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

Citation: *R. E v. Minister of Employment and Social Development*, 2017 SSTGDIS 111

Tribunal File Number: GP-16-962

BETWEEN:

**R. E.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Income Security Section

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DECISION BY: Virginia Saunders

HEARD ON: July 13, 2017

DATE OF DECISION: August 14, 2017

Canada

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on January 12, 2015. The Appellant claimed that she was disabled because of a concussion and a head and neck injury. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2018.

[3] This appeal was heard by teleconference for the following reasons:

a) The issues under appeal are not complex.

b) 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.

[4] The Appellant attended the hearing as did her representative, Ashley Silcock. Also present as observers were the Appellant's husband, X, and her children X, X and X. The Respondent did not attend.

[5] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

### EVIDENCE

[6] The Appellant was born in X. She lives in the X with her husband and her three children, who are now X, X and X years old.

[7] The Appellant worked as a unit clerk at the X from May 1995 to July 2013. She testified that her employment was casual, which meant that her schedule depended on what postings were available. She was consistently employed at the X but often at part-time hours. She supplemented her income by working as a hairdresser, although she stated that this work was minimal. She described her job at the X as a high-stress and high-pressure one that required constant multi-tasking.

**The Appellant's Injury, Symptoms and Limitations**

[8] The history of the Appellant's injury is well-documented in the file. While on vacation in July 2013 she was swimming laps on her back. She swam into the edge of the pool, hitting her head hard on the concrete. She did not lose consciousness but had instant head and neck pain and began to feel dizzy and nauseous soon after. She went to the hospital and had a CT scan of her head, which showed no abnormality.

[9] The Appellant testified that she tried to return to work shortly after the injury. She recalled that she tried one shift and she felt terrible. She left early and could barely drive home.

[10] In her disability application the Appellant stated that her injury caused anxiety, vision impairment, vertigo, poor balance, dizziness, cognitive disorder, poor memory, migraines, and an irritable stomach. At the hearing she testified that since her injury she has continued to have these symptoms and that her headaches occur almost every day and last for several hours.

[11] The Appellant described almost daily episodes of feeling as if she will black out. These occur in circumstances such as going to stores or to her children's school where she encounters too much light, too many people, too much noise, or too many things happening at once. These cause her to feel dizzy and to need air, so she leaves the situation if she can. After these incidents she does not feel well for days and has to stay in her room. She testified that for a while after her injury she would actually lose consciousness in these situations, but she has learned to avoid them or to minimize the amount of time spent in them. If she is alone and feeling unwell and at risk of blacking out she will arrange to have someone call her later to check on her.

[12] The Appellant testified that she began to feel anxious and depressed sometime after her injury. She found this hard to explain and stated that "it just comes on".

[13] In several letters in the file and in her testimony, the Appellant described continued difficulty since July 2013. Besides having to remove herself from daily activities because of her headaches and fear of blacking out, she struggles to interact with her husband and children because she cannot concentrate and she often cannot bear to hear them talking. She cannot help her children with their homework; nor can she organize them or the household. She cannot focus on reading, either on paper or on a computer. She is extremely forgetful. She is embarrassed by her cognitive deficits and so avoids going out or seeing friends. She is afraid to drive. She relies on systems created by her husband and her oldest child to help her remember things.

**Medical Treatment Relevant to this Appeal**

**i. “Natural” Remedies**

[14] The Appellant testified that early on that she wanted to try “natural” treatment methods to see if these helped her. She saw naturopaths Dr. Duffee and Dr. Willis, who operate out of the same clinic and who gave her acupuncture and cranio-sacral therapy, as well as homeopathic medications and nutritional supplements. She testified that at first she saw these practitioners quite often because she found the treatments helped her cope with her symptoms; however, the treatments were quite expensive and she has been unable to go as often as she would like. She testified that the craniosacral therapy in particular was helpful, but that she had not had any since last year because of her financial situation and her inability to schedule anything because of her symptoms.

[15] In spite of her attraction to naturopathic therapies, the Appellant testified that she was not averse to conventional treatment and that as far as she knew she had tried every therapy and medication that was suggested to her by any of the physicians she has consulted.

**ii. Chiropractor**

[16] The Appellant saw a chiropractor, Dr. S. J. Blaskovich, at the Whiplash and Injury Clinic. It appears that she first went there in 2013, and had a dynamic x-ray of her cervical spine which according to Dr. Blaskovich showed instability at C1-C2 level and explained the Appellant’s complaints of recurring episodes of headaches, migraines, neck pain, dizziness, nausea, sleeplessness, tiredness/fatigue, nervousness, and concentration problems (GD2-49-52).

