Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. R. v. Minister of Employment and Social Development*, 2016 SSTGDIS 28

Tribunal File Number: GP-14-3738

BETWEEN:

D. R.

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: Jeffrey Steinberg

HEARD ON: April 12, 2016

DATE OF DECISION: April 13, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. R., the Appellant

Alexandra Victoros, the Appellant's legal representative

T. R., witness (the Appellant's spouse)

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on September 30, 2013. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives

b) There are gaps in the information in the file and/or a need for clarification.

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

[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.

EVIDENCE

Documentary Evidence

[8] On October 17, 2013, the Appellant completed the Questionnaire in support of his application. He stated he completed Grade 12 and worked in an office between August 1, 2009 and August 13, 2013. He stopped working due to an accident. He was self-employed running an accounts receivable 3rd party collection agency. Due to pain, he was not able to sustain long hours and closed the company. He was the owner/operator and had no employees. He previously worked between December 5, 1997 and July 21, 2009 for VFC Inc. He is visually impaired due to brain surgery, has epilepsy and is not able to drive. He receives private insurance with Manulife Financial. He states he could no longer work because of his medical condition as of March 31, 2012. He stated that on February 19, 1978, he had a brain tumour removed, lost vision and became epileptic. He is still treated for seizures. He had a “stroke on surgery plus possible

further stroke on injury on March 31, 2012. Can't test as due to past brain surgery. Have no short term memory". According to the Appellant, due to pain, he is not able to stand or work for more than one hour. He lives in a remote area that has limited public transportation. He cannot walk long distances. He is visually impaired due to brain surgery as the optic nerve was severed to remove the brain tumour. He has no short term memory due to brain surgery and is treated for epilepsy. He has mild dyslexia due to surgery. He has had to stop swimming and walking due to pain levels on the right leg. He can sit/stand a maximum of one hour. He can walk a maximum of one km with many stops due to pain. He cannot climb ladders due to balance problems. He can bend but gets dizzy from sudden movement. He can manage his personal needs and perform light duty household maintenance over time. He is more than 50% blind due to impairment in both eyes. His speech gets confused due to possible stroke. He has very limited memory due to lack of short term memory. His family has advised him that he gets confused very easily. His sleep is okay. He does not drive due to visual impairment. He is prescribed Apo-Metoprolol, Carbamazepine, Paroxetine, Telmisartan and Pravastatin, Pms- Indapamide, ASA and Oxycocet as needed (takes 5-6 per day). He had physiotherapy in 2012, but it did not work. He will see another specialist in January 2014 to assess whether he is a candidate for an ankle replacemen.t He uses a cane, ankle brace and orthopedic shoes.

[9] In the Notice of Appeal, the Appellant's legal representative contends he is severely impaired as a result of his diagnosed epilepsy, headaches, memory loss, anger issues, visual impairment and ankle fracture, which will require fusion or arthroplasty. The combination of the memory loss, headaches and anger issues, with the physical impairments caused by the severity of the fracture of the right leg requiring three surgeries and future ankle replacement, resulted in his having to stop working as a self-employed collection agent in 2012. He is incapable of returning to any substantially gainful employment since he stopped working and prior to his 2013 MQP. His doctor has stated his memory loss will probably worsen and his anger issues remain the same. He is limited physically by his ankle fracture.

[10] On October 20, 2013, Dr. Cole, family physician, completed the CPP Medical Report. She stated she knew the Appellant for 12 years and started treating him for his memory issues in September 2011. She diagnosed memory loss – saw Dr. Bruni; headaches- saw Dr. Bruni, anger issues; ankle fracture (may need brace) ankle arthroplasty; and seizures controlled by

medication. He had surgery for benign brain tumour in 1989. He was left with seizures and zero right peripheral vision. He is prescribed Tegretol for seizures (controlled), HA takes Tylenol 3. Under Prognosis Dr. Cole wrote: Memory will probably get worse. HA probably will not change. Anger remain the same may or may not be related to brain tumour. He also has hypertension and hyperlipidemia. He is prescribed Paxil, Pravachol, Tegretol, Indapamide Metoprolol and Micardis.

[11] On May 21, 1998, the Appellant saw Dr. Chepesiuk, neurology, who reported the Appellant had spontaneous improvement in his headaches. He would still get occasional left sided pounding headaches when under stress.

[12] On October 14, 2011, Dr. Bruni, neurologist, saw the Appellant, whom he noted had a history of seizures secondary to meningioma that was resected around 1978. He last saw the Appellant in 2006 at which time he was experiencing some left sided headaches that had been going on for several weeks. He reported no seizures. A CT did not demonstrate any acute pathology. His headaches subsequently settled down. He continued to remain seizure free and discontinued his Dilantin in 2006. He further continued to have intermittent headaches since about 2006. Since his headaches returned recently, the Appellant reported he has had recurrent seizures when asleep. The headaches are not posture related and do not wake him from sleep. There is no associated phonophobia, photophobia, nausea or vomiting. He described a squeezing type of pain which is almost constant. Generally, they are about 6 out of 10 in intensity. He continues to be forgetful. He states that since his initial surgery, he has had a problem with balance. A repeat CT scan was reported to demonstrate no acute pathologies. He does not drive and continues to operate his own business. Cranial nerve examination revealed mild nystagmus in the right homonymous hemianopia. A formal mental status exam was not performed. Dr. Bruni recommended an MRI (CT). The Appellant did not wish to take additional medication for his headaches. Dr. Bruni recommended medication other than Dilantin for recurrent seizures if the Appellant was not satisfied with his former medication due to hyperplasia. Dr. Bruni started the Appellant on Tegretol at 20 mg once daily to be increased to 200 mg twice daily.

