the Social Security Tribunal

A Self-Help Guide for Canada Pension Plan Disability Appeals

Updated Jan. 2016

prepared by Disability Alliance BC
Community Legal Assistance Society

funded by Law Foundation of BC

original funding from Law Foundation of Ontario

Contents

The Social Security Tribunal: A Self-Help Guide for Canada Pension Plan Disability Appeals was prepared by Disability Alliance BC (formerly BC Coalition of People with Disabilities) and **Community Legal Assistance Society (CLAS),** thanks to generous funding from the **Law Foundation of BC** and original funding from **the Law Foundation of Ontario.**

Writing: Peter Beaudin, Kevin Love and Ashley Silcock
Layout: Ann Vrlak
Legal Consultant: Kevin Love

Disability Alliance BC (DABC)
204-456 West Broadway, Vancouver, BC V5Y 1R3
Tel: 604-875-0188 | Toll-Free: 1-800-663-1278 | Fax: 604-875-9227
feedback@disabilityalliancebc.org | www.disabilityalliancebc.org

See our online web library for more free self-help resources at www.disabilityalliancebc.org/library.

About this Guide

This Guide has been produced by Disability Alliance BC and the Community Legal Assistance Society. It is designed to help people who are representing themselves with Canada Pension Plan Disability (CPP-D) appeals to the Social Security Tribunal (the "Tribunal"). Representatives may also find the Guide helpful if they have clients with appeals before the Tribunal.

After it was established in April 2003, the Social Security Tribunal used its regulatory authority to establish different procedures to deal with a significant backlog of appeals that it inherited. In order to process appeals in a timely manner it suspended some of the pre-hearing procedures that are contained in the *Social Security Tribunal Regulations*. Since that time, the Tribunal has reduced its backlog substantially. As of December 1, 2015, it will be dealing with appeals in accordance with the *Regulations*. For a limited period of time there will be two appeal streams. One for those filed before December 1, 2015 and one for all appeals filed after this date. This handbook provides guidance for those appeals filed after December 1, 2015. Appendix A contains information about the prehearing process for earlier appeals.

In this Guide and Appendices, we refer to several legal decisions. **Although some readers may feel intimidated by legal material, your ability to present a good appeal will be strengthened, if you have some understanding of past legal decisions.**

We wish to thank the Social Security Tribunal for taking the time to review the previous version of this Guide and providing valuable feedback. We would like to acknowledge the support that the Law Foundation of Ontario contributed to this work. Last but by no means least; we wish to sincerely thank the Law Foundation of British Columbia for generously providing the funding needed to complete this Guide.

It should be noted that while the state of the law and legal decisions are reviewed in this document, please be aware it is a guide only and should not be taken as legal advice. This Guide is disseminated for information and self-help purposes only. Anyone who feels the need for actual legal advice should see a lawyer or such other qualified professional.

The Social Security Tribunal–General Division

Process Overview[1]

- The Appellant receives the reconsideration denial letter.
- The Appellant files a *Notice of Appeal* form, within 90 days.
- The Tribunal acknowledges the *Notice of Appeal*.
- The Tribunal sends the Appellant the Minister's File along with a Notice of Readiness.
- The Appellant is given 365 days from the date the Tribunal received the appeal to file a Notice of Readiness.
- The Appellant sends additional information and/or submissions in support of the appeal.
- The Ministry sends its submission.
- The Appellant and Ministry respond to each other's submissions.
- If both parties send their Notice of Readiness to the Tribunal before the 365 day period has expired or no Notice of Readiness has been sent after one year, the Tribunal will advise the parties that the appeal is ready to proceed. It will send them a *Hearing Information Form to complete*.
- The parties submit a *Hearing Information Form*.
- A *Notice of Hearing* is sent to all parties.
- The hearing is held or a decision is made based on the written record.
- The Tribunal sends a written decision to the parties.

[1] As mentioned in the introduction to this guide, it covers the procedures that the Social Security Tribunal is using for appeals that were filed after December 1, 2015. If you're Appeal was filed before December 1, 2015 please see Appendix A.

Starting Your Appeal

You must file an appeal in writing with the General Division of the Social Security Tribunal, within 90 days of receiving the Reconsideration denial letter from CPP.

Assess the Merits of Your Case

Before you invest time in preparing an appeal, we recommend you assess your chances for success. There are some situations where the Social Security Tribunal will have no choice but to dismiss your appeal.

- There are no provisions in the *Canada Pension Plan and Old Age Security Act* which give a Tribunal the power to grant an appeal on compassionate grounds. No matter how compelling your situation may be, the Tribunal must apply only the law to the facts.
- If you do not have sufficient contributions to CPP, the Tribunal will deny your appeal.
- If you do not have any medical evidence to show you were so incapacitated that you were unable to work at any job on a consistent basis when you last qualified for benefits (Minimum Qualify Period), the Tribunal will deny your appeal.
- If you have been receiving early retirement benefits for more than 15 months before you applied, or became disabled after you started receiving early retirement benefits, the Tribunal will have no option but to deny your appeal.

Notice of Appeal

To start an appeal, you need to complete the Tribunal's Notice of Appeal form which is available on its web site or by calling the Tribunal. See Appendix A, Resources, for the Tribunal contact information.

Most of the information required on the Appeal form is contact information. Section C asks you to explain why you are appealing the decision and why you think it is wrong. You should provide an explanation about why you are appealing, but it is not necessary to go into great detail at this stage. You will be able to make a more detailed submission at a later date.

We recommend completing your remarks under Section C with a comment such as:

> I will be providing additional information, after I have had a chance to review my complete CPP-D File. I am prepared to provide my evidence under oath and to answer any questions the Tribunal or the Ministry may wish to ask me.

Section D of the Appeal form asks you to attach any documents you may have to support your appeal. **The only document you must attach is the CPP reconsideration denial letter.** The Tribunal needs to see this letter before it will accept an appeal. **If you do not include the reconsideration decision or neglect to complete all parts of the form, your Notice of Appeal will not be accepted.**

It is a good idea to wait until you have reviewed the Minister's File (see below), before you add too much additional information in support of your appeal. You need to be sure any new information does not contradict information already in your file.

Late Appeals

The Tribunal has the power to accept an appeal that is past the 90-day deadline. **Section B** of the Appeal form allows you to explain why you have filed your appeal past the deadline. If your appeal is not late, do not complete this section. Legislation prevents the Tribunal from accepting an appeal that is filed more than a year after a reconsideration decision was sent to you. See **Appendix D** for more detailed information about late appeals.

Tribunal Response

If you have sent all the necessary documents and your Notice of Appeal Form has been properly completed, the Tribunal should send you a letter of acknowledgement in about two weeks. If you do not receive a letter within four weeks, contact the Tribunal to confirm it has received your appeal.

The Ministry File

In the acknowledgement letter, the Tribunal will advise you that they will be obtaining a complete copy of your CPP File. They will ask the Ministry of Employment and Social Development Canada (referred to as ESDC or the Ministry in this guide) for all relevant CPP-D information gathered during the application and reconsideration process. This includes your CPP-D application, medical information, doctors' letters, a record of earnings, CPP contributions, decision letters, and usually includes adjudication summaries.

ESDC is required to provide a copy of your file to the Tribunal within 20 days. You should receive a copy of your file from the Tribunal about a month after you receive the Tribunal's acknowledgement letter. If you have not received a copy of your file in this period of time, contact the Tribunal.

You will have 365 days from the date that your appeal was received by the Tribunal to provide any additional information or argument in support of your appeal. It is always a good idea to wait until you review your file before gathering additional information. After you receive your file you should still have 10 or 11 months to do this.

Tribunal Sends Your CPP File

The Tribunal will send you another letter enclosing your CPP file.

Read this letter carefully. It will advise you that you have up to one year to provide the Tribunal with any new information that you want the Tribunal to consider. The Tribunal will provide you with a date when the one year period expires (usually the date it received the appeal).

Along with its letter, the Tribunal will also provide you with a Notice of Readiness Form. You will have up until the date that is shown in the letter to complete and send your Notice of Readiness. **Do not complete the Notice of Readiness unless you are sure that you have no more new information to provide or no more arguments to make in support of your appeal! The Tribunal might not accept any new information from you after you send in your Notice of Readiness.**

You do not have to wait the full year before sending in your Notice. You can indicate that you are ready at any time – if you send the notice early, make sure you are ready.

Decision-making Process

Social Security Tribunal decisions are made by a single Tribunal Member.

There is no automatic right to an In-person Hearing.

Decisions can be made in any of the following ways.

Summary Dismissal

If the Tribunal believes your appeal has no reasonable chance of success (ie. it has no legal authority to allow it), it can summarily dismiss your appeal. The Tribunal must advise Appellants in writing before summarily dismissing an appeal and give the Appellant a chance to provide a written response. If your argument convinces the Tribunal that your appeal has a reasonable chance, it might not summarily dismiss it. There is an automatic right to appeal a summary dismissal decision. This type of decision can be made at any time during the appeal process.

Decision Based on the Written Record

A Tribunal Member could decide not to hold any type of hearing and make a decision based on the written record alone. A Tribunal Member can grant an appeal based on the written record or dismiss it. This type of decision will be made after the parties have reviewed the Minister's file and provided any new information or argument related to the appeal. **There is no automatic right to appeal this type of decision.**

The Tribunal uses this form of hearing when: the issues are not complex; there are no gaps in the information in the file or need for clarification; credibility is not a prevailing issue. See **Appendix F** for more discussion about hearings based on the written record.

