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

Citation: *M. K. v. Minister of Employment and Social Development*, 2016 SSTGDIS 43

Tribunal File Number: GP-15-3737

BETWEEN:

M. K.

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: Raymond Raphael

HEARD ON: June 6, 2016

DATE OF DECISION: June 8, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. K.: Appellant

Karen Kensett: Minister's representative (participating by Teleconference)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 18, 2009. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.

[2] On February 5, 2015 the General Division dismissed the appeal after a Teleconference hearing. On November 4, 2015 the Appeal Division allowed the Appellant's appeal and referred this matter back to the General Division for a full reconsideration.

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

a) The Appellant will be the only party attending the hearing;

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

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

d) 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] The Tribunal finds that the MQP date is December 31, 2011.

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

BACKGROUND

[9] The Appellant was 57 years old on the December 31, 2011 MQP date; she is now 62 years old. She worked for Telus for 22 years as a business sales support representative. Prior to June 2008 she had been involved in three falls as well as a motor vehicle accident (MVA), and she had suffered four concussions. She was involved in a serious MVA in June 2008 in which she exacerbated her previous conditions and sustained injuries to her back, knees and shoulder

as well as a fifth concussion. She has not worked since that MVA and is now in receipt of permanent Long Term Disability (LTD) benefits.

APPLICATION MATERIALS

[10] In her CPP disability questionnaire, signed on March 1, 2009, the Appellant indicated that she has a grade 12 education and that she attended college for 1 ½ years. She noted that she last worked as a sales support representative from May 12, 1987 until June 27, 2008. The Appellant stated that she stopped working because of post-concussion syndrome, her needing a back fusion and laminectomy, and other problems.

[11] She claimed to be disabled as of June 27, 2008 and stated that the illnesses and impairments that precluded her from working include osteochondroma or osteophyte at lumbar spine with cauda equnia syndrome; post-concussion syndrome (5th concussion in 7 years); possible torn meniscus in the right knee; [torn] right shoulder rotator cuff ; pain in neck and cervical spine with numbness extending down in the arm into pinkie and ring finger with accompanying pins and needles; very severe spinal stenosis; and right elbow soreness and swelling.

[12] The Appellant noted that her other medical conditions included osteoarthritis; dish arthritis; bone spurs on the bottom of her heels; morbid obesity (fatty liver); and ossification of the posterior longitudinal ligament (OPLL) in three vertebras in the neck and in two in the lumbar spine. She noted functional limitations when sitting, standing, walking, lifting, carrying, reaching and bending; that she requires help for household maintenance; that she has difficulties with speaking, remembering, concentrating and sleeping; that she has she hasn't been able to drive for 10 years; and that when she takes public transit she often has trouble with taking the wrong bus or getting off at the wrong bus stop.

[13] A report dated December 2, 2008 from Dr. Lorne, the Appellant's family doctor, accompanied the CPP application. Dr. Lorne diagnosed post-concussive syndrome; lumbar spinal stenosis; right mechanical knee injury; and right rotator cuff injury. Dr. Lorne described the relevant/significant medical history as follows: *post-concussive syndrome* – headaches, confusion, poor memory, poor concentration, and fatigue; *lumbar back pain* – severe pain,

severely decreased mobility, can't walk more than 2-3 blocks, previous bladder/bowel symptoms from nerve impingement; and unable to bend; *knee pain* – limits walking; and *shoulder pain* – pain lifting and reaching overhead. The prognosis was uncertain; that the Appellant was unlikely to make full recovery; and that it was uncertain whether spinal surgery is an option. Dr. Lorne opined that the Appellant will likely be unable to work again. Dr. Lorne further opined that the Appellant was severely limited by her back and post-concussive syndrome.

Initial Application

[14] This was the Appellant's second application for CPP disability. She initially applied for CPP disability on July 31, 2003. This application was denied both initially and on reconsideration. The Appellant did not appeal the reconsideration decision.

[15] A report dated July 15, 2003 from Dr. Burak, family doctor, accompanied the initial application. This report diagnosed bilateral knee medial compartment osteoarthritis; probable right knee medial meniscal degeneration tear; morbid obesity; bilateral carpal tunnel syndrome despite bilateral median nerve decompression surgeries; and degenerative disc disease of the cervical and lumbar spine. The prognosis was that despite her degenerative arthritis of both knees, the Appellant has a "very good" chance of returning to her normal work duties following her upcoming arthroscopic right knee assessment and surgery. Dr. Burak opined that he did not believe that the Appellant was permanently disabled and that she stands a "very good" chance of being able to work in some capacity in the future.

