Citation: ***M. L. v. Minister of Employment and Social Development,*** **2015 SSTGDIS 78**

Date: July 20, 2015

File number: GT-123879

GENERAL DIVISION - Income Security Section

Between:

M. L.

Appellant

and

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

Respondent

Decision by: Verlyn Francis, Member, General Division - Income Security Section

Heard by Videoconference on June 2, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: M. L.

Appellant's Representative: Rajit Singh Gill

Witness: D L.

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 4, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The hearing of this appeal was by videoconference for the following reasons:

a) The form of hearing is most appropriate to allow for multiple participants;

b) Videoconferencing is available close to the area where the Appellant lives; and

c) 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.

THE LAW

[3] 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 Tribunal.

[4] 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).

[5] 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.

[6] 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

[7] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2013.

[8] 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

[9] The Appellant is a married father of two adult children who was 52 years of age at his MQP and 54 years of age at the time of the hearing. He has a Grade 9 education. Between 1994 and 1996, he painted cars in his own auto body repair shop. He closed his business because it did not generate enough business. Prior to stopping work, he worked full-time as a loader operator for a construction company.

APPLICATION MATERIALS

[10] In his Questionnaire which was date stamped April 3, 2012, the Appellant indicates that between July 1994 and June 1996, he was self-employed in his own body shop where he painted cars. He had stopped working in his own business because it was no longer busy. His last position before stopping work was as a loader-operator for James Dick Construction from April 20, 2005 until he was laid off on September 6, 2010, because of work injury to his back. Prior to that time, he worked ten to eleven hours a day, five days a week at James Dick.

[11] The Appellant claims that he is disabled because of lower back pain, chronic pain syndrome, Asthma/COPD, impaired fasting glucose, chronic neuromuscular chest pain, and depression. He was prescribed narcotics and antidepressants to treat his conditions and they have impaired his cognition. He is prevented from working because of constant pain, and he cannot stand or sit for any length of time.

[12] As far as activities, since April 2010, he has not been able to ride motorcycles. He claims that his social life is non-existent and his marriage is suffering as a result of his disabilities.

[13] He indicates that he has the following functional limitations: he can sit or stand for half hour to an hour; he cannot even walk half a block maybe; and he cannot lift or carry. His reaching is not good, poor; and bending is not very good, poor. His condition has made it difficult for him to take care of his personal needs and sometimes his wife has to help him with his personal care. He is constipated due to medication and mobility issues. He does no household maintenance. His memory and concentration have been impaired. His sleeping and good breathing are not good. He is not driving a car any more due to medication, and he does not use public transportation.

[14] He visits his family doctor to follow up on his back pain and medications. His medications at the time of his application were: Cymbalta 120 mg daily, Omeprazole mag 20 mg daily, Statex 10 mg twice daily, Teva-morphine 60 mg twice daily, Celebrex 200 mg daily, Mylan-Cyclobenzaprine 10 mg three times daily, Spiriva 200 mg daily, and Ventolin/Flovent

as needed. His treatment has been counselling, physiotherapy, pain management courses and he uses a back brace.

[15] While the Appellant indicates that he would consent to a vocational rehabilitation assessment, he had never been involved in a rehabilitation program.

[16] The Appellant testified at the hearing that for 20 years, he drove a tractor trailer. He wanted to get off the road so he took the job as a front end loader operator for James Dick Construction from April 20, 2005 until he was laid off on September 6, 2010. The heavy equipment he operated was in a pit digging gravel and sand and putting them in trucks. In April 2010, he was operating a frontend loader at work with the bucket 20 feet in the air. The line holding the bucket of the loader broke and the bucket came crashing down on the machine. He claims he was thrown around "like a rag doll". His boss came down to the site and ordered him back on the loader right away to load the next truck in line. The Appellant indicated that he kept walking until he could not walk any more. He went on sick leave for six months and received Employment Insurance sickness benefits because he could not move and walk. In September 2010, he was laid off work. During his sick leave, he claims he was not thinking of applying for any disability because he thought he was going back to work.

[17] The disabilities he complains of in his application include back pain, depression, mental illness, asthma and COPD. He indicates that he has been diagnosed with Attention Deficit Disorder (ADD). He claims that he had been sleeping on his side for the past six years because he had a leg injury at work before he hurt his back. He cannot sleep on his right side or back. If he wakes up on his right side, his wife has to help him down from the bed because he cannot get out of bed by himself.