[13] According to a November 30, 2011 clinical note, the Appellant was on anti-seizures to age 21, stopped them in 2006 and restarted them secondary to petit mall. He stopped them on his

own and restarted them in 2010. He needs to stay on his medication indefinitely. His headaches are continuous like a dull nag worse in the a.m. and better later in the day. He has no nausea or vertigo with the headaches. They have been continual since August.

[14] According to a December 15, 2011 clinical note, the Appellant had no improvement in his headaches. He was scheduled to see Dr. Bruni. He was not taking anything for pain. He used Tylenol 3 which did not help. The headaches are daily. He still has ringing in his head.

[15] According to a March 5, 2012 clinical note, the Appellant still had headaches and ringing. “Still has HA 24/7”. “He mentally blocks it”.

[16] On July 23, 2012, the Appellant underwent surgery for nonunion of fracture of the distal tibial plafond of right tibia. The operation consisted of removing a screw from the lateral side of the ankle, arthrotomy of the ankle joint with capsulectomy and synovectomy and removal of fixation, i.e. plate and screws from the distal tibia on the medial side with repair of nonunion and osteotomy plus allograft. The post-operative diagnosis was nonunion of fracture of the distal tibial plafond of the right distal tibia.

[17] An October 19, 2012 ankle imaging report revealed moderate varus deformity at the right talo tibial joint. There were presumed old fractures involving the medial aspect of the distal tibia and distal fibula.

[18] On October 20, 2012, Dr. Quinn, saw the Appellant in the Fracture Clinic. He was noted to have had an extensive history with regard to his lower right extremity. In 1999, he had a tibia fracture treated with a nail fixation. He went on to have difficulties with the screws backing out and went on to a subsequent removal of the hardware. He was seen on March 31, 2012 when he fell out of his attic at home and went to emergency. He was treated with open reduction and internal fixation and went on to nonunion of his medial and lateral malleolar fractures. X-rays demonstrated nonunion of his distal fibula and medial malleolus which is displaced medially and superiorly. He had destruction of the medial aspect of his plafond. On physical examination, he had a weak and thread dorsalis pedis pulse and granulation tissue within his healing medial and lateral wounds. According to Dr. Quinn, the Appellant was not a candidate for arthroplasty. At age 49, he was too young. The only surgical reconstructive option Dr. Quinn was prepared to

offer was an ankle fusion given his plafond destruction, his loss of medial and lateral buttress of his malleoli and his youth. Dr. Quinn stated his wait list for fusion was two years plus.

[19] According to a March 7, 2013 clinical note, the Appellant was going to Dr. Daniels regarding his ankle in January 2014. He was currently coping with his ankle brace and was using Oxycodone. He was "now walking to work also walks home for lunch".

[20] According to a September 9, 2013 clinical note, the Appellant was seizure free since 2002.

[21] On June 6, 2013, Dr. McCall, orthopaedic surgery, reported on his June 4, 2013 assessment of the Appellant. He was wearing an ankle brace which seemed to be helpful to him. He recently twisted it and he had some soft tissue swelling laterally. X-rays showed that his distal tibia and fibula were well healed. There was some talar tilting. Dr. McCall explained that his choice for future treatment continued to be ankle brace, ankle fusion or ankle arthroplasty. The Appellant was scheduled to see Dr. Daniels in January for review of possible ankle arthroplasty. Dr. McCall stated: "..but the way he is moving around today, he is walking quite well and his pain seems to be reasonable well controlled with one or two Percocet a day, this would suggest to me that he should probably continue with non-operative management, but we will see what develops".

[22] On October 10, 2013, Dr. McCall reported that the Appellant was scheduled to see Dr. Daniels in January, was using about 4 Percocet a day for control of his chronic pain, which seemed quite reasonable. Dr. McCall prescribed 100 Percocet and stated the Appellant had been fitted with orthopaedic footwear incorporated with a brace.

[23] On January 20, 2014, Dr. Daniels reported on his review of the Appellant. He noted he had a brain tumour as a child and underwent prolonged rehabilitation. Since then, he had two substantial fractures to his right ankle and pilon area, leaving him with end-stage posttraumatic arthritis of his right ankle joint. The most recent fracture developed a nonunion, which had to be replated. Eventually, the hardware was removed – about one year earlier. His primary complaint was ongoing deformity and pain in the right hindfoot. He had discomfort with walking and was taking Percocet for pain. He also had hypertension, which is managed by medication. On

examination, he stood with a slight varus deformity putting pain through the lateral border of his right foot. X-rays revealed end-stage arthritis of the right ankle with a proximal malunion of the medial malleolus, resulting in a varus tilt to his talus within the ankle mortise. They discussed the pros and cons of fusion versus replacement. Dr. Daniels advised that a fusion is a good operation that helps relieve the pain. Stiffness is noted by patients but usually they can adapt. If done properly, the varus deformity is corrected at the time of surgical fusion. Dr. Daniels stated he would obtain a CT and discuss further treatment options once the CT was completed.

[24] On January 27, 2014, Dr. Daniels reported on his review of the Appellant's CT taken one week earlier. It demonstrated avascular changes to the distal tibia. The subtalar joint looked relatively well preserved. According to Dr. Daniels, the most reliable operation would be an ankle arthrodesis as ankle replacement may be too risky. The Appellant consented to the risks and he was placed on a surgical waiting list.

