



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. C. v. Minister of Employment and Social Development*, 2016 SSTGDIS 65

Tribunal File Number: GP-16-589

BETWEEN:

J. C.

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: Jude Samson

HEARD ON: July 14, 2016

DATE OF DECISION: August 26, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: J. C.

Dr. Yves Turgeon, Neuropsychologist (witness)

Respondent: Written submissions only

OVERVIEW

[1] The Appellant is a 48-year-old man who has encountered a lot of difficulties in his life. He is divorced and has one child of his own and two step-children. His Neuropsychologist, who participated in the hearing, described his medical condition as being extremely complex given the multitude of overlapping physical and mental health conditions with which he struggles. On August 5, 2010, he applied for *Canada Pension Plan* (CPP) disability benefits, but his application was denied by the Respondent at the initial and reconsideration levels. It is the September 13, 2011 reconsideration decision that is now being appealed before the Social Security Tribunal (Tribunal).

[2] For the reasons that follow, the appeal is dismissed.

METHOD OF PROCEEDING

[3] To begin, it is worth briefly describing the procedural history of this appeal.

[4] On October 11, 2011, the Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) (GT1-204). Since the OCRT had not heard the appeal prior to April 1, 2013, the file was deemed on that day to have been transferred to the Tribunal's General Division, which replaced the OCRT: section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[5] On August 30, 2015, a different Member of the Tribunal dismissed the appeal without an oral hearing. Unsatisfied with the decision, the Appellant sought leave to appeal from the Tribunal's Appeal Division (AD-15-1188). Leave was granted on December 24, 2015, and on

February 16, 2016, the Appeal Division approved an agreement that had been reached between the parties, thus sending the file back to the General Division for a new hearing.

[6] This Member of the Tribunal's General Division then decided that the matter should be heard on July 14, 2016, by teleconference, for the following reasons:

- a) videoconferencing is not 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) the method of proceeding is the most appropriate to address inconsistencies in the evidence; and
- d) 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.

[7] While the matter was scheduled to proceed in French, the Appellant asked at the hearing of the appeal that it be conducted in English and that the decision be drafted in English too.

THE LAW

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for obtaining a 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).

[9] 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.

[10] 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.

ISSUES

[11] The Appellant raised no issue regarding the MQP as calculated by the Respondent. The Tribunal also agrees with that calculation and finds that the Appellant's MQP ended on December 31, 2004.

[12] Section 19 of the CPP provides that when an appellant's earnings and contributions are below the year's basic exemption for that year, their earnings and contributions can be prorated if they became disabled during the prorated period. In this case, the prorated period is from January 1, 2005, to January 31, 2005.

[13] The question the Tribunal must decide, therefore, is whether it is more likely than not that the Appellant had a severe and prolonged disability on or before the expiration of his MQP? Alternatively, is it more likely than not that the Appellant had a severe and prolonged disability during the prorated period from January 1, 2005, to January 31, 2005?

SUMMARY OF THE EVIDENCE

[14] The evidence in this appeal included the oral testimony of the Appellant and that of his Neuropsychologist, Dr. Turgeon, along with all of the medical reports and other documentary evidence found in the Tribunal's record. While the evidence has been reviewed in its entirety, only the aspects that the Tribunal found to be most relevant are described below.

[15] At the outset, Dr. Turgeon explained that the Appellant had called him the morning of the hearing to ask whether he could participate in the teleconference. Though he had to cancel a number of appointments, Dr. Turgeon nevertheless agreed to do so without any remuneration or benefit of any kind. While Dr. Turgeon did not have the Appellant's file with him, he felt that he

had seen the Appellant with sufficient regularity over the last five to six years that he knew the file well and was particularly well placed to comment on the Appellant's ability to work.

