Citation: *A. K. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 66

Appeal No: GT-117965

BETWEEN:

A. K.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Patricia Board
HEARING DATES:	November 12 and December 11, 2014
TYPE OF HEARING:	In Person and Videoconference
DATE OF DECISION:	January 19, 2015

PERSONS IN ATTENDANCE

The following people attended the hearing:

- Mr. Bibhas Vaze, supervising lawyer for the Appellant's representative
- Peter Beaudin, Appellant's representative
- A. K., Appellant

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 June 4, 2010. 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 an in person hearing on November 12, 2014 for the reasons given in the Notice of Hearing dated July 24, 2014. The Tribunal found that it was necessary to reconvene the hearing in order to clarify some evidence. A second hearing was held by way of videoconference on December 11, 2014.

[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 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] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2012.

[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.

EVIDENCE

[10] The following overview of the evidence is not intended to be a complete description. It is to provide a general background.

[11] At the hearing, the Appellant testified as follows:

[12] He attended college and graduated as a mechanic. He worked full time for 4 years and then got his journeyman license. In 1997 he started to work an attendant for an automobile assistance program. In 2008 he had the first motor vehicle accident and his work duties were modified to accommodate his limitations.

[13] He started to work doing warehouse duties in a hospital supply warehouse in April 2010 where he would sort through supplies and load bins. He had to reduce his hours because of the pain. He did not work that much in 2011. He tried to do modified duties towards the end of 2011, but was unable to do so.

[14] He and his wife started an internet investment company. In 2012, he worked maybe 2-3 hours in the company. He was not able to carry on with the company. His wife was initially interested, but by the time the marriage had dissolved in July, 2012, he had lost interest. While the company has not been closed, he has not worked on it since 2012 and it does not make money. Only he and his wife were involved in the company.

[15] By 2012 he could no longer do the warehouse duties. He worked one day in December, that being December 27, in 2013. He was a landlord up to September 29, 2014. His father did the repairs for the building. He handled the finances; however, his wife takes care of that now. He still owns property, but his wife receives the income from it. He lives in a home that his parents own.

[16] When asked about the 2012 tax return where he declared business or professional income of $19,103.00, he stated that his accountant has allocated the funds incorrectly as income and in fact the $19,103.00 was an expense for interest on his rental property. He confirmed that the e-mail dated September 10, 2014 which explained this discrepancy was from his accountant[1].

[17] He applied for disability while he was working as his health was deteriorating. When asked to rate his pain on a scale where 0 was “o.k.” and 10 was such that he wanted to go to emergency, he stated that without medication, the pain in his shoulders

[1] This e-mail is discussed further in the decision.

was at a 10. With medication, the pain was at a 7. The pain in his lower back and hips is worse than the pain in his shoulders.

[18] He sought help in the spring of 2012 because he did not know what was wrong with him. He did not remember the exact details of his behaviour but he knew he was angry with people. He saw a psychiatrist at a Community Centre. The Community Centre confirmed that they would admit him but he did not want to be admitted. In May 2012, he started to see Dr. Thinda, a psychologist. He went to see Dr. Solomon, a psychiatrist in July, 2012 who certified him under the Mental Health Act and he was hospitalized for a month.

[19] He sees Dr. Leech-Porter, a psychiatrist, about 1 to 2 times a month for about a half hour. In the summer of 2012, he saw him about 1 time a month for a half hour. However, when asked to comment on the Dr. Leech-Porter's statement that he did not see him since January 2013 his answer was vague. He sees Dr. Thinda about once every 3 months for an hour. He does not attend support group, but he does meditation and yoga daily. Over the last few years, he has suffered from more pain and depression.

[20] The specialists he has seen is Dr. Yu, Dr. Hershler and Dr. Yorke. He saw specialists about 2 to 3 times in the last 2 years [2].

[21] He sees his family doctor about 1 time a month in the last 8 months. He sees Dr. Ngui as his family doctor. He saw Dr. Sakian about once a month at a walk in clinic. He also saw Dr. Haq, who worked in the same office as Dr. Ngui, but has not done so for some time.

[22] He was taking Topamax up to a month prior to the hearing. For a while he was taking both Topamax and Oxycontin. Currently taking Oxycontin and Ativan which are prescribed by Dr. Leech-Porter, a psychiatrist. He started to take Ativan a few days prior to the hearing.

