



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. K. v. Minister of Employment and Social Development*, 2017 SSTGDIS 116

Tribunal File Number: GP-15-746

BETWEEN:

L. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Pierre Vanderhout

HEARD ON: July 26, 2017

DATE OF DECISION: August 18, 2017

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* ("CPP") disability pension on April 10, 2014. The Appellant claimed that she was disabled because of dystonia (a disorder causing involuntary muscle contractions), manic depression, a heart condition, chronic obstructive pulmonary disease ("COPD"), migraines, glaucoma, cataracts, dizziness, and falling. 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. In most cases, 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, 2016. However, the Appellant also began receiving a CPP retirement pension in May of 2013. Accordingly, as explained in more detail below, the Appellant must be found disabled on or before April 30, 2013.

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

- a) The Appellant will be the only party attending the hearing.
- b) The issues under appeal are complex.
- c) There are gaps in the information in the file and/or a need for clarification.
- d) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The following people attended the hearing: L. K. (Appellant).

[5] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension for the reasons set out below.

PRELIMINARY ISSUES

[6] As noted above, the Appellant began receiving a CPP retirement pension in May 2013. However, pursuant to ss. 44(1)(b) and 70(3) of the *Canada Pension Plan*, a person cannot receive a CPP retirement pension and a CPP disability pension at the same time. Subsection 66.1(1.1) of the *Canada Pension Plan* and subsection 46.2(2) of the *Canada Pension Plan Regulations* confirm that a CPP retirement pension can only be cancelled in favour of CPP disability benefits if the claimant is deemed to be disabled before the month that the CPP retirement pension becomes payable. For this reason, the Appellant must be found disabled on or before April 30, 2013.

EVIDENCE

[7] There is a significant amount of documentary evidence in the file, in addition to the evidence from the hearing. While all evidence has been considered, only the most relevant evidence is specifically referenced in this summary.

[8] The Appellant is 64 years old and lives by herself in an apartment in X X, Ontario. She has a Grade 12 education and also studied Office Systems Operation for one year at college. Her most recent employment was as a part-time cashier/greeter at the Home Depot. She worked there from June 7, 2003 until March 27, 2014. In her March 30, 2014 Questionnaire (“Questionnaire”), she stated that she was no longer able to work because of her medical condition on March 28, 2014. All of the positions at her Home Depot, with the exception of a single employee who had been there since the store opened, were part-time positions.

[9] The Appellant had an extensive work history prior to working at Home Depot. She attached a list of more than 20 prior jobs to her Questionnaire: these included support worker, review clerk, gas meter reader, receptionist, real estate office supervisor, realtor, taxi driver, telephone solicitor, department store sales associate, cafeteria helper, and bookkeeper. She said that a number of these jobs were contract positions.

[10] The Appellant previously applied for CPP disability benefits in 1999, on the basis of her dystonia. However, her application was denied at the initial level and no reconsideration was requested. She had qualifying CPP contributions for every year from 1992 until 2013. Her

earnings from 2004 until 2009 were all well in excess of \$12,000.00, but her recent earnings were more modest: these amounted to \$9,618.00 (2010), \$9,211.00 (2011), \$8,010.00 (2012), and \$6,576.00 (2013). It is not clear from the evidence before the Tribunal at which point during the year the 2013 earnings were made.

[11] The Appellant could not remember if there had been a spike in her hours or earnings for the first four months of 2013. She said that there were sometimes more hours available when students went back to school. It is also unclear how much she earned in the rest of 2013 or the first three months of 2014. She indicated at one point that she thought she began receiving her CPP retirement pension after she stopped working at Home Depot. Finally, she noted that Home Depot would pay its employees a bonus after the end of each calendar year. This was dependent on the company's performance but she said that she would be lucky to receive \$100.00.

[12] The Appellant said she had been switched from her cashier position to a greeter position because it was lighter work. She thought that this took place in the last year of her employment and that she would already have been down to three 4-hour shifts by that point. However, even when she was working as a greeter, she would still have to work as a cashier from time to time if cashiers were unavailable.

