

Citation: *A. Y. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 4

Appeal No: GT-118886

BETWEEN:

A. Y.

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 8, 2014

TYPE OF HEARING: Videoconference

DATE OF DECISION: January 12, 2015

PERSONS IN ATTENDANCE

A. Y.: Appellant

Martin Zatoeknuk: Appellant's representative

L. S.: Witness (Appellant's cousin)

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on June 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 27, 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 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, 2010.

[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 41 years old on the December 31, 2010 MQP date; he is now 45 years old. He was born in Iraq and had a high-school education there. He worked as a welder in Iraq and immigrated to Canada in 1989. In Canada he worked as a welder, a landscaper, and lastly as a tow truck operator. He was involved in an initial motor vehicle accident (MVA) in September 2002, and in a second MVA in August 2009. He claims chronic pain syndrome, depression (anger management issues), chronic back and left hip pain, migraines, and sleep disturbance as his main disabling conditions.

APPLICATION MATERIALS

[11] In his CPP disability questionnaire, date stamped by the Respondent on June 14, 2011, the Appellant indicated that he last worked as the owner/operator of a tow truck company from April 23, 2008 until September 29, 2009; he noted that he stopped working in the business because of pain caused by a motor vehicle accident (MVA). He noted that

his other work in the last five years included working for UTC Landscaping, SMR Landscaping, and T. G. He claimed to be disabled as of September 29, 2009. He noted that he was going for physiotherapy for his neck and hip three times a week, and that he was seeing a psychiatrist on a monthly basis.

[12] A report from Dr. Cooper, psychiatrist, dated stamped June 14, 2011, accompanied the CPP application. The report diagnosis chronic pain syndrome, chronic adjustment disorder, socioeconomic problems, and issues with legal authorities. Dr. Cooper assessed a Global Assessment of Functioning (GAF) of 50-55. With respect to relevant medical history Dr. Cooper noted that the Appellant was depressed, irritated, and experienced angry outbursts; that he has never been the same since he was involved in the MVA on August 29, 2009; that he suffered from back pain, and pain in his left hip and leg, headaches, and problems with sleep because of his pain. The report notes that psychiatric medications are not helpful because of the side-effects. The treatment included supportive psychotherapy and anger management.

ORAL EVIDENCE

Appellant's Evidence

[13] In his oral evidence at the hearing, the Appellant had great difficulty recalling the details and dates of events. He couldn't remember when he immigrated to Canada, and whether he came as a refugee claimant. He recalled that he came to Canada because of his being involved in fights in Iraq because he was a Christian. He recalled working in Canada as a welder, and then as a landscaper, but he couldn't remember when he started working as a tow truck driver. He couldn't remember if he worked at any other jobs in Canada. He recalls that he had his own tow truck company, and thinks he had two trucks. He was working very long hours –seven days a week, from five in the morning until nine at night.

[14] He stated that he hasn't been able to work since the August 2009 MVA because he is always in so much pain. He has pain in his neck, back, and head; he can't sleep; he can't remember anything; all that he thinks about is his pain; and he can't walk because of the pain in his hip and low back. His condition has been getting worse. Sometimes he can't

sleep for days at a time. Sometimes he wonders out, and can't find his way back home; the police either bring him home in a cruiser or send him home in a taxi. The only way he copes is by living with his mother - he doesn't go out anywhere and just stays home with his mother. When explaining why he moved in with his mother he stated, "I had lost everything...I lost my business...my credit cards... I had no one to take care of me...I had no one to help me...I had no money...I live with my mother because I need her to help me."

[15] When referred by the Tribunal to Dr. Cooper's April 2011 report which indicates that he had an argument with another man who told him he was in his territory, the Appellant stated that he wasn't working and that he was just trying to get his truck back from the person who was operating it, and not paying the lease. That person threatened him, and the police were called. He told Dr. Cooper about what had happened, and Dr. Cooper told him to let the police deal with this. Eventually, he was able to get the tow truck back, and he returned it to the leasing company.