[16] Dr. Turgeon also prefaced his comments by saying that the Appellant's file is an extremely complex one given the multitude of overlapping conditions that are present. He also said that the Appellant tends to ramble and has trouble expressing himself, which can make it difficult, even for medical professionals, to understand his concerns and treat him appropriately. Indeed, the Tribunal initially had difficulty ascertaining whether or not the Appellant had the appeal documents with him on the day of the hearing. Rather than responding to that question, the Appellant instead referred to new medical documents that he had recently received. Dr. Turgeon used a particular technique to bring the Appellant back to the question at hand, but explained that it is as though the Appellant's mind sometimes gets caught in a loop.

[17] And even though the Appellant had called Dr. Turgeon the morning of the hearing and provided him with all of the dial-in information needed to participate in the conference call, the Appellant was late joining the conference call himself because he had lost his papers in the intervening hours. Dr. Turgeon explained that such symptoms are common for the Appellant.

Overview of the Appellant's Claim

[18] The Questionnaire that was submitted as part of the Appellant's application for CPP disability benefits (GT1-182) does not accurately set out the main parts of the Appellant's claim, at least not as it was presented during the hearing. An overview of the claim *as presented* is therefore in order.

[19] According to the Appellant, he was diagnosed with severe mental health issues from a very young age. Nevertheless, he held a variety of jobs, the last regular one being as a long-haul truck driver. In addition to his mental health issues, the Appellant had a long history of pain in his left groin and testicle. That pain intensified to the point where he had to stop working altogether in late 2004. On January 6, 2005, his left testicle was surgically removed, after which the Appellant had a period of recovery. But on May 20, 2005, just before he intended to return to work, the Appellant was involved in a serious motorcycle accident.

[20] Much of the Questionnaire that the Appellant submitted as part of his application for disability benefits (GT1-182) refers to ailments and impairments that arose following the May 2005 motorcycle accident. At the hearing, with a better understanding of the CPP's eligibility requirements, particularly the hurdle presented by his MQP, the Appellant and Dr. Turgeon focused much more on the Appellant's early mental health issues, and Dr. Turgeon underscored numerous factors – many of which were present long before the 2005 motorcycle accident – that contributed towards the Appellant's current disability.

[21] The challenge presented by this appeal, therefore, is to assess the degree to which the Appellant was impaired on or before December 31, 2004, or during the prorated period from January 1 to 31, 2005, and whether that degree of impairment meets the criteria for obtaining CPP disability benefits.

The Appellant's Evidence

[22] The Appellant was 36 years old on January 31, 2005, being the prorated date when he last met the contribution requirements for obtaining CPP disability benefits. He had a grade 12 education, but said that he is dyslexic and struggled through school to the extent that his actual abilities to read and write are far less than what his high school diploma would suggest. (A sample of his writing can be found at GT10.) The Appellant lives in the Maritimes and is bilingual.

[23] The Appellant claims to have been diagnosed with severe attention deficit hyperactivity disorder (ADHD) from a very young age and was prescribed high doses of Ritalin between the ages of 10 and 16. At 16, he stopped taking his Ritalin and turned shortly thereafter to illegal substances. Eventually, he said that he came to realize the importance of Ritalin, and struggled to have it prescribed to him once again. He claims that he could not function normally without it. On account of his ADHD, the Appellant said that he often speaks so quickly that people have trouble understanding him. And even people who know him well, like his parents, frequently accuse him of being "high" when he is not. Indeed, the Appellant asked that the hearing be conducted in English because he speaks slower in English and is more easily understood.

[24] The Appellant claims to have started experiencing pain in his left groin from the time that he was about 14 years old. A large inguinal hernia was later removed, though he says that complications arose leaving him with ongoing pain in that area as well as in his left testicle.

[25] The Appellant said that he started working at a local garage when he was 16 years old. He then moved to X, where he worked in masonry. Following an injury to his back, the Appellant returned to the Maritimes and trained as a heavy equipment operator, but found it difficult to manage because he was having trouble controlling his bowels. He then started working as a long-haul truck driver, which he was better able to manage because he had a toilet in the cab of his truck and a freezer where he kept ice packs to soothe the pain in his left groin and testicle.

