



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. R. v. Minister of Employment and Social Development*, 2017 SSTGDIS 72

Tribunal File Number: GP-16-3249

BETWEEN:

A. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

HEARD ON: May 29, 2017

DATE OF DECISION: June 6, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. R. (Appellant)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on February 3, 2016. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] This appeal was heard by Teleconference for the following reasons:

- a) The issues under appeal are not complex.
- b) Credibility is not a prevailing issue.
- c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

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

- a) be under 65 years of age;
- b) not be in receipt of the CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the minimum qualifying period ("MQP").

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

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

[6] In this case, it is also relevant that the Appellant began receiving a CPP retirement pension in April of 2015. According to ss. 44(1)(b) and 70(3) of the *Canada Pension Plan*, a person cannot receive CPP disability benefits and a CPP retirement pension at the same time, unless certain criteria are met. In particular, s. 66.1(1.1) of the *Canada Pension Plan* states that a person can only cancel an existing CPP retirement pension in favour of CPP disability benefits if the person is deemed to be disabled before the month in which the retirement pension became payable.

ISSUE

[7] There does not appear to be any dispute about the MQP and the Tribunal finds that the MQP date is December 31, 2017. Ordinarily, 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. In this case, however, the Tribunal must consider the fact that the Appellant began receiving a CPP retirement pension in April of 2015. Thus, as a result of the combined operation of ss. 44(1)(b), 66.1 (1.1), and 70(3) of the *Canada Pension Plan*, the Tribunal must instead decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before March 31, 2015.

EVIDENCE

[8] The Appellant is 62 years old and lives with her husband in a one-level townhouse in X, British Columbia. In addition to a Grade 12 education, she has a 3-year registered nurse diploma and a certificate in advanced labour and delivery. She has worked as a registered nurse for her entire working life. The Appellant was still working part-time as a registered nurse when she completed her Questionnaire for CPP disability benefits on January 28, 2016

(the “Questionnaire”). At that time, she listed her illnesses and impairments as rheumatoid arthritis (“R/A”), chronic bronchiectasis (shortness of breath, chronic cough, and chronic low grade fever), and the removal of discs at C4 through C7 as well as the associated rods and screws in her neck. She wrote that she was prevented from working by chronic pain and stiffness in her joints, severe headaches, neck pain, decreased neck movement, worsening vision, chronic cough, shortness of breath and chronic fatigue. She ultimately stopped working on June 1, 2016.

[9] In addition to the above conditions, the Appellant’s Questionnaire also listed chronic fatigue, depression, sleep apnea, hypertension, alopecia, and numbness, tingling, weakness and stiffness of her hands. At the hearing, the Appellant indicated that she also suffered from an inability to concentrate and an overall inability to apply her nursing skills. She said that the physical symptoms, especially the constant headaches, caused discomfort all the time. If she turns her head the wrong way, it sends her neck into spasms and exacerbates her headache.

[10] The remainder of the evidence is presented chronologically. While all evidence was reviewed and considered, only the most relevant evidence is specifically referenced below.

History – Prior to Commencement of CPP Retirement Pension

[11] The Appellant started her most recent job at Lighthouse Medical Clinic (“Lighthouse”) in August of 2007. While she had previously been working 5 days per week in a hospital setting, the Lighthouse position was only for 4 days per week. She found that her symptoms improved a little when she started at Lighthouse. The Appellant had significant surgery on her neck in 2010 and testified that her medical conditions forced her to reduce her workload to 3 days per week in 2012, although she was reluctant to do this because of the financial impact. She further reduced her workload to 2.5 days per week in 2014, but was unsure of when exactly she made this change. She said that she would also leave work early whenever possible.

[12] On June 19, 2013, a CT scan of the Appellant’s chest revealed “very minimal central bronchiectasis” that was stable in comparison to a previous study. A CT scan of the head on September 26, 2013 was normal: it was commissioned to rule out a bleed as the cause of a

severe headache. The Appellant was described as having a connective tissue disorder. An MRI of the cervical spine on October 8, 2013 revealed normal atlantoaxial articulation.