### iii. Physiotherapy

[17] At some point following her injury the Appellant began to see a physiotherapist, R. Fletcher. His report of October 26, 2015, indicated that at that time the Appellant continued to complain of multiple symptoms including headaches, mood changes, sensitivity to light and noise; and concentration and memory issues. In spite of these, many of her vestibule-visual tests appeared normal. Mr. Fletcher stated that he would continue with conservative treatment to try to desensitize the Appellant's symptoms to visual and vestibular challenges and to increase her cardiovascular exercise. He queried whether a referral to G.F. Strong [Rehabilitation Clinic} or to the Fraser Health Concussion Clinic might be worthwhile. He also indicated that he was concerned about some of the Appellant's mood changes such as frustration and irritability, and wondered if she should also see someone for these (GD2-48).

[18] The Appellant testified that she went to a concussion clinic; however it appears that by this she meant Mr. Fletcher's office. The file does not contain a report from the Fraser Health Concussion Clinic or any other one.

### iv. Neurologist Dr. S. Alghamdi

[19] The Appellant saw neurologist Dr. S. Alghamdi in October 2013. His report indicated that the Appellant's headaches improved within the first three weeks of her injury, but then recurred along with speech arrest and difficulties with concentration and keeping up with tasks. At the time of her appointment she described no other focal neurological or depressive symptoms.

[20] After physical examination Dr. Alghamdi opined that the Appellant had post concussive syndrome and that she would have a dramatic improvement in the next three months; although he noted that some patients might be symptomatic for 12 to 18 months. He suggested the Appellant take six months off work and then try a gradual return. He reported that the Appellant told him her headaches were well-controlled with Tylenol and that she was not interested in any other medication. He did not think she required any other treatment (GD2-90-91).

[21] The Appellant testified that she did not remember any period during which her headaches improved significantly or were controlled by Tylenol as suggested by Dr. Alghamdi. She thought

she may have been feeling better on the day she saw Dr. Alghamdi and that may be why he made the statements that he did. She stated that Dr. Alghamdi made her feel as though was crazy.

**v. Internal Medicine Specialist**

[22] In March 2014 the Appellant saw Dr. M. Hussein, a specialist in internal medicine. He noted that since the injury she complained mainly of headaches but also lack of concentration and focussing, inability to multi-task, emotional lability, and dizziness. She had hit her head a second time. Dr. Hussein observed that the Appellant was fully conscious, alert and oriented with no acute distress. Her mental status and neurological examination was normal. He noted that an MRI in October 2013 showed no significant abnormalities and no changes with previous scans. He opined that the Appellant had persistent post concussive symptoms that were mainly headache, lack of concentration, positional unsteadiness and vertigo. He arranged for an MRI of the cervical spine. The Appellant reported being on regular medications. Dr. Hussein started her on propranolol and gabapentin. He was to see her again in two months (GD2-96-98).

[23] When the Appellant returned in May 2014 Dr. Hussein noted that the recent MRI of her cervical spine was normal. She reported continued symptoms as well as some anxiety and depression. Dr. Hussein noted that the Appellant had not filled her prescriptions and that she refused an anti-depressant (Cipralex) because she wanted to try physical exercise and natural treatments first. Dr. Hussein advised the Appellant to see Dr. Dang, her family physician, if she decided to try an anti-depressant after all. He did not schedule a follow-up appointment but indicated that he would be happy to see her again if needed.

[24] The Appellant testified that she remembered taking gabapentin but did not remember how or if it affected her. She took Cipralex but she did not remember when she started it or how or if it might have helped her. (Her disability questionnaire as well as Dr. Dang's medical report indicated that she was taking Cipralex by December 2014).

**vi. Mental Health Treatment**

[25] In November 2015 the Appellant was assessed at White Rock Mental Health after referral by Dr. Dang. The intake report indicated that she presented with feelings of being overwhelmed; anxiety; occasional anxiety attacks; a low threshold for stimulation including lights; increased

irritability; dizziness; low mood on occasion; poor memory; and challenges with concentration. She also reported disturbed sleep and headaches. She reported feeling all of these symptoms in varying degrees since her concussion in 2013. They made it difficult for her to perform activities of daily living, to return to work, or to drive outside of her town. She feared passing out. She reported that she believed that she had been prescribed medication for anxiety but she did not recall the name or whether it had helped.