[25] On April 9, 2015, B. C. wrote a letter. He stated he knows the Appellant in both a professional and personal capacity. When they first met, the Appellant was a legal representative for a financial company in Toronto. As they got to know each other better, the Appellant's side effects became increasingly more evidence. During the past 5 years, his short term memory has drastically declined. During a telephone conversation, he will repeat something he just stated. Mr. B. C. has also noted a tremendous change in his written form as it pertains to spelling and order of words. He stated: "This combined with his physical disabilities has left (the Appellant) in a position that would not make him employable in my opinion. I am not a medical Doctor, but it would not take much during the course of an interview to come to this conclusion".

[26] On April 17, 2015, the Appellant's spouse wrote a letter. She stated that when she met the Appellant, he was an active employee who could compensate with the loss of his peripheral vision and short term memory issues caused by removal of a significant brain tumour. To date, that is not the case. He is unable to read and retain any information immediately after reading and cannot pronounce words that are more complicated He has great difficulty retaining information and committing to long term memory. He often has difficulty following a conversation and providing an expected or reasonable answer. He is not able to repeat or relay information back in sequence or its entirety. There are times he finds himself confused. When in

the car, he is unable to identify his location or where he is. He is presently on significant amounts of medications for existing, past, and present conditions, which enhance his lack of mental capabilities. He also suffers from seizures as a direct result of the brain surgery. Most transpire at night which results in his being physically and mentally exhausted. Due to an accident he is unable to stand on his feet or walk any distance, even with the support of an ankle brace. Even with possible upcoming surgery, mobility issues will not increase. Due to significant staples in his skull, they are unable to get a proper image of what is transpiring or a proper diagnosis other than the understanding that his scar tissue is increasing. Without particular medication, he is subject to anger outbursts. He relies heavily on her for clarification.

[27] On April 24, 2015, Gail Korol wrote a letter. She is a Registered nurse for 40 years (recently retired). She stated she knew the Appellant for 3 years. In that period, she noted a change in his memory. When talking to him, he can mention a friend or neighbor, then change the subject. If she returns to the same friend of neighbor, he has a blank look on his face. Since injuring his ankle, his endurance has lessened. The distance he can walk is reduced. Most in the neighborhood have come to know and accept his memory loss when speaking to him and repeat names/stories as needed. Given her professional background, she understands that often people with memory loss learn to cover up and that it is not until one spends times with the person to realize and understand the shortcomings. She can see he has a reduction in memory coupled with loss of mobility. It has made it a difficult time for him and his spouse.

[28] Janet Duffenais, Guidance Counsellor, Glenforest Secondary School, wrote a letter on May 1, 2015. She stated the Appellant was her friend and neighbor for the past number of years. She is writing the letter as an educator with more than 25 years' experience. His troubles started with removal of a tumour as a teenager. This caused loss of peripheral vision, short term memory issues and loss in ability to focus. He spent an additional 3 years in school relearning and working with Special Education teachers. The extra time and help at school allowed him to develop coping mechanisms for life after high school. As he aged and met with multiple accidents, the coping mechanisms were not enough. Along with headaches, memory loss and outbursts, he now has to contend with pain in his ankles, legs and feet. He must wear a brace at all times. He is unable to stand for prolonged periods of time, walk for more than a few blocks and has difficulty walking up hills and stairs. This causes fatigue, morning stiffness and painful

joints which all contribute to his disability. He has chronic pain which requires use of medication leaving his concentration impaired. He has to be reminded to water the plants; has trouble remembering people's names - even friends of many years. He becomes confused and mixes up the most simplistic of details or instructions in various setting, business or social. He has emotional outbursts that are inappropriate. He is unable to stand for any prolonged period of time. He is visibly always in pain and discomfort.

Oral Testimony

[29] He started high school on a full-time basis. He had to leave school in 1979 due to surgery for a brain tumour. He was age 15 at the time. The doctors removed his tumor. He had post- surgical symptoms and dragged his leg. He had to learn how to walk again. He lost 50% of his vision after his optical nerve was cut. He has no right peripheral vision in either eye. He was also left with epilepsy and headaches. He had to relearn how to walk, talk and communicate. He had to relearn his ABCs and to read and write. He subsequently returned to school on a part-time basis in order to complete Grade 12. He was provided with a personal tutor. He would always experience some dizziness upon walking and was told to be careful. After surgery, he used a cane for a long time, went off it for about a decade and now uses one again. It took him 6 and one half years in total to complete high school.

[30] He attended college on a part-time basis and studied general business. He obtained a certificate. It was a one year program. It took him four and one-half years to complete the program on a part-time basis. Humber College was very accommodating. They gave him extra time to complete written tests. .e.g., three hours instead of one. He relied on Humber's student assistance program (other students) for certain courses such as economics.

[31] In the workforce, employers would send him on training courses.

[32] After college, he got a job managing a dry cleaning company. Due to his vision loss, he would bang into things and he left the job. He tried working in retail (Canadian Tire, Simpson Sears) but would bump into things in the warehouse.

[33] He worked for a bank doing collections (telephone communications) in which he would call people and demand payment. He did this work for approximately 25 years. TD bought out the bank and he received a package.

[34] He then started his own collection company. At first he attended the business every day. He could choose his hours and come and go as he pleased. His office was around the block from his home. Initially, he was the only employee. Subsequently, he employed his spouse who did all the paperwork. He would "dial for dollars". If his client wanted him to sue a debtor, he would prepare the Small Claims Court documents.