[13] A December 3, 2013 MRI of the thoracic spine was done to rule out herniation. Mild multilevel lower thoracic degenerative disc disease was noted, without spinal or foraminal stenosis. An MRI of the head was done on March 3, 2014 because of headaches. The radiologist reported non-specific scattered T2 hyperintensities in the white matter that were compatible with the Appellant's age. No features of vasculitis were observed.

[14] On April 14, 2014, the Appellant saw Dr. Jay Sarbit (Internal and Respiratory Medicine). Dr. Sarbit noted the presence of bilateral lower long zone bronchiectasis from the summer of 2013, with chronic cough and purulent sputum, as well as the existing diagnosis of R/A. Additional investigations were ordered, with bronchoscopy a future possibility. Bronchial culture was later collected on September 18, 2014. The only subsequent medical documentation prior to the Appellant's commencement of a CPP retirement pension in April of 2015 was a November 5, 2014 consultation with Dr. Carmel Anderson (Dermatologist) in connection with a two-year history of hair loss. Dr. Anderson's assessment was non-scarring, non-inflammatory alopecia.

[15] When asked at the hearing about her work capacity at March 31, 2015, the Appellant said that she had started cutting back on the more physical tasks by that time (although her employer was not aware of it). She said that she knew she was having difficulties but, for financial reasons, she still did not want to cut back too much.

History – After Commencement of CPP Retirement Pension

[16] The Appellant saw Dr. Nancy Hudson (Rheumatology) on April 9, 2015. Dr. Hudson provided diagnoses of CCP-positive R/A, chronic cervicgia related to mechanical abnormalities, bronchiectasis with chronic cough, and chronic myofascial pain. Dr. Hudson also noted severe injection site reactions in connection with the Humira injections for rheumatoid arthritis: this necessitated a switch to Orencia in place of Humira.

[17] Dr. Scott Meckling (Neurology) saw the Appellant on June 25, 2015. The Appellant reported an ongoing daily headache since the 1980s that seemed to be associated with an

ongoing neck problem and was also getting progressively worse. The pain was sharp, constant, and mostly in the right frontal region but also extended back to the occiput and into the upper neck. Dr. Meckling thought the headaches were cervicogenic in origin and did not think that another medication was going to solve her problem. He recommended getting her back to a pain clinic doctor to see if any interventional therapies might help: some fluoroscopy-guided injections had been done 12 years previously and was now a potential treatment again.

[18] On July 10, 2015, Dr. Ryan McFayden (Kelowna Sleep Clinic) provided diagnoses of central sleep apnea (moderate, reasonably controlled on Respiroics ASV) and psycho-physiological insomnia. Some adjustments were recommended, as well as a reduction in opiate medication. On September 10, 2015, Dr. Hudson repeated her previous diagnoses and noted that Orenica was being switched to Actemra.

[19] At the hearing, the Appellant said that she had to take a week off in approximately November of 2015 due to spasms. She was told by her doctor to eliminate physical work tasks. However, her vision was also being affected. This affected her ability to remove sutures but she was still able to do injections until approximately February of 2016 when she had an R/A flare-up in her wrist and had to call in sick. She was unable to work for two days, as she could not move her right hand or wrist due to the pain. Her employer's focus on obstetrics was a problem for her from that point forward as she could no longer hold babies.

[20] On December 1, 2015, Dr. John-Paul Basil Etheridge (Okanagan Interventional Pain Clinic) saw the Appellant for her chronic neck pain and occipital headaches: the pain was localized in the upper neck. Dr. Etheridge noted that the Appellant was working as a registered nurse in a family medicine practice for 2.5 days per week but had increased pain after two days of work. Dr. Etheridge's diagnosis was chronic cervicogenic headaches and proceeded with injecting nerve blocks and medial branch blocks.

[21] Dr. Hudson saw the Appellant again on January 20, 2016. She repeated her previous diagnoses of CCP-positive R/A, bronchiectasis with chronic cough and chronic myofascial pain. While she did not mention chronic cervicalgia, Dr. Hudson did note chronic headaches, a clearly debilitating chronic cough, and the fact that Dr. Etheridge's injections had helped temporarily.

