



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. G. v. Minister of Employment and Social Development*, 2016 SSTGDIS 84

Tribunal File Number: GP-16-227

BETWEEN:

L. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: October 13, 2016

DATE OF DECISION: October 18, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

L. G.: Appellant

Deborah Hastings: Appellant's representative

Shyla Oates-Pennell: paralegal (assisting Ms. Hastings)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on October 8, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on January 19, 2016.

[2] The hearing of this appeal was initially scheduled to be heard by Teleconference.

[3] By letter dated September 20, 2016 [GD6] Ms. Hastings requested that the form of hearing be changed to either in person or by videoconference because the Appellant is extremely depressed.

[4] By Notice of Hearing dated September 22, 2016 [GDOA] the form of hearing was changed to videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) The method of proceeding provides for accommodations required by the parties or participants.
- c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.
- d) There are gaps in the information in the file and/or a need for clarification.
- e) 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.

Adjournment Request

[5] On October 6, 2016 Ms. Hastings requested an adjournment because additional relevant medical information had been received. [GD9]

[6] On October 7, 2016 [GDOB] the Tribunal refused the adjournment request for the following reasons:

- The documents that the party wanted to file late had been available prior to the end of the filing period and the party failed to file the documents on time.
- The Appellant's representative filed a Notice of Readiness dated August 29, 2016 in which she indicated that she does not have documents that she wishes to add to the file. The Appellant's representative has not sought leave to file the additional documents and explained why they should be admitted notwithstanding the Notice of Readiness.
- If the Appellant's representative wishes to file the additional documents she should immediately file paper copies of the additional documents with the Tribunal and explain why they should be admitted. If the Appellant's representative complies with these conditions she may seek leave to file the additional documents at the hearing.
- The hearing is to proceed as scheduled.

Additional Documents

[7] On October 7, 2016 Ms. Hastings filed the additional documents [GD10] consisting of 355 pages of medical records that she had received by CD on May 24, 2016 from the personal injury lawyers representing the Appellant in her motor vehicle litigation.

[8] At the outset of the hearing Ms. Hastings explained that she had failed to initially file the additional documents through inadvertence and that she immediately contacted the Tribunal when she learned last week that they had not been filed.

[9] The Tribunal determined that the additional documents were of significant relevance and that in the interests of justice they should be admitted with the Respondent being given a reasonable opportunity to file additional submissions.

[10] After the oral evidence and the Appellant's submissions the Tribunal administratively adjourned the hearing on the following terms:

1. The Respondent shall have until November 15, 2016 to file additional submissions in response to the late documents.
2. Once the additional submissions are received the Tribunal will determine if a further hearing is required. If a further hearing is required, it will likely proceed by Teleconference.
3. If no further hearing is required, the Tribunal will deliver its reasons for decision.

[11] The Respondent delivered its additional submissions on October 14, 2016 [GD12]. The Respondent submitted that the additional medical reports contain similar findings to those previously submitted and show that the Appellant sustained musculoligamentous strain type injuries in her 2008 MVA with subsequent chronic neck, shoulder, back and knee pain as well as depression; that as noted in the previous submissions her treatment has remained conservative and the diagnostic tests and consultation reports do not support a severe physical or psychological condition at her MQP; and that she has not provided any new findings which would warrant a change in the position to deny the CPP disability benefit.

THE LAW

[12] 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).

[13] 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.

[14] 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

[15] The Tribunal finds that the MQP date is December 31, 2012. [Record of Earnings: GD2- 5]

[16] 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

[17] The Appellant was 52 years old on the December 31, 2012 MQP; she is now 56 years old. She was born in Sri Lanka. She initially emigrated to Great Britain (where she taught mathematics) and came to Canada in 1986. She was working as a Personal Support Worker (PSW) and pursuing a Registered Practical Nurse (RPN) degree as a part-time student when she was injured in a motor vehicle accident (MVA) in July 2008. She returned to work on part-time hours during 2011 and 2012 as a cashier/stocker for a Dollarama store. She has not worked since October 2012. The Appellant has been separated since 1990 and lives in a house with two of her adult sons.

