Citation: ***J. L. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 64**

Date: June 25, 2015

File number: GT-119831

GENERAL DIVISION - Income Security Section

Between:

J. L.

Appellant

and

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

Respondent

Decision by: Carol Wilton, Member, General Division - Income Security Section

Heard In person on June 4, 2015, Hamilton, Ontario

REASONS AND DECISION

The Appellant:	J. L.
Appellant's Representative:	Hadeel Kamal
Interpreter (Punjabi):	Neena Khan

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 April 4, 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 in person for the reasons given in the Notice of Hearing dated September 23, 2014:

- More than one party will attend the hearing;
- The form of hearing is most appropriate to allow for multiple participants;
- The issues under appeal are complex; and
- The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] This matter was scheduled to be heard January 5, 2015 and was adjourned at the request of the Appellant when the interpreter failed to appear. The hearing was rescheduled for June 4, 2015, with the filing periods remaining the same as before, as stated in the notice of the rescheduled hearing dated January 28, 2015.

[5] On January 12, 2015, the Appellant submitted approximately 2,000 pages of additional material to the Tribunal (the late documents). On January 21, 2015, the Tribunal wrote the Appellant's representative for an explanation of why the late documents were

provided so long after the end of the filing period on November 5, 2014. On February 6, 2015, she informed the Tribunal that they had been sent by the "main office that is representing him regarding his motor vehicle accident," which had been unaware that a hearing had been scheduled. She did not provide submissions as to the admissibility of the documents, beyond saying that they were relevant. The Tribunal wrote her again on February 17, 2015, pointing out that the filing periods had not changed and again requesting detailed submissions on the admissibility of the information. The Tribunal received no response to this request.

[6] The late documents were provided to the Respondent, which by e-mail dated January 30, 2015, declined to review the information because it had been submitted so long after the end of the filing period.

[7] The Tribunal has reviewed the information in the late documents and determined that it is relevant and should be admitted.

[8] At the rescheduled hearing, while being questioned about his property management business, the Appellant rather abruptly declared that he was in too much pain to continue. By this time the hearing had been going on for more than an hour and a half. After he had answered a couple of additional questions, his representative made her closing argument. As no adjournment was requested, the hearing was declared closed.

THE LAW

[9] 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.

[10] 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).

[11] 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.

[12] 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

[13] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2008.

[14] 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

[15] The Appellant is 55 years old and obtained a Grade 10 education in India. After obtaining a welding certificate and working at a variety of jobs, he took a position at a company in X in May 1990. There, he worked as a press operator, lifting and moving heavy scrap metal pieces to set up a die. There was a lot of repetitive lifting and reaching, and the Appellant testified that he worked 12 hour days, 5 to 6 days a week. His Record of Earnings (ROE) shows that he made between $29,000 and $35,000 in the last three years that he worked, 2004-2006. He left his employment after a car accident in October 2006.

[16] The accident occurred on October 28, 2006, when the Appellant was the driver of a car that was rear-ended (the accident). He was taken to the emergency department at the

local hospital, where X-rays found no fractures or dislocation. According to his family physician, the diagnosis at that time was soft tissue injuries.

[17] The Appellant's major medical conditions, according to his family doctor, are chronic neck pain, left rotator cuff tendinopathy, and tension headaches secondary to anxiety and insomnia.

[18] In the interests of clarity, the information in the remainder of this section will be divided as follows: Work history; Physical condition and treatments; Psychological issues; and the Appellant's testimony.

Work history

[19] At the end of 2007, the Appellant returned to modified duties with his employer, who gave him a job sorting small items. His family physician, Dr. Sukh C. Vohra, had provided a note dated November 5, 2007, stating that he should go back to work on November 12, 2007, gradually increasing his hours until he was able to work up to an 8-hour shift. The Appellant indicated that after 2 months, the company could not continue to offer him lighter duties, and he had to stop his part-time work. He testified that if his employer had continued to offer light duties, he would have remained on the job.

[20] The Appellant testified that he did not look for work afterwards, because "who else would give me more than $18 an hour?" He also stated: "It was so painful, how could I do more work?" He further indicated that he did not try to learn English because he needed a Punjabi teacher and where would he find one? Nor did he try to retrain for another job.