[26] The Appellant said that he fell in love with truck driving when he realized how much money he could earn. He said that he stopped taking illegal drugs at this point because of the possibility of drug testing. He had family to help him with all of the maintenance and paperwork associated with truck driving, so all he had to do was drive. And drive he did: over 900,000 km in 30 months, according to his evidence. To do so, he said that he slept just four and a half hours per day, and given the intensity of his pain in late 2004, he said that he could “eat up to 100 Tylenol 1s per day”. Since he was on the road constantly, the Appellant said that he was able to purchase this much medication by stopping at different pharmacies along his route. Despite the hours that he was working and medications that he was taking, the Appellant said that he was nevertheless very careful to never have an accident or get stopped by the police, something that he did successfully.

[27] As mentioned, the pain in the Appellant’s left groin and testicle increased to the point where he needed further surgery. In June 2004, he underwent an epididymectomy at the hands of Dr. Cianciulli, but claims to have been frustrated that the doctor did not remove his left testicle altogether, as he was supposed to do. By October 24, 2004, he testified that the pain was such that he could no longer work. In January 2004, the Appellant’s left testicle was removed by Dr. Rusu. At one point during the hearing, the Appellant said that his left testicle measured 14.5 cm when it was removed, and at another point he said that it was the size of a baseball.

[28] Following the January 2005 surgery and a subsequent period of recovery, the Appellant seemed to concede that the pain in his groin was mostly resolved, but said that he suffered from other complications, such as a lack of energy and motivation. It would take some time, according to him, before doctors realized that his testosterone levels had been significantly affected by the surgery.

[29] Nevertheless, in May 2005, the Appellant said that he had secured a new truck for himself and was ready to start driving again. He went out for a last night of partying with his friends, but on his way home, after a night of drinking, he was involved in a serious motorcycle accident that resulted in the loss of his spleen, several broken ribs and a serious concussion. Long after the accident, its effects continued to negatively impact on numerous aspects of the Appellant's health.

[30] The Appellant described making at least a couple of attempts at returning to work between 2005 and 2007. Precisely when he worked at these jobs is somewhat unclear, though the Appellant said that they were brief (see also GT1-183). In May 2005, the Appellant spent a week working for a friend cutting and clearing branches, but he apparently had trouble manipulating the required scissors and had to take too many breaks (GDR2-4). He also said that he drove a sanitation truck, filling in for a friend who was away for medical reasons. Fortunately, the Appellant said that he could do the work as and when he was able, so he usually felt safer working at night when there was less traffic.

[31] But this is nowhere near the end of the Appellant's woes: he was hospitalized for mental health issues from March 30, 2010, to April 23, 2010 (GT1-49), was diagnosed with testicular cancer in 2011, suffers from polyneuropathy, and now claims that his hands are seizing and that he has severe pain in his feet, to name a few more.

The Medical Evidence

[32] Along with his application for disability benefits, the Appellant submitted a medical report that was completed by Dr. Connely on November 22, 2010 (GT1-17). Dr. Connely has been the Appellant's Family Physician since April 1985, and noted that he has been treating the

Appellant for his main medical condition since October 2005. In his report, Dr. Connely provided the following diagnoses:

- a) chronic non-malignant pain, lower back since work accident in Ontario in 1990;
- b) left para-scapular pain;
- c) left hemi thorax chest wall pain since polytrauma Spring 2005;
- d) chronic left testicular pain;
- e) hypertension,
- f) normocytic anemia;
- g) irritable bowel syndrome;
- h) sleep apnea;
- i) thrombocytosis post disc herniation (no neurological deficit);
- j) carpal tunnel syndrome (right)
- k) major depression/intractable hypersomnolence/intractable fatigue;
- l) microscopic hematuria under investigation;
- m) obesity; and
- n) pancreatitis.