[26] The Appellant was offered a psychiatric assessment; and it was suggested that she would benefit from one-on-one short-term counselling to increase her coping skills and reduce her anxiety. She indicated that she was open to group therapy but did not feel able to manage groups at present. She was assigned to a therapist for treatment (GD3-21-24).

[27] The Appellant testified that she saw a counsellor named X several times at White Rock Mental Health. He gave her "different things to work on" but she continues to feel overwhelmed. She could not remember when she last saw X, and testified that she would like to go back but her calls to White Rock Mental Health have not been returned.

**vii. Neurologist Dr. K. Kowal**

[28] The Appellant saw neurologist Dr. K. Kowal in December 2015. Dr. Kowal noted that the Appellant had sustained a head trauma in December 2013. He did not mention the accident in July 2013. The Appellant told him that since that time she had chronic headaches at least 15 times a month with episodic worsening where she would get nausea, vomiting and photophobia, and would need to stay in dark room. These headaches would last from 4 to 72 hours. She also reported, among other things, intermittent dizziness triggered by rolling over in bed, difficulty with focussing and concentration, and fear of crowds and of going places where there was noise and light. Dr. Kowal noted that the Appellant took Advil and Tylenol more than 10 days a month for her headache, as well as "a large load of homeopathic and naturopathic medications".

[29] Dr. Kowal noted that the Appellant's neurological examination was normal; but that she had "a plethora of diagnoses": a post-concussive, episodic migraine disorder; secondary chronic daily headache which was a mixture of transformed migraine and medication-induced headache; stabbing headache lasting less than a minute that was responding to indomethacin therapy;

intermittent benign paroxysmal positional vertigo (BPPV); anxiety and depression. He noted how difficult it was to interact with the Appellant and stated that she might have a psychiatric disorder that was impairing her functioning. He recommended treatment with SSRIs as soon as possible, and opined that her lack of improvement might be due in part to her preference for staying off medication. He stated that most people respond to nortriptyline and Topamax (topiramate) for post-concussive migraine.

[30] Dr. Kowal made the following recommendations, which the Appellant agreed to carry out. He recommended that she taper off analgesics as they might be contributing to her headache, and use them no more than five days per month. She was to start nortriptyline with slow upward titration to 75 or 100 mg, and stay on it for at least six months if tolerated; and to start Topamax as well up to 100mg twice daily. She was to learn Epley and Semont maneuvers on you-tube to treat her vertigo. Dr. Kowal felt that the Appellant's stabbing headaches would be less likely to occur once her migraines were settled down, and indicated that she should not take indomethacin at this time as it might encourage her chronic daily headaches. He noted that although her cervical spine MRI was normal she might want an orthopedic assessment of her neck to address her conviction that she had a cervical spine instability. He was to reassess her in six months (GD2-42-44).

[31] The Appellant testified that she tapered off Advil and Tylenol as suggested, and she recalled taking some other medication that Dr. Kowal gave her, but she could not remember if it helped or not. Her pharmacy records indicated that she filled a prescription for Aventyl (nortriptyline) from Dr. Kowal in December 2015 (GD4-13). She testified that her migraines have never settled down and she has been to the hospital many times because of them, where she is given intravenous medication which she could not remember the name of it. She was told by her physiotherapist that the Epley and Semont maneuvers had already been tried and that these had not worked and would not work because her problems were caused by her neck. She did not remember if she had had an orthopedic consultation as she has had so many appointments.

**viii. G.F. Strong Rehabilitation Clinic**

[32] The Appellant was seen by a resident in physical medicine and rehabilitation, Dr. D. Dance, in February 2016 (GD2-29-32). She reported ongoing, refractory symptoms including

disrupted balance, light and noise sensitivity, headaches, changes in sleep, and cognitive changes such as poor memory. After examination Dr. Dance found the Appellant had post-concussion syndrome. He felt that her neck pain was a significant contributing factor to her headaches and might also contribute to her dizziness. He discussed a plan with the Appellant including cold therapy, topical anti-inflammatories, self-massage and use of Tylenol and Advil. Because she had recently developed acid reflux, he suggested that her family doctor consider use of a proton pump inhibitor to facilitate use of a stronger anti-inflammatory such as naproxen for one to two weeks. He also provided instructions for physiotherapy targeting myofascial pain and oculomotor dysfunction. If Advil and Tylenol did not control her headaches then a triptan could be considered. He recommended that she continue with her counselling, and that venlafaxine be considered as it was known to help myofascial and neuropathic pain in addition to being an anti-depressant.