Employment and Social Development Canada (ESDC) is the government department (also referred to as the Ministry in this Guide) responsible for CPP. ESDC has been asking the Tribunal to dismiss almost every appeal without a hearing. Do not be alarmed if the Ministry asks the Tribunal to do this with your appeal – it asks the Tribunal to dismiss every appeal without a hearing. The Tribunal Member deciding your case has the final say about whether or not to hold a hearing.

It should be noted that the writers of this guide are aware of several appeals that were approved by the Tribunal based on the written record alone.

Hearing by Written Question and Answers

If the Tribunal Member deciding your appeal needs more information, he or she can send you

questions in writing, which you will answer and send back. The Tribunal may use written questions and answers if there are gaps in the evidence that require more information, but the issues are not complex and credibility (who to believe or not believe) is not an issue.

Telephone Hearing

The Tribunal could decide to hold a hearing by teleconference. All parties will be given instructions on how to connect to the conference call. The Tribunal tends to use conference calls when there are gaps in the evidence, but there is only one person participating in the hearing and credibility is not a prevailing issue.

Videoconference

The Tribunal could hold a hearing by videoconference. You will go to a Service Canada Centre that has a videoconferencing room; you do not use your own computer. Videoconferences may be used if there are gaps in the evidence and credibility is an issue, the case is complex, or there will be multiple people at the hearing.

In Person Hearings

The Tribunal could hold an in person hearing where everyone gets together in the same place. In person hearings are most often held because there are serious issues of credibility. However, in person hearings may also be appropriate in other circumstances. For example, an in person hearing may be appropriate if the issues in the appeal are unusually complex, if there will be many people participating at the hearing, or if someone participating in the appeal has a disability that will make it difficult to understanding what is said by telephone or videoconference.

Preparing Your Case

Reviewing the Ministry File

It is very important to carefully review and familiarize yourself with all the information in the File. The Tribunal Member reads the file–it gives the first impression of your case.

The pages in the file will be numbered at the bottom right hand corner. The first section starts

with the number GD1-1 and contains the appeal that was filed with the Tribunal. The second section starts with the number GD2-1 and contains the complete file that the Tribunal received from the Ministry.

As you go through the File, look for any important missing information. **In particular, read all the medical letters and reports, check the CPP contribution record, and look at ESDC's adjudication summary notes for the application and reconsideration decisions.** Keep the following questions in mind as you review the File:

- Is there information in the File you were not aware of?
- Has important information been left out?
- Which information supports the appeal?
- Which information weakens the appeal?
- Do the ESDC adjudication notes give you more insight into why the application was turned down?

The answers to these questions will help you decide your next steps. **Focus on identifying the things you need to do or obtain to support your case before the Tribunal.**

Time Lines

As mentioned previously, you will have up to a year to provide new information and argument. If at the end of the one year period you have not sent in your Notice of Readiness, the Tribunal will consider your appeal to be ready and will assign it to a Member. **Unless there are exceptions circumstances, you may not be able to provide any new information if you failed to provide it within 365 days.**

The Tribunal has indicated it will expedite some appeals if there are compelling reasons to do so. If, for example, there is medical evidence to suggest an Appellant might not survive a long delay or their condition will deteriorate to the point they may not be able to participate in a hearing, the Tribunal will give the appeal priority. Financial hardship is not a factor, however, because most Appellants will be having financial difficulties, extraordinary circumstances will be needed. The Tribunal will not expedite an appeal without clear evidence there is a need to do so. Any request to speed things up must be made in writing.

The sooner you provide additional information and let the Tribunal know you would like to pro-

ceed with your appeal, the sooner your appeal will be heard. Try not to be influenced by any financial pressures you may be facing. It is better to take your time to be sure that you have everything need for your appeal to succeed than to push for an early hearing and face the prospect of a loss.

The Ministry will also be providing submissions in support of its position. It is a party to the appeal and has the right to make its arguments. Sometimes people get confused by documents that the Ministry submits because they are sent to them by the Tribunal. Some appellants think the Ministry's documents are written by the Tribunal – they are not. These documents represent the Ministry's position. The Ministry also must send in its Notice of Readiness within one year.

The Tribunal has indicated that it hopes to set hearing dates for appeals and to issue a final decision 5 months after both parties have sent in their Notice of Readiness or after the one year period has expired. This suggests that a hearing might be held about 3 months after both parties have sent in their Notice or after the one year period had expired.

Extension of Time

Sometimes there may be reasons why you might not be prepared to proceed with your appeal even after the one year period has expired. You may be waiting for a referral to a specialist other important medical information. The Tribunal may grant an extension of time if there are good reasons for it. If you need more time, remember to let the Tribunal know before the 365 day period has expired. If you don't the Tribunal might not accept any new information.

Late Documents

All documents relevant to your appeal must be submitted to the Tribunal before the 365 day period has expired or when you submit your Notice of Readiness. As mentioned above, if you know there is information that might be late you can ask the Tribunal to extend the 365 deadline. If however some new and unexpected important information were to surface after you sent in your Notice of Readiness or after 365 days, the Tribunal has the discretion to consider whether or not it will accept the late information. It all depends on why the information was not sent in sooner, how important it might be, and whether or not there is enough time for the Ministry to consider the new information and respond to it. The Tribunal will not respond kindly

to new information that is provided on the day of the hearing. In addition if the hearing is by telephone or teleconference, the Tribunal will not be able to see it on the day of the hearing in order to assess its relevance. An adjournment may be required or the Tribunal may decide not to accept the late document. Do not send any late information without a good explanation as to why it is late.

Obtaining Additional Information

In making its decision, the Tribunal will consider any information that was previously submitted to ESDC during the application and reconsideration process. It can also consider new information you or the Ministry provide.

One of the most important things you can do to prepare for a hearing is to gather new information that supports your appeal.

Current letters from doctors or specialists can help. Make sure your doctors understand that CPP disability benefits can only be paid if you are unfit for any form of work and your condition is not likely to improve in the foreseeable future. If your qualifying date (MQP) is sometime in the past, make sure your doctors are aware of this date. You must be able to provide medical evidence indicating you were disabled as of your qualifying date and continuously since that time.

If the medical information in the file is out of date, or if you have started seeing new health professionals, you should make every effort to ask for new letters and medical records that will address your current health-related restrictions. It may be necessary to clarify medical information that is already in the file.

Medical information is not the only material that may help your case. You may be able to obtain other documents to support your argument that you are incapable of working or being retrained for alternative work. Some examples are:

- Letters from previous employers or others who know how your disability limited your ability to work; Statements from teachers who have seen you struggle in a retraining program:
- Comments from employment counselors or other vocational specialists who have evaluated your capacity to work.

It is best not to send new information to the Tribunal in bits and pieces. Wait until you have all of the documents you plan to rely on and include them as attachments to a single submission.

After the Tribunal receives new information it will copy it and send it to both parties with page numbers. Make sure you add all new numbered pages to your file.

Research

A little research may be a great benefit in preparing your case. Understanding previous appeal decisions, and why they were made, will help you understand how Tribunals make decisions.

The Tribunal has developed a new research tool on its website. Under its **Jurisprudence** Section there is a link to: **Decisions Categorized by Benefit and Subject for: the Canada Pension Plan**. This research tool allows you to look at past decisions that might help you understand how past decision makers have addressed issues that are similar to the ones in your appeal.

You can also visit your local library or the law library at a Court House or Law School. Find a copy of the *Annotated Canada Pension Plan and Old Age Security Act* (published by Wolters Kluwer). This annual publication provides summaries of past decisions and includes a disability case table that covers many types of disabilities.

Many of the decisions mentioned in the *Annotated Canada Pension Plan and Old Age Security Act* are Pension Appeals Board decisions. The Pension Appeals Board made decisions about CPP before it was replaced by the Social Security Tribunal. A Link to these decisions can be found on the Tribunal's web site under its Jurisprudence Section.

We recommend you review **Appendix E** of this Guide, **Using Case Law**. We have selected excerpts from a number of important decisions and provided comments on how they relate to common appeal issues.

Please also be sure to read **Appendix C**, **Key Definitions** which looks at the key issues that are often central to the appeal process.

The Tribunal posts a selection of its decisions on its website under **Tribunal Decisions**. It also provides links to other websites that may contain decisions in its Jurisprudence Section.

Dispute Resolution and Settlements

There are provisions in the *Social Security Tribunal Regulations* that allow the Tribunal to ask the parties to participate in a dispute resolution process, in order to resolve appeals without a hearing. In addition, any party to the appeal can ask the Tribunal to hold a settlement conference to attempt to resolve any part of the appeal. The writers of this guide are aware of a number of appeals where the Tribunal Member has asked the parties to participate in this process. Although a number of Appellants have agreed to participate, the Ministry has consistently refused to participate.

OFFER OF SETTLEMENT FROM THE MINISTRY

If you provide new medical information or other compelling evidence, we are aware of appeals where CPP has offered to settle appeals without a hearing. If CPP offers a settlement it will usually offer the same amount of benefits that a Tribunal would allow if a hearing was held and the appeal was allowed. CPP will send a settlement agreement along with Notice of Withdrawal form and ask the appellant to sign and return both documents to their office. CPP will then complete its part of the documents and send them to the Tribunal. When the Tribunal receives the settlement agreement and the Notice of Withdrawal it will discontinue the appeal. CPP will then process the claim. Generally speaking, this is the preferred method of resolving appeals.

