



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *P. V. v. Minister of Employment and Social Development*, 2016 SSTGDIS 19

Tribunal File Number: GP-14-1325

BETWEEN:

P. V.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: February 18, 2016

DATE OF DECISION: February 20, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

P. V.: Appellant

Neil Keating: Appellant's representative

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 8, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on March 10, 2014.

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

- a) The Appellant will be the only party attending the hearing;
- b) The method of proceeding is most appropriate to allow for multiple participants;
- c) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;
- d) The issues under appeal are complex;
- e) There are gaps in the information in the file and/or a need for clarification; and
- f) This method of proceeding 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] 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).

[4] 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.

[5] 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

[6] The Tribunal finds that the MQP date is December 31, 2010.

[7] 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

[8] The Appellant was 46 years old on the December 31, 2010 MQP date; he is now 51 years old. The Appellant was born in Jamaica and came to Canada in 1981. He is a carpenter by trade. He has participated in training to become a chiropodist and also studied some theology courses; he is also a qualified travel agent. He suffered injuries in four workplace

accidents between December 2005 and February 2006. He was subsequently injured in a motor vehicle accident (MVA) on June 22, 2007.

APPLICATION MATERIALS

[9] In his CPP disability questionnaire signed on November 11, 2012, the Appellant indicated that he has a grade 13 education, a college degree and diploma, and certificates in house renovations and blue print reading. He stated that he last worked for Labour Unlimited Temporary Services framing basement walls from January 2004 until June 17, 2006; he noted that he stopped working because of severe knee and back pain caused by workplace injury. He also stated that he was a self-employed carpenter; that his business started on November 7, 1999; and that he stopped working in his business on December 7, 2010. He further stated that he has no plans for the future where construction is concerned, and that he had worked with temporary agencies doing less physically demanding jobs but was in constant unbearable pain.

[10] He did not indicate a date as of which he was claiming to be disabled and stated that the illnesses or impairments that prevented him from working included a torn and damaged medical meniscus: constant bilateral leg pain; and low back inflammation. He further stated that he cannot work because of severe back and knee pain; that he has to wear braces on his knees and back; that he uses a scooter; and that he is unable to sleep at night due to severe and constant pain. He described multiple physical limitations with respect to sitting, standing, walking, lifting, carrying, and bending as well as problems with speech, memory, concentration, sleeping and breathing. He stated that he does not drive and that he uses Wheel Trans for transportation.

[11] A report dated March 3, 2013, from Dr. Jacobson, the Appellant's family doctor, accompanied the CPP application. The report diagnoses: chronic low back [pain] on the basis of myofascial strain/mechanical low back pain; chronic bilateral knee pain/ degenerative tear right medial meniscus/contusions; post-traumatic migraine headaches; diet controlled diabetes; and sleep apnea. Dr. Jacobson indicated that he had known the Appellant for 4½ years and that he started treating him for his main condition in March 2009.

[12] The report indicates that the Appellant's back and knee pain began in December 2005 because of multiple work injuries; that despite extensive physiotherapy, chiropractic treatment, and specialist consultations his pain persists and is continuous and severe; that his pain was exacerbated in a 2007 MVA; and that he has been unable to work in construction since 2010. The prognosis is guarded. Dr. Jacobson also noted that the Appellant has controlled type II diabetes and sleep apnea, and that his sleep apnea contributes to his other conditions by increasing fatigue, decreasing stamina and concentration, and causing depression.

Prior Application

[13] This is the Appellant's second application for CPP disability. His initial application was date stamped by the Respondent on November 17, 2006 and denied on February 12, 2007. The Appellant did not request reconsideration.

[14] A report dated October 24, 2006, from Dr. Liu, rheumatologist, accompanied the initial application. The report diagnosis mechanical back pain and paraspinal muscle spasm. The prognosis indicates that the overall prognosis of mechanical back pain can vary, and that with regular physiotherapy and use of analgesia the prognosis becomes more favourable.

ORAL EVIDENCE

[15] The Appellant reviewed his education and employment history. He wasn't sure when he last worked and stated that the December 2010 date indicated in his disability questionnaire was his best estimate made three years after the fact. He stated that his last work involved cleaning frames which was less physically demanding than working as a carpenter, but he wasn't able to continue because of his "unbearable pain."