[33] Dr. Dance suggested that the Appellant increase her physical activity by walking at a moderate pace up to 30 minutes per day, five days per week. He suggested that she make cognitive and social goals although he recognized that with her current state cognitive and social activity might be difficult for her to tolerate. He suggested a sleep study as she had some features consistent with sleep apnea. He stated that if the Appellant's symptoms proved refractory, further consideration should be given to a dedicated pain program although he did not think one was warranted at this time. He was to see her in three months.

[34] The Appellant testified that she has always tried to exercise regularly by walking, and that her success is variable. She did not remember if she had taken any medication recommended by Dr. Dance. She recalled that she went to the hospital several times this past winter and was given medication. She does not remember a pain program being suggested; nor does she remember having a sleep study. She thought that one might have been booked for her and that she missed the appointment.

**ix. Family Physician**

[35] Dr. N. Dang has been the Appellant's family doctor for over 15 years. In December 2014 he completed the medical report that accompanied her disability application. He stated that since July 2013 he had treated her for post-concussion syndrome, chronic neck strain, and reactive

depression and anxiety; and that he that he had last seen her on the day of his report. She was limited by severe headaches, neck pain, dizziness, poor balance, photosensitivity, poor cognition, decreased memory, poor concentration, poor energy, reduced memory, and physical anxiety symptoms including palpitations. She was hospitalized in July 2013 for severe headaches and in December 2013 for severe headaches and chest pain. Dr. Dang noted that the Appellant had had physiotherapy, craniosacral therapy, massage, and acupuncture, some of which were ongoing. She was also taking Cipralex. He felt her prognosis was poor due to her prolonged course to date (GD2-84-87).

[36] In September 2015 Dr. Dang reported that the Appellant had not improved since her initial injury, and that she had been referred to a neurology clinic for reassessment as well as for treatment at a concussion clinic (GD2-12).

[37] Dr. Dang's clinic notes indicated that the Appellant saw him in March, June, November and December 2015, and that she continued to be symptomatic. In November 2014 he indicated that he provided counselling and was "considering another SSRI such as Trintellix" [vortioxetine] (GD3-55). In December she returned to renew her medication (unspecified) and reported that her mood had been steady and that she felt better on her medication. She saw Dr. Dang next in February 2016 and told him that she had seen a physiatrist at G.F. Strong who had advised her of "things to do" (GD2-80-81; GD3-55-58).

[38] There are no records of any visits to Dr. Dang after February 2016. The Appellant testified that she continues to see him every few months. His office is 45 minutes from her home and it is difficult for to get there; as a result she often will go to the emergency department instead.

[39] In January 2017 Dr. Dang reported that the Appellant had had no improvement in her condition since July 2013. She continued to suffer from severe migraines, dizziness, vertigo, photosensitivity and nausea, which caused difficulties with activities of daily living and left her "totally unable to work" (GD4-3).

**SUBMISSIONS**

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

a) She has had a severe and prolonged condition since July 2013.

b) She has no capacity to attempt or retrain for any type of work.

c) Because of her condition she cannot commit to a schedule and could not attend work regularly.

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

a) The medical evidence does not show that she would be prevented from doing suitable work within her limitations.

b) Her mental health treatment yielded some positive results and further improvement could be expected with continued treatment.

c) Investigation and treatment options remain which might help her manage her symptoms.

d) The Appellant's age and transferable work skills mean that alternate work is not precluded.

**ANALYSIS**

**Test for a Disability Pension**

[42] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that she is disabled as defined in the CPP.

[43] 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 MQP.

[44] 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.

**Severe**

[45] The Tribunal finds that the Appellant is incapable regularly of pursuing any substantially gainful occupation because of the multiple symptoms resulting from her head injury.

[46] The Tribunal accepts that the Appellant spoke honestly. Her ability to focus on the questions that were asked of her was extremely poor, as was her memory. Her testimony was therefore of little value in providing a chronology of events; however, it did provide vivid confirmation of the symptoms and limitations she has reported consistently since 2013.

[47] There are few objective findings to explain the Appellant's symptoms, other than the results of the dynamic x-ray as interpreted by the chiropractor Dr. Blaskovich. His opinion appears to have been disregarded by physicians. Regardless, the specialists' conclusions indicate that the absence of objective findings did not mean that the Appellant did not legitimately have the symptoms she complained of. No one has suggested that the Appellant was malingering or exaggerating.

[48] 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.