[33] Dr. Connely noted that the Appellant experienced intractable symptoms of fatigue, hypersomnolence, and chronic non-malignant pain, along with symptoms of ADHD, depression and anxiety, all of which persist in spite of aggressive pharmacotherapy, psychotherapy, pain and specialty consultation/management (GT1-19). Dr. Connely further opined that the Appellant's symptoms are severe and prolonged, his prognosis is guarded, and that he functions at less than 50% on both activities of daily living and social activities.

[34] Dr. Connelly prepared a further report on April 28, 2014, which included the following additional diagnoses (GT3-2):

- a) right testicular cancer since December 2011;
- b) childhood and adult ADHD; idiopathic polyuria; and
- c) polyneuropathy, upper and lower limbs.

[35] With a few exceptions, Dr. Connelly's reports are not written in such a way that the reader can easily tell whether the diagnoses provided arose before or after January 31, 2005. However, based on the Tribunal's review of the evidence, it is established that certain conditions, such as the Appellant's ADHD, depression, lower back pain, and left groin/testicular pain were all present to some degree prior to his MQP.

[36] The longstanding pain in the Appellant's left groin and testicle were well described by the Appellant and are well documented in the evidence. Even documents from 1994 describe his pain as dating back six or seven years (GT1-122 and 126). And post-surgical documents from 1995 indicate that the Appellant's pain continued to interfere with his ability to maintain steady employment and he was reported to be taking analgesics daily for relief (GT1-121).

[37] By 2004, the Appellant was seeing Dr. Cianciulli for this pain (GT1-141 to 144) and he performed a left epididymectomy on June 21, 2004 (GT1-200). But the Appellant said that he was frustrated with this procedure because the pain had been so intense that he wanted the doctor to remove his testicle altogether, something that would later be done by Dr. Rusu on January 6, 2005 (GT3-110).

[38] The Appellant accepted that this surgery was largely successful at reducing or eliminating his pain, but said that there were other negative consequences, like a lack of energy and motivation.

[39] As outlined above, however, Dr. Turgeon attributed the Appellant's disability to a multitude of factors, of which the pain in his left groin and testicle are just one aspect.

[40] In his oral evidence, Dr. Turgeon further expanded on his comprehensive report dated July 19, 2013, in which he provided the following diagnosis (at GT8-6):

[TRANSLATION]

[The Appellant] has a neurocognitive disorder, the most likely cause of which is a combination of factors, including persistent post-concussion syndrome, an acute hyperactivity and attention deficit disorder and chronic affective disorder. Despite the results of assessments concerning the aspects related to the mental health issue, there is a degree of neuropsychological certainty that [the Appellant's] cognitive problems in the tests stem from a dysfunction of his neuropsychological functioning, of which the physiological substrate is a serious mental health issue.

[41] With respect to his functional abilities and the possibility of returning to work, Dr. Turgeon wrote this (at GT8-7):

[TRANSLATION]

[The Appellant] is much more severely affected than he lets on. He has much less control over his cognitive processes, emotions and behaviour than he actually believes, which adds to his problems adapting and his inability to modify his behaviour in order to lessen his cognitive, affective and behavioural symptoms.

Regarding a return to work, I am of the opinion that [the Appellant] is not fit to return to any employment, despite his motivation to do so. Nor do I believe that one day he will once again be fit to do so. Given the history of his psychological disorders, I cannot see how he could fulfill his responsibilities at work. Working as a trucker or in any other job that he has previously held requires much more than average cognitive skills, not to mention the improbability of the effects of medication under stress. Furthermore, the work requires skills in managing emotions and adjusting behaviours, which, unfortunately, [the Appellant] no longer has. Psychologically, he is fragile.

I find that he now has very little tolerance to effort or stress. He also has a reduced capacity to carry out a number of complex tasks simultaneously, which is nevertheless crucial in occupations like those that he has held in his life and that he held until his last work stoppage. Despite his good will, I do not believe that [the Appellant] could possibly commit to a return to work process, which is uncertain given the development of his adjustment disorder symptoms in recent years.

