



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development*, 2016 SSTGDIS 55

Tribunal File Number: GP-14-3097

BETWEEN:

J. M.

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: Virginia Saunders

HEARD ON: June 21, 2016

DATE OF DECISION: July 20, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. M. Appellant
David Green Appellant's Representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on September 24, 2013.

[2] In her disability application the Appellant stated that she stopped working as a business manager at an office supplies store on June 27, 2011, because of a back injury, fibromyalgia and a herniated disc, resulting from a car accident in December 2010.

[3] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[4] The appeal was originally scheduled to be heard on April 20, 2016. The Appellant requested an adjournment because her representative had a scheduling conflict, and to ensure that up-dated medical reports were available in time. The adjournment was granted.

[5] The appeal was heard 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) the method of proceeding is the most appropriate to address inconsistencies in the evidence; 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.

PRELIMINARY MATTERS

[6] On July 19, 2016, before this decision was finalized, the Tribunal received documents from the Respondent concerning the Appellant's employment as of December 2014. The Tribunal did not admit the documents as the time for filing them was long past, they did not relate to matters in dispute and so were of little relevance, and there was no compelling reason to allow them in the interests of justice.

THE LAW

[7] 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).

[8] 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.

[9] 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.

[10] Paragraph 70(1)(a) of the CPP states that a disability pension ceases to be payable with the payment for the month in which the beneficiary ceases to be disabled.

ISSUE

[11] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013, with a pro-rated MQP date of February 28, 2014.

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

EVIDENCE

[13] The Appellant is 43 years old and lives in Nova Scotia. She completed Grade 12 and attended college for one semester. Her Record of Earnings indicated that she worked and made contributions to the CPP in every year from 1990 to 2011. She has a son, born in February 1995.

[14] The Appellant testified that she often held several jobs at a time. From 2006 to 2009 she worked as a deli manager for Sobeys. In 2009 she was hired at Staples, where she worked as a business manager. This job involved being on her feet all day, running the cash office and working at customer service.

[15] In December 2010 the Appellant was involved in a motor vehicle accident in which she sustained soft tissue injuries to her neck and back. She had been in several similar accidents in the past, but this one caused great difficulty for her. In addition to her injuries causing headaches, widespread pain, and numbness in her legs; she had pre-existing conditions including prior low back pain and gastroesophageal reflux disease (GERD). She had been struggling with her weight and she now gained more because she was unable to do any type of exercise. This exacerbated her pain and caused her to have high blood pressure.

[16] The Appellant testified that she tried to return to work immediately after the accident, but she lasted less than a week. She returned again in April 2011 on a graduated return to work program of light duties, on the recommendation of her family doctor, Dr. Roy. Initially she worked 10 to 15 hours a week, and she gradually worked up to full-time hours in June 2011. However, she was in considerable pain and was relying on pain medication while working, which caused brain fog. She felt that she could not manage, and she stopped working on June 27, 2011. She testified that any earnings recorded in her Record of Earnings after this date were from

vacation pay and withdrawals from her pension, and that after June 2011 she did not work again until December 2014 as discussed below.

[17] The Appellant testified that she wanted badly to return to Staples or to get some other type of job, but that she was not capable of doing anything in pursuit of either. She testified that for the next three years she had very little mobility because she was restricted by her pain. She tried several different types of pain medication, and she became addicted to Hydromorph Contin. She suffered withdrawal symptoms including shaking and vomiting as she waited between doses, and she was “doped up” and unable to focus because of this and other pain medication. She could not sleep because her pain prevented her from lying still in one position. She was exhausted every day and this contributed to her brain fog. She relied on her partner, who was a personal caregiver, to look after her. She slept in a special bed and used a wheelchair. She was unable to look after the household. Her teenage son did his own cooking and laundry. She testified that during this time Dr. Roy diagnosed her with depression.

[18] By January 2012 the Appellant weighed 220 pounds, up from the 140 she had weighed as a young adult. In the previous year she had seen several specialists regarding her GERD and her obesity, and this resulted in her undergoing bariatric surgery that month.

[19] The Appellant testified that after this surgery she began a long process of trying to lose weight and learning how to cope with everyday life again. Over the next two years she lost 100 pounds in total. However, she found that this did not improve her pain or her mobility. She developed an irritable bladder as a result of the surgery.