[2] Reports from these doctors are discussed below.

[23] He attended massage therapy from about August 2012 to December 2013 about 1 time a week for an hour. His home remedies include hot bean bags, hot water bottles, about once a day.

[24] He lived with his wife until 2012 when they separated. From 2012 to 2014, he lived in one section of a house and tenants lived in the rest of the house. He had a landscaper to help with the yard work and did not shovel a driveway. His mother helped him with housework about 1 time a week. He parents would help him with the grocery shopping and cooking. He would do laundry when the "pain would let him".

[25] He stated that a typical day was as follows. He wakes up with pain and shower. He would pray. He surfs the internet for about an hour. He sees his children, who are 3 and 5 years old, about one time a week.

[26] He is capable of grooming but it is slow. He does not shave daily. He finds that food preparation is difficult so his family gives him pre-packaged food. He has difficulties sleeping because of the pain in his shoulder and back. He will nap to make up the time.

[27] He started an investment company over the internet with his wife. He had some investment skills but has none now. He had some property and a tenant who helped with his bills but the house is sold he has no source of income. His social life consists of visiting with his mother and father. He confirmed that he has had to give up golf however he volunteers at the golf course.

[28] While he wrote in his Questionnaire that he anticipated returning to his work as an automobile attendant in 2004, he was being optimistic. He said he was working when the form was completed and his wife completed.

[29] The documentary evidence included the following:

[30] The Appellant had a right shoulder arthrogram on February 4, 2009. It showed that there was a moderate thinning at the anterior inferior glenoid joint space cartilage.

The findings in this region were suggestive of mild chondromalacia. He had partial articular surface tear of the anterior supraspinatus tendon and infraspinatous tedinopathy.

[31] Dr. Haq, an attending physician, wrote a report dated January 19 2010, where he noted that the Appellant had had 2 motor vehicle accidents. The first was in September 5, 2008. The second motor vehicle accident was in August 17, 2009 where the Appellant injured his neck and upper back. He noted that the Appellant reported with progressive pain and was disabled to pursue the regular light and casual job. He remains unable to be employed in any job for uncertain period due to this post trauma chronic pain condition.

[32] Dr. Yu, an orthopedic surgeon, saw the Appellant on April 8, 2010. He noted that he had seen the Appellant on January 9, 2009. The Appellant had found a new job which he believes he will be able to do as his job is light. Dr. Yu thought that the likely diagnosis was that of chondromalacia involving the shoulder joint. It did not require any surgical intervention. Dr. Yu encouraged the Appellant to continue exercising and believed the work would be tolerable.

[33] Dr. Haq completed a medical report in support of the Appellant's application dated May 25, 2010. In it, he noted that the Appellant had post-traumatic and repetitive strain, related chronic pain right shoulder. His prognosis was guarded for an immediate full recovery of right shoulder; however, he expected the Appellant to recover over a prolonged period.

[34] In June, 2010, the Appellant applied for CPP.

[35] The Appellant had an arthrogram of his right shoulder on March 31, 2011. It showed that he had severe acromioclavicular arthritis and supraspinatus tendinosis. There was high signal intensity within teres minor muscle belly without a gross teres minor tear. There was horizontally oriented cleft of gadolinium extending into the biceps tendon at its biceptal insertion, consistent with a delaminating intrasubstance tear. No labral tear was seen.

[36] Dr. Yu provided a report dated May 4, 2011. He stated that he last saw the Appellant on January 9, 2009. The Appellant had stopped working in December 2010 because of pain. Dr. Yu wrote that he believed his symptoms were due to degenerative changes in his shoulders. An MRI showed moderate thinning of the anterior glenoid joint space and some degenerative changes in the acromioclavicular joints. There was a partial articular surface tear of the supraspinatus.

[37] As of the previous visit, Dr. Yu believed the Appellant was unable to return to work as a service attendant with BCAA. It is probable he will not be able to do any significant physical work. He has tried working at a lighter type of job but was unable to continue due to pain in his neck and shoulders, especially his right shoulder likely due to degenerative arthritis of the shoulder.

[38] The Appellant completed a Questionnaire in support of his application for CPP. He studied to be an automobile mechanic and graduated in 1997. He was in receipt of Employment Insurance at time of application. He recorded that he stopped working in November 2010 but did not provide a reason for so doing.

