Citation: *P. R. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 1

Appeal No: GT-110163

BETWEEN:

P. R.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Kelley Sherwood
HEARING DATE:	December 17, 2013
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	January 8, 2014

PERSONS IN ATTENDANCE

P.R. – Appellant
Bill Glover, Katherine Wallocha – Observers/ Members of the General Division of the Social Security Tribunal

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on October 29, 2008. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated November 20, 2013. The hearing was originally scheduled for December 3, 2013 but was adjourned as the Appellant was missing pages from his medical file.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] 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).

[6] 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.

[7] 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

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[9] 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

[10] The Appellant is 54 years old with a grade 12 education. He last worked in 2007. He had been employed by Canada Post for almost 20 years as a nightshift supervisor on the shipping/receiving dock. His job involved coordinating the shipping/receiving of parcels and packages onto/from trucks for the Priority Post division of Canada Post.

[11] The Appellant described the “wear and tear” on his knees from walking on concrete floors for so many years. He had a workplace injury earlier in his career where he hit his knee on a rolling belt. He is unsure of the date but confirms he underwent an arthroscopy on his left knee. He reports that the surgery was only partially successful due to a hole in the meniscus.

The medical reports on file confirm that an arthroscopy took place but describe it as “failed” without further explanation (GT-41-44).

[12] Around 2003, he was given a cart to drive at work. He could no longer walk long distances on the warehouse floor. He began experiencing additional pains. Both knees, his back and feet were sore and he also developed general numbness. Nonetheless, he continued working using his cart for mobility.

[13] His condition worsened in 2006. He described increasing neck pain. He could not move his neck and had to turn his entire body to see around him. He tried to continue to work for a couple of months taking Arthrotec for pain. In early 2007, he started to experience greater numbness in his fingers that would cause his hands to seize up. The combination of symptoms became too much for the Appellant to manage and he left his job in early 2007.

[14] His workplace tried to reintegrate him to a desk job on the dayshift. He was given a job managing and tracking absences of fleet workers. On three occasions he went into the office to attempt this job. The first attempt lasted four hours before he was sent home. He rested for a week and then tried again but only lasted two hours. On his last attempt, he was simply sent home. He tried to type but he experienced a “pins and needles” feeling in his hands that prevented him from doing any desk work. His hands were shaking so badly he could not type.

[15] He has not tