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

[TRANSLATION]

Citation: *MP v Minister of Employment and Social Development*, 2016 SSTGDIS 586

Tribunal File Number: GP-14-1621

BETWEEN

M. P.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jude Samson

HEARD ON: October 13, 2016

DATE OF DECISION: October 28, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant:	M. P.
	G. F. (Representative)
Respondent:	Written submissions only

OVERVIEW

[1] On March 18, 2005, the Appellant was in a motor vehicle accident. At the time, she was 34 years old and her daughter was still very young. Since the accident, she has had significant after-effects that affect how she works. Her attempts to return to work after the accident were unsuccessful.

[2] On June 20, 2007, the Appellant first applied for a *Canada Pension Plan* (CPP or Act) disability pension, but that application was denied initially and upon reconsideration. The Appellant appealed the reconsideration decision, but the Office of the Commissioner of Review Tribunals (OCRT) dismissed the appeal following a hearing on August 17, 2010. The OCRT decided that the Appellant's minimum qualifying period (MQP) had ended on December 31, 2007.

[3] On October 25, 2013, the Appellant applied for a disability pension a second time. This time, the child-rearing dropout (CRDO) provisions were applied, and the Appellant's MQP was extended to December 31, 2009. The second application was also denied initially and upon reconsideration. The August 20, 2014, reconsideration decision is the subject of this appeal to the Social Security Tribunal (Tribunal).

[4] For the following reasons, the appeal is dismissed.

METHOD OF PROCEEDING

[5] This appeal hearing was by teleconference for the following reasons:

a) The videoconference service is not available within a reasonable distance of the area where the Appellant lives.

b) The issues are complex.

c) The file is missing information or clarification is required.

d) This was the most appropriate way of proceeding to address inconsistencies in the evidence.

e) This way of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[6] Initially, a hearing for this appeal was scheduled on March 31, 2016, but the Appellant asked for it to be adjourned because she found that her file was missing information. The adjournment was granted and the hearing was rescheduled to June 21, 2016 (GD0A). In the meantime, the Appellant submitted GD12, which includes, among other things, a timeline of the file to highlight the Appellant's deteriorating physical and mental condition since 1991.

[7] The hearing began on June 21, 2016, but the Tribunal noted from the start that, in the Appellant's timeline, she had referred to documents that the Tribunal had never received. So, the hearing was rescheduled a second time on October 13, 2016, and proceeded as scheduled that day.

[8] Following the second adjournment, the Appellant filed GD15 with the Tribunal. This 733-page document is, in fact, the appeal file that existed before the OCRT, which may lead to some confusion because each page has now been numbered twice. For example, in the Appellant's timeline starting on page GD12-39, she refers to the OCRT page numbers, whereas

in this decision, the Tribunal uses the more recently added page numbers (for example, GD15-1). Unfortunately, the numbers are not the same.

THE LAW

[9] Paragraph 44(1)(b) of the Act sets out the eligibility criteria for a CPP disability pension. To be eligible 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

d) have made valid CPP contributions for not less than the MQP

[10] The calculation of the MQP is important because a person must establish that they had a severe and prolonged disability by the end of their MQP.

[11] Under paragraph 42(2)(a) of the Act, to be disabled, a person must have a severe and prolonged mental or physical disability. A person is considered to have a severe disability if they are 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.

ISSUE

[12] For reasons unknown to the Tribunal, when the Appellant first applied for a disability pension, the CRDO (GD2-9) had not been applied. That extended the Appellant's MQP from December 31, 2007, to December 31, 2009. The Appellant does not dispute this new date and the Tribunal also found that the MQP ended on December 31, 2009.

[13] The Appellant also agrees that, based on the principle of *res judicata*, the Tribunal cannot call into question the previous decision of the OCRT (*Canada (MHRD) v. Macdonald*, 2002 FCA 48, and *Belo-Alves v. Canada (A.G.)*, 2014 FC 1100). So, as a starting point, the Tribunal

presupposes that the Appellant did not have a severe and prolonged disability as of December 31, 2007.

