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

Citation: *T. G. v. Minister of Employment and Social Development*, 2017 SSTGDIS 141

Tribunal File Number: GP-16-1388

BETWEEN:

T. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: George Tsakalis

HEARD ON: September 26, 2017

DATE OF DECISION: September 28, 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 21, 2015. The Appellant claimed that she was disabled because of rheumatoid arthritis (RA) /fibromyalgia. 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 videoconference for the following reasons:

- Videoconferencing is available within a reasonable distance of the area where the Appellant lives
- 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.

[3] The following people attended the hearing: T. G., Appellant, and Angelo Consiglio, Legal Representative.

[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, Education and Work Experience

[5] The Appellant was born in 1972.

[6] The Appellant in her Questionnaire for Disability Benefits, which was date stamped on July 21, 2015, stated that she completed a community college diploma in Early Childhood Education. She was working part-time at the grocery store at the time of her application for disability benefits.

[7] The Appellant's Record of Earnings (ROE) showed earnings above the year's basic exemption from 1996 to 2014. The Appellant's earnings in 2015 and 2016 fell below the year's basic exemption. She earned $5,252.00 in 2015 and $4,995.00 in 2016.

[8] The Appellant testified that she stopped working completely in May 2017. She is currently on sick leave.

Medical Condition and Treatment

[9] The Appellant's family physician, Dr. A.A. Chowdhry, completed a Medical Report for Service Canada that was date stamped on July 21, 2015. He diagnosed the Appellant with RA, and had been treating her for this condition since September 2011. Dr. Chowdhry stated that the Appellant suffered from significant pain in most of her joints. He stated that the Appellant was being followed by a Rheumatologist. The Appellant was taking Actemra for her rheumatoid arthritis. The Appellant also underwent physiotherapy and chiropractic treatments, as well as being treated with a TENS machine. Dr. Chowdhry provided the Appellant with a poor prognosis despite her having undergone treatment.

[10] The Appellant in a letter dated November 11, 2015, stated that she had been suffering from rheumatoid arthritis since 2011. She stated that she had difficulty getting out of bed, and problems walking. She reported difficulty caring for her special needs son. The Appellant stated that she could only work two days per week because that is all she could handle. She reported difficulties with her activities of daily living, including dressing, undressing, bathing and showering. She stated the continuous repetition at work, and constant standing did not help with her medical condition. She always had swollen and sore hands and feet. Her RA impacted all of her joints. She also suffered from fibromyalgia and carpal tunnel syndrome in her right hand. She believed that she had left handed carpal tunnel syndrome as well. She was being treated by Dr. A. Abdelgader, Rheumatologist. She was taking Actemra once a month through infusions,

Celebrex, Tramadol, Aventyl, Calcium, Vitamin D3, coconut oil, Tylenol, and Ibuprofen. The medication did not relieve her pain. She also took steroid injections for her carpal tunnel, but she only obtained temporary relief from these injections.

[11] A CT scan of the lumbar spine taken on March 23, 2011 showed minor degenerative changes.

[12] The Appellant went to the hospital on December 2, 2011 in relation to left leg and joint pains. A pelvic and left hip X-ray taken on December 2, 2011, showed minimal degenerative changes. A left knee X-ray taken on December 2, 2011 was essentially a normal study. She also went to the hospital for a sort right ankle on December 14, 2011.

[13] Dr. Abdelgader in a consultation report dated February 1, 2012 stated that the Appellant had been experiencing polyarthagia mainly involving her knees, feet and hands. The Appellant had chronic back pain for 17 years. She reported feeling tired and not sleeping well. Dr. Abdelgader diagnosed her with rheumatoid arthritis. He started the Appellant on Methotrexate.

[14] Dr. Abdelgader in a consultation report dated August 15, 2012 stated that the Appellant was taking Methotrexate for her RA. Physical examination revealed tenderness both wrists and her MTP joints. Dr. Abdelgader prescribed the Appellant Cimzia.