[21] A summary of a surveillance report from R. C. of Pearce Cohen, an investigative service, dated January 22, 2014, was included in the Appellant's Multidisciplinary Catastrophic Determination Assessment (MCDA) Report dated October 10, 2014. It noted that the Appellant had been seen on X Drive in X, working at a plaza that contained a restaurant and four other small tenants. The investigator searched corporate and land records and discovered that the Appellant and a partner, a Mr. D., had bought the plaza through a numbered company in February 2013 with a down payment of more than half a million dollars and a first mortgage of $1 million. In November 2013, this was discharged and a new

first mortgage in the amount of $915,000 was secured. The Appellant and Mr. D. were able to pay down an additional $85,000 against the outstanding debt. Payments on the new mortgage were $13,672 per month. The source of the original down payment and other information on refinancing or making mortgage payments was unknown (GT6, 3- 24).

[22] At the hearing, the Appellant testified that he is the owner of the plaza and that he had bought it with the proceeds of the sale in 2013 of an 8-unit apartment building he owned with a partner. He insisted that the partnership with Mr. D. had dissolved in 2010 or 2012. He stated that he himself organized people to do repairs and cleaning at the plaza, and his 21-year-old son runs the business, whose taxes are done by an accountant. Further inquiry about this matter was forestalled when the Appellant, who did appear to be in pain, requested the termination of the hearing.

Physical condition and treatments

[23] Mohannad Bakri, PT, provided a report on the Appellant's condition dated November 10, 2006. He found a limited range of motion of the cervical and lumbar spine, as well as both shoulders.

[24] Dr. Vohra completed Disability Certificates dated February 16, 2007, September 27, 2007, November 7, 2007, and August 8, 2008. He provided the following diagnoses: Grade II whiplash; neck injury; thoraco-lumbar strain; traumatic whiplash neck injury; bilateral traumatic shoulder, hip and knee injury; soft tissue injuries; left shoulder strain; left knee sprain; tension headaches, migraines; and anxiety, phobia and stress.

[25] The Appellant saw Dr. Ali T. Ghouse, a physiatrist, on January 15, 2007 for an independent medical evaluation. Dr. Ghouse stated that the Appellant had "impaired cervical and lumbar spine range of movements, impaired range of movements in multiple directions over both shoulders and weakness of his left arm and hand." He had suffered multiple soft tissue injuries, among other complaints. Dr. Ghouse recommended a number of restrictions on sitting, standing, walking, using his left arm and hand, and repetitive neck movements for a period of 6 months. On February 6, 2007, Dr. Ghouse reported on the

Appellant's electrodiagnostic tests. The motor conduction studies, sensory nerve conduction studies, and needle electromyography studies were normal.

[26] The Appellant had a functional abilities evaluation with Michael Drinkwater, PT, in April 2007. At that time he was attending Physio Art in Hamilton 3 times a week for massage, exercise, and heat. His medications were Tramacet, Naproxen and Tylenol #3. He reported no improvement in his condition. Mr. Drinkwater found the Appellant's performance was inconsistent and submaximal. He declined to take most of the tests because of left shoulder complaints. The testing that could be done revealed pain in the left shoulder and a reduced range of motion in his neck, but functional range of motion in the lumbar spine.

[27] Dr. A. Adili, an orthopaedic surgeon, conducted an independent orthopaedic examination on April 25, 2007. He stated that the Appellant's main issue was myofascial pain that could be expected to improve in future. Dr. Adili was uncertain whether the Appellant had suffered a rotator cuff injury, and could not comment on his neurological symptoms. He recommended an EMG of the Appellant's neck and shoulder symptoms, as well as imaging reports on his head. The functional abilities form, Dr. Adili said, "demonstrated too many inconsistencies to draw any useful conclusions from." In a further report dated June 29, 2007, Dr. Adili took the position that the Appellant's soft tissue pain would improve over time, but thought that an imaging report of his left shoulder would clarify this.

[28] In May 2007, a discharge report from the Appellant's physiotherapist stated that he had completed 48 treatments since November 2006. These included chiropractics and massage, as well as ultrasound, heat, and electrical muscle stimulation. In addition, he had physical therapy in the form of an active conditioning program. Mr. Bakri reported that the Appellant showed satisfactory improvement: "there was no neurological signs in arms, right shoulder and lower back pain completely improved." He prepared another treatment plan in September 2007 that was reviewed by Mr. Drinkwater.