[14] As a result, the Tribunal must decide in this case whether it is more likely than not that the Appellant became disabled within the meaning of the CPP between January 1, 2008, and December 31, 2009.

[15] The onus is on the Appellant to prove her disability during the relevant period and continuously since.

EVIDENCE

[16] The Appellant's application for disability benefits is founded on chronic back pain affecting her left leg and resulting in depression (GD2-60). She testified that after her motor vehicle accident in March 2005, she had to leave her hospital food service job, a position she had held since 1999. In the Appellant's disability questionnaire, she noted several functional limitations she faces (GD2-61).

[17] The Tribunal considered the entire record, including the oral and documentary evidence. The most relevant evidence, in the Tribunal's view, is summarized below.

THE OCRT DECISION

[18] After the two adjournment requests by the Appellant had been granted, the appeal was heard on August 17, 2010, by three OCRT members at an in-person hearing (GD7). As noted above, the OCRT considered whether the Appellant had a disability under the CPP by December 31, 2007 (GD7-5). The appeal was dismissed on November 3, 2010. To come to this conclusion, the OCRT relied primarily on:

a) an analysis of transferable skills finding several sedentary jobs that met the Appellant's limitations

b) a lack of medical reports highlighting a serious medical condition, including Dr. Dupuis's opinion that the Appellant could do sedentary work

c) the Appellant's testimony that she takes care of several household tasks with her mother (with whom she lives) and that these tasks require a reasonable effort on the Appellant's part

[19] The OCRT reviewed evidence from 2005 to March 9, 2010, and found that the Appellant's condition was not severe to the extent that she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2007 (GD7-16).

APPELLANT'S EVIDENCE

[20] At the hearing, the Appellant testified very little. Instead, her representative relied more on the documentary evidence.

[21] According to the Appellant, her condition has deteriorated continuously since the motor vehicle accident in 2005. She has done everything her doctors have asked her to do without any improvement. In 2006, she tried to return to work gradually and to retrain by taking a sterilization course, but she was not able to.

[22] Since the Appellant was receiving social assistance, she said that she had to apply for several jobs in the area, but that she never found an employer who could accommodate her. Her representative said that she had at least 15 rejection letters from prospective employers on file. From September 2011 to May 2012, she was also a client at X, a government agency designed to help people get back to work (GD3-2). This agency had suggested that the Appellant attend workshops for one day, but the Appellant said that she would not be able to attend for a full day. Finally, her file was closed (GD3-3) "because her goals are not realistic."

[23] The Tribunal asked several questions to find out how the Appellant's condition deteriorated in 2008 and 2009, but the Appellant had a hard time answering those questions except to say that her condition worsened continuously. For example, she could not report functional limitations that appeared or worsened in 2008 and 2009. She testified, for example, that she can no longer do a lot of housecleaning like she used to. But, when the Tribunal asked when was the last time she did clean a lot, she said it was before the accident in 2005.

MEDICAL EVIDENCE

[24] The Appellant's application for a disability pension was submitted along with a medical report completed on October 24, 2013, by her family doctor, Dr. Isabelle Dupuis, who has been her doctor since 1991 (GD2-66). Dr. Dupuis diagnosed the Appellant with [translation] "vertebral ligament conflict in the dorsolumbar area" and indicated that she has had cervical dorsolumbar pain since 1994 and depression. She referred to the report of an orthopedic specialist, Dr. Philippe Perkins, and concluded, as other specialists have, that it is unlikely that the Appellant could find another job (GD2-69).