[15] The Appellant had physiotherapy treatment with Elyse Waters in relation to a locked left elbow. Ms. Waters in a report dated August 27, 2013 stated that the Appellant did not receive benefit from physiotherapy treatments. She noted that the Appellant was going to see Dr. Elashaal, Orthopaedic Surgeon. Ms. Water's asked the Appellant's family physician if light or modified work duties would be beneficial at that time. The Appellant reported work as an aggravating factor to her condition. The Appellant was noted to work at a deli counter.

[16] Dr. Abdelgader in a consultation report dated September 20, 2013 stated that the Appellant was on Cimzia. He decided to start performing Actemra infusions and advised the Appellant to continue taking Celebrex.

[17] Dr. Abdelgader in a consultation report dated November 14, 2013 stated that the Appellant had her first Actemra infusion that day. The Appellant was on Celebrex. She could not

tolerate Percocet. She also took Prednisone that day. Dr. Abdelgader started the Appellant on Tramacet. He was going to bring the Appellant back for a steroid injection to her left elbow.

[18] Dr. Abdelgader's clinical notes and records contain nursing notes and infusion records. A nursing note dated February 11, 2014 stated that the Appellant had right hand swelling. She was experiencing sharp pain in her right shoulder, both knees and toes. She had an Actemra infusion.

[19] A nursing note dated March 11, 2014 stated that the Appellant looked exhausted from her pain with facial grimacing and deep bags under her eyes. The Appellant was teary-eyed when discussing her pain. Her hands and fingers were swollen and it was difficult for her to close her hand into a fist. The Appellant underwent an Actemra infusion.

[20] Dr. Abdelgader in a consultation report dated March 11, 2014 stated that the Appellant's RA was still active. He adjusted the Appellant's medication by adding Leflunomide in addition to the Appellant's Actemra infusions.

[21] A nursing note dated June 10, 2014 stated that the Appellant had been extremely itchy since starting Leflunomide. The Appellant had red irritation in both of her arms, abdomen and back. The Appellant was taking Benadryl at home but she was obtaining no relief. The Appellant underwent an Actemra infusion.

[22] A nursing note dated September 2, 2014 confirmed that the Appellant had an Actemra infusion. The Appellant complained of swollen hands and sensitivity. The Appellant was having pain with grasping and fine motor movements with her right hand. Activities at work including cutting and slicing meat were causing pain.

[23] Dr. Abdelgader in a consultation report dated September 25, 2014 stated that the Appellant respondent well to intravenous Actemra infusions. He stated that the Appellant's right-hand pain was due to a repetitious stress injury and also flexor tenosynovitis. Dr. Abdelgader recommended a cortisone injection but the Appellant declined. Dr. Abdelgader sent the Appellant for a nerve conduction study to rule out an ulnar nerve entrapment.

[24] A nursing note dated September 25, 2014 stated that the Appellant had an Actemra infusion. The Appellant reported right shoulder and hand pain. She had swelling in her right hand and suffered from total body pain.

[25] A nursing note dated October 21, 2014 stated that the Appellant visited the emergency room (ER) two weeks ago for pain control. The Appellant was given an injection of Dilaudid and Prednisone. The Appellant felt much better but her pain was still poorly controlled. Her Actemra infusion dosage was increased.

[26] Dr. H. Desai, Neurologist in a consultation report dated November 6, 2014 confirmed that the Appellant underwent electrophysiological studies that showed moderate dysfunction of the right median nerve at the wrist and mild dysfunction of the right ulnar nerve at the elbow.

[27] Dr. Abdelgader in a November 18, 2014 consultation report stated that the Appellant had seropositive RA. She was improving through her intravenous Actemra infusions. Dr. Abdelgader stated that had more active synovitis prior to her infusions. He felt that the Appellant's main issue related to repetitious work that she was doing in her job. Dr. Abdelgader recommended that she no longer do this job because it was flaring up her RA and causing more damage.

