movement. Flexion, extension and rotation to the right and left were restricted and limited by tenderness and spasm of the neck muscles including spasm and tenderness of the sternocleidomastoid muscles on both sides. Right shoulder pain was increased by overhead activities. Pain on the side of the face and TMJ was

increased by chewing food. She also had moderate tenderness in both sides of the neck in multiple facet joints in the cervical spine, right shoulder right side of face and TMJ. Dr. Billing diagnosed myofascial pain in the right shoulder, atypical facial pain, TMJ disorder on the right side, cervical disc disease, osteoarthritis of the cervical spine, lumbar disc disease, right sciatic and Chronic Pain Syndrome.

[74] In a similar vein, Dr. Frisina, D.C, set out in his May 2014 report that the Appellant had decreased range of motion of the lumbar spine in all planes with pain at the end ranges; restrictions in extension and right and left rotation; cervical spine and shoulder pain with cervical degenerative disc disease with limited movement in all planes; limited movement in forward flexion/extension; internal external rotation of the right shoulder; and chronic myofascial pain in the above areas.

[75] Both Drs. Billing and Dr. Frisina noted marked limitations in function. Dr. Billing did not question the Appellant’s description of pain as burning, stabbing, throbbing and sharp in nature, As indicated, he noted her low back and leg pain were increased by sitting, standing and walking more than 10-15 minutes. Dr. Frisino reported ongoing debilitating pain which occurs daily. Both Dr. Billing and Dr. Frisino reported pain of a similar nature. Dr. Billing diagnosed chronic pain. Dr. Frisino referred to chronic myofascial pain.

[76] The Tribunal is satisfied that as a result of the Appellant’s chronic or myofascial pain and restrictions involving standing, walking, and overhead movement of her shoulder, she would not be capable regularly of pursuing her previous physical labourer job or any physical job.

[77] This leaves the question whether she was capable regularly of pursuing lighter or sedentary work.

[78] The Tribunal finds the Appellant does not possess residual capacity to perform light or sedentary work, and therefore, is relieved of the obligation to pursue such work or retraining for work within her functional restrictions.

[79] The Tribunal notes that the Appellant has some difficulty with prolonged sitting, which would affect her capacity to perform sedentary work. The Tribunal has also considered Dr. Billing’s findings that the Appellant has restricted neck movements involving flexion, extension

and rotation to the right and left, limited by tenderness and spasm of the neck muscles. This would reasonably impact on computer or desk work which requires a degree of flexion, extension and rotation of the neck.

[80] The Tribunal notes that the Appellant also suffers from a psychological impairment as detailed in Dr. Pilowsyky's December 2013 psychology report. Dr. Pilowsky stated the Appellant was significantly depressed and stressed and finding it increasingly difficult to cope. She was anhedonic, had diminished self-esteem and confidence, was easily irritable and angered, had problems with memory and concentration, difficulty making decisions and multi-tasking. She further had poor sleep, would wake frequently due to pain and headaches and would suffer from daytime exhaustion. Dr. Pilowsky also described high levels of anxiety with symptoms including shortness of breath and dizziness, etc. She diagnosed a Major Depressive Disorder, Severe, Pain Disorder Associated with Both Psychological Factors and a General Medical Condition and set out a GAF of 40-45.

[81] Given the combined effect of the Appellant's physical and mental impairment, the Tribunal concludes the Appellant was incapable regularly of pursuing any substantially gainful occupation on or before the date of hearing. Given her multitude of symptoms and restrictions, it is difficult to envision her being capable regularly of attending any workplace, let along remaining there for the duration of her shift and productively applying herself to her work duties.

[82] The Respondent asserts that the medical evidence does not show any serious pathology of impairment, which would result in the Appellant being categorized as disabled and unemployable in all occupations. They note that the objective investigations concerning her physical complaints show no abnormality on x-ray, MRI or ultrasound, referring to a right shoulder MRI, x-ray findings of the SI joints, obliques and lumbosacral spine, and the April 2014 MRI of the spine. The Tribunal does not find the absence of objective radiological evidence to be an obstacle for the purpose of concluding that the Appellant's disability is severe as defined in the CPP. She has been diagnosed with chronic pain, myofascial pain and a Pain Disorder, none of which would show up on radiological imaging. The Tribunal notes that in their November 26, 2014 Drs. Ko, physiatry and Dr. Lawson, chiropractor, diagnosed cervical strain and sprain,

lumbar strain and sprain, and diffuse chronic neuropathic pain syndrome with 17 out of 18 fibromyalgia points. Again, such findings would not show on radiological tests.

[83] The Respondent also submits that the Appellant is not being followed by psychiatry, psychology or pain management. They further state many treatment options commonly used in chronic pain situations have not been utilized. Also, the Appellant did not refer to any psychological issues in her Questionnaire. They note it is not sufficient for CPP purposes to support the presence of a medical disability based on a one-time assessment in the absence of more than one clinical presentation, treatment recommendation and referral to a specialist with associated programs. They further contend that with the severity of symptoms described, it would be reasonable to expect referral to psychiatry where at least one medication trial can be explored, when no previous history or treatment has been undertaken.