In some exceptional circumstances, a party might want the Tribunal to issue a formal decision in which it acknowledges the settlement. This would involve the parties signing a settlement agreement and asking the Tribunal to make a formal decision without a Notice of Withdrawal. This method of settlement will take longer.

Witnesses

Your oral testimony is the most important source of information for the Tribunal. You are also allowed to call witnesses who can give testimony in support of your appeal.

The Social Security Tribunal usually schedules hearings to last an hour and a half. You should only call witnesses who are genuinely helpful to your case. Avoid calling unnecessary witnesses

or witnesses who are just going to repeat what has already been said. If possible, ask your witness(es) to prepare a statement that you can submit before the deadline for adding new documents has passed.

You can also ask a friend or family member to attend the hearing for support. Tribunals are often swayed by witnesses who know you well (adult children, spouses/partners, close friends) and can provide evidence about how your life has changed over time because of your disability. It is not necessary to have a witness at the hearing, but it can help if there is someone who has direct knowledge of your personal history.

One of the best witnesses, from the Tribunal's perspective, is a health professional. Most CPP-D cases are decided based on information about the degree of the Appellant's health-related limitations. Unfortunately, many doctors are unable to take the time to attend a hearing and they may expect to be paid for their time. However, you can make arrangements with the Tribunal to have a witness provide testimony by phone. A doctor may be more willing to help with the appeal without charge, if they can call in from their office.

Job placement or vocational counselors are also good potential witnesses because they know the skills required in the job market.

Tips About Witnesses

If a potential witness cannot come to the hearing, ask them to provide a letter to include as written evidence. It should be noted however that a Tribunal Member might not give much weight to a letter. It is always best to have a witness attend in person. Alternatively, you can make arrangements with the Tribunal to let the person give evidence by phone.

If someone does agree to testify, be sure to speak to them before the hearing. You do not want to be surprised by unhelpful testimony, so know what the person can say that will benefit your case. Do not use a witness, unless they support your appeal.

Go over the issues you want them to address. Let your witness know they should expect to answer questions from the Tribunal member (and the Ministry representative if present).

Your Written Submission

There are many reasons to submit a written submission in advance of the hearing. If you have poor English reading and writing skills, consider asking someone else to help you prepare your submission.

- Your written submission should address the key issues under appeal.
- The Tribunal will probably form some opinions about your appeal after reading the Hearing File in advance of the hearing. The Ministry will also be providing written arguments before the hearing. You should address the Ministry's position before the hearing, so the Tribunal has a balanced view before the hearing starts.
- Making a presentation at a Tribunal hearing is stressful for most people. When you are nervous, you can forget important things you want to say. With a written submission, you will not have to depend on your memory.
- Writing a submission will help you organize the information you want to present and stay on track during your presentation.
- Finally, if your submission is strong and clear, it might be enough to convince the Tribunal to allow your appeal based on the written record alone. It might even convince the Minister to offer a settlement without a hearing.

Submission Guide

Use these guidelines to help write your submission.

Prepare a brief biography: your place of birth, early family life, education, work history and so on. You want to tell the Tribunal who you are. Include details about your life leading up to your

application for CPP disability benefits.

- If you have a degenerative condition, when did you start noticing symptoms? When did you stop working and when were you unable to work because of your disability? It is important to make the Tribunal aware of all of your limitations.
- If you tried to work but could not, explain how your disability made it impossible to work.
- If you looked for work, explain how the disability made it impossible to find a job. A lack of jobs in your region is not a valid reason. Decisions are based on your ability to work, not the job market.
- The Tribunal could also ask about retraining. If you tried, explain what happened. If you could not retrain, explain why.
- If you have been doing some work, explain why it is not "substantially gainful" (see **Appendix C, Key Definitions**), either because your attendance at work was unpredictable or the amount of earnings is not significant.
- If your record of earnings shows income for any year you claim you could not work, explain the earnings.
- If you received regular Employment Insurance (EI) benefits during a time when you claim to have been disabled, explain why you indicated on your EI forms that you were "ready, willing and able to work." Perhaps you were overly optimistic about your condition or were not ready to accept that your disability made you unable to work. Pride can be a legitimate explanation. Although the Minister may make arguments about Appellants receiving regular EI, past Tribunals rarely rejected appeals for this reason.
- Address the Minimum Qualifying Period. Double check your record of earnings. Make sure the Ministry did not make a mistake in its calculations–this sometimes happens. State whether you agree or disagree with the Ministry's date. For more information about the MQP, see **Appendix C, Key Definitions**.
- Provide details about your medical condition(s) and list current medications.
- Which health professionals have you seen and when?
- If there are conflicting reports, it is best to address this directly and explain which report should carry more weight. Which doctor was more thorough? Who spent more time with you? In the case of specialists, are they providing information about their area of specialization or commenting on something that is more appropriately addressed by a family doctor?

- Provide details of the treatments you have tried and how effective they have been.
- If a doctor has referred you to specialists and has not followed up, why not? Are specialists available? Are you on a wait list? Are treatments available where you live? Can you afford them?
- Describe why your disability is long term and of indefinite duration (prolonged).
- Describe why your disability is severe and how it has stopped you from working. Bear in mind your MQP, especially if you last qualified a number of years ago.
- Explain why doing a different kind of job or being retrained is not a realistic option.
- Add a conclusion that summarizes your most important points.
- Use case law, if appropriate. See **Appendix E, Using Case Law** for past decisions that may be relevant to your situation.

Use sticky notes to identify the documents from the Hearing File that you refer to in your submission. Mention the page number of the document you want the Tribunal to look at. Create a numbered outline when you type your submission, so paragraphs and points can be referred to easily. The Tribunal asks that submissions not be bound.

Pre-Hearing Notices

Hearing Information Form (HIF)

When it is ready to proceed, the Tribunal will send a *Hearing Information Form (HIF)*. This document asks appellants to indicate if they have a representative, have any witnesses, and whether or not they require the assistance of a translator.

The *HIF* will also ask the parties to indicate what type of hearing they could not participate in. The choices give are:

- Written questions and answers
- Videoconference (at a Service Canada Centre)
- Teleconference (by telephone)

- Personal appearance of the parties (at a Service Canada Centre)

It is important that you provide clear reasons why you might not be able to participate in some types of hearings. For example, if you have poor English skills or have difficulty writing, a hearing based on the written record might not be appropriate. If you have a hearing impairment and communicate through sign language or read lips, only some type of face to face hearing would work. Be specific. The Tribunal has a duty to accommodate people with disabilities.

Even if you would ultimately be willing to participate in more than one type of hearing, do not be afraid to let the Tribunal know what type of hearing you think is most appropriate. For example, if you feel that an in person hearing is appropriate because there are serious issues of credibility in your case, let the Tribunal know. Again, be specific.

The Tribunal will also ask the parties to provide dates when they may be unavailable for a hearing. You will also be asked which days of the week and the time of day when you would prefer a hearing to be scheduled.

If you do not send a Hearing Information Form, the Tribunal will set the date and determine the type of hearing it will hold without your input.

Notice of Hearing

If the Tribunal decides to hold a hearing, they will send a *Notice of Hearing* and specify the date, time, place, and form of hearing.

If the hearing is to be held by teleconference, the parties will be provided with a teleconference number, ID, and security code to connect with the hearing.

When a party receives the *Notice of Hearing* they will be given two days to contact the Tribunal if there is a problem with the hearing date. If a party contacts the Tribunal in two days, the hearing date can be changed. If a party does not contact the Tribunal in two days and later asks for a new date, this will require a good reason and will be considered an adjournment. Unless there are exceptional circumstances it is unlikely that the Tribunal will grant more than one adjournment. Make sure to contact the Tribunal right away if there is a problem with the date on the *Notice of Hearing*. If you disagree with the type of hearing the Tribunal has decided to hold,

you should write to the Tribunal and let them know why it is not appropriate.

If the Tribunal decides not to hold a hearing, it will send a notice saying that the decision will be made on the basis of the documents and submissions in the file (written record). The Tribunal will use this form of decision making if: the issues are not complex; there are no gaps in the information in the file or need for clarification; credibility is not a prevailing issue–see **Appendix F**. Again, if you disagree with the Tribunal's decision not to hold a hearing, you should write to the Tribunal right away and explain why.

The Tribunal has the final say on the type of hearing it will hold. There is no automatic right to any specific type of Hearing.

At the Hearing

When the day comes for your hearing, allow extra time so you arrive early. Do not arrive late. If the hearing is held at a Service Canada office, make sure you bring some identification with you. Some Service Canada offices will not allow appellants into the hearing room without photo ID.

Do not forget to bring all your documents with you.

Special Accommodation

Make sure that you indicated that you require a translator or other form of assistance on the *Hearing Information Form*. The Tribunal must be notified well in advance of a hearing if special accommodation is required.

Hearing Outline

- The Tribunal will:
  - Welcome you and ask everyone present to introduce themselves.
  - Advise you that the hearing is being recorded so that the Tribunal Member can refer back to what was said at the hearing.

