Citation: *S. O. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 38

Appeal No: GT-119061

BETWEEN:

S. O.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Raymond Raphael
HEARING DATE	December 2, 2014
TYPE OF HEARING:	Videoconference
DATE OF DECISION:	December 5, 2014

PERSONS IN ATTENDANCE

S. O.: Appellant

Jose Carlos Macedo: Appellant's representative

A. O.: Appellant' wife

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on March 14, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated August 25, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] 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).

[6] 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.

[7] 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.

ISSUE

[8] The Tribunal finds that the MQP date is December 31, 2011.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

BACKGROUND

[10] The Appellant was 54 years old on the December 31, 2011 MQP date; he is now 57 years old. He was born in Honduras and immigrated to Toronto in 1987. He had a grade 12 education in Honduras, which is equivalent to a grade 10 education in Canada. In Toronto he worked as a cleaner, as a landscaper, and as a construction worker. In 1989 he fractured his ankle while working, and submitted a WSIB claim. He was off work for 4-5 years and attended WSIB programs to learn English, as well as computer and accounting skills. He was on an office placement for 2-3 months, but his English was too poor, and he didn't have the skills to do the work. Eventually, he was able to return to his work as a cleaner.

[11] In 1999 he was involved in two motor vehicle accidents (he was hit twice in one month); his major injury was to his back, and he underwent physiotherapy and other treatment. He was off work for several years, and in 2005 he started to slowly re-enter the work force. In 2008 he started to work full-time as a construction worker.

[12] In September 2009, he “burnt his eyes” because of ultraviolet light, and subsequently suffered “itchy and dry” eyes. Although he made a WSIB claim, it was determined that he was not entitled to any benefits because he did not miss time from work, and he did not have any permanent impairment. On January 16, 2010, he was removing temporary construction fencing, and suddenly fell backwards on at patch of black ice onto the sidewalk at his worksite; he landed onto the concrete pavement with his neck and back. He did not lose consciousness, but he was dizzy for several hours after the fall, and he was taken to the emergency department at Southlake Regional Health Centre. He returned to work on modified duties and last worked on May 27, 2010. He has not returned to work since that date. He was involved in a subsequent motor vehicle accident (MVA) on October 25, 2011.

Application Materials

[13] In his CPP disability questionnaire, date stamped by the Respondent on March 14, 2011, the Appellant indicated that he has a grade 10 education form Honduras, and that he last worked for Carillion Construction from May 2008 until May 27, 2010; he noted that he stopped working because of a traumatic work-related injury suffered on January 16, 2010. He also noted that he had to do lighter work after January 16, 2010 and that he could not cope due to the severity of his problems.

[14] He also noted that he had submitted WSIB claims, which were under appeal, for an injury to both of his eyes in 2009, and for an injury to his head, neck, and back in 2010. The Appellant did not indicate a date as of which he was claiming to be disabled, and indicated his main disabling illnesses and conditions to be as follows: severe neck and back pain; severe head pain with headaches and dizziness; left rib cage pain post rib fracture; burning pain in both eye; bilateral shoulder pain; depression and anxiety; poor sleep; fatigue; and that he was very limited with daily activities.

[15] When describing his difficulties/functional limitations he noted: that he can’t sit or stand for more than five minutes; that he can’t walk for more than 10 minutes; that he can’t lift, and has difficulty reaching or bending; that with respect to his personal needs he needs help drinking from his partner because of his neck and throat pain; that he suffers from

constipation because of his medications; that he is unable to do household maintenance; that he suffers from blurry vision; that he is forgetful and can't focus on simple tasks; that he sleeps poorly; that he has difficulty breathing and experiences shortness of breath; that he doesn't drive a car; and that he can use public transportation when his partner or son take him.

[16] A report dated February 22, 2011 from Dr. Fernandez, the Appellant's family doctor, accompanied the CPP application. The report diagnoses headaches and dizziness; mechanical back pain; cervical myofascial pain; anxiety and adjustment disorder; and major depression. The prognosis indicates that the Appellant suffers from a severe, prolonged, and substantial disability that prevents him from returning to any kind of gainful employment; that his condition is chronic and permanent; and that he is unlikely to improve.

