



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *M. A. v. Minister of Employment and Social Development*, 2017 SSTGDIS 168

Tribunal File Number: GP-16-1948

BETWEEN:

**M. A.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Raymond Raphael

HEARD ON: October 19, 2017

DATE OF DECISION: November 8, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on August 13, 2015. The Appellant claimed that he was disabled because of a heart attack, back pain, and a shoulder injury. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on June 1, 2016.

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP).

[3] The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2017. [Statement of contributions: GD2-4]

[4] Since this date is in the future the Tribunal must determine whether the Appellant was disabled on or before the date of the hearing.

[5] The appeal was heard by videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing.
- b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives.
- 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.
- d) In the hearing information form the Appellant indicated that because of anxiety he is most comfortable speaking about his conditions "face to face" at an in person hearing. The Tribunal is satisfied that the Appellant's requirements will be accommodated at a videoconference hearing where he will have "face to face" contact with the Tribunal Member.

[6] The following people attended the hearing:

M. A.: Appellant

L. S.: Appellant's representative

[7] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

## **ORAL EVIDENCE**

### ***Background***

[8] The Appellant is 53 years old. He was born in Somalia; in Somalia he worked as a teacher at an elementary school and was promoted to assistant principal. Because of the political turmoil in Somalia he moved to Kenya in October 1986. He worked as a truck driver for 1 ½ years in Kenya and then went to Zambia for three weeks. He came to Canada in October 1988.

[9] In Canada he worked as a shipper/receiver in a factory for 11 years: his work duties included driving a truck from the factory to the warehouse. When he left the factory he started to work as a spray painter but he couldn't continue because he had breathing difficulties from the paint. He then upgraded to an AZ truck driving license and drove long haul trucks for a few months. His last employment was as a scrap metal truck driver for X from November 2010 until he suffered a heart attack in June 2014. He has not returned to work since his heart attack.

### ***The Accidents***

[10] In 1993 he was injured in a motor vehicle accident when the truck that he was driving was cut off, and his truck rolled over. He was off work for two months, came back to work on light duties, and returned to his regular duties after two months. He has suffered from low back pain since this accident.

[11] He was involved in another accident in 2003, when part of the truck that he was driving hit a bridge. This made his back pain worse and he started to feel pain radiating into his right lower leg. He was off work for a month and then gradually returned to regular duties.

[12] In July 2010 he injured his right shoulder when a plastic container fell on his right shoulder when he was dumping scrap metal at a dump site. He didn't take any time off work. After July 2010 he was only able to work on light duties: he drove a truck with only one container and an automatic tarp to cover the load – he didn't do any of the loading or unloading. His pain got worse and a MRI revealed a right shoulder tear. In February 2012 he was off work for three months for right shoulder surgery.

[13] In June 2014 he suffered a heart attack: he has not returned to work since the heart attack. His employer told him that they no longer had light duty work available for him. He hasn't looked for suitable work with an alternate employer. When asked why not, he stated that his condition deteriorated and by September 2016 his back was worse and he couldn't sit, stand, or walk for more than 15 minutes.

### ***Disabling Conditions***

[14] ***Right Shoulder:*** he is right handed and has pain in his right shoulder; he has broken sleep because he wakes up because of shoulder pain if he sleeps on his right side. During the day he doesn't have as much pain if he doesn't use his right arm: his arm goes numb when he brushes his teeth and he avoids pushing and pulling. He is tired and fatigued during the day because of his broken sleep. He rates his shoulder pain as a seven, but the pain increases if he does anything with it.

[15] ***Back:*** His back is stiff when he wakes up in the morning. He walks for 20 minutes but then has to lie down. He also does a light exercise routine. His back pain starts at a seven to eight, but if he walks, sits, or stands for too long (more than 15 minutes) or pushes or pulls anything, the pain gets worse. When referred to his description of his limitations in his disability questionnaire [GD2-123] he stated that this was accurate as of August 2015 when he signed the questionnaire, but his condition became worse in September 2016: now he can only walk for 20 minutes, stand for 15 minutes, he can't do any lifting, and the pain now radiates down to his right knee.