  - Ask you and any witnesses to swear they will tell the truth.
  - Let you know that you are free to move around or take a break if you need one.
  - Check to see if you have a complete Hearing File, including any information that was sent to the Tribunal after the Ministry File was sent to you.
  - Ask if you agree on the Minimum Qualifying Period
- You make your presentation first.
- After you have presented your side of the story, the Tribunal and the Ministry representative (if one is present) will ask you questions. The Ministry has not sent a representative to any of the General Division hearings that the writers of this guide have attended since the Tribunal was established.
- The Ministry representative, if present, lays out their case. The Appellant may respond.
- The Appellant makes closing remarks.
- The Tribunal will eventually make a decision and send a written copy of its decision to both parties.

Your Presentation

The Tribunal will usually ask you to present your case first. Tribunals hear many appeals where Appellants are unrepresented by a lawyer or an advocate. As a result, some Tribunal Members can be more hands-on than others–they may direct the proceedings more than you expect.

Try to approach the hearing as if it were a conversation. It is your job to start the conversation, but do not be surprised if the Tribunal asks a question that takes the conversation in a different direction. You will also be able to provide information about issues the Tribunal may not have asked about.

If you have a witness who is also a support person, have the person testify first. This way, they will not be asked to leave the hearing room (this may not be an issue if it is a telephone hearing). Witnesses may be asked to leave the room before they testify so their evidence will not be affected by other witnesses or evidence. The Appellant is allowed to be present when witnesses present their testimony. The Tribunal or the Ministry's representative (if present) may also have questions for any witness.

The Ministry's Presentation

Do not be surprised if the Ministry does not send a representative to the hearing.
The Ministry has not sent a representative to any hearing before the General Division of the Social Security Tribunal that the writers of this guide are aware of.

Final Steps

After all the evidence and testimony has been presented, you will be given the chance to make closing remarks. You don't have to cover every point in your written submission. It depends on what was said during the hearing. If all the key points from your submission were made, and you think the Tribunal is sympathetic toward your position, keep your closing remarks brief. If it seems the Tribunal is not sympathetic, you may want to go over the most important points of your appeal in more detail.

Using case law in a submission can be a powerful tool but when making an oral submission at a hearing a little restraint might be wise. Provided that you have made a written legal argument, don't be overly legalistic. The Tribunal has provided all Members with legal training. Many of the Tribunal Members are lawyers. Assume that the Tribunal will read your written submission. Remind the Tribunal of the legal principals you are relying on but focus your closing remarks on the facts not the law.

Tips for the Hearing

-  Be yourself. The hearing is your opportunity to tell your story in your own words. The proceedings are meant to be as informal as possible. You do not need to dress formally, but you want to be respectful.
- Remember that CPP will probably not send a representative to the hearing. It will be a conversation between you and the Member who has been assigned to hear you're appeal.
- If you are nervous, take a few deep breaths or pour yourself a glass of water before the hearing begins. If your hearing is to take place at a Service Canada office, make sure to bring a bottle of water with you.
- Be honest about your lack of experience with this type of presentation. The Tribunal will guide

you.

- If it is a telephone hearing be sure to describe things that the Tribunal Member can't see – are you using a cane, do you have body tremors, do you have problems using your hands – try to give the Member a picture of how your disability may have an impact on you physically.
- Stay focused on the reason you are there: to explain why you think you meet the eligibility criteria for CPP-D. Remember, the Tribunal cannot allow an appeal based on compassionate grounds or on the basis of financial need. It is your job to explain why you think the facts of your case satisfy all the eligibility requirements.
- Be prepared to answer some difficult questions. The Tribunal may focus on the weak parts of the appeal. Be truthful and straightforward when you answer. It is better to say "I don't know" than to guess. The Tribunal will be assessing how believable you are, as well as the facts of your case.
- Tribunal members cannot give you medical or legal advice about the appeal. Their role is to hear all the facts of your case and make a decision based on the CPP legislation.
- You cannot know what the Tribunal Member is thinking. Do not make assumptions, other than assuming the Tribunal has an open mind.
- You may be upset by the fact that you application was denied but try not to blame the Tribunal. Keep in mind that it was CPP who denied your application not the Tribunal.

- Be respectful to everyone at the hearing, even if you become frustrated or angry. Try to stay calm and avoid blaming others for previous decisions. If you disagree with something that is said, you will usually have a chance to express your point of view, so do not interrupt when someone else is speaking. Write down what you want to say and wait for the time when you are given the chance to respond.
- Always follow the direction given by the Tribunal.

After the Hearing

The Tribunal's Decision

The Tribunal Member will not make a decision on the day of the hearing. **After the hearing is over, the Tribunal Member will review all of the evidence.** Hearings are now recorded, so the Tribunal member can refer back to the statements made during the hearing. The Tribunal will

decide if there is enough evidence to rule in your favor. They will provide written reasons for their decision.

The Tribunal will advise you to expect a written decision in about two months. It should be noted however that some decisions can take longer. The writers of this guide are aware of a few decisions that have taken more than 5 months to decide.

Social Security Tribunal-Appeal Division

If you are still unhappy with the decision made by the General Division, you can apply for leave (permission) to appeal to the Appeal Division. You do not automatically get to appeal to the Appeal Division. You will only be given permission to appeal if you convince the Appeal Division that your appeal has some reasonable chance of succeeding. The Minister can also ask for leave to appeal if they disagree with the General Division's decision.

There is an exception if your case was summarily dismissed by the General Division. If your case was summarily dismissed, you get to appeal automatically and you do not need permission.

Before filing your Leave to Appeal Request, it might be a good idea to obtain a copy of the hearing record. You can write to the Tribunal and ask for a copy of the audio or audio visual record. You can review the tape in order to refresh your memory about what took place.

The Deadline

The deadline is 90 days from the date you first found out about the decision, regardless of whether you are applying for leave to appeal or appealing a summary dismissal. It is very important that you write the date you first found out about the decision on your application. If you fail to do this, the Appeal Division may treat your application as late even though it is not. If you miss the deadline, you can ask for an extension of time. You will need to explain how:

- There is a reasonable explanation for why you did not appeal in time;
- You really did mean to appeal all along;
- There is some reason to believe your case could win if you get to appeal; and
- Allowing you to appeal late will not prejudice (make life difficult for) the other people involved in the appeal, most commonly the Minister).

Like the General Division, the Appeal Division cannot extend the deadline to appeal beyond one

year from the date you first found out about the decision.

The Appeal Application

The Application Requesting Leave to Appeal to the Appeal Division is available on the Tribunal's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ARLTATTAD.pdf

If your case was summarily dismissed by the General Division, you can appeal automatically by filling out an Application to Appeal to the Appeal Division, which is also available on the SST's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATATTAD.pdf

The forms are very similar, so make sure you have the right one. It is important that you fill in all mandatory sections because your application will not be accepted if it is missing any mandatory information. You must attach a copy of the General Division decision you are trying to appeal.

Reasons for Appeal

You must state your reasons for appealing (Box 3D on the Application for Leave to Appeal; Box 3C on the Application to Appeal a summary dismissal). When filling out this section, it is important to remember that the Appeal Division works much differently than the General Division. The Appeal Division cannot just allow your appeal because you disagree with the General Division's decision. The law says that the Appeal Division can only allow your appeal if the General Division made certain types of mistakes, which are listed in section 58(2) of the *Department of Employment and Social Development Act*. Unfortunately, the government used very complicated legal language to describe theses mistakes, so we will review each of them in turn:

The General Division failed to observe a principle of natural justice.
The Principles of Natural Justice require that the General Division use a fair process to decide your appeal and that the person who made the decision against you appears to be unbiased. To ensure the process is fair, the General Division must let you know the case against you and what evidence it will be considering, and then give you a fair chance to present your side of the story. For example, if the General Division determined that you were not telling the truth, but did not give you a chance to explain yourself at an oral (live) hearing, that might be contrary to natural justice because you did not get a proper chance to present your side of the story.

Allegations of bias should not be made lightly. Just because the Tribunal Member disagrees with you or asks tough questions at the hearing does not mean that he or she is biased. Bias might include situations where the Tribunal Member makes nasty personal remarks about you or situations where the Tribunal Member had a close personal or business relationship with someone involved in your appeal.

These are just examples. It is impossible to cover all the different ways that the appeal process can be unfair so you will need to think about your own case and what made the process unfair. Keep in mind that we are talking about unfairness in the process that the General Division used, not unfairness in the ultimate decision that the General Division made. You may think that the General Division's decision is totally unfair and full of mistakes, but that does not necessarily mean that the process the General Division used was unfair and contrary to natural justice. We will be discussing other grounds for review through which you can challenge the General Division's ultimate decision.

The General Division acted beyond its jurisdiction or refused to exercise its jurisdiction.
This is just a fancy way of saying that the General Division did something that it did not have the legal power to do, or refused to do something it had a legal obligation to do.

The General Division erred in law in making its decision, whether or not the error appears on the face of the record.
This simply means that General Division misinterpreted the law relating to your case. Often this will mean that the General Division applied the wrong legal test when deciding your appeal. The words "whether or not the error appears on the face of the record" are just an old fashioned, confusing way of saying that the Appeal Division can look beyond the General Division's decision and the evidence in your file when deciding whether there has been an error of law. Practically speaking, you can just ignore these words and explain the error of law.