[35] When he first met his spouse on another collection job, she would review his work. He has issues with spelling and grammar resulting from his brain surgery. They eventually married. She continued to check over his work once he started his own business.

[36] He sustained an injury in March 2012. He was in the attic of their new house on a ladder putting in a ceiling fan. He lost his balance, fell off the ladder and out of the attic and snapped his leg. The doctors believe he suffered a stroke on the ladder. At the hospital, he relayed he had headaches. They sent him for a CT scan (they could not send him for an MRI because he had surgical staples placed inside his brain during surgery and the doctors are uncertain whether the staples contain stainless steel).

[37] He fractured his right leg around his ankle. He could see his fibia and tibia sticking out. He underwent three attempted surgeries. He previously broke the same leg when crossing the road (due to vision impairment he got hit by a car) and had two surgeries. He now has bone depreciation and arthritis. The screws keep falling out. He wears a special ankle brace to keep his foot from falling out of the socket. He uses a brace for walking. The doctors told him he cannot have an ankle replacement due to his young age. They recommended an ankle fusion. He has been on a surgical waiting list for the past three years at St. Michael's Hospital.

[38] He lives in continuous pain. He takes Oxycodone in the morning and toward the end of the day. He can walk one-half kilometer, uses a cane and wears special footwear. It took 2.5 hours to get to the hearing. It caused him pain to sit for that long in the car. He sits with his foot

elevated and uses a La-Z-Boy chair at home. If he has a seizure, he is tired afterward and becomes more sensitive to pain.

[39] He developed epilepsy after brain surgery. He used to take Dilantin and Phenobarbital. Dilantin caused his gums to grow. He would have to go to the dentist to have his gums cut back. He is now on a new medication which prevents his gums from growing. However, he still has many night seizures. He knows he has these because his wife has bruises on her legs in the morning, which indicates he is kicking her in his sleep. He does not know he is doing this because he is fast asleep. He believes he has night seizures 3-5 times a week. They leave him feeling drained. He will sleep for 10 hours at night, wake up very tired and have a midday nap. He experiences fatigue daily. He was having night time seizures and experiencing fatigue in 2013 at his MQP.

[40] He had a daytime petit mal seizure about 10 days ago. These are mild and do not last long. He knows if one is coming. He will experience a tingling sensation on the tips of his fingers.

[41] During the past few years, he has not left his house alone very much. He is always with his spouse, T. R. She works from home most of the time.

[42] He has never driven due to his visual impairment.

[43] He took himself off anti-seizure medication in the past because Dilantin caused his gums to grow which necessitated that he undergo painful dental procedures. Since he was not having seizures, he decided to discontinue the Dilantin. He was off it for almost 10 years.

[44] He has continuous headaches. He told Dr. Bruni he goes to bed and wakes up with a headache. The headaches last all day. The pain medication for his ankle helps but does not fix the headache. Drinking a moderate amount of alcohol, e.g., one glass of wine daily also helps the headaches to subside.

[45] He also has memory issues. They moved to a new area in January 2012. He got a new cell phone. He realized things were not one hundred percent He did not remember his cell phone number when he had to call 911 after he fell off the ladder. He also hit his head after he fell off

the ladder. His memory loss has gotten worse. The doctor who did surgery on his leg after the fall sent him for a CT scan. The doctors realized he has a lot of scar tissue in his brain. They contacted Dr. Bruni. Friends have noticed his memory loss and the fact he repeats himself. His wife, T. R., notices his repetition and the fact he retells the same story.

[46] He closed his business because he could not fulfill his job duties. He had two clients in the auto industry. He could not remember some peoples' names. He had fixed expenses but the business was not panning out. He was no longer going to work on a daily basis. At one point, T. R. worked with him. He could no longer afford to employ her so she had to look for other work.

[47] At some point after he closed the business, he applied for a job at Pizza Hut for call center work where he could work from home. He did online tests to see if he would qualify. He barely passed the typing test. He also had to take a test where he was supposed to ask the customer whether they wanted anything else. He did not see half the screen due to his impaired vision and read back what he saw, not what was on the computer screen. He was not offered this job.

[48] He cannot work at Home Depot because he cannot stand for four hours. He also cannot work a cash register standing for four hours.

[49] The Tribunal had some questions for the Appellant. He clarified that Dr. Bruni told him he is having night time seizures. However, Dr. Bruni did not send him to a sleep clinic to confirm the diagnosis. Dr. Bruni indicated it is common with the amount of scar tissue he has to have some sort of reaction. Dr. Bruni explained the scar tissue would also explain his headaches. Dr. Bruni put him back on anti-seizure medication. He no longer sees Dr. Bruni. He now sees Dr. Perez, a neurologist at another hospital. He has seen her for about six months now.

[50] Although the medication Dr. Bruni prescribed for seizures does not cause his gums to grow, he still has night seizures.

[51] A doctor at the Collingwood Marine Hospital offered the opinion he suffered a stroke when he fell from the ladder. The doctors arrived at this conclusion after they performed the basic tests, e.g., having him touch his nose, taking into account the scar tissue in his brain and upon talking to Dr. Bruni.

[52] He tried Tylenol 3 for his headaches but it did not help. He takes a lot of other medication including anti-anger pills.

[53] His business was close to his home when he lived in X – about one half mile away. After he moved to his current address in January 2012, his new office was less than one kilometer from his new home, i.e., a block and a half away.