APPLICATION MATERIALS

[18] In her CPP disability questionnaire [GD2 -73 to 79], signed on July 31, 2014, the Appellant indicated that she has a grade 12 education as well as a degree from Seneca College. She noted that she last worked as a cashier/stocker in October 2012; she stated that she stopped working because of injuries from a MVA. She claimed to be disabled as of July 2008 and described the injuries or impairments that precluded her from working to include collision related injuries (as per attached medical documentation); cervical strain; right knee strain; limited range of motion and chronic pain.

[19] She described difficulties/functional limitations with sitting/standing, walking, lifting, reaching and bending; difficulty with personal needs; requiring assistance for household

maintenance; short term memory and attention deficits; sleep disturbance; phobias relating to traffic; and difficulties using public transportation.

[20] A report dated October 15, 2014 from Dr. Dhillon, the Appellant's family doctor, accompanied the CPP application. Dr. Dhillon diagnosed chronic neck and back pain, degenerative disc disease at L4-5 and depression. Dr. Dhillon noted that the Appellant's pain started after her MVA in July 2008; that she walked slowly; that she was not able to bend or change position without being in pain; that she had restricted neck and back movements; that she was feeling depressed due to chronic pain; that she had low mood and poor motivation and concentration; and that she was not able to do any sustained physical activity. The prognosis was poor due to the chronic nature of her condition. [GD2-59]

ORAL EVIDENCE

[21] The Appellant had significant memory problems while giving evidence and it was necessary for Ms. Hastings to refer to the hearing file reports to establish many aspects of the Appellant's evidence. The Appellant had difficulty recalling her personal education and employment history, her attendance for various medical treatments and assessments, and the details of her employment at Dollarama in 2011 and 2012.

[22] With respect to her education and employment history, the Appellant was referred to Avi Davis's vocational evaluation dated February 25, 2013 at GD10-45.

[23] This indicates that the Appellant completed high-school in Sri Lanka; that in 1995 she enrolled in a 9-month business diploma program; that in 1998 she returned to school and completed a 9-month PSW diploma; that at the age of 48 she returned to school to complete her RPN degree as a part-time student; and that she was injured in the MVA after completing six months of that program.

[24] The vocational evaluation also indicates that her pre-accident employment in Canada included working for a sewing company in Montreal from 1986 to 1987; light factory work from 1992 to 1995; working as a cashier at Sobeys from 1996 to 1998; and working in a nursing home from 1998 to 2008.

[25] The Appellant remembered working as a PSW. She “thinks” that she was healthy before the July 2008 MVA. She couldn’t recall attending assessments for the reports in the hearing file. She remembered the MVA. She couldn’t remember whether she worked after the MVA before she started to work for Dollarama. She stated that she went back to work at Dollarama because she didn’t want to be dependant. She worked four hours per day at Dollarama and did mostly shelving and heavier work. She stated that she remembered falling and missing a lot of time from work.

[26] Ms. Hastings referred the Tribunal to the February 2013 vocational evaluation report at GD10-48 which states that given her desire to return to work the Appellant attempted to work at a Dollar Store between 2010 and 2011 and that during this period she “took many days off, she was given lighter duties, and despite these ‘accommodations’, she was unable to continue due to her pain.” The Appellant testified that she stopped working at Dollarama because she couldn’t do the lifting and standing. She didn’t look for lighter sedentary work because her back is very painful and she “suffers” when she sits.

[27] The Record of Earning (GD2-5) indicates that the Appellant’s employment earnings were below the CPP amount in 2009 and 2010 and that they were \$9,373 in 2011 and \$12,657 in 2012. When referred to the Record of Earnings the Appellant could not remember what the earnings were for, or the time period that she worked for Dollarama. She could not remember how she got the job at Dollarama.

[28] The Appellant started seeing Dr. Dhillon in February 2010 [GD4-3] and she now sees her once or twice a month for medication prescriptions. Her main problem is her constant severe back pain – it is very painful when she sits or stands. She also has pain in her right arm and neck. She cannot recall if she was ever treated by a psychologist or a psychiatrist. She cannot recall if anyone ever suggested that she see a psychiatrist and she stated that she doesn’t know if she would see a psychiatrist. She has not applied for Ontario Works despite Ms. Hastings urging that she do so because she “doesn’t want to.” Her sons handle her finances and urged her to apply for CPP disability.