ORAL EVIDENCE

[16] The Appellant testified that prior to the June 2008 MVA she had a history of arthritis, joint related problems, and concussions caused by falls due to her decreased mobility. She stated that she had been off work on several occasions for periods of 5-6 months because of back and shoulder issues. Despite these issues, she was able to live a very active life; she walked an hour every night with her husband, went camping, volunteered, and was very involved in their children's and grandchildren's lives.

[17] In the June 2008 MVA their car hit a deer and she was flung from side to side inside the car. She began to suffer excruciating back pain, her knees hit the dashboard (she already needed partial knee replacements), she tore the rotator cuff off of her right shoulder and she lost consciousness. She stated that after this MVA her life has been completely different.

[18] The Appellant described her surgeries after the MVA. She needed a total replacement of both knees but the doctors wanted to have her back surgery done first. There were delays in her back surgery because she needed a team of surgeons; they were delays for the required testing; and she slipped and broke her leg in April 2010, just before the initially planned surgery. She did not undergo back surgery until 2012. The surgery fixed her disc problem and removed the osteochondroma; but they ran out of time to perform a foraminotomy on L4-S1. After her surgery her blood pressure plummeted and the doctors didn't want to do a second surgery since they were concerned about the effect of the low blood pressure on her brain injury.

[19] She completed rehabilitation from the back surgery and stated that the surgery helped "to some degree." Prior to the surgery she was able to walk unassisted but was in "extreme" pain; after the surgery the pain has decreased but she can't walk more than three house lengths without using walking poles. She has to stop after about two blocks and rest. She stated that before her back surgery her back pain was a level 12, and now it is 9-10 on most days and down to a 7 on a good day.

[20] Her right knee replacement was initially scheduled for March 2016; however, she had to put it off because her mother suffered a fatal heart attack at that time. Her right knee replacement is now scheduled for September 2016 and her left knee replacement for the following year. She saw a shoulder surgeon about a year ago but he told her there isn't enough of her rotator cuff left for a normal surgery and that she would need a reverse surgery which requires a huge recovery. He recommended that she not do the surgery at this time. Because of her shoulder pain she can't sleep in a bed and has to sleep in a recliner – she doesn't sleep well.

[21] She has had injections to her back, knees and shoulders. They only give relief for a short time and then wear off. She stated that the injections are the only way to prevent her from going crazy because of the pain.

[22] The Appellant described her post-concussions symptoms. She stated that for the first year after the MVA she would get off at the wrong spot when she took the bus, and then would get on the wrong bus. She applied for HandiDart. She can't follow through; she might look good in the moment but after five to ten minutes she can't remember what was said; things don't stay with her very long and she has great difficulty learning new things. Her doctors didn't agree with the advice from the concussion clinic which was that she take anti-depressants and sleeping pills.

[23] Her doctors told her to give her brain time to heal by doing no reading, watching no television, and no games. Maureen Woodward taught her how to read and to do a variety of anagrams and math problems, but she still transposes words and gets confused when she tries to put what she was taught into action. She follows the strategies that Maureen Woodward recommended. She can now read a small article in a magazine and comprehend, she can speak using mostly the right words, she can't cope with multi-tasking and her husband does 60% of the housework. She can still have problems on buses and tries to put as little load on herself as possible. She has done the bare minimum activity for the last three weeks to prepare for this hearing.

[24] At Telus she supported the salespeople for the top 100 customers who were large entities and government departments. She has now lost her ability to think on her feet and focus. She has not approached Telus for less demanding work because Sun Life has determined that she has a permanent disability and all of her doctors have told her that she shouldn't return to work at all. On many occasions her doctors have told her that she has to face the facts and that she won't be getting any better. Her doctor signs a form for Sun Life every year saying that she isn't fit to return to work, and she would be defying her doctors if she tried to do this. She used to do a lot of volunteer work with her union and in politics but she can't think of any type of volunteer work that she could do now. She stated, "If I could volunteer, I would look for a job." She used to do the banking but her husband now does it all. She believes her post-concussion syndrome prevents her from even doing a menial job.