[28] A nursing note and infusion record dated November 18, 2014 stated that the Appellant took one month off work and had been wearing wrist braces at night. She found that the wrist braces helped but she wanted to proceed with surgery. The Appellant found that her pain was not controlled by Tylenol or Advil. Diagnostic testing found that she had a pinched nerve in her right wrist and right elbow, as well as carpal tunnel syndrome in her right wrist. Her left wrist also bothered her but she had not undergone any testing. The Appellant also experienced left knee pain and sharp shooting pain in her left great toe when walking. She was limping.

[29] A nursing note and infusion record dated December 16, 2014 confirmed that the Appellant received an Actemra infusion. The Appellant reported morning neck stiffness. She had a consultation scheduled with Dr. Adams in March 2015 for carpal tunnel syndrome**.** The Appellant was off work since November 13, 2014 and was scheduled to return to work on March 9, 2015. The Appellant reported that her fingers were still numb and she was looking to obtain a referral to get into surgery earlier.

[30] A nursing note and infusion record dated January 15, 2015 stated that the Appellant had an Actemra infusion. The Appellant consulted with Dr. Niessen for the numbness and tingling in her hand and fingers.

[31] A nursing note and infusion record dated February 10, 2015 stated that the Appellant had an Actemra infusion. The Appellant reported that her job aggravated her body pain and especially her hand pain. The Appellant was going back to work in one month. She reported that her hands and her arthritis were feeling better with rest. The Appellant was seen in consultation for a steroid injection into her right wrist. She was referred by Dr. Niessen who advised her that surgery was an option if injections did not work.

[32] Dr. Yuri Marchuk, Physiatrist diagnosed the Appellant with right carpal tunnel syndrome and right upper extremity mild myofascial pain syndrome in a report dated February 10, 2015. The Appellant decided to proceed with an injection.

[33] Dr. Abdelgader noted in a consultation report dated March 19, 2015 that the Appellant had seropositive RA. He stated that her RA was under control but he thought her issues related to a repetitious stress injury at work. He recommended that the Appellant take Celebrex.

[34] Dr. Marchuk in a report dated March 19, 2015 stated that the Appellant was being treated for right carpal tunnel syndrome as a hospital outpatient. She was seen in follow-up to a previous injection. Dr. Marchuk's impression was that the appellant had improved right carpal tunnel syndrome after her injection. Since the Appellant experienced pain in her hands and feet after working, it was recommended that she try ice water baths after work. The Appellant was advised to use Ibuprofen to reduce the inflammation that she experienced. The Appellant was invited to return for another injection if she wished.

[35] A nursing note and infusion record dated June 11, 2015 stated that the Appellant underwent an Actemra infusion. She had many bad days compared to good days. The Appellant's knees were very sore and some swollen. Nodules had returned on her elbows that were painful and sensitive. She also complained of difficulty sleeping. The Appellant advised that the Actemra infusions worked to an extent but she was still having difficulty on a day to day basis.

[36] A nursing note and infusion record dated July 9, 2015 stated that the Appellant underwent an Actemra infusion. The Appellant's report that her pain was intolerable. She also received two cortisone injections in her right wrist from her family physician because of carpal tunnel syndrome. The Appellant was prescribed Nortriptyline to help with her nerve pain. She was taking Tylenol and Advil daily but received no benefit from these medications.

[37] A nursing note and infusion record dated August 6, 2015 indicated that the Appellant had an Actemra infusion. The Appellant reported that her pain was better controlled by Actemra and Nortriptyline. She still experienced severe fatigue.

[38] A nursing note and infusion record dated September 6, 2015 stated that the Appellant had an Actemra infusion. The Appellant stated that she was unable to straighten a finger in her right hand when she woke up that morning. She had never experienced this before. The Appellant reported being very tired especially when it was raining or humid. The Appellant had severe stiffness for approximately 1.5 hours per day.