[29] On June 22, 2007, Dr. Gordon Sawa, neurologist, performed an independent neurology evaluation on the Appellant. Dr. Sawa found no signs of cervical or lumbar

radiculopathy and stated that the headaches were tension-type. There was no neurological diagnosis associated with the Appellant's left shoulder pain. From a neurological perspective, the Appellant was not unable to perform the essential tasks of his pre-accident employment, or from engaging in housekeeping and home maintenance.

[30] Michael Drinkwater, PT, completed a Physiotherapy Insurer's Examination on October 12, 2007, commenting on Mr. Bakri's recommended treatment plan dated September 19, 2007. He observed that the Appellant presented "with severe guarding and self-limitation in the left arm which is difficult to correlate to orthopaedic findings." The therapist found that "neurologically he is intact, with the exception of the giving-way weakness in the left arm. He demonstrated functional range of motion of the lumbar spine and lower extremities." His nerve conduction test was unremarkable. The assessor thought that the Appellant had achieved maximum therapeutic benefit.

[31] In a report of October 12, 2007 Mr. Bakri disputed Mr. Drinkwater's negative assessment of the Appellant's condition and argued in favour of further treatment. In a rebuttal to that report, dated January 24, 2008, Mr. Drinkwater observed that "there are gross inconsistencies in range of motion demonstrated by [the Appellant] in his [left arm], which in itself is suggestive of an inconsistency in anatomical movement restriction the orthopaedic assessment and my own physical therapy assessment highlighted significant areas of self-limitation and guarding with no clear anatomical pattern of restriction evident."

[32] Dr. Adili evaluated the Appellant again on October 31, 2007. He stated that the primary complaint was headaches, which were apparently related to the Appellant's perception and experience of pain in his neck and shoulder. However, "from an orthopaedic perspective, I cannot find any muscular, ligamentous, neurologic, or bony condition which represents an absolute contraindication for [the Appellant] returning to his pre-accident level of activity." Dr. Adili thought that the pain in the Appellant's neck and shoulder "is subjective based on the level of pain only." He did not expect any significant further improvement from an orthopaedic perspective. There was no objective evidence of neck and shoulder problems. Based on objective findings, there was no reason why the Appellant could not return to his duties as a press operator.

[33] The Appellant had a Functional Capacity Evaluation on February 6, 2008 performed by Dr. David MacLeod. The doctor suggested a conditioning program for his left shoulder, an aerobic conditioning program, and education on proper lifting technique. He recommended that the Appellant return to work at sedentary duties on an occasional basis with restrictions on lifting above his waist with his left arm until the results of an ultrasound could be obtained.

[34] A Chiropractic Assessment by Constance A. Columbus dated February 22, 2008, indicated that the Appellant had been diagnosed with strain/sprain injury of the cervical-thoracic and the lumbopelvic regions, cervicogenic headache and left shoulder sprain/strain. He was complaining of headache, neck and left shoulder pain, and low back pain. At the time of the report, he stated that he had a 70% improvement in his right shoulder, 25% improvement in his left shoulder, and 50% improvement in his neck. There was no improvement in his low back. The assessor considered that the Appellant had suffered soft tissue injuries of his neck and back. He had not been doing his exercises because he found them difficult and had just been walking in the mall. The assessor found that a home exercise program was reasonable.

[35] In March 2008, Dr. H. Platnick, medical consultant, observed that on reviewing the Appellant's file, the documents "did not identify objective evidence supporting significant musculoskeletal, neurological or orthopaedic accident-related injury or impairment."

[36] In July 2008 an imaging report showed focal tendinosis (degeneration in the tendon) in the Appellant`s supraspinatus tendon in his right shoulder, and the left shoulder showed two tears in the tendons, along with some restriction of motion.

[37] On August 25, 2008, the Appellant underwent an Independent Medical Evaluation with Dr. S. Dharamshi, sports and rehabilitative medicine. The doctor found that "there were some findings of tenderness and decreased range of motion in both the neck and the lower back." He had been asked whether a prescription for Tylenol #3 was reasonable. Dr. Dharamshi recommended that the Appellant reduce his usage of this medication because of the dangers of dependence and gastrointestinal complications. Ibuprofen or acetaminophen were the recommended alternatives.