[16] **Heart:** he has chest pain when he wakes up and when he walks for too long. He sees Dr. Bauer on a yearly basis and he has told him that the abnormal rhythm wasn't something to be concerned about.

### ***Treatment***

[17] He takes a pain medication prescribed by the pain clinic and Extra Strength Tylenol. He also takes heart medications. He has gone for extensive physiotherapy, massage therapy, and chiropractic treatment but these only give temporary relief. He is now going for injections to his lower back every second week (initially he went every week) but these only give relief for a day or two.

[18] He doesn't go places anymore. His children do the grocery shopping, cooking, cleaning, and laundry. On "bad days" (3-4 days a month) he isn't he isn't able to get out of bed and he has to ask his children for help go the washroom. He stated that he has worked hard for his family all of his life, and now he is "always in pain" and "can't stand, walk or sit for more than 20 minutes". He has no "quality of life."

### **MEDICAL AND DOCUMENTARY EVIDENCE**

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

### ***Disability Questionnaire***

[20] In his disability questionnaire, signed on August 12, 2015, the Appellant indicated that he has a college diploma in teaching and that he last worked as a truck driver for X from November 6, 2000 to June 24, 2014: he noted that he stopped working because of a heart attack, lower back pain, and a workplace shoulder injury. He claimed to be disabled as of June 26, 2014. [Disability Questionnaire: GD2-120 to 122]

### ***Limitations***

[21] He reported difficulties/functional limitations with sitting/standing for more than 15-20 minutes; that he could walk for one hour; that he could lift 5-10 lbs; that he cannot reach above shoulder level or bend for more than 1-2 minutes; that he isn't able to do household maintenance; that he has occasional forgetfulness; that he isn't able to sleep for more than 1-2 hours; and that he can only drive for a short distance. [GD2-123]

### *Medical Reports*

[22] On March 17, 2014 Dr. Chan, orthopaedic surgeon, reported that the Appellant continued to complain of right shoulder pain despite successful surgery. The Appellant was loading and unloading trailers at work and Dr. Chan suspected that his problem was overuse. [GD2-117]

[23] On June 26, 2014 Dr. Radhakrishnan, cardiac surgeon at X Hospital, performed a coronary angiography with a stent. [GD2-133]

[24] In a discharge summary dated July 1, 2014 Dr. Bauer, cardiologist, noted that the Appellant had undergone an angioplasty at X; that the primary diagnosis was post angioplasty myocardial infarction; and that the Appellant should be off work until at least October 2014. [GD2-110]

[25] On July 24, 2014 Dr. Bauer reported that the Appellant was doing quite well. [GD2-108]

[26] On October 14, 2014 Dr. Chan reported the Appellant's basic problem was overuse and that although his tendon had healed it was not robust enough for him to be doing the type of work he was doing. He gave the Appellant a note limiting his activities to below shoulder only.

[27] On November 14, 2014 Dr. Bauer reported that the Appellant would be best served by going back to work in July 2015, a year after his original heart attack. [GD2-102]

[28] On January 26, 2015 Dr. Bauer reported that the Appellant has atypical chest pain and an abnormal EEG response to exercise. He arranged a nuclear test and to follow-up with the Appellant in two months.