[29] She recalls seeing Dr. Hawass, a chronic pain specialist, in June 2015. She stated that her sons “forced” her to see him because her condition was getting worse. She believes that she

went back to see Dr. Hawass on a couple of occasions and he gave her injections in her shoulders, knee and back. She stated that the injections only helped for one day and then the pain returned.

[30] The Appellant described her usual day. She stated that she doesn't dress every day and that sometimes she sleeps in her clothes. She can't sleep. She spends most of the day crying and praying. She doesn't eat lunch and doesn't go anywhere. She only goes out for medical appointments and once a week for an hour to a mall – her sons take her and make her walk. She might walk the dog for 10-15 minutes and then has to sit down. Her sons do the household maintenance and grocery shopping. She sometimes does some dusting and goes grocery shopping with her sons – she tells them what to buy and they do all of the lifting.

[31] Her present prescribed medications include Percocet (3 per day), Cymbalta (once or twice a day), and another pain medication. She also takes six Tylenol per day. She is not going for any treatments. When referred to the period from July 2011 to February 2013 during which she didn't see Dr. Dhillon, the Appellant stated that she was “doing bad” during this period and was drinking because of her pain. Her sons told her to go back and see her family doctor, to stop drinking and to take her medications. She stated that she still drinks when she “can't handle the pain.” She hasn't told Dr. Dhillon about her drinking and she has not participated in any programs for her drinking.

MEDICAL EVIDENCE

[32] 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.

[33] A MRI on April 16, 2009 revealed an unremarkable cervical spine and relatively severe degenerative changes involving the bilateral L4-L5 facet joints. [GD2-79]

[34] A MRI of the cervical spine on November 25, 2010 revealed no apparent spondylitic changes and no evidence of nerve root impingement. [GD2-70]

[35] On March 11, 2014 Dr. John, physiatrist, reported that the Appellant suffered musculoligamentous strain injuries to her neck, shoulder girdle, low back, hip girdle and knees

due to a 2008 MVA; that she has ongoing myofascial pain; adhesive capsulitis of the right shoulder; and osteoarthritis affecting her right knee. Dr. John made recommendations with respect to stretching, strengthening and postural correction exercises, suggested use of an Obus Forme supporting roll and foot stool, and gave a prescription for a Depo-Medrol injection of the right shoulder and right knee. [GD2-65]

[36] Dr. John saw the Appellant for a further psychiatric assessment on July 10, 2014. [GD2-52]

[37] On April 1, 2015 Dr. Dhillon reported to Service Canada that the Appellant has been suffering from chronic neck and back pain since her 2008 MVA. Dr. Dhillon described the Appellant's constant pain and limitations and stated that her pain has been constant and limits her ability to work at home and outside. She also stated that although pain medications give her some relief it is not enough for her to do any sustained physical activity or go back to work. [GD2-14]

[38] On April 21, 2015 Dr. John reported that the Appellant had been seen for psychiatric follow up. He noted that she was involved in a MVA in 2008; that it was a rear end collision; that she underwent one year of physiotherapy; that she has ongoing pain in the neck and shoulder girdle which is worse on the right side; that she has back problems radiating to both knees; that she has some numbness in the shoulder; that she has ongoing pain problems in her neck and back; and that she has some arthritis in her thumb. [GD4-5]

[39] On June 10, 2015 Dr. Hawass, from CPM Centres for pain management, noted that over the past two years the Appellant did not attempt any physio, chiro, massage, acupuncture or pool therapy; however, seven years ago she did use some physio and massage that helped her for less than a day. The pain diagnoses included lower back pain, neck pain and shoulder pain. The treatment recommendations included psychological, weight loss, exercise, pharmacotherapy and interventional nerve blocks. It was anticipated that the treatment plan would last between six and twelve months. [GD4-7]

[40] Dr. John saw the Appellant for a further psychiatric consultation on December 7, 2015. [GD4-14]

[41] On June 28, 2016 Dr. Dhillon reported to the Appellant's lawyer that the Appellant is suffering from chronic back pain, depression and sleep problems. Dr. Dhillon opined that the Appellant has been physically disabled since she has known her (February 2010) and that her symptoms may have been severe before but she does not have any record prior to that. She opined that it would be appropriate to grant her CPP disability since she has been disabled and that her prognosis is poor since her problem has been long standing without any significant improvement. [GD4-3]

Additional Medical Evidence

Dr. Dhillon's Office notes

[42] There are office notes from Dr. Dhillon covering the period from February 10, 2010 [GD10-10] to July 27, 2011 [GD10-17].