[20] The Appellant testified that she was distraught at not being able to work, as she had been employed almost continuously since age 17. She was receiving long term disability benefits from Sun Life, and around June 2013 she consulted an advisor there to discuss possible jobs and areas of retraining. She testified that she and the advisor could not think of anything that she would be able to do. She was not capable of performing any physical tasks, and she could not sit still or concentrate. As a result, Sun Life would not provide funds for any retraining.

[21] The Appellant testified that she followed every treatment that was recommended to her. She went to physiotherapy on and off for about two and a half years with no success. She last

attended sessions from July to September 2013, after which the physiotherapist told her that there was nothing she could do but wait for time to heal her. She continued to use a TENS machine and do the exercises that were suggested to her, when she was able to.

[22] The Appellant applied for a CPP disability pension in September 2013. She testified that she was required to do so by Sun Life, and that had she been aware of the benefit, she would have applied sooner than she did.

[23] The Appellant completed a questionnaire on September 18, 2013, which she submitted as part of her disability application. In the questionnaire she indicated significant limitations in all areas caused by extreme fatigue, fibromyalgia, spinal damage, nerve damage and a herniated disc in her back. Numbness, stiffness and extreme pain made sitting or standing difficult. She stated that she had a lot of anxiety, and was unable to perform as a manager. She no longer walked with friends; housework was extremely hard, and she relied on her 18-year-old son. She stated that her activities had stopped or dramatically decreased as a result of the December 2010 accident. She was on prescription drugs that impaired her judgement and ability to focus. She indicated that she followed up with Dr. Roy every two weeks for pain management, high blood pressure, and therapy; and that she was waiting for referral to another pain clinic for fibromyalgia.

[24] In January 2014 Sun Life terminated the Appellant's long term disability benefits on the grounds that she was capable of performing some type of work.

[25] In her letter requesting reconsideration, dated February 10, 2014, the Appellant stated that she continued to have great difficulty managing on a daily basis. She had had no improvement with treatment. She stated

I wake up in a head fog due to the drugs prescribed for pain every day. I find it very difficult to concentrate on a single task. Getting out of bed takes time. I cannot sleep for more than 30-40 minutes at a time, it becomes extremely uncomfortable. I am up several times during the night. I wear a tens unit daily to try and get through tasks like cooking a meal, or doing a load of dishes. I need assistance with the laundry; I cannot lift a load of clothes or maneuver the stairs. Afterwards I am too tired to do much else. My daily living has been drastically affected by these medical conditions. It is very depressing to live this way. I do not enjoy social functions and often avoid them, too many people around me cause confusion. Any amount of stress creates more pain, and

stiffness, it's very uncomfortable. Pain drugs have given me very little relief, and are not effective to reduce the pain. It has taken me several attempts to write this letter, as sitting or standing for any period of time is very difficult and painful. Other methods of therapy like massage, or physio had very little, short term or no relief. There has been no improvement in my condition. It has only gotten worse with time.

[26] The Appellant testified that over several years she tried unsuccessfully to adjust to her pain medication, and in early 2014 she quit Hydromorph Contin. She had a difficult withdrawal that lasted over several months. She recalled that for three weeks in April 2014 she did nothing but lie on the couch after stopping the medication entirely. She continued to have difficulty after this, as she was relying on Tylenol 3 or Extra-Strength Tylenol, and occasionally amitriptyline. She continues to take these medications.

[27] The Appellant testified that the combination of losing weight and clearing the drugs out of her system helped her immensely, and so by the summer of 2014 she very gradually began to exercise as had been recommended to her. She had a considerable amount of loose skin and no muscle tone, and she found this difficult. She started very limited walking and gradually increased.

[28] By late fall 2014 the Appellant thought that she should try to work, although she had no idea if she would be successful. She did not feel ready to return but she thought she would test herself. She testified that Dr. Roy told her he did not think that she was physically capable of doing anything, but he agreed that trying to work might help her mental state. She contacted Sobeys, where she had worked in 2009, and she was hired as a part-time deli manager. Her official hiring date was November 23, 2014, and she started work on December 1, 2014. She earned \$13.13 per hour.

[29] In this job the Appellant was able to spread her hours out. If she felt unable to work she could switch her hours with others. She had freedom to move about so she could sit down or stand up, and she was not required to lift more than ten pounds. She could delegate tasks to others if necessary. She testified that this flexibility was very important to her, as she still had significant chronic pain. She slowly increased her hours, and by May 2015 she was able to work full-time.