Response to Questions from Ms. Kensett

[25] When referred to the November 2008 report from the Fraser Health Concussion Clinic (see paragraph 36, *infra*) which recommended that she come back in December for cognitive screening, the Appellant stated that they did cognitive screening and that Maureen Woodward ran three cognitive screens. She didn't go back for the December follow up because she left 12 messages to try and arrange this and they didn't return her calls. She acknowledged that her last message was very angry and abusive, and that might be why they didn't return her calls. Dr. Lorne didn't agree with the concussion clinic's recommendations and when she spoke to her doctors a year later they told her that she was doing the right thing.

[26] She stated that she saw Maureen Woodward on as many occasions that the insurer would fund. She never refused an appointment with her and "loved" the sessions with her. She described the difficulties she had trying to find a family doctor after Dr. Lorne left in 2011 – she stated that they were never able to trace her. Dr. Eadie finally agreed to take her on but Dr. Eadie hated the CPP and refused to answer any questions from or provide any documents to the CPP. She stated that she saw Dr. Eadie on a regular basis: they discussed her depression; Dr. Eadie prescribed anti-depressants; and she saw a psychiatrist on five occasions. Dr. Eadie referred her for some of the MRIs and had the reports from the speicialists but she wouldn't release any of the papers. The Appellant stated that she had to run around to the treating specialists to get papers and this was while she was suffering from the effects of her post-concussion symptoms.

MEDICAL EVIDENCE

[27] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

Pre-June 2008 MVA

[28] On September 4, 2001 Dr. Boyle, plastic, reconstructive and hand surgeon, diagnosed bilateral carpal tunnel syndrome. He made arrangements for surgery.

[29] On November 15, 2001 Dr. Boyle performed a right carpal tunnel release. [30] On February 13, 2002 Dr. Boyle performed a left carpal tunnel release.

[31] On June 1, 2003 Dr. O'Brien, orthopaedic surgeon, reported that the Appellant had a history of spontaneous onset of right knee pain in November 2002. On physical examination the Appellant had a markedly antalgic gait. He diagnosed degenerative right knee arthritis with probable degenerative tear of the medial right knee meniscus. He recommended an arthroscopy and transarthroscopic joint debridement.

[32] On October 14, 2003 Dr. O'Brien performed a right knee arthroscopy and a transarthroscopic partial medial meniscectomy and debridement.

[33] On November 30, 2003 Dr. O'Brien reported that after initially feeling better following arthroscopy the Appellant's symptoms have returned. He recommended continued anti-inflammatory medication; that the Appellant work hard on a weight reduction program; and that she start a formal physiotherapy program for quads muscle strengthening exercises. He opined that the Appellant could return to work as soon as her symptoms allow.

[34] On March 19, 2004 Dr. Burak reported to Service Canada that Dr. O'Brien performed a right knee arthroscopy and a transarthroscopic partial medial meniscectomy and joint debridement on October 14, 2003, and that he had examined the Appellant on November 20, 2003 and diagnosed right knee post-arthroscopic synovitis and moderate right knee medial joint compartment osteoarthritis. Dr. Burak indicated that when he examined the Appellant on October 1, 2003 and November 12, 2003 he noted her depressed mood and additional chronic soft tissue pain involving her back, neck, shoulder and hip regions. He further indicated that when he examined the Appellant on February 4, 2004 he noted improvements in the Appellant's right shoulder rotator cuff inflammation and in her right knee synovitis. He felt the Appellant could attempt a gradual return to her normal work duties. He also indicated that when he last saw the Appellant on March 10, 2004 she was in good spirits and motivated to lose weight and return to work. He concluded that the Appellant was complying with the graduated schedule for return to work and that he anticipated that she would be able to commence her full, regular and normal work duties as of April 5, 2004.

Post-June 2008 MVA

[35] A MRI of the lumbar spine on November 21, 2008 revealed very severe canal stenosis at L3-4 from either a right-sided facet fracture of a very large osteophyte, resulting in near obliteration of the central spinal canal and deviation of the right traversing L4 nerve root and deviation of the cauda equina roots to the left. The MRI commented that this requires an urgent CT and urgent referral to a spine surgeon.

[36] On November 17, 2008 Suzanne Leach, occupational therapist with the Fraser Health Concussion Clinic, reported to Dr. Lorne. She noted that a CT scan of the head on November 3, 2008 was unremarkable. The Appellant reported that she was in "horrible' health prior to the June 2008 MVA and that she had a history of three previous concussions as well as previous depression which she experienced after a fall down stairs in 2005. The Appellant's current concerns included: being terrible with numbers; memory difficulties; being extremely irritable; poor sleep; difficulty spelling; fatigue; dizziness/vertigo; headaches; neck and back pain; and right shoulder and knee pain. Ms. Leach informed the Appellant that most people who sustain a concussion injury fully recover and that she should anticipate improvement over time but factors that might contribute to a slower rate of recovery include significant stress and changes in mood and the potential cumulative effect of multiple concussions. She provided education regarding brain injury and recovery as well as strategies to help manage her symptoms. The Appellant's progress was to be reviewed on December 1, 2008.