[84] In response, the Tribunal notes that Dr. Pilowsky provided her expert opinion within her area of expertise as a clinical practicing psychologist. She stated that "based upon a reasonable degree of medical certainty, it is my professional opinion that (the Appellant) is suffering from psychological difficulties as a result of her disability, which further precludes her from performing her regularly occupational duties or duties of any alternative employment for which she may be qualified by training, education or experience". She also stated it was "important to note that there has not been any recovery, despite psychotropic medication, as well as physiotherapy treatment for pain". Given Dr. Pilowsky's findings and conclusions about the non-efficacy of medication and prognosis, the Tribunal is not convinced that the failure to refer the Appellant for psychiatric follow up or treatment undermines the integrity or validity of her diagnosis or prognosis. Given her finding that there was no recovery despite psychotropic medication, the Tribunal finds it entirely speculative whether upon referral to a treating psychiatrist, the Appellant's psychological impairment would abate.

[85] In terms of the Respondent's contention that it is not sufficient for CPP purposes to support the presence of medical disability based on a one-time assessment, the Tribunal has carefully reviewed the entire medical record and the Appellant's oral testimony in assessing the severity of the Appellant's disability.

[86] In terms of the Respondent's observation that the Appellant did not refer to any psychological issues in her Questionnaire, the Tribunal notes she did refer to some limitations with memory, difficulty with concentration due to pain and difficulty with sleep. She also reported she was prescribed Cymbalta 30 mg 1x daily.

[87] The Tribunal further notes that Dr. Cole, psychologist reported in November 2014 that the Appellant has elevated levels of anxiety, depression and stress. He diagnosed Major Depressive Disorder, Severe chronic, Generalized Anxiety Disorder with Panic, moderate – severe chronic and Pain Disorder with a General Pain Condition and Psychological Factors chronic.

[88] The Tribunal is satisfied upon consideration of the medical record including the reports of Dr. Pilowsky, Dr. Frisina, Dr. Cole and Drs. Ko and Lawson, the Appellant's oral testimony and the fact she has a pending referral to a pain clinic, that the Appellant suffers from a severe disability as defined in the CPP.

[89] The Tribunal is satisfied the Appellant suffered from a severe disability as October 2012 at which time she had the slip and fall and was no longer able to return to her previous job.

Given the combination of her physical pain and mental impairment, she would be incapable regularly of performing any substantially gainful occupation.

[90] In terms of the income attributable to the Appellant for the years 2013 and 2014, the Tribunal is satisfied based on the Appellant's unchallenged and credible oral testimony, that the source of such income was EI sick benefits and Sun Life disability benefits.

[91] The Tribunal is further satisfied taking her "real world" *Villani* factors into account, the Appellant's disability is severe. As pointed out by Mr. Cohen in his February 2015 Vocational Evaluation and Transferable Skills Analysis Report, the Appellant is illiterate in the English language. Her concentration, focus, energy levels and general coherence was poor. Her prior training, education in Portugal, impoverished English language skills, lack of computer knowledge, lack of Canadian and/or Ontario education, clearly suggested that her loss of competitive advantage was significant. The Tribunal is satisfied the Appellant does not possess transferable skills to lighter work and is not a suitable candidate for retraining.

Prolonged

[92] The Tribunal is satisfied the Appellant's disability was prolonged in October 2012. Despite suffering an October 2012 slip and fall, the medical record supports the development of a chronic pain disorder and major depressive disorder, severe without psychotic features. The weight of the medical record, all speak to a guarded or poor prognosis.

[93] As noted by Dr. Vas in his May 2013 CPP Medical Report, the prognosis was poor due to the length and type of injury.

[94] In her December 2013 report, Dr. Pilowsky stated the Appellant's psychological problems were in themselves incapacitating and that she would most likely not improve.

[95] In her May 2014 report, Dr. Frisina reported that from a musculoskeletal point of view, the Appellant had reached a plateau and was in fact, deteriorating. He stated: "Due to these circumstances, she is definitely not fit to work any longer and should be considered as functionally permanently disabled. I fully support this pleasant and co-operative patient for CPP benefits".

[96] In his November 2014 report, Dr. Cole stated the prognosis, given the entrenchment of the Appellant's symptoms (both physical and psychological) was rather poor.

[97] In their November 26, 2014 report, Drs. Ko and Lawson stated the prognosis was reported. They noted it was 24 months since the slip and fall accident and that she continued to have ongoing symptoms and impairments.

[98] Although the Appellant has a pending referral to a pain clinic and may still find some relief, the medical evidence, on balance, supports a finding of a prolonged disability.

CONCLUSION

[99] The Tribunal finds that the Appellant had a severe and prolonged disability as of October 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of February 2013.

[100] The appeal is allowed.

Jeffrey Steinberg
Member, General Division - Income Security