ORAL EVIDENCE

Appellant's Evidence

[17] In his oral evidence at the hearing, the Appellant described in detail his education and work history in both Honduras and Canada. He also described his numerous motor vehicle and workplace accidents. When describing his workplace accident in January 2010, he stated that he slipped on black ice and fell on his head. After the accident he felt dizzy, tried to go back to work for a couple of hours, but started to experience more dizziness and vomiting. He was taken to the hospital emergency department. He stated, "I was experiencing pain all over my body." He was given pain killers and sent home from the hospital. The accident occurred on a Saturday, and he returned to work on the following Monday.

[18] His employer gave him lighter duties laying carpet, but he was unable to do this for a full eight hours, and he had to continually go out to his car to rest. After two weeks, he was sent to a construction site at the new CAMH building, where he was put in a small unheated booth, opening and closing the gate to allow construction vehicles to enter and leave the site. He had to continually go and lie down in his car because he felt dizzy and nervous; he was bothered by the noise; he heard a buzzing sound; he was vomiting; and he experienced a lot

of pain in his back and neck. In March he fell, while trying to go to his car, and was again taken to the hospital. He was released from the emergency department after five hours, and returned to work the next day doing the same job. He asked for a different job, but was told "that is all we have."

[19] He went for physiotherapy and chiropractic laser therapy treatments. He continued to experience a lot of pain and dizziness. He stopped working on May 27, 2010, after Dr. Kirwin checked him over for two hours, and told him that he has to stop working because of his pain, nervousness, and stress. He continued with laser therapy after he stopped working but the treatments weren't helpful. In May 2010, Dr. Fernandez sent him to see Dr. Kirwin, a physiatrist; to Dr. Picard, a neurologist; and to Dr. Hanick, a psychiatrist. He saw another psychiatrist, Dr. Arbitman, in January 2011. He saw Dr. Hanick again in October 2012. Dr. Hanick's office notes confirm that the Appellant saw Dr. Hanick on a monthly basis from October 2012 through to December 2013.

[20] He has not looked for work after May 2010. He stated that he isn't able to return to work because he is only able to sleep 3-4 hours a night, he is constantly in pain, he takes a lot of medication, he is confused and nervous, and he frequently vomits. He stated, "I have a lot of pain in my life." His only present treatments are medications. The WSIB sent him for a regional evaluation by Dr. Malcolm in December 2010, and Dr. Malcolm recommended that he attend a pain clinic; however, the WSIB refused to pay for any pain or treatment programs. The WSIB did not agree to a Functional Restoration Program (FRP), or a Labour Market Re-entry (LMR) program. They have denied liability based on the May 2011 assessments (see paragraphs 38 to 43 below). He attended for injections at Dr. Wilderman's pain clinic in 2013, but they didn't help.

[21] He concluded his evidence by describing how the January 2010 accident has affected his life. He stated that he just stays home and doesn't go outside; he isn't able to do any housework; he only drives to see his doctor or to go downtown to see his son; and he might go shopping at the corner store for five minutes. He can't watch television because his eyes will bother him, and he can't read because he gets headaches. He stated, "My mood is getting deeper and deeper…I have no energy …. I am always fatigued."

Mrs. A. O.'s Evidence

[22] She met the Appellant at the gym in 2006. At that time he was muscular, lifted weights, and was focused on maintaining his health. The January 2010 accident has had a big impact. When describing the period up to May 2010 during which the Appellant was working on modified duties, she stated, "It was awful…he couldn't sleep…he was in pain…he couldn't see properly because of his eye injuries…he was ill…he was wiped out when he came home from work, and needed to immediately go to bed…he was exhausted and worried that he was going to have a heart attack…he thought he had to do everything through his doctors…finally the specialist stopped him from working."

[23] The Appellant was involved in a motor vehicle accident in October 2011 and suffered further injuries. She recalls that he went for physiotherapy for his knee, and underwent knee surgery. The October 2011 MVA exacerbated his conditions.

[24] After May 2010, they were hoping he would get better with the physiotherapy and rest. Going to see all the doctors was like a full-time job. He was resting, but nothing worked. She recalls the Appellant seeing a psychiatrist in May 2010 because he was very depressed and feeling tired all of the time. She stated that nothing has improved since the Appellant stopped working, and that he is actually getting worse. She doesn't feel that he is able to do any kind of work because of his pain and exhaustion.

MEDICAL EVIDENCE

[25] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

Reports prior to Appellant stopping work

[26] A Functional Abilities Form (FAF), dated February 5, 2010, completed by Dr. Roya Salehoun, from Physiotherapy Fix, indicates that the Appellant is unable to maintain repetitive work, and recommends modified hours.