[54] He takes between 4-6 Percocet daily. It deadens but does not stop the pain. In the morning, his pain is not bad because he has been lying down all night. When he stands up, he gets a shooting pain which he would rate at 10 on a pain scale of 0-10. He takes his morning medication which includes two Percocet. Depending on how much he has physically moved, he may take another Percocet at lunch. It may bring the pain down to a six. He has a high pain threshold. Although he rates the reduced pain at a six, another person may experience it as a ten.

[55] His reduced income during 2010 and 2011 in comparison with his prior employment income was due to the fact he was building up a new business. The first year, he was getting clients on straight commission. However, he still had to pay rent.

[56] His record of earnings did not show any income for 2012 or 2013. He only filed his taxes for these years approximately six months ago. His filings are under review by the Canada Revenue Agency. There is some issue about his rental costs. He cannot recall what income his business generated in 2012 or 2013. He believes the income might have been in line with the income the business generated in 2010 and 2011. However, he recalls he had to cash in his RRSPs to make ends meet.

[57] Between March 2012 (the fall in the attic) and August 2013 (when he closed the business), he hardly went into work anymore. He was paying rent for something that was not panning out. He had commitments to his landlord. His performance was minimal. He cannot specify exactly how many days per week he went into work during this period. However, he can state he went to work less frequently than he did before the accident. Also, for at least six weeks after the accident, he did not go anywhere while the nurse came and did his stiches. He then had to go to physiotherapy.

[58] He cannot say what income the business generated in 2013. He knows he had costs he had to offset against income.

[59] He applied for the Pizza Hut job in or around late 2013/early 2014. He took the test at home and passed the typing test. He then had to take an online "sampling" test which he failed. He explained to the interviewer that he is visually impaired and indicated that a bigger screen would have helped. They refused to provide any accommodations. He feels he failed this test because he could not see the entire screen that would prompt him what to say to the customer.

[60] He has some issues with rage. It has always been there. His wife, T. R., noted he was always "blowing up" easily. Instead of divorcing, they went to see Dr. Cole, the family doctor, who said the anger management was because of scar tissue in his brain. Dr. Cole placed him on anger management pills. It helps with the rage. However, he agrees with the contents of the letter of Janet Duffenais who states he has emotional outbursts that are inappropriate. He gets "pissed off" pretty easy. He could have problems interacting with other people in the work world and maintaining employment.

[61] He feels he could no longer work in or around March 2012 when he fell, not August 2013, when he closed the business. He tried to make an effort in the business but it did not work. It did not make sense to keep throwing the last of his RRSPs into a "sinking ship" to support himself. He could no longer do the job and make an income.

[62] In re-examination, the Appellant clarified he tried to keep the business going between March 2012 and August 2013 but was not able to do so. He had a contract for his rent. He would normally walk to his business. After his fall, it would take a lot longer to walk there. He had two clients in the business. Following the accident, he kept them for a short period of time. They were very patient. It got to the point he was using his RRSPs. His spouse had to find other employment and she was no longer helping him. Without her help, he could not have run the business on his own.

[63] The Appellant's spouse, T. R. testified. She has known the Appellant for over 15 years. They used to work together. When he first opened his own business, she was the overseer. She did his administration, made sure everything was correct and was part of his negotiations. She

was an “intricate part” of the business. She checked what he wrote before it went out the door. She does not believe he could have carried out the business without her. He cannot spell appropriately or recall the last thing he read or wrote. He would get issues confused and it would become quickly apparent to other individuals that there was a problem. She attended the business pretty much every day.

[64] In her current job, she can generally work out of the home and keep an eye on the Appellant. This is not unlike keeping an eye on a child in the house.

[65] Since the 2012 accident, the Appellant has needed someone to check in on him. He is known to get lost. He leaves things on the stove and forgets about people, things and obligations. She sends him emails and tasks and relies on a network of friends in the neighborhood who help out.

[66] He has night time seizures. He flails at times falls out of the bed. She has had to move to another bedroom. It is too chaotic for her to sleep in the same bed. He has these nightly. Even when he falls out of bed, he has no recollection how he got there and she cannot wake up him up. He was having these episodes in 2013. They have approached a new neurologist to find a new resolution or to calm things down.

[67] His daily routine involves sleeping a lot. She gets him up and has him go outside with the dog. He also spends time with her in her basement office. He sits in his La-Z-Boy chair and elevates his leg. He naps daily.

[68] He has memory loss. She was always aware he had some short term memory issue but it became worse to the point he does not recall he has had a conversation. He was getting lost and would not remember a street he previous walked down. It became worse after the accident. He has good and bad days. During a week, he may have two good days on average.

[69] He has anger issues consisting of outbursts. His outbursts are getting more physical. He is on medication – it could be Lorazepam but she is uncertain. It is calming. His outbursts are also directed at people he knows in the community. Previously he was able to manage his outbursts. He has been less able to manage these since the 2012 accident.

[70] After the accident, he could not go into work right away. His foot needed to be repaired so he could become more mobile. He was also on a lot of pain medication. He tried to make an effort to go in. It became increasingly difficult for her to manage. She was taking on more work. Although he was the face of the company as owner, it was becoming clear this was not the case. People were calling and asking her if there was a problem.

[71] She heard about his Pizza Hut interview and the fact he needed assistance. She understands they refused to allow him to use a different computer screen. He failed to repeat the orders back. It did not go over well.