Events Prior to Stopping Work

[13] The Appellant was seeing a specialist for conductive hearing loss by early 2010 and underwent an exploratory tympanotomy on April 13, 2010. Her husband, who had worked at the X X X, passed away on May 7, 2010 and she began receiving a survivor's pension shortly afterwards. However, at the hearing, she initially placed his death in 2012. She was unclear whether this pension was included in her earnings for CPP purposes, or if CPP deductions were made from it, but subsequently confirmed the monthly amount of this pension was \$1,362.00 per month. This would result in a yearly survivor's pension amount of approximately \$16,344.00.

[14] Other than ongoing hearing-related matters, there is no documentary evidence of any other specialist involvement until the February 25, 2011 appointment with Dr. Marcus Newton (Internal Medicine). Dr. Newton saw the Appellant with respect to pulmonary nodules and noted that she had underlying COPD. She continued to smoke a pack of cigarettes daily and had likely

accumulated a 40-pack year smoking history. She appeared somewhat chronically ill but there appeared to be little follow-up necessary after her July 13, 2011 appointment. After that date, there was no medical documentation until a hearing assessment on July 18, 2012 that affirmed significant hearing loss.

[15] Dr. Brian O'Doherty (Physical Medicine and Rehabilitation) saw the Appellant on September 25, 2012 for botox injections for cervical dystonia. Dr. O'Doherty described a 12-year history of injections from other doctors for a "no-no-no" type of head tremor and bilateral lateral neck pain: these were improved by injections. Her head also had a tendency to rotate. She continued to smoke roughly one pack of cigarettes per day and reported a history of manic depression, migraines (5 per year), osteoporosis, cataracts, glaucoma, COPD, and cervical dystonia. Dr. O'Doherty agreed to continue providing botox injections: at the hearing, the Appellant said that this was not really his area of specialization but there was no other neurological expertise in the X X area.

[16] On October 9, 2012, Stephanie Hargrave (Speech Language Pathologist) performed a barium swallow study, as the Appellant reported choking when swallowing certain foods. Mild pharyngeal dysphagia was diagnosed: a referral to a speech language pathologist for exercises and postural strategies was recommended.

[17] Dr. Newton saw the Appellant again on January 10, 2013 for her COPD. She had been stable but continued to smoke up to one pack of cigarettes daily. There had not been any worsening of her dyspnea and he said that he would see her again in the fall. At the hearing, the Appellant said she had been unable to quit and was still smoking at the same rate. She said that she had tried different products but was either allergic to them or simply unable to stop. As noted above, the Appellant began receiving her CPP retirement pension in May of 2013, shortly after her 60th birthday on X X, X.

[18] Dr. Johnson (Internal Medicine) saw the Appellant on May 1, 2013 for evaluation of chest pain. The pain occurred about 6 weeks before: she developed chest tightness for 5 minutes while in a reclining chair. On May 1, her heart rate was quite high and Dr. Johnson elected not to perform a stress test as a result. However, she was put on a Holter monitor to ensure her heart

rate was not constantly high. She also reported feeling quite anxious that day and said that her COPD was acting up. She was still smoking one pack of cigarettes per day.

[19] Dr. O'Doherty reported on June 4, 2013 that the Appellant was pleased with the botox injections performed in January of that year: they lasted for about 3 months. She still had a head tremor and slight rotation of the head to the left. Another botox injection was given. At the next appointment on September 3, 2013, the Appellant was reasonably pleased with the June injection but still had persistent cervical rotation to the left, in addition to the "no-no-no" type of head tremor. Another botox injection was given.

[20] The Appellant saw Dr. O'Doherty again on October 17, 2013, as she had suffered 3 weeks of severe left-sided pain (in the neck and the upper border of the trapezius) that radiated into her left upper extremity after the September 3 injection. She had since returned to normal but with more cervical rotation to the left. He thought his injection might have been off target and would see her again in December for the next injection.

[21] Although there is no separate record of a visit to Dr. O'Doherty in December 2013, the Appellant saw him again on March 4, 2014 and he said that she had no specific problems with the last injections. They wore off after 6 weeks: she continued to demonstrate a "no-no-no" head tremor and a very mild cervical rotation to the left. Another injection was given and a follow-up was proposed after three months. However, there does not appear to be any subsequent documentation from Dr. O'Doherty in the Tribunal file.