[18] He testified that he has been attending pain clinic every Friday for the past two years. He claims that he gets 10 needles in his back and left leg and he is bruised all week from them. He indicates that when he gets home, he still has the same pain. He indicates the doctors recommend the morphine until they find something else. For three months, he had withdrawal and diarrhea because they tried to change the medication and it did not work. He claims he wants to get better. He indicated that he tried to convince himself at the beginning that the

needles were helping but he does not feel any difference. If it is a damp day, he describes his pain as being so bad, it is akin to being hit with a baseball bat or being run over by a car. Sometimes, he says, the same pain is so bad he can hardly get out of his seat. He indicates that he is never pain free anymore. He has pain with or without medication.

[20] The Appellant claims that he rambles because of some of the medications he takes for his back injury, including morphine which he has been taking three times a day for six years. He claims that if he was not taking the medications, he would have more than double the pain. The medication is affecting his brain, his life situation and his spouse. He indicates that his wife tells him that he rambles, interrupts people and he is foggy. He takes Ritalin for his ADD and sleeping pills because he cannot sleep at night. He testified that the doctors told him that the medications have given him terrible memory, and he was never like that before.

[21] The Appellant testified that the psychiatrist he was seeing for four years left and he went to Canadian Mental Health Association (CMHA) where they teach him how to manage his depression and strategies for reacting in all situations. He continues to see a counsellor every month. In his sessions with the psychiatrist, they talked about his depression and the reaction to medication. As he understands it, "the anti-depressant is trying to fight with the morphine and the same with the Ritalin and nobody knows how to fix that stuff". At the psychiatrist, they talk about the things bothering him and situations he is going through each day including his life situation, his wife problems, depression, and medications. They explain to him why some medications react with other medications they prescribe. They try to help him cope but he claims he is suffering daily.

[22] He indicates that he takes two to three sleeping pills a night and he wakes up every hour. He just lays there and cannot get out of bed but his wife will help him when he has to get out. He indicates that, because of his condition, his relationship with his wife is not good. They sleep in different rooms because he wakes up all the time and she has to work. She is the only one working in the house. The pain is getting worse than it was before. It feels like he is going backwards. He feels worse than when he originally got hurt. He just keeps going to the doctors and they ask him to tell them when things get better. Before he got hurt, he indicates he was walking fine. He worked eight hours a day. Now, he cannot do anything around the house.

[23] He started using a cane four years ago to keep himself stable so he did not fall. When he gets the pain on his left side, it shoots from his lower back down his left leg. He described it as numbness and he gets sharp pains like needles. He indicated that the doctors have told him that his pain is chronic and will last a lifetime. They cannot say when it will go away.

[24] He indicates that the doctors have advised him not to go back to work. He was operating a front end loader which is heavy equipment. He claims he would not be able to get on that loader today because he would not be able to get his leg up to the first step to get on it. The loader is higher than his height of 5 feet 7 inches, and the step is 2 – 3 feet off the ground. He can slowly go up steps one at a time for two or three steps with his cane every day, but he could not do three feet, and not for long periods of time. He indicates that if he stays on his feet that long, his back seizes and cramps up.

[25] The Appellant testified that nothing makes his pain better. He tried acupuncture, tried counselling, and got a back brace. He claims he is waiting for a fusion on his sciatic nerve at Toronto Western. The doctors have told him it should take the pain away for nine months but he is not sure he could go back to work. It is an ongoing process, according to the Appellant.

[26] He claimed he tried to find work but when prospective employers observed him walking, they did not employ him. He tried to retrain and upgrade himself but he does not know what job he can do. His attention span is such that if he reads a page, he forgets what he read and he has to go back. He has to be in a room with no noise. He claims he could not focus on anything even when he was a child. He went to school not knowing any English. He spoke only Italian. He failed Grade 1 and was behind in every class after that. The Appellant indicates he is open to suggestions on what work he could retrain for. He indicated a nurse practitioner suggested finding retraining and his body got worse. In his description, he did all the baby steps and he still crawling today. He does not know where he could go but is open to suggestions because he tried everything. He claims that the doctors have told him to forget about his work because he cannot go back. In looking for different types of work, he tried to go back to school but he believes he will be laughed at because he is 54 years old and, cognitively, it is tough. He indicates that he could not do a clerk's job because he would not be able to sit for four to eight hours.

[27] On his relationship with his wife, the Appellant testified that she is the only person working in their household. He applied to the Ontario Disability Support Program (ODSP) but was turned down because his wife is employed. He had known his wife since he was 13 years old and he had never been off work before. They have downsized four houses and are now renting an apartment. He does not have a car. When he takes the morphine, he says it makes his ears whistle like an airplane when it is taking effect. Lately he has been watching the way he speaks because his wife is talking about a separation because she wants to get away from him. He says he understands he gets abusive. He gets foggy. He lamented that his wife is going to leave him. He claimed that he just does not want to wake up anymore.