[72] Since his 2012 accident, he cannot hold down regular work. He cannot be on his feet for any length of time. He has no peripheral vision and he would not be able to stock shelves at Home Depot. He does not drive which is an issue for transportation. It would become clear if he were to work in an office that he has issues, e.g., spelling, not remembering, confrontations, daytime sleeping. He was able to set his own hours in his business. Also, she was there to oversee things and correct mistakes.

[73] In response to questions from the Tribunal, the witness clarified that between the accident in 2012 and closure of the business in 2013, clients of the business would call her and ask why the Appellant was forgetting things, not responding accordingly or not following their conversations.

SUBMISSIONS

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

a) He was 51 at the MQP. He completed Grade 12 (assistance of Special Education teacher) and attended College for four years. He last worked as a self-employed owner/operator of Debt Resolution Group, responsible for third party collections. He closed the business in August 2013.

b) His health issues date back in 1979 (benign brain tumor). During surgery, he lost peripheral vision and developed epilepsy.

c) Since 2011, he has suffered from severe headaches and a head CT scan revealed extensive scar tissue in his brain. In letters from friends/family, they noted that over the past five years (since 2010), his short-term memory has significantly deteriorated and he is unable to retain information or follow a conversation. He is also prone to emotional outbursts which friends and former work colleagues deem inappropriate.

d) In addition to the cognitive issues, he suffered a severe fracture of the right ankle in 2012 following a fall out of his attic resulting in severe open fracture of the ankle, requiring three surgeries. It never properly healed. He developed chronic pain and restrictions with walking/standing. Walking was one of his main modes of transportation as he never had a driver's license (due to epilepsy/lack of peripheral vision). His treating practitioners have discussed the necessity of an ankle replacement, however it cannot be done at this time because of his age.

e) He continues to experiences pain, discomfort and numbness at his surgical site. When considering his limited ability to walk and stand, headaches, loss of peripheral vision, uncontrolled emotional outbursts, short-term memory loss and chronic pain, it is not probable he will be able to succeed regularly in securing substantially gainful employment.

f) There was and is ample medical evidence to explain his inability to work. It attests to the severity and complexity of his multiple impairments and chronic pain condition, which precludes him from performing any type of work.

g) The submission goes on to extensively review the medical reports.

h) Based on the case law (as set out in detail in the written submission), it is incumbent on the Tribunal Member when determining whether he has a severe and prolonged disability not only to make note of the Villani case and Villani factors, but also to turn its mind to applying those factors to the Appellant's situation. The Member must consider the extensive entire condition including his evidence of his limitations and the impact it would have on his "real world" employability. Where there is documentary

evidence which relates to one of the criteria for disability, the Member must discuss the evidence if it makes a finding contrary to such evidence.

i) He is unable to engage in his own employment or any other occupation due to his well-documented physical impairments, which include epilepsy, severe headaches, loss of peripheral vision and an ankle injury, which has developed into a chronic pain condition. These have caused him to suffer restrictions and limitations with regard to standing and walking. He has never been able to drive because of his impaired vision and epilepsy. Also, he is further disabled by his short-term memory loss, inability to concentrate or follow a conversation and inappropriate emotional and angry outbursts.

j) He has been totally disabled from his own and any other occupation due to his physical and cognitive symptoms since August 2013. His prognosis for recovery and return to gainful employment is extremely poor. He attempted to work at a reduced capacity in his last year of employment but could not consistently perform the essential duties of his employment because of his increasing head pain, fatigue, chronic pain and memory loss. He should be deemed disabled as of March 2012, the date in relation to which he was last capable of engaging in regular gainful employment.

k) In oral submissions, Counsel contends the Appellant meets the test for a severe and prolonged disability.

l) During the first two years of his business, his employment income was relatively low. His wife, T. R., testified she considered herself the overseer of the business and reviewed documents that needed to be inspected. It could be stated that he could not run his own business without her assistance, even prior to the 2012 accident.

m) Following the 212 accident, he injured his ankle and required numerous surgeries. There is also the possibly he had a stroke. It cannot be definitively stated although CT scans reveal multiple scar tissue. Since then, it became apparent he could not run the business any longer. The two clients of the business called T. R. with concerns about the Appellant. She stated his symptoms worsened a lot in terms of short term memory and recall. He was getting lost to the point she was not comfortable leaving him alone. Her

current job allows her to be at home a lot. She also relied on a network of neighbours to keep an eye on him.

n) Given his impairment, he cannot walk or stand for any length of time. He has peripheral vision loss and now short term memory loss, seizures which cause profound fatigue during the day and anger issues.

o) He attempted to find work. Arguably, his own business was such an attempt. After one eliminates this business as an option, it would be extremely difficult to find any job he could train for given his fatigue, daily headaches and short term memory loss.

p) He brought himself with the Inclima case. He has arguably tried to work within his work capacity at his business. Since 2012, there is no evidence of work capacity despite his efforts to keep the business going. It was not financially feasible. His spouse had to take it over to keep it going.

q) He falls within the Villani factors. It would be extremely difficult if not impossible to find work in a "real word" situation that was both regular and substantially gainful.

r) He was no longer capable of any performing any substantially gainful occupation as of March 2012. He had to cash in RRSPs to keep the business going.