[16] When asked why he stopped working, he stated "the pain wouldn't go away...my knees wore out...the pain was killing me when I went home...I wasn't able to sleep." He hasn't looked for alternative work or attempted retraining since 2010. When asked why not, he stated, "I have a hard time sitting ... I am always in pain ... I can't concentrate ... I can't be organized

... I am not even able to take care of my own personal needs and rely on my family and relatives for this.”

[17] The Appellant testified that he has continued with his treatments since 2010 including all types of physiotherapy, chiropractic, specialist consultations, medications, orthotics, ice and heat but nothing has helped. He uses a CPAP machine because of sleep apnea. He stated, “Pain is the foundation for everything...I can’t sleep...I can’t concentrate...I haven’t attempt retraining because my pain is unbearable.” When asked about whether he has not gone for any treatment for mental health issues he stated that Dr. Pilowksy is “the crazy one” and there is no reason for me to go for mental health treatment. He saw Dr. Armitage a pain specialist who suggested he take over the counter ointments. He hasn’t gone to a chronic pain program because his family doctor has told him that there is no need for him to go.

MEDICAL EVIDENCE

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

Pre-MQP reports

[19] On October 24, 2006 Dr. Liu reported to the Appellant’s family doctor that the Appellant developed lower back pain while pulling a heavy load at work, and that this has been worsening in severity with some radiation to the lateral hip area. The Appellant’s am stiffness was not significant and his pain tends to worsen towards the end of the day. Dr. Liu opined that the Appellant’s symptoms appeared to be mechanical in nature and that his knee and lateral hip pain was likely referred from his lumbar back.

[20] On August 6, 2007 Erin Klein, occupational therapist, reported on her in-home assessment conducted at the request of the MVA insurer. The Appellant’s presenting problems included hip, mid-back (between the shoulders), shoulder, knee, and upper and low back pain; difficulty sleeping; and emotional issues. The report stated:

There are noted inconsistencies that were observed and reported during the in-home assessment. With respect to range of motion testing, the evaluatee appeared to present with moderate range restrictions to his neck, both shoulders and back. These range

restrictions would limit his ability to participate in housekeeping and home maintenance tasks. For example, he would not be able to dust, as this activity requires functional shoulder flexion and abduction. During functional testing, the recorded range restrictions on testing were not observed. For example, Mr. P. V. was observed to reach with his right hand for a loaf of bread on top of the fridge. His right shoulder flexed and abducted at great ranges, as compared to on ROM testing.

Mr. P. V. reported that he is able to lift and carry 5-10 pounds. He also reported that he is unable to participate in housekeeping tasks that would require lifting, such as laundry and carrying the groceries. When asked to simulate to prepare a sandwich, Mr. P. V. reached for the bread but reported that it is too heavy to lift. A loaf of bread weighs less than one pound. There appears to be inconsistencies between his reported skills and abilities.

With respect to Mr. P. V.'s ambulation, he would use a cane to walk. He initially would hold the cane in his right hand; however, he would also hold the cane in his left hand when walking. There was no observable differentiation in the weight distribution between the right and left foot, i.e. walks with an even, functional gait.

Mr. P. V. did not demonstrate physical and functional limitations during the assessment. His mobility and overall endurance for activity is currently not limited. He demonstrated functional strength and balance for activities of daily living.

[21] On September 11, 2007 Dr. Pilowsky, psychologist, reported on her assessment of the Appellant. Dr. Pilowsky reported that it was clear from their interview that the accident resulted in a tremendous change to the Appellant's psychological functioning. The Appellant's described symptoms included insomnia due to pain, unstable appetite and loss of interest and pleasure in daily activities, cognitive dysfunction (the Appellant believed that his cognitive abilities are 'undoubtedly 100% decreased'), and uneven memory that interferes with his daily functioning and decision making abilities.

[22] The Appellant believed that the police are following him and believe he is a pedophile homosexual; that the police want to kill him; that other people want to harm him; and that he is being profiled. The testing revealed that the Appellant was suffering from severe depression. She noted that it was clear that the Appellant was experiencing "some flight of ideas" and stated:

To summarize, Mr. P. V.'s test scores indicated that he has been experiencing severe emotional distress since the accident, mostly in the form of somatic symptoms and symptoms of depression and anxiety. These symptoms reflect his difficulties with pain and sleep, depressed affect, lack of motivation and anxiety.

[23] Dr. Pilowsky opined that the Appellant “is plagued by paranoid delusions.” She recommended that he undergo a psychiatric evaluation and treatment given the severity of his symptoms. She further opined that once his paranoid delusions become stable he would be able to undergo a treatment plan, and at that time she will submit a treatment plan.