[27] A FAF, dated February 25, 2010, completed by Dr. Fitz-Rison, chiropractor, indicates that the Appellant is suffering neck pain and headaches, and that he is on reduced

duties. A report from Dr. Fitz-Rison dated February 26, 2010 indicates that the Appellant's symptoms include insomnia, dizziness, headaches, neck and back pain, limited range of motion in the cervical and lumbar spines, and radiation into the right leg. The diagnosis is post-traumatic grade II whiplash, with cervical spine disc protrusion. On April 28, 2010 Dr. Fitz-Rison recommended that the Appellant stop working.

[28] On May 10, 2010 Dr. Hanick, psychiatrist, reported that the Appellant suffers from chronic adjustment disorder, with features of depression and post-concussional disorder/post-traumatic syndrome. The report notes that much of the Appellant's distress rests with his physical injuries, and that he requires aggressive treatment, rehabilitation and perhaps more significant analgesia; that his depression and emotional distress rests with his pain and consequent disability; and that given the reactive nature of his disability, he is not likely to respond to treatment and medication until his situation can be improved.

[29] On May 17, 2010 Dr. Kirwin, physiatrist, reported that the Appellant presented with neck and low back pain, headache, and right leg pain following a fall at work on January 16, 2010. The report notes that after this accident, the Appellant could not return to his regular job, and that he was transferred to a job where he was in a booth and responsible for opening the gate at the Centre for Addiction and Mental Health. This job required the Appellant to stay in the booth all of the time with no heating, and he had difficulty doing the job because of his multiple pains.

[30] Dr. Kirwin concluded that the Appellant is suffering from non-specific cervical, thoracic and lumbar pain with non-specific primarily right side paresthesia; non-specific right arm and leg weakness; post-traumatic vertigo; hearing complaints; cervicogenic headache; non-specific right ankle arthralgia; and bilateral rotator cuff tendinosis. Dr. Kirwin recommended that the Appellant be excused from work until he has a total body scan, as well as other investigations by his neurologist and ENT specialist.

[31] On May 18, 2010 Dr. Picard, neurologist, reported to Dr. Fernandez. The Appellant's complaints included headaches, buzzing tinnitus in his ears, sonophobia, awareness of heart action and chest pain, shaking throughout his body, a sense of swelling in his throat, and loss of appetite. The Appellant was on Oxycocet, amitriptyline, meloxicam,

and ranitidine. Dr. Picard reported that examination proved difficult, and that the dominant feature of the examination was a marked increase of the Appellant's level of pain from baseline. He noted that they had to take numerous breaks throughout the examination because the Appellant felt he could not tolerate the manoeuvers, and that testing his reflexes at virtually every site was indicated to be painful. He prophetically commented as follows:

> As I am sure you know, post-traumatic pain disorders of this type are difficult to treat and often prove to be refractory to every available therapy including medication, psychological therapies and physical therapies.
>
> Is [sic] common practice in conventional wisdom to send these patients for extended courses of physically-based therapies but the results are often disappointing to all concerned.
>
> Cases of this type often prove to be controversial.

[32] On May 25, 2010 Dr. Kirwin reported to Dr. Fernandez that there had been no change in the Appellant's symptoms, and that the Appellant had returned to complete his FAF form. He noted that the Appellant had been called to return to work last week, but he could not do it because the walking increased his back pain, because he experiences ongoing dizziness, and because the noise at work increased his pain, caused ringing in his ears, and caused increased headaches. Dr. Kirwin filled out the FAF form excusing the Appellant from work until his review of the bone scan and other investigations was completed. The FAF indicates that the Appellant is unable physically to return to work at this time.

Reports after Appellant stopped working

[33] On September 23, 2010 Dr. Kirwin reported that he had reviewed all of the notes from the Appellant's other specialists, that there were no problems found, and that these specialists were diagnosing him with a chronic pain syndrome. Dr. Kirwin concluded that the Appellant was most likely suffering from chronic pain syndrome, and that he also appears to have a right anterior talofibular ligament strain. He noted that the Appellant may formally discontinue his physical therapy.

[34] On January 7, 2011, Dr. Arbitman, psychiatrist, diagnosed a pain disorder with anxiety and depression, and opined that the Appellant was in no condition to work at the present time. Dr. Arbitman noted that the Appellant was already on anti-depressant and

tranquilizing medication, and indicated that he had nothing further to add to the Appellant's present regime.