[25] On April 3, 2006, the Appellant was assessed by a physiatrist, Dr. Smith (GD15-504 to 506). He said that the Appellant had pain in her lower and upper back, without radiation to her legs. Her pain was aggravated by activity and wet weather conditions. He reported the following diagnoses (GD15-504):

> [GD3-6]
>
> 1. traffic accident with deceleration/flexion forces
> 2. soft tissue injury of neck and back secondary to no. 1
> 3. myofascial and mechanical back pain secondary to no. 2
> 4. postural problems including forward protruded neck increased thoracic kyphosis and weakness of core stabilizers of the lumbar spine contributing to problems of mechanical back pain
> 5. de-conditioning
> 6. obesity

[26] Dr. Smith then requested a lumbar MRI, which the Appellant got on October 5, 2006. But, it did not reveal anything unusual except for a mild facet arthropathy (GD15-87). In a follow-up dated November 14, 2006, (GD15-88) Dr. Smith was of the opinion that the Appellant

was not yet ready to return to her job as a cook, so he recommended either an exercise program that could increase the Appellant's functional ability or a change to sedentary work.

[27] On April 12, 2007, a second physiatrist, Dr. Béliveau (GD15-167), assessed the Appellant. At that time, the Appellant indicated that her pain was in her left buttock and thigh and that pain often bothered her at night. In his report, Dr. Béliveau noted that the Appellant had numerous physiotherapy, rehabilitation, and chiropractic sessions, received facet injections, and he even had the orthotics adjusted in her shoes. He concluded the following (GD15-168): [translation] "Today there is minor intervertebral disorder associated with facet abnormality, without any disc components. There seems to be a significant discrepancy in the clinical picture."

[28] On September 28, 2007, the clinical psychologist, Mr. Richard Bérubé, wrote a very comprehensive report about the Appellant (GD3-4). According to the Appellant's testimony, she consulted this psychologist to obtain this report, but according to Dr. Dupuis's progress notes, he had been following her since June 2006, every one or two weeks (GD15-251 and 253).

[29] In Mr. Bérubé's report, the Appellant's pain was reported as follows (GD3-5):

> [Translation]
> The results show that the client's pain is at 5 on a scale of 0 to 10 where 0=no pain and 10=unbearable pain when the client does nothing. The pain increases to a 7 when the weather is wet and towards the end of the day. [The Appellant] has pain every day that extends from her left buttock to the middle of her back. The pain is continuous, but it varies in intensity. It is felt as a heaviness or internal tremors in the form of pressure points. The use of a TENS machine and a wedge to lift her legs while lying down can temporarily relieve the pain. Pain severity varies with movement. The following things will increase the pain severity: wet weather, vacuuming, standing for long periods, sitting for long periods, walking long distances, and driving long distances.
>
> Associated with her physical condition, she says that she is nervous in a car, hypervigilant, tense, and cannot pay attention/concentrate. She sleeps well enough as she gets up rested. She is very emotional with mood swings, irritability, anxiety, and sadness. Social contacts are limited. Her appetite is good to the point that she eats her emotions. Also, [the Appellant] feels isolated because her activities are limited and she cannot follow others.

[30] The Appellant also told Mr. Bérubé that the state of her mental health seems to have been deteriorating since December 2006. In September 2007, Mr. Bérubé made the following diagnoses (GD3-9):

> [Translation]
>
> **Axis I:** **A clinical disorder or other condition that can be clinically examined**
>
> 309.81 Post-traumatic stress disorder (PTSD)
>
> 724.3 Pain disorder associated with a general medical condition: chronic
>
> 309.28 Adjustment disorder with anxiety and depressed mood
>
> **Axis II:** **Personality disorder or mental retardation**
>
> Dependent personality traits
>
> **Axis III:** **General medical condition**
>
> Back pain
>
> **Axis IV:** **Psychosocial and environmental problems**
>
> Problems with primary support group: car accident, health issues, and loss of physical ability. Work-related problems: inadequate income, inability to work, and loss of employment.
>
> **Axis V:** **Assessment scale for overall functioning for adults**
>
> ##41: Important symptoms of social and professional functioning

[31] Mr. Bérubé concluded that the Appellant had physical and psychological after-effects from the March 2005 accident that prevented her from returning to her job as a cook and from taking up any other employment. In reaching this conclusion, Mr. Bérubé also found that the

Appellant had significant issues concentrating and paying attention, and a modest academic ability (GD3-13). He recommended 20 treatment sessions of one hour.