[28] The wife of the Appellant was excluded during his testimony. She testified as to her observations of the Appellant on a daily basis.

[29] She indicated that there is a lot of frustration in regard to being the sole provider for herself and her husband because he has no income. She indicated it is very stressful for her to see him daily very depressed about his situation and not being able to work because of his condition. His cognitive ability to hold conversation has been affected due to his condition and the medication. She indicates there is always arguments and frustration. She testified that they have two daughters, 26 and 33 years old. The older daughter has spina bifida and she has been in hospital for the last year with four surgeries. Because of his condition, the Appellant cannot be there to assist her. The financial strain has been severe. They have been to St. Michael's Hospital on a number of occasions. Their daughter is scared of dying. Their 26- year has inter-cranial pressure and she is in remission at this time. They have sold their house and she now suffers from depression as a result of the stress.

[30] The Appellant's wife testified that sometimes she has to physically help him out of bed. It takes him a long time to get out of bed. He is taking slow release morphine twice a day. He is taking Statex, two different anti-depressants, one for sleeping at night and another one. The morphine takes away from the anti-depressant and then he has to have more morphine and it becomes a whole cycle. The morphine keeps him awake so he gets medication for sleeping and they are taken away because they are addictive. He has some issues with his frustration with

ADD because the morphine has made him more impulsive and interferes with the ADD and impulsivity.

[31] She indicates that she has accompanied him to doctors on numerous occasions and she has spoken to the doctors. They have indicated that he will not get better; what he has is for life. He goes to the doctor every week. He attends pain clinic every week for freezing of his back. Sometimes he gets relief for five minutes and sometimes not at all. There is no difference from the time he started; sometimes it is worse. The doctors have not given a timeline as to when he will get better.

[32] She claimed that before the accident, he was a good provider, working 12 hours a day every day. Weekends he was working around the house, cooking whatever had to be done and he cannot do that anymore. Occasionally he does things around the house but he pays for it the next day.

[33] She indicated that he is hard to be around and his communication is hard to understand. His cognitive ability is impaired by the medication he is on and he gets lost in a simple conversation. When he gets lost, he will get angry. Cognitively, the medication makes it hard to be around him and hard to have a conversation with. This is causing a lot of trouble in their married life. They have separate rooms. He does not sleep soundly and that is why he has medication. If he sleeps for more than four hours, he needs to be helped out of bed. As his wife puts it, he has morphine to function, not a quality of life.

MEDICAL EVIDENCE

[34] On March 10, 2009, the Appellant had a consultation with Dr. Anna Czok, Brampton Civic Hospital, for right-sided ribcage pain. Dr. Czok indicated that around November of 2007, he had spontaneous onset of right-sided ribcage pain. At the time, he had Mill of the spine and the thoracic spine which were reported as normal. That was followed by Mill of the abdomen and liver which did not demonstrate any changes that could explain his symptoms. He had a MRI of the lumbar spine in February of 2008 which showed minor degenerative disc changes at L3-L4 to L5-S1 but there was no significant stenosis or foraminal narrowing. Following full investigation, he returned to work in May 2008 and was laid off in November of 2008. His

medication when he saw Dr. Czok in March 2009 were morphine 10 mg daily, Losec, Paxil and Ventolin and Flovent for his asthma. On examination, she found that the Appellant had decreased sensation to pinprick at the level of T5 to T8 on the right side only. There was also tenderness of the lower ribcage on the right only. The rest of the examination, including muscle strength in upper and lower extremities, reflexes and sensation, was normal. His gait pattern was normal and mobility of the neck and shoulders was normal. In summing up her findings, Dr. Czok indicated the Appellant had persistent ribcage pain unilaterally. There were several findings on clinical examination that were suggestive of thoracic disc at T5-T7 level or costochondritis. To determine whether there was any pathology, the Appellant was referred for MRI of the thoracic spine and a bone scan.

[35] The MRI which carried out at William Osler Health Centre on May 27, 2009, identified no significant thoracic abnormality. Alignment of the thoracic spine was normal, no vertebral body compression fracture was seen, thoracic cord signal and morphology was normal. There was no significant disc focal herniation. There was mild non-compressive posterior disc bulges present at T5-6 and T7-8. The mid thoracic spine showed mild shallow posterocentral disc protrusions but no spinal canal stenosis. No paraspinal soft tissue mass was seen and no thoracic epidural lipomatosis identified.

[36] A whole body bone scan carried out on April 13, 2010, found no areas of abnormal uptake in the thoracic cage, including the ribs. The impression was that the study was unremarkable with no scintigraphic evidence of rib fractures.

