



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. T. v. Minister of Employment and Social Development*, 2017 SSTGDIS 91

Tribunal File Number: GP-16-848

BETWEEN:

A. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: George Tsakalis

HEARD ON: May 24, 2017

DATE OF DECISION: July 12, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on July 14, 2015. The Appellant claimed that she was disabled because of chronic pain, migraines and fibromyalgia that prevented her from working in any capacity. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Tribunal must decide if it is more likely than not that the Appellant was disabled as defined in the CPP on or before the minimum qualifying period (MQP) date. The appeal was heard by teleconference for the following reasons:

- The issues under appeal are not complex.
- There are gaps in the information in the file and/or a need for clarification.
- 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 Appellant in her submissions contained in GD-7 requested an oral hearing by telephone. The Tribunal agrees that a teleconference would be appropriate in this case.

[3] The following people attended the hearing:

- A. T., Appellant
- Kiran Qureshi, Legal Representative
- Dr. Y.F. Chen, Psychiatrist/Medical Witness
- Dr. Robert Kemp, Family Physician/Medical Witness

[4] The Tribunal decided that the Appellant was disabled as defined in the CPP on or before the MQP date, which is December 31, 2016. The reasons for that decision follow.

EVIDENCE

Age, Work Experience

[5] The Appellant was born in 1971. She stated that she had a Grade 12 education in her Questionnaire for Disability Benefits that was date stamped by Service Canada on July 29, 2015. She completed the Life Licence Qualification Program (LLQP) and the Investment Funds Institute of Canada (IFIC) course. She last worked in June 2015, where she was employed at a major Canadian bank. She stated that she had modified hours and duties prior to leaving her place of employment.

[6] According to a report signed by Dr. Maurice Siu, Psychiatrist on August 25, 2014, the Appellant enrolled in a secretarial program at Humber College for one year. She also attended George Brown College where she completed a microcomputers and business applications program. The Appellant began working at a bank in 1999 in customer service. The Appellant was off work for one year after she was injured in a motor vehicle accident in 2009. She suffered from chronic back and neck pain. In October 2012, she went off work for four weeks because of panic attacks. She then returned to work for three months on modified hours. She saw a CIBC physician in March 2013, and was given permanent accommodation with respect to tardiness. She began experiencing shoulder pain, finger cramping, left arm stiffness, left arm pain that ran down her hand, and left arm weakness. She began receiving disability benefits in September 2013, as she working only modified hours. In March 2014, she was working three days per week for up to five hours per day. She was having difficulty working full-time hours. She was experiencing panic attacks and migraines and she was fatigued with poor sleep. She stopped working after her short term disability ended and because she was unable to work full time. The Appellant had positive performance reviews before her illness.

[7] Dr. Y.F. Chen, Physiatriist authored a report for the Appellant's legal representative that is dated May 17, 2016. The Appellant was involved in a motor vehicle accident in March 2009. She returned to modified duties in June or July 2009. She was placed on long term disability in September 2009. She returned to work in 2011, with a gradual return to work duties. She obtained her mutual funds licence between 2009 to 2011. She transferred work places in April 2012. She reported increased pain and symptoms and she was placed on short term disability in

September 2012. The Appellant then commenced a gradual return to work in March 2013. She returned on short term disability in September 2013. In March 2014, she was placed on long term disability. The Appellant then commenced a graduated return to work program in December 2014, but stopped in June 2015 because of chronic pain, migraines, fibromyalgia and panic attacks. Her long term disability claim was denied in May 2015.

[8] The Appellant testified at her hearing that she received her mutual funds licence in 2004 or 2005. She attended George Brown College, where she studied microcomputers, and business applications. She started working at a bank in 1999, and remained working there until 2015. She settled her case with her disability insurer, Great West Life in August 2016.

Medical Condition and Treatment

[9] The Appellant in her Questionnaire for Disability Benefits stated that the illnesses that prevented her from working were fibromyalgia, irritable bowel syndrome, panic and anxiety attacks, chronic lower back pain, migraines, depression, neck arthritis, and insomnia. She claimed that she has blurred vision and cognitive challenges.