[39] Dr. Abdelgader in a consultation report dated October 6, 2015 stated that the Appellant had seropositive RA. The Appellant also had severe fibromyalgia with pain, frequent flare ups, and stiffness. The Appellant had not been sleeping well. She worked in a grocery store in a job that involved repetitious maneuvers. Dr. Abdelgader noted that Nortriptyline was not helping the Appellant anymore. Dr. Abdelgader recommended that the Appellant be seen at a pain clinic for proper management.

[40] The Appellant had an Actemra infusion on October 6, 2015. The nursing notes from October 6, 2015 indicate that the Appellant was teary-eyed and upset at the clinic. The Appellant was constantly exhausted, sore and stiff. Her hands were painful and tender. Her knuckles and fingers were swollen. She had shoulder pain. She also struggled with twisting, turning and manipulating objects. The Appellant was advised by Dr. Abdelgader that her symptoms were consistent with fibromyalgia. The Appellant was prescribed Nortriptyline, which worked well when she started using it. However, the Appellant was receiving minimal relief with Nortriptyline.

[41] Dr. Abdelgader in a consultation report dated March 3, 2016 provided the Appellant with a RA and fibromyalgia diagnosis. Dr. Abdelgader stated that fibromyalgia was the Appellant's main issue. The Appellant also had a right elbow deformity and decreased function.

[42] A nursing note dated April 5, 2016 stated that the Appellant had been stiff and sore in the last week. She was walking with a limp. The appellant had a sore mid back and hands. The Appellant was taking Tramadol for her pain. The Appellant underwent another Actemra infusion.

[43] A nursing note dated May 5, 2016 stated that the Appellant was wearing a left wrist brace. The Appellant had sharp pain in her toes. She was seeing a chiropractor who told her that she might have a pinched nerve.

[44] A nursing note dated May 31, 2016 stated that the Appellant had intermittent body pain. The Appellant was having pain in her third and fourth toe which had occurred since she received acupuncture six weeks before. The Appellant underwent another Actemra infusion.

[45] Dr. Abdelgader in a consultation report dated July 26, 2016 stated that the Appellant had a flexion deformity in her right elbow. She had surgery scheduled for her right elbow, as well as a carpal tunnel surgery. Dr. Abdelgader noted that the Appellant was taking Actemra infusions and was doing very well. He advised the Appellant that if she was having going to have surgery that it should be done between her infusions.

[46] Dr. Elashaal in a consultation report dated June 29, 2016 stated that the Appellant had suffered from right elbow arthritis for at least three years. The Appellant had right elbow pain, locking and catching. Dr. Elashaal recommended therapy and cortisone injections. He stated surgery might be required on the right elbow if conservative treatments did not work.

[47] A nursing note dated July 26, 2016 stated that the Appellant had a stiff and sore left shoulder. She also had a locked right elbow after undergoing a cortisone injection on July 7, 2016.

[48] Dr. Desai saw the Appellant because of complaints of numbness in both hands on July 27, 2016. The Appellant had surgery scheduled for August 2016. Dr. Desai performed EMG studies that were normal. He stated that there was no objective evidence of carpal tunnel

syndrome. Dr. Desai stated that nerve conduction abnormalities seen in 2014 were no longer seen. Dr. Desai advised her to cancel her carpal tunnel surgery. He recommended conservative treatment with braces.

[49] The Appellant underwent surgery on her right elbow with Dr. A. Elashaal, Orthopaedic Surgeon on September 2, 2016. Dr. Elashaal performed a right elbow synovectomy.

[50] Dr. Abdelgader in a consultation report dated September 15, 2016 stated that the Appellant had right elbow surgery two weeks previously, and she also underwent a carpal tunnel release surgery three weeks previously. The Appellant had not had an Actemra infusion for seven weeks and experienced a major flare-up in pain. She had difficulty walking and her daughter was helping her dress. Dr. Abdelgader performed an Actemra infusion and it went well. Dr. Abdelgader expected the Appellant to feel better in the next two days after her infusion.

