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

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTGDIS 120

Tribunal File Number: GP-15-2037

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: June 26, 2017

DATE OF DECISION: August 25, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. B.: Appellant

Justin Linden: Appellant’s representative

V. B.: Appellant’s wife

INTRODUCTION

[1] The Appellant’s application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on August 7, 2014. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on June 3, 2015.

ADJOURNMENTS

[2] This appeal was initially scheduled to be heard on November 24, 2016 by teleconference. On August 17, 2016 the hearing was adjourned to February 16, 2017 at the request of the Appellant because he had retained a new representative who indicated that he required additional time to review the file and submit additional documents.

[3] At the outset of the hearing on February 16, 2017 the Appellant's representative requested an adjournment to file materials including medical documents in response to the Respondent's addendum to submissions which he had not received until two days prior to the hearing. The Tribunal noted that the addendum was filed with the Tribunal on February 13th, 2017 which was long after the January 19, 2017 response date.

[4] Due to the complexity of the issues and the late filing of its addendum by the Respondent, the Tribunal was satisfied that there were exceptional circumstances and that the adjournment request should be granted.

[5] The hearing was adjourned to June 26, 2017 to be heard by videoconference.

FORM OF HEARING

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

a) The Appellant will be the only party attending the hearing.

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

c) The issues are complex.

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.

THE LAW

[7] 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).

[8] 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.

[9] 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

[10] The Tribunal finds that the MQP date is December 31, 2013. [Record of earnings/contributions: GD2-5]

[11] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

BACKGROUND

[12] The Appellant was 36 years old on the December 31, 2013 MQP date; he is now 39 years old. He dropped out of high-school shortly after his 16th birthday and initially worked at various labouring and retail jobs including cleaning offices and helping an uncle maintain the grounds of a cemetery. He then worked as a moving helper for two years. After 2001 he worked in the trucking industry: his last employment was as a local transport driver.

[13] On January 7, 2012 while he was on his way to work, he encountered slush on the roadway and lost control of his vehicle. He slid over to the other side of the roadway and was T-boned by a half-ton vehicle coming in the opposite direction. He suffered burst fractures to his thoracic spine as well as a closed head injury. He underwent fusion and decompression surgery on the following day. On January 14, 2014 he underwent further surgery in which the instrumentation was removed.

[14] He hasn't worked since the motor vehicle accident (MVA).

APPLICATION MATERIALS

[15] In his disability questionnaire, signed on July 15, 2014, the Appellant indicated that he has a grade 12 education as well as a fifth wheel transport driving certificate. He noted that he last worked as a transport driver for X X from September 14, 2011 until January 6, 2012; he stated that he stopped working because of a back injury in a MVA. He claimed to be disabled as of January 7, 2012 and stated that his main disabling condition is back pain resulting from a January 2012 MVA. [Disability Questionnaire: GD2-71 to 73]

[16] He described his difficulties/functional limitations as follows: only able to stand for 15-30 minutes, to sit for 20-30 minutes, and to walk for 15 minutes; limitations in lifting/carrying and reaching; only able to do minimal tasks at a slower pace for household maintenance; troubled sleep due to chronic pain; able to drive for 1 ½ hours (but requiring breaks); and that public transportation causes pain due to condition of roads. [Disability questionnaire: GD2 – 74]

[17] A report dated July 22, 2014 from Dr. Smith, the Appellant's family doctor, was submitted in support of the disability application. The report diagnoses burst thoracic vertebrae requiring instrumental fusion with screws and rods; L4-5 disc herniation; and chronic pain. The report indicates that further surgery was required to removed implements in January 2014 and that the Appellant continues to be limited in all of his activities of daily living. Dr. Smith stated that the Appellant is currently unable to work and that although he hopes to return to some form of employment the prognosis is guarded. [GD2-53]

ORAL EVIDENCE

[18] The Appellant described his main problems as follows:

- He isn't able to sit for more than 20 minutes because of pain; if he sits for another 15-20 minutes he will be "done for the day."
- He has to keep moving around when he stands: he leans on things and keeps lifting one leg up and down.
- He has to sit sideways and he has to stop and lie down as soon as he starts feeling the pain: he can't sit straight.
- He is in constant pain and takes eight Percocets and four Ibuprofens a day.
- He is always tired, irritable and forgets things.
- He can't do any heavy lifting and can't lift overhead – he can't even lift a case of pop from the floor. If he moves too quickly his muscles spasm and his back locks up.
- His hands go numb: he feels numbness from his elbows to his fingers. He is getting both of his arms checked out by a specialist in Sudbury.
- He has 2-5 bad days a week. When he wakes up on a bad day it takes everything he has just to get out of bed. He will spend the whole day either

reclined on the couch or in bed. He doesn't do anything and just going to the washroom hurts.

- There is never a day when he isn't in very bad pain. He will try and do things like grocery shopping with his wife, showering, going for medical appointment in the morning because his pain gets worse as the day goes on.

- He gets headaches. They are very sharp and he has had 5-7 headaches during the last month.

- He hardly sleeps because of pain and numbness. He is up repeatedly during the night and has to nap for about ½ hour during the day.

[19] As of December 2013 he had "loose hardware" which caused sharp pain: this was taken out in January 2014. His condition has been getting worse since the January 2014 surgery. He is always in pain. The pain is "non-stop." When referred to the limitations described in his July 2014 disability questionnaire [GD2-74] he stated that they were accurate as of that date.

[20] He has done everything his doctors have suggested. His family doctor has never recommended psychological counselling. He went for a six week pain clinic at the same location as his family doctor. He stated that this wasn't helpful because his pain is more severe that what the program is designed for. He has never attended a multidisciplinary pain program and stated that he could not recall this ever being recommended. He hasn't looked for work because he "has a hard time just making it through the day."

[21] V. B. described the Appellant's problems since the accident as follows: he isn't as "physical" - he can't bring in groceries and he can't cut the grass; he is always miserable and unhappy; his memory is "awful" – he misplaces his keys, his wallet and papers; it is a "nightmare"; he is popping pills every couple of hours – he never took any before; the Percocets make him tired and he just sits on the couch and watches television – he tries to limit what he takes but he is in too much pain to not take the pills.

[22] The doctors have suggested a chronic pain management program but he hasn't gone. They don't see why he should have to leave home for a lengthy period to attend when everything is going to be the same. She doesn't think it is worth the cost and time of going. She is not aware of there ever having been a recommendation for psychological counselling.

MEDICAL EVIDENCE

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

Dr. Mantle: neurosurgeon

[24] On January 8, 2012 Dr. Mantle diagnosed T8 and T9 vertebral compression fractures with 30% canal compromise. The Appellant consented to a fusion from T6 to T12 for stabilization as well as decompression of the canal. [GD2-60]

[25] On May 24, 2012 Dr. Mantle's impression was ongoing thoracic pain, most likely related to nerve injury at the time of his fracture, which may take 1-2 years to resolve, and lumbar pain with intermittent bilateral leg numbness, improving. [GD2-65]

[26] On May 23, 2013 Dr. Mantle reported that the Appellant remains off work and takes 5-6 Percocets per day. His impression was possible bony pullback around T6 screws. The Appellant agreed to removal of the instrumentation. [GD2-46]

[27] On January 14, 2014 Dr. Mantle removed the instrumentation. His post-operative diagnosis was bony pullback at right T5. [GD2-47]

[28] On March 16, 2014 Dr. Mantle reported that the Appellant's spine was stable and well fused. Dr. Mantle had no objection to heavy lifting and a return to work. [GD2-51]

[29] On May 26, 2016 Dr. Mantle related that the Appellant has improved his sharp back pains; that he continues to have rather severe dull mid back pains with intermittent swelling; and that this prevents him from returning to driving or other work. He noted that the Appellant remains on occasional Percocet. The Appellant consented to T6 and T7 corpectomies. In his oral evidence the Appellant advised that he had not proceeded with this surgery. [GD13-64]