[35] On December 10, 2010, Dr. Malcolm, orthopaedic surgeon, reported to the WSIB on his Regional Evaluation Centre assessment of the Appellant. Dr. Malcolm reviewed in detail the Appellant's workplace injury in January 2010 and his subsequent medical treatment. Dr. Malcolm noted that the Appellant began physiotherapy at the end of February 2010, and that he attended three to four times per week for 3-4 weeks. The Appellant had TENS and acupuncture, as well as some active range of motion; but he reported dizziness with active movements and couldn't do them. He then attended chiropractic three times a week for two months, which comprised laser therapy; but, this increased his pain. The Appellant had another trial of physiotherapy from May to June 2010 for about seven weeks; he had heat and modalities, and received instruction in a home exercise program.

[36] The Appellant reported constant occipital, cervical, thoracic and upper lumbar pain, numbness in his right arm, and intermittent dizziness. The Appellant stated that cervical spine ranges of motion cause anxiety, trembling, and dizziness; that coughing increases his pain; that his dizziness is associated with ringing in his ears; that he has had difficulty swallowing for a month; that he has some occasional drop attacks secondary to sharp pain in his right thigh; that he has gait disturbance secondary to pain and limping on the right side; and that he has some double-vision and other difficulties, possibly related to an eye injury which occurred in October 2009.

[37] Dr. Malcolm stated that it is clear that the Appellant's dizziness and chronic pain are the major constellation of symptoms preventing physical restoration. His diagnoses included closed head injury, cervical strain, probable right shoulder strain, and chronic pain. He recommended that the Appellant be referred to a functional restoration, or equivalent, program.

WSIB May/June 2011 Assessments

[38] On May 3, 2011 Dr. Ranali, neurologist, reported to the WSIB on his neuro-ophthalmological assessment of the Appellant. Dr. Ranali reviewed the radiographic testing

to date and noted that the CT brain scan on January 16, 2010 was normal; that the MRI brain scan on April 16, 2010 revealed non-specific white matter changes associated with age; and that the MRI of the cervical spine revealed degenerative changes at several levels. The Appellant's current concerns and symptoms included dizziness, headaches/neck pain, intermittent palpations, insomnia, right ear pain, and persistently dry and itchy eyes. The report notes that the Appellant displayed numerous pain behaviours and symptom magnification throughout the interview and examination. Dr. Ranali diagnosed chronic dry eye syndrome unrelated to the workplace accident, and an otherwise normal neuro-ophthalmological examination. He opined that from a neuro- ophthalmological perspective there were no restrictions on the Appellant's return to work.

[39] On May 19, 2011 S. C., pharmacist, reported to the WSIB on her pharmacological assessment. She noted that there may be a medically induced component to the Appellant's headaches. She noted that the Appellant's current prescribed medications included Oxycocet, clonazepam, meloxicam, quetiapine, venlafaxine, and omeprazole. She expressed concerns concerning the efficacy, and potential psychological and physical dependence that may be created by the Appellant's medications.

[40] On May 19, 2011 Dr. Farewell reported to the WSIB on his psychiatric assessment of the Appellant. Dr. Farewell opined that the Appellant no longer meets the criteria for either an adjustment disorder or a mood disorder; and that his previous diagnosis of adjustment disorder with depressed mood and anxiety was now resolving, and that his major depressive disorder was now in remission. Dr. Farewell noted that pain disorder associated with both psychological factors and a general medical condition should be ruled out, and that cognitive disorder should be deferred to the new neuropsychologist. Dr. Farewell noted that the Appellant was a vague historian, especially with respect to pre-accident periods of disability and his basis for leaving Honduras. He noted that the Appellant demonstrated consistent pain behaviour across the assessment, but the type of pain behaviour varied, and that grimacing behaviour which was common at the outset of the assessment did not continue. Dr. Farewell also noted the Appellant's fluid movements when demonstrating dancing appeared inconsistent with his other pain behaviours. He further noted that the Appellant's emphasis was on his perception of himself as disabled and that he was symptom

focused. Dr. Farewell opined that the Appellant's prognosis for returning to work from a psychiatric perspective with respect to mood and anxiety should be good.