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

a) While the Respondent acknowledges he may have had limitations related to a seizure disorder and loss of vision following removal of a benign brain tumour in 1978, the medical evidence shows the seizure disorder is controlled with medication. While he may have lost peripheral vision in the right eye, neither his visual impairment nor seizure disorder have prevented him from performing suitable work in the years subsequent to this event. There is no evidence of deterioration in either condition.

b) Although he feels he is disabled as a result of memory problems, in his October 2011 report, Dr. Bruni recorded that although he continued to be forgetful, he continued to

operate his own business. No medical evidence of deterioration in his cognitive state has been submitted for review.

c) Although he asserts he is disabled from a stroke in March 2012, no medical evidence of this event has bene received to date.

d) Although there is evidence on file of an ankle injury, he does not report it as a disabling condition. Dr. Daniels, orthopedic surgery, indicated in his January 2014 report the Appellant was on a waiting list for surgical repair. In a reported dated June 2013, Dr. McCall, orthopedic surgeon, noted the Appellant was wearing an ankle brace and was walking quite well with reasonable control of his pain. While surgery is pending, the ankle injury does not appear to be severely limiting.

e) It is recognized he may have limitations with the types of work he is able to perform. However the medical evidence does not show any serious pathology of impairment which would prevent him from doing suitable work. The sequelae resulting from his benign brain tumour removal in 1978 have not prevented him from securing and maintaining employment in the past and there is no evidence of recent deterioration. Also, no medical evidence was received concerning his report that he suffered a stroke in March 2012. Also, it should be noted he worked until August 2013, over a year subsequent to this reported event. No quantifiable evidence of any serious cognitive defect has been received to date.

f) Supportive letters from friends/colleagues were submitted for review. However, no new medical evidence relevant to the MQP was received. As such, a change in the position of the Respondent is not warranted.

ANALYSIS

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

Severe

[77] The Tribunal is not satisfied that the Appellant's visual impairment or epilepsy considered in isolation render him severely disabled as defined in the CPP on or before the MQP.

[78] The Tribunal recognizes that the Appellant first developed these conditions many years ago after undergoing surgery to remove a brain tumour and that has worked for many years with them, i.e., between December 5, 1997 and July 21, 2009 at VFC Inc and between August 1, 2009 and August 13, 2003 as a self-employed owner of an accounts receivable 3rd party collection agency. The Tribunal has not been presented with any medical evidence substantiating a deterioration in these conditions at the time of the MQP.

[79] On the other hand, the Tribunal notes the Appellant testified that he started to re-experience seizures. His spouse provided credible and unchallenged testimony that the Appellant flails in his sleep and falls out of the bed. She has had to move to another bedroom to sleep. In his October 14, 2011 report, Dr. Bruni, neurologist, reported the Appellant relayed that since his headaches returned recently, he started to have recurrent seizures when asleep. Dr. Bruni recommended medication other than Dilantin for recurrent seizures.

[80] The Appellant testified he suffers pervasive daytime fatigue and has to nap during the day. He attributes the fatigue to his night time seizures. As previously noted, the Appellant's spouse testified as to night time flailing on the part of the Appellant which may be consistent with night time seizures. She also confirmed he requires day time naps.

[81] Whether the Appellant actually suffers from night time seizures or some other pathology which accounts for his night time flailing, and whether or not the seizures or the other pathology causes his day time fatigue, the Tribunal accepts the Appellant's unchallenged evidence that he suffers from considerable daytime fatigue and requires daily napping. The Tribunal further accepts that considerable daytime fatigue is one factor which contributes to the existence of a severe disability as defined in the CPP

[82] The Appellant also lacks peripheral vision and consequently does not possess a driver's license. Given his historic inability to drive for medical reasons, his current immobility as of March 2012, and the August 2013 closure of his business within walking distance of his house,

the Tribunal is satisfied the Appellant faces an additional obstacle to securing and attending a job outside the home. While his lack of mobility and reduced vision are not severely disabling conditions when considered in isolation, their intersection clearly makes securing and attending an employer's place of employment outside the home all the more challenging to the Appellant from a "real world" perspective. The Tribunal is satisfied that even if the Appellant had public transportation readily available to him in his current geographical location, given his limited mobility, he could not realistically avail himself of it to travel to and from work on a regular basis.

[83] The Tribunal is satisfied that the Appellant suffers from significant ongoing ambulatory restrictions resulting from his ankle condition. He is currently on a waiting list for surgery. He has been on that list for approximately three years. When surgery will take place and the outcome of surgery is uncertain at this time. The Tribunal is satisfied the Appellant would not be capable regularly of pursuing ambulatory work on or before the MQP resulting from this condition.

[84] This leaves the question whether the Appellant is capable of performing sedentary work on or before the MQP.

[85] The Tribunal is satisfied the Appellant is incapable regularly of pursuing sedentary work on or before the MQP given the cumulative impact of his multiple conditions.

[86] Although the Appellant's ankle condition would not rule out sedentary work *per se*, the Appellant testified he has to keep his leg elevated due to pain. He sits in a La-Z-Boy Recliner at home with his leg elevated. Also, he has to take strong analgesic painkillers such as Percocet on a daily basis to manage his pain. And as noted above, he experiences daytime fatigue, whatever its cause, and has to nap during the day. These factors would present significant obstacles to the pursuit of gainful employment in the competitive labour market.

[87] The Tribunal is satisfied the Appellant's also suffers from additional symptoms. In the CPP Medical Report, Dr. Cole diagnosed memory loss, headaches and anger issues.