[37] On referral from Dr. Josephson, the Appellant underwent an enhanced CT of the thorax on August 8, 2010. The scan revealed no significant abnormality. It did show occasional small lymph nodes, the largest being 17 mm at the left hilum, which were unchanged from 2007. There was no sign of neoplasm.

[38] The Appellant was assessed at the Wasser Pain Management Centre at Mount Sinai Hospital in Toronto on February 8, 2011 by Dr. S. L. Librach. The doctor reported that the Appellant gave a history of intermittent back pain for many years since his teenage years but the pain was intermittent and not bothersome. Three years previous to seeing the doctor, he

developed sudden severe chest pain on the right side. He was found to have fractured ribs. His lower back pain increased over the last year. He described the pain as low and mid lumbar that radiates slightly laterally and occasionally radiating down his legs but this was rare. Sometimes he had tingling over the anterolateral right thigh. He did not have any weakness in his legs. The pain stopped him from walking too much. He had difficulty picking up things and some difficulty with other activities of daily living. He could not ride his motorcycle because jarring bumps in the road made the pain worse. He had tried acupuncture for his chest pain and found it helpful but he does not have any plans now to try acupuncture again. He did not find physiotherapy helpful and chiropractic seemed to make his pain worse.

[39] Dr. Librach noted that the Appellant had been on increased doses of opioids. He had previously been on OxyContin but was then on MS-Contin 60 mg b.i.d. and the dose had been increased recently. The Appellant admitted to Dr. Librach that this did not handle much of the pain but it took the edge off the pain. He also took 10 mg of Statex up to four times per day. These medications modified his pain just a little.

[40] On examination, Dr. Librach noted that the Appellant showed a loss of lordosis in his lumbar area with paravertebral muscle spasm. The doctor noted that it was difficult to assess his range of motion because he was resisting movement. Motor power and tone were equal and normal bilaterally. Reflexes were equal and active bilaterally. He did have a patch of slightly decreased sensation on the anterolateral aspect of his right thigh. He was quite obese.

[41] Dr. Librach's diagnosis was that the Appellant has chronic lower back pain and the likelihood of it being modified by any treatment is very limited. He was also found to be depressed and having a lot of muscle spasm. The doctor also noted that the Appellant was at high risk for addiction and, because opioids have little effect on chronic lower back pain, he suggested lowering the dose or not increasing it further.

[42] Dr. Librach recommended that the Appellant be retrained if he wants to find another type of work. Counselling was also recommended for his depression along with a change of his antidepressant medication. The doctor noted that he was deconditioned and suggested that aqua- fit classes may be appropriate to increase his abdominal muscle tone. He also suggested meditation to try to reduce the muscle spasms. Dr. Librach commented that the Appellant had

gotten wrapped up in his pain syndrome to the extent that he has not been able to make progress. The doctor concluded, however, that he was not sure that there is anything that will help the Appellant in the long run.

[43] An x-ray of the Appellant's dorsal and lumbar spine on July 11, 2011, showed limited posterior element degenerative changes in the lumbar spine.

[44] A CT scan of the thorax on September 6, 2011, revealed no change from the prominent mediastinal and portal lymph nodes that had been seen in August 2010. There were no findings to suggest malignancy.

[45] He was also referred to the Power Over Pain Program to help manage his pain. In a pain assessment carried out on December 7, 2011, the Appellant gave a history of intermittent lower back pain without known injury or trauma since his teenage years, spontaneous onset right-sided ribcage pain around November 2007. In addition, he outlined a workplace accident in April 2010 which left him with central lumber back pain with numbness, pins and needles sensation down the buttocks, lateral/anterior left thigh to dorsal or left foot to all five digits of his left foot. The neuropathic pain appeared to be following L4 and L5 dermatone. Lumbar x-ray in summer 2011 indicated limited facet joint hypertrophy beginning at L3-L4 and extending to L5-S1. No nerve root compression was noted on x-ray and there was no diagnostics to support nerve root compression of the lumbar/sacral spine. At that time he indicated that physical activity made the pain worse and medications made the pain better. He also reported that pain was interfering with his sleep. It was noted that his pain outcomes profile highlighted was high in relation to his feelings of lack of concentration, depression and anxiety, as well as his feelings of tension. It was considered fortunate that he was receiving mental health support at that time to help him with these issues. He indicated that it was difficult to go from full-time employment making good money to depending on his wife financially. He also reported that his vitality was low, he had limited energy, low endurance and strength and he was not participating in physical activity. He was encouraged to continue working and hydrotherapy was recommended.