[22] In the January 28, 2016 Questionnaire, the Appellant wrote that she had to stop work tasks such as restocking, reaching and bending. She also described a headset that enabled her to handle telephone calls: at the hearing, she said Lighthouse had purchased this for her after the 2010 surgery. She could no longer walk for more than 15 minutes and could no longer bend, garden, or do house painting. She had cut down her quilting hobby considerably and no longer worked on big projects. She indicated that she would continue with the neck injections as long as they improved her headaches. She also listed extensive functional limitations.

[23] On January 28, 2016, Dr. Marius Aucamp (Family Physician) completed a Medical Report in support of the Appellant's application for CPP disability benefits. His diagnoses included R/A, chronic severe headache (related to neck R/A), sleep apnea, bronchiectasis (related to R/A with chronic cough and chest pain), depression, alopecia (related to R/A) and hypertension. He reported multiple failed interventions, including neck fusion surgery aimed at controlling the headaches, and noted that the R/A was resistant to treatment.

[24] Dr. Aucamp stated that the Appellant's severe headaches restricted her functioning on a daily basis. Her functioning and social interaction was restricted by her chronic cough and neck pain; she also had neck stiffness. While the prognosis would normally be "fair", he suspected that it was "poor" in her case, noting her intolerance to several DMARDs (disease-modifying anti-rheumatic drugs). As her chronic neck pain might never improve, he thought that her headaches and need for chronic pain medication would remain. He also stated that her bronchiectasis and cough would not improve.

History – After Receipt of Application for CPP Disability Benefits

[25] The Appellant's application materials for CPP disability benefits were received by the Respondent on February 3, 2016. In a February 20, 2016 call to the Appellant, the Respondent confirmed that she was still working and covering her shifts, although she hoped to stop working in March or April of 2016.

[26] On April 21, 2016, Dr. Hudson wrote that Actemra had been discontinued and temporarily replaced by Prednisone, with future treatment of Remicade and Methotrexate. The diagnoses were CCP-positive R/A, bronchiectasis with chronic cough, and chronic headaches

and myofascial pain. Dr. Hudson stated that the Appellant should go on permanent disability due to her active deforming arthritis. She already had to decrease her hours in an attempt to accommodate some of her symptoms but nonetheless continued to be quite disabled. Dr. Hudson concluded that she would not be able to resume any kind of gainful employment in the future.

[27] On May 4, 2016, Dr. Aucamp wrote to the Respondent and stated plainly that the Appellant was disabled and could not work. He said she had tried to continue only for financial reasons and her love of her job. He said that he had been trying to convince her to stop working since 2014, but she had first wanted to try several different pharmacological and medical interventions before giving up her job. He felt that continuing to work might have caused her increased pain and suffering; he also suggested that she could not stop working until she began to receive CPP disability benefits. He concluded by stating that she would now stop working.

[28] In a letter dated May 15, 2016 to the Respondent, the Appellant stated that Dr. Aucamp had been encouraging her to stop working since 2014 as her R/A symptoms had been getting progressively worse. She had persisted with work by cutting down her hours, changing her work load, and continuing to try new medications. However, this had only increased her pain and headaches to the point where she was now unable to work and had stopped working. In addition to physical limitations, the increased pain had impacted her concentration. After working 2½ days, she needed to rest on her days off to recuperate before working again. She had been advised by Drs. Aucamp and Hudson that working was only making her symptoms worse; she also felt she was being unfair to her co-workers. At the hearing, the Appellant clarified that Dr. Aucamp had told her in late 2014 that “I think you’re going to have to think about disability”; she said he was trying to break the news to her gently because she loved her job. As time went on, he kept saying that “you want to think about this”, adding that she could qualify for CPP disability benefits and “you need to do this for your health”.