Furthermore, the prognosis is grim in this respect, given the complexity of his neuropsychological assessment, not to mention the challenges of daily life. Unfortunately, [the Appellant] no longer has the personal aptitudes, either cognitive or emotional, to carry out the routine tasks of an average employee, given his education, training and experience. Therefore, from my analysis, I am recommending that a

pension application be considered, as I am of the opinion that he is disabled from performing any employment.

[42] Dr. Turgeon reinforced at the hearing that the Appellant is significantly impaired on the cognitive, emotional and behavioural levels and that the source of those impairments likely arises from an accumulation of physical and psychological medical conditions, including his severe ADHD, mood disorder, motorcycle accident (including persistent post-concussion syndrome) and cancer. In addition, several aggravating factors are present, including drug abuse and the numerous challenges that he has faced personally and financially (for example, he has not worked since 2004 and the divorce from his wife resulted in a difficult custody dispute). Indeed, Dr. Turgeon also notes that the treatments the Appellant requires for one symptom may worsen another.

[43] An impediment to the Appellant's recovery, the Neuropsychologist explained, is the Appellant's limited ability to understand the severity of his impairments. Up until about two years ago, he said, the Appellant would come into his office saying that he was ready to return to work, and the doctor would have to continuously remind him of the reasons why he would not succeed or why it was unsafe to do so.

[44] With respect to the onset of the Appellant's disability, the Tribunal noted the seriousness of the May 2005 motorcycle accident and asked several questions to Dr. Turgeon pertaining to its contribution towards the Appellant's overall level of impairment. In this respect, Dr. Turgeon wrote this in his July 2013 report (at GT8-2):

[TRANSLATION]

[The Appellant's] life changed dramatically after the May 20, 2005 motorcycle accident. Even if he showed a number of symptoms of mental illness, such as acute hyperactivity, signs of a mood disorder, including signs of mania, and substance abuse, it seems that he was no longer the same man after the accident. In fact, there is evidence that his symptoms of mental illness were considerably exacerbated as a result of the brain trauma that he sustained in the accident.

[45] Dr. Turgeon refined this answer somewhat at the hearing by placing more emphasis on the Appellant's very severe ADHD, combined with drug abuse and chronic pain, all of which

were present prior to 2005. When asked if it was possible to say whether the Appellant would have been disabled were it not for the May 2005 motorcycle accident, Dr. Turgeon felt that the answer was likely yes. In his view, the Appellant's severe ADHD, addiction and other mental health issues had already put him on an irreversible path towards failure such that some other event would have almost certainly intervened, even if it were not for the motorcycle accident.

[46] While Dr. Turgeon only started treating the Appellant around 2010, he drew on the Appellant's evidence regarding the extreme distances he drove and lengths that he was going to manage his pain and commented that "nobody in their right mind would drive that many kilometers in that period of time."

[47] The complex nature of the Appellant's file, he added, creates a risk of his problems being regarded as a matter of temperament, whereas Dr. Turgeon is of the view that it was a very severe mental health condition that prompted him to engage in such risky behaviour, putting his own life in danger and that of others. In addition, Dr. Turgeon said that such conditions do not develop overnight, meaning that the Appellant's illness was likely present for at least two years before exhibiting such reckless behaviours.

[48] In some ways, Dr. Turgeon found it remarkable that the extent of the Appellant's mental illness was not detected earlier. He also said that the accumulation of negative factors in the Appellant's life would likely be overwhelming to almost anyone. Indeed, he finds the Appellant's resilience in the face of such overwhelming adversity to be remarkable.

SUBMISSIONS

[49] The Appellant submitted that he qualifies for a disability pension because he had a severe and prolonged disability prior to December 31, 2004. In particular, the Appellant emphasized the severe ADHD that he has had since childhood, the chronic pain that he has suffered in his left testicle and groin since the late 1980s and drug abuse. And though the Appellant was working as a long-haul truck driver in 2004, he engaged in extreme and risky behaviours that demonstrate the depths of his impairment.