[29] On March 30, 2015 Dr. Bauer reported that the Appellant was stable from a cardiac perspective; that he was pleased with the results of his recent nuclear stress test; that the

Appellant can go back to work with modifications; that he should not work for more than eight hours; and he should only drive and not do any lifting. [GD2-83]

[30] In a Functional Abilities Assessment Form dated June 3, 2015 and a certificate dated July 29, 2015 Dr. Berih, the Appellant's family doctor, noted that the Appellant could return to truck driving for no more than eight hours a day on permanent light duties with restrictions [GD2- 78 & 79]

[31] Dr. Berih completed the initial medical report in support of the disability application on September 3, 2015. He diagnosed right shoulder infraspinatus tear, myocardial infarction in 2014, and recurrent back spasm. The prognosis for full recovery of the right shoulder was guarded; the prognosis from a cardiovascular point of view was good. Dr. Berih stated that the Appellant is able to drive a truck without lifting or tightening of latches. [GD2-64]

[32] A stress test on June 15, 2016 revealed good exercise tolerance and no chest pain. The test indicated mild exercise induced myocardial ischemia with a good post exercise tolerance. [GD6-6]

[33] There is an independent chronic pain assessment report from Dr. Nimni, emergency and pain management physician, dated June 17, 2016 which was produced as a post-hearing document. This report is detailed in paragraphs 45 to 51, below.

[34] On July 27, 2016 Dr. Silverberg, internal medicine, reported to Dr. Berih regarding his review of the Appellant's low back pain. His impression was mechanical low back pain due to soft tissue injuries of the lumbosacral spine suffered in the motor vehicle accidents. [GD4-1]

[35] A MRI of the lumbar spine on August 20, 2016 revealed very mild stenosis at the L4/5 level; very mild bilateral foraminal stenosis the L4/5 and L5/S1 levels; and a small annular tear at the L5/S1 level. [GD4-15]

[36] On March 20, 2017 Dr. Konasiewicz, neurologist, related that the Appellant started having increased pain after a truck rollover accident in 2003; that over the years his pain has continued and worsened; and that he was presently not working because of significant cardiac and right shoulder issues. He stated that the Appellant has myofascial pain in the lumbar region

due to lumbar spondylosis changes; that his right shoulder pain is likely due to previous surgery and ongoing arthritic changes and rotator cuff pathology; and that the Appellant would be a candidate for interventional treatments to both areas. [GD6-4]

[37] Dr. Konasiewicz performed injections from April 4, 2017 to July 4, 2017. [GD7-2 to 7]

[38] On April 10, 2017 Dr. Berih reported to the Appellant's representative detailing the Appellant's restrictions because of his heart attack, his shoulder pain, and his low back pain. He noted that in 2014 he believed that the Appellant had improved enough to attempt light driving duties. He described the Appellant's present physical restrictions as follows: he cannot lift, carry, pull, or push; he has difficulty sitting for more than 15-20 minutes; he cannot stand for more than 15 minutes at a time; he has difficulty with bending, stooping, and kneeling; he cannot perform above shoulder activities; he cannot perform repetitive shoulder movements; and his cognition is intact. He opined that the Appellant would not be productive in a work setting due to his restrictions and that "he may be dependable with his desire to work but his work attendance could be affected by his restrictions and the unpredictability of the onset of his pain." He noted that the Appellant has seen a rheumatologist and is HLAB24 positive; that he does not suffer from fibromyalgia; that he reports irritability but denied mood disorder or depression; and that he has sleep difficulties because of chronic pain.

[39] On July 28, 2017 Dr. Silverberg related that the Appellant's lower extremity pain has improved with back injections since March 2017; that he has been unable to work as a truck driver since 2014 because his job requires him to bend over, to pull and push more than 50 pounds, and to sit in his truck for up to 16 hours daily; that his back pain increases when he bends over, if sits for more than 15 minutes; and if he walks or stands for more than 20 minutes. He concluded that the Appellant suffered soft tissue injuries to the lumbosacral spines in motor vehicle accidents in 1994 and 2003; that he continues to experience pain from those injuries; that he (Dr. Silverberg) cannot improve on his past analgesic and physiotherapy treatment; that he doesn't anticipate any improvement in the future; and that the Appellant is unable to return to any job that requires him to walk, sit, stand, bend, reach, carry or lift. [GD4-7]



[40] A MRI of the sacroiliac joints on April 2, 2017 revealed mild degenerative changes about the sacroiliac joints; probable acute Schmorl's node involving the superior endplate of S1. [GD4-11]

## **POST-HEARING DOCUMENTS**

[41] During the course of the hearing it became apparent that the Appellant's representative had inadvertently failed to file a copy of the report from Dr. Nimni dated June 17, 2016 which is referred to at GD4-7.