[38] Dr. Franco Tavazzani, an orthopaedic surgeon, performed an Independent Medical Examination on August 20, 2008. He diagnosed the Appellant with Whiplash Associated Disorder type II injury to the cervical spine, myofascial injury to the lumbar spine, sacroiliac joint strain, possible labral tear of the left hip, and possible rotator cuff tear of the left shoulder. He suggested an MRI of his left shoulder and left hip to see whether there was any significant underlying structural abnormality that would require surgery, such as a rotator cuff tear in the shoulder. If not, the diagnosis was soft tissue injury resulting in chronic pain. Dr. Tavazzani stated that "he is disabled from performing high-impact and repetitive activities," and noted that his prognosis for returning to a high-impact job was poor because of the chronic pain associated with his soft-tissue injuries. The doctor recommended functional capacity testing, and occupational retraining or return to modified activities. He also suggested referral to a chronic pain specialist.

[39] In October 2008 the Appellant was hospitalized for a few days with pancreatitis; it appears that he has not had any recurrence of this illness.

[40] Dr. A. Adili, orthopaedic surgeon, performed an independent orthopaedic evaluation on November 6, 2008. He observed that the Appellant still suffered from myofascial pain "with ongoing improvement of his symptoms overall." It was his expectation that the Appellant's condition would improve over time. There was an addendum to this report dated March 26, 2009, after Dr. Adili had an opportunity to examine ultrasounds of the Appellant's shoulders and forearms and an independent psychovocational evaluation of February 12, 2009. He stated that he did not feel "that the insured has suffered a complete inability to engage in any employment for which he is reasonably suited by training, education, and experience." He had not seen the MRIs of November 2008 for the Appellant's left shoulder and lower lumbar spine.

[41] An MRI of the left shoulder taken on November 13, 2008 showed rotator cuff tendinopathy (tiny tears in the tendon with no significant inflammation) with a possible tear in the fibres of the supraspinatus tendon. An MRI done on November 15, 2008 showed mild degenerative changes in both hips.

[42] Dr. R. Ganesan, a neurologist, reported on February 3, 2009 on numbness in the Appellant's right hand "when he works with frozen pizza dough" and when he scraped ice off his car. All neurological tests were normal.

[43] Dr. Alan J. Starcevic, chiropractor, conducted an independent chiropractic evaluation on February 5, 2009. He stated that he had observed "a number of inconsistent, conflicted, and exaggerated findings during orthopaedic and neurological testing that I believe cannot be accounted for solely by an acceleration/deceleration injury that occurred almost two years ago." He saw evidence of "amplified pain focused behaviours, functional overlay, repeated instances of self- imposed activity restrictions (scarcely present when he was unaware of being observed)," and other suspicious behaviours. Dr. Starevic could not obtain accurate results for the Appellant's cervical spine, lumbar spine, and left shoulder. He diagnosed chronic myofascial sprain/strain of lumbar spine and left rotator cuff musculature, and chronic tension type headaches. He wrote that the Appellant's soft tissue injuries were uncomplicated, and that he had received "more than sufficient and adequate care to address" them.

[44] Dr. Salim M. Esmail, an orthopaedic surgeon, completed an independent orthopedic assessment on May 25, 2010. He found evidence of traumatic sprain/strain injury to the lumbar and cervical spine, possible degenerative arthritis of left hip, and possible joint injury to the cervical and lumbar spine. Nevertheless, he stated that "this man is not totally disabled from all employment for the future," and considered that the Appellant was fit for sedentary and light level activities. Dr. Esmail recommended vocational counselling on the subject of future employment.

[45] In his CPP disability questionnaire, dated April 4, 2011, the Appellant listed his impairments as chronic pain in his left shoulder, low back, neck and head. He was limited in sitting, standing, walking, lifting, carrying, reaching, bending, and personal needs. He had trouble with his memory and concentration, and slept only 3-4 hours per night. He could drive for 20 minutes. He reported that his medications were Tylenol #3, Diazepam (anti-anxiety medication), and Naproxen (an anti-inflammatory). He had taken physiotherapy.

[46] On April 11, 2011, the Appellant was assessed for the insurer by Dr. Igor Wilderman, a doctor and pain management consultant, who believed that he had a chronic pain disorder and other symptoms, including myofascial pain of the left rhomboid region, chronic post-traumatic headaches, PTSD, and depression. Dr. Wilderman believed that the Appellant's prognosis was guarded in view of his chronic pain, and recommended multidisciplinary chronic pain program.