[50] The Respondent submits that the Appellant has not established a severe and prolonged disability within the meaning of the CPP on or before December 31, 2004, or within the prorated period from January 1 to 31, 2005, and does not, therefore, qualify for a disability pension because:

- a) the Appellant's application materials, including his Questionnaire and the Medical Reports prepared by his Family Physician, all indicate that his condition was greatly affected by the May 2005 motorcycle accident, which occurred after the expiration of his MQP;
- b) given his education and age at the expiration of his MQP, the Appellant ought to have been able to find work that was better suited to his condition; and
- c) even if present, the Appellant's ADHD, hyperactivity and affective disorder were not disabling conditions prior to January 31, 2005, since he managed to work for many years prior to this date.

ANALYSIS

[51] To be successful, the Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before his MQP. Alternatively, did he develop a severe and prolonged disability between January 1 and 31, 2005?

Credibility

[52] The Appellant's evidence was presented in a frank and genuine way, sometimes using colourful language. While he occasionally veered off on tangents, his answers were generally responsive. He did not come across as a person who had things to hide; to the contrary, he was very open and quite talkative.

[53] Since the Respondent did not participate in the hearing, the Appellant's evidence was not challenged in any serious way. Even though few (if any) of the Appellant's statements were directly contradicted, the Tribunal nevertheless approached his evidence with a degree of caution, since the documentary evidence casts doubt over some of his statements and others are

so far from the norm that they are difficult to accept without corroborating evidence. For example:

- a) With reference to the pain in his left testicle, the Appellant said during the hearing that at the time of its removal, his testicle was both the size of a baseball and that it measured 14.5 cm. There is quite a big difference between the two. In addition, the Tribunal would have expected to find a reference to such surprising dimensions somewhere in the medical documents, such as in Dr. Rusu's operative report (at GT3-110) or in his Family Physician's clinic notes (see transcription at GT1-169 to 170), but no such reference could be found. Rather, in the subsequent pathology report, it is mentioned that the specimen labelled "left testicle" measured 6 x 4 cm (GT3-111).
- b) The Appellant said several times at the hearing that he drove over 900,000 km in the 30 months that he operated his last truck. This amounts to a remarkable 1,000 km/day, without taking into account any vacation days or days when the truck might have required maintenance, servicing or even loading and unloading. Again, such evidence is difficult to accept without corroborating evidence and does not seem to be supported by his earnings, which are not particularly high (GDR9).
- c) When his pain reached its peak, the Appellant said that he was taking 100 Tylenol No. 1s per day. The Appellant claimed to have had evidence of those purchases that he used to question various pharmacies as to why they would allow him to buy such vast quantities of medication. That evidence was never filed with the Tribunal, though the Appellant suggested that it might have been destroyed due to a flood in his basement. It is remarkable to the Tribunal that taking such large doses of any medication would not have raised a flag of some sort, whether with customers, at border crossings or inspection stations, or affected the Appellant's health in ways that would be better reflected in the medical documents.

Severe

[54] The severity requirement 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 consider an appellant's medical condition in its totality and keep in mind factors such as age, level of education, language proficiency, and past work and life experience: *Bungay v. Canada (A.G.)*, 2011 FCA 47. The question is not whether appellants are incapable of performing their regular or preferred occupation but whether they are incapable of performing any substantially gainful occupation that is suitable to their condition: *Villani* at para. 45, *Patterson v. Canada (A.G.)*, 2009 FCA 178 at para. 2.

[55] When assessing severity, the Tribunal focuses less on whether an appellant has been diagnosed with a particular medical condition and more on how that medical condition affects the appellant's capacity to work: *Klabouch v. Canada (MSD)*, 2008 FCA 33, *Ferreira v. Canada (A.G.)*, 2013 FCA 81. To succeed, an appellant must provide some objective medical evidence of his or her disability; however, the Tribunal must give due consideration and weight to the whole of the evidence, both objective and subjective, written and oral: *Warren v. Canada (A.G.)*, 2008 FCA 377, *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB).