The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.
The General Division's findings of fact are its conclusions about what happened (i.e. who did what, when, where and how). The General Division will also make findings of fact about the nature of your disability. It can be very difficult to challenge the General Division's findings of fact. The Appeal Division will not interfere just because it would have come to a different conclusion than the General Division did. The Appeal Division will only set aside the General Division's de-

cision if there is no way the evidence in your file can reasonably support the General Division's version of the facts. So long as there is some evidence that can reasonably support the General Division's findings of fact, the Appeal Division is not going to second guess the General Division's findings.

Reason for Leave to Appeal

If you are filling out an Application for Leave to Appeal, you must also explain why your appeal has a reasonable chance of success (Box 3C). This is the test the Appeal Division will use to decide whether or not to give you leave to appeal (The Application to Appeal a summary dismissal does not have this section because you get to appeal automatically).

This section can be a little confusing and repetitive because whether or not your appeal has a reasonable chance of success will likely come down to whether your reasons for appeal have some merit (see the previous section on Reasons for Appeal). However, it may be worth reminding the Tribunal that the question at this point is not whether you should win or lose, but only whether there is some reasonable chance you might win. In other words, you want to highlight or explain how your reasons for appeal will have some chance of succeeding if you are allowed to fully present your appeal.

The Appeal Division does not have to agree that all your reasons for appeal have some merit. As long as at least one of your reasons could ultimately succeed, you should get leave. However, the Appeal Division may only let you pursue the reasons for appeal that it feels have a reasonable chance of success.

New Evidence

Generally you are not allowed to send in new evidence to the Appeal Division that the General Division never had a chance to consider. However, there are exceptions. If you are alleging that the General Division breached the rules of natural justice, you will generally be allowed to submit new evidence to show what the General Division did wrong.

For matters not relating to natural justice, the Appeal Division still has the ability to let you submit new evidence if it would be in the interests of justice to do so. But keep in mind that there is a separate process through which the General Division can reconsider its decision if you have new evidence (see the section below on "Rescinding or Amending a Decision"). Generally, this is the proper way to deal with new evidence. However, if you have started an appeal and

you discover new evidence that is really important to your case, you can always send it in with an explanation of why you did not send it to the General Division.

Decision About Whether or not You Will Get Leave to Appeal

The Appeal Division will review your Application Requesting Leave to Appeal. Generally, the Appeal Division does not hold any kind of hearing before deciding whether or not to give you leave to appeal, although it may ask for further information in writing from you or give the other parties (most often the Minister) a chance to respond. If the Appeal Division finds that your appeal has no reasonable chance of winning, you will not get leave to appeal and that will end your case (subject to a process called judicial review, which is not covered in this guide). If the Appeal Division finds that your appeal has a reasonable chance of success, you will be given leave to appeal. In either case, the Appeal Division will send you written reasons for its decision. If you are appealing a summary dismissal, there will obviously be no decision about leave to appeal because you can appeal automatically and do not need permission.

The Appeal Process

If you are given leave to appeal, there is no need to fill out a separate Notice of Appeal to confirm that you want to appeal. The Appeal Division will automatically move on and start the process for deciding your appeal. Remember that getting leave to appeal does not mean that you win. It just means that your case has a reasonable chance of winning, so the Appeal Division will give you an opportunity to fully present your case. You still need to convince the Appeal Division that you should actually win.

Once the Appeal Division makes its decision to let you appeal, you will have 45 days to file written submissions arguing why your appeal should win. Note that this deadline starts running from the date the Appeal Division makes its leave decision, not the date you first found out about it. If you are appealing a summary dismissal, your written submissions are due 45 days after you file your Application to Appeal a summary dismissal.

Your submissions to the Appeal Division will likely look a little different than your submissions to the General Division. You need to focus on the mistakes in the General Divisions decision and/or why the process the General Division used was unfair. Avoid long or ranting submissions, but make sure you say all that you have to say. The Appeal Division is not required to hold a hearing, so your written submissions may be your last chance to state your case.

If the Appeal Division does decide to schedule a hearing, you will get a *Notice of Hearing* setting out the time and place, or instructions on how to connect by telephone. Keep in mind that the same rules about rescheduling or adjourning a hearing also apply in the Appeal Division.

If the Appeal Division does schedule a hearing, it will be much different than your hearing at the General Division. You will not be presenting your evidence all over again or calling witnesses because new evidence is generally not allowed at the Appeal Division. Once again, you should focus on explaining the mistakes in the General Division's decision or why the process the General Division used was unfair.

The Decision

After considering all the evidence and submissions, the Appeal Division will make its decision. If the Appeal Division decides that your appeal should win, there are several things that could happen. The Appeal Division may decide to take charge and make the final decision about the case. However, often the Appeal Division will send your case back to the General Division so they can make a new decision without repeating the same mistakes. This can be frustrating because it means that your case is not necessarily over even though you won at the Appeal Division.

If the Appeal Division denies your appeal, that will end your case (subject to judicial review, which is not covered in this guide). If you are considering judicial review, you should talk to a lawyer.

Rescinding or Amending a Decision (Reopening)

Sometimes you discover new evidence that would have helped your case after the Tribunal (either the General Division or the Appeal Division) has already made a decision. In these cases, you can apply to rescind or amend the decision. Often this is referred to as "reopening" the decision. If the General Division made the decision you want to reopen, you direct your application to the General Division. If the Appeal Division made the Decision you want to reopen, you direct your application to the Appeal Division. This is the biggest difference between an appeal and an application to reopen; when you appeal you go up a level (i.e. you appeal the General Division's decision to the Appeal Division) but when you apply to reopen, you go back to the same level that made the decision.

The Deadline to Apply

You must apply to reopen a decision within one year of the day the decision was communicated to you. You may only apply to reopen a particular decision once. Also keep in mind that applying to reopen a decision does not stop the deadline for filing an appeal. For example, if you apply to reopen a General Division decision based on new facts and your application is denied, you will be out of time to appeal that same decision if more than 90 days have passed since it was communicated to you. If you are unsure whether to appeal a decision or reopen based on new facts, you should try to get legal advice.

How to Apply

You can apply to reopen a decision by filling out the Application to Rescind or Amend (Reopen on New Facts) form, which is available on the Tribunal's website: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-ATROA.pdf

As with all forms, you must make sure that all the required information is filled out or it will not be accepted. You must attach a copy of the decision you are trying to reopen. Once you have completed the form, you can mail or fax it to the Tribunal. Contact information for the Tribunal is listed on the form. Presently it is unclear whether you can email the form to the Tribunal, so it is best to avoid email for now.

What Counts as New Facts?

The Tribunal will only reopen a decision if there is a new fact that you could not have discovered with reasonable diligence at the time of your hearing. You have an obligation to gather up all the relevant evidence before your hearing and the Tribunal will not reopen a decision later on just because you missed something. The new fact must also be material in the sense that it could reasonably be expected to affect the outcome of the case.

The Process

The Tribunal will send your application to the other people involved in your appeal (most often, the Minister) to give them a chance to make submissions by a certain deadline. After the Tribunal gets everyone's submissions or the deadline passes, the Tribunal will decide whether or not to hold a hearing. There is no obligation for the Tribunal to hold a hearing for an application to

reopen.

If the Tribunal decides not to hold a hearing, they will simply make a decision about your application and mail the decision to you.

If the Tribunal does decide to hold a hearing, they will send a *Notice of Hearing* to everyone involved. The *Notice of Hearing* will set out what type of hearing will be held. The different types of hearings and the process for scheduling a hearing are discussed in more detail in the "Social Security Tribunal - the General Division" section of this guide.

Disclaimer

It should be noted that while the state of the law and legal decisions are reviewed in this document, please be aware it is a guide only and should not be taken as legal advice. This Guide is disseminated for information and self-help purposes only. Anyone who feels the need for actual legal advice should see a lawyer or another qualified professional.

APPENDIX A

APPEALS FILED PRIOR TO DECEMBER 1, 2015

Prior to December 1, 2015, the Tribunal's prehearing process for dealing with appeals was different. This was due to the large backlog of Appeals that it inherited when it was set up in 2013.

All the information in this guide relating to the decision making process and how to prepare for a hearing applies to all appeals but the deadlines are not the same. The process for submitting new information and the way the Tribunal assigns appeals to a Member are different for appeals filed before December 1, 2015.

For appeals filed before December 1, 2015 the Tribunal does not use the 365 day deadline for sending in a Notice of Readiness. It does not use the Notice of Readiness to determine when to assign a file to Member.

If your appeal was filed before December 1, 2015 the Tribunal will be sending you a copy of your CPP file but instead of sending a Notice of Readiness, it will review your appeal to see if it thinks it is ready to proceed. It will not assign your appeal to a Member until after you have had a chance to review your file.

If the Tribunal determines that your appeal is ready, it will send you a letter indicating that it is ready to assign your appeal to Member. It will also send you a Hearing Information Form and ask you to complete it and send it back to them. It will also suggest that if you have any new information to provide you should submit it.

About a month after you send in the Hearing Information Form, you will then receive a Notice of Hearing with a hearing date. The Tribunal will give you a further 60 days from the date of the hearing to provide any additional documents or arguments. The parties will also be given 30 days to respond to any submissions that were sent during the previous 60 day period.