[42] Accordingly the Tribunal made the following directions:

1. The Appellant's representative is to file Dr. Nimni's report by October 20, 2017.
2. The Respondent has until November 3, 2017 to file additional submissions in response to this report.

[43] The Appellant filed Dr. Nimni's report on October 19, 2017. [GD7]

[44] Dr. Nimni's independent chronic pain assessment report is dated June 17, 2016. Dr. Nimni reviewed the Appellant's medical history and noted that he has not returned to work since his myocardial infarction in June 2014; that he has been stable since the stenting in June 2014; that he has intermittent chest pains which his cardiologist has said are non-cardiac in nature; and that after six months in cardiac rehabilitation his doctor advised him to go back to work on modified duties, but his company said that they had no modified duties to offer him - the Appellant stated the company wanted him to do driver training or dispatch, but the Appellant stated that he has no computer training and did not feel comfortable doing these tasks.

[45] Dr. Nimni also noted that in addition to his cardiac issues, the Appellant has been suffering with lower back pain since a trucking accident in 2003; that this has worsened to the point where it is daily, constant, and unremitting; that it radiates down his right leg to the calf area; that he also has daily right shoulder pain related to a work related injury; and that despite surgery he continues to have chronic shoulder pain.

[46] With respect to his psychological profile Dr. Nimni related that the Appellant feels “hopeless” because of his financial difficulties and his not having a job; that he has not had any psychiatric assessment or treatment; and that his anxiety and depression scores are significant for underlying mood and anxiety disorder.

[47] Dr. Nimni diagnosed coronary artery disease, stable; chest pain, not yet diagnosed; right sciatica/right L4-S1 radiculopathy; mechanical back pain; chronic right shoulder pain and rotator cuff tendinopathy; probable mood disorder; non-restorative sleep disorder; and probable fibromyalgia. His treatment recommendations included Cymbalta, a MRI of his lower back, referral to a pain clinic, and a psychological assessment. His prognosis was poor with respect to his chronic right shoulder and lower back pain, and guarded with respect to his cardiac issues.

[48] He opined that the Appellant is disabled from working as a truck driver due to the physical requirements and his poor sleep making it unsafe for him to drive a truck or operate other heavy machinery. He also opined that “in his current state” the Appellant is disabled from working in any occupation and that “Given his multiple physical elements and underlying coronary issues, he is disabled from working in any occupation, which requires a physical component.

[49] He was asked by the Appellant’s lawyer to comment on the transferable skills analysis report dated January 6, 2015 which deemed that a dispatcher or truck driver trainer were appropriate occupations for the Appellant.

[50] Dr. Nimni commented as follows:

... As a dispatcher, he would have to sit for prolonged periods of time [and] using a computer for which he has no formal training [and] also sitting in a stationary position for more than 20 minutes at a time causes him increased lower back pain. Furthermore, his chronic pain causes him to have disturbed sleep, which would interfere with his ability to carry out the tasks for these occupations.

Truck driver training would also be difficult because M. A. states that as a truck driver trainer there is still a physical component to the occupation and therefore he felt that he would be unable to perform the duties required to complete those tasks.

[51] The Respondent filed an addendum to its submissions on October 27, 2017. [GD11]

[52] In its addendum to submissions the Respondent takes the position that the additional evidence does not support a determination that the Appellant was disabled within the meaning of the CPP. The Respondent submitted that no severe findings were identified in the Appellant's lumbar spine; that his rotator cuff was repaired surgically without any evidence of severe secondary complications; that his cardiac condition has been stable; that his cardiologist, orthopaedic surgeon, and family doctor cleared him to return to modified work; that the more recent July 2017 medical reports indicate that the Appellant did not have fibromyalgia or a mood disorder; that there is no evidence that Dr. Nimni's recommended treatments have been exhausted: and that there is no evidence that he has attempt to return to any type of work, including lighter alternative work.