[56] In the Tribunal's view, the Appellant and Dr. Turgeon correctly focused on the Appellant's mental health at the date of his MQP rather than on the testicular pain from which he had previously suffered. While that pain may have been severe and initially interfered with his ability to work, it appears from the Appellant's oral testimony and from the medical evidence that this condition was largely resolved once his left testicle was surgically removed in early January 2005.

[57] And while the Appellant may have experienced some complications resulting from that surgery – namely, a lack of energy and motivation, possibly caused by reduced testosterone levels – there is no evidence in the Tribunal record to suggest that those complications would amount to a severe and prolonged disability. Indeed, according to the Appellant's own evidence, he had secured a new truck and was ready to start driving again just before his motorcycle accident in May 2005. In addition, his low testosterone levels are currently treated with medication.

[58] The Tribunal accepts, based on the notes and reports of Dr. Connely (e.g. GT1-17 and 169) and the evidence of Dr. Turgeon, that at least some of the Appellant's mental health issues

were present prior to the MQP. However, the question the Tribunal must decide is whether, on or before that date, the Appellant's overall condition, including those mental health issues, amounted to a severe and prolonged disability, as defined under the CPP?

[59] In this respect, Dr. Turgeon drew from the Appellant's evidence and characterized the Appellant's behaviours as putting not only his own life at risk but those of others too. In particular, Dr. Turgeon highlighted the long hours and huge distances that the Appellant claimed to have driven, all while sleeping very little and taking massive amounts of medication. These behaviours, he argued strenuously, are not typical of a right-minded person. He also stressed that the Appellant's illness is characterized by a lack of self-awareness; that is, a failure to understand his own limits. In his opinion, it was unsafe for the Appellant to be working, even prior to January 31, 2005.

[60] With respect to the Appellant's risky behaviours, the Tribunal has, as already mentioned, approached his testimony with a degree of caution. In addition, this evidence must also be balanced against the fact that the Appellant apparently maintained a good driving record: he said that he was not involved in any accidents and never attracted the attention of the authorities. And he gave evidence of a family who supported his work, rather than one that tried to intervene because he was a danger to himself and to others.

[61] In addition, the Appellant had a Family Physician, Dr. Connely, who he had known since 1985, and who, based on the transcription of his clinic notes at GT1-169 to 170, he had been seeing regularly throughout 2004. Yet neither Dr. Connely, nor any of the other doctors that the Appellant was seeing at the time, appear to have viewed his behaviour as creating such a significant risk. In the Tribunal's view, these aspects of the evidence are entitled to significant weight when balanced against the evidence of Dr. Turgeon, who only started treating the Appellant around 2010.

[62] While the Tribunal does accept Dr. Turgeon's evidence that the Appellant's disability was caused by an accumulation of factors, and that some of those factors were present prior to the Appellant's MQP, the evidence strongly suggests to the Tribunal that the May 2005 motorcycle accident was a significant, if not *the most*, significant factor contributing to his

disability. It was the “tipping point”, so to speak. The importance of this event can be seen from, for example:

- a) the medical reports completed by Dr. Connelly in which he noted that he has been treating the Appellant for his main medical condition since October 2005 (GT1-17 and GT3-2);
- b) the Questionnaire that the Appellant submitted as part of his application for disability benefits, on which he wrote that his medical condition has been preventing him from working since May 2005 (GT1-184); and
- c) Dr. Turgeon’s July 2013 report (at GT8 and quoted above at para. [44]), which highlights the significant impact of the May 2005 motorcycle accident. To use Dr. Turgeon’s words, the Appellant [translation] “was no longer the same man after the accident” and “there is evidence that his symptoms of mental illness were considerably exacerbated as a result of the brain trauma that he sustained in the accident”.