The hearing will take place as set out in the Notice of Hearing.

APPENDIX B | Resources

Disability Alliance BC
#204 - 456 West Broadway, Vancouver, BC V5Y 1R3
Phone: 604-872-1278; Toll Free: 1-800-663-1278
http://www.disabilityalliancebc.org/

Community Legal Assistance Society
300 – 1140 West Pender Street
Vancouver, BC V6E4G1
Tel: 604-685-3425
www.clasbc.net

CLAS only helps people with judicial review (going to Court), and occasionally appeals to the Social Security Tribunal - Appeal Division. CLAS cannot help before you have received some decision from the Social Security Tribunal.

PovNet
This community organization has a web site that lists other advocacy organizations in BC and across Canada.

Visit: http://www.povnet.org/find-an-advocate

Canadian Legal Information Institute (CanLII)
This website publishes a selection of decisions by the Social Security Tribunal.
http://www.canlii.org/en/ca/sst/index.html

Social Security Tribunal
Notice of Appeal Form
Get a copy of the form at: http://www.servicecanada.gc.ca/eng/common/sst-tss/forms-formulaires/SST-NOA-GD-IS-CPP.pdf. Please note you can fill out the form online and print it, but you cannot save a completed copy on your computer. You can also call the Tribunal and ask them to mail a form to you. Mail the completed form to the Tribunal or fax it to their toll-free number.

Social Security Tribunal,
PO Box 9812, Station T CSC,
Ottawa, ON K1G 6S3

Email: info.sst-tss@canada.gc.ca
Web Site: http://www.canada.ca/en/sst/index.html
Telephone (toll-free in Canada and the USA): 1-877-227-8577
From outside of Canada and the USA, call collect: 613-952-8805
TTY (for people with hearing loss only): 1-800-465-7735
Fax (toll-free in Canada): 1-855-814-4117
Office hours: 7:00 a.m. to 8:00 p.m. Eastern Time - Monday to Friday

The Tribunal also has resources in its Jurisprudence section that allows you to research past decisions. http://www1.canada.ca/en/sst/rdl/jurisprudence.html

Canada Pension Plan
http://laws-lois.justice.gc.ca/eng/acts/C-8/index.html

Canada Pension Plan Regulations
http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._385/index.html

Department of Employment and Social Development Act
http://laws-lois.justice.gc.ca/eng/acts/H-5.7/index.html

Social Security Tribunal Regulations
http://laws-lois.justice.gc.ca/eng/regulations/SOR-2013-60/index.html

APPENDIX C | Key Definitions

The following are definitions and issues that are often central to a denial of CPP disability benefits. This section will help you to understand them and how they may relate to your appeal.

Eligibility

In order to be eligible for CPP disability benefits a person must:

- Be between 18 and 65 years of age;
- Have a severe and prolonged disability; and
- Have made sufficient contributions to the Canada Pension Plan.

Contributions

Occasionally, a denial will involve the issue of contributions. These types of cases rarely go to a hearing because it is usually clear whether or not someone has made enough contributions to qualify for CPP disability benefits. In order to determine if the Ministry made a mistake when it calculated your Minimum Qualifying Period, the following information might be helpful.

Minimum Qualifying Period

This is the minimum period of time that a person must have worked and contributed to CPP. It is calculated by counting the number of most recent calendar years you have made contributions. Under the rules, if a person has worked only four years, they must have made the required contributions in each of these years. If they have worked more than four years, valid contributions must have been made in four out of the last six years. This is known as the "four out of six year rule." A person must prove they were disabled by the end of the MQP in order to qualify for disability benefits. The end date of a person's MQP is usually December 31st of their last qualifying year. The last qualifying year is in general, the sixth year.

Late Applicant Provision

This provision applies to a person who is applying for CPP-D, but stopped working so long ago they no longer have CPP contributions in four of the last six years. If a person meets all the other conditions of eligibility, they may still be eligible for a benefit. As long as the person had

enough years of CPP contributions when they first became severely disabled, and as long as they are considered to be continuously disabled (as defined by CPP legislation) from that date up to the present time, they may be eligible.

The rules about how to calculate the minimum qualifying period have changed over time. Sometimes, late applicants will be found to have become disabled so long ago that different rules apply.

- If CPP determines that a person became disabled between January 1, 1987 and December 31st, 1997, then they must have worked and contributed to CPP in either two of the last three years, or five of the last ten years before becoming disabled.
- If CPP determines that a person became disabled between January 1, 1998 and December 31, 2006, they must have worked and contributed to CPP in four of the last six years before becoming disabled.
- If CPP determines that a person became disabled after December 31, 2006, they must have:
  - worked and contributed to CPP in four of the last six years before becoming disabled; or
  - worked and contributed to CPP for at least 25 years, including three of the last six years before becoming disabled.

Date applicant deemed to have become disabled	MQP (made minimum CPP contributions in…)
Between Jan 1, 1987 and Dec 31, 1997	2 of last 3 years, or; 5 of last 10 years
Between Jan 1, 1998 and Dec 31, 2006	4 of last 6 years
After Dec 31, 2006	4 of last 6 years OR 3 of last 6 years & 25 years of contributions

Definitions

Disability

S. 42(2) of the *Canada Pension Plan and Old Age Security Act* defines disability as follows:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
>
> (ii) a disability is prolonged only if it is determined in the prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death.

The most common reason ESDC gives when defending a denial of CPP-D is that the Appellant's disability is not severe and prolonged. We will look at these terms in some detail.

Severe

The term "severe" requires a realistic assessment of the whole person, taking into account age, education level, language proficiency, and past work and life experience. However, it is not the diagnosis of a condition or disease that is considered, but its effect on the person (*Villani v. Canada (A.G.) [*2001] FCA 248

It may be possible for an Appellant to argue that their condition is indeed severe, by answering the following questions.

- In what ways do the Appellant's condition(s) prevent working?
- Has the Appellant attempted to work, but found they were not able to?
- Has the Appellant attempted to look for work, but even the search was impossible because of their disability?
- Does the Appellant have chronic unpredictable pain and/or fatigue which interferes with working, even some of the time? Does the person experience nausea, incontinence, anxiety attacks, low energy, low motivation, dizziness, drowsiness, difficulty with concentration or memory or other symptoms?

- Would a prospective employer, if made aware of the Appellant's limitations, consider the Appellant for employment?
- Do the person's medications cause side-effects which contribute to the inability to work predictably or at all?

If there is evidence of any ability to work, the Appellant must show that he/she has tried to find work and has been unable to do so because of a mental and/or physical condition [(*Inclima v. A.G. Canada* (2003 FCA 117). If there is no evidence to show that an Appellant might be able to work, this decision would not apply.

Some questions the Tribunal may ask in relation to an appeal are:

- Is there any evidence that the Appellant has the ability to work?
- Have they collected regular EI benefits in the past two years? (It should be noted that the writes of this guide are not aware of any decision where a Tribunal has denied an appeal based solely on the fact that an appellant has collected regular EI.)
- Has the Appellant tried medication, surgery, therapies, counseling, exercise or other recommendations by their doctor(s)? Tribunals can be very critical of appellants who have not followed medical advice or who have made little effort to try therapies that might allow them to recover.
- Are there any plans or possibility in the future of surgery, medication or other medical approaches that could result in the Appellant being able to work?
- Has the Appellant remained unable to work continuously since their MQP?

Prolonged

The term "prolonged" has been interpreted to mean there is no medical evidence to show the Appellant is able to return to "substantially gainful" work in the foreseeable future. If there is a reasonable expectation of recovery, the appeal may fail. Short-term disability benefits are not available.

The Appellant must show they have made reasonable efforts to follow up on medical advice and appointments.

Incapable Regularly

This term means you cannot work or commit yourself to a work schedule with any degree of reliability or predictability.

It may be possible to argue the employer was accommodating the Appellant's disability in ways that most employers would not. In this case, they could be considered a "benevolent employer" and therefore the job was not "regular" employment.

Before the Appellant became unable to work, or during an attempt to return to work, did their condition cause them to miss shifts, arrive late, leave early, require help from other employees to satisfy the requirements of their position, change to lighter duties or otherwise not fulfill the full duties required by the employer?

Substantially gainful

Concerns about what the term 'Substantially Gainful' means usually arise if the appellant had some earnings after their Minimum Qualifying Period (MQP). It will not be a factor in an appeal where the appellant had no earnings after their MQP.

The Tribunal's approach to this subject is on a case-by-case basis, considering the specific Appellant's circumstances, including earnings, hours of work and rates of pay. There is no rule at the Tribunal stage about how many hours of work or what rate of pay will be considered "substantially gainful" but there is a provision in the regulations about the amount of earnings that a Tribunal must consider.

Section 68.1 of the *Canada Pension Plan Regulations* reads as follows:

For the purpose of subparagraph 42(2)(a)(i) of the Act, "substantially gainful", in respect of an occupation, describes an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension…This new regulation applies to appeals of CPP decisions that were made after June 18, 2014.

Disability benefits are calculated based on the amount of earnings an individual has had and the contributions an individual has made to CPP over the years. The monthly benefit ranges from a

low of about $450 to a maximum of $1,290.81 a month (in 2016). Over a 12 month period this provides a range between $5,400 and $15,490 a year.

