

Citation: *G. T. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 5

Appeal No: CP 27568

BETWEEN:

**G. T.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

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SOCIAL SECURITY TRIBUNAL  
MEMBER:

Valerie HAZLETT PARKER

HEARING DATE: September 20, 2013

TYPE OF HEARING: In Person

DATE OF DECISION: October 9, 2013

## PERSONS IN ATTENDANCE

The Appellant	G. T.
Witness for the Appellant	M. T.
Counsel for the Respondent	Vanessa Luna
Witness for the Respondent	Dr. Michael Cain

## DECISION

The Appeal is granted.

## INTRODUCTION

[1] On August 23, 2010, a Review Tribunal determined that a *Canada Pension Plan* (the “CPP”) disability pension was not payable.

[2] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the “Leave Application”) with the Pension Appeal Board (PAB) on October 29, 2010.

[3] The PAB granted leave to appeal on January 7, 2011. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[4] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated July 24, 2013.

## THE LAW

[5] To ensure fairness, the Appeal will be examined based on the Appellant’s legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de*

*novus* in accordance with subsection 84(1) of the *Canada Pension Plan* (CPP) as it read immediately before April 1, 2013.

[6] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[7] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[8] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

## **ISSUE**

[9] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2006.

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

## **EVIDENCE**

[11] The Appellant was 56 years old at the MQP. He obtained an Engineering degree in the United States, and worked in Saudi Arabia, and Northern Ontario for a number of years. In 1991 he slipped on ice at work, injuring his knee and low back. In his application for CPP disability benefits the Appellant states that from 1987 to 2003 he tried to operate his own business as a civil engineer inspector, contractor and renovator. He testified that this was not successful. He began to retrain to be a Home Inspector but did not finish the course as his doctor advised that he would not be able to do this job because of his physical limitations. He worked as a project co-ordinator's assistant for approximately four weeks, and testified that he could not continue because he could not hear properly on the phone to take orders. He subsequently obtained a license and drove a taxi from October 2005 to March 2006. He also obtained a license and drove a school bus, then a school van from 2008 until 2009, part time. He has not worked since then.

[12] The Appellant suffers from four medical conditions which he claims render him disabled: knee pain, back pain and left foot drop, hearing loss, and nausea and dizziness while driving. He also suffers from diabetes and high blood pressure but did not testify regarding these conditions.

[13] The Appellant testified that he completes chores around the home with pacing and breaks. He also naps during the day. He lives in a condominium with his wife and youngest son.

[14] The Appellant testified that he has knee pain. His right knee was injured in the fall at work in 1991. He returned to work on modified duties after this injury, and had hoped for a full recovery.

[15] On July 8, 1992 Dr. Gollish reported that the Appellant continued to complain of right knee pain, then eight months after arthroscopic surgery. He relied on a cane to walk. At that time x-rays showed no abnormalities and the doctor expected that the Appellant would continue to have symptoms that would preclude him from working in an environment that requires kneeling, squatting or climbing. The Appellant should consider retraining. The

Appellant testified that he then wanted to work as a Construction Manager, but WSIB would not pay for the required retraining course.

[16] Then, from 1987 to 2003 the Appellant tried to build his own business in engineering inspection, contracting and renovations. He testified that this was unsuccessful. He had difficulties with the physical requirements of the work. He also had no prior experience hiring labour, etc. which impacted the financial success of the business. The Appellant testified that he has not worked in a substantially gainful occupation since 2002 because he had to have restrictions on his work – he required shorter shifts, the ability to use cruise control when driving, and the need for headphones in lieu of hearing aids.

[17] On August 9, 2003 Dr. English, orthopedic surgeon, reported that several courses of physiotherapy and rest did not relieve all of the Appellant's symptoms completely. He also had mechanical low back problems brought on by walking and movement. Because the Appellant doesn't flex his knees but twists his entire back as he walks, Dr. English was not surprised that he suffered from back pain. He concluded that physically there was not a lot wrong with the knee, and queried whether the Appellant was magnifying his symptoms. The Appellant denied any symptom magnification in his testimony.

[18] On June 28, 2005 Dr. Schwartz reported that lifting, stress, climbing stairs and squatting cause the Appellant back pain. He has intermittent knee pain. He falls to the right when he squats. For this reason, he recommended that the Appellant not retrain as a home inspector. The Appellant took this advice and did not complete the course for this career change that he began through HRSD in 2004. He testified that he didn't think he would be able to build a business and obtain referrals from clients if he fell during an inspection, and the risk of such a fall off a roof would place him in danger.