Post-Work Evidence

[22] The Appellant last worked on March 27, 2014. In the Questionnaire, she said she stopped because she was in too much pain from her dystonia and could not take the stress. She also mentioned dizzy spells and stated that she had been switched from cashier to greeter duties because they were lighter. She also said that her hours had been cut down to three 4-hour shifts per week but she was still not capable of it. At the hearing, the Appellant clarified that the dizzy spells were caused by her breathing issues. However, she could not say for sure when she started working only three 4-hour shifts. Before that, she had been working four or five shifts per week: these would be either 4 or 8 hours in length.

[23] In her Questionnaire, completed just 3 days after her last day of work, the Appellant said that she could not work because dystonia caused great pain in her neck area and became a migraine within the first hour of work, despite the botox injections. She said that the injections were no longer effective and she could only take her pain medication at home because it was too strong and it forced her to go to bed. She said that she could not do her job with the pain, shaking, and bad balance (dizziness). She suggested that her heart condition caused dizzy spells that led to falling. She also said that her depression left her unable to concentrate and wanting to avoid the public because of her dystonia. In addition, she was under stress as her daughter needed help with her mental health condition: this made her condition worse.

[24] The Appellant identified physiotherapy as a treatment for her dystonia, to help strengthen and gain control of her weakened muscles. She said that her employer knew she was struggling and had given her a warning notice because she “had missed so much time last year”. She said that she had missed 10 days already this year: she would try to work but would have to take time off due to the pain. At the hearing, the Appellant said that physiotherapy had not been successful and, if anything, made her condition more painful. She believed that she attended five times and that her coverage for physiotherapy had expired.

[25] The Appellant also mentioned losing so much of her family: her brother drowned (prior to her own birth), her father died of heart failure, her mother had a stroke, another brother committed suicide, and her husband died 4 years previously from leukemia. She then lost her house and her son no longer associated with his family after remarrying. Her daughter was in and out of the hospital due to mental illness; the Appellant herself also had a history of mental illness, including suicide attempts when she was younger. She said that the pain, migraines, and stress were a lot to handle.

[26] Dr. Cam Tweedie (Family Physician) provided a Medical Report on April 2, 2014 for the Appellant’s CPP disability application. He provided diagnoses of torticollis with dystonic head tremor, depression, migraine, menopause, glaucoma, upper GI sliding hiatus hernia (2007), asthma, osteoporosis (2007), COPD (February 2008), and hearing loss (hearing aid prescribed 2007). He reported shortness of breath upon exertion, due to her COPD. She also had chronic neck, upper arm, and shoulder pain that significantly interfered with lifting and using her arms.

[27] Dr. Tweedie wrote that chronic depression affected the Appellant's concentration, mood, and energy levels; she also had motivation problems. She had daily headaches as well as recurrent migraines from her neck problems. He wrote that physiotherapy and injections had not been effective. He said that, despite good compliance with treatments, her condition had not improved and she would not progress from her current condition. There is only one subsequent medical document in the Tribunal file.

[28] In a letter dated August 21, 2014, the Appellant said that she was unable to work because her dystonia and depression had worsened. Her head was pulled to the left and it was difficult to turn it to the right. The pain was more than she could stand. She described an episode when she collapsed at the cash register at Home Depot: she was helped to the Human Resources office and then sent home. Her shakes were so bad that customers, staff and family asked her if she was cold. She hated to leave work, as she enjoyed it. Physiotherapy did not help and the botox injections were not working either.

[29] The Appellant wrote that, despite being on medication for her COPD, she coughed all day and night. It kept her awake or woke her up. Her depression had worsened, as she had become lonely since leaving her job. She had trouble sleeping at night and staying awake during the day, knowing that she was no longer employable. She was worried that she might end up in hospital again, as she did when she was younger and suicidal. She felt that she was 81 rather than 61 years old. She felt that it would be impossible for her to get or maintain a job and added that her doctor would be sending more information.

[30] In appeal materials dated February 9, 2015, the Appellant said that she was unable to perform any type of work due to her dystonia. Her tremors were constant and caused constant pain. Her day was filled with pain: she would get up for breakfast and then return to bed with Advil. She would repeat this at lunch and dinner. She did errands quickly so that she could get back to bed. She felt her dystonia was worse than ever.