[16] He sees his family doctor on a weekly basis for pain injections; but these don't help, if he is in a lot of pain. He recalls going to the Rothbart Clinic for injections to his back, neck, shoulders, and neck. The injections only helped for a few days, and the Rothbart Clinic told him that they couldn't give him any more injections because they weren't helping him. He went for physiotherapy after the MVA; he went every day, but stopped when the insurance company refused to continue paying. He stated that the physiotherapy helped a bit.

[17] He could not recall if he tried to continue working after the MVA. When referred by the Tribunal to Dr. Cooper's January 24, 2013 report which indicates that the Appellant could only work 2-3 hours a day when he first saw him in October 2009, the Appellant couldn't remember if he tried to go back to work for three hours a day after the accident. He stated that he didn't look for less physically demanding work because he was in so much pain, and he had to go for treatments. He still sees Dr. Cooper once or twice a month. Dr. Cooper has told him that he can come without an appointment, and he has never missed an appointment with Dr. Cooper. Dr. Cooper helps him by telling how to try

and get some sleep, and how to cope with the pain. He stated, “Dr. Cooper takes care of me, he calms me down.”

[18] The Appellant stated that he has lost his life...that he has lost everything. There is no one there for him, except for Dr. Cooper. He just spends his days at home with his mother; sometimes, one of his cousins will come and pick him up. He usually just talks to his mother, and tries to watch a little television. He doesn't go out. He stated, “I don't trust people anymore...I am confused...sometimes I go places and can't remember how to get home..... the police send me home in a cruiser or a cab.” One of his cousins will take him to medical appointments.

[19] His memory problems started right after the MVA. After the accident, he couldn't control himself...he doesn't remember if he had problems with the police. Sometimes he is so sick of himself, that he doesn't know what to do. He stated, “If my mother wasn't there, I wouldn't know what to do...I wouldn't know what to eat.”

L. S.'s Evidence

[20] Mr. L. S. testified that he has known the Appellant for 15 years. The Appellant used to own tow trucks, and he was working more than 12 hours a day. He didn't have any problems working before the MVA.

[21] Since the accident he forgets things, and his memory is very poor. Sometimes, the Appellant calls him for a ride but won't even know the location of the place he is supposed to go to. He is always at home with his mother, and rarely goes out. He drives the Appellant to appointments for his injections. Other people also come and take him out. When he has anger or stress problems at home, his mother will call someone to take him out for coffee. He doesn't think that the Appellant could properly do any kind of job because of his memory problems. Sometimes he doesn't remember anything; and sometimes he remembers things from twenty years ago. He is now a little more controlled than he was before; he is a little quieter and much better than he was a few years ago.

MEDICAL EVIDENCE

[22] 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.

Pre-MVA reports

[23] On December 13, 2005 Dr. Gotkind, psychiatrist, diagnosed the Appellant with chronic anxiety disorder with irritable outbursts, depression, and terrible tension headaches.

[24] On March 7, 2006, Dr. Angilletta, family doctor, noted that the Appellant suffers from depression and diffuse pain of his knees and legs. The Appellant was to be off work immediately until further notice.

[25] On August 21, 2006 Dr. Amba, rheumatologist, assessed the Appellant for left hip discomfort. Dr. Amber noted that the Appellant's examination was completely unremarkable.