### **SUBMISSIONS**

[53] L. S. submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant's oral evidence was straight forward and credible: it correspondences with the medical documents and it should be considered to be reliable and accurately reflecting the Appellant's current reality;
- b) His employment history demonstrates that he is a very hard worker and that he has a strong work ethic;
- c) Although the medical evidence when he applied in 2015 might indicate that he could pursue lighter work, his condition has progressed and he is now regularly incapable of pursuing any type of employment;
- d) The Tribunal should not focus only on his heart condition: his back and shoulders are now causing the most stress and the medical evidence and investigations show that he has significant issues with his spine and significant limitations;
- e) The involvement of further specialists and his attending at the pain clinic demonstrates that his condition has deteriorated over time and that it is not under control;
- f) The Tribunal should take a "real world approach" and proposed occupational alternatives have to be "real" occupations.

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

- a) While the Appellant feels that he cannot return to work as a truck driver, he has not attempted alternative lighter work;
- b) He was medically cleared to return to his job as a truck driver with restrictions of avoiding repetitive twisting or movement of his back and shoulders, avoiding extreme hot and cold weather, and no lifting more than 5 kg or pushing/pulling above 10 lbs;
- c) When considering the Appellant's age, education, and transferable skills there are many occupational pursuits that would respect the Appellant's restrictions;
- d) Regarding the Appellant's heart, a stress test revealed good exercise tolerance with no chest pain and his family physician reports he should not perform physically demanding work;
- e) While M. A. has chronic right shoulder pain/dysfunction, this condition reportedly improved enough in 2014 for light work. While this condition may preclude repetitive or above shoulder work it would not preclude all work;
- f) While M. A.'s subjective complaints of back pain are acknowledged, the objective evidence does not support total disability. Investigations reveal only mild degenerative changes in his lumbar spine and no evidence to support ankylosing spondylitis. Clinical examination of M. A.'s back does not demonstrate severe findings;
- g) While the Appellant may not be able to return to physically demanding work, he retains the capacity for sedentary type work;
- h) The inability of his employer to provide modified/light work does not establish that the Appellant is precluded from suitable work with an alternate employer.

## ANALYSIS

### Test for a Disability Pension

[55] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he was disabled as defined in the CPP on or before the date of the hearing.

[56] 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).

[57] The Tribunal has found that the MQP date is December 31, 2017. Since this date is in the future, the Tribunal must determine whether the Appellant was disabled on or before the date of the hearing.

[58] 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.

[59] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before the date of the hearing he was disabled within the definition.

## **Severe**

[60] 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.

[61] 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).

[62] The Appellant was a good historian and he testified in a straight-forward manner. His evidence was consistent with the extensive medical evidence in the hearing file, and there is no suggestion in any of the medical evidence that he was feigning or exaggerating his symptoms in anyway. The Tribunal found the Appellant to be a truthful and credible witness.

[63] In considering this matter the Tribunal found it useful to consider three time periods: 1) the period prior to June 2014 when the Appellant suffered a heart attack, 2) the period from June 2014 to September 2016 when the Appellant testified that his condition worsened, and 3) the period from September 2016 to the date of hearing.

### ***Prior to June 2014***

[64] The Appellant suffered significant injuries in motor vehicle accidents in 1993 and 2003, and further injuries in a workplace accident in July 2010. He has suffered chronic back pain since the 1993 accident and this was exacerbated by the 2003 accident: notwithstanding his chronic back pain he returned to his physically demanding work as a scrap metal truck driver. He has suffered chronic right shoulder pain since the July 2010 accident: after this accident the Appellant continued working as a truck driver but on what he referred to as "light duties". He

underwent shoulder surgery in 2012, but still continued to experience chronic shoulder pain: Dr. Chan attributed this to overuse and limited the Appellant to below shoulder activities. (Dr. Chan March 17, 2014 and October 14, 2014: paragraphs 22 & 26, above)