[63] Even if the Tribunal were to accept Dr. Turgeon’s evidence that the Appellant had embarked, prior to December 2004, on an irreversible path towards failure, the Tribunal cannot find, based on the evidence, that a severe and prolonged disability had interfered with his ability to regularly engage in remunerative employment prior to the May 2005 accident.

[64] Although the Appellant had stopped working temporarily due to the pain in his groin and testicle, accepting Dr. Turgeon’s evidence would require the Tribunal to conclude that the Appellant suffered from a disabling mental illness at a time when he was, in fact, regularly engaged in remunerative employment. While the Tribunal is not prepared to rule out the possibility of such a case, the Federal Court of Appeal in *Miller v. Canada (A.G.)*, 2007 FCA 237 at para. 4 described the ability to regularly engage in remunerative employment as “the very antithesis of a severe and prolonged disability.” In other words, how could the Tribunal conclude that the Appellant suffered from a disabling mental illness prior to his MQP when he was able to drive such long distances without any accidents and without attracting the attention of police, customers, supervisors, border and inspections agents, or even his doctors for that matter?

[65] As part of its assessment, the Tribunal has considered the Appellant's condition in its totality, along with his age, level of education, language proficiency, and past work and life experience, as required by the Federal Court of Appeal in *Villani*. The Tribunal recognizes that the Appellant has limited academic abilities, but he speaks two languages, was just 36 years old when he last met the CPP's contribution requirements, and has had a variety of work experiences that show a degree of adaptability. Having considered all of these factors, the Tribunal could not conclude that the Appellant had a severe disability on or before the expiration of his MQP.

[66] For the same reasons, the Tribunal could not conclude that the Appellant had a severe and prolonged disability in the prorated period between January 1, 2005, and January 31, 2005. Rather, the Tribunal finds that it is the May 20, 2005 motorcycle accident and its after effects that contributed most significantly to the Appellant's level of impairment.

Prolonged

[67] Since the Tribunal found that the Appellant's disability was not severe at the expiration of his period of eligibility, it is not necessary to make a finding on the prolonged criterion. Nevertheless, a few points are worth mentioning:

- a) while the Appellant's testicular and inguinal pain caused a work stoppage prior to the expiration of his MQP, the Tribunal cannot find that those conditions were prolonged, since they were largely resolved by the surgical removal of the Appellant's left testicle in January 2005, and any complications arising from that surgery also appear to have been resolved; and
- b) while the Appellant may currently suffer from a prolonged disability, the Tribunal concludes that the May 2005 motorcycle accident is the factor that contributed most significantly to the Appellant's degree of impairment, though that accident occurred after his period of eligibility had already expired.

[68] In the circumstances, the Tribunal would not have been able to conclude that the prolonged criterion under the CPP had been met either.

CONCLUSION

[69] The Tribunal is grateful that both the Appellant and Dr. Turgeon were able to participate in the hearing of this appeal. Their testimony shed an important light on aspects of the appeal that were not obvious from the documents alone. While the result is not the one that they were hoping for, the Tribunal sincerely hopes that they at least feel as though they were heard and understood.

[70] The Tribunal feels a great deal of sympathy for the Appellant. He has had to face a multitude of difficult and harrowing situations that most people would find overwhelming. However, factors such as sympathy, suffering and need are not ones that the Tribunal can take into account.

[71] Ultimately, the Tribunal accepts that the Appellant was struggling with a variety of physical and mental health issues prior to the expiration of his MQP, but he managed to continue working as a long-haul truck driver without incident of any kind and without attracting the attention of authorities. Rather, the Tribunal sees the Appellant's May 2005 motorcycle accident as a tipping point after which his degree of impairment became much more severe. But that accident occurred a few months after the Appellant's eligibility for CPP disability benefits had expired. This legal requirement is not one that the Tribunal has the power to ignore.

[72] The appeal is dismissed.

Jude Samson
Member, General Division - Income Security