[51] A nursing note dated September 15, 2016 stated that the Appellant was in severe pain after her surgeries. She was taking Dilaudid to control her pain. The Appellant was tearful because of her pain and her RA. The Appellant's hands, wrists, legs, feet, and knees were in pain. The Appellant's feet were so swollen that she was unable to put on her shows. She as unable to step on the scale to be weighed. The Appellant underwent another Actemra infusion.

[52] A nursing note dated October 12, 2016 stated that the Appellant's son was now home full time and the Appellant was caring for him alone. She felt very fatigued and tired.

[53] The Appellant saw Dr. Curt Wimmer at a pain clinic on November 29, 2016. Dr. Wimmer examined the Appellant and diagnosed her with RA and fibromyalgia. The Appellant was taking Celebrex, Tramacet, Baclofen, along with her Actemra infusions. The Appellant was noted to be employed. Dr. Wimmer recommended adjusting the Appellant's medications, including using Cymbalta. Dr. Wimmer stated that the Appellant was a candidate for nerve block injections but she did not have a driver's licence. It would be difficult for her to access this service because of transportation issues.

[54] The Appellant's testified that her medical issues began in September 2011. She was having difficulty getting out of bed and walking. Her family physician referred her to Dr. Abdelgader who diagnosed her with RA. The Appellant has tried physiotherapy, massage,

acupuncture and chiropractic treatments with limited relief. She received Actemra infusions until recently. She recently began receiving Orencia infusions in 2017 to treat her RA. She currently takes Cymblata, Synthroid, Celebrex and Nortriptyline. The Appellant's current medications include Cymbalta. Carpal tunnel syndrome became an issue for the Appellant in either 2012 or 2013. The Appellant had two surgeries in 2016. One of the surgeries related to carpal tunnel syndrome, and she also underwent right elbow surgery in 2016. The Appellant reported that her carpal tunnel surgery was successful. The Appellant decided to undergo the carpal tunnel syndrome against Dr. Desai recommendation that she not proceed because her orthopaedic surgeon provided an opinion that such surgery would be beneficial. The Appellant was diagnosed with an underactive thyroid in 2017 but she believed that her thyroid was an issue for 1.5 years prior to her diagnosis.

[55] The Appellant testified that she went to a pain clinic in 2016 but she could not go to appointments regularly because of transportation difficulties. She does not have a driver's licence and the clinic was located outside her rural community. Her sleep has been interrupted since 2011. It takes her one hour to fall asleep and she wakes up after only one to two hours of sleep. The Appellant stated that her physicians have told her that her condition will not improve. Her treating doctors are not trying to cure her but are instead trying to manage her pain levels. The Appellant testified that she would not even be able to walk if she did not take her medications or undergo infusions.

Work Capacity

[56] The Appellant in her Questionnaire for Disability Benefits stated that she is still working but her hours have been reduced. She was having difficulty working because of severe osteoarthritis. She reported going off work for 17 weeks. She stated that she was not in pain when she returned to work. However, the pain came back upon her return to work. She was having difficulty walking and using her hands. She reported difficulty with dressing and bathing to the point where her husband had to assist her with those activities. She reported being able to sit or stand for no more than 15 minutes. She was unable to lift anything more than two pounds because of numbness, tingling, and weakness in both arms. She reported concentration difficulties. It was difficult for her to bend and reach. Showering was problematic because of

difficulties with getting her arms above her head. The Appellant reported disrupted sleep and not being able to drive because she could only sit for 15 minutes at a time. She reported difficulty with household maintenance tasks in that she had to take frequent breaks and rests. The Appellant stated that she was not using any assistive device to walk, but she should have been using a cane.