[32] According to a progress note dated May 13, 2008, Dr. Dupuis discussed the Appellant's file with Dr. David as follows (GD15-261): [translation] "Given the limited improvements [with] injections, recommend orthopedic opinion: Dr. Efoé."

[33] The assessment by orthopedist Dr. Efoé was dated May 29, 2008 (GD2-139). He noted that the Appellant was being treated with Lyrica, Celebrex, and Flexeril. He cleared trochanteric bursitis, a diagnosis previously made and treated with cortisone injections, but they did not bring about any relief. Dr. Efoé reviewed an MRI (which does not appear to be in the appeal file) that showed [translation] "facet joint arthritis in her back and bulging discs with suspected radicular conflict." He discussed the file with the radiologist and they agreed to do another MRI to compare results. In the meantime, he recommended psychotropic medication, returning to physiotherapy, and stopping non-steroidal anti-inflammatories and repeated injections.

[34] The next MRI was on August 26, 2008, to determine whether there was left radicular conflict (GD15-164). Dr. Efoé saw the Appellant again on September 16, 2008, and reported the following (GD15-161):

> [Translation]
> I had asked for an MRI to rule out a left discoradicular conflict. The MRI, conducted on August 26, 2008, did not show a herniated disc or radicular conflict. This lady probably has anxiety and common low back pain with a strong psychological component. In her care, I had recommended the prescription of a psychotropic medication, particularly in the amitriptyline group. I think the last thing to be done for this lady is a neurological consultation to rule out a spinal cord condition, including the onset of MS, why not? This is the only diagnosis left to be ruled out. I am no longer scheduling her for orthopedic appointments; however, I am always willing to discuss this lady's case.

[35] This neurological assessment was done on November 19, 2008, by Dr. Vaucher (GD15-169). At that time, Dr. Dupuis added the drug Elavil to those listed above. According to Dr. Vaucher, there was no evidence of radicular abnormalities, the electrophysiological studies were entirely normal, there was nothing to suggest a demyelinating disease, and the neurological

examination was entirely normal. He raised the possibility of thoracolumbar junction syndrome, which Dr. Dupuis discussed with Dr. Efoé (GD15-170).

[36] Around December 2008, the Appellant told Dr. Dupuis that she could no longer afford Mr. Bérubé's services (GD15-264). She was then referred to regional community mental health services and, in September 2009, her file was assigned to Andrée Marquis, a social worker. The Tribunal identified the following key points from Ms. Marquis's report dated January 2, 2010 (GD2-84):

a) The Appellant has little education and would have had difficulties in school in the past, which explains why she would have opted for jobs that were rather manual.

b) At the time, the Appellant complained of the following symptoms: chronic pain and muscle spasms in her back, sleep disorder caused by chronic pain, irritability, fatigue, loss of appetite, feeling useless and powerless, loss of energy and interest, and reduced pleasure in the activities she previously enjoyed. She was also saddened by her loss of autonomy and it was difficult for her to cope with the worries caused by several psychosocial stressors, such as economic issues.

[37] Ms. Marquis was of the opinion that the Appellant could not meet the requirements of sedentary work (GD2-86) [translation] "because of her physical limitations and depression, she could easily become exhausted given her reduced ability, chronic fatigue, and lack of energy." Ms. Marquis noted that the Appellant had been going through this for four years without any improvement in her functional abilities. She recommended that the Appellant continue with mental health therapy sessions, continue with pain management sessions, and continue to be followed by her family doctor to provide appropriate pharmacotherapy.

[38] In a letter to a lawyer dated March 29, 2012, Dr. Dupuis described the Appellant's condition as follows (GD12-5): [translation] "This patient has chronic low back pain. This is a minor intervertebral disorder with facet abnormality. She also has a left hip bursitis. Her anxiety and depression are related to her chronic pain." She acknowledged the 2005 functional ability assessment, which found that the Appellant had the ability to do sedentary work with some basic

skills, but also raised the opinions of Mr. Bérubé and Ms. Marquis that it would be difficult for the Appellant to move towards a new occupation.