[49] 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, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[50] 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).

[51] Although the Appellant is fairly young, educated, and had skills that were likely transferable to a different work environment, these cannot overcome the effect of her symptoms. She is sensitive to noise, light, and crowds; these make her feel nauseous and anxious. She suffers from regular, debilitating headaches that require her to spend long periods in a dark room. Her memory and concentration are poor. She has no control over any of these symptoms, except to minimize her activities to prevent their onset. It is not realistic to expect that she would be regularly able to attend work and be productive.

[52] Dr. Kowal's observation that the Appellant was able to manage her three children does not suggest that she had work capacity. It is unclear what Dr. Kowal based this statement on. In a letter the Appellant wrote that same month, she described difficulties she had with caring for her family, and how her children were often late to school or absent because of these. The Tribunal notes that in December 2015 the Appellant's children were aged 5, 9 and 10; thus, "managing" them required much less in the way of attention and physical activity that it would have had they been younger. The Tribunal accepts the Appellant's evidence that much of the children's care has been substandard or has been attended to by her husband since July 2013.

[53] The Appellant's previous job was fast-paced and would no doubt trigger her symptoms. It is likely that this would be the case in any work environment. The Tribunal accepts the evidence that the Appellant can barely function at home and has to withdraw from family life regularly. There is no work place in which she would be able to function. Her condition is severe, as that term is defined in the CPP.

**Prolonged**

[54] The Tribunal finds that the Appellant's condition is likely to be long-continued and of indefinite duration.

[55] In October 2013 Dr. Alghamdi did not think further treatment was necessary because he believed the Appellant would recover within a matter of months. This proved to be wrong. Since

then the Appellant has had a number of different types of treatment, without significant improvement and without any reasonable expectation that they will be successful in future. This is because the Appellant’s case illustrates what is common knowledge in British Columbia: that individuals who must access the medical system on their own rather than through workers’ compensation or insurance companies face significant challenges in receiving comprehensive care and follow-up, and in obtaining complete reports and records. The family doctor is the gatekeeper to all of these, and the quality of care and record-keeping depends very much on his or her level of engagement. That in turn may be affected by the patient’s ability to see the family doctor regularly and to be assertive in obtaining all the treatment that has been recommended.

[56] In this case there is no doubt that Dr. Dang has been involved in the treatment of the Appellant’s injury and that he feels that she is disabled. He referred her for the investigations and to the specialists noted above and he received the resultant reports. However, it does not appear from his clinic notes that he took all possible steps to ensure that the Appellant pursued the recommended treatments, including persisting with medication or returning to specialists for follow-up. He did not counsel her with respect to the conflicting suggestions made by Dr. Kowal and Dr. Dance within a two month period in 2015-2016; he did not refer her to a psychiatrist as suggested by White Rock Mental Health; his notes regarding her prescriptions are brief and unhelpful.

[57] It is possible that the Appellant did not see Dr. Dang more than the few times noted by him. It is possible that she did not follow-up with Dr. Dance and that she has also failed to pursue her counselling. Possibly she has not taken all the medication that was suggested. As indicated above, her memory is poor and she did not remember much about her treatment. What was clear, however, was that even with the help of her husband she has been incapable of navigating the health care system and following up on all of the treatments that were suggested.

[58] The Appellant cannot be faulted for this. She has not been consistently wilful in refusing to try medication or attend appointments. The Tribunal is satisfied that the Appellant has made and continues to make a reasonable effort to access treatment to the best of her abilities. She has significant health, financial and other challenges that have affected her ability to do so. There is nothing to suggest that this situation is going to improve. Thus, while potentially promising

treatments may exist in theory, the Appellant has not been able to obtain them in a regular or timely fashion and is unlikely to do so in the future.

[59] At the time of the hearing it was four years since the Appellant's accident. Her symptoms continued to be debilitating. She has had no lasting improvement since July 2013. Her condition is prolonged.

**CONCLUSION**

[60] The Tribunal finds that the Appellant had a severe and prolonged disability in July 2013, when she first sustained the head and neck injury. Although there is some suggestion that her headaches were controlled for a time and that her depression and anxiety occurred later, the weight of the evidence is that she has had significant symptoms and has been regularly unable to work since July 2013. The subsequent injury later that year may have exacerbated her symptoms but on balance the Tribunal is satisfied that they have been debilitating since July 2013.

[61] 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) of the CPP). The application was received in January 2015; therefore the Appellant is deemed disabled in October 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of February 2014.

[62] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security