[57] The Appellant testified that she would work 28 to 40 hours per week prior to the start of her health problems in September 2011. She worked as a deli clerk which was a stand-up job and required the use of her hands. She continued to work despite her pain. She began calling sick more frequently when her health problems started. She went on sick leave in 2014 for 16 weeks. The Appellant has only worked 8 or 9 hours per week since 2015. She earned approximately $14 to $15 per hour. She was off work from August to October 2016 because of her carpal tunnel and elbow surgery. When she returned to work in October 2016, her boss removed her from the deli counter. She began doing administrative tasks for her boss for six to eight hours per week, such as paper work and scheduling but even this proved to be too much for her to handle. She stopped working completely in May 2017. She decided to take a sick leave. She would like to return to work but she does not believe that she can.

[58] The Appellant testified that she cannot work in the early childhood education field where she obtained her college diploma. She has lifting restrictions. She cannot extend her arms. She cannot do computer work because her RA impacts her keyboarding. She does not use a computer frequently at home. She began receiving ODSP in 2016. The Appellant testified that is unstable on her feet. She can only work on a task for five minutes before having to take a break. When she worked at the deli counter, she took 4 or 5 breaks during or 4 to 5 hour shift in 2015 and 2016. She stated that she needed help from other employees for complicated orders. She testified she could not work as a receptionist because of fatigue and sitting restrictions. She also testified that a return to school is not feasible because of her concentration difficulties.

[59] The Appellant testified that she continued working after health problems began in September 2011. She credited her continued employment to having an accommodating employer. The Appellant testified that her medical conditions had a negative functional impact

on her ability to work. She suffered from chronic fatigue, chronic pain, disrupted sleep, and impaired memory and concentration. She stated her medications make her dizzy.

[60] The Appellant testified that she had no restrictions on her ability to work or in her activities of daily living prior to September 2011. The Appellant reported significant restrictions relating to completing her household tasks. She is able to start her indoor housekeeping chores but she must take frequent breaks. She testified that she used to love to garden but does not do so anymore. Her social life is limited. She does not bathe because she cannot physically get out of a bathtub. She waits for her husband to come home so that she can shower because she is worried about her balance issues and falling. The Appellant used to love to read but this activity is now limited. Her arms get tired holding up a book and she has difficulty concentrating because of her pain.

[61] The Appellant testified that she does little during the day. She has a disabled son who is 22 years old. They watch television together. Her husband works full-time outside the house and prepares supper for them. Her husband bathes her son and she supervises her son with dressing and undressing.

[62] The Appellant testified that she cannot work because she is unreliable. Attendance has been an issue for her. She is tired and lethargic. She has had significant accommodation from her employer since. She needs help from other employees to complete her tasks. She was in significant pain after working a 4 or 5-hour shift. She would go home in tears.

SUBMISSIONS

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

a) The Appellant has a severe disability under the CPP. The work that she did post-MQP in 2017 was not substantially gainful. The Appellant worked few hours. The only reason the Appellant lasted as long as she did in her job was because of an accommodating employer.

b) The Appellant is not employable in a real world context because of her RA and fibromyalgia that has led to significant impairments.

c) The Appellant had a severe disability on or before her MQP despite following treatment recommendations.

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

a) The Appellant continued to work part-time at her deli job at a grocery store chain. She was working eight to nine hours per day, two days per week at the time of her application for CPP disability benefits.

b) The medical evidence did not demonstrate any serious pathology that would in the Appellant being disabled and unemployable in all of her occupations for an indefinite period of time.

ANALYSIS

Test for a Disability Pension

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

[66] 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).

[67] 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.

[68] 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

[69] The Tribunal finds that the Appellant has proven on a balance of probabilities that she had a severe disability that rendered her incapable regularly of pursuing any substantially gainful occupation on or before her MQP date of December 31, 2016.

[70] 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.