[43] The February 10, 2010 note indicates that the Appellant is registering as a new patient; that she has had chronic back pain for almost two years since her MVA; that she has been getting care from walk-in clinics; that she went for physiotherapy; that she has seen a psychiatrist in the past regarding depression; and that she has severe back pain – she cannot bend or lift anything, her shoulders hurt, no radiation to legs, no tingling/numbness in legs.

[44] The March 13, 2010 note indicates that the Appellant was seen in follow up for back pain; that she is feeling depressed; and that she is not able to do her household chores or enjoy anything. Dr. Dhillon observed that the Appellant was sad and tearful.

[45] The April 28, 2010 note indicates chronic back pain.

[46] The May 21, 2010 note indicates that the Appellant was crying. She was prescribed Cloralex, Elavil, Flexeril, Naprosyn and Percocet.

[47] The July 28, 2010 note indicates chronic pain syndrome, ongoing back pain and that the Appellant was a little better with Percocet.

[48] The September 26, 2010 note indicates that the Appellant was being followed up for back pain; that she is able to do more at home but she still gets pain after doing some walking; that she lives alone and is feeling depressed; no suicidal ideations; and worsening of back pain.

[49] The December 7, 2010 note indicates that the Appellant was followed up for back pain; that her pain is not any better; that she is feeling very depressed again and doesn't want to live anymore; no active suicidal ideations; and that she had called Catholic Services for counselling but didn't have an appointment with them yet.

[50] The February 16, 2011 note indicates that the Appellant was followed up for back pain; that she had no new symptoms; that she was feeling better; that she still doesn't have an appointment with a pain specialist; she needs her medications refilled; that she has cut down on her Percocets; and that she sleeps well.

[51] The July 27, 2011 note indicates that the Appellant stopped taking her medications two months ago; that she was feeling very sad; that she still has ongoing back pain; that she has no new symptoms; and that she wants to go back on her medications.

[52] In her April 1, 2015 report to Service Canada (see paragraph 37, supra) Dr. Dhillon noted that the Appellant was not seen from July 2011 to February 2013.

Assessments

[53] On January 5, 2009 Dr. Osinga, orthopaedic surgeon, reported on his independent medical evaluation of the Appellant. Dr. Osinga noted that after the July 2008 MVA the Appellant had been referred by her family doctor to a multi-modality rehabilitative care clinic; that she has been attending three days a week; that she has received massage as well as physical therapy; that she has done home related exercises and modalities; and that she believes the treatments have been useful. Dr. Osinga concluded that the Appellant has had important post MVA injuries including a low back strain injury, myofascial injury of the neck and ongoing knee pain. He believed that the Appellant was at risk for chronic pain and recommended a further course of treatment. [GD10-148]

[54] April 13, 2009 Dr. Ali, orthopaedic surgeon, reported to State Farm with respect to his independent orthopaedic examination of the Appellant. He noted that the Appellant was still attending for rehabilitative therapy. Her main complaints were neck pain, low back pain, right knee pain and right shoulder pain. On examination the Appellant appeared slightly depressed. Dr. Ali felt that there was a behavioural element to the Appellant's pain and that she was likely developing chronic pain syndrome. He recommended treatment with a multi-disciplinary chronic pain management team. He opined that she was unable to perform the essential tasks of her employment at that time. [GD10-155]

[55] On April 28, 2009 Dr. Seon, psychologist, reported to State Farm with respect to the independent psychological assessment of the Appellant. The report diagnoses adjustment disorder and states that due to severity of her reported symptoms of depression her prognosis is guarded to fair. Dr. Seon concludes as follows:

There is evidence from the psychological assessment that supports the finding that Ms. L. G.'s psychological condition meets diagnostic criteria for Adjustment Disorder. At this time, Ms. L. G. is focused solely on her pain and the limitations this is causing. She is keenly avoiding participating in activities in fear of increasing her pain. The avoidance behaviour is correlated with her depressive symptoms. She feels worthless and unmotivated, however, and is not participating in activities to increase her sense of contribution. Ms. L. G. is relying on her children who reside in the home, for support, however feels guilty and ashamed for doing so.