[46] On December 7, 2011, the pharmacist noted that the combined dosage of his MsContin and Statex at that time was 160 mg oral morphine per day. He had recently been switched from

Paxil to Cymbalta 30 mg which he felt helped the numbness in his left leg. He was concerned about side effects and those were discussed with him. The Appellant indicated that the increased dose of MsContin to 60 mg made him feel fuzzy and he expressed the desire to "come off all these pills". This was a long-term goal but, on discussion with the pharmacist, it was noted that he understood that his requirement for the pain medication would continue.

[47] On December 9, 2011, the Mental Health Therapist at Dufferin Area Family Health Team, reported that the Appellant was seen for assessment and treatment of depression on November 2, 15, 28 and December 15, 2011 and he was being jointly followed by the therapist, Dr. Josephson, and Nurse Practitioner Savage. On his first visit on November 2, 2011, he presented with severe clinical depression and persistent chronic pain.

[48] Dr. David Josephson and Nurse Practitioner Joy Savage both completed the Medical Report accompanying the Application on March 19, 2012. They indicated they started treating the Appellant in March 2009 and last saw him March 7, 2012. The diagnoses were chronic pain syndrome, asthma / COPD, impaired fasting glucose, chronic neuro-muscular chest pain, and depression. The relevant medical history relating to the main condition was spontaneous right-sided rib cage pain unrelated to trauma; degenerative lumbar disc disease; decreased sensation at level of T5 – T8; and lumbar back pain post work related injury when thrown out of truck. The physical findings and functional limitations that Appellant had at that time were constant lower lumbar that radiates slightly laterally. Occasionally there was some radiation to legs but this is rare. Pain prevents the Appellant from ambulating too much. He had difficulty picking up things and some difficulty with other activities of daily living. He was unable to ride his motorcycle because of the jarring of the potholes which makes pain worse.

[49] In the section reserved for further consultations or medical investigations planned relating to the main medical condition, the report indicated there were none and noted Highland's Family Health Team chronic pain program. Further referrals physiatry / chronic pain clinic were to be pursued. Ideally, further referral to a rehab specialist would be planned but, at that time in March 2012 nothing planned due to financial constraints of the Appellant.

[50] His medications were Spiriva 18 mg od, Losec 20 mg bid, Cymbalta 90 mg od, Statex 10 mg, Flexeril 10 mg tid, Novo-morphine SR 60mg bid, Celebrex 200 mg od. He had been

treated with acupuncture with relief, physiotherapy was not helpful, chiropractic made pain worse. He was not receiving any other treatment at the time of the report due to financial difficulties.

[51] The prognosis of Dr. David Josephson and Nurse Practitioner Joy Savage was that the Appellant has chronic lower back pain and the likelihood of this being modified by any treatment in a major way is very limited. He is also quite depressed. He is at high risk for addiction. Significant deconditioning has occurred.

[52] In the additional information section, it was noted that the Appellant needed to be retrained if he wanted to find another type of work. He seems to be totally wrapped up in this pain syndrome to the extent that progress is limited. An aggressive program of cognitive therapy/ rehabilitation / physical condition would be paramount, while a modified recovery would be ideal and would certainly be possible. There has been little change / improvement to date.

[53] Nurse Practitioner Savage reported on September 26, 2012, that the Appellant was unable to perform any job responsibilities because of the medications he is taking for pain, his limited education, his inability to sit, stand or walk for long periods of time. She was also of the opinion that he could not be trained in any other work related field and he is unable to return to the workforce within a foreseeable and reasonable period of time. She indicated that the Appellant had exhausted modalities such as physiotherapy, chiropractic care and he was awaiting a psychiatric assessment and a pain management specialist. She indicated that his mental status was then under assessment and she would leave the decision as to whether his disability was both severe and prolonged up to a specialized chronic pain management team. In Nurse Savage's view, present conservative treatment has been exhausted for these conditions and hospitalization is not required. She was not sure that there were further treatment measures that can be attempted at that time.

[54] The Canadian Mental Health Association Waterloo Wellington Dufferin (CMHA) which provides counselling, psycho-educational groups and psychiatry appointments for adults with moderate to severe mental health symptoms. The CMHA prepared a report dated March 27, 2015, that was signed by Cynthia Kipp, Counselling Psychology, Mental Health Worker II and

Tim Smith, Counselling Psychology, Supervisor, Adult Services. They reported that, on referral from Nurse Practitioner Savage, the Appellant was seen by them for psychiatric assessment for severe depression on August 23, 2012. In the initial admission interview, the Appellant reported being depressed for his entire life. He also reported having attention deficit disorder and learning disabilities, insomnia, poor concentration, low energy, chronic extreme back pain.