[24] On February 12, 2008 Dr. Majl, neurologist, reported on his independent neurological assessment of the Appellant prepared at the request of the Appellant’s lawyer. The Appellant’s reported current symptoms included headaches; neck pain; back pain; poor sleep, anxiety; and flashbacks. Dr. Majl noted that the Appellant was awake, alert, oriented, cooperative, put forth a good effort, and that he was cognitively intact. Dr. Majl reported that that Appellant’s current symptoms were a direct result of his June 2007 MVA and that he suffers from post-traumatic migraine headache. Dr. Majl opined that the Appellant’s impairments prevent him from adequately performing his duties as a home builder and that, in particular, he has difficulty with prolonged sitting, standing, bending, and lifting which put excessive strain on his back and neck.

[25] On June 10, 2008, Dr. Zabieliauskas, physiatrist, reported on his independent physiatry assessment of the Appellant conducted at the request of Toronto Medical Assessments. Dr. Zabieliauskas concluded that the Appellant suffered an exacerbation of all of his pre-existing injuries in the June 2007 MVA and that he also sustained a cervical strain WAD II as well as a lumbosacral strain in addition to bilateral knee contusions. He opined that the Appellant continues to experience myofascial pain in his neck and back that is limiting his ability to return to work. He also opined that the Appellant was able to resume his activities of daily living.

[26] On September 15, 2009 Dr. Yu reported that the Appellant suffers from chronic back and knee pain which started after his work related injuries in 2005; that these were aggravated by his MVA in 2007; that despite numerous therapies he continues to experience such pain; that he is unlikely to be able to return to work as a framing carpenter; and that he should consider retraining for more sedentary occupations.

[27] On November 27, 2009 Dr. May, endocrinologist, reported that the Appellant told him that he was not convinced that he had type II diabetes even though he had been informed

approximately two years ago of his diagnosis. Dr. May diagnosed type II diabetes and suggested referral to an ophthalmologist for a routine retina check and to the diabetes education centre.

[28] On December 15, 2010 Dr. Tavazzani, orthopaedic surgeon, reported that there was no significant damage causing the Appellant's ongoing pain and that he was demonstrating positive Waddell signs which suggest chronic pain and nonorganic source to his pain. There was no indication for orthopaedic intervention and Dr. Tavazzani recommended referral to a chronic pain management program.

Post-MQP reports

[29] On March 11, 2011 Dr. Yu reported to the Ministry of Community and Social Services that upon recent assessment it came to his attention that the Appellant's back and knee affected his functional abilities much more than before. He revised the Appellant's health status report and asked that this be taken into consideration on the Appellant's upcoming ODSF appeal.

[30] On October 1, 2012 Dr. Sekhon, chiropodist, reported that the Appellant presented with severe knee and back pain with secondary heel pain. He noted that the Appellant was presently wearing full knee brace supports on both legs and a full metal back brace. He recommended a custom orthotics and orthopedic shoes.

[31] On October 3, 2012 Timothy Lee, occupational therapist, recommended a straight cane.

[32] On December 13, 2012, Dr. Hill, sleep medicine, noted that the Appellant has never been seen by a psychiatrist and that there has been a mild decline in his cognitive function. He also noted that the Appellant's Beck depression score was six, which is not consistent with any evidence of major depression.

[33] A sleep study summary report, prepared by Dr. Moltyaner, from the Sleep Disorders Clinic, on January 2, 2013 concluded that the Appellant had borderline obstructive sleep apnea associated with oxygen desaturation and poor sleep efficiency with difficulty in sleep maintenance and absence of short wave sleep.

[34] On March 3, 2014 Dr. Yu, family doctor, noted that the Appellant had to stop working as a carpenter since 2008 due to work related injuries to his knee and back; that he has been suffering from chronic knee and back pain since that time despite numerous therapies; and that he presently uses an electric scooter that requires new battery or repairs to be functional again.