Pre-MQP reports

[26] On October 7, 2009 Dr. Cooper reported on his initial assessment of the Appellant. The Appellant stated that he was in good health until he was involved in a MVA on August 29, 2009, and that after that he life changed; he became depressed, irritable and tense. The report indicates that for the last few years the Appellant had been working as a tow truck driver and that he used to work 16 hours a day, and that he was now working 2-3 hours a day. The Appellant complained of back pain, and that at times the pain goes down his left hip and leg. The Appellant stated that he feels tired and exhausted; that he has flashbacks of the MVA; and that he feels very weak. The Appellant also stated that he has a buzzing sound on the left side of his head, and that he was having bitemporal headaches. The report concludes that the Appellant is experiencing a pain syndrome and many aspects of a post-traumatic stress disorder. He was also going through an adjustment order which Dr. Cooper felt would be chronic, as well as aspects of a major reactive depression

[27] On November 10, 2009 Dr. Cooper reported that the Appellant was feeling much better, and sleeping better. He commented, "Generally, he has been doing quite well." The Appellant told Dr. Cooper about an incident with another tow truck driver in April 2008, when he was charged with assault with a dangerous weapon; the Appellant stated he was just arguing and using a screw driver. Dr. Cooper understood that the Appellant would be taking anger management.

[28] On May 31, 2010 Dr. Chaiton, pain management, saw the Appellant for complaints of left hip pain that seems to come and go, and that are not consistently related to the time of day, position or activity. The report notes that the Appellant is currently employed as a truck driver and that he has been off work for several months. The Appellant denied radicular pain. Dr. Chaiton concluded that the cause of the Appellant's symptoms was unclear, and not revealed by a recent pelvic and left hip x- ray.

[29] There are handwritten office notes from Dr. Cooper dated November 10, December 6, and December 9, 2010. The notes are to a large extent illegible. They appear to relate to difficulties that the Appellant was having with his probation officer, and her wanting the Appellant to attend for anger management. The note dated December 6th is in more legible hand-writing. The note indicates that Blackwell Probation called and wants to know how often the Appellant is seen, and advised that the Appellant yells and screams when he is seen by them.

Post-MQP reports

[30] The next office note from Dr. Cooper is dated May 12, 2011 and is illegible.

[31] On April 20, 2011 Dr. Birnbaum, neurologist, reported that the Appellant has frequent severe migraine headaches without aura On July 13, 2011 Dr. Birnbaum reported that the Appellant has a long history of migraine without aura and that, according to his history, the frequency and severity of his headaches increased after the MVA. He noted that the Appellant did not use either the Nortriptyline or Frovatriptan as instructed; however, he tolerated both medications. On November 30, 2011, Dr. Birnbaum reported

that it did not appear that the Nortriptyline has produced an adequate response. He suggested trials of other medications.

[32] On April 21, 2011 Dr. Cooper reported that the Appellant seemed to be upset and told him about a situation that occurred on February 7, 2011 in which he had an argument with another man who told him that he was in his territory, and had to work for him. Dr. Cooper related that this incident was one week after another altercation in which the Appellant was beaten up, and called the OPP who accompanied him to a hospital emergency department. Dr. Cooper commented: "This man is a very proud man and wants to obey the law, but he also needs to make a living and finds himself in a bind and this is frustrating to him."

[33] On June 17, 2011 Dr. Amba, rheumatologist, reported that he had seen the Appellant in 2006 for discomfort in his left hip, and that at that time his symptoms were mainly localized to his hip and he had difficulty walking on an episodic basis. The Appellant now had a more extensive symptomatology involving his left lower spine, SI joint, knee and foot. The Appellant described constant pain which is worse with standing or walking for a prolonged period of time; numbness in his left leg after sitting up for 40 minutes; and a clicking noise in his left knee when he gets up from a kneeling position. The Appellant had a past medical history that included migraines and chronic neck pain. On examination there were no markers for sero-negative or positive arthritis, no psoriasis, nail changes, nodule or vasculitic lesions. The Appellant had excellent back mechanics and could touch his toes on forward bending without any difficulty.

[34] On June 27, 2011 Dr. Amba saw the Appellant for follow up and noted that the X-rays of the SI joint and knee were normal, and that that there was no evidence of inflammatory change. He suggested further investigations because of increased C - reactive protein.