Other

[30] On January 14, 2012 Dr. Boyle, emergency care, reported that the Appellant suffered the following injuries in the MVA: T8-9 burst fracture; right close head injury with a small subdural contusion; and a tiny residual piece of glass in the right ear. [GD2-63]

[31] On October 23, 2012 Dr. Harding, orthopaedic surgeon, reported to the Appellant's lawyer on his medical-legal assessment of the Appellant. The Appellant's symptoms included mid back pain; exacerbation of pre-existing low back pain with radiation down both legs; and occasional headaches. Dr. Harding diagnosed severe thoracic spine fractures; exacerbation of pre-existent lower back pain; and head injury resulting in subdural hematoma. He opined that the Appellant will probably continue to suffer significant chronic pain on a permanent basis and that he will be limited in his workplace duties on a permanent basis. [GD14-2]

[32] On January 17, 2014 Dr. Brankstone, specialist in emergency medicine, reported to the Appellant's lawyer on his paper review of the Appellant's file. He opined that the Appellant's severe chronic back pain and considerable quantities of daily Percocet impaired his cognitive thought processes. [GD1-13]

[33] On August 16, 2016 Dr. Finkelstein reported to the Appellant's lawyer with respect to his independent orthopaedic assessment of the Appellant. He conclude that the Appellant will have a permanent impairment in returning to a physically active job that requires repetitive lifting and bending; that he will have impairment in returning to his previous job as a truck driver because sitting for long periods of time will impact loading on his back and cause pain; and that he will not be able to return to this occupation. [GD13-40]

[34] On August 17, 2016 Dr. Waisman, psychiatrist, reported to the Appellant's lawyer with respect to his psychiatric medical-legal evaluation of the Appellant for the purpose of a catastrophic impairment determination. The Appellant's current complaints included depression, anxiety, and cognitive difficulties. He stated that the MVA contributed to a cascading series of events that led the Appellant to collapse his defenses and develop a major depressive episode and somatic symptoms disorder. He further stated that the Appellant also suffers from symptoms of post-traumatic stress disorder and substance misuse disorder. He also stated:

> In the case of A. B., he has had considerable difficulty in adapting to his physical problems and chronic pains. He socially isolates. He has not returned back to any of his pre-accident social activities. He has not been able to sustain employment. His adaptation has been poor. The synergistic effects of chronic pain and depression have led to a downward spiral of hopelessness and helplessness. [GD8-118]

[35] On August 18, 2016 Dr. Berbreyar, physiatrist, reported to the Appellant's lawyer with respect to his medical-legal evaluation of the Appellant. He related that the Appellant has been unable to return to any occupation since the MVA and that he is currently unemployed due to his pain and poor concentration. Dr. Berbreyar diagnosed right subdural hematoma with closed head injury; post-concussion syndrome with ongoing difficulty with concentration and attention to tasks; post-traumatic headache on a daily basis; fracture T8-T9; cervical sensory radiculopathy; and chronic pain syndrome. The prognosis was guarded. [GD8-2]

[36] On August 25, 2016 Dr. Muller, neurosurgeon, reported to the Appellant's lawyer with respect to his neurological assessment of the Appellant. He diagnosed thoracic spine fracture; closed head injury with small subdural hematoma; L4/5 lumbar disc herniation and stenosis – long standing; and post-traumatic situational anxiety. He concluded that the Appellant's spinal impairment is permanent and opined that he is unable to return to his pre-accident employment and that he suffers a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. [GD13-51]

[37] On November 4, 2016 Dr. Bhatia, psychologist, reported to the Appellant's lawyer with respect to his psychological assessment of the Appellant on August 16, 2016. He noted that the documentation indicates that the Appellant has taken upwards of 12 Percocets per day to manage pain. His potential malingering test scores were slightly elevated indicating the need to interpret his reporting of psychological symptoms with caution and rely on all available sources of information when making diagnostic considerations. Dr. Bhatia stated that given his clinical presentation, the review of his medical file, his clinical observations, and the results of other testing material, it was his clinical opinion that the Appellant was not attempting to exaggerate any symptoms. He diagnosed major depressive disorder; somatic symptom disorder; and post-traumatic stress disorder, resolving. He recommended a neurocognitive assessment, 24 sessions of psychological counselling, and participation in chronic pain management. [GD9-2]