How $5,400 a year could be considered to be a substantial gainful income is beyond the imagination of the writers of this guide. Even $15,490 seems unreasonably low.

It remains to be seen how rigidly the Tribunal applies this new regulation. The amount of earnings is just one aspect that relates to how the disability definition that is contained in the legislation is be interpreted. Considerations such as the regular nature of the work, past earnings, any accommodation an employer might have made for the individual, and other factors need to be taken into account.

It should also be noted that the Ministry's own Adjudicative Framework (http://www.esdc.gc.ca/eng/disability/benefits/framework.shtml) has the following provision:

> **2.6.1.3 Sub-factor: Twice Substantially Gainful Amount and Over**
>
> A person with earnings at or above twice the maximum annual or monthly CPP disability pension amount is generally presumed to have a capacity for work at a substantially gainful level (twelve (12) times the maximum monthly CPP disability pension).
>
> The medical adjudicator confirms that the earnings level is the result of the person performing and being productive.
>
> Although rare, there may still be grounds for considering such an individual to be disabled if the work effort is accommodated to a significant degree, or if the work is irregular because they are working for a benevolent employer.

If the Ministry's Adjudicators can consider earnings greater than $30, 980 a year not to be substantially gainful, it does not seem reasonable that a Tribunal Member would not have this kind of discretion.

Special Provisions

The following provisions should be considered, if there is a denial based on insufficient contributions.

Child Rearing Dropout | Parents and guardians who have taken time out of work to raise chil-

dren under the age of seven and received the family allowance or child tax credit may apply for this provision. Under this provision, years when the parent or guardian had little or no earnings because he or she was caring for their child(ren) can be excluded from the 4 out of 6 year rule calculation. Although they would still need 4 years of valid contributions, this provision can be used to extend a Minimum Qualifying Period.

Credit Split | When a couple (married or common-law, including same-sex couples) separates or divorces, a request can be made to CPP to split the CPP contributions made by a partner during the time they were living together. This means the lower earning person would acquire extra contributions. A credit split may not be applied to years in which the partner had very little earnings covered by CPP. A split can provide additional contribution years and could provide a person with enough contributions to qualify and /or increase the monthly benefit.

Employment Outside of Canada| If the Appellant worked in another country that has a social security agreement with Canada, contributions to the social security program in that country may be used to help meet the CPP contribution requirement.

Proration | This provision applies to people who do not have sufficient earnings covered by CPP in the year they became disabled, so the year would ordinarily not count as a valid year in their minimum qualifying period. In these cases, CPP can prorate the basic exemption for that year (the required minimum earnings) to reflect the fact that the person could only work part of the year because of disability.

For example, in 2014, the basic exemption was $5,200. So a person must have made CPP contributions on more than $5,200 for that year to count towards their minimum qualifying period. Suppose Mary only earned and paid contributions on $2,800 in 2014. At first blush, it does not appear that Mary has enough earnings for 2014 to count towards her minimum qualifying period. However, if she can show that she became disabled in June, 2014, the basic exemption for 2014 would be prorated to $2,600 to reflect the fact that Mary could only work 6 months. So Mary would indeed have enough contributions in 2014, and 2014 would count as a valid year in her minimum qualifying period.

Incapacity | If an Appellant was unable to apply for CPP disability benefits due to the severity of their condition, the Tribunal may be able to approve additional retroactive benefits (s. 60 of the Act). The term “incapacity” has been referred to by the Courts as “narrow and precise.” An application must have been made after a person has regained the capacity to do so, and within a

year after they regained capacity (see Weisberg v. MSD, CP21943 PAB December 2004). This provision came into effect in 1991. The Tribunal's website has links to a number of decisions under the heading of **Incapacity,**

APPENDIX D | Late Appeals

If you are filing your appeal more than 90 days after your received the letter denying your reconsideration request, you will have to provide reasons why your appeal is late. You will be expected to provide answers to all of the following questions in section B of your Notice of Appeal:

- Is there is a reasonable explanation as to why you delayed filing your appeal?
- Can you show that you always intend to file and appeal?
- Is there an arguable case in support of your appeal?
- Will anyone experience prejudice because of the delay? (Does the delay make it too difficult for the Minister or anyone else to be able to properly respond to your appeal?)

If you are aware at the time of submitting your appeal that the 90-day appeal period has expired, it is recommended that you answer each question listed above and provide any other information you feel is relevant in Section B of your Notice of Appeal (use a separate sheet of paper and say “see attached” if necessary). If you do not fully answer these questions, the Tribunal will send you a letter before it accepts your appeal and ask you to provide more information. This could create even more delay and make it harder for your appeal to be accepted.

See *Canada (Minister of Human Resources Development Canada) v. Gattellaro*, 2005 FC 883

Legislation prevents the Tribunal from accepting an appeal that is filed more than one year after the reconsideration letter was received by an appellant.

APPENDIX E | Using Case Law

The Tribunal must follow decisions of the Courts. A Tribunal will often consider previous Tribunal and Pension Appeals Board decisions but it is not bound by them.

Court decisions are available from the Canadian Legal Institute's website, better known as Canlii. (www.canlii.org). Selected decisions by the new Social Security Tribunal are also available through Canlii, and are also published on the Tribunal's website under the "Decisions" tab (http://www.canlii.org/en/ca/sst/). You should focus on the cases involving the Minister of Human Resources and Skills Development (now Employment and Social Development Canada).

As mentioned previously, the Tribunal has developed a new research tool on its website. Under its **Jurisprudence** Section there is a link to: **Decisions Categorized by Benefit and Subject for: the Canada Pension Plan**. This research tool allows you to look at past decisions that might help you address issues that are similar to the ones in your appeal.

The Tribunal is often guided by decisions of the former Pension Appeals Board, which was replaced by the Appeal Division of the Social Security Tribunal. There is a link to old PAB decisions on the Social Security Tribunal web site under Jurisprudence. The problem with using this link is that you need the name of the parties or the appeal number in order to locate a specific decision. You cannot just browse them. If you use the *Annotated Canada Pension Plan/Old Age Security Act* (Wolters Kluwer) to do a little research, it provides the names of the parties and case numbers for cases that might interest you.

Using case law in a submission can be a powerful tool. When making oral submissions at a hearing however, a little restraint might be wise. Provided that you have made a written legal argument, don't be overly legalistic at a hearing. The Tribunal has provided all Members with legal training. Assume that the Tribunal has read your written submission.

Always provide a citation for decisions that you use [i.e.: *Villlani* (PAB CP24087, November 27, 2006)] or for Social Security Tribunal decision *[i.e.: G. D. v. Minister of Human Resources and Skills Development* 2014 SSTGDIS 3]. It is wise to attach a full copy of any decision you cite to your submission unless it is one that that can be accessed easily by the Minister or the Social

Security Tribunal on line. A full copy of an unpublished decision is needed so that the other parties can read it in its entirety. It is not necessary to provide a copy of decisions if there is a link to it on the Tribunal's website.

Decisions of Interest

One of the leading CPP disability decisions is *Villani v. Canada* (A.G.) [2001] FCA 248 This decision is a must read for advocates. Two important passages are as follows:

> [29] Accordingly, subparagraph 42(2)(a)(i) of the Plan should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the Plan is clearly a qualified one which must be contained by the actual language used in subparagraph 42(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits.
>
> **(c) The Appropriate Legal Test for Disability under the Plan**
>
> [37] Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the Plan. That one occasion was the Board's relatively recent decision in *Patricia Valerie Barlow v. Minister of Human Resources Development*, CP 07017 (November 22, 1999). It is worth repeating the central passage of the Board's decision in that case:
>
> Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?
>
> To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:
>
> Regular is defined in the Greater Oxford Dictionary as "usual, standard or customary".

Regularly – "at regular intervals or times."

Substantial – "having substance, actually existing, not illusory, of real importance or value, practical."

Gainful – "lucrative, remunerative paid employment."

Occupation – "temporary or regular employment, security of tenure."

Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.

[38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[39] I agree with the conclusion in Barlow, supra and the reasons therefore. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would

> serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute.

Another important case is *Inclima v. A.G. Canada* (2003 FCA 117). This case was decided after *Villani*. The Ministry often cites the following passage from this decision to argue that an Appeal should be denied because the Appellant has not made sufficient effort to look for work:

> [3}… an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition. (emphasis added)
>
> **Some of the original words have been bolded because they support the proposition that Appellants do not have to look for work if they are not capable of working.**

For those who do try to work, the Ministry will often argue that any earnings after a MQP is a sign that the Appellant is capable of gainful employment. In *Tasse v. M SD* (PAB CP24087, November 27, 2006) the Board examined the issue of what constitutes gainful employment and looked at the question of employment and entitlement to CPP disability benefits. The Board wrote at page 3:

> [7] To her credit in 2005, she resumed employment as a sales clerk, at Zehrs, a grocery store, which involved working 21.50 hours per week at an hourly rate of $7.75.
>
> [8] She was forced to return to work because she and her husband were in dire financial straits, as the husband was unemployed for some time. She was unable to continue at the end of the six months and resigned due to her health problems. She later worked for a three month period at a nursing home in 2006. Based on a 32 ½ hour work-week on alternate weeks at the same rate of pay, i.e. $7.75 per hour.