[37] On December 8, 2008 Dr. Maloon, from the Surrey Memorial Hospital Cast Clinic, reported that the Appellant presented with low back pain radiating into her right leg to her right foot. The pain was aggravated by standing and walking, particularly walking downhill and the Appellant also reported a two week period of loss of bladder control. The Appellant reported a longstanding history of back pain that was aggravated by a MVA in June. Treatment to date included massage and physiotherapy, both of which aggravated her back and leg pain. The Appellant had been taking Celebrex, Mobicox and Tylenol #3. Dr. Maloon's impression was that the Appellant presented with symptoms of mechanically activity related low back pain and that her symptoms were consistent with lumbar spinal stenosis.

[38] On February 2, 2009 Dr. Boyd, orthopaedic surgeon, related that the Appellant has had back pain on and off for about ten years; that she has had about five episodes of severe exacerbation which have taken her anywhere from five to six months to recover; and that she has had three falls and two motor vehicles accidents. He noted that although there has been some improvement since the MVA in June 2008 the Appellant was still quite disabled; she could only walk one block before experiencing pain radiating down her right leg and numbness in the leg; and she had increasing back pain. He did not think that Appellant was a candidate for a major fusion, other than a local fusion.

[39] A bone scan on February 18, 2009 revealed moderately intense increased activity within the left L4-L5 facet; mild increased activity within the facets bilaterally at L3-L4 as well as within the right side of the L5-S1 disc space and the right side of the T11-T12 disc space; and moderate to severe arthropathy within both knees especially in the medial compartment of the right knee.

[40] On March 23, 2009 Maureen Woodward, occupational therapist with JR Rehab Services Inc., listed the Appellant's injuries in the June 27, 2008 MVA as concussion, right knee soft tissue injury, right shoulder rotator cuff tear and low back soft tissue injury. The Appellant's medical history included arthritis in both knees and hands, neck and both big toes, previous tear of meniscus in right knee, four concussions and bilateral torn rotator cuff injuries. The Appellant has a history of falls due to arthritis in her toes and stated that at the time of the MVA she had ongoing post-concussion symptoms from previous occasions. In addition to her physical functional limitations and limitations, the report indicates that her post-concussion symptoms such as poor attention, memory, orientation to date and organisational skills, as well as difficulty multi-tasking affected the Appellant's daily function and were be a barrier to a return to work at that time. Occupational therapy directed cognitive rehabilitation was recommended.

[41] On March 24, 2009 Dr. Dipaola, from the Vancouver Coastal Health Spine Clinic, reviewed the February 18th bone span and noted that the Appellant continues to have severe nueroclaudication-type symptoms, most significant in the right leg; that she needs to sleep on a recliner and otherwise extended posture gives her exacerbation of her symptoms; that this is

difficult and distressing and causing a strain on her marriage; and that she is unable to walk as she used to. The Appellant was to undergo a right side L5 nerve root injection, and if this did not provide relief a foraminotomy to decompress the L5 nerve root was to be considered.

[42] On September 17, 2009 Dr. Legiehn performed a right L5 nerve root block.

[43] On November 4, 2009 Dr. Voorhoeve, surgical resident for Dr. O'Brien, reported to Dr. Eadie that the steroid injection markedly reduced the pain in the Appellant's knee and that it has been improving since then. He noted that the MRI shows that her right knee has ostomatacia as well as a degenerative meniscal tear and that her left knee shows that her medial patellar facet has full thickness chondral loss. X-rays taken that day showed quite marked medial compartment osteoarthritis. He recommended continued conservative treatment, and that if her symptoms did not improve the only options would be bilateral total knee replacements.

[44] On November 13, 2009 Dr. O'Brien noted that the Appellant was anxious to proceed with back surgery. He noted that he did not think that she needed a fusion and that hopefully they could proceed with a decompression without disrupting her spinal stability.