SUBMISSIONS

[35] Mr. Keating submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant's medical conditions cause him to suffer from chronic and acute pain in his knees, hips and back, anxiety, mood disorders, headaches, severe depression and sleep disorder which cumulatively leave him with a disability which is both severe and prolonged;
- b) His medical impairments can largely be attributed to a combination of four workplace accidents that occurred from December 2005 to June 2006, a MVA in June 2007, and various congenital and degenerative conditions;
- c) He has been diagnosed with multiple physical and mental impairments (see GD13-3);
- d) The medical reports confirm that he was severely disabled as of December 2010 and that he has continued to go for treatment in order to manage his pain. He has relied on Dr. Yu to triage his medical treatment and he has followed all of Dr. Yu's recommendations;
- e) He is not precluded from CPP disability because he hasn't sought gainful employment after December 2010 since it is unlikely that he would have been able to pursue employment with any regularity or consistency;
- f) The Tribunal should take a "real world approach" in determining whether the Appellant meets the CPP disability criteria and consider the Appellant's age, his narrow work history which has been limited to physical work, his severe chronic pain, as well as his sleep disturbance.

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

- a) Although the Appellant may not be able to perform his usual job or other physically demanding work, the medical evidence does not substantiate a severe medical condition, but rather supports that the Appellant should still have been able to do some type of alternative work at his MQP of December 31, 2010;
- b) The March 2013 report from the Appellant's family doctor, which accompanied the CPP application, indicates that the Appellant was able to continue to work in his physically demanding employment until 2010, which was long after his MVA;
- c) Although Dr. Pilowsky in September 2007 reported that the Appellant had paranoid delusions there is no evidence that he required hospitalization or psychiatric follow up. In December 2012 Dr. Hill noted that the Appellant had never been seen by a psychiatrist and that his Beck depression score was not consistent for major depression;
- d) Dr. Hill noted that the Appellant spends most of his time writing a book as well as doing some internet writing but cannot do anything physical. The Appellant has studied as a chiropractor (but did not finish training), and has also studied theology and worked as a travel agent. This evidences capacity to perform alternative employment;
- e) Erin Klein's August 2007 in-home assessment notes inconsistencies during the assessment. In December 2010 Dr. Tavazzani noted that the Appellant's chronic pain was no-organic and that he exhibited positive Waddell signs (non-organic findings/symptom magnification);
- f) The Appellant is fairly young, has a good education, and transferable skills from his previous employment as a travel agent and self-employed carpenter. There is no evidence of efforts by him to pursue alternative work or retraining;
- g) The main question is whether the Appellant has established that he suffered from a severe and prolonged disability by the expiry of his MQP in December 2010, and

continuously thereafter, and if he fails to establish this the fact that his condition may have deteriorated after his MQP is irrelevant.

ANALYSIS

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

Severe

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

Guiding Principles

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

[40] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2010 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[41] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an

applicant incapable of pursuing with consistent frequency any truly remunerative occupation: *Villani v Canada (Attorney General)*, 2001 FCA 248.

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

[43] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada (Attorney General)*, 2003 FCA 117. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[44] The Appellant should demonstrate a good-faith preparedness to follow obviously appropriate medical advice and to take such retraining and educational programs as will enable him to find alternative employment when it is obvious that one's prior employment is no longer appropriate: *Lombardo v MHRD*, (July 23, 2001), CP 12731(PAB).

[45] The Tribunal must consider whether the Appellant's refusal to pursue a recommended treatment is unreasonable and what impact the refusal might have on the Appellant's disability status should the refusal be considered unreasonable: *Lalonde v Canada* (MHRD), 2002 FCA 211. Each case must be considered on its own particular facts, and the test in each case is whether the Appellant has acted reasonably having regard to his own particular circumstances and capabilities: *Bulger v MHRD*, (May 18, 2000) CP 9164 (PAB). The issue to be determined is whether it was reasonable in the context of the Appellant's particular circumstances for the Appellant not to have followed the

recommended medical advice. The *Bulger* decision is of assistance in this regard where it states as follows:

Compliance must be viewed in the context of the Appellant's circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or trauma injury.

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

Application of Guiding Principles

[47] In determining this matter the Tribunal initially focused on the December 2010 MQP date which was more than five years prior to the hearing date. Understandably it may have been difficult for the Appellant to accurately recall the severity of his conditions and limitations at that time. This is highlighted by the Appellant's testimony that he could not remember the date when he last worked, and that the date in his disability questionnaire is a best estimate made three years after the fact. Accordingly, the Tribunal placed particular emphasis and reliance on the medical evidence and reports.

[48] After a careful review of the medical reports as well as the oral evidence the Tribunal is satisfied, on the balance of probabilities, that the Appellant suffered a severe disability as of the December 2010 MQP, and continuously thereafter.