[41] On May 26, 2011 Dr. Sourkes, neurologist, reported to the WSIB on his neurological assessment. His diagnoses included: head injury, unlikely mild brain injury/concussion, judged to be resolved even if he had this; non-specific headaches, possible medication overuse headaches; resolved cervical strain; query, inappropriate opiate use; query somatoform disorder; suspect malingering of symptoms; possible dry eyes.

[42] On June 2, 2011 Dr. Slonim, psychologist, reported to the WSIB on his neuropsychological assessment. His diagnoses included: probable malingered neurocognitive dysfunction; probable malingered psychiatric dysfunction; and rule out possible adjustment disorder with depressed mood and anxiety. Dr. Slonim commented that the Appellant presents with numerous, extreme, and atypical symptoms that are greatly out of keeping with the accident parameters and subsequent objective studies. He further commented that his neuropsychological evaluation revealed a range of empirical evidence of malingering, including exaggeration of cognitive, psychiatric, and somatic symptoms, as well as level of disability. Dr. Slonim had no recommendations for treatment from the neuropsychological or psychological perspective.

[43] In a case conference summary dated June 9, 2011 on behalf of the WSIB assessing doctors, Dr. Massanic indicated the case conference final diagnoses included head injury, direct, no brain injury; nonspecific headaches, possible medication overuse headaches; cervical strain resolved, with ongoing nonspecific complaint of neck pain, with no evidence of a cervical radiculopathy or myelopathy; probable malingered neurocognitive dysfunction; probable malingered psychiatric dysfunction; no longer meets criteria for either an adjustment disorder or a mood disorder; and cannot rule out acute vestibular injury.

Dr. Fernandez's Pre-MQP clinical notes

[44] Dr. Fernandez's clinical notes from February 2010 to December 2011 were included in the hearing file.

[45] The noted dated February 4, 2010 indicates a date of accident of January 16, 2010; and that the Appellant was experiencing acute exacerbation of his lower back pain and stiffness, difficulty with prolonged sitting, standing, bending, and lifting; and that he was attending physiotherapy. The report also notes anxiety disorder, and that the Appellant required cognitive restructuring to address his feelings of helplessness and anxiety.

[46] The note dated May 20, 2010 indicates mechanical lower back pain, cervical myofascial pain, right rotator cuff tendonitis, anxiety disorder, and depression. The note indicates that the Appellant has great difficulty staying at work; that the work he does is very artificial; and that he will not be able to substantiate his presence at a real job. The Tribunal noted that this clinical note coincides with the date the Appellant stopped working.

[47] The note dated July 19, 2011 indicates severe neck and low back pain with stiffness; anxiety; insomnia; and stress. Dr. Fernandez noted that the Appellant "has long since reached maximum level of recovery, at a dysfunctional level." The Tribunal noted that this clinical note coincides with the WSIB assessments set out in paragraphs 38 to 43, above.

[48] The note dated October 1, 2011 refers to a letter from the WSIB accusing the Appellant of malingering. Dr. Fernandez commented that "there is a culture barrier", and that the Appellant "appears to be [an] extremely sincere, consistent historian", who is "concerned about his future, [and] inability to work." The note concludes that the Appellant [is] indeed unable to work.

[49] The note dated December 13, 2011 indicates chronic low back pain and stiffness, neck pain and stiffness, not working, and significant depression. The note also indicates that the Appellant appears downcast, dysphoric, and in obvious pain and discomfort. The impression is cervical lumbosacral myofascial pain, chronic headaches, post-traumatic anxiety disorder, and adjustment disorder with depression. Supportive psychotherapy was given. The Tribunal noted that this clinical note coincides with the MQP date.

Post-MQP reports

[50] On October 11, 2012 Dr. Hanick reported to Dr. Kirwin that over the last six months, the Appellant has become despondent and has thoughts of suicide. Dr. Hanick reported that

the Appellant now suffers from a major depressive episode with features of a post-concussional disorder/post-traumatic syndrome. Under the Axis II diagnosis there was a concern about possible more dramatic and even histrionic features. Under the Axis III diagnoses the Appellant continued to suffer with cervicogenic and perhaps vascular headaches, neck and low back mechanical dysfunction syndromes, right side sciatica, and a left knee injury. The Appellant had come to see himself as useless and his Global Assessment of Functioning (GAF) was between 50 and 55. Dr. Hanick planned to treat the Appellant's depression more aggressively, and to follow him during this time of tumult.