[10] The Appellant's family physician, Dr. Robert Kemp completed a Medical Report for Service Canada that was date stamped on July 29, 2015. He diagnosed the Appellant with fibromyalgia, chronic pain and mood disorder, irritable bowel syndrome and migraines. He noted that the Appellant was coping with chronic problems quite well until she was involved in a motor vehicle accident in 2009. Her problems accelerated after that. The Appellant was taking Percocet, Gabapentin, Celebrex and Effexor. He stated that the Appellant had limited improvement with medication. He stated that an improvement in the Appellant's condition was "very unlikely." He opined that the Appellant's condition would likely deteriorate.

[11] Dr. Kenneth Keeling, Psychologist in his report of April 27, 2009, diagnosed the Appellant with an adjustment disorder. He recommended 10-12 weekly sessions of psychological counselling.

[12] The Appellant underwent a right shoulder MRI on June 3, 2009 which showed high-grade supraspinatus tendinosis.

[13] Dr. Kemp in a letter to the Appellant's legal representative dated January 21, 2010 stated that he reviewed a report from Dr. Steiner, Psychologist and Dr. Goodman, Psychologist. He stated that these reports confirmed that the Appellant suffered from psychological distress. The Appellant's psychological disability related to a chronic pain disorder. Dr. Kemp was having difficulty determining the correct medications and dosage for the Appellant. He stated that it was essential that the Appellant have adequate psychological counselling to enable her to come to terms with her psychological disability.

[14] Dr. J.D. Salmon, Psychologist prepared a report at the request of Great West Life that was dated May 13, 2010. He diagnosed the Appellant with a major depressive disorder with associated anxiety and a pain disorder with both psychological factors and a general medical condition.

[15] The Appellant underwent a left shoulder ultrasound on February 4, 2013, because of shoulder impingement. The study was unremarkable. There was no evidence of a rotator cuff tear.

[16] A left shoulder MRI taken on March 5, 2013, showed findings suggestive of impingement syndrome but correlation with a physical examination was required. There was no evidence of a discrete rotator cuff tear.

[17] A cervical spine MRI taken on August 14, 2014, showed multi-level degenerative changes.

[18] Dr. Siu in his report of August 25, 2014, stated that the Appellant suffered from iron deficiency and fibromyalgia. She had neck, left arm, back, left hip, left knee, and bilateral shoulder and elbow pain. She reported constant pain. She suffered muscle spasms in her hands and legs. Her motor vehicle accident case settled in February 2014. The Appellant was taking Cymbalta, Percocet and Oxazepam. The Appellant began experiencing symptoms of depression because of her ongoing pain and workplace stress in December 2013. Dr. Siu diagnosed the Appellant with adjustment disorder and mixed anxiety and depressed mood.

[19] Dr. Kemp in a letter dated May 14, 2015, noted that the Appellant's symptoms included drowsiness, dizziness, irregular bowel movements, impaired focus/problem solving, blurred

vision, trembling/chills, muscle twitching, slurred speech, headaches, irregular sleep, altered sensation in the face and limbs, and sensitivity to light and sound. The Appellant suffered from depression, panic attacks and migraines. She had difficulty handling stress.

[20] Dr. Kemp in a report to the Appellant's legal representative dated July 7, 2015, stated that the Appellant's medical problems included migraines, chronic mood disorder, chronic anxiety, chronic pain disorder, spinal osteoarthritis with degenerative disc disease and high situational stress. Dr. Kemp thought that the Appellant could obtain some benefit from a pain management clinic referral. He had tried a wide number of modalities that pain clinics would use. He thought nerve blocks or injections might make a difference in some of the Appellant's pain levels. He doubted that this would help with her fibromyalgia but her migraines might be reduced.

[21] A prescription summary that runs up to December 2015, showed that the Appellant took Endocet, Sumatriptan, Cymbalta, Gabapentin and Risperidone.