[49] In making this determination the Tribunal considered the collective effect of all of the Appellant's disabling physical and psychological conditions (see *Bungay* and *Barata*, supra) which include severe chronic back and neck pain; migraine headaches; sleep disturbance; sleep apnea; diabetes; hypertension; as well as untreated emotional and psychological issues. A

review of the medical evidence confirms that all of these conditions were extant as of the MQP:

- Dr. Jacobson's March 2013 report indicates that he started treating the Appellant for his main condition in 2009; that his conditions include chronic low back and right knee pain; post-traumatic migraine headaches; diabetes and sleep apnea; that his back and knee pain began in December 2005; and that despite extensive physiotherapy, chiropractic, and specialist consultations his pain persists.
- Erin Klein's August 2007 in-home assessment notes the Appellant's presenting problems to include hip, mid-back (between the shoulders), shoulder, knee, and upper and low back pain; difficulty sleeping; and emotional issues.
- Dr. Pilowsky's September 2007 report noted that the June 2007 MVA resulted in a "tremendous change" to the Appellant's psychological functioning and that he described symptoms including insomnia due to pain, unstable appetite and loss of interest and pleasure in daily activities, cognitive dysfunction, and uneven memory. The test scores indicated that he has been experiencing severe emotional distress since the MVA including somatic symptoms, depression and anxiety. She opined that the Appellant is "plagued by paranoid delusions."
- On February 12, 2008 Dr. Majl reported that the Appellant's current symptoms include headaches; neck pain; back pain; poor sleep; anxiety; and flashbacks. He noted that the Appellant has difficulty with prolonged sitting, standing, bending and lifting which puts excessive strain on his back and neck.
- On June 2, 2008 Dr. Zabieliauskas concluded that the Appellant suffered an exacerbation of all of his pre-existing injuries in the June 2007 MVA and that he was experiencing pain in his neck and back limiting his ability to return to work.
- On September 5, 2009 Dr. Yu reported that despite numerous therapies the Appellant continues to experience chronic back and knee pain.

[50] The evidence also establishes that the Appellant has pursued and continues to pursue extensive treatment for his physical conditions including specialist consultations, physiotherapy, chiropractic, medications, ice and heat. He uses numerous assisting devices including orthotics, back and knee braces, a cane, an electric scooter, as well as a CPAP machine. There is no suggestion that the Appellant has not pursued all recommended treatments for his physical conditions.

[51] The Respondent relies on the Appellant not pursuing treatment for his mental health conditions or attending a multi-disciplinary chronic pain program. It is clear that the Appellant has not followed these recommendations because he believes that Dr. Pilowsky is crazy and that he has no mental health problems. The Tribunal has been guided by the *Bulger* decision, supra, and considered the issue of compliance in the context of the Appellant's particular circumstances. Dr. Pilowsky opined that the Appellant "is plagued by paranoid delusions" and that he has been experiencing severe emotional distress including somatic symptoms, depression and anxiety. Given these conditions and the Appellant's adamant subjective belief that Dr. Pilowsky is crazy and his being in denial about his needing mental health treatment, it is understandable (although unfortunate) that such treatment has not been pursued. Having regard to the Appellant's own particular circumstances and beliefs, it cannot be said that it has been unreasonable for him not to have pursued a mental health treatment program. Further, it is difficult to envision how such treatment could have been successfully pursued.

[52] The Respondent also relies on the Appellant not having pursued alternative employment or retraining since December 2010. In this regard, the Tribunal noted that the Appellant continued to work after four workplace accidents and a MVA, and that he was no longer able to continue working at less physically demanding work cleaning frames because of his unbearable pain. Although some of the medical evidence (see paragraphs 20 & 28, supra) suggests a significant non-organic component to the Appellant's chronic pain, the reality is that he is genuinely "suffering and in distress" and the "disability that he experiences is real." (See *Martin*, supra).

[53] The Tribunal is satisfied that because of the collective effect of his physical and psychological conditions and limitations, the Appellant lacks the residual regular capacity

to pursue any form of alternative gainful employment. The Tribunal finds that the Appellant has satisfied his obligations as set out in *Inclima*, supra.

[54] The Tribunal has determined that the Appellant has established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

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

[56] The Appellant's multiple disabling conditions have persisted for many years, and despite extensive treatment there has been little improvement. If anything, it would appear that his overall condition has been deteriorating.

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

CONCLUSION

[58] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2010, when he last worked. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in April 2013; therefore, the Appellant is deemed disabled in January 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of May 2012.

[59] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security