[51] Dr. Hanick's office notes confirm that the Appellant saw him on a monthly basis from October 11, 2012 through to December 12, 2013.

[52] Dr. Hanick's office note dated December 12, 2013 indicates that the Appellant's pain persists, but he benefits from oxycodone control-release, and medications for his mood. Dr. Hanick noted that in his non-specific fashion, the Appellant described feeling "bad", and that his sleep and vegetative signs were also described as "bad", without elaboration. The Appellant no longer actually believed that he was being followed, but conceded that he feels that he is being followed. On falling asleep he has heard his name being called and wonders about the significance. He remains idle, doing 'completely nothing.' The Appellant was unshaven, staggered in a controlled fashion, and had simply fallen into his seat. The Axis I diagnoses included query emerging delusional disorder, major depressive disorder, chronic adjustment disorder, and post-concussional disorder/post-traumatic syndrome. The Axis III diagnoses included chronic pain disorder, persistent somatic symptom disorder with predominant pain, severe mixed cervicogenic/vascular headache, neck and back dysfunction, right–sided sciatica, left knee meniscal surgery, and query sleep apnea. Dr. Hanick assessed a GAF of 50-55. The Appellant's medications included sertraline, mirtazapine, risperdidone, clonazepam, oxycodone, and olanzapine.

[53] On December 11, 2013 Dr. Wilderman, pain and addiction consultant reported that the Appellant has been diagnosed with occipital neuralgia, fibromyalgia, degenerative disc disease, and osteoarthritis of the spine. Dr. Wilderman opined that at this point in time, the

Appellant is not fit to partake in any and every form of gainful employment due to actual or anticipated physical and psychological pain and distress due to his injuries.

[54] On January 5, 2014 Dr. Kirwin reported that his up to date diagnosis of the Appellant was a chronic pain syndrome (primarily manifested as chronic mechanical cervical thoracic and lumbar pain, plus cervicogenic headache), fibromyalgia, as well as depression and anxiety. Dr. Kirwin opined that the Appellant is totally disabled from pursuing or engaging in any form of substantially gainful occupation. Dr. Kirwin noted that the Appellant's chronic severe multi-site pain limits his ability to perform activities which require flexing, twisting and extension of his cervical and thoracic spine, and that his chronic severe low back pain limits his abilities to sit, stand, or walk for prolonged periods of time. Dr. Kirwin did not expect any substantial improvement for the foreseeable future. Dr. Kirwin opined that at no time after the Appellant stopped working on May 25, 2010, did he have the capacity to pursue any form of substantially gainful employment.

SUBMISSIONS

[55] Mr. Macedo submitted that the Appellant qualifies for a disability pension because:

a) He suffered a very traumatic work-related accident on January 16, 2010 as a result of which he suffered multiple physical injuries, and developed multiple disabling psychological conditions;

b) He attempted to continue working on modified duties, but was not able to continue after May 2010, when he stopped working at the direction of his treating physicians;

c) Because of the cumulative effect of his multiple physical and psychological conditions, he has suffered great life disruption and is dependant on his wife for many activities of daily living;

d) He is substantially and permanently disabled from pursuing any form of gainful employment;

e) His personal characteristics including his age, limited education and English language proficiency, and narrow work history involving primarily heavy physical

labour, together with the barriers caused by his multiple conditions, render him incapable of pursuing any form of gainful employment on a regular and consistent basis;

f) The reports from the Appellant's treating physicians, as well as the December 2010 assessment by Dr. Malcolm for the WSIB, confirm the Appellant's long- standing disabling conditions and that he has pursued all recommended treatment modalities. These reports should be preferred to the May/June 2011 assessments by experts retained by the WSIB, who may have a bias in favour of the WSIB, and who were not involved in the Appellant's treatment. Mr. Macedo emphasized that none of the treating physicians ever questioned the Appellant's integrity or veracity in regards to his symptoms, and that their diagnosis of chronic pain syndrome was similar to Dr. Malcolm's diagnosis.

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

a) The Toronto Rehabilitation assessments indicate that there is no evidence to establish the existence of either post-traumatic stress disorder or psychotraumatic disability; that the Appellant does not meet the criteria for an adjustment, anxiety, or mood disorder; that although he might have suffered a mild traumatic brain injury/concussion, any resulting symptoms should have resolved; that his persistent head-aches were non-persistent and are possibly the result of medication; that he was not precluded from work from a neurological perspective; and that his cervical strain had resolved;

b) These assessments opine that the Appellant' symptoms were likely exaggerated, and that they were suggestive of pain behaviours, symptom magnification, and malingering;

c) Although the Appellant has limitations, the medical evidence does not support disabling medical conditions precluding him from working.

d) The Appellant's disability does not meet the CPP severe and prolonged criteria.