[47] The Appellant's family physician, Dr. Vohra, reported on July 4, 2011 that following the accident in October 2006, the Appellant had suffered from chronic neck pain and left rotator cuff tendinopathy, and an MRI of the Appellant's left hip showed degenerative changes there. An EMG of his right hand had proven negative. His other conditions included tension headaches secondary to anxiety and insomnia; the insomnia led to chronic fatigue. His condition was stable with normal gait and posture and chronic pain. The Appellant, he said, had undergone extensive physiotherapy and chiropractic treatments in the past. His only medication was Tylenol #3. The prognosis, according to Dr. Vohra, was poor.

[48] In a letter to the OCRT in July 2011, Dr. Vohra noted that the Appellant had been assessed by numerous specialists at the request of his insurance company, but that he had not seen the reports. The Appellant's cognitive status, he said, was normal at all times, and Dr. Vohra believed that he was "certainly" capable of a "light sedentary type of job." However, he said, his limited education and language skills hampered his efforts to find employment. With regard to the prognosis, Dr. Vohra stated that the Appellant had "reached the point of maximum recovery."

[49] The Appellant's file contains a number of reports on his mental and physical condition between July 2011 and October 2014, well after his MQP. Only those reports most relevant to the issue before this Tribunal will be considered.

[50] Summaries of several surveillance reports from 2011 and 2013 by D. P. and R. C. of Pearce Cohen appear in the MCDA report of October 2014. In July 2011, D. P. wrote that the Appellant was able to carry several trays of food and bend over at the waist while placing them in his vehicle. He was able to rotate his head over his right and left shoulder as

he reversed his vehicle with no apparent difficulty. All the [Appellant's] movements were without hesitation or restriction. At no time did he appear to be in any discomfort.

[51] Another surveillance report from September 2013 stated: the Appellant "was able to work with his right arm extended up over his head for long periods of time as he scraped and painted the door. All of his movements were without hesitation or restriction and at no time did he appear to be in any discomfort or fatigue."

[52] One of the assessors for the MCDA was Lesya Dyk, an occupational therapist. She stated that part of the Appellant's routine was going to his garden every day. She watched the Appellant working there, throwing weeds and vegetables onto the lawn for his sons to pick up because he could not carry a basket full of vegetables himself.

Psychological issues

[53] Dr. N.E. Morris, a psychologist, assessed the Appellant on May 2, 2007. He stated that he did not believe that he suffered from "debilitating emotional impairment", but "the degree of his apparent dysfunctionality due to his reported pain cannot be dismissed." He recommended that he receive psychological treatment to "address his somatic preoccupation and emphatic pain presentation." He also recommended a pain management program. The Appellant's "behavioural portrayal and reported pain severity would certainly pose a distinct deterrent to his ability to manage his employment duties and therefore constitutes a substantial disability from a psychological perspective."

[54] In September 2007 the Appellant underwent a psychological assessment supervised by Dr. H. Van Der Spuy. In a report dated October 4, 2007, Dr. Van Der Spuy stated that the Appellant was "significantly depressed," and recommended 12 sessions of psychotherapy. There was no indication in the file whether this program had been completed.

[55] Dr. Morris re-assessed the Appellant on October 18, 2007. His opinion remained that the Appellant did not suffer from debilitating emotional impairment, but that "the degree of his apparent overall dysfunctionality cannot be dismissed." His psychological state appeared to have deteriorated since April 2007 in that his anxiety level had increased to moderate-severe, and his anxiety about travelling by car had worsened. Dr. Morris strongly

recommended that the Appellant receive psychological treatment, perhaps as part of a pain management program. He should also be encouraged to return to work. The diagnosis was "Adjustment Disorder with Depressed Mood and a Pain Disorder Associated with Psychological Factors and General Medical Condition."

[56] Dr. R.C. Bradley, a psychologist, completed a Psychological Assessment November 27, 2008 for the insurer. Dr. Bradley noted that the Appellant was independent in self-care activities, and that he drove the car almost daily; he took the children to school, and drove to the grocery store. He drove on highways and at night. He was unable to shovel snow, cut grass, dig up or sow vegetables, or rake leaves. He did have friends come over and visit for 1 to 2 hours. He was taking 2 to 3 Tylenol #3 per day.