[39] The Respondent's medical advisor [MA] called the Appellant on May 4, 2011 and asked him about his comment in the questionnaire where the Appellant indicated he was still working. The Appellant indicated he had incorrectly filled out his last day of work at BCAA. The correct date that stopped work should have been September 22, 2009. He got a casual job in April of 2010 and remained casual until October 30, 2010 when he could no longer work due to pain. The Appellant indicated his condition had changed a lot since he filled out his application and requested that the MA write to his physician to get an update. The MA agreed to do so.

[40] In March, 2012, the Appellant had a psychiatric consultation for his significant depressive symptoms. Dr. Waraich wrote a report on March 8, 2012. The Appellant had lost his job because of his mental health symptoms. The Appellant indicated that at times he wished he would be struck by a truck, although he was not trying to do so, so his family would get insurance money. He had not had any counselling care or psychiatric hospitalizations. Dr. Waraich indicated that he had suicidal ideations. He suggested a trial

of mood medication such as Effexor and a referral for a chronic pain specialist. He and the Appellant developed a plan for flare ups of suicidality. He also recommended that the worker stay as an in-house patient while starting the Effexor trial.

[41] The Appellant did not agree with the recommendation that he stay as an in-house patient and returned to his home.

[42] Dr. Solomon, a psychiatrist, saw the Appellant on July 3, 2012. His family doctor, Dr. Haq, had referred him. His wife had indicated that the Appellant was threatening suicide and that he had become worse. She was worried for his safety. Dr. Solomon found that the Appellant was acutely manic. He was unwilling to consider in patient admission, so Dr. Solomon completed a From 4 Mental Health certificated and contacted the police to bring him to the hospital. The Appellant required treatment which was beyond that available in a private office and fit the criteria for a mental health team follow up.

[43] On July 3, 2012, the Appellant was involuntarily committed to the hospital. Dr. Madhani, a physician at the hospital, prepared a report dated July 3, 2012 where he wrote that it was quite likely that the Appellant was manic with psychosis and noted the Appellant's use of marijuana.

[44] Dr. Ronsley, a physician at the hospital, wrote on July 14, 2014 that the Appellant manifested delusional behavior, and was saying that he was God. He was "manifesting" things on the internet. He was using marijuana and Topamax. He stated that the Appellant had an acute manic episode with psychotic features. He agreed to admit him in the hospital.

[45] While in hospital, the Appellant was examined by a treatment team and Dr. Morton wrote a report on July 19, 2012. He noted that the Appellant had chronic pain and found that Topiramate was helpful. However, Dr. Morton found the medication had side effects of aggression, depression, behavioural problems, mood problems, emotional liability, psychosis, neurosis and hallucination and he indicated that he wanted to reduce the use of medication slowly.

[46] Also while in hospital, the Appellant saw Dr. Yorke, a rheumatologist, on July 17, 2012. He diagnosed the Appellant with chronic myofascial pain syndrome at shoulders and the back together with fibromyalgia. The hospital would not discharge him to his family with a prescription of Topamix. The Appellant left the hospital to an alternate address.

[47] On July 31, 2012 Dr. Popovic saw the Appellant about his pain in his shoulders with the right being significant worse than the left. He diagnosed the Appellant with bicep tendonitis and a reduced pain tolerance due to Fibromyalgia. The Appellant was supposed to begin a chronic pain treatment program. He suggested a freezing and steroid injection into the bicep tendon sheen for diagnostic and therapeutic purposes. The Appellant declined the doctor's management plan.

[48] Dr. Ronsley prepared a discharge summary for the psychiatric ward of the hospital on July 31, 2012, however, it was incomplete.

[49] Dr. Thinda, a psychologist, wrote a report dated November 28, 2013. In it, he stated that the Appellant was functionally debilitated by chronic pain and emotional difficulties to the level where it was difficult for Dr. Thinda to see the Appellant returning to any work at the time of the report or in the near future.

[50] Dr. Leech-Porter, a psychiatrist wrote a report on March 25, 2014. In it, he discussed the Appellant's pain, fibromyalgia and mental stress. He supported the Appellant's application for CPP. The Appellant's "current functional level" was at a 20-30 range[3]. The Appellant could not work for a few years. If the Appellant had his marriage and children, he might not be permanently disabled. However, that did not preclude the Appellant from being completely disabled at the time of the report.