[45] On November 24, 2009 Dr. Boyd reported to Service Canada that the Appellant had presented to him in February 2009 with a history of back and right leg pain. He further reported that although the Appellant has complaints of back and leg symptoms she is neurologically intact and has good function except when she is active; that she is not totally incapacitated and is capable of performing sedentary activities including a sedentary job; and that her limitations are of lifting and walking but she can participate in sitting activities. He stated that the Appellant was booked for surgery and that there is hope that the chronic symptoms she has in relation to the pain with activities will improve with surgical intervention.

[46] On July 15, 2011 Maureen Woodward summarized the Appellant's occupational therapy and kinesiologist interventions since her initial assessment in March 2009. The Appellant reported that her concussion symptoms (missing appointments when busy, difficult making decisions, forgetting kettle is turned on, anxiety and difficulty maintaining friends due to finding small talk exhausting) are the hardest issues to manage on a day to day basis. On self-

rating scales the Appellant identified issues with visual memory while reading, practicing patience in conversation, decision making, poor attention and poor mood.

Post-MQP

[47] In a Disability Tax Credit Certificate dated January 1, 2014 Dr. Eadie noted that the Appellant is markedly restricted in performing the mental functions necessary for everyday life and that the marked restriction is present or substantially present at least 90% of the time. Dr. Eadie noted that the Appellant needs walking sticks ...needs supervision and constant redirection...is not independent...[and has] poor memory. She diagnosed brain damage.

[48] A MRI of the lumbar spine on October 9, 2014 revealed mild to moderate degree of multilevel lumbar spondyloctic change and postsurgical changes secondary to a posterior decompression.

[49] On October 20, 2014 Dr. Kwee, orthopaedic surgeon, referred the Appellant for physiotherapy for bilateral rotator cuff disease, right side tendinitis, left side small supraspinatus tear and left side AC joint arthritis

Note from Appellant's Husband

[50] In a note addressed To Whom It May Concern dated March 31, 2014 A. K. stated:

> I am writing regarding my observations of my wife M. K.'s ongoing medical conditions. She suffered a concussion and back injury caused by a motor vehicle accident in 2008. Since that time I have observed that she has problems with short-term memory loss. She also forgets what she is doing at times. She has no sense of direction and loses track of time easily. She no longer drives and relies on others for transportation to and from one place to another. She misspeaks frequently confusing names or numbers. She often complains of headaches and neck pains. She sleeps in a reclining chair almost every night which often leaves her unrested and moody the following day.
>
> M. K. has had one back surgery since the accident. It is common to hear her voice her discomfort after any attempt at physical activity. She often has complaints related to her neck shoulder areas as well as her lower back, legs and knees. She now walks longer distances with the aid of walking poles or a shopping cart.

> M. K. is under her Doctors care and takes daily prescription drugs to help manage her pain and discomfort for all of the above related maladies.

SUBMISSIONS

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

a) She suffers from multiple longstanding physical conditions which together with her post-concussion symptoms prevent her from doing any type of work;

b) In her written submissions received on April 3, 2014 (GT3-1) the Appellant set out in details the symptoms from her post-concussion syndrome which include difficulty focusing on more than one thing at a time; being easily distracted; inability to read a book; inability to follow directions; forgetfulness; difficulty locating right word or thought; mix up numbers; and daily headaches. The Appellant also set out in detail her multiple physical conditions including hip, pelvic girdle and lower back pain radiating down her right thigh and calf; torn supraspinatus in both shoulders, and pain in her knees.

c) In her written submissions dated April 3, 2016 (GDR3-1) the Appellant reviewed in detail the extensive physio and massage sessions and brain injury recovery strategies and treatments that she underwent from 2009 to 2001 at JR Rehab and stated:

> I still suffer from the mobility limitations and pain that I have listed in each step of this CPP application process. My cognitive issues still remain. I have memory issues, concentration problems. cannot multitask, suffer headaches, confuse my thoughts, have an inability to focus on issues for any length of time, I forget to turn off appliances, can get confused if there is too much going on around me, and at times can be moody and withdrawn. I am exhausted most of the time just from the simple process of daily living, even though my husband shoulders most of the cooking, grocery shopping, cleaning and errands required. He creates the shopping lists and plans our trips out for errands.

d) She has to do the bare minimum and avoid any stress and activity.

e) She can’t think of any type of job that she could do because of her inability to focus and it takes her days to recover from doing any activity such as going for a medical appointment.

[52] Ms. Kensett submitted that the Appellant does not qualify for a disability pension because:

a) The evidence does not support that the Appellant was disabled in accordance with the CPP criteria, as of December 2011 and continuously thereafter;

b) The Appellant has the burden of proof and there is a significant gap in the medical information to establish limitations that preclude all work;

c) There is no medical information as to the Appellant's current status.