[35] On October 13, 2011 Dr. Cooper reported to the Appellant's family doctor. The report indicates that Dr. Cooper has known the Appellant since his initial referral in October 2009, and that the Appellant has tried as best he can to work, but is in quite a lot of pain and cannot do physically exerting work. Dr. Cooper noted that he has tried to treat

the Appellant's depression, and that although his depression has improved, the Appellant is still in pain and gets on with life as best he can. He stated that the Appellant is also suffering from chronic pain syndrome which worsens when he gets upset.

[36] On November 8, 2011 Dr. Chaiton reported that he hadn't seen the Appellant for over 1 ½ years, and that he had not returned to work since his MVA in 2009. He noted that the Appellant demonstrates pain magnification behaviour and non-organic physical findings. Dr. Chaiton also noted that the investigations to date have been extensive, and have not revealed any specific pathology in the lumbosacral spine, pelvis or legs. Dr. Chaiton did not recommend any specific treatment because he suspected that there were psychological factors operative in promoting his ongoing symptoms and perceived disability.

[37] On February 24, 2012 Dr. Olah, pain management, saw the Appellant for his main complaint of chronic lower back pain. The report notes that physiotherapy and chiropractic were not helpful, and that the Appellant had not undergone any other treatment. The differential diagnosis was lower back pain due to strain. Dr. Olah recommended medications and a trial of diagnostic/therapeutic intervention.

[38] On February 7, 2013 Dr. Motlani, anesthetist, performed a bilateral sacroiliac steroid joint injection.

[39] On January 24, 2013 Dr. Cooper reported to the Appellant's lawyer. Dr. Cooper reported that he first saw the Appellant on October 7, 2009, at the request of his family doctor, and that the Appellant presented with feelings of anxiety, tension, and depression. The Appellant had been working as a tow truck driver, and at times would work 16 hours a day. The Appellant could only work 2-3 hours a day when he first saw Dr. Cooper. Dr. Cooper stated that he has been seeing the Appellant on a regular basis, and that his last appointment was on January 23, 2013. Dr. Cooper reported that it appears that the Appellant's MVA on August 29, 2009 caused a personality change in which there was an exaggeration of the Appellant's previous personality traits and outbursts. He noted that the Appellant had seen a psychiatrist for stress management, three years prior to his first seeing Dr. Cooper, when he was involved in a minor MVA. Dr. Cooper indicated that

there has been no evidence of thought or perceptual disorder; and that “He did have problems focusing and had problems with his memory and concentration and at times still does, but his cognitive functioning has improved with time. His memory is now only slightly impaired whereas when I saw him on October 7, 2009 his memory was grossly impaired...”

[40] Dr. Cooper opined that the Appellant is unable to be gainfully employed in any kind of competitive capacity and his prognosis for vocational rehabilitation is poor. Dr. Cooper concludes that the Appellant cannot do work which is physically exerting, and that he can't do work which requires cognitive functioning. He opined that, accordingly, the Appellant is unemployable as a result of the August 2009 MVA. Dr. Cooper diagnosed chronic pain syndrome, major depressive disorder (which is improving), generalized anxiety disorder, and chronic adjustment disorder. He assessed a GAF of 50-55.

[41] Dr. Cooper goes on to state as follows:

As a result of his temper outbursts, and his uncontrollable temper since the motor vehicle accident of August 29, 2009, he has had incidents where he has been charged with assault by the police, and these may have been minor incidents, but nevertheless, seemed related to the motor vehicle accident of August 29, 2009. He claims he has always been a law abiding citizen and he gets into skirmishes, and arguments whereas he told me that the only problems he had in Iraq was being persecuted as a Christian and had to always defend himself, and had a controllable temper. Apparently his temper has been uncontrolled since the motor vehicle accident of August 29, 2009. A vicious cycle has ensued and he is always in pain and he cannot sleep. He is irritable and tense.