[38] On March 10, 2017 Dr. Hamilton, neuropsychologist, reported to the Appellant's lawyer with respect to her neuropsychological evaluation of the Appellant. She stated that the Appellant is "clearly presenting with cognitive challenges" and that he "sustained a complicated mild traumatic brain injury" as a result of the MVA. She opined that the Appellant would not be able to return to work given his level of mood disturbance and pain; that he has major depression and features of post-traumatic stress disorder; and that the has cognitive issues with problem solving and organisation that would impact his ability to engage in his pre-accident employment. The prognosis was guarded to poor. She recommended ongoing rehabilitation intervention to assist the Appellant in maintaining quality of life. [GD13-66]

[39] On March 24, 2017 Robert Katz, from Vocational Rehabilitation Associates, reported to the Appellant's lawyer with respect to his vocational assessment of the Appellant. He stated that there was no possibility of the Appellant returning to work as a driver while his symptoms persist because he can only drive a car with a semi-inclined seat; that he needs frequent breaks; and he lacks sitting tolerance. He further stated that he cannot conceive of any occupation for which the Appellant is presently suited by virtue of his education, training, experience, physical capacities, and tolerance.

[40] With respect to the Appellant's probable career forward he stated:

> If this man mounts a good or fairly good physical recovery, he will return to work at once. If he recovers some, but not all of his physical capacities, he will identify a light driving job making local deliveries in a van or car. If his physical condition remains as it is, he will not return to any form of employment.
>
> In my opinion his psychological symptoms are not preventing a return to work. If his physicality is restored he will return to work no matter how depressed or distressed he may feel. [GD3-15]

POST-HEARING DIRECTION

[41] At the hearing there was discussion concerning the November 2014 assessments reports prepared for the insurer which were not included in the hearing file. These reports are discussed at GD8-26 to 33. The Appellant's representative offered to file copies of these reports.

[42] The Tribunal determined that in the interests of justice the reports should be filed in order to ensure that there is a complete hearing file and that all relevant reports are before the Tribunal.

[43] The Tribunal made following directions:

1. The Appellant's representative is to file the following reports with the Tribunal by **July 5, 2017**:
    i. Dr. Yadev's November 27, 2014 orthopaedic assessment report.
    ii. Dr. Graham's November 27, 2014 physiatry assessment report.
    iii. Dr. Salstone's November 27, 2014 psychological assessment report.
    iv. The Workwell Functional Capacity Evaluation report dated November 27, 2014, and
    v. Allison Gould's November 27, 2016 vocational assessment report.
2. The Respondent shall have until **August 4, 2017** to file responding submissions.

[44] The Appellant filed the additional reports on June 28, 2017. [GD17]

[45] The Respondent filed an addendum to submissions on August 17, 2017. Although this was filed late, the Tribunal admitted the addendum in order to ensure that complete submissions were before the Tribunal. [GD18]

[46] The additional assessment reports indicate that from an orthopaedic (assessment dated November 5, 2014), psychological (assessment dated October 2, 2014) and vocational perspective (assessment dated August 29, 2014 the Appellant did not suffer from a complete inability to engage in any employment for which he was reasonably suited by education, training or experience; but from a physiatry (assessment dated October 22, 2014) perspective and overall he did suffer from a complete inability.