[55] The Appellant received the following services from the CMHA: psychiatric assessment by Dr. Kwama Badoe on April 16, 2013 who diagnosed him with major depressive disorder, recurrent type, partial remission. The psychosocial stressors were moderate financial pressures and Dr. Badoe ascribed a Global Assessment of Functioning (GAF) score of 45-50.

[56] He was next seen by Dr. Sadiq Hasan on September 30, 2014, who diagnosed major depressive disorder with anxiety, ADHD predominantly inattentive type; chronic pain in the back, asthma, borderline sleep apnea, moderate psychosocial stressors and a GAF score of 45-50.

[57] He was assessed on December 7, 2012 on the Ontario Common Assessment of Need which showed significant impairment in day-time activities, physical health (back pain, COPD), psychological distress, company, basic education (learning disabilities). He had 10 individual counselling appointments between January 9, 2013 and March 27, 2015. On observation, the Appellant walked slowly with the aid of a cane, winced at times when moving and moved cautiously, appeared tired on days and reported high levels of pain. His mood was lower on days with high levels of pain. He reported his mood drops with interpersonal conflict. The counsellor was of the opinion that he participated willingly in treatment. He reported some benefit from relaxation exercises and behavioural interventions like walking and positive social contact but continued to report struggling with low mood and chronic pain. He also reported difficulty tracking the interventions and their effects on him. The Counsellor indicates that the Appellant reported he is very limited in the type and duration of work he can do. The counsellor reported she was not qualified to assess any safety risks associated with his potential work tasks. Based on doctor reports and his pharmacy prescription history, his medications were methylphenidate 10 mg am, Citalopram 10 mg bid, zopicione 15 mg pm, morphine SR 30 mg bid, Statex 10 mg daily.

SUBMISSIONS

[58] Mr. Gill submits that the Appellant qualifies for a disability pension because:

a) The Appellant injured his back and rights ribs in a work place accident in April 2010 and he applied for CPP disability benefits because he has chronic pain and is unable to walk, sit or sleep for long periods. He also suffers from depression

b) He cannot get out of bed without the help of his wife if he sleeps in a certain position. He he walks with the help of a cane because he loses his balance because due to sudden numbness in his legs.

c) Despite taking numerous medications, injections and attending counselling at the Canadian Mental Health Clinic, he is unable to pursue his prior work or any kind of work. His condition has been deteriorating since the accident. His inability to work has put financial strain on his relationship with his family and this has exacerbated his depression.

d) He is disability is severe and prolonged as defined in section 42(2) and he qualified for benefits under the CPP.

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

a) The March 2012 Medical Report of Joy Savage and Dr. Josephson diagnosed the Appellant with chronic pain syndrome, asthma and COPD, impaired fasting glucose, long-standing atypical chest pain, and depression. They indicate that the Appellant was not actively engaged in physical treatment and was significantly deconditioned, although aggressive participation in cognitive therapy, rehabilitation, physical conditioning would be paramount. While modified recovery return would be ideal and certainly possible, there was little change and initiative to date.

b) Although the Appellant was diagnosed with asthma and COPD, he was not actively followed by a respirologist and there are no tests submitted to support this as a limitation hindering his ability to return to work.

c) In February 2011, Dr. Librach at the Pain Management Centre indicated that the Appellant had a long history of back pain since his teen and this increased following a workplace incident. There was no involvement of the WSIB. At the time of the Assessment, he was off work. His symptoms of chest pain had been treated with acupuncture and gradually disappeared. His movements were guarded and reflexes, motor power and tone were normal. The doctor indicated that the Appellant required retraining if he wanted to find other types of work. He indicated that the Appellant has gotten wrapped up in his pain syndrome to the extent that he has not been able to make any progress. His recommendations are muscle relaxants, aqua-fit classes and reconditioning.

d) The nurse practitioner indicated in a letter dated August 2012 that the Appellant was seen every 2-3 months following his injury. No office consultation notes were submitted to identify the purpose of the visits. It is indicated that he has exhausted treatment modalities of physical therapy and chiropractic care, massage therapy, mental health therapy, occupational therapy and chronic pain control but there is no indication he exhausted treatment modalities suggested by Dr. Librach. The nurse practitioner also reported that the Appellant tried lighter work activities and failed but the Appellant indicated in his questionnaire that he did not attempt lighter or different type of work.

e) Chronic pain is a descriptive term of subjective pain complaints. However, it is incumbent on the Appellant to show that all treatment modalities were sought and efforts were exhausted to cope with the pain. The pain must be such as to prevent the Appellant from regularly pursuing a substantial gainful occupation.

f) CPP legislation makes no provision for granting disability pension based on a person's belief that he is disabled and his adoption of a disabled lifestyle based on that belief. The fact that suitable alternative work might be difficult to find and might require retraining is not a criterion for awarding disability benefits under the legislation

ANALYSIS

[60] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

Severe

[61] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A person with a severe disability must not only be unable to do their usual job, but also unable to do any job they might be reasonably expected to do. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Guiding Principles

[62] The principles set out in the following cases assisted the Tribunal in determining the issues on this appeal.