[42] An insurer multidisciplinary catastrophic assessment report dated November 8, 2013, completed by Dr. Meikle, psychiatrist, Dr. Mehdiratta, neurologist, Dr. Sue-A-Quan, orthopaedic surgeon, Susan Javosky, occupational therapist, and Dr. Spivak, psychiatrist, concluded that the Appellant met the criteria of catastrophic impairment because of a marked mental and behaviour adaptation impairment. He did not meet any of the other criteria for catastrophic impairment.

[43] In his examination report dated November 8, 2013 Dr. Spivak diagnosed major depressive disorder – moderate to severe, and cognitive disorder, not otherwise specified.

He assessed a GAF of 40, with a best GAF in the last year of 41 to 50. When evaluating the Appellant's deficits using the AMA Guide to the Evaluation of Permanent Impairment Dr. Spivak stated:

I will now evaluate Mr. A. Y.'s deficits using the AMA Guide to the Evaluation of Permanent Impairment. With respect to activities of daily living, Mr. A. Y. shows mild deficits. He describes days where he will go not taking care of his hygiene and he requires assistance to look after things such as groceries. If one takes his description at face value, and I do not have any documentation to contradict his accounts, one can presume that his deficits in this realm are mild (**Class 2**). Similarly, with his social deficits, it is difficult to get a clear account from Mr. A. Y. He notes that prior to his motor vehicle accident, he used to play soccer and go to clubs on a regular basis. He also notes that he would have been inclined to visit with his son. He has not visited his son in over a year and notes that the only reason why he sees friends is because they come to pick him up. He describes; little to no enjoyment in interacting with others. His deficits in this realm could be viewed as being mild to moderate (**Class 3**).

Mr. A. Y. shows marked deficits with respect to adaptation. He describes a limited scope of functioning where his activity is essentially dictated by whether or not he is taken to an appointment or taken for coffee by friends. He describes chronic feelings of hopelessness. Furthermore, it was my impression that he had symptoms, which were reaching psychotic proportions if one considers his belief that the insurance company might be poisoning him to be an actual reflection of his emotional state. There is no reason to question the veracity of this statement and I was not under the impression that he asked this question in an attempt to complicate things, but rather it was an actual belief that he held. Given these deficits, his impairment in this realm can be viewed as being marked (**Class 4**).

It is difficult to gauge his evaluation of his concentration, persistence and pace. He certainly was unable to give a temporal account of anything that has transpired. However, it was my impression that this was mostly a psychological issue and due to a general lack of effort. As such, grading this realm as generously as possible, I would evaluate his deficits in this realm to be mild (**Class 2**). I would recommend further evaluation by a neuropsychologist to more accurately reflect what his cognitive deficits may be as I do not feel that there is a way to precisely gauge them by virtue of his own account of his memory issues.

Given the impairment levels in the above four spheres, Mr. A. Y.'s global impairment can be viewed as being moderate (**Class 3**). Using the AMA Guide for the Assessment of Emotional or Behavioral Impairment, Mr. A. Y. presents as having an impairment of 25%, which is in the range of moderate limitation.

[44] On December 1, 2014 Dr. Cooper reported that the Appellant continues to experience feelings of anxiety and pain; that he is unable to do any work which is physically exerting; and that he is definitely unsuitable for work requiring cognitive functioning. Dr. Cooper stated, “This man is unable to be gainfully employed in any kind of vocational capacity and the prognosis for any vocational capacity and the prognosis for any vocational rehabilitation is poor.”

SUBMISSIONS

[45] Mr. Zatoeknuk submitted that the Appellant qualifies for a disability pension because:

- a) Although his disability is primary psychological, he also had significant physical impairments;
- b) Dr. Cooper’s reports confirm that he is unable to perform any form of gainful employment. His physical limitations preclude him from pursuing physical employment, and his cognitive limitations preclude alternative employment;
- c) The November 2013 catastrophic impairment reports, prepared for an insurer, confirm the Appellant’s psychological and physical impairments. Mr. Zatoeknuk placed particular reliance on Dr. Spivak’s November 8, 2013 psychiatric assessment which determined that the Appellant suffered from major depressive disorder and marked deficits with respect to adaptation. He submitted that these findings from a psychiatrist retained by the insurer were consistent with and confirmed Dr. Cooper’s findings.