[31] The last medical documentation in the file is Dr. Tweedie's March 10, 2015 Disability Tax Credit Certificate. He found the Appellant markedly restricted in performing the mental functions necessary for everyday life, with such marked restriction present at least 90% of the time. He wrote that her marked restriction began in 2014. He stated that her severe anxiety and

depressive symptoms caused decreased motivation, inability to focus, inability to concentrate, and memory lapses. His diagnosis was major depression. He said that her impairment had lasted, or was expected to last, for a continuous period of at least 12 months.

[32] When asked at the hearing what had happened medically after Dr. Tweedie's March 10, 2015 Certificate, the Appellant said that her blood pressure became an issue approximately one year ago. She started getting chest pain that radiated into her ear (and vice versa). She then started taking blood pressure medication.

[33] On July 24, 2016, L. F. of Home Depot completed an Employer's Questionnaire for the Respondent. L. F. confirmed that the Appellant worked as a cashier from June 4, 2003 until March 31, 2014, when she resigned due to medical concerns. She earned \$12.00 per hour. Part-time associates were not guaranteed a set number of hours, so she could work anywhere from 0-32 hours per week. The reason for part-time work was "all the work that was available", as opposed to "all she is capable of performing". Her attendance was described as fair, as she "missed work often her last year due to health concerns". Her work was satisfactory and she did not require help from her co-workers. No special services, equipment, or arrangements were required.

[34] However, L. F. indicated that the Appellant was unable to handle the demands of her job, noting that "she made the choice to resign due to what she felt were medical concerns that deterred her from doing her cashier role". When asked about this at the hearing, the Appellant thought that this was accurate.

Other Evidence from the Hearing

[35] Dr. Tweedie is still the Appellant's family doctor. She sees him roughly once per month. His role is primarily to oversee her medications and make referrals. However, she was unsure of his current prognosis for her, as she has not seen him in the past two months. She said that she needs to set up another appointment with him.

[36] The Appellant said that pain from the twisting of her neck forces her to rest because of the pain and jerking. This, as well as her COPD and depression, is what makes her disabled now. She said that she almost passed out a couple of times at work because of her COPD and it

was dangerous for her to continue in that environment. She believed that no other company would hire her because of her breathing, coughing, and jittery appearance. She also said that these were the same reasons that prevented her from working after March 27, 2014. She believes that her condition has deteriorated since then, because she spends most of the day in bed and is also now taking medication for her blood pressure and acid reflux conditions.

[37] The Appellant is on medication for her depression and anxiety: she periodically sees a psychiatrist when directed by her family doctor. She last saw her psychiatrist regularly about one year ago but could not remember his name. However, she said that she is going to talk to her doctor about being in bed so much. This worries her and she think she may need to see her psychiatrist again. In addition to the family losses described earlier, the Appellant also mentioned her mother's death and another brother's stroke. She said that it all added up: to deal with it all, it was easier for her to sleep.

[38] The Appellant said that she was no longer seeing a specialist for her COPD, although Dr. Tweedie continued to prescribe breathing medication for her. She is also still getting botox injections from Dr. O'Doherty, roughly once every three months. These usually work for a short period of time, but sometimes do not. However, even if they do not work, she needs to wait for three months before getting more injections.

[39] As Dr. O'Doherty thought she needed further specialized help with her neck condition, he referred her to Dr. Jog (a X neurologist). She will see Dr. Jog on October 6, 2017. The Appellant had previously also seen another X neurologist for her dystonia. That unnamed specialist also gave her botox injections. However, the specialist apparently failed to keep Dr. O'Doherty informed of the treatment and he consequently made a referral to Dr. Jog instead.

[40] The Appellant has not done any paid or volunteer work since she stopped working at Home Depot, nor has she taken any courses or done any retraining. She has not applied for any jobs, other than an attempt to return to Home Depot approximately one year ago. However, they turned her down as she was not able to meet the job requirements. There is no job that she can see herself doing now.

[41] The Appellant still “barely” does her housework: she has to take breaks after doing a small portion. She moved to a first-floor apartment so that she would not have to climb stairs. She does the grocery shopping but finds it difficult with her dystonia pulling her neck. She drives but only around town. Her sister or daughter will drive her to out of town appointments.