ANALYSIS

[57] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2011.

Severe

[58] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

[59] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[60] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2011 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General,* 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[61] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada* (Attorney General), 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[62] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at

obtaining and maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada* (Attorney General), 2003 FCA 117.

[63] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[64] There is no authorative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real: *Nova Scotia (Worker's Compensation Board) v Martin* [2003] SCC 54.

[65] The assessment of the credibility of a witness is more of an art that a science *R v S. (R.D)* [1997] 3 S.C.R.484 at para. 128. Demeanor can be misleading, and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency, and consistency with contemporaneous and undisputed documents. The Tribunal found the Appellant's oral evidence to be at times vague and non-specific; however, his description of his symptoms, and how they have affected his life and capacity to work, was consistent with the very extensive treatment medical documentation. Significantly, his description was consistent with the reported symptoms in his office visit with Dr. Fernandez in February 2010, and in his consultations with several treating specialists prior to his stopping work in May 2010. The Appellant impressed the Tribunal as a sincere witness who, despite obvious memory difficulties, was genuinely trying to describe his conditions and symptoms to the best of his ability.

[66] The Tribunal relied to a large extent on the medical reports from the Appellant's treating physicians and specialists, all of whom confirm the Appellant's long-standing

symptoms and efforts to get better. He continued working to the best of his ability until May 2010, and did not stop working until he was advised to do so by Dr. Kirwin. By that point he was taking significant medications, he had attended for physiotherapy and laser therapy, and he had consulted with numerous specialists including Dr. Picard, a neurologist, Dr. Hanick, a psychiatrist, and Dr. Kirwin, a physiatrist. The primary diagnosis appears to have been chronic pain syndrome and associated psychological conditions. None of the treating physicians have suggested that the Appellant is feigning or exaggerating his symptoms in any way. The *Martin* case, supra, indicates that "there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real." Despite what may be referred to as a lack of objective findings, the Tribunal is satisfied that the Appellant is suffering and in distress, and that the disability he experiences is real.

[67] The Tribunal also placed significant reliance on the assessment by Dr. Malcolm in December 2010, which was performed on behalf of the WSIB. Dr. Malcolm's diagnoses were similar to those of the Appellant's treating physicians, and he recommended to the WSIB that the Appellant be referred to a functional restoration or equivalent program. Unfortunately, this recommendation was not accepted by the WSIB.

[68] The Respondent relies on the assessments by the experts retained on behalf of the WSIB (see paragraphs 38 to 43 above); however, the Tribunal prefers the opinions and diagnoses of the Appellant's long-standing treating family doctor and specialists including Dr. Fernandez, Dr. Kirwin, and Dr. Hanick. These physicians saw and treated the Appellant over an extended period, and their reports are all supportive of the Appellant's disability claim. They know the Appellant far better than the WSIB experts, who only saw him for assessment purposes. The Tribunal also considered it to be significant that the diagnoses and treatment recommendations in Dr. Malcolm's December 2010 assessment for the WSIB, are consistent with those of the treating physicians.

[69] The Tribunal has taken into consideration all of the Appellant's multiple physical and psychological conditions, and is satisfied that he lacks the residual capacity to pursue any form of gainful employment on a regular and consistent basis. (see *Bungay*, *Barata*, and *Bennett*, supra). The Tribunal has also considered the Appellant's personal characteristics

including his age, limited education and English language skills, and his narrow work history consisting primarily of heavy physical labour.

[70] After a careful and detailed review of the totality of the evidence, the Tribunal is satisfied on the balance of probabilities, that the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[71] Having found that the Appellant's disability is severe, the Tribunal must also make a determination on the prolonged criteria.

[72] The Appellant's disabling conditions have continued since he fell in January 2010, and despite extensive treatment there has been no improvement. Unfortunately, the Appellant appears to be deteriorating.

[73] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[74] The Tribunal finds that the Appellant had a severe and prolonged disability in May 2010, when he was no longer able to continue working on modified duties. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of September 2010.

[75] The appeal is allowed.

Raymond Raphael
Member, General Division