[63] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[64] In addition to his background, all of the Appellant's impairments that affect employability are to be considered, not just the biggest or the main impairment (*Bungay v. Canada (A.G.)*, 2011 FCA 47).

[65] 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).

Application of the Guiding Principles

[66] In assessing the severe criterion in a real world context as required by *Villani*, the Tribunal takes into consideration the fact that, at the time of his MQP in December 2013, the

Appellant was 52 years of age. He has a Grade 9 education but he testified that, because he could not speak English when he started school, he was always behind in all his grades. The Appellant testified that up until his workplace accident in April 2010, he had worked for approximately 27 years around machinery – first in his own auto body shop repairing motor vehicles, next as a truck driver and, finally, as a front end loader operator. The Tribunal observed that, in giving his evidence, the Applicant rambled, left sentences unfinished, talked over his representative and, at times, did not appear to be able to concentrate on the questions being put to him. From observation of the Tribunal, it did not appear that the Appellant was being difficult but was attempting to give his evidence as best he could. This behavior appeared to be in keeping with what was reported to the CMHA on his initial assessment as ADD and learning disabilities, and referred to by Dr. Hasan as "ADHD predominantly inattentive type" in September 2014.

[67] The wife of the Appellant was excluded during his testimony. She testified in a credible, straightforward manner concerning the Appellant's physical and mental condition, and what she described as his impulsivity, lack of concentration and memory problems. She corroborated his evidence that before his accident in 2010, he had worked full-time for eight to 12 hours per day and after September 2010 and up to the time of the hearing, he had changed to the point that she was considering ending the marriage. He was in pain all the time, did not sleep at night, is depressed, and the morphine medication is making his impulsivity worse.

[68] In keeping with *Bungay,* the Tribunal is required to take into consideration the cumulative effect of the Appellant's conditions which can be found in the reports of Dr. Josephson and Nurse Practitioner Savage, Dr. Librach, Dr. Czok and included sudden onset of right-sided rib cage pain, chronic lower back pain from a work-related injury which radiates to his legs, major depressive disorder with a GAF score of 45 - 50, ADHD and he was noted as being at high risk for addiction because of being prescribed the equivalent of up to 160 mg of morphine per day. The medical evidence indicates that, even though he had had acupuncture, physiotherapy and chiropractic treatments, the likelihood of his chronic pain being modified by treatment was very limited. Both the oral evidence and medical reports also confirm that the Appellant cannot stand, sit or walk for extended periods of time, and he walks with the assistance of a cane.

[69] The Respondent submitted that at the time of the Medical Report which accompanied the Application in March 2012, Dr. Josephson and Nurse Practitioner Savage indicated that the Appellant was not actively engaged in physical treatment and was significantly deconditioned. The Tribunal notes that the Report also indicated that the Appellant had been treated with acupuncture with relief, physiotherapy was not helpful and chiropractic made the pain worse. They indicated that he was not receiving treatment at the time of the report due to financial reasons but noted that consultation with Highland Family Health Team chronic pain program was being considered. They also noted that the Appellant has chronic lower back pain and the likelihood of it being modified by any treatment in a major way is very limited.

[70] The Respondent also submitted that in February 2011, Dr. Librach of the Pain Management Centre at Mount Sinai Hospital in Toronto indicated the Appellant had gotten wrapped up in his pain syndrome to the extent that he has not been able to make any progress. The doctor indicated that the Appellant required retraining if he wanted to find other types of work and recommended muscle relaxants, aqua-fit classes and reconditioning. The Respondent submits that the Appellant did not follow the doctor's recommendations. That was not the extent of the doctor's findings, however. The Tribunal notes that Dr. Librach's report also found the Appellant had chronic lower back pain and indicated that the likelihood of it being modified by any treatment is very limited. He also found that the Appellant was depressed and having a lot of muscle spasm. Dr. Librach also noted that the Appellant had been on increased doses of opioids and the pain limited his activities of daily living and prevented him from walking too much. The doctor's conclusion was that he was not sure that anything will help the Appellant in the long run. The Appellant and his wife also testified that, in addition to the other treatments and medications, he attends pain clinic every week and receives injections in his back. They testified that he has undertaken all treatments recommended by the doctors if he is able.