[3] Dr. Leech-Porter is presumably referring to the Appellant's Global Assessment of Functioning. This will be clarified in his report of March 25, 2014.

[51] Dr. Ngui, a different attending physician, wrote a report dated March 27, 2014. The Appellant was a patient since 1977. He had been in 2 car accidents. He stated that the Appellant had stated that he still suffered from severe musculoskeletal pain, neck, shoulders and lower back. He was also severely depressed and required help with many of the activities of daily living. He was handicapped by his bipolar disorder and Fibromyalgia and he was unfit to be gainfully employed. It will be difficult for the Appellant to be retrained for another profession because of his thought disorder and depressed state of mind. He is unable to tolerate prolonged standing and walking because of his fibromyalgia and easy fatigue. He supported the Appellant's appeal.

[52] Dr. Yorke wrote a report dated April 21, 2014. He had not seen the Appellant since July 2012. The Appellant had ongoing pain in his shoulders, in addition to twitching and spasm from his back to his leg, at night. He diagnosed the Appellant with Fibromyalgia; however, he stated that the reason for episodic muscle cramps was unclear.

[53] Dr. Ng, an oral medicine and pathologist, wrote a report dated June 9, 2014. He stated that Dr. Chung had referred the Appellant because of jaw pain since the accident. The pain was likely part of the Appellant's chronic pain and Fibromyalgia. He diagnosed the Appellant with oral facial pain, featuring temporomandibular joint (TMJ) dysfunction, mainly myofascial pain of muscle mastication and TMJ arthralgia. He suggested that the Appellant attend the pain clinic and see Dr. Sakian.

[54] Dr. Leech-Porter provided another report dated July 23, 2014. In it, he stated that he had seen the Appellant on May 27, June 24, and July 18, 2014. The Appellant's GAF [Global assessment function] had not changed significantly. The Appellant was incapable of working.

[55] Dr. Leech-Porter wrote again on August 11, 2014 that the Appellant had periods of instability due to pain. He did not see him ever returning to work. The Appellant continued to have pain.

[56] Dr. Hershler, a physical and medicine rehabilitation specialist, provided a report dated August 28, 2014. The Appellant was an auto mechanic. The history and physical

findings are consistent with widespread myofascial pain. The pain is being generated by tender points in muscle. There is no evidence of radiculopathy or neuropathy. He wrote that the Appellant was completely disabled from physical labour that involved repetitive lifting, twisting or bending. He recommended an activity-based rehabilitation program with pain control.

[57] Dr. Thinda, a psychologist, wrote a report on September 22,2014.He diagnosed the Appellant with Somatic Symptom Disorder with predominant severe and persistent pain, a Major Depressive Disorder. He noted that the Appellant had symptoms of anxiety.

[58] The Appellant also submitted a statement of business or professional activities which was completed for the Canada Revenue Agency [CRA]. It showed that he had declared $19,103.0 as gross profit and from that he had an income of $10, 611.19 in 2012. He also provided the subsequent "T1 adjustment" form in in May, 2013 where the amount of his income was revised to 0. Finally, he provided an e-mail from his account addressed to his representative. In it, the accountant explains that some information was unintentionally but incorrectly reported to him for the tax return. This included the amount for business income. The amount was later reallocated as interest on real estate rentals in a subsequent statement to the CRA.

SUBMISSIONS

[59] The Appellant submitted that he qualifies for a disability pension because:

a) The Appellant has established on the balance of probabilities that he is a person with a disability in accordance with the CPP Act as he was unable to engage in any form of gainful employment on a consistent basis.

b) The Appellant did try to return to work in 2011 but could not maintain a regular schedule because he was physically and emotionally drained.

c) The weight of the medical evidence supports a finding that the Appellant had a severe disability before the time of the MQP. Further, the representative specifically noted that while Dr. Hershler stated in his report of August 28, 2014 that the Appellant was not taking an anti-depressant, the Appellant took Topamax which is also an anti-depressant and Dr. Leech-Porter pointed out in his report dated November 26, 2013 that the Appellant was taking Tegeretol, which is the same type of medication

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

a) That while Dr. Leech-Porter, the Appellant's psychiatrist provide a functional level of 20-30 on the GAF, it was at March 2014 and does not apply to the time of the MQP, which is December 2012.

b) The Appellant is young with transferable skills.

c) The Appellant has not established that he had a severe and prolonged disability before the MQP of December, 2012.