[19] On February 17, 2006 Dr. Krystobovich reported that the Appellant would not be able to work as a project manager due to the physical requirements of the job, and the Appellant's ongoing knee pain.

[20] On July 12, 2006 Dr. Zarnett reported that the Appellant would not be able to complete his normal job without modifications while he waited for knee surgery. He was

restricted from prolonged standing, heavy lifting, bending, squatting, and kneeling. The Appellant had knee surgery in November 2006 to repair a meniscus tear and osteoarthritis.

[21] On January 14, 2008 Dr. Vandersluis reported that the Appellant would eventually need left knee replacement surgery, and was restricted from heavy physical labour. In the meantime he recommended that the Appellant participate in physiotherapy, and take anti-inflammatory medication.

[22] The Appellant testified that he has required prescription pain killers since 1991 “off and on”. He does not like to take this medication. He needed them more after his knee was re-injured in 2002. He currently takes narcotic pain medication due the pain in numerous areas, including his knees, back, and most recently his shoulder (which pain arose long after the MQP and was not considered at the hearing). The Appellant testified that the pain killers make him drowsy, and cause difficulty with concentration and focus. He schedules when he takes the medication, so as to minimize their effect on his social activities.

[23] The Appellant testified that he was quickly able to obtain a taxi license in 2005. He testified that he was not prevented from continuing this job because of back pain, but upon cross-examination clarified that when one is in pain, one does not always know exactly where that pain comes from. He did testify, however, that he was able to rest in the taxi between rides, which provided some relief. He testified that his knee pain while driving prevented him from continuing with this job. He did not lift bags for customers while working as a taxi driver as he could not do this. The Appellant testified by this time his hearing had declined significantly, but it did not impact this work.

[24] The Appellant suffers from hearing loss. He wrote to the Tribunal on November 6, 2009 and stated that he is unable to carry on a conversation because of this. The Appellant’s son, M. T., testified for the Appellant. He stated that he is very close to his Father. He moved from home to attend university in Hamilton, ON from 2001 – 2005, then worked at Bruce Power in Northwestern Ontario for four years. Despite this he had frequent contact with his Father by telephone. This was effective communication despite the Appellant’s hearing loss, as the Appellant would place a speaker phone near his ear to hear. The Appellant testified that

he only tried to use a TTY phone once, and hung up when an operator was going to assist. The Appellant now prefers to communicate by email or text message.

[25] Dr. Kaul, otolaryngologist, reported on May 30, 2002 that the Appellant had started to rapidly lose his hearing in the last year. He had significant hearing loss, and poor quality hearing. If his hearing worsened, the Appellant would be disabled.

[26] On September 28, 2007 Dr. Tassios, audiologist, reported that the Appellant had profound sensorial hearing loss in the right ear, and moderate to severe loss in the left ear. He had hearing aids for both ears. The Appellant testified that he had hearing aids in both ears. His testimony was not clear whether they were helpful to him. He was clear, however, in testifying that he had a lot of problems with the hearing aids, and they were replaced at least four times to repair moisture in them, and were also adjusted a number of times. He was last offered to purchase a different kind of hearing aid, but did not do so as there was no guarantee that they would benefit him. He also testified that he stopped wearing hearing aids because they were inconvenient. Instead, the Appellant is now investigating headphones, which he currently uses with his computer, to aid his hearing.

[27] The Appellant is currently involved with an accessibility committee with the Town of Richmond Hill. He has had some trouble hearing at the meetings, and testified that at the next meeting, they will try a new hearing amplifier for him.

[28] The Appellant also testified that his hearing loss impacted his ability to work as a project manager's assistant. He obtained this job to be trained to be a project manager. He could not, however, properly hear on the telephone, and had difficulty taking orders for parts, etc. He left this job because of his hearing difficulties. The Appellant testified that his poor ability to write letters impacted this job also.

[29] The Appellant testified that his hearing impairment did not impact on his ability to work as a taxi driver, or a school vehicle driver although he could not hear communication from his employer while driving.

[30] The Appellant also suffers from low back pain, resulting in left foot drop. He had a laminectomy in 2004, which relieved some of his pain, but he continues to have some pain left foot drop. M. T. testified that the Appellant must wear a brace on his foot/calf. He has no muscle at all in his left calf. It also takes him a long time to straighten up from sitting, and he requires a cane to ambulate.