[22] Dr. Y.F. Chen in his May 17, 2016 report diagnosed the Appellant with myofascial injuries of the spine and limb muscles, shoulder dysfunction, post-traumatic anxiety and mood disturbances, chronic pain disorder with associated psychological impacts, cognitive dysfunction, fibromyalgia, post-traumatic headache, possible neuropathy in the limbs, post-traumatic insomnia, possible TMJ dysfunction and symptomatic flares of degenerative disc changes in the spine.

[23] The Appellant testified that she was involved in two motor vehicles in 2009 and 2017. The Appellant had lower back pain and a neck injury in her 2009 car accident. She has had chronic pain since the 2009, and other issues. She suffered from fibromyalgia, panic attacks, migraine with blurred vision, irritable bowel syndrome, insomnia, memory and concentration difficulties, and nausea.

[24] The Appellant's treatment since 2009 has included taking medication, physiotherapy, massage therapy, and acupuncture. She has used a TENS machine, heating pads and cold packs. She has taken Percocet, Cymbalta, Imitrex, Motrin, Reactine, and asthma puffers. She has spoken to several pastors because of her psychological issues, and she has undergone mental health counselling.

Capacity to Work

[25] The Appellant in her Questionnaire for Disability Benefits reported that she could only sit, stand or walk for no more than 20 minutes. She could only lift or carry five pounds for 10 feet. She reported difficulty with reaching and bending. It took her more time to complete her personal care tasks, and she often needed help. She reported blurred vision and stuttering. She reported memory and concentration issues. She indicated that she had insomnia, panic attacks and asthma. She could drive for no more than 15 minutes. She also needed more time to complete her household tasks and she often needed help.

[26] Dr. J.D. Salmon, Psychologist prepared a report the request of Great West Life that was dated May 13, 2010. The Appellant advised Dr. Salmon that she was on modified duties from May to August 2009, but believed that her employer required her to be employed at full capacity. Prior job modifications were not satisfactory in that she remained in a leadership position. She believed that modified duties were available, but she needed to avoid high levels of responsibility on the job. Dr. Salmon stated that her perception is objectively supported in this regard. He stated that the Appellant could work part-time with appropriate accommodations, which included low stress job duties with an absence or regular disruptions or distractions. He also recommended more frequent breaks and reduced hours. The Appellant reported poor memory, concentration and word finding difficulties since the accident. Dr. Salmon stated that the Appellant's depressive symptoms, fatigue, pain and anxiety were incompatible with the expected demeanour, stamina and persistence required for her work duties in a full time capacity.

[27] The Appellant's employer prepared an addendum Workplace Accommodation Report dated June 29, 2013 that was signed Cindy Vogel, Social Worker and Accommodation Specialist. The Appellant reported that she unable to perform all tasks associated with her job because of both physical and non-physical issues. It was taking her longer to complete her tasks. The Appellant had pain and stiffness. She had headaches and her medications caused her to be slower to organize herself in the morning. The recommended accommodations included taking occasional 5 to 10 minute medical breaks, in addition, to normal breaks to manage her condition. The Appellant should also be provided with occasional flexibility with her work start time

because of having to manage her medical symptoms or to attend treatment. It was also probable that the Appellant's work attendance would be impacted and she might experience more absences than her peers. It was also suggested that the Appellant be provided with adjustments to her work performance expectations because of her medical issues. It was expected that most of the Appellant's conditions would improve with time and a brief status review should be conducted in one year to determine if the accommodation solutions are still required.

[28] Ms. Vogel prepared another Workplace Accommodation Report on January 21, 2014. The Appellant was placed on short term disability on September 30, 2013. She initiated a return to work plan with part time hours as of October 22, 2013. It was noted she was working three days per week for four hours per day. The Appellant's sitting tolerance was about 10 to 15 minutes before intense pain symptoms began. This impacted her ability to drive to work. Ms. Vogel suggested accommodating the Appellant in a location that would reduce her commute to work.