[88] In terms of the memory loss issues, although it would have been preferable and helpful to the Tribunal had the Appellant submitted neuropsychological testing measuring the nature,

extent and severity of his memory loss, the Tribunal accepts the evidence of the Appellant and his spouse, as well as the letters of support submitted in support of his appeal from individuals who described their direct observations of and interactions with the Appellant, that the Appellant is struggling with significant memory loss issues.

[89] Although the Tribunal has not been provided with any medical evidence directly linking the onset of the Appellant's memory loss or significant deterioration in memory loss to a stroke which caused him to fall off the ladder in March 2012, the Tribunal has also considered the fact that what is important for the purpose of assessing the severity of a disability is not a medical diagnosis *per se* but the impact the condition or symptom has upon functional capacity. Dr. Cole's diagnosis of memory loss provides some medical substantiation of this condition or symptom. He wrote that "Memory will probably get worse" which indicates that he took this condition or symptom seriously.

[90] Given the Appellant's unchallenged evidence corroborated by that of his spouse, Dr. Cole's diagnosis and the letters filed by the Appellant of those who know him and have had an opportunity to observe and interact with him, the Tribunal is satisfied the Appellant would face a serious impediment to securing and maintaining any substantially gainful occupation in the competitive labour force resulting from his memory loss.

[91] Dr. Cole also diagnosed headaches. The medical record contains reference to headaches in numerous clinical notes. The evidence indicates they are daily. The Tribunal is satisfied that daily headaches would also contribute to a severe disability as defined in the CPP.

[92] The evidence also supports a finding the Appellant suffers from anger issues consisting of inappropriate emotional outbursts. In her October 2013 CPP Medical Report, Dr. Cole noted that the anger may or may not be related to the past brain tumour. As noted above, what is relevant to the consideration before the Tribunal is not the diagnosis *per se* but whether an applicant for disability benefits is functionally impaired to the extent he or she is incapable regularly of pursuing any substantially gainful occupation. According to the Appellant's spouse, since the 2012 accident, the Appellant has been less able to manage his emotional outbursts. The Tribunal is satisfied that such emotional outbursts, along with all his other conditions and/or

symptoms, would present a significant obstacle to pursuing substantially gainful work in the competitive labour market.

[93] Given the Appellant's day time fatigue and his need to nap, memory loss issues, chronic headaches, anger issues with emotional outbursts, lack of mobility, pain in his ankle, the need to keep his leg elevated while seated and the inability to drive resulting from reduced visual fields, the Tribunal is satisfied the Appellant is incapable regularly of pursuing any substantially gainful occupation.

[94] The Tribunal is satisfied the Appellant suffered the onset of a severe disability as of March 2012, at which time he fell off a ladder in his attic and fractured his ankle. Based on all the evidence, the Tribunal is satisfied, on balance, that at or around that time, the Appellant started to suffer significant problems with his short term memory. In combination, with his daytime fatigue, daily headaches, anger issues, lack of mobility, pain and inability to drive resulting from his visual impairment, he was severely disabled as defined in the CPP. The Tribunal finds he did not possess residual capacity to pursue other work and was not a suitable candidate or retraining. As such, he was relieved of the obligation as set out in *Inclima v. Canada (A.G.)*, 2003 FCA 117.

[95] Although the Appellant continued to operate his own business between March 2012 and August 2013, based on the evidence before it, the Tribunal is not satisfied that the Appellant's work efforts reflected a capacity regularly on his part to pursue a substantially gainful occupation.

[96] According to the Appellant, after the March 2012 accident, he hardly went into work anymore. He was paying rent for something that was not panning out. Although he had a commitment to his landlord, his performance was minimal. Although he could not specify what income the business generated, he states he had to start cashing in his RRSPs in order to make ends meet. This indicates to the Tribunal that the business was generating little to no income and certainly not a substantially gainful income.

[97] In further support of the Tribunal's finding that the Appellant's efforts in his business did not reflect capacity on his part regularly to pursue a substantially gainful occupation, the

Tribunal has considered the credible and unchallenged evidence of the Appellant's spouse. She testified that she would oversee his business operations. This was necessary as he could not spell appropriately, could not recall the last thing he read or wrote and was getting issues confused. Although he was the owner and public face of the company, it was becoming clear to others this was no longer the case. People were calling her and asking if there was a problem. For example, his clients would call her and ask why he was forgetting things, was not responding to their queries and was not following their conversations.

[98] Given the fact the Appellant had to cash in RRSPs to financially support himself and further given his spouse's evidence as to how his lack of short term memory and confusion affected his capacity to interact with customers, the Tribunal is satisfied the Appellant's operation of his business as of March 2012, did not reflect a capacity regularly on his part to pursue a substantially gainful occupation.

Prolonged

[99] The Tribunal is satisfied that the Appellant's disability is prolonged. Despite being treated with medication and having seen various specialists, the Appellant continues to suffer chronic headaches, daytime fatigue, short-term memory loss, confusion and inappropriate emotional outbursts.

[100] As previously indicated, he is on a waiting list for ankle surgery. At this point, he continues to wait for a date and the outcome of surgery is unknown.

[101] The Tribunal accepts Dr. Cole's prognosis as set out in her October 20, 2013 CPP Medical Report: "Memory will probably get worse. HA probably will not change. Anger remains the same may or may not be related to brain tumour".

CONCLUSION

[102] The Tribunal finds that the Appellant had a severe and prolonged disability as of March 2012. 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 September 2013; therefore the Appellant is deemed

disabled in June 2012. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of October 2012.

[103] The appeal is granted.

Jeffrey Steinberg
Member, General Division - Income Security