…

> [15] Does the fact that the Appellant returned to work for brief periods in 2005 and 2006 preclude her from obtaining a pension? In my view it does not. The Federal Court of Appeal has held that it is the responsibility of the Appellant to attempt to return to work at a lighter, sedentary type of employment, if they cannot return to their original job. The Appellant is required to show that he or she has made an attempt to do so, and has been refused due to disability, or if successful, are unable to continue because of their incapability to continue. See *Inclima v. Canada (Attorney General)* 2003 FCA 117.

…

> [20] The evidence adduced also raises another issue which needs to be addressed, namely, whether the amount of wages earned by the Appellant during her brief stints of employment following her stoppage of work in 2000, constitutes "a substantially gainful occupation." Ms. Tasse worked a 32½ hour week on alternate weeks and received $7.75 per hour or $501.85 per month, for a period of six months. For the three month period in 2006, while employed at a nursing home her weekly take home pay calculated at 21½ hours per week at $7.75 amounted to $166.63 per week or $675.00 per month.
>
> [21] This meager sum is substantially below the "poverty line" as referred to by Statistics Canada. Had her previous work prior to her disability occurring, been at the same hours and wage, this issue would not arise.
>
> [22] Different considerations however are present in this appeal. Ms. Tasse was previously working a regular 40hour week for a period of approximately ten years. She subsequently was capable of sporadic employment at different jobs, with reduced hours.
>
> [23] Her family physician agrees that she is incapable of working longer hours. A disability is "severe" only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation.

(Emphasis added in original)

[24] "Regular" has been defined as 'with consistent frequency." The Oxford Dictionary defines "substantially" as "having substance, actually existing, not illusory." The Webster Dictionary defines "gainful" as "profitable, lucrative." In my view, the legislature, by prefacing the word "gainful" with substantially, intended that the employment would be in excess of gainful.

[25] The Appellant has established that she has a combination of both physical and mental disabilities i.e. bipolar disorder and chronic fatigue.

[26] In addition I find that on incontrovertible evidence that she lacks the capacity to pursue with consistent frequency any substantially gainful occupation, due to disabilities. The Appellant therefore succeeds in her appeal.

Chronic pain is one of those conditions that often results in a hearing because there are often few objective tests to explain its cause. The issue comes down to one of credibility which can only be tested through oral evidence. The Board in *Mullaney v. MSD* (CP24444 February 2007) wrote:

[25] Before the Supreme Court of Canada in the case Re: *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] SCC 54, the Court was persuaded beyond doubt that chronic pain was a legitimate medical condition and was entitled to constitutional protection as falling within the enunciated ground of "physical disability" within Subsection 15(1) of the Charter. In his judgment at paragraph 1 Gonthier, J. stated:

> Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at

> the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanism that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians … [Emphasis added in the original.]

At times there may not be a clear diagnosis for a condition. In *B.K. v. MHRSD* (CP25269 PAB January 4, 2008) the Board wrote:

> [8] Her concentration and memory are both very poor. This in my view was quite obvious as she gave her evidence. She was unable to continue a thought for more than a few seconds. She was also diagnosed as having a major depressive disorder in 2001 with a GAF score of 55-60 which is not that of a well-functioning person...
>
> [10] A great deal of focus has been placed on the fact that there has been no definite diagnosis of MS. Dr. M. Hohol her main neurologist while unable to give a definite diagnosis has not excluded its possibility…
>
> [17] Clearly she is suffering from a multiplicity of problems both now and as of December 2002. Whether she has MS or not is in my view not relevant. A definitive diagnosis is not required. The fact is that these health problems are real and prolonged. Mrs. BK is not employable now nor was she in 2002.
>
> [18] This woman now and in 2002 could not function either physically

> or mentally. She is now and was then incapable of regularly pursuing any substantially gainful occupation.
>
> [19] The appeal is allowed ..

Also in *P.R. and M.H.R.S.D.* (2014 SSTGDIS 1) the Social Security Tribunal wrote:

> [40] Regarding the Respondent's point about a lack of "serious pathology", it is true that the investigations have not uncovered any serious pathology however it is a leap to conclude the Appellant should, therefore, be able to work. The very nature of fibromyalgia is such that it does not appear on diagnostic tests. Still the label of fibromyalgia is not sufficient to satisfy a severe finding; the Tribunal must look at the effect on the individual (Petrozza v. MSD, (October 27, 2004) CP 12106 (PAB)). In this case, the Appellant has been largely home-bound since leaving the workforce. He describes pain throughout his body. His family doctor lists numerous functional limitations in the CPP Medical Report, notably that the Appellant is unstable while standing, has pain on rising from the seated position, suffers multiple tender trigger points, has a loss of strength (due to pain) in his knees, hips and elbows. He is only able to walk short distances with aid of cane (often two). At the hearing, the Appellant reported that he spends most of his days lying on a couch. He requires assistance in travelling to medical appointments and doing his groceries. He is even unable to walk across the street to go to the coffee shop. Given his extensive limitations, when considered in a "real world" context (*Villani v. Canada (A.G.)*, 2001 FCA 248 (CanLII), 2001 FCA 248), the Tribunal is satisfied that the Appellant's disability is severe since he left work in February 2007.

"Real world" considerations as set out in *Villani* (age, education, English literacy skills, etc.) are often important when determining the appellant's capacity to work or to be retrained.

In K.A v. MHRSDC (CP25289 PAB December 2007) the Board decided:

> [15] In considering Mrs. KA's condition it must be remembered that she has only attended school to Grade 8 in her native country of Guyana. Her

> language skills in English are very limited. Her work experience involved a labour intensive job which she can no longer do because of her disabling condition. In 2002 she completed a program which was intended to qualify her for work more suitable to her condition. This was not successful and she did not obtain re-employment.
>
> [16] Taking into account the evidence of the Appellant and that of her daughter who testified as a corroborative witness, it is my opinion that Mrs. KA was in January 2003, incapable regularly of pursuing any substantially gainful occupation and that she has continued to be thus disabled since then. The evidence also supports the conclusion that her disability is prolonged in that it is likely to be long continued and of indefinite duration.
>
> [17] The appeal is therefore allowed with the date of onset of the disability deemed to be 15 months prior to the date of application for benefits being March 2005.

In P.R. v. MHRSDC (CP25115 PAB January 2008) the Appellant was 60 years old, had a grade 8 education, and English was not her first language. The Board wrote:

> [17] It has been submitted on behalf of the Minister that Mrs. P.R. has not made any effort to retrain or to obtain employment that might accommodate her condition. It has been held in prior decisions that in order to establish a severe disability applicants must not only show a serious health problem, but where there is evidence of work capacity, must show effort at obtaining and maintaining employment has been unsuccessful by reasons of the health condition. (*Inclima v. Canada (Attorney General)* [2003] FCA 117.)
>
> [18] With respect to work capacity, Mrs. P.R. stated that she tried to return to her job as a packager but was not able to continue because of her medical problems. She also stated that when it was known that she was not going to get better that she thought she was too old to learn new skills.

[19] Mrs. P.R. came to Canada with limited education and limited ability to speak or to write in English. Because of work and family responsibilities she has not improved her abilities in these areas.

[20] In my view, given her age, medical condition and limited education and language skills, it would not be realistic to expect her to retrain. I found her to be an honest witness and that she did not exaggerate or embellish her difficulties.

[21] Taking into account all of the evidence, I find that the Appellant does suffer from a disability that is severe which renders her incapable of regularly pursuing any substantially gainful occupation and that such condition is prolonged and has persisted since her fall at the end of November 2001.

[22] The appeal is allowed and I would determine the date of onset of the disability to be 15 months prior to the date of her application in October 2004.

APPENDIX F | Hearings Based on the Written Record

It is always difficult to know why a Tribunal Member might choose this form of hearing. It could be that the Member has been persuaded by the information you provided and feels that the time and effort to hold a hearing is not needed and is prepared to allow your appeal. It could also mean that the Member has been persuaded by the Minister's argument and might dismiss it.

You may feel that you have provided a strong case and may want a decision based on the written record. You could also prefer a written decision for other reasons.

If you would prefer to have an oral hearing it is important that you make a strong case as to why you think an oral hearing is necessary when making your submissions or when you complete the *Hearing Information Form*.

If an appeal has some chance of success, it is difficult to imagine what type of circumstance would exist for the Tribunal to dismiss an appeal based on the written record alone.

In Singh v. Minister of Employment and Immigration, [1985] 1 SCR 117, the Court wrote:

> 59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an Oral Hearing...Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person....I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

The vast majority of CPP-D denials are made because of the way the CPP Medical Adjudicators interpret the written medical record. They often conclude the individual's subjective experience does not match the Adjudicator's interpretation of the medical evidence. They conclude the applicant "should be capable of engaging in some type of work."

The credibility of an applicant is, therefore, of crucial importance in most CPP-D appeals and that credibility is difficult to establish, unless there is an opportunity to provide oral evidence under oath.

When the Tribunal decides to make a decision based on the written record it indicates that "credibility is not a prevailing issue". When making your final submission based on the written record, you might want to consider writing something such as:

The Tribunal has indicated that "credibility is not a prevailing issue" in my appeal. I assume that this means that it finds that the evidence I have presented to be credible. If the Tribunal has any doubts about the credibility of my position, I ask it to hold an oral hearing where I can present my evidence under oath and answer any questions that the Tribunal or the Minister may wish to ask me. ■

.