Based on the findings from the assessment and a review of the clinical records, it is my opinion that, although it is apparent Ms. L. G. is struggling with depressive symptoms, these symptoms do not reflect a substantial inability to engage in her activities within the home, including housekeeping and home maintenance. There is insufficient evidence to suggest she is unable to be successful in participating in her essential tasks of her employment as a Personal Support Worker. It will be very important that Ms. L. G.'s treatment team monitor and encourage a gradual increase in productive and rewarding activity. This will facilitate an improvement in her mental health. [GD10- 119]

[56] On June 9, 2009 Dr. Fern, orthopaedic surgeon, reported on his orthopaedic rebuttal assessment of the Appellant. He opined that the Appellant has developed chronic pain syndrome, that her overall prognosis is extremely guarded, and that the likelihood of full recovery is remote. He opined that at this time she has a substantial inability to perform the housekeeping and home maintenance services that she performed prior to the MVA, and that she is unable to perform the essential tasks of her employment as a personal support worker. He

indicated that she would have difficulties with activities that involve repetitive bending, lifting and twisting of her lower back and neck; that she would have difficulties with activities that require prolonged static postures; and that she would have difficulties especially with the heavier aspects of home maintenance and housekeeping. He further stated that her ongoing problems with her right shoulder and right knee will also impact on her abilities to do activities that require pushing, pulling, lifting and carrying. [GD10-81]

[57] On July 23, 2009 Dr. Shnek, psychologist, reported on his psychological assessment of the Appellant. Dr. Shnek concluded that the Appellant currently presents significant levels of psychological distress and adjustment issues relating to the MVA and recommended 12 psychological sessions. Dr. Shnek diagnosed mixed anxiety and depressive disorder, and posttraumatic stress disorder. [GD10-75]

[58] On October 24, 2009 Dr. Esmail, orthopaedic surgeon, reported on his independent orthopaedic assessment of the Appellant. He diagnosed post-traumatic cervical spinal dysfunction with musculoligamentous injuries; post-traumatic lumbar spine spinal dysfunction with possible discogenic injury; and traumatic right knee patella femoral chondromalacia. He stated that the Appellant continued to function but was not able to return to work. He opined that at the present time the Appellant will have difficulty being gainfully employed because of the amount of pain and disability that she exhibits. [GD10-187]

[59] On February 25, 2013 Avi Davis, MSW, RSW, MA, reported on his vocational evaluation of the Appellant. He observed that upon her entering the office it was obvious that she was having great difficulty walking, and that she attempted to sit on the couch but after a few minutes stood up due to the pain. Mr. Davis reviewed in detail the Appellant's education; her pre-accident employment; the nature of her pre-accident employment duties as a PSW; and the results of testing. He concluded that based on the documentation reviewed and his observations "it is evident that Ms. L. G.'s physical impairments pose a considerable barrier to safe and productive work. The disability (functional aspects) that results from these impairments are functional restrictions including reduced tolerance for sustained postures and sitting, standing, walking, climbing stairs, bending, kneeling, lifting and carrying." He opined that the problems of pain and poor tolerance for physical activity prevent her from performing

the essential tasks and physical activities of work for which she is suited by way of training, experience and education.