[29] Dr. Siu in his August 25, 2014 psychiatric report asked the Appellant to estimate her ability to return to work on a scale of 1 to 10. She gave an estimate of 5 out of 10. When asked what needed to change in order to work, the Appellant stated that she needed a change of job duties. She was having difficulty using her handset and she wanted to be allowed to stretch. She did not want to initially meet with clients because the meeting lasted more than one hour and stretching in front of a client would be unprofessional. She wanted to improve her ability to socialize with others. She also wanted to implement previous work accommodations that she had received with respect to tardiness and absenteeism. Otherwise, there were no issues that were preventing her from returning to work completing modified hours and days. Ideally, she wanted to receive long term disability benefits and work completing modified duties and hours. She was willing to change her medication and engage in treatment for her fibromyalgia. She also wanted to receive therapy to deal with anxiety, depression and pain. Dr. Siu stated that the Appellant's prognosis was directly related to her ability to cope with and/or reducing her pain level. He provided her with a guarded prognosis.

[30] The Appellant underwent a Functional Abilities Evaluation at the request of Great West Life on September 15, 2014. The report signed by Kyle Murphy, Occupational Therapist and Adam Luu, Physiotherapist stated that the Appellant passed validity testing. The assessors

opined that the Appellant demonstrated functional standing, sitting and walking tolerances, forward, and shoulder level reaching. The Appellant demonstrated the ability to lift and carry on an occasional basis and met the demands to work in the sedentary category of occupations.

[31] Dr. Kemp in a letter dated January 2, 2015, stated that the Appellant had family issues which led to increased stress. She developed severe headaches, anxiety attacks, exhaustion, and emotion fragility. The Appellant was unable to work in accordance with her return to work schedule. The Appellant was emotionally overwhelmed by her personal problems and was unable to work. It was anticipated that she could return to work in the next week.

[32] Dr. Kemp in a letter dated May 14, 2015, stated the Appellant required a stretch break after sitting or standing for more than 15 minutes. Her ability to write was limited to two to three minutes. Her reading was limited to about five minutes. It took her about longer to complete her daily chores and housekeeping tasks. The Appellant was avoiding social interaction. She also was not participating in any recreational activities

[33] Dr. Kemp in a report to the Appellant's legal representative dated July 7, 2015, stated that it was his medical opinion that the Appellant was unable to engage in any occupation that she is reasonably suited for by education, training or experience. It was his impression that the Appellant made a conscientious effort to attempt to resume her normal work duties but she could not so because of factors outside her control. The pressure to push through her disabilities worsened her stress; as did her conflict with her insurance company. Dr. Kemp was extremely pessimistic about her ability to improve to any significant degree that would allow her to re-enter the work force.

[34] Dr. Chen in his report of May 17, 2016 stated that the Appellant was limited in her ability to sit and stand for long periods, bend and twist, reach, push and pull, maintain static postures and perform repetitive tasks. He stated that the Appellant was substantially limited in her ability to resume her pre-accident employment because of her limitations, which included operating a computer, concentrating on calculations and interacting with clients. These impairments were severe enough to interfere with her occupational functioning in her own and any occupation. She was not able to engage in any occupation for which she was reasonable suited by education, training or experience. The Appellant would likely encounter a number of

difficulties as she tried to pursue any employment. The likelihood of the Appellant returning to the workforce was poor. She had suffered a significant loss of employability and her future earning capacity is considerable reduced. He stated that the Appellant had a severe and prolonged disability.

[35] Dr. Kemp in a report to the Appellant's legal representative dated March 9, 2017, stated that the Appellant's medical condition resulted in her activities of normal daily living being slowed, restricted or just not able to be done. The Appellant had no ability to devote the time and energy into any sort of gainful occupation. A wide range of treatment had been employed but no progress had been made. The chances of future progress should be considered almost zero. The Appellant will be disabled for life and there was some change it would get worse.

[36] The Appellant testified that her medical conditions impacted her activities of daily living. She tried working through her health problems, but ultimately failed. She tried numerous modifications, including modifying her hours and duties at work. She even changed locations so that she would not have to drive as far. She testified that she dislikes driving. Driving gives her panic attacks, and increased pain in her arms and back. She suffers from dizziness, and she never knows when it will come on.