[39] Regardless of whether it was prepared after the Appellant's MQP, the Appellant's representative argues that particular importance should be given to the opinion of Dr. Perkins, [translation] "the greatest orthopedist in the region" (GD2-71 to 83). Dr. Perkins' report begins with helpful background information of the file and describes many treatments the Appellant has tried, such as massage therapy, physiotherapy, chiropractic, acupuncture, and pharmacotherapy.

[40] As for the Appellant's pain, Dr. Perkins reported the following:

a) At GD2-76: [translation] "The patient tells us that she has always had about the same degree of pain since her accident to the present day."

b) At GD2-76: [translation] "The pain is primarily described as stiffness and a burning sensation in the interscapular region and in the lumbar region. Her pain is exacerbated by certain movements and when the patient has to remain in a prolonged position. The pain that was initially rated 100% decreased to about 75% or 80%. She says she is constantly in pain. On her best days, the patient still tells us that she feels a certain level of pain and that, at the worst times, the pain is almost 100% compared to what she initially had. [...] She also says that her back pain tends to lead to radiation at her outer left thigh."

c) At GD2-81: [translation] "We already have, seven and a half years after the accident, a sample of what the pain will be like in the future. The patient reports remaining at about 70% of her original maximum pain."

[41] Dr. Perkins reviewed the radiology exams and noted (GD2-79), [translation] "Upon review, there are no abnormalities with the plain X-rays, and the MRI and CT scan are within normal values. The radiology exams, for all practical purposes, are within normal values. Only mild scoliosis is mentioned on the various exams but has no bearing on the issue at hand."

[42] Under "Social Life," Dr. Perkins noted that the Appellant did light work around her mother's house and that she did some sports such as snowshoeing and swimming. But, since the accident, the Appellant has said that she is no longer able to do any of these activities that she previously did (GD2-77). He concluded as follows (GD2-79):

> [Translation]
> Although there was no X-ray evidence of a fracture or dislocation of the dorsolumbar spine, the [Appellant] typically demonstrates a problem with the musculoligamentous region of the spine leading to a spinal ligament conflict. This can be summarized as a whiplash diagnosis of the dorsolumbar region. However, there is no associated neurological injury.

[43] Regarding the Appellant's disability and the likelihood of returning to gainful employment, Dr. Perkins accepted that the Appellant has relatively severe but partial functional impairments. However, he noted that just sitting still or maintaining the same position can also cause significant pain (GD2-80). He noted that the Appellant required periods to rest and change positions intermittently during work, which resulted in slow performance and a lack of productivity, efficiency, and profitability (GD2-81 to 82). He also feels that the Appellant's lower level of schooling would prevent her from retraining (GD2-82).

[44] He finished his report by saying it would be wise for the Appellant to apply for disability (GD2-82). In an additional note, Dr. Perkins noted that the further X-ray assessment had clearly shown (GD2-71) "that the patient remains with a severe spasmodic component due to her accidental trauma."

SUBMISSIONS

[45] The Appellant argues that she is eligible for a disability pension because she has not been able to work since her motor vehicle accident in 2005, and her condition has deteriorated gradually since then. The Appellant says that this deterioration in 2008 and 2009 is noticeable and points mainly to the following evidence:

a) the MRI of the lumbar spine in 2006 compared to 2008

b) changes to pharmacological treatments, mostly by Dr. Dupuis

c) as of 2009, the appellant required more psychological treatment

[46] The Respondent argues that the Appellant is not eligible for a disability pension because the medical evidence on file does not support that her condition deteriorated significantly, and that she became disabled during the period from January 1, 2008, to December 31, 2009. The Respondent points to the following evidence in particular:

a) Dr. Dupuis's progress notes do not show a deterioration of her condition.

b) The Appellant's pain has remained about the same since the accident on March 18, 2005.

c) Regarding mental health issues, not all treatment modalities have been tried and the evidence in the appeal file does not support a severe and prolonged disability.