[29] The Appellant’s letter went on to state that she would apply for medical Employment Insurance (“EI”) as she needed the income. She had applied early for her CPP retirement pension hoping that she would earn enough to live on, but her monthly pension had recently been reduced to \$267.59. She did not know how much she would receive as a retirement

pension when she applied for it. She affirmed her reluctance to stop working and stated that her pain specialist was now refusing to try more injections into her cervical spine. The Appellant's last day of paid work, according to her June 10, 2016 Record of Employment ("ROE"), was June 1, 2016: this date worked out best for payroll purposes and she did not want to leave her employer hanging. The ROE reason for termination was "illness or injury" and the pay period was bi-weekly. There were 1,002 total insurable hours and total insurable earnings of \$15,407.77.

[30] A review of the Appellant's CPP contributions and associated employment earnings reveals recent income of \$32,336.00 (2007), \$24,786.00 (2008), \$28,185.00 (2009), \$23,920.00 (2010), \$28,310.00 (2011), \$27,692.00 (2012), \$32,296.00 (2013), \$31,880.00 (2014), and \$26,153.00 (2015). In 2015, she earned \$13,400.00 prior to the commencement of her retirement pension in April and \$12,753.00 after the commencement of her pension.

[31] At the hearing, the Appellant said that her employer never asked her to stop working. However, she was often asked how she was doing. She said that she appeared fatigued despite keeping a "stiff upper lip", although her superiors cared deeply for her and apparently "did not want to be the ones that told her". While she wanted to quit in March, she said that she dragged her feet about quitting because she hoped that another medication might still make a difference.

[32] In mid-2016, Dr. McLeod replaced Dr. Hudson as the Appellant's Rheumatologist. He took a more active approach and referred her to Dr. Dominelli (Pulmonary Specialist), who she first saw on December 5, 2016. Dr. Dominelli did a "lung scope" (in which scrapings from the lungs are analyzed) on January 25, 2017 and also referred her to Dr. Brake (Ear, Nose and Throat Specialist) for further investigations.

[33] On August 30, 2016, Dr. Aucamp wrote the Respondent and said that he had advised the Appellant to consider applying for CPP disability benefits. He said that he had made those suggestions over the last year: she enjoyed working and needed the financial incentive. He did not see why her application should be denied, as she had tried different treatment regimes in the hope that something would help and she could carry on with her life and work. After failing multiple treatments and getting worse, she finally stopped working. He did not understand why

she was penalized for trying to get better, instead of applying for CPP disability benefits on the day she was diagnosed with R/A.

[34] On October 3, 2016, the Appellant wrote that she was very sad about no longer being able to work. She had been diagnosed with R/A four years before and work had become progressively more difficult with severe headaches following a major neck operation in May of 2010. In 2014, her family doctor and rheumatologist suggested that she might consider stopping work: it was at this time that she reduced her workload to 2.5 days per week. She had tried different biologic medications in 2015 but they did not work for her: she turned 60 at this time and thought that an early application for a CPP retirement pension would yield enough income to let her stop working. However, the pension turned out to be insufficient. As her family doctor saw how difficult work was getting, he suggested that she find out about disability benefits.

[35] The Appellant wrote that she went to a Service Canada office in February of 2016 and was told that she should keep working as long as she could, as a decision on her application could take 8-12 weeks. She said that she also asked about the commencement of her CPP retirement pension and was told that she just needed to apply for CPP disability benefits within 15 months of applying for her CPP retirement pension. As a result, she continued working 2.5 days per week and adjusted her work by doing less, not holding babies, not putting away stock, and leaving work early whenever she could. She also wanted to give her employer enough time to find a replacement for her. She said that, even after receiving the initial denial, she was not advised to be off work when applying for CPP disability benefits.

[36] The Appellant then stated that she was physically unable to continue working by the end of April 2016 and gave notice to her employer. She then was advised on August 5, 2016 by a Respondent employee that she should have stopped working when she was first diagnosed, as she would have qualified easily for medical reasons. She said that she would have stopped working when she first applied for CPP disability benefits if she had not been advised by that employee to keep working until she received a decision on her application.

Appellant's Current Status

[37] At the hearing, the Appellant said that her condition had deteriorated since March of 2015. She said it was hard to say whether her condition had also deteriorated since she had stopped working: her symptoms are exacerbated every time she tries to do something but she also is less active now that she is no longer working. She has not applied for any jobs since the beginning of 2014, nor has she done any paid or volunteer work other than her work for Lighthouse. There is no job that she can see herself doing now.