[30] The Appellant testified that since December 2010 at least until she returned to work she saw Dr. Roy every two to three weeks. She went to different specialists from two to four times a month. She was never given a time frame by any health professional as to when or if she would be able to return to the workforce. She did not ever feel that there was a time when she could work, until she actually returned in December 2014.

Medical Reports

[31] Diagnostic imaging of the Appellant's lumbar spine and sacroiliac joints taken in February and March 2012 showed mild degenerative changes and a small paracentral disc herniation at L4-L5.

[32] The Appellant was assessed for her chronic low back pain by Dr. P. Doucette at the Dartmouth Centre for Pain Management on July 20, 2012. She reported to Dr. Doucette that she had low back pain beginning in the early 2000s, worsened in the last year following a rear-end collision. Gastric sleeve surgery had resulted in a 60 pound weight loss but also caused irritable bladder. She had tried physiotherapy for six months, including TENS and stretching exercises, but "unfortunately, her pain has become a daily occurrence." It was made worse by prolonged standing or sitting, or ascending stairs. Her symptoms were improved by stretching, frequent position changes, and heat. She was presently taking amitriptyline in the evening, which caused morning sedation. She had previously taken Celebrex, cyclobenzaprine and Oxybutynin gel (for active bladder).

[33] Dr. Doucette conducted a physical examination, which revealed mild pain at extreme left lateral bending and upon toe touching. The Appellant was able to extend her back, rotate her lumbar spine and bend forward to touch her knees without pain. A neurologic examination was normal. There were no points of tenderness consistent with a diagnosis of fibromyalgia, and no signs of inflammation of peripheral joints of hands and wrists. He concluded that the Appellant had developed chronic low back pain as a result of degenerative disc disease of the lumbar spine. He recommended a trial of Ultram (tramadol). The Appellant was to return to the clinic in a couple of weeks.

[34] On June 24, 2013, Dr. Roy provided an update on the Appellant's condition and progress. He stated that her pain persisted and was ongoing. She was frustrated and felt unable to

do a job that required constant sitting or standing, as she could do neither of these for any length of time before having to move. He noted that the Appellant was very cooperative in her treatment program and had attended physiotherapy when it was paid for. She had now been referred to a rheumatologist, Dr. E. Shaw. He noted that in spite of her weight loss she was unable to do the exercise required for more weight loss. She was limited in her household chores.

[35] The Appellant saw Dr. Shaw on July 18, 2013. She reported “pain from head to toe” for about 2-1/2 years. While there was some daily fluctuation in her symptoms, she felt in severe discomfort every day. Her pain worsened with activity; she was fatigued; and she woke frequently at night because of her pain. She did not think physiotherapy had helped. She had some temporary relief from massage therapy. She was taking Hydromorph Contin, which helped at first but no longer made much of a difference. She had gradually increased the dose and found that when the next dose was due she had withdrawal symptoms including anxiety, sweats and shakiness. She had taken amitriptyline in the past but not for about a year. She had not tried Gabapentin, Lyrica or Cymbalta. Although she had lost 80 to 90 pounds since her gastric bypass surgery, this had not decreased her pain symptoms. She did not do any regular exercise.

[36] Dr. Shaw found that on physical examination the Appellant was diffusely tender at all of the fibromyalgia trigger points. She stated that the Appellant’s symptoms of diffuse musculoskeletal pain and non-restorative sleep were in keeping with fibromyalgia, and she thought the Appellant likely had some fibromyalgia prior to this although her symptoms had flared and worsened since the MVA of December 2010. Dr. Shaw made the following recommendations:

I reviewed the diagnosis of fibromyalgia with her today. I gave her a pamphlet from the Arthritis Society. One thing I did forget to mention is the Fibromyalgia Education Program that is run through the Physiotherapy Department at the Halifax Infirmary. If you thought she would benefit, it is something you could consider referring her to. Otherwise, I suggested that she try to go back on Amitriptyline but take it on a regular basis with hopes that it will help her sleep a bit more soundly as well as perhaps help with pain. I have started it at 10 mg nightly and you may titrate the dose depending on her response. Other considerations for medications include Gabapentin, Lyrica and Cymbalta and I will leave this to your discretion. Otherwise, I encouraged her to try to incorporate some cardiovascular exercise into her daily routine. Certainly, there is a role for this and it can help overall with pain symptoms.