ANALYSIS

[47] In this case, the Tribunal must decide whether it is more likely than not that the Appellant became disabled between January 1, 2008, and December 31, 2009.

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 consider the applicant's condition in its entirety, and factors such as age, level of education, language ability, and past work and life experience (*Villani* and *Bungay v. Canada (A.G.)*, 2011 FCA 47. The severity of the disability is not based on the applicant's inability to work at their regular job, but rather on their inability to work at any substantially gainful occupation (*Villani* and *Patterson v. Canada (A.G.)*, 2009 FCA 178).

[49] It is the ability to work, not the diagnosis or description of the illness that determines the severity of the disability under the CPP (*Klabouch v. Canada (MSD)*, 2008 FCA 33).

[50] Socio-economic factors, such as labour market conditions, are not relevant to a decision about whether a person is disabled under the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[51] This file is unique because there is a 2010 decision from the OCRT deciding the Appellant's disability on December 31, 2007, or earlier. Currently, the Tribunal has to decide whether the Appellant became disabled in 2008 or 2009, based on several pieces of evidence that the OCRT has already assessed.

[52] The Tribunal recognizes that there are currently more doctors, including Dr. Dupuis (GD2-69 and GD12-5) and Dr. Perkins (GD2-74), attesting to the Appellant's disability. However, even if the Tribunal accepts, for our purposes, that the Appellant had a severe and prolonged disability by the date of the hearing, the starting point for the Tribunal is necessarily the decision of the OCRT stating that the Appellant was not disabled by December 31, 2007. This means that the Tribunal must ask: did the Appellant become disabled in 2008 or 2009? Based on the evidence on file, the Tribunal is unable to answer yes to this question.

[53] The Tribunal placed significant weight on the reports of Dr. Smith dated April 5, 2006, (GD15-506) and Mr. Bérubé dated September 28, 2007 (GD3-4). That is because they show that the physical and psychological after-effects of the 2005 motor vehicle accident, discussed by several medical professionals after January 1, 2008, were all present before that date. The Tribunal carefully reviewed Dr. Dupuis's progress notes in 2008 and 2009 and, like the Respondent, found that they did not show a deterioration in the Appellant's condition during that period.

[54] Although the Appellant saw an orthopedist and neurologist for the first time during the relevant period, these references were not made due to an evolving clinical picture, but because of pain that was poorly understood and resistant to treatment.

[55] The Appellant underwent MRIs of her lumbar spine in 2006 and 2008, and claims that the comparison shows a deterioration of her condition. The results of the two radiology exams (GD15-87 and 164) are as follows:

Lumbar spine MRI – 2006	**Lumbar spine MRI – 2008**
Multiple sequences were realized in different planes. Normal corporeal heights and disc spaces. Normal disc hydration. Normal aspect of the pre and perivertebral soft tissues. Distal cord and conus appear to be of normal aspect. Mild degree of facet arthropathy, predominant at lower lumbar level. COMMENT: No significant abnormality identified apart from mild facet arthropathy particularly at the lower lumbar level.	Moderate global disc bulge at L4-L5 and LS-S1 level without any focal disc herniation or any definite discoradicular conflict. Intraspongeous herniation through the inferior endplate of D11, D12 and L1. The distal cord and conus show normal signal intensity. Normal signal intensity is noted also of the vertebral bodies and disc spaces.

[56] The Tribunal acknowledges that the results of these two tests are quite different. However, as Dr. Smith explained to the Appellant (GD15-504): "[I]t should also be noted that disc bulges or even disc herniations are common incidental findings on MRI studies and therefore one must always correlate between the clinical picture and medical imaging findings."