[38] The Appellant sees Dr. Aucamp every 3 weeks. He has recently raised the possibility of a different kind of scalp injection, as this has worked on another patient of his who had headaches. Her current specialists are Dr. Brake, Dr. Dominelli and Dr. McLeod. She is no longer seeing Dr. Meckling, Dr. Etheridge (as any additional injections would be a high risk), or Dr. McFayden (as her sleep is better now). She is still taking Remocaid for her R/A; other medications include Proxen, Nexium, Prozac, Methotrexate, Hydrochlorothiazide (HCTZ), Tylenol and Dilaudid. She is also being investigated for possible glaucoma.

[39] The Appellant's husband does most of the housework, especially heavy tasks such as vacuuming, and all of the grocery shopping. She uses a computer for perhaps 3-4 hours per week: this is limited as it is hard on her neck and she has vision difficulties. She only drives short distances, with 15 minutes being a rough upper limit. Her husband drives her places whenever possible; she also cannot drive at night. Although she has many grandchildren (with 4 of them in town), it is too hard for her to take care of any of them.

[40] When asked to describe a typical day, the Appellant said that she gets up with her husband at 7:00 a.m. and will have a shower. She might go out for a coffee with her husband and then return home. She will watch TV or read books, although it is difficult for her to hold a book up. She also still does some quilting: as she can alternate between sitting and standing, she estimates that this takes up 8-10 hours per week. When she was working 2.5 days per week, she was only doing 5-7 hours of quilting per week because she was very tired. She used to do much more quilting before her health deteriorated. Other than occasionally meeting her husband for lunch, she does not do much else.

[41] However, the Appellant's husband has a music school and she might sit at the reception desk to answer the phone once or twice a week for 60-90 minutes. She is not paid for this and believes that her husband is just trying to get her out of the house and meeting people. She is very tired by the end of the day and is in bed by 9:00 p.m.

[42] The Appellant said that she was from a family of extremely ambitious high achievers and that none of them had ever utilized the social security system. Toughness in the face of adversity was paramount: she said that her father refused to speak to her many years ago when she was briefly off work due to a workers' compensation-supported back injury, even though the workers' compensation program wanted her to remain off work even longer. She did not want her family to see her as a failure. She said her husband also did not want her to go on disability.

SUBMISSIONS

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

- a) She had been advised by her doctors to apply for CPP disability benefits for quite some time before she actually made the application in 2016;
- b) She is unable to work and only kept working as long as she did because a Service Canada employee advised her to continue working until her disability benefits application was assessed; and
- c) She was determined to work as long as she could, despite her deteriorating condition, and ought not to be penalized for hoping that future treatment might help her.

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

- a) It is the capacity to work and not the diagnosis or the disease description that determines the severity of the disability under the CPP;

- b) While she may have had limitations and been unable to do her usual job, she was not precluded from any other work (including sedentary and/or part-time employment) in March 2015 and onward; and
- c) She only stopped working in June of 2016, which is well past the date by which she must be found disabled.

ANALYSIS

[45] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before March 31, 2015.

Severe

[46] As noted above, a person is considered to have a severe disability if she is incapable regularly of pursuing any substantially gainful occupation. 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. In this case, the Appellant is now very close to the usual retirement age. However, she is well-educated, articulate, and has worked extensively as a nurse.

[47] The Tribunal finds that the Appellant's oral evidence and the documentary evidence paint a consistent picture of a person who loved her job and wanted to work as long as she could. She continued working despite physical adversity. She likely worked considerably longer than most other people who have similar symptoms. The Tribunal accepts that, when she stopped working on June 1, 2016, there was no realistic prospect of continuing to work. The Tribunal also accepts that, since commencing employment at Lighthouse in 2007, the Appellant was working as much as she could. She faced financial and familial pressure to do so.