[47] The Appellant in a letter dated June 28, 2017 enclosing the additional reports referred to the multidisciplinary assessment report summary which concluded that the Appellant does suffer a complete inability, as a result of the accident to engage in any employment or self-employment

for which he is reasonably suited by education, training or experience. He also referred to Dr. Graham's November 2014 physiatry assessment report which states:

> From a physical standpoint, this gentlemen presents with mechanical thoracic back pain. Given the circumstances, with the finding of a kyphotic deformity, as well as the hardware having been removed, possible non-union of the fracture, and the fact that no post-operative imaging has taken place to confirm stability, l don't think he has had medical clearance for full activity.
>
> Dr. Mantle commented that the spine felt stable to palpation intra-operatively. However, I think follow-up imaging is required, with respect to an MRI of the thoracic spine, to assess the spinal cord for myelomalacia, as well as imaging of the spine itself, to assess the degree of deformity and alignment and fracture healing, as well as stability, From a functional standpoint, he reports difficulty with bending, heavy lifting, maintaining prolonged positions, or with resisted use of the right upper extremity in particular. The Functional Capacity Evaluation, which was valid, documented sedentary physical tolerance. Until further investigations and medical documentation confirming medical clearance for full activity are obtained, it is my opinion that A. B. currently demonstrates a complete inability. I note the Psychology, Vocational, Orthopedic opinions to the contrary.

[48] The Respondent in its addendum submissions noted that these conflicting assessment reports were after the December 31, 2013 MQP and that the Appellant has the onus to establish a severe and prolonged disability prior to the expiry of the MQP: if he has not done so, it is irrelevant if his condition deteriorated after the MQP.

SUBMISSIONS

[49] Mr. Linden submitted that the Appellant qualifies for a disability pension because:

a) There is uncontroverted evidence that he was undergoing surgery within two weeks of the MQP and that he continues to suffer from chronic pain and take significant narcotic medications;

b) He continues to suffer from significant symptoms of mechanical back pain requiring use of eight Percocets daily for pain control;

c) His pain is aggravated by prolonged sitting, standing, heavy lifting, bending, squatting and twisting;

d) He has attended physiotherapy, massage therapy and pain management to help deal with his pain;

e) His severe chronic pain and considerable quantities of pain medication impair his cognitive thought processes, mood and sleep; his cognitive impairment was not properly assessed at the time of the MQP but this resulted from his head injury in the MVA and demonstrates that his overall condition is continuing to deteriorate;

f) The Tribunal should consider the Appellant's limited education, his difficulties in high school, as well as his narrow work history which involved either trucking or physical labour type work;

g) Although Dr. Mantle was hopeful in 2014 the totality of the evidence establishes that his condition has deteriorated: he continues to use "heavy" amounts of narcotic pain medication and that there is no reasonable prospect of recovery;

h) Performing household chores and everyday activities exacerbate his pain;

i) He is still significantly disabled and the likelihood for further improvement and recovery is slim.

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

a) While the Appellant may not be able to perform his heavy physical work as a truck driver, he has not tried any alternate lighter work;

b) The medical evidence does not show any serious pathology of impairment which would result in him being categorized as disabled and unemployable in all occupations;

c) If a significant degree of impairment is the result of narcotic intake as opined by Dr. Brankston in his June 2014 assessment, it would be expected that referral for participation in a pain management program and formal evaluation be sought as soon as possible in order to adequately provide the Appellant with tools for better pain control;

d) In his March 2014 report (three months after the MQP) Dr. Mantle stated that that Appellant's spine was stable and well fused and that he had no objection to heavy lifting and a return to work by the Appellant;

e) The Appellant has not been referred to a psychiatrist or psychologist for a mental health condition, his family doctor did not indicate a diagnosis of depression, and no medication has been prescribed for this.

ANALYSIS

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

Severe

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

[53] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2013 he was disabled within the definition. The severity requirement must be assessed in a "real world" context (*Villani* 2001 FCA 248). The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[54] Remedial legislation like the Canada Pension Plan should be given a liberal construction consistent with its remedial objectives and each word in the subparagraph 42(2)(a)(i) of the CPP must be given meaning and effect, and when read in that way, the subparagraph indicates that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation (*Villani* 2001 FCA 248).