ANALYSIS

Preliminary Matter Regarding Representation

[61] The Appellant's representative was not a delegated paralegal or legal counsel. This raised issues regarding whether or not the representative had the authority to appear before the Tribunal, as the Law Society in the province of the venue of the hearing has specific provisions regarding this issue. The Tribunal informed the representative of this issue on a letter dated October 30, 2014. It also informed the representative that the Tribunal Member may refuse to proceed with the hearing upon discovering that the representative is unauthorized to appear before the Tribunal. This could lead to an adjournment and a significant delay. This issue raises several considerations.

[62] At the outset of the hearing, Mr. Vaze, a lawyer who supervises the representative, presented written submissions that the representative, who is not legal counsel or a designated paralegal, was entitled to appear before the Tribunal. He submitted a letter dated November 12, 2014 stating that he was a supervisory lawyer of the non-profit organization where the representative works. He clarified that the representative does not accept any fee from any client when providing representation. He also noted that in the Legal Profession Act of the province where the Appellant resides and the hearing was held, the definition of the practice of law as set out in subsection 1(h) clarifies that the practice of law does not include any of those act if performed by a person who is not a lawyer and not for or in any expectation of a fee, gain or reward, direct or indirect from the person for whom the acts are performed.

[63] In addition, Mr. Vaze confirmed that the organization received funding from the Law Foundation. The status of non-profit organizations and their relation to the practice of law is also address in the Law Society of British Columbia Code of Conduct [Code of Conduct] for B.C.. Specifically, Rule 6 begins by providing definitions. It states that:

> 6.1-2 In this section,
>
> "designated paralegal" means an individual permitted under rule 6.1-3.3 to give legal advice and represent clients before a court or tribunal;
>
> "non-lawyer" means an individual who is neither a lawyer nor an articled student;
>
> "paralegal" means a non-lawyer who is a trained professional working under the supervision of a lawyer.

[64] It states that a designated paralegal may appear before a tribunal. In particular, it states that a lawyer cannot permit a non- lawyer to:

> (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;

[65] However, it notes at 6.1-3.1that:

> The limitations imposed by rule 6.1-3 do not apply when a non-lawyer is:
>
> (a) a community advocate funded and designated by the Law Foundation;

[66] Rule 6.1-3.1 of the Code of Conduct exempts certain non-profit groups from the restrictions in delegation, including those that have a funding relationship with the Law Foundation.

[67] The Tribunal has considered these provisions in the context of the appeal before it. The supervising lawyer clarified that the representative works for a non-profit organization that has provided advocacy for years for Tribunals. None of the representatives are permitted to accept a fee of any manner from Appellants. He has argued that as the representative does not accept any type of a fee from the Appellant, the representation is an exception to the general prohibition of unauthorized representatives appearing before Tribunals. In this case, in these particular circumstances, the Tribunal finds that this is correct. It is clear that the representative is not accepting a fee from the Appellant for his work. In addition, the representative may be paid a salary for his work; however, this salary is not an indirect gain or reward *from the Appellant*. The salary is from the non-profit organization.

[68] Further, given that the non-profit organization is funded from the Law Foundation, the Tribunal finds that the limitations on representation before Tribunals do not apply to it. For this reason, and in these circumstances, the representative was permitted to proceed to represent the Appellant at the hearing.

Preliminary Matter Regarding Late Medical Evidence

[69] A secondary preliminary matter arose when the representative attempted to submit a medical report for Dr. Leech-Porter dated November 7, 2014 at the hearing. When asked why it had not been submitted earlier, the representative stated that he had only

received on that day. The Tribunal informed the representative that it reserved on the admissibility of the evidence and that it would address this issue in the decision.

[70] The Tribunal notes that the parties were advised of the filing periods in a notice of hearing dated July 24, 2014. The parties had until September 15, 2014 to file additional documents; the response period closed on October 13, 2014. In addition, the Tribunal noted that the report of Dr. Leech-Porter did not present any additional evidence that was not already on record. For these reasons, the medical report of Dr. Leech-Porter dated November 7, 2014 was not admitted into evidence in this appeal.

Did the Appellant have a severe disability before or at the MQP?

[71] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 2012.