[57] Dr. Bradley reported: "there was no evidence of emotional distress, significant pain difficulty or cognitive compromise throughout the assessment." He found significant symptom exaggeration on the Appellant's part. He diagnosed him with adjustment disorder with anxiety and depressed mood, and pain disorder with associated psychological factors and a general medical condition. The assessor found no evidence of specific phobia, major depressive episode, or PTSD. He stated: "It is believed that [the Appellant] presents as more disabled than is believed to be the case. Yet he continues to have accident related clinical issues that warrant treatment." There was no change in his clinical presentation from the April and November 2007 psychological examinations done by Dr. N.E. Morris.

[58] In March 2009, Dr. Bradley provided an addendum to his November 2008 report. He had deferred responding to a question on the Appellant's ability to work in any employment for which he was reasonably suited by education, training or experience. Since the November assessment, a Psychovocational Evaluation and Transferable Skills Analysis (PETSA) had become available, in a report dated February 1, 2009. The PETSA report identified some potentially suitable jobs such as labourer in food processing and light assembly work. It was pessimistic about the Appellant's employability, however, noting his physical and psychological impairments, his lack of English, and the fact he had little formal training and no computer skills. That report also indicated that he was unable to sit for exams because of poor emotional and pain tolerance. Dr. Bradley pointed out that the

Appellant had not received pain management treatment, or any medication for his "mood disturbance." He concluded that "the nature and severity of [the Appellant's] psychological impairments deem him to have a complete inability to engage in any employment for which he is reasonably suited by education, training or experience, at this time."

[59] The Tribunal notes that Dr. Bradley subsequently changed his mind about the Appellant's psychological condition, in another psychological evaluation report dated June 2, 2014. In the interim, in September 2013, psychologist Dr. Jacques Gouws had done an assessment as part of the MCDA. He estimated the Appellant's Global Assessment of Functioning (GAF) at 45 (moderate to severe functional impairment), and his Whole Person Impairment rating as at least 55%. This report was not available to Dr. Bradley as it did not appear until October 2014. In his 2014 report, following almost 8 hours of clinical examination, Dr. Bradley stated that there was no clinical evidence to support the Appellant's complaints of "significant psychological compromise and disability." It was his opinion that the Appellant had "the psychological resources and therefore the capacity to normalize his life much more than he has or reports, irrespective of pain symptoms."

The Appellant's testimony

[60] The Appellant complained of pain in his head, left shoulder, neck, and left hip that he said had been ongoing since 2006. He also experienced difficulty sleeping. He testified that he had tried physiotherapy, massage, and pain patches, and had been on Tylenol #3 and Apo-Naproxen (NSAID) since the accident. He was not taking medication for anxiety because his doctors said that the side-effects were such that he should not take them for a long time. His family doctor had recently given him a prescription for Gabapentin, another pain medication. Surgery had never been recommended for him. He had found physiotherapy helpful when he was actually taking it, but the pain was worse when he stopped. He had not found psychological treatment helpful. In terms of assistive devices, he had been given a belt to keep his back straight and ease the strain. He used a heated car seat and a heating pad. His daily routine includes visits to the gym, where he sits in hot water or the sauna and walks on the treadmill. He drives himself the short distance there, and also drives elsewhere in the neighbourhood, but not long distances. He has been unable to work

in the garden since the accident. In the kitchen, he was able to heat bread and make tea, but not to roll out pizza dough, as that would require him to use his left shoulder and he is unable to lift his left arm. He has had no social life since the accident.

SUBMISSIONS

[61] The Appellant submitted that he qualifies for a disability pension because his disabilities are severe and prolonged. His family doctor's medical report indicated in July 2011 that he had reached maximum medical recovery, and he had undergone numerous treatments for his conditions.

[62] In an Explanation dated May 29, 2013, the Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The Appellant's family physician stated that he was able to return to light or sedentary work;

b) Although he may have difficulties with the English language, this has not prevented him working in the past or managing his own affairs; the "prime indicator for a disability benefit remains the medical conditions;" and

c) There are no physical or psychological findings reported that would prevent him from working.

[63] In an "Addendum to the Submissions of the Minister" dated October 8, 2014, the Respondent submitted that further medical information that the Appellant had supplied did not support his position that he suffered from a severe and prolonged disability at the date of his MQP.