ANALYSIS

[53] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

Severe

[54] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[55] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[56] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2011 she was disabled within the definition. The severity requirement must be assessed in a "real world" context: (*Villani* 2001 FCA 248). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past

work and life experiences when determining the "employability" of the person with regards to his or her disability.

[57] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation: (*Villani* 2001 FCA 248)**.**

[58] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: (*Bungay* 2011 FCA 47). Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[59] Where, despite having a serious health condition, there is evidence of work capacity, the Appellant must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition: (*Inclima* 2003 FCA 117). However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

Application of Guiding Principles

[60] The most striking feature of this case is the Appellant's longstanding multiple disabling conditions. In her December 2008 report Dr. Lorne diagnosed post-concussive syndrome, lumbar spinal stenosis, right mechanical knee injury, and right rotator cuff injury. She opined that the Appellant was unlikely to make full recovery and that she will likely be unable to work again. In her questionnaire signed on March 2009 the Appellant noted other longstanding disabling conditions including bone spurs on the bottom of her heels, morbid obesity, neck pain radiating down her arm, and right elbow soreness. As the *Bungay* and *Barata* cases, *supra*,

indicate, the Tribunal should consider the cumulative effect of all of the Appellant's disabling conditions.

[61] The Appellant gave consistent and detailed oral evidence as to the effects of these longstanding conditions (most significantly the post-concussion symptoms) on her life and capacity to work. Her evidenced was consistent with and supported by the medical evidence, by her previous written submissions to the Tribunal in April 2014 and April 2016 (see paragraphs 51(b) and (c), supra), and the with the March 31, 2014 note from her husband (see paragraph 50, *supra*.)

[62] The Minister points to the gaps in the medical evidence after 2011 and failure of Dr. Eadie, the Appellant's family doctor, to provide a copy of her file which would likely contain her clinical notes as well as specialist consultation reports and investigations. The Appellant has testified that Dr. Eadie is very hostile to the CPP and refuses to cooperate with CPP applications.

> This is unfortunate. However, the Tribunal does have the January 1, 2014 Disability Tax Certificate in which Dr. Eadie noted that the Appellant is markedly restricted in performing the mental functions necessary for everyday life; diagnosed brain damage; and noted that the Appellant needs walking sticks ...needs supervision and constant redirection...is not independent...[and has] poor memory. This is consistent with and confirms the Appellant's oral evidenced concerning her longstanding post-concussion syndromes.

[63] The Tribunal has an obligation to consider both the oral and the documentary evidence: *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB). The very nature and credibility of the Appellant's oral evidence may be of sufficient probative value to outweigh the gaps in the clinical medical evidence: *Smallwood v. MHRD* (July 20, 1999) CP 9274 (PAB). In this case, the Tribunal is satisfied that the Appellant's consistent oral evidence outweighs the gaps in the medical information during the post 2011 period.

[64] The Tribunal is mindful that Dr. Boyd in November 2009 opined that despite the Appellant's limitations due to back and leg pain she is "not totally incapacitated and is capable of performing sedentary activities including a sedentary job." This opinion, however, fails to take into account all of the Appellant conditions most significantly her post-concussion symptoms which affect her focus, memory, ability to read and follow directions, cause

difficulty finding the right word or thought, cause her to mix up numbers, and from which she suffers daily headaches.

[65] Having regard to the totality of her conditions and symptoms, the Appellant lacks the residual regular capacity to perform any form of gainful employment. Accordingly she is relieved from the obligation to pursue alternative less demanding employment in accordance with the principles set out in *Inclima*, supra. She is "incapable of pursuing with consistent frequency any truly remunerative operation." (See *Villani*, supra.)

[66] The Appellant's lengthy work history demonstrates her strong work history and ethic. Prior to the June 2008 MVA, she had returned to work on several occasions despite a history of arthritis, joint related problems and concussions caused by previous falls and accidents. The Tribunal is satisfied that she is the type of person who would have continued working, if she were able to do so.

[67] The Tribunal has determined that the Appellant has established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[68] The Appellant's physical and post-concussion conditions have been extant for many years. Despite extensive treatment including surgery, specialist consultations, therapy both for the physical and post-concussive symptoms and significant ongoing medications her multiple disabling conditions persist.

[69] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[70] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2008, when she suffered multiple injuries in a MVA. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of October 2008.

[71] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security