[37] The Appellant stated that she was involved in telephone banking prior to her 2009 motor vehicle accident, and she trained people. She was moved to a branch after the accident. She was allowed to switch branches because of the pain caused by driving. She reported being late and absent because of illness. She had panic attacks. She had anxiety. She made errors. She struggled with maneuvering through the computer system. She stated that the bank and her disability insurer, Great West Life, assisted her with her return to work programs and workplace accommodations over the years. She has had several returns to work over the years that ended in failure. The Appellant has been on short term disability, long term disability, and sick leave.

[38] The Appellant gave evidence that her symptoms are unpredictable, and she cannot work regularly. She stated that she needs help going to the washroom on her worst days.

[39] The Appellant testified that her last set of work modifications took place from April to June 2015. She was given a job calling clients and booking appointments. She worked in a

basement with a phone and a computer. She had to follow a script to book appointments for different financial services representatives. She would have anxiety when customers had questions. Attendance became an issue. She was not meeting her calling quotas, which were reduced to 20 telephone calls a day. She only had to work three to four hours a day. She could not meet her telephone quota even when it was reduced.

[40] The Appellant wants to work, but the challenge that she has is that her symptoms are unpredictable. She handles stress poorly. Weather changes bring on migraines. She can go from having a tolerant pain level to being in bed for three days. She has thought of retaining, but feels that she would not be a good candidate. Her concentration is poor, and she no longer wants to be around people. She is never pain free. Her pain varies, and is unpredictable.

[41] She stated that she received her LLQP after her 2009 motor vehicle accident because she wanted to do something productive. She stated she received her IFIC licence after the accident, but failed the test several times. She took the IFIC course while she was off work.

[42] The Appellant testified that she has constant neck, shoulder and back pain. She cannot walk much longer than 5 to 10 minutes, and she does not drive alone because of pain levels and migraines. She reported significant restrictions with her housekeeping activities. She gets help from her older children to complete heavier household chores. Her children do the majority of the indoor housecleaning. She testified that there are days where she can accomplish doing household chores, but doing them would “knock her out” for two or three days.

Evidence of Dr. Y.F. Chen

[43] Dr. Chen saw the Appellant in May 2016, and made the diagnoses outlined in paragraph 24 of these reasons. Dr. Chen stated that the Appellant met the criteria for a fibromyalgia diagnosis. The Appellant also had chronic pain. It is not uncommon to be diagnosed with both chronic pain and fibromyalgia. Dr. Chen testified that the treatment of fibromyalgia involves reducing pain to a manageable level in order to have as much function as possible in one’s activities of daily living. He stated that nerve blocks do not work with fibromyalgia, and medical practitioners use the term management rather than cure when dealing with fibromyalgia. Dr. Chen testified that the Appellant’s impairments include an inability to operate

a computer and to interact with clients. The Appellant has physical and psychological losses. She lacks endurance, has reduced sleep function and sitting and standing capacity. She also has a reduced range of motion.

[44] Dr. Chen stated that the Appellant is disabled from any gainful employment. He cannot see her re-entering the workforce in a gainful capacity.

[45] Dr. Chen reviewed the Appellant's work history. The Appellant worked as a financial service representative at a bank until her 2009 motor vehicle accident. She made a genuine effort to return to work. The Appellant worked at a large corporation where they have the resources to modify her work. The Appellant went on and off work at different levels and different attempts. She was cautioned for poor performance, and she stopped working altogether in June 2015.

[46] Dr. Chen discussed whether the Appellant could work elsewhere. He stated that some jobs are less physical but jobs require the ability to concentrate and multi-task. When you combine the physical and psychological impairments, he did not see her holding down a job at a physical level. He also did not believe that the Appellant would be able to hold down a job with a generous employer who provided accommodations because of her impairments.