***June 2014 to September 2016***

[65] The evidence establishes that the Appellant was precluded from returning to work after his heart attack until at least July 2015. On November 14, 2014 Dr. Bauer reported that the Appellant would be “best served” by returning to work in July 2015. and in March 2015 he reported that the Appellant’s cardiac condition was stable and that he could return to work with modifications. (Dr. Bauer November 14, 2014 and March 30, 2015: paragraphs 27 & 29, above). In his September 2015 report Dr. Berih stated that he was able to drive a truck without lifting or tightening of latches (paragraph 31, above). Based on the medical evidence the Tribunal is satisfied that as of the August 2015 application the Appellant was capable of returning to gainful employment, subject to restrictions.

***September 2016 to hearing***

[66] It is a question of fact as to when a disability begins and when it becomes severe. In some cases the severity may occur in an instant. In other cases, it may take months or years for the disability to become severe as defined by the CPP: *Forrester v MHRD* (November 3, 2003) CP 20789 (PAB).

[67] The key issue is whether the Appellant’s condition has progressed to severe by the date of hearing. The Tribunal has determined that it has.

***Multiple Conditions***

[68] 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.

[69] The Appellant testified that by September 2016 his back pain was worse and that he couldn’t sit, stand, or walk for more than 15 minutes. He stated that he is now in constant pain;

that he is bed ridden for 3-4 days a month; that he requires assistance from his children for household tasks; and that he has is very limited in standing, walking, and sitting.

[70] The Appellant's chronic shoulder and chronic back conditions have been deteriorating. He is limited in sitting, standing, and walking and suffers from constant pain - he has 3-4 unpredictable "bad days" a month when he is bedridden. Although his heart cardiac condition is stable it creates additional limitations and restrictions. The deterioration of his back and shoulder conditions is confirmed by Dr. Konasiewicz's March 2017 report and the Appellant undergoing injections from April to July 2017 (Dr. Konasiewicz: paragraphs 36 & 37, above). In his June 2016 chronic pain assessment Dr. Nimni opined that "in his current state" the Appellant is disabled from working in any occupation (Dr. Nimni, paragraph 48, above). In his April 10, 2017 reported Dr. Berih stated that although he had previously believed that the Appellant has improved enough to attempt light driving duties, he now believes that he could no longer be productive in a work setting and that his work attendance would be affected by his restrictions and unpredictable pain (Dr. Berih, paragraph 38, above). On July 28, 2017 Dr. Silverberg opined that the Appellant is unable to return to any job that requires him to walk, sit, stand, reach, carry or lift. (Dr. Silverberg, paragraph 39, above).

[71] The Tribunal has determined that because of the cumulative effect of the Appellant's back, right shoulder, and cardiac conditions he is now "incapable of pursuing with consistent frequency any truly remunerative occupation": see *Villani*, paragraph 61, above. He could not be a regular and reliable employee.

### ***Alternate Work***

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



[73] The Appellant has acknowledged that he has not made any efforts to pursue alternative employment since his heart attack in June 2014. However, the Appellant is not obligated to make such efforts when he lacks the residual capacity to pursue alternative employment: the Tribunal has found that he lacked this capacity as of the date of hearing.

[74] The Tribunal also noted that the Appellant has a lengthy and consistent work history and that he returned to full employment after significant injuries in three accidents. He continued working despite his chronic back and right shoulder pain. The Tribunal is satisfied that the Appellant has a strong work ethic and that he is the type of person who would continue working if he were able to do so.

### ***Severity Determination***

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

### **Prolonged**

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

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

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

## **CONCLUSION**

[79] The Tribunal finds that the Appellant had a severe and prolonged disability as of Dr. Berih's April 2017 report (paragraph 38, above). According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of August 2017.

[80] The appeal is allowed.

Raymond Raphael  
Member, General Division - Income Security