[72] While there is more recent medical information, the Tribunal must consider the Appellant's condition as it was in or before December 2012. Having done so, the Tribunal finds that by that date, his disability was severe and prolonged.

[73] The cumulative effect of the Appellant's psychological and physical condition was such that he could not regularly engage in substantially gainful employment. In 2012, the Appellant had chronic pain in his shoulders and a Major Depressive Disorder. While the Appellant had medical conditions in 2010 and onwards, there is insufficient evidence that it was a severe disability until July 2012 for the following reasons.

[74] The Appellant had been able to work on a regular basis until about 2011. While the statement of contributions confirms that he worked on a minimal basis in 2011, the Appellant confirmed that at that point in time he started an internet investment company in November 2011. Essentially, the Appellant worked up to January 2012; it appears that his main limitation was his physical injuries which were not sufficient to preclude remunerative work. In fact, Dr. Yu wrote on January 2012 that the Appellant was able to do light work. As part of the application for CPP, Dr. Haq wrote on May 25, 2010 that the

Appellant's shoulder injury was expected to recover over a prolonged period. Certainly, up to January 2012, there is insufficient evidence to conclude that the Appellant had a severe disability that precluded his ability to regularly pursue any substantially gainful occupation. Further, from January to July, 2012, evidence surrounding the Appellant's condition was vague. While it did not appear that he was working, the medical evidence does not provide a description of his abilities during the 7 month period. Further, the Appellant's testimony regarding his activities up to July, 2012 was unclear. There is insufficient evidence that the Appellant had a severe disability that precluded his ability to regularly pursue any substantially gainful occupation.

[75] By March, 2012, the Appellant had attended a psychiatric consultation with Dr. Waraich and was diagnosed with significant depressive symptoms. At that point, he had passive suicidal thought but was starting to have increasing anxiety and depressive symptoms. In Dr. Waraich's view, part of the Appellant's motivation to see him was for assistance with his CPP appeal. At that point, Dr. Waraich advised the appellant to be hospitalized so that a trial of medications could begin. However, the Appellant did not wish to do so.

[76] There is no question that in July 2012 the appellant experienced an acute episode and that he did not completely recover from it. Upon initially meeting the Appellant in July 2012, Dr. Solomon immediately certified him under the Mental Health Act for involuntary committal. Dr. Ronsley, a physician with the hospital, prepared a consultation report on July 14, 2012, where he described diagnosed the Appellant an acute manic episode with psychotic features. Upon release from hospital, the Appellant did not return to work and pursued regular treatment.

[77] The weight of the medical evidence paints a picture of a severe disability in July, 2012. It appears that there have been different diagnoses for the Appellant's psychological condition. Dr. Madhani thought the Appellant was manic. Dr. Waraich found a positive diagnosis for a personality disorder. Dr. Ronsley thought the Appellant had a manic episode with psychotic features. The Appellant was clearly unable to work while he was hospitalized. Further, the evidence leads to the conclusion that he was

unable to regularly pursue substantially gainful employment after his release. In the summer of 2012 the Appellant was suicidal and acutely manic. He started to seek psychiatric counselling from Dr. Leech-Porter. Further, while he was in hospital being treated for the acute psychological episode, his physical limitations required consultations with specialists. He was examined by a rheumatologist, Dr. Yorke, who found that the Appellant had chronic myofascial pain syndrome at his shoulders and the back together with Fibromyalgia. Dr. Popovic also saw him while at the hospital and stated that he presented with significant pain. The Appellant's physical symptoms were sufficiently severe to warrant examination from two specialists while he was in the psychiatric unit. Further, his physical condition was such that Dr. Popovic recommended further treatment such as injections, whether or not the Appellant chose to pursue it.

[78] The Tribunal notes that a refusal of treatment may be a reason to find that the Appellant does not have a severe disability. However, in this case, the Appellant was seeking treatment for an episode of acute mania and he was not in a position to make the best decisions about his care. In these circumstances, the Appellant should not be penalized for this refusal.

[79] The weight of the evidence leads to the conclusion that the cumulative effect of the Appellant's physical and emotional disabilities precluded him from regularly pursuing employment from the summer of 2012. While the Appellant may have improved and become less suicidal and manic, he was still debilitated from his psychological and physical limitations from that date onwards.