[47] Dr. Chen was asked if the Appellant could work at a help desk where she could rotate between sitting and standing. Dr. Chen stated that the Appellant does not have the endurance for such a position. She does not have the mental capacity to be in a fast paced environment which involves planning and executive function, and quick response times. Dr. Chen was asked if she could work at a help desk in a slower environment. He stated that such a job is not practical in terms of the job market. He stated that the chances of the Appellant surviving in a slow paced environment were small given her impairments.

[48] Dr. Chen stated he reviewed the medical history, medical documented, and his own examination prior to providing his medical opinion.

Evidence of Dr. Robert Kemp

[49] Dr. Robert Kemp stated that the Appellant has been a patient since 2004. He sees the Appellant every month. The Appellant suffered a neck strain, low back strain, depressive mood

disorder, and a bruised chest in her 2009 motor vehicle accident. There have been no changes in terms of the Appellant's health since 2009. She suffers from a chronic mood disorder, poor sleep, fibromyalgia, migraines, and common headaches. The Appellant basically injured every joint in her body in the motor vehicle accident. The Appellant's musculoskeletal pain causes her body to shift work load to other regions, which aggravates her problems.

[50] Dr. Kemp provided the Appellant with poor prognosis for recovery because of the fact that she has tried many different treatment modalities with a good level of enthusiasm. He has tried numerous medications, but nothing is working. The Appellant tried massage, physiotherapy, and psychological treatments. The Appellant tried relaxation therapy, stretching, and time energy management, but none of these treatments made a dent in assisting her. Dr. Kemp could not say if nerve block injections would work for the Appellant, as that treatment works better for localized and not generalized pain.

[51] Dr. Kemp testified that he monitored the Appellant's return to work schedule, which the Appellant complied with. The Appellant complied with treatments. The Appellant has not been successful in a return to work because some people do not respond to pain and physical limitations. Dr. Kemp stated that the Appellant cannot focus. Her memory is poor. She cannot handle much stress. She gets migraines on an unpredictable basis. He does not believe that she can work on a substantially gainful basis.

[52] Dr. Kemp stated that the Appellant has been on a slew of medications. He has adjusted the medications. He has taken into account medication side effects, and interactions. However, nothing that he has tried has worked to relieve the Appellant's symptoms. He stated that seeing an orthopaedic surgeon would have done little to alleviate the Appellant's symptoms. orthopaedic surgeons like to operate on people, and they struggle with chronic pain like other physicians do.

[53] Dr. Kemp discussed the MRI of the Appellant's spine taken in August 2014. He stated that the findings in the neck were advanced far beyond the Appellant's chronological age. A left shoulder MRI taken on March 5, 2013, showed impingement syndrome, and a fair degree of inflammation to the tendon. He examined the Appellant in January 2013 for rotator cuff tenderness. The Appellant had extensive shoulder pain.

SUBMISSIONS

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

- a) The Appellant worked on and off from 2009 to 2015. The Appellant could not maintain employment despite aggressive modifications agreed to by her disability insurer and her employer, and treatments that were provided.
- b) The medical evidence contains objective findings that form a basis for her symptoms.
- c) The Appellant cannot work on a regular and predictable basis, and as such, is incapable regularly of pursuing any substantially gainful occupation.

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

- a) The evidence does not show any severe pathology or impairment which would have prevented the Appellant from performing suitable work within her limitations.

Test for a Disability Pension

[56] The Appellant must prove on a balance of probabilities that she was disabled as defined in the CPP on or before December 31, 2016.

[57] 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).

[58] 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.

[59] 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.

Minimum Qualifying Period

[60] The Tribunal finds that the MQP date is December 31, 2016.

Severe

[61] The Tribunal finds that the Appellant had a severe disability that rendered her incapable regularly of pursuing any substantially gainful employment on or before her MQP date.

[62] 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.

[63] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. 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 (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[64] 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 v. Canada (Attorney General)*, 2011 FCA 47).