[37] Dr. Roy completed a medical report in support of the Appellant's disability application. The report, dated August 23, 2013, stated that he began treating the Appellant for her condition in December 2010. She had ongoing chronic neck and low back pain from the MVA of December 22, 2010, with resultant fibromyalgia; a para central L4-5 disc herniation; chronic GERD and Barrett's esophagus; obesity requiring gastro duodenoscopy and laparoscopic sleeve gastrostomy; as well as fatigue and non-restorative sleep. He noted that she was in obvious pain, with decreased range of motion of the neck and lower back, and tender trigger points. He noted that the Appellant wanted to get back to work but "there is no way she can do the work as before as a manager and needs retraining etc." He stated that the Appellant had tried Celebrex, cyclobenzaprine and Tylenol Extra-Strength; as well as physiotherapy, acupuncture, massage therapy and home exercises. Her current medication was Hydromorph Contin, Nexium and amitriptyline.

[38] Dr. Roy stated in this report that the Appellant's prognosis was unsure. She was determined to get herself off narcotics "and will eventually work toward this. However, at present she is so limited now." He noted the Appellant had a great attitude to return to the workforce and do something she could be retrained for and cope with.

[39] In a letter dated January 16, 2014, Dr. Roy stated that the Appellant had chronic neck and low back pain since December 22, 2010, and resultant fibromyalgia and fatigue. He stated that his hope had been to improve her enough to be able to do some kind of employment, but that as time went on it appeared that she was not capable of doing this as pain and restrictions prevented her from completing her activities of daily living in a timely fashion, which exacerbated her pain and insomnia. She was unable to sit at a computer long enough to be productive. He stated that "with her progress to date, I just cannot see her being gainfully employed or doing a retraining program for the foresee (sic) future."

[40] Dr. Roy reported on April 26, 2016, that the Appellant had been his patient for many years. He stated that in the December 2010 accident she sustained injuries to her neck; upper, mid and lower back; and her shoulder. He provided details of the Appellant's recovery and medication as set out in previous reports, adding that in addition to her pain she began to be bothered more by her GERD and her weight, which had been aggravated by the amitriptyline

and her inability to exercise, and by overactive bladder symptoms. The Appellant had bladder surgery in June 2012, followed by different medications that were ineffective. She continued to have irritable bowel and persistent diarrhea.

[41] Dr. Roy stated that the Appellant participated faithfully in therapy, and was referred to the Pain Management Clinic in July 2012. Dr. Doucette tried her on Ultram, but eventually started her on Hydromorph Contin in November 2012 and continued to increase the dosage. This caused constipation, nightmares and insomnia, without reducing her pain. The Appellant at this time continued to be unable to return to work or to do any household chores, or to sit for any length of time to do a job.

[42] Dr. Roy stated that the Appellant was started back on amitriptyline at Dr. Shaw's suggestion, but with Lyrica added in. This became a concern as she needed increasing dosage and this was interfering with her weight loss. Because of the Appellant's difficulty with Hydromorph Contin, Dr. Roy worked with her to decrease the dosage so that she was able to stop it completely in April 2014.

[43] Dr. Roy stated that until she returned to work in November 2014, the Appellant had been unable to do any job, including part-time work.

SUBMISSIONS

[44] The Appellant submitted that she had a severe and prolonged physical and psychological disability which precluded her from returning to work in any capacity between June 2011 and November 2014; or between December 2010 and November 2014.

[45] The Respondent submitted that the Appellant does not qualify for a disability pension because the medical evidence does not show any serious pathology or impairment that would prevent her from doing suitable work within her limitations; in particular:

- a) Diagnostic imaging did not show evidence of a severe condition;
- b) Only conservative treatment was recommended, including medication trials, education, physiotherapy and daily exercise, and there is no evidence that the Appellant tried these recommendation;

- c) There are no referrals, investigations or consultations for neck problems reported by Dr. Roy, and these were not mentioned on assessment by the pain management specialist either;
- d) there is no evidence on file indicate that the Appellant had any counselling or treatment for her claimed addiction to prescription drugs;
- e) there is no evidence that the Appellant was referred to a psychiatrist or mental health provider for anxiety or depression, or that she was taking medication for these conditions
- f) the Appellant has not exhausted all forms of pain management;
- g) there is no objective evidence that the Appellant could not be retrained, as she is young with a high school diploma and transferable skills from her management position;
- h) the Appellant applied for CPP disability benefits only after she was urged to do so by her LTD insurer, and not in 2011 when she now claims to have become be disabled;
- i) the Appellant's earnings in 2015 indicate that she retained the capacity for work after her MQP ended; and
- j) the CPP was not intended to provide disability pensions in temporary situations.