[80] While the Respondent argued that the Dr. Leech-Porter's comment that the Appellant's GAF score was at 20-30 as set in his report of March, 2014 only applied for the time of the report, Dr. Leech-Porter in his report of July 23, 2014 states that the GAF score had not significantly changed and that the Appellant continued to be incapable of working. The evidence does not demonstrate that the Appellant was capable of functioning at a higher level at any point after July, 2012. Further, while Dr. Leech-Porter stated in his report of May 6, 2013 that he had not seen the Appellant since January, 2013, he later stated in his report dated March 24, 2014 that the cumulative

effect of the Appellant's physical and psychological shows he has a severe disability. It is clear from the Appellant's testimony and the medical evidence that the Appellant has been precluded from regularly pursuing remunerative employment since July, 2012 because of the cumulative effect of his physical and psychological conditions.

[81] Even if there was some evidence of work capacity after the summer of 2012, it would be insufficient to conclude that the Appellant did not have a severe disability at that time. Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant did try to work. The Tribunal accepts his testimony that he has not worked at the warehouse since the end of 2011 as it is consistent with the statement of earnings. Also, although he set up an investment internet company, the Appellant testified that could not work at it in a regular and remunerative manner. There is insufficient evidence to contradict this testimony and the Tribunal accepts it.

[82] In addition, while the Appellant wrote in his Questionnaire dated in May 2010 that he anticipated returning to work in April, 2010, he also wrote that the last day he worked at the job was in September 2010. The dates are not consistent. However, given that the Appellant clearly tried to work in 2011, the inconsistencies in the form are not sufficient to deny the appeal.

[83] The respondent has argued that as the Appellant is young and has transferable skills, the principle in *Villani* v. *Canada* (*A.G.*), 2001 FCA 248 that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience, does not apply. It is true that that Appellant is young and has skills. However, he also has a debilitating psychiatric condition that requires regular treatment and physical injuries that preclude any physical work. With his psychological impairment, any retraining appears unlikely. The evidence of the failed internet investment business leads to the conclusion that even sedentary work on a regular basis is beyond the Appellant's capacity. In this

particular case, the Appellant's youth, education and work background is not sufficient to find that his disability is not severe.

[84] As stated before, after the Appellant was released from hospital in July, 2012, his medical conditions did undergo some improvement. However, the Tribunal finds that the Appellant's physical and psychological condition still prevented him from regularly pursing any substantially gainful employment. He still suffered from debilitating chronic pain. He seeks regular treatment for his psychological condition. He has been unable to work in a regular manner in an occupation that is substantially gainful.

Does the Appellant have a prolonged disability?

[85] There is compelling evidence that the Appellant's debilitating psychological and physical disabilities were long continued and of an indefinite duration. He has pursued regular treatment for his psychological issues. Recent reports from his psychiatrist confirm that he is still disabled from his psychological issues. While Dr. Leech-Porter in his report of March, 2014 seems to suggest that the Appellant's condition would improve if his domestic situation improved, it appears that this improvement is speculative; certainly, at the time of the hearings, the Appellant was still separated from his wife. This speculation is not sufficient to find that the Appellant does not have a prolonged disability. Further, in his report of August 11, 2014, Dr. Leech-Porter stated that he could not see that the Appellant would ever return to work.

[86] The Appellant has sought out further treatment from specialists for his chronic pain which has also been diagnosed as Fibromyalgia and myofascial pain. Dr. Hershler wrote in August, 2014 of the compounding effect of the physical and psychological conditions. Further, the Appellant's testimony and the medical documentation from Dr. Ngui of March, 2014 support a conclusion that his disability was a prolonged disability. The weight of the evidence leads to the conclusion that the Appellant had a severe disability, composed of his psychological and physical disabilities, which was long continued and of an indefinite duration at the time of the MQP.

CONCLUSION

[87] The Tribunal finds that the Appellant had a severe and prolonged disability in July, 2012, when he was hospitalized for his psychological condition. At that point, the cumulative effect of the physical and psychological condition prevented him from regularly pursuing substantially gainful employment. While the evidence demonstrates that the Appellant did have some improvement in his psychological condition after that date, the improvement was not sufficient for him to be able to participate in the work force in more than a sporadic fashion where he had minimal earnings. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of November, 2012.

[88] The appeal is allowed.

Patricia Broad
Member, General Division