[65] In applying the general legal principles to the facts of this appeal, the Tribunal finds that the Appellant is incapable regularly of pursuing any substantially gainful occupation in a "real world" context. The Appellant was 45 years at the time of her MQP. She has a community

college education, and 16 years of work experience at a major Canadian bank. She also has computer skills, which is reflected in her completion of a microcomputers and business applications program at George Brown College. She has experience training employees. The Appellant obtained professional licences after her 2009 motor vehicle accident. An argument could be advanced that she has transferable skills, and if she could not work at her present occupation, she can find work elsewhere. However, the Appellant testified that she cannot work on a consistent and regular basis because of her medical basis. Her health has deteriorated since her 2009 motor vehicle accident. She suffers from fibromyalgia, panic attacks, migraines, irritable bowel syndrome, insomnia, memory and concentration difficulties. She also suffers from depression, and panic attacks which impairs her ability to work. She has tried modified duties that were offered by her employer, which included reduced hours and duties, but those work attempts all failed. The Appellant has sitting, standing, and walking restrictions. According to the Appellant, her combined impairments make her incapable of working in any capacity.

[66] The Appellant's disability is supported by the medical evidence. Dr. Siu in his psychiatric report of August 25, 2014 noted that the Appellant suffered from fibromyalgia. She had neck, left arm, back, left hip, left knee, bilateral shoulder and elbow pain. The Appellant reported constant pain to Dr. Siu. She was suffering from muscle spasms in her hands and legs. Dr. Siu diagnosed the Appellant with adjustment disorder and mixed anxiety and depressed mood. Dr. Siu stated that the Appellant's prognosis was directly related to her ability to cope with and/or reducing her pain level. He provided her with a guarded prognosis. Unfortunately for the Appellant, she was unable to reduce her pain level, which is reflected in Dr. Kemp's evidence.

[67] Dr. Kemp in his Medical Report for Service Canada that was date stamped on July 29, 2015, diagnosed the Appellant with fibromyalgia, chronic pain and mood disorder, irritable bowel syndrome and migraines. Her problems accelerated after her 2009 car accident. The Appellant had limited improvement with medication. He stated that an improvement in the Appellant's condition was "very unlikely." Dr. Kemp in a letter dated May 14, 2015 noted that the Appellant's symptoms included drowsiness, dizziness, impaired focus/problem solving, and difficulty handling stress. Dr. Kemp stated the Appellant required a stretch break after sitting or standing for more than 15 minutes. Her ability to write was limited to two to three minutes. Her reading was limited to about five minutes.

[68] The Appellant's inability to work full-time is verified by the report of Dr. J.D. Salmon, Psychologist prepared at the request of Great West Life that was dated May 13, 2010. The Appellant at that time believed that modified duties were available, but she needed to avoid high levels of responsibility on the job. Dr. Salmon stated that her perception is objectively supported in this regard. He stated that the Appellant could work part-time with appropriate accommodations, which included low stress job duties with an absence or regular disruptions or distractions. He also recommended more frequent breaks and reduced hours. The Appellant reported poor memory, concentration and word finding difficulties since the accident. Dr. Salmon stated that the Appellant's depressive symptoms, fatigue, pain and anxiety were incompatible with the expected demeanour, stamina and persistence required for her work duties in a full time capacity.

[69] However, the Appellant's attempts at modified duties, along the lines suggested by Dr. Salmon, with an accommodating employer, all ended in failure. The Appellant had her car accident in March 2009. The Appellant was placed on modified duties from May to August 2009. Those modifications were not satisfactory because she remained in a leadership position, and she went off work again. She returned to work in 2011 with a gradual return to work duties. She obtained a funds licence when she was off work. However, she struggled with her return to work. She transferred work places in April 2012, but she reported increased pain and symptoms. She was placed on short term disability in September 2012. She commenced a gradual return to work in March 2013, but this did not work out for the Appellant. She went on short term disability again in September 2013. She went on long term disability in March 2013. She then commenced another graduated return to work program in December 2014, but she stopped working in June 2015 because of chronic pain, migraines, fibromyalgia, and panic attacks. She was denied long term disability in May 2015, but eventually settled with her long term disability insurer in 2016.