[57] The Tribunal could not make a finding based on these radiology exams because they are not associated with changes to the Appellant's clinical picture. For example, Dr. Efoé's and Dr. Vaucher's reports do not indicate that the Appellant's pain was increasing. Dr. Efoé did not seem to be concerned about the 2008 MRI results because he then stopped sending the Appellant to the orthopedic clinic (GD2-135). Also, according to Dr. Perkins' report, the Appellant's radiology exams were all within normal ranges (GD2-79) and the Appellant had told him that her level of pain has remained roughly the same since the accident (GD2-76).

[58] Changes to pharmacological treatments were made for a variety of reasons, including the opinion of the specialists consulted and the fact that the Appellant could not afford certain medications. The Tribunal was unable to make findings based on this information.

[59] Finally, the Appellant indicated during her testimony that she did not see Mr. Bérubé regularly, but saw him mainly for the assessment he wrote on September 28, 2007 (GD3-4). Instead, the Appellant's representative maintains that it was not until 2009 that the Appellant needed more intensive psychotherapy because of her deteriorating condition.

[60] The Tribunal cannot accept this argument. First, Dr. Dupuis's progress notes indicate that the Appellant had been consulting with Mr. Bérubé regularly since June 2006 (GD15-251 and GD253). Also, the fact that she was not consulting with him more frequently could also have been due to costs and not because there was no need. Mr. Bérubé noted in his report that the state of the Appellant's mental health seemed to be deteriorating since December 2006 (GD3-9). He diagnosed her with psychological disorders present in 2007 and recommended 20 treatment sessions of one hour. So, the Tribunal cannot accept that it was not until 2009 that the Appellant's mental health condition deteriorated to the point that she required fairly intensive psychotherapy. This need existed in 2007, at the time of Mr. Bérubé's report.

[61] In short, if the Appellant's condition deteriorated between December 31, 2007, and the date of the hearing, October 13, 2016, the Tribunal is unable to determine the effect of this deterioration in 2008 and 2009. At the hearing, the Appellant did not provide details. Dr. Perkins' report cites some functional limitations, but indicates that the Appellant has not been able to resume these activities since the 2005 accident (GD2-77).

[62] In addition, an employment counsellor at X reviewed medical reports given to her and found that they all dated back to 2005. In response to her request for more up-to-date information, on January 19, 2012, she received a call from Dr. Dupuis who confirmed that the 2005 reports were still valid and that the Appellant was capable of sedentary work (GD3-3). Again, the evidence on file tells the Tribunal that the Appellant's condition was rather stable.

[63] Regarding the Appellant's efforts in 2006 and 2007 to return to work and retrain, the OCRT assessed these efforts (GD7-15, para. 52). If the 15 rejection letters from prospective employers described in paragraph 22 above reveal further efforts that the Appellant made in 2008 and 2009, the Tribunal is not in a position to assess them, since they were never in the Tribunal's file.

[64] In assessing whether the Appellant's disability is severe, the Tribunal considered the Appellant's characteristics such as her age, level of education, language ability, and past work and life experience. On the one hand, the Tribunal acknowledges that an academic evaluation indicated that the Appellant's level of education is below Grade 6 requirements (GD15-27) and that the Appellant has always opted for jobs that are rather manual. On the other hand, the Tribunal notes that the Appellant was only 39 years old as of December 31, 2009, and that her language skills are good. These factors have changed little during the period that the Tribunal must decide.

[65] After a careful review of all of the evidence, the Tribunal could not conclude that the Appellant met the severe criterion under the Act.

PROLONGED

[66] Since the Tribunal has found that the disability is not severe, it is not necessary to decide on the prolonged criterion.

CONCLUSION

[67] The Tribunal carefully reviewed the medical reports and listened to the Appellant's testimony. The Tribunal recognizes that the Appellant has significant limitations, but the evidence on file did not allow the Tribunal to assess how those limitations might have evolved during 2008 and 2009. To accept the Appellant's arguments, the Tribunal is of the view that the OCRT decision would have to be reconsidered, which the Tribunal is unable to do.

[68] The appeal is dismissed.

Jude Samson
General Division – Income Security Member