[48] However, the Tribunal's first concern is not with the Appellant's ability to work on June 1, 2016. As she began receiving a CPP retirement pension in April of 2015, the Tribunal must address the fact that she continued working for more than a year after the date by which she needs to establish the onset of a severe disability. The Tribunal notes that the measure of

whether a disability is “severe” is not whether the person suffers from severe impairments, but whether her disability prevents her from earning a living (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[49] The Appellant’s employment after March 31, 2015 is, in itself, not necessarily determinative of the matter. It is possible that a person could continue to work on a limited basis and still succeed in establishing the existence of a severe disability. The test is whether that person is incapable regularly of pursuing any substantially gainful occupation.

[50] To assess the Appellant’s capacity to pursue a substantially gainful occupation, it is first necessary to determine what exactly is meant by the words “substantially gainful occupation”. On June 18, 2014, s. 68.1 of the *Canada Pension Plan Regulations* came into effect. That section confirmed that a “substantially gainful occupation” is one that provides wages equal to or greater than the maximum annual amount a person could receive as a CPP disability pension. In the year 2014, the maximum annual amount a person could receive was \$14,836.20. This increased to \$15,175.08 in 2015 and to \$15,489.72 in 2016.

[51] As the Tribunal has accepted that, since 2007, the Appellant was not capable of working more than she actually did, the Appellant’s ability to pursue a substantially gainful occupation can be reasonably assessed by examining the income actually earned during that period. It is clear that for the years from 2007 through 2013, the Appellant displayed a sustained ability to earn well in excess of the “substantially gainful threshold” that was first formally defined in 2014. Her earnings were lowest in 2010, but this was also the year in which she underwent major surgery. Even though s. 68.1 of the *Canada Pension Plan Regulations* was not in force prior to June 18, 2014 and there was more discretion with respect to interpreting the term “substantially gainful threshold” prior to that date, the Tribunal still finds that the Appellant was capable regularly of pursuing a substantially gainful occupation during those years. Her earnings were substantial and consistent during that time and roughly doubled the formal threshold that was eventually adopted in 2014. The Tribunal also notes the decision in *Ferreira v. Canada (Attorney General)*, 2013 FC 81, in which the Federal Court of Appeal found it was reasonable to conclude that a capacity for part-time work demonstrated that a disability was not severe. The real question is whether such capacity continued in 2014 and up to March 31, 2015.

[52] The Appellant's earnings in 2014 were \$31,880.00. This is more than double the "substantially gainful threshold" set out in the *Canada Pension Plan Regulations* for the 2014 calendar year. While the Appellant described two recent periods during which she was unable to work due to her medical condition, these were in November of 2015 and February of 2016. Accordingly, the Tribunal finds that the Appellant was capable regularly of pursuing a substantially gainful occupation in 2014.

[53] As for 2015, it appears that the Appellant substantially reduced her hours once she started receiving her CPP retirement pension. For the first three months of 2015, her earnings were \$13,400.00: she would have had annual earnings of approximately \$53,600.00 for 2015 if she had continued working at the same pace after commencing her CPP retirement pension in April of 2015. This is more than three times the "substantially gainful threshold" for 2015. Given this evidence, the Tribunal cannot find that the Appellant was incapable regularly of pursuing a substantially gainful occupation on or before March 31, 2015. Her earnings clearly demonstrate substantial capacity at that point in time: her reported work interruptions also took place subsequent to that date. While this appears to dispose of the appeal, the Tribunal will first consider other evidence and submissions.

Inability to Perform Certain Work Tasks

[54] The Appellant gave evidence that she was no longer able to perform all of the tasks associated with her job. Unfortunately for the Appellant, the fact that some aspects of her job were no longer possible is also not determinative. The decision in *Klabouch* affirmed that the determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work. The Lighthouse clinic appears to have had an emphasis on obstetrics: other clinics without this emphasis would have had reduced demands for tasks such as lifting babies. In any case, there is also no evidence that Lighthouse terminated the Appellant or forced her to quit. While she may have been aggravating her condition, the necessary inference is that Lighthouse was satisfied that the Appellant was still a contributing employee.

[55] The Appellant testified that she had started cutting back on the more physical tasks of her employment by March 31, 2015. However, she also indicated that her employer was not

aware of it at that time. Once again, the necessary inference is that she still was able to do enough tasks to justify her continued employment by a private employer.