[70] The Appellant testified that she had an accommodating employer, which is reflected in the Workplace Accommodation Reports of Cindy Vogel, Social Worker. Ms. Vogel in her report dated June 29, 2013, recommended accommodations such as medical breaks in addition to the Appellant's normal breaks to manager condition. Ms. Vogel also suggested adjusting the Appellant's work expectations. Ms. Vogel in another report dated January 21, 2014, noted that

the Appellant's sitting tolerance was about 10 to 15 minutes before intense pain symptoms began. This impacted her ability to drive to work, and Ms. Vogel suggested accommodating the Appellant in a location that would reduce her commute to work. Ms. Vogel also noted that the Appellant was only working three hours per day, four days per week at the time of her January 21, 2014 report.

[71] A Functional Abilities Evaluation report dated September 15, 2014, indicated that the Appellant met the demands to work in a sedentary occupation, but every return to work attempt in a sedentary occupation ended in failure. Ms. Vogel in her reports accepted the Appellant's limitations, and tried to create a work environment where the Appellant could succeed, but was not successful in doing so. The Appellant could not handle part-time work with suggested accommodations.

[72] The Appellant testified about her last round of modifications at the bank from April to June 2015 where she was given a job calling clients and booking appointments. She worked in a basement with a phone and a computer. She only had to work three to four hours a day. She followed a script to book appointments for different financial services representative. However, she could not complete this job. She became anxious when clients had questions. She did not fulfill her work quota, and stopped working at the bank. This job offered by the bank was ideal for an individual with chronic pain and fibromyalgia. The Appellant did not look for work outside the bank, but she was afforded significant accommodations that she would have sought elsewhere. The Appellant in her last work trial was afforded the opportunity to work in a quiet and slow-paced environment in a job that did not involve much in terms of cognitive function at reduced hours. However, the Appellant failed in this work attempt as she did in others.

[73] 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 Tribunal is satisfied that the Appellant lacked the capacity to pursue any form of gainful employment on a regular and consistent basis after taking into account her multiple disabling conditions.

[74] The Tribunal in making its findings found that Dr. Kemp's evidence was persuasive. He had been the Appellant's family physician for more than 10 years, and it was clear that he found

the Appellant's condition be both frustrating and disabling. He has tried different treatment modalities and nothing worked. Dr. Kemp's medical reports also confirm impairments in the areas of sitting, standing, memory, and concentration.

[75] Dr. Chen's evidence was helpful in the sense that he summarized the medical evidence in a manner that was of assistance to the Tribunal. He also confirmed a chronic pain and fibromyalgia diagnosis that had been made by other physicians. However, Dr. Chen's report often strayed into the ultimate issue on this appeal, which is whether the Appellant had a severe and prolonged disability on or before her MQP date. It is up to the Tribunal, and not a medical expert to determine whether the Appellant satisfies the test of having a severe disability under the CPP. The Tribunal would have made its finding even without the evidence of Dr. Chen. The Appellant was a credible witness. The Tribunal finds that she managed her medical condition reasonably. She underwent physiotherapy treatment, massage therapy, and acupuncture. She had counselling. She tried numerous medications, but no treatment alleviated her medical condition. She also tried to return to work on multiple occasions, but all her attempts failed.

[76] The Tribunal after considering all the evidence finds that the Appellant has established on a balance of probabilities that she is incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2016 on the basis of chronic pain, fibromyalgia, and depression, which led to restrictions in her ability to walk, sit, stand, and drive. Her memory and concentration have been seriously impacted because of her physical and mental conditions.

[77] The Tribunal finds that the Appellant has established on a balance of probabilities that she had a severe disability in June 2015, when she last worked at the bank.

Prolonged

[78] Dr. Kemp in a report dated March 9, 2017, stated that a wide range of treatment had been employed on the Appellant but no progress had been made. He opined that the chances of future progress should be considered almost zero. He stated that Appellant will be disabled for life and there was some chance her condition would get worse.

[79] As the Appellant's condition has not improved despite having received treatment, the Tribunal is satisfied that her condition is likely to be long continued and of indefinite duration.

CONCLUSION

[80] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2015, when she last worked at the bank, as explained above. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of October 2015.

[81] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security