SUBMISSIONS

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

- a) She is unable to perform any type of work because of her dystonia and other medical conditions;
- b) No employer would hire her, due to her obvious physical limitations and inability to attend work on a regular basis; and
- c) Her condition continues to deteriorate and she experiences constant pain and constant tremors: she spends most of her day in bed because it is the only way to deal with her pain and her significant depression.

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

- a) It is the capacity to work, not the diagnosis or disease description, that determines the severity of a disability under the CPP;
- b) The medical conditions provided by her as the basis for her disability claim had been pre-existing over several years and did not interfere with her employment until she stopped working in March 2014; and
- c) There is no eligibility for benefits as she cannot be considered disabled by April 2013, the month prior to commencing her CPP retirement pension.

ANALYSIS

Test for a Disability Pension

[44] The Appellant must ordinarily prove on a balance of probabilities, that she was disabled as defined in the CPP on or before the end of the MQP.

[45] 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.

[46] As the Appellant she started receiving her CPP retirement pension in May 2013, she must prove that she was disabled (as defined in the CPP) on or before April 30, 2013.

[47] 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

[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. In this case, the Appellant was 60 years old when she began receiving her CPP retirement pension, has completed one year of college, speaks English fluently, and has had a remarkable number of jobs in many different professions and work environments. As she is nearing the typical retirement age, the Tribunal has been particularly

mindful of this fact when assessing severity. The other *Villani* factors are indicative of a claimant with significant options.

[49] The Appellant's situation is somewhat unusual. Because she elected to start receiving her CPP retirement pension while she was still working, she will have to establish that she was severely disabled despite continuing to work. She also stated that, because of her medical condition, she was no longer able to work on March 28, 2014. At first glance, it therefore appears impossible for her to succeed, as she needs to establish a severe disability on or before April 30, 2013. However, one interpretation of her statement is simply that she was unable to work at all by March 28, 2014. She may have believed that she was only capable of working a nominal amount, such as one hour per month, prior to that date.

[50] Although the Appellant worked part-time for Home Depot after April 30, 2013, the non-binding 1998 decision of the Pension Appeals Board in *Minister of Human Resources Development v. Porter*, CP 5616, suggests that it is possible for a person to be employed and yet be incapable regularly of pursuing a substantially gainful occupation. It follows that the application and interpretation of those statutory terms is quite important in this case. At the time of her application on April 10, 2014, there was no statutory definition of "substantially gainful occupation". The guidance regarding "substantially gainful occupation" that currently appears in section 68.1 of the *CPP Regulations* only applies to applications made on or after May 29, 2014. As such, s. 68.1 is not applicable to the Appellant's case.

[51] The Tribunal has examined decisions predating the applicability of s. 68.1 of the *CPP Regulations*. The Federal Court of Appeal has indicated that it is generally unwise to formulate the legal test in words other than those contained in the statute itself (see *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92). As for "regularly", the Federal Court of Appeal has accepted that "predictability is the essence of regularity" in the CPP context (see *Atkinson v. Canada (Attorney General)*, 2014 FCA 187).

[52] The Tribunal will now turn to the particular circumstances of the Appellant's case. It is important to remember that the onus in this case is on the Appellant: she must establish a severe disability on a balance of probabilities.

Analysis of the Appellant's Capacity

[53] While the Appellant had earnings that continued into 2014, the Tribunal finds that these earnings do not disqualify the Appellant: they are not so substantial that they can be assumed to be substantially gainful. On the other hand, the earnings are not so low that they prove she was incapable regularly of pursuing a substantially gainful occupation at any point up to April 30, 2013. In particular, it is not clear that her earnings represented the maximum of what she was capable of doing.

[54] In that regard, the Tribunal places some weight on the employer's evidence: part-time employees were not guaranteed a set number of hours and could work anywhere from 0-32 hours per week. It is also noted that the reason for the Appellant's part-time work was "all the work that was available", as opposed to "all she is capable of performing". While nearly all the employees at that location were part-time, it was certainly open to the employer to indicate that the Appellant herself was not capable of more than what she was doing. The employer chose not to do so. The Tribunal also notes the Appellant's broad and varied work experience. She may have been able to earn more on an hourly basis elsewhere than what she earned at Home Depot. While the Tribunal assigns little weight to this, it is nonetheless consistent with finding that her actual earnings were not necessarily reflective of her maximum earning capacity.