ANALYSIS

[46] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before February 28, 2014.

[47] The determination by Sun Life in January 2014 that the Appellant was capable of some type of work is of minimal relevance, if any. There is no information as to what test or policy was applied by Sun Life, or what evidence the decision was based on.

[48] The fact that the Appellant did not apply for a CPP disability pension until September 2013 is not evidence that she was not disabled before then, as suggested by the Respondent. She did not know the benefit existed until she was made to apply by Sun Life. Even if she had been

aware, her motivation for applying when she did is of little relevance when weighed against the other evidence.

[49] The Tribunal found the Appellant to be credible. She answered questions carefully and thoughtfully. She did not embellish. The Respondent has not challenged the truthfulness of her written evidence, and did not attend the hearing to cross-examine her. The medical reports confirm the Appellant's testimony. The Tribunal found no reason to disbelieve any of her evidence.

[50] The Appellant was under the care of her family doctor, Dr. Roy, who directed her treatment, referred her to specialists and adjusted her medication. Dr. Roy's reports are based on the Appellant's records and do not venture into advocacy. It is apparent that he was familiar with all of the Appellant's treatment options and their results. The Tribunal accepts his reports as a reliable history of the Appellant's injuries, her treatment and her recovery; including treatment by specialists and others whose reports are not in the file.

Severe

[51] 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.

[52] The relatively insignificant findings of the Appellant's diagnostic imaging in early 2012 are not fatal to this appeal. Her claim for disability is based mainly on chronic pain. Chronic pain is pain that persists beyond the normal healing time for the underlying injury or is disproportionate to the injury, and whose existence is not supported by objective findings. The courts and the medical profession recognize chronic pain as a legitimate condition. (*Nova Scotia (Worker's Compensation Board) v. Martin*, [2003] SCC 54).

[53] Chronic pain, chronic fatigue syndrome, and fibromyalgia are conditions with a strong subjective component. They affect each individual differently. The Tribunal must focus on the effect of the condition on the Appellant, and must consider not only the medical evidence, but the Appellant's subjective assessment of her condition (*Thawer v. MHRD* 2003 CP 18204).

[54] The Appellant gave evidence of other conditions such as depression, GERD and irritable bladder, which she submitted contributed to her disability. While these no doubt added to her difficulties, the Tribunal finds that the evidence of chronic pain and fibromyalgia is sufficient by itself to support a finding that the Appellant's condition was "severe" at December 22, 2010, for the reasons that follow.

[55] Following the accident of December 2010, the Appellant experienced pain in her neck and back, with numbness into her leg. In spite of minimal objective findings, her pain persisted and became chronic. It prevented her from returning to substantially gainful employment, as was apparent from her failed attempt at light duties between April and June 2011. She attended physiotherapy and tried different medications, none of which improved her condition. Her pain prevented her from being active which, along with her use of amitriptyline, caused significant weight gain. Her pain prevented her from restorative sleep, which led to further inactivity and lack of concentration. She was prescribed increasing doses of an opioid that created its own problems without significantly reducing her pain.

[56] The Respondent submitted that the Appellant had failed to exhaust all forms of pain management; and that her treatment did not support a finding that her condition was severe. It points to the lack of referrals for neck problems or depression; the recommendation for conservative treatment only; the lack of counselling for her addiction; and the lack of medication for depression.

[57] As indicated above, Dr. Roy knew the Appellant best and was in the best position to coordinate her treatment. The treatment methods employed by Dr. Roy indicate a continuous concern with multiple conditions. He determined that physiotherapy, weight loss, and medication would be in the Appellant's best interests. He referred her to other specialists as she failed to improve. He adjusted her medication as he saw fit. He referred her for surgery and oversaw her weight loss, which was key to allowing her to become active and improve her condition.

[58] There was no reason for the Appellant to have addiction counselling. She was not abusing prescription drugs. She found that when used as prescribed their side effects – including the withdrawal symptoms she experienced between doses – to be debilitating. With Dr. Roy's help, she was eventually able to stop her use of opioids.