[71] The Respondent submitted that even though Nurse Practitioner Savage indicated in her August 2012 letter that she saw the Appellant every two – three months following his injury, her consultation notes were not before the Tribunal for consideration. While it would have been helpful to have all of the office notes of Nurse Practitioner Savage, in view of the Tribunal, this

is not fatal to the Appellant's case. There are notifications, for example, from CMHA that the referral to them was from Nurse Practitioner Savage.

[72] By memorandum dated May 29, 2015, the Respondent indicated that it received documents which included the March 27, 2015 report from the Canadian Mental Health Association of Waterloo but chose not to make submissions on these documents. The CMHA report sets out the treatment the Appellant received from them for severe depression starting in August 23, 2012 and continuing to the time of their report. It indicates he was diagnosed and being treated for major depressive disorder with anxiety, ADHD predominantly inattentive type, chronic pain in the back and borderline sleep apnea, moderate psychosocial stressors. The Tribunal accepts the evidence of CMHA that the Appellant had these impairments at least from 2012 and they continued to March 2015. The Tribunal also accepts the testimony of the Appellant and his wife that his condition is further complicated by the fact that his pain medications interact with his anti-depressants to aggravate his ADHD, impulsivity and lack of concentration. As early as December 2011, the Appellant had discussed his concerns about the side effects of his medications with the pharmacist and his desire to "come off all these pills" but the pharmacist indicates in the Power Over Pain report that, after discussion, the Appellant understood his requirement that his pain medication continue.

[73] The Tribunal finds that, given his multiple physical and mental conditions, the Appellant is unable to return to his previous physically demanding employment working with heavy duty motor vehicles. The issue, however, is whether the Appellant is incapable regularly of pursuing any substantially gainful occupation. In deciding this issue, the Tribunal takes into consideration the Appellant's chronic lower back pain, his major depressive disorder, his age, his limited education and learning disability, his inability to concentrate, his memory problems, his ADHD and impulsivity, his inability to sit, stand or walk for any length of time, and his instability when walking. Applying the test in the "real world context" (*Villani*), the Tribunal finds that the Appellant is incapable regularly of pursuing any substantially gainful occupation.

[74] Taking into consideration all the evidence before it, the Tribunal is satisfied that, on a balance of probabilities, the Appellant suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[75] The Tribunal must also determine whether a disability is prolonged as set out in the CPP legislation.

[76] In his oral evidence, the Appellant indicates that he was on Employment Insurance (EI) sick benefits for six months after his accident at work in April 2010. He then stated that, because of his disabilities, when he was scheduled to return to work from sick leave, he was not able to do so and his employer laid him off in September 2010. The Appellant and his wife testified that his chronic back pain and depression started when he had his workplace accident in April 2010 and continued up to the time of his MQP and to the time of the hearing. The Appellant testified and the medical reports support his claim that the limitations caused by his chronic lower back pain have led to depression. Attempts to alleviate these conditions with medication have led to potential opioid dependency which have exacerbated his ADD. In other words, five years after his disabling injury, his disability not only persists, it continues to deteriorate.

[77] Dr. Librach's opinion in February 2011 was that the Appellant has "chronic lower back pain and the likelihood of it being modified by any treatment is very limited." He also found that the Appellant was depressed. Although he made some suggestions for modifying his pain experience, Dr. Librach's conclusion was that he was not sure that there is anything that is really going to help the Appellant in the long run. Dr. Josephson and Nurse Practitioner Savage who had been following him since 2009 also indicated in March 2012 that the Appellant's "low back pain was chronic and the likelihood of this being modified by any treatment in a major way is very limited".

[78] By September 2012, his nurse practitioner indicated that the Appellant was unable to perform any job responsibilities because of the medications he is taking for pain, his limited education, and his inability to sit, stand or walk for long periods of time. Nurse Practitioner Savage also opined that he could not be trained in any other work-related field and he was unable to return to the workforce within a foreseeable and reasonable period of time. In addition, as late as March 2015, CMHA confirmed their 2012 diagnosis and concluded that the

Appellant continued to suffer from a major depressive disorder which, in addition to their earlier diagnosis, now included anxiety, ADHD inattentive type and chronic back pain.

[79] Based on all the evidence, the Tribunal finds that, in accordance with the CPP, the Appellant's disability is prolonged.

CONCLUSION

[80] The Tribunal finds that the Appellant had a severe and prolonged disability by September 2010, when he was laid off work at James Dick Construction. For payment purposes, a person cannot be deemed disabled more than 15 months before the Respondent received the application for disability pension (para 42(2)(b) CPP). The application was received in April 2012. Therefore, the Appellant is deemed disabled in January 2011. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of May 2011.

[81] The appeal is allowed.

Verlyn Francis
Member, General Division - Income Security