[31] The Appellant testified that it takes approximately one hour from when he rises in the morning to straighten his back, or at least 15 minutes in a hot shower. He also can only walk a short distance before his knees start to cramp, causing further pain. It is very difficult for him to get up from the floor. His pain is relieved with rest, ice packs and medication. Sometimes, if he has been more active, his pain will continue into the next day.

[32] Dr. Schwartz reported on January 14, 2003 that the Appellant had severe stenosis in the L4-5 discs, and left foot drop as a result. On August 31, 2004 he reported that the Appellant had surgery on May 17, 2004, but the back pain continued to be unbearable. He still has left foot drop and can not run. Dr. Schwartz concluded that the Appellant would not be able to return to construction work, and if he returned to work it would have to be in an office environment.

[33] The Appellant testified that when he began to drive a yellow school bus, he became nauseous. This happened when he was training for the license. The Appellant also had increased knee pain from driving the bus. He therefore obtained position driving a van for school children instead. The Appellant was fired from this job in June 2009 because he was travelling on Highway 407, which was not on the prescribed route.

[34] In his application for CPP disability benefits, the Applicant stated that being a school bus driver was not an appropriate occupation, as it was not full time and the income was inadequate. It also caused continuous stress on his right knee, and increased pain and discomfort in his low back. He also suffered from nausea when driving, and headaches.

[35] On August, 12, 2009 Dr. Ramzy (family physician) reported that the Appellant's hearing loss caused nausea, and advised him to avoid driving a school vehicle. The Appellant testified that in 2009 he began to take medication for dizziness.



[36] The Appellant's last employer completed a questionnaire for the Respondent. It indicated that the Appellant's work was satisfactory, he was not absent, and did not require any special accommodations while employed there.

[37] Dr. Michael Cain was accepted as an expert witness in general medical practice. He testified on behalf of the Respondent. He has not examined the Appellant, and his opinion is based on his review all of the medical evidence in the hearing file.

[38] Dr. Cain testified that on January 27, 2009 Dr. Zarnet, an orthopedic surgeon, wrote that the Appellant could not do any physical labour in construction.

[39] Dr. Ranzy reported on November 5, 2007 that the Appellant suffers from hearing loss, osteoarthritis in both knees, drop foot and could not return to work in January 2006. Dr. Ranzy does not, however, specify what work the Appellant was unable to do.

[40] He also testified that there are no medical reports at the time of the MQP that state that the Appellant is unable to work in any job, although medical documents do state that he is unable to do a physically demanding job at that time.

[41] On August 14, 2008 there is a report addressed to WSIB which states that the Appellant could do some jobs, but the Appellant stated that a clerical job assignment was insulting to him.

[42] It was not until December 2010 that a medical professional reported that the Appellant would likely not be able to work in a retail or clerical position due to his medical conditions.

## **SUBMISSIONS**

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

- a) He was not able to earn a substantially gainful income since 2002. Therefore he was disabled in 2002.

- b) His physical conditions, cumulatively, when examined along with his age, education and work experience, demonstrate that he is disabled.

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

- a) While it is acknowledged that the Appellant has some physical limitations, they do not render him disabled at the MQP;
- b) The Appellant is well educated and has a lot of work experience, such that he has transferrable skills;
- c) The Appellant worked for over two years after the MQP, demonstrating capacity to work;

## **ANALYSIS**

[45] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2006.

### **Severe**

[46] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, the Appellant was 56 years of age at the MQP. He is highly educated, receiving a university degree in engineering some years ago, taxi and bus driving licenses. He also partly completed a course to be a home inspector. The Appellant is fluent in English although he speaks with an accent. He testified that his difficulties in communication relate to his hearing loss, not language or comprehension problems.

[47] The Appellant clearly suffers from back and knee pain, and has for a number of years. The medical reports are also clear that the Appellant is unable to work in a physically demanding position because of this pain, and his physical limitations. The Appellant

stopped work in construction some years ago, and tried to build his own business. This did not succeed. He then trained to drive a taxi, which he did for almost one year. He also stopped this work because of knee pain.