[71] In applying Villani to the facts of this appeal, the Tribunal finds that the Appellant was incapable regularly of pursuing any substantially gainful occupation in a real world context on or before her MQP. The Appellant was only 44 years old at the time of her MQP and also possessed a community college diploma in early childhood education. The Tribunal is satisfied that the Appellant had a severe disability on or before her MQP, despite her relative youth and education, as well as a good command of the English language. The Tribunal is satisfied that the Appellant cannot maintain employment in any capacity. She reported severe pain arising from RA and fibromyalgia that has led to significant impairments in the areas of sitting, standing, walking, lifting, reaching, bending and concentration. The Appellant is not capable of sustaining activities for prolonged periods of time. Her medical condition renders her incapable of maintaining work on a consistent and predictable basis.

[72] The Appellant's hearing evidence is supported by the medical evidence. Her family physician, Dr. Chowdhry in his Medical Report to Service, date stamped on July 21, 2015, noted that the Appellant suffered from significant pain in most of her joints. He provided her with a poor prognosis despite undergoing treatment. She has undergone extensive treatment with her Rheumatologist, Dr. Abdelgader. She underwent Actemra infusions starting in 2013. Dr.

Abdelgader's consultation reports, beginning on February 1, 2012, contain numerous references to pain in the Appellant's knees, feet, hands, back, as well as fatigue and sleeping problems. Dr. Abdelgader in a November 18, 2014 consultation report recommended that the Appellant stop working as a deli clerk because it was repetitive work that aggravated her RA and caused more damage. The nursing notes from Dr. Abdelgader's office contained in references to right hand swelling, right shoulder pain, knee pain and toe pain. A nursing note dated September 2, 2014 confirmed that the Appellant complained of swollen hands and sensitivity. The Appellant was having pain with grasping and fine motor movements with her right hand. Her work activities, which included cutting and slicing meat, were causing pain. Dr. Yuri Marchuk, Physiatrist diagnosed the Appellant with right carpal tunnel syndrome and right upper extremity mild myofascial pain syndrome in a report dated February 10, 2015. The Appellant underwent surgery to alleviate her right carpal tunnel syndrome in August 2016 and she had right elbow surgery in 2016. The medical evidence confirms that the Appellant underwent physiotherapy and chiropractic treatment. She also saw Dr. Wimmer at a pain clinic on November 29, 2016. Dr. Wimmer confirmed the Appellant's RA and fibromyalgia diagnosis.

[73] The Appellant was a credible witness at her hearing. She answered her questions in a straightforward manner. She was emotional and was clearly distraught over her inability to work on a predictable basis. What makes the Appellant particularly credible was that she struggled with medical issues since 2011 before applying for CPP disability benefits in July 2015. Her evidence about reduced work hours is corroborated by her ROE, which showed that the Appellant's income steadily declined each year after 2010, the last year that she was healthy. The Appellant earned $19,830.00 in 2010. By 2016, her income had decreased to $4,995.00. The Appellant testified at her hearing that the Respondent misinterpreted her Questionnaire for Disability Benefits. It appeared on reading her Questionnaire that she worked two, eight to nine-hour shifts per week or 16 to 18 hours per week. In actuality, she worked eight or nine hours per week over two shifts. The Appellant's nominal income in 2015 and 2016 corroborates her hearing evidence. The Appellant, despite experiencing significant pain, continued to work as a deli clerk with reduced hours. She received significant accommodation from her long-standing employer, who allowed her to work at her own pace. Other employees would assist her with filling out complicated orders at the deli counter. However, working as a deli clerk where she had to cut and slice meat with RA proved to be difficult even with the accommodation that she

received. She went on leave from November 2014 to March 2015. She returned as a deli clerk but her hours kept falling because of her medical condition. She underwent two surgeries in 2016 and was off work from August to October 2016. She stopped working as a deli clerk on her return to work in October 2016. She began doing administrative tasks for her boss, such as paper work and scheduling for six to eight hours per week but even this proved to be too much for her to handle. She stopped working completely in May 2017. She decided to go on sick leave. She wants to go back to work but she does not believe that she can.