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

- a) The medical evidence does not establish that all reasonable medical treatments have been explored;

- b) Dr. Cooper's mental status examinations do not support a severe disability, and the medical evidence does not support that the Appellant is precluded from all forms of gainful employment;
- c) The Appellant was only 41 years old at the time of the MQP, and had the residual capacity to pursue lighter less physically demanding employment; the evidence establishes that he has failed to take steps to retrain for and/or pursue such employment;
- d) The catastrophic impairment reports were completed almost three years after the MQP and do not speak to the Appellant's condition as of the MQP; further, the criteria for catastrophic impairment are different than those for CPP;

ANALYSIS

[47] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2010.

Severe

[48] 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.

Guiding Principles

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

[50] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2010, 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.

[51] However, this does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a serious and prolonged disability that renders them incapable regularly of pursuing any substantially gainful occupation. Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[52] The determination of the severity of the Appellant's disability is not premised upon his inability to perform his regular job, but rather on his inability to perform any work, i.e. "any substantially gainful occupation:" Canada (*Minister of Human Resources Development*) v. *Scott*, 2003 FCA 34. A claimant for disability benefits under the Plan bears the onus of demonstrating functional impairment which both in reality prevents him or her from engaging in gainful employment but also an impairment which on a more objective level as well leads the Tribunal to the conclusion that virtually all substantially gainful employment is beyond the Appellant's functional capabilities: *Buckley v MHRD* (November 29, 2001), CP 15265 (PAB).

[53] 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.

[54] It is not sufficient for chronic pain syndrome to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. It is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

[55] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47).

Application of Guiding Principles

[56] The Appellant was a vague historian who had great difficulty recalling and providing evidence concerning significant events. The Tribunal accepted that this was to a large extent because of his present condition, and that he was not attempting to be evasive and/or to avoid what he may have considered to be troubling questions. This does, however, make the Tribunal's task more challenging, and in such circumstances the Tribunal is required to place greater reliance on the medical and witness evidence. The Tribunal also has to take into consideration that the hearing was more than four years after the MQP, and that the Appellant's condition as of the hearing date, may not necessarily represent his condition as of the MQP.

[57] Mr. Zatoeknuk placed substantial reliance on the November 2013 catastrophic reports confirming the reports from Dr. Cooper, and in view of all the evidence, the Tribunal is satisfied that the Appellant was likely severely disabled as of November 2013. This was, however, close to three years after the MQP and, for the reasons set out below, the Tribunal is not satisfied that the Appellant was severely disabled in accordance with the CPP criteria as of the MQP.

[58] The Appellant was only 41 years old on his MQP, and he has a varied work history and significant transferable skills. Although the Appellant lacked the capacity to return to his previous physically demanding and stressful employment as a tow truck driver, he has made no efforts to retrain for and/or pursue alternative light employment. The evidence does not establish he lacked the residual capacity to do so as of the MQP date, and accordingly, the Appellant has failed to meet the test set out in *Inclima*, supra.

[59] Further, the extent to which the Appellant continued working after the August 2009 MVA is unclear. In his oral evidence, the Appellant initially testified that he hasn't been able to work since the MVA in August 2009. Dr. Cooper's October 7, 2009 report

indicates that the Appellant had continued to work for 2-3 hours a day. When referred to this report at the hearing, the Appellant stated that he couldn't remember whether he tried to go to work after the MVA. Dr. Chaiton's May 31, 2010 report indicates that the Appellant is currently employed as a truck driver and that he has been off work for several months. More significantly, Dr. Cooper's April 2011 report refers to an incident on February 7, 2011 (which was post-MQP) in which the Appellant had an argument with another man who was in his territory. When referred to this report at the hearing, the Appellant stated that he wasn't working but attempting to get his truck back from the person who was operating it but not paying the lease. This explanation by the Appellant does not seem to be consistent with Dr. Cooper's report and, particularly, with Dr. Cooper's comment that "...he also needs to make a living..." This comment suggests that the Appellant retained at least some residual capacity to work as of April 2011.