[55] The Tribunal recognizes that the Appellant is very young (he was only 36 years old on the MQP and 34 at the time of the MVA) and that he has acknowledged that he has not made any efforts to pursue alternative employment since the MVA. However, after a careful review of the oral evidence as well as the extensive medical evidence the Tribunal is satisfied, on the balance of probabilities, that he lacks the residual capacity to pursue alternative employment.

[56] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment: *Bungay* 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata* v MHRD (January 17, 2001) CP 15058 (PAB).

[57] The Tribunal has put significant weight on the oral evidence which the Tribunal found to be credible and consistent with the medical evidence. The Appellant's description of his main problems (paragraph 18, above) reveals constant severe pain for which the Appellant continues to take significant narcotic pain medications; substantial limitations in sitting, standing, walking, and lifting; cognitive impairments; headaches; sleep disturbance; and 2-5 bad days per week during which the Appellant spends the whole day either reclined on a couch or in bed. His wife's evidence (paragraph 21, above) confirms his physical and cognitive limitations as well as the side effects of the medications.

[58] The progression of the Appellant's disability was described by Dr. Waisman in August 2016 (paragraph 34, above) as "a cascading series of events that led to the collapse" of the Appellant's defenses and that the "synergistic effects of his chronic pain and depression have led to a spiral of hopelessness and helplessness." The Tribunal agrees with this description and notes that the Appellant has been diagnosed with multiple physical and psychological conditions including: severe thoracic spine fractures; exacerbation of pre-existent lower back pain with radiation down both legs; and a head injury resulting in subdural hematoma (Dr. Harding, paragraph 31, above, October 2012): severe back pain and impaired cognitive thought processes (Dr. Brankstone, paragraph 32, above, January 2014): a major depressive episode; somatic symptoms disorder; post-traumatic stress disorder; and substance misuse disorder (Dr. Waisman, paragraph 34, above, August 2016): right subdural hematoma with closed head injury; post-

concussion syndrome with ongoing difficulty with concentration and attention to tasks; daily post-traumatic headaches; fracture T8-9; cervical sensory radiculopathy and chronic pain syndrome (Dr. Berbreyar, paragraph 35, above, August 2016): and major depressive disorder; somatic symptom disorder; and post-traumatic stress disorder (Dr. Bhatia, paragraph 37, above, November 2016).

[59] Although there has been a progression in the Appellant's condition since the removal surgery in January 2014, the Tribunal is satisfied that the Appellant's disabling physical and psychological conditions were extant and disabling as of the December 2013 MQP. The Tribunal has noted Dr. Hamilton's March 2017 neuropsychological assessment (paragraph 38, above) which indicates that the Appellant is "clearly presenting with cognitive challenges" and that he "sustained a complicated mild traumatic brain injury" as a result of the MVA: this relates his Appellant's cognitive challenges back to the MVA which was close to two years prior to the MQP. Dr. Hamilton also described the barriers to the Appellant returning to work including mood disturbance, pain, major depression, features of post-traumatic stress disorder, and cognitive issues.

[60] Having regard to the cumulative effect of the Appellant multiple conditions and limitations he could not pursue with "consistent frequency any truly remunerative occupation" (*Villani*, paragraph 55, above). He could not be a regular and reliable employee.

[61] The Tribunal is mindful of Dr. Mantle's March 2014 report (paragraph 28, above) which indicates that that the Appellant's spine was stable and well fused and the he has no objection to heavy lifting and a return to work. However, the Tribunal believes that this assessment was overly optimistic and that it failed to take into account the totality of the Appellant's conditions. The Tribunal also believes that this assessment is inconsistent with the preponderance of the medical evidence which supports a severe disability.

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

Prolonged

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

[64] The Appellant's disabling conditions have persisted for many years and despite extensive treatment there has been little or no improvement. If anything it would appear that his condition continues to deteriorate.

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

CONCLUSION

[66] The Tribunal finds that the Appellant had a severe and prolonged disability in January 2012, when he suffered severe injuries in a MVA. 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 August 2014: therefore, the Appellant is deemed disabled in May 2013. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of September 2013.

[67] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security