[60] Mr. Davis referred to Dr. Ali's April 2009 report (see paragraph 54, supra) which refers to the Appellant's chronic pain syndrome delaying recovery and her inability to perform the essential tasks of her employment at that time, and stated "While it is true that these reports are dated, the client's presentation, based on observation during several hours of testing, seems not to have changed or have improved but not to the point of being able to return to work." In his conclusion, Mr. Davis opined that the Appellant "suffers a substantial inability to perform the essential tasks of her pre-accident occupation and does not appear in any way ready for a return to her pre-accident occupation at this time. Furthermore, as long as Ms. L. G.'s symptoms remain unchanged gainful employment will be severely compromised. There are no realistic alternative occupation goals." [GD10-44]

SUBMISSIONS

[61] Ms. Hastings submitted that the Appellant qualifies for a disability pension because:

- a) The medical reports from Dr. Dhillon confirm that the Appellant has suffered constant severe back pain since the July 2008 MVA;
- b) She is disabled because of her chronic neck and back pain, depression and inability to sleep;
- c) The vocational report from Avi Davis in February 2013 confirms her limitations as of the December 2012 MQP;
- d) She lacks motivation because of her depression and she drinks to mask her pain;
- e) The prognosis from Dr. Dhillon confirms that the Appellant is unable to pursue any type of gainful employment, now or in the future.

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

- a) She collected regular Employment Insurance benefits from March 2013 to December 2013 declaring that she was ready, willing and able to work after her MQP expired;
- b) Although the Appellant may not be able to return to her usual heavy work as stocker and cashier, she has not attempted to return to any alternate lighter work;
- c) She was not seen by her family physician at the time of her MQP between July 2011 until February 2013 which is indicative of stability and her treatment has been most conservative and underutilized to date;

ANALYSIS

[63] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2012.

Severe

[64] 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

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

[66] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2012 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.

[67] 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).

[68] Not only must there be medical evidence to support a claim that disability is "severe" and "prolonged", but also evidence of efforts by the Appellant to obtain work and to manage his or her medical condition (*Klabouch* 2008 FCA 33; *Angheloni* 2003 FCA 140).

[69] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay* 2011 FCA 47).

[70] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that she has made efforts at obtaining and maintaining employment that were unsuccessful by reason of her health: (*Inclima* 2003 FCA 117).

Application of Guiding Principles

[71] This was a challenging case for the Tribunal. The Appellant had severe memory problems while giving her evidence and as a result it is necessary for Tribunal to place significant reliance on the hearing file documents and reports.

[72] The Tribunal was satisfied that her memory difficulties were genuine and that the Appellant was attempting to provide accurate evidence to the best of her ability. However, the Tribunal must focus on the Appellant's condition as of the December 2012 MQP. Based on its review of the hearing file documents the Tribunal is satisfied that the severe memory deficits displayed by the Appellant at the hearing arose after her MQP.

[73] The Tribunal noted that the Appellant was able to provide detailed information concerning her personal history and limitations to Avi Davis in February 2013 (see paragraph 59 & 60, supra) when he performed his vocational evaluation; that the Appellant was also able to provide detailed information to Dr. John and Dr. Hawass who treated her from March 2014 and June 2015 (see paragraphs 35 to 40 supra) and that there is no indication of significant memory problems in any of their reports; and that although Dr. Dhillon refers to depression, short term memory and attention deficits (see paragraphs 20, 37 & 41, supra) there is no mention of severe memory problems in any of her reports including her last report which was dated June 28, 2016 (approximately four months before the hearing).

[74] In focusing on the Appellant's condition as of the December 2012 MQP the Tribunal considered the totality of her conditions as of that date (see *Bungay*, supra). In this regard, the medical evidence establishes that during 2008 and 2009 (see paragraphs 53 to 59, supra) the Appellant suffered from chronic back, neck, right shoulder and right knee pain; that this had progressed to chronic pain syndrome; and that she had been diagnosed with adjustment disorder, depression and post-traumatic stress disorder. Dr. Dhillon's office notes confirm that her chronic pain and depressive symptoms continued during the period from February 2010 to July 27, 2011 (see paragraphs, 42 to 52, supra).

[75] The Respondent noted that there is a gap in the medical information for the period from July 2001 to February 2013. It would appear that there may have been some improvement in the Appellant's condition since she was able to pursue part-time employment with Dollarama during 2011 and 2012; however, she wasn't able to continue working after October 2012 because of her severe pain and the Tribunal's focus is on the December 2012 MQP.