Advice of the Appellant's Doctors

[56] The Appellant suggested that Dr. Aucamp and Dr. Hudson suggested she stop working in 2014 and that this implied incapacity prior to the commencement of her CPP retirement pension. It is accepted that she has had medical conditions for quite some time and that it eventually prevented her from working. However, that there is no contemporaneous evidence pertaining to her work capacity prior to her MQP date of March 31, 2015. The documentary evidence suggests Dr. Hudson only suggested that she stop working in April of 2016.

[57] However, Dr. Aucamp eventually provided evidence suggesting that Appellant should have stopped working earlier than she actually did and that he had encouraged her to stop working prior to 2016. He also suggested that continued employment had aggravated her condition. The Tribunal has carefully considered Dr. Aucamp's evidence on the timing of his recommendations.

[58] On May 4, 2016, Dr. Aucamp wrote that he had been trying to convince the Appellant to stop working since 2014, but she had first wanted to try several different interventions before giving up her job; he also suggested she could not stop working until she began to receive CPP disability benefits. However, on August 30, 2016, Dr. Aucamp said that he had advised the Appellant to consider applying for CPP disability benefits "over the last year". It is notable that the Appellant's CPP retirement pension commenced more than a year prior to August 30, 2016. Finally the Appellant stated on May 15, 2016 that Dr. Aucamp had been encouraging her to stop working since 2014. At the hearing, the Appellant clarified that Dr. Aucamp had suggested in late 2014 that she would "have to think about disability". She said that he repeated this advice as time went on.

[59] While Dr. Aucamp may have made suggestions about leaving her job as early as 2014, the Appellant also testified that she reduced her workload as a result of such recommendations. As noted above, there does appear to have been a reduction in the Appellant's workload subsequent to March 31, 2015. Even if the Tribunal disregards his "one year" time estimate

from August 30, 2016, the Tribunal is unable to conclude that Dr. Aucamp's advice persuasively establishes that the Appellant was incapable regularly of pursuing a substantially gainful occupation at some point in 2014 or even prior to April of 2015.

Advice of Service Canada to Continue Working

[60] The Appellant submitted that she only kept working because a Service Canada Centre employee advised her to continue working until her disability benefits application was assessed. As noted above, the fact that the Appellant continued working is not in itself determinative. In some cases, a claimant can continue to work and still qualify for CPP disability benefits. In addition, the Appellant only completed the Application and associated Questionnaire for CPP disability benefits in January of 2016. This suggests that the advice was given somewhere around the very end of 2015 or the very beginning of 2016. The fact that she continued working into 2016 does not ultimately play a role, as the Appellant failed to establish the onset of a severe disability by March 31, 2015.

Additional Comments

[61] The Tribunal has considerable sympathy for the Appellant's situation. She appears to have been a skilled, loyal and dedicated employee. In addition to her 2010 surgery and the deterioration that has occurred since then, she has also suffered from a number of other medical conditions. It also appears that she faced extremely high expectations and associated pressure from family members. As noted in *Ferreira*, disability appeals are often difficult cases and a claimant is often fully disabled by the time of the hearing. However, *Ferreira* confirms that the decision-maker is bound by both the statutory definition of disability and the time at which it must be shown to have existed. In this case, the Tribunal finds itself restricted by the Appellant's commencement of a CPP Retirement Pension in April of 2015.

[62] The Appellant has suggested that she may have received erroneous advice. According to section 81 of the *Canada Pension Plan*, the Tribunal does not have the authority to make a finding on erroneous advice from the Respondent. In the case of erroneous advice, s. 66(4) of the *Canada Pension Plan* specifically gives the Minister of Employment and Social Development the power to take any remedial action that the Minister considers appropriate.

Any remedy available to the Appellant for erroneous advice therefore lies through the Minister, not the Tribunal.

Conclusion on Severity

[63] After considering the evidence and the Appellant's submissions in this matter, the Tribunal finds that the Appellant has not established the commencement of a severe disability on or before March 31, 2015. That date is critical in this appeal because the Appellant began receiving her CPP retirement pension in April of 2015.

Prolonged

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

CONCLUSION

[65] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security