ANALYSIS

[64] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability by December 31, 2008.

Severe

[65] The Tribunal did not find that the Appellant's testimony was very reliable because it frequently conflicted with information in the documentary records. For example, he testified

that he was unable to roll out pizza dough because of his left shoulder pain, but Dr. Ganesan reported that he experienced finger numbness when engaging in this activity. This is not an isolated example. The Appellant testified that after the accident he had no social life and was unable to garden; yet Dr. Bradley reported that friends visited him for 1 to 2 hours, and an occupational therapist observed him working in the garden. Further, the Appellant claimed that he worked 60-65 hours a week for $18 an hour, but the income recorded on his ROE does not support this. Accordingly, the Tribunal gave only limited weight to the Appellant's testimony.

[66] Was the Appellant suffering from a severe disability by the date of his MQP? From the viewpoint of his physical health, the file contains imaging reports, the reports of several physicians, and capacity evaluations that are relevant to this question.

[67] Imaging reports from 2008 show that the Appellant had tendinosis in his right shoulder, tendon tears in the left shoulder, and mild degenerative changes in both hips. All other objective tests were negative, and surgery was never recommended.

[68] In the four months prior to his MQP, the Appellant was examined by a specialist in rehabilitative medicine and two orthopaedic surgeons. Dr. Dharamshi found that he had tenderness and decreased range of motion in his neck and lower back. Dr. Tavazzani, one of the orthopaedic surgeons, tentatively diagnosed soft tissue injury leading to chronic pain. In November 2008, Dr. Adili wrote that the Appellant had myofascial pain.

[69] The Tribunal recognizes that myofascial pain and chronic pain can be serious medical conditions. The Federal Court of Appeal has held, however, that "it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP (*Klabouch v. Canada (MSD*), 2008 FCA 33 at para. 14). In this connection, the Tribunal notes that none of the specialists who assessed the Appellant prior to his MQP took the position that he would be unable to work at any occupation. Dr. Ghouse (physiatrist, 2007) thought that he should have restrictions for a period of six months. Dr. Adili (orthopaedic surgeon, 2007, 2009) believed that the Appellant's main issue was myofascial pain and that this would resolve in the future. There was no objective evidence of neck and shoulder conditions, Dr. Adili wrote, and no reason why the Appellant

could not return to work. Dr. Sawa (neurologist, 2007) took the position that, from a neurological perspective, the Appellant could return to his former work, as well as housekeeping and home maintenance. Dr. Tavazzani (orthopaedic surgeon, 2008) diagnosed the Appellant with chronic pain resulting from a soft tissue injury; he thought he should undergo retraining or return to modified duties, though he believed the Appellant could not resume high-impact activities. In the period following the Appellant's MQP, Dr. Esmail wrote in 2010 that the Appellant could perform sedentary and light activities, and in 2011 his family doctor took the same view. The Tribunal also notes that a capacity evaluation in February 2008 recommended that the Appellant work at a sedentary job with restrictions.

[70] The Tribunal finds that the assessments of the Appellant's condition that considered his functional limitations do not support a finding that he was disabled from all work. [1] Mr. Drinkwater found that the Appellant was neurologically intact except for his left arm, and that he had a functional range of motion in his back and legs. Dr. McLeod recommended conservative treatment, such as exercise and education on lifting, and thought that the Appellant could work at sedentary duties. Dr. Starevic diagnosed chronic myofascial sprain/strain of the lower back and left shoulder and chronic tension headaches, and noted that the soft tissue injuries were uncomplicated.

[71] The PETSA report dated February 1, 2009, shortly after the Appellant's MQP, was doubtful about the Appellant's employability on the basis, in part, of his lack of English and computer skills. Nevertheless, it did identify some jobs that the Appellant was possibly capable of performing.

[72] The Tribunal also notes that the investigators' surveillance reports in 2011 and 2013 did not support the Appellant's claims relating to his limitations. Moreover, while the

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[1] The Tribunal notes that some assessors found it difficult to provide an accurate account. Michael Drinkwater (PT, March 2007) indicated that the Appellant's performance during the assessment was inconsistent and "submaximal." Dr. Adili stated that there were too many inconsistencies in that assessment to draw any conclusions from it. In a subsequent assessment done in October 2007. Mr. Drinkwater found that it was difficult to correlate the Appellant's guarding and self-limitation of the use of his left arm to the orthopaedic findings. Dr. Starcevic (chiropractor, 2009) was of the view that the Appellant engaged in symptom magnification and was unable obtain reliable results when he examined him.

information relating to his property management business is scanty, it does suggest the possibility of work capacity.