[76] In determining the Appellant's condition as of the MQP the Tribunal gave particular consideration to the vocational evaluation prepared by Avi Davis in February 2013 which was only six weeks after the MQP (see paragraphs 59 & 60, supra) and is satisfied that this speaks to her condition as of the MQP. In this report Mr. Davis describes the Appellant's numerous physical impairments and her chronic pain syndrome. He opines that not only is she unable to return to her previous employment as a PSW but that "There are no realistic alternative occupation goals." The Tribunal also gave particular consideration to the reports from Dr.

Dhillon (see paragraphs 20, 37 & 41, supra). Dr. Dhillon has been the Appellant's family doctor since February 2010 and in her June 28, 2016 report she stated that the Appellant is suffering from chronic back pain, depression and sleep problems and opined that the Appellant has been physically disabled since she first started to treat her.

[77] The Tribunal is satisfied that because of her chronic pain syndrome, sleep disturbance and depression the Appellant was unable to pursue any form of gainful employment as of the MQP. The Tribunal noted that the Appellant commendably returned to part-time work in 2011 and 2012 but wasn't able to continue after October 2012 due to her severe pain. The Appellant has satisfied the test set out in *Inclima*, supra.

[78] The Tribunal also noted that the Appellant had a consistent work history since her immigrating to Canada in 1986 until the July 2008 MVA. In addition, she upgraded her education and work skills by obtaining business and PSW diplomas and she returned to school at the age of 48 on a part-time basis to pursue a RPN diploma. The Tribunal is satisfied that the Appellant has a strong work ethic and that she is the type of person who would continue working if she were able to do so.

Mitigation

[79] The Tribunal has also carefully considered the issue of mitigation. In this regard, there is a significant gap in the Appellant's treatment between July 2011 and February 2013; she does not appear to have pursued any significant treatment for her severe depression; she has had limited attendances for pain management; and she does not appear to be addressing her apparent alcohol dependence issue.

[80] The Appellant should demonstrate a good-faith preparedness to follow obviously appropriate medical advice and to take such retraining and educational programs as will enable her to find alternative employment when it is obvious that one's prior employment is no longer appropriate: *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB).

[81] The Tribunal must consider whether the Appellant's refusal to pursue a recommended treatment is unreasonable and what impact the refusal might have on the Appellant's disability

status should the refusal be considered unreasonable: *Lalonde v Canada (MHRD)*, 2002 FCA 211.

[82] Each case must be considered on its own particular facts, and the test in each case is whether the Appellant has acted reasonably having regard to her own particular circumstances and capabilities: *Bulger v MHRD*, (May 18, 2000) CP 9164 (PAB). The issue to be determined is whether it was reasonable in the context of the Appellant's particular circumstances for the Appellant not to have pursued the types of treatment detailed in paragraph 79, supra. The *Bulger* decision is of assistance in this regard where it states as follows:

Compliance must be viewed in the context of the Appellant's circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or trauma injury.

[83] The Tribunal has resolved the compliance issue in favour of the Appellant. It is clear from the reports that she initially pursued extensive treatment for her physical conditions and although there have been gaps she has since February 2010 received ongoing treatment from Dr. Dhillon and the chronic pain specialists to who she was referred.

[84] The Tribunal has taken guidance from the *Bulger* decision, supra, and taken into consideration the Appellant's particular circumstances and capabilities. Because of her severe depression, chronic pain syndrome and sleeplessness, the Appellant lacks motivation and energy. It would appear that steps are taken by her only on the urging of her sons as indicated by her evidence that her sons "forced" her to see Dr. Hawass a chronic pain specialist, her failure to apply for Ontario Works despite Ms. Hastings urging her to do so, and her evidence that she doesn't know if she would see a psychiatrist if this were recommended by her doctor. The Tribunal also considered the Appellant's evidence describing her usual day (see paragraph 30, supra) in which she testified that she doesn't dress every day... that sometimes she sleeps in her clothes... that she spends most of the day crying and praying...that she only goes out for medical appointments. This is consistent with severe depression and a resultant lack of energy and motivation.

Determination

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

Prolonged

[86] Having found that the disability is severe the Tribunal must also make a determination on the prolonged criteria.

[87] The Appellant's multiple disabling conditions have been extant for many years and they appear to be deteriorating.

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

CONCLUSION

[89] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2012, when she last worked. 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 October 2014; therefore the Appellant is deemed disabled in July 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of November 2013.

[90] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security