[60] Mr. Zatoeknuk strongly relied on the reports of Dr. Cooper, and the Tribunal has carefully reviewed and considered those reports. The Tribunal recognizes that Dr. Cooper is a very experienced psychiatrist. However, it is the Tribunal's task to come to its own conclusion based on the whole of the evidence before it, and it would not be properly fulfilling its function if it were to merely rubber stamp, without a proper analysis, the opinions expressed in the reports from one of the treating physicians. In this case, the Tribunal was reluctant to accept Dr. Cooper's opinions, at least in so far as they purport to speak to the Appellant's capacity to work as of the MQP date:

- The Tribunal was concerned about the conclusions by Dr. Cooper in his initial October 7, 2009 assessment that the Appellant was experiencing a "pain syndrome" and that his adjustment disorder would be "chronic." This was only six weeks after the MVA, and the Appellant had not yet undergone any treatment by Dr. Cooper. It seems that such findings were at least as of that time premature. Further, Dr. Cooper is not a chronic pain specialist.
- It would appear that Dr. Cooper appears to have assumed the role of an advocate, in addition, to his role as a treating psychiatrist. Many of the reports and visits are directed either towards purposes such as MVA or disability claims, or

directed towards problems arising from the Appellant's behaviour. There is no evidence of any ongoing treatment by Dr. Cooper during the period between November 2009 and the December 31, 2010 MQP. The only office notes in the hearing file during this period are in November and December, 2010, and these seem to be directed towards issues regarding difficulties that the Appellant was having with his probation officer, and not towards actual treatment.

- Dr. Cooper's April 21, 2011 report seems to be related to two incidents in which the Appellant was involved in altercations leading to police involvement. His June 2011 report was for the CPP application. His November 2012 report related to an incident when the Appellant lost his temper during examinations for discovery. Other reports appear to be for medical-legal purposes for either the MVA claim or the CPP disability claim.
- Although Dr. Cooper's November 10, 2009 report indicates that he understood that the Appellant would be taking anger management and his handwritten office notes refer to his probation officer wanting him to attend for anger management, there is no evidence in the hearing file of the Appellant having attended for this.
- Dr. Cooper's June 2011 report which accompanied the CPP application is also problematic. Dr. Cooper diagnosis chronic pain syndrome, chronic adjustment disorder, socioeconomic problems, and issues with legal authorities. Socioeconomic problems and issues with legal authorities are not medical conditions, and they are not appropriate considerations for a CPP disability claim. (see *Rice* decision, supra). Further, the Appellant's issues with legal authorities pre-dated the MVA. This is confirmed by Dr. Cooper's November 2009 report which refers to the Appellant having been charged with assault with a dangerous weapon in April 2008.

[61] The Tribunal also noted that there is no evidence in the hearing file of ongoing treatment for the Appellant's chronic pain prior to the MQP. There are no office notes or reports from Dr. Angilletta covering the period from the MVA to the MQP. The Appellant saw Dr. Chaiton for pain management on May 31, 2010, but there is no evidence of any

follow up until the Appellant saw him again on November 8, 2011. Dr. Chaiton's November 28, 2011 report notes that he hadn't seen the Appellant for over 1 ½ years, and also notes that the Appellant demonstrated "pain magnification behaviour and non-organic physical findings."

[62] The Appellant has the burden of proof, and after a careful review of the totality of the evidence, the Tribunal has determined that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with CPP criteria as of the December 31, 2010 MQP date.

Prolonged

[63] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criteria.

CONCLUSION:

[64] The appeal is dismissed.

Raymond Raphael
Member, General Division