[59] The Tribunal notes that the recommendations made by Dr. Shaw were directed at Dr. Roy, to implement if he thought the Appellant would benefit, or at his discretion. Dr. Roy's evidence is that he did pursue some of these. It is apparent that Dr. Roy had careful oversight of the Appellant's condition and made informed judgments about her care. While these may not have included every conceivable method of treatment that someone in the Appellant's situation might receive, the choices Dr. Roy made do not suggest in any way that the Appellant's condition was not severe, or that he failed to direct her to obvious methods of treatment. The Respondent offered no evidence to support a conclusion that Dr. Roy's care of the Appellant was not reasonable.

[60] 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). The Appellant had a good work history. She was motivated to return to work, yet she could not. She failed at a work attempt in early 2011. For several years she was unable to sit, stand, or concentrate long enough to realistically expect her to perform in the workplace.

[61] Dr. Roy suggested in 2013 that she might retrain, but the tone of his report indicates that he was not commenting on the Appellant's current ability but was hoping that she would eventually be able to. None of the other evidence suggests that the Appellant would have been successful in an attempt to work at any type of job. She had no work capacity from December 2010 and for the following 47 months.

[62] The Tribunal finds that the Appellant was incapable regularly of pursuing any substantially gainful occupation as of December 22, 2010. The evidence indicates that from that date she had persistent issues with pain, sleeplessness and fatigue that prevented her from returning to her job, or pursuing or retraining for other work. Her symptoms did not respond to reasonable efforts to treat her complex condition.

[63] It was not until November 2014 that the Appellant was able to return to substantially gainful employment. The Tribunal finds that at that time her condition was no longer "severe" as that term is defined in the CPP. The Tribunal notes that although the Appellant did not actually

begin working until December 2014, it was in November that she determined – correctly - that her symptoms had subsided enough to permit her to make the attempt

Prolonged

[64] The question of whether the Appellant's condition was prolonged is related to the issue of whether she can be granted benefits for a closed or temporary period. The Respondent submits that she cannot; the Appellant submits otherwise.

[65] The CPP does not expressly state that a disability cannot be temporary. In fact, it contemplates that scenario in paragraph 70(1)(a) which provides that a disability pension is no longer payable when a beneficiary ceases to be disabled. The Appellant does not have to prove that her condition was permanent. She must prove that it was prolonged.

[66] Paragraph 42(2)(a) of the CPP states that a disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[67] In *Minister of Human Resources Development v. Henderson*, 2005 FCA 309, the Federal Court of Appeal found that the claimant could not receive a disability pension for a period of just under three years between the time his condition was agreed to be severe until he underwent knee surgery. The medical evidence in that case was that prior to the operation it was expected that the surgery would improve the claimant's condition. The Court stated that the disability was not prolonged because it was not of indefinite duration. It distinguished previous decisions of the Pension Appeals Board where a pension had been granted for a closed period prior to recovery, on the basis that in those cases "the medical opinion prior to the prescribed treatment about the likelihood of the claimants' recovery and of their subsequent ability to work was much less clear."

[68] In *Litke v. Minister of Human Resources and Social Development Canada*, 2008 FCA 366, the Court again refused to grant benefits for a closed period. In that case, the appellant's condition was found to be "clearly of a definite duration" but the Court did not elaborate. Of note, the Court stated that it was not necessary for a disability to be permanent in order for it to be prolonged.

[69] These cases clearly state that there may be circumstances where a temporary condition is prolonged under the CPP. Their facts can be distinguished from the present case. A review of the medical reports here indicates uncertainty as to when or if the Appellant would recover, even if she was able to implement all the recommendations that were made to her. There was no path to recovery laid out for her. She had to overcome significant hurdles in order to be able to return to work, and her success was due to her singular persistence. As late as February 2014 she was still reporting lack of progress and significant pain and limitations. These continued until November 2014, when she determined that she was able to re-enter the workforce and she was hired by Sobeys.

[70] Tribunal finds that the Appellant's condition was likely to be long-continued and of indefinite duration from December 2010 to November 2014.

CONCLUSION

[71] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2010, when she was injured in the motor vehicle accident. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in September 2013; therefore the Appellant is deemed disabled in June 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of October 2012.

[72] The Tribunal finds that the Appellant ceased to be disabled in November 2014. Her disability pension ceases with the payment for that month.

[73] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security