[73] A number of psychologists evaluated the Appellant's psychological condition prior to December 2008. Dr. Morris (May and October 2007) did not believe that he suffered from any debilitating emotional impairment, and thought that the Appellant should be encouraged to return to work. Dr. Van Der Spuy (October 2007) was of the view that the Appellant was significantly depressed, and recommended psychotherapy, but did not say that he was unable to work. Dr. Bradley, writing at the end of 2008, noted that the Appellant had never been on medication for his psychological condition. He thought that he presented himself as more disabled than he was, and saw no evidence of emotional distress. A few months later, however, relying on the PETSA report, he proffered the opinion that he was unable to work at any job for which he was reasonably suited by education, training or experience. The Tribunal notes that this opinion relied heavily on non-psychological factors, such as the Appellant's lack of fluency in English and lack of formal training, rather than on factors related primarily to his psychological state. Moreover, the Tribunal observes that by 2014, in the opinion of Dr. Bradley, the Appellant's psychological issues had largely resolved.[2] On the basis of the foregoing evidence, the Tribunal is not persuaded that the Appellant's psychological condition was severe at the time of his MQP (or afterwards).

[74] This is not a case where an appellant is disqualified from receiving a CPP disability pension on the basis of failure to follow treatment recommendations. The Appellant has undergone physiotherapy when it was available, used the facilities of a local gym, and taken advantage of assistive devices such as a back brace. There is no evidence that he failed to comply with medication recommendations. Although the Appellant did not attend at a pain management clinic prior to his MQP, there is no indication that his family doctor referred him to such a program, so in that sense he did not fail to comply with suggested treatment options.

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[2] Dr. Gouws (2013) and Dr. Bradley (2014) came to very different conclusions, with Dr. Gouws diagnosing pain and chronic adjustment disorders and assessing the Appellant's GAF at 45, and Dr. Bradley finding no evidence to support a diagnosis of significant psychological compromise and disability. The Tribunal prefers the conclusion of Dr. Bradley: he had assessed the Appellant twice before, on one occasion somewhat sympathetically; and his is the most recent report on the Appellant's psychological state.

[75] On the basis of the imaging reports, functional abilities evaluations, and reports of specialists on the Appellant's physical and mental health, however, the Tribunal is not persuaded that the Appellant's disabilities were severe at the time of his MQP.

[76] Further, the Tribunal notes that even if the Appellant's disabilities had been found to be severe, there is a further element of the severity test to be considered. In *Inclima v. Canada (A.G.),* (2003 FCA 117 [*Inclima*]) the Federal Court of Appeal Court held that, where there is evidence of work capacity, a person must show that "efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition" (at para. 3). In *Villani v. Canada (A.G.)*(2001 FCA 248 [*Villani*]*),* moreover, the Court stated that claimants would need to provide "evidence of employment efforts and possibilities" (at para. 50).

[77] In the present case, the Tribunal notes that the Appellant did return to light duties work following his accident. He stopped working, however, not because he lacked the capacity to continue, but because his employer had no further light duty work. Further, the Appellant testified that if such work had been available he would have continued on the job. This suggests that he had some capacity to work. Moreover, after leaving his job, the Appellant testified, he did not look for other work, apparently in part because he did not think he could find anything that would pay as much as his old job. The Tribunal notes, however, that the question is whether he could work at any job, not one that paid as much as his original employment. Nor did he try to learn English, which would have been a good first step towards other employment. The Tribunal was not persuaded that his explanation – that he did not think he would be able to find a teacher who also spoke Punjabi – was a reasonable one. Accordingly, the Appellant does not meet the terms of the tests in either *Inclima* or *Villani.*

[78] To be clear, it is not disputed that since his accident, the Appellant has experienced difficulties with both his physical and his mental health. On the whole of the evidence, however, the Tribunal found that the Appellant's disability was not, on a balance of probabilities, severe.

Prolonged

[79] Since the Member found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[80] The appeal is dismissed.

Carol Wilton
Member, General Division - Income Security