[55] The Appellant's evidence also reveals that she had some difficulty with dates and was unable to accurately describe the nature of her hours and earnings in the first four months of 2013. While the Tribunal acknowledges the Appellant's evidence that she was unable to work three 4-hour shifts per week by March 28, 2014, it is not clear when she switched to that level of work and when that level of work became untenable for her.

[56] The Tribunal finds it most likely that, if the Appellant became incapable regularly of pursuing a substantially gainful occupation, it would have been at some point after April 30, 2013. For the reasons noted above, this is not substantially based on the Appellant's own statement that she could no longer work by March 28, 2014 because of her medical condition. However, that statement does support a finding that her condition became worse by March 28, 2014. In the following paragraphs, the Tribunal will describe the other evidence that is supportive of finding that any severe disability commenced at some point after April 30, 2013.

[57] Dr. Tweedy stated on March 10, 2015 that the Appellant became markedly restricted in performing the mental functions necessary for everyday life in 2014. That does not help with establishing the severity of a disability by April 30, 2013, although the Tribunal acknowledges that all elements (not just mental health) of a claimant's medical condition must be considered (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). Nonetheless, it does point to a deterioration in the Appellant's overall condition in 2014.

[58] The medical evidence up to April 30, 2013 is completely silent on the effect of the Appellant's medical conditions on her ability to work. The Appellant has had a long history of dystonia and other medical conditions: in 2012, for example, Dr. O'Doherty noted a 12-year history of injections for her head tremor and neck pain that appeared to improve her condition. Her mental health history may have gone back even farther. Nonetheless, she had made qualifying CPP contributions every year from 1992 to 2013. It is important to remember that the mere existence of medical conditions is not determinative: the ultimate impact on the claimant is the key consideration.

[59] The medical evidence after April 30, 2013 and prior to the Appellant's resignation on March 27, 2014 is also silent with respect to her ability to work. In fact, Dr. O'Doherty stated on June 4, 2013 that the Appellant was pleased with the botox injections performed in January of that year and said that they lasted for about 3 months. This is not very supportive of the onset of a severe disability by April 30, 2013, particular when Dr. O'Doherty further noted on September 3, 2013 that the Appellant was reasonably pleased with the June injection.

[60] Dr. Tweedie's April 2, 2014 Medical Report speaks more directly to work capacity and is much more supportive of the Appellant's claim. However, other than identifying a number of medical condition onset dates in 2007 and 2008 (when the Appellant had even higher earnings), his report does not substantially assist in establishing the commencement of a severe disability by April 30, 2013 or even significantly prior to April 2, 2014.

[61] Finally, the employer's evidence of July 24, 2016 is also inconsistent with the establishment of a severe disability by April 30, 2013. The employer does not seem to have seen the Appellant's performance as problematic: her work quality was satisfactory and she did not require special services, equipment, arrangements, or help from her co-workers. The employer's

statement that the Appellant “made the choice to resign due to what she felt were medical concerns that deterred her from doing her cashier role” suggests that the Appellant’s resignation was not entirely driven by the employer.

[62] Significantly, the employer stated that the Appellant “missed work often her last year due to health concerns”. Although the Appellant only resigned about 11 months after April 30, 2013, there is no objective evidence of a significant deterioration between the end of March 2013 and the end of April 2013. Once again, this suggests that the Appellant’s capacity most likely began to significantly falter at some point after April 30, 2013. As previously noted, the essence of “regularity” is predictability. The evidence before the Tribunal is insufficient to establish substantial non-predictability before April 30, 2013. The employer’s comments could be supportive of a lack of predictability at some later date, but that does not assist the Appellant.

[63] As a result of this analysis, the Tribunal finds that the Appellant has not proven that she was incapable regularly of pursuing a substantially gainful occupation on or before April 30, 2013. Such incapacity may have commenced after that date, but the onus is on the Appellant to establish the onset of a severe disability prior to the commencement of her CPP retirement pension.

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