[48] The Appellant then studied for and obtained a license to drive a school bus. He did this for a period of time, then drove a school van, which still caused pain, dizziness and nausea. The Appellant was fired from this job for taking an alternate route with the vehicle. The Appellant testified that he drove on the 407 highway (the reason he was fired) to reduce the time he had to drive. He also testified that he was offered a different route to drive, but did not attempt it. The employer questionnaire states that the Appellant was not accommodated by his employer.

[49] The Appellant tried to work in an office environment as a project manager's assistant for a short period of time. This was a sedentary job. He left this work as he could not hear properly and therefore could not complete his duties. At this time, the Appellant had been prescribed hearing aids. He had a lot of difficulty with the aids that he purchased, requiring a number of replacements and adjustments. The Appellant finally "gave up" on hearing aids, although different aids had been suggested. He now uses headphones through the computer to assist with hearing.

[50] The Appellant stated in his application for CPP disability benefits that he has difficulty carrying on a conversation due to his hearing loss. His son testified, however, that when he was at university and working at Bruce Power he maintained communication with the Appellant by telephone, with the Appellant using a speaker phone.

[51] The Appellant has not followed all medical recommendations regarding his hearing as he has not tried all of the hearing aids recommended to him. In the *Bulger v. Minister of Human Resources Development* decision (CP 9164 May 2000) the Pension Appeals Board concluded that an Appellant is obliged to follow all reasonable treatment recommendations, or to explain why such recommendations have not been tried, to succeed in a claim for CPP disability benefits. In this case, the Appellant was prescribed hearing aids for both ears. He purchased them. He tried to use them despite having to have them adjusted and replaced a

number of times. Other hearing aids were then recommended to him. I find that it is reasonable for the Appellant to not purchase these hearing aids without some certainty that they would work. Instead, he is using headphones with his computer to improve his hearing.

[52] On a review of all of the medical documents in the file, the testimony and submissions, I am satisfied that the Appellant had some capacity to work at the MQP. While it is clear that he can not successfully work in a heavy physical position, the Appellant was able to obtain positions that required less physical labour, as a driver for short periods of time.

[53] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). In this case, the Appellant obtained work despite his physical limitations. He worked in his own business, and as a driver. He also attempted to work in project management. He was not able to keep these jobs due to his pain, and nausea (although the nausea may now be treated). He left the job as a taxi driver because of knee pain. He was fired from his job as a school vehicle driver because he shortened the route to accommodate his conditions. He could not complete the project management position because of his hearing loss.

[54] The Appellant argued that he has been disabled since 2002 as that is when he was no longer able to earn substantially gainful wages. A review of the Record of Earnings in the hearing file shows that the Appellant did not earn more than approximately \$9,400 in any year after 2002. The Appellant's income prior to 2002 was also low as he was trying to build his business, which he testified was unsuccessful.

[55] I find that the Appellant's occupations since 2002 have not been substantially gainful. While this term is not defined in the CPP, decisions have consistently concluded that this term includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed (*Poole v. The Minister of Human Resources Development* CP20748, 2003). The Appellant's income is nominal. It is less than what a

person in Ontario would earn working half-time at minimum wage. In addition, this was unskilled work, although the Appellant certainly has skills as an engineer, and in construction and renovation, as well as in running a business.

[56] In addition, the Appellant was not able to complete his job duties. When driving a taxi he could not hear passengers or his employer. He did not exit the taxi to lift bags for passengers. He could not complete telephone work required to be a project manager's assistant. He could not drive the correct route as a school vehicle driver, and suffered from nausea and dizziness when driving. Therefore, the Appellant has demonstrated that he could not maintain substantially gainful work due to his disabilities.

[57] For these reasons, I find that the Appellant's knee and back pain, and hearing loss, cumulatively, are a severe disability as that term is defined in the CPP.

### **Prolonged**

[58] I find that the Appellant's disability is prolonged. The Appellant has suffered from knee and back pain for a number of years. There is no indication that this will improve. Similarly, his hearing loss has been ongoing since at least 2002 and there is no prognosis for improvement.

### **CONCLUSION**

[59] I find that the Appellant had a severe and prolonged disability in 2004, when he had back surgery that did not completely resolve his pain, and did not correct the foot drop. At this time the Appellant was also suffering from ongoing knee pain, and required hearing aids that were not beneficial to him. The Appellant was not able to maintain any substantially gainful employment after this. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in March 2009; therefore the Appellant is deemed disabled in December 2007. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of April 2008.

[60] The appeal is allowed.

*Valerie Hazlett Parker*  
Member, Appeal Division