[74] The Respondent in its submissions pointed out that the Appellant continued to work at the time she applied for CPP disability benefits in July 2015. The Respondent submitted that this was evidence of the ability to work on the part of the Appellant and that she therefore did not meet the test for a severe disability under the CPP. The Tribunal disagrees with this submission.

[75] A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. Section 68.1 of the CPP *Regulations* states that "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. Using section 68.1 of the *CPP Regulations* as a guide, the Tribunal finds that the income earned by the Appellant in 2015 and 2016 was not substantially gainful. The Appellant earned less than the maximum annual amount that a person could receive as a disability pension. The Tribunal finds that working for eight to nine hours per week at approximately $14.00 per hour is not substantially gainful employment.

[76] 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). The Tribunal finds that the Appellant cannot return to her former job as a deli clerk. Dr. Abdelgader was clear in his consultation report dated November 18, 2014 that he no longer recommended that the Appellant continue working as a deli clerk because it was aggravating her RA. In considering the question of whether the Appellant is able to work at any occupation, the Tribunal finds that she cannot do so. The

Tribunal accepts the Appellant's evidence that she cannot work on a reliable or predictable basis. The Appellant suffers from significant pain because of RA and fibromyalgia. She sleeps poorly. Her concentration is significantly impaired. She needs to take frequent breaks when she completes her activities of daily living. Her mobility is impaired. Going back to school is not a realistic option in light of her impairments which also include sitting restrictions. Her RA makes keyboarding extremely difficult.

[77] 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 after reviewing the medical, documentary and hearing evidence that the Appellant lacked the capacity to pursue any form of substantially gainful employment on a regular and consistent basis on or before her MQP after taking into account her multiple disabling conditions. The Tribunal finds that the Appellant lacked the capacity to pursue any form of substantially gainful employment beginning in November 2014 when she initially went off work. When the Appellant returned to work in March 2015, her hours and income dropped substantially. She has had a nominal income since that time that does not constitute substantially gainful employment.

[78] The Tribunal finds that the Appellant's efforts to manage her medical conditions have been reasonable. She has been treated by a rheumatologist. She has had two surgeries. She has had physiotherapy and chiropractic treatments. She underwent Actemra infusions for five years. She has taken many medications including Methotrexate, Cimzia, Celebrex, Percocet, Prednisone, Nortriptyline and Cymbalta. She has undergone cortisone injections to her right elbow and Dr. Marchuk also provided the Appellant with an injection in relation to her carpal tunnel syndrome. The Appellant attended a pain clinic but she did not have nerve block injections. The Tribunal does not find this to be unreasonable on the part of the Appellant. She had other injection treatments and numerous infusions prior to her attendance at the pain clinic in November 2016 that did not lead to significant symptom alleviation. Her physicians have advised her that her condition is permanent and they are now managing a chronic condition. The Tribunal is currently on sick leave and expressed an interest in returning to work but she did not believe that she could do so. The Tribunal agrees that a return to substantially gainful employment is not a realistic option for the Appellant.

[79] 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). The Tribunal finds that the Appellant has severe impairments related to sitting, standing, walking, lifting, reaching and bending because of RA and fibromyalgia. The Appellant's pain levels and fatigue have led to a significant concentration impairment. Her RA makes handling objects and keyboarding extremely difficult. The Appellant cannot sustain any type of activity long enough to work consistently and reliably.

[80] The Tribunal therefore finds that the Appellant has established on a balance of probabilities that she had a severe disability commencing in November 2014, when she initially went off work.

Prolonged

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

[82] The Appellant is still under Dr. Abdelgader's care. Dr. Chowdhry in his Medical Report to Service Canada provided the Appellant with a poor prognosis.

[83] As the Appellant's condition has not improved with treatment, the Tribunal is satisfied that the Appellant's disability is likely to be long continued and of indefinite duration.

CONCLUSION

[84] The Tribunal finds that the Appellant had a severe and prolonged disability in November 2014, when she first went on leave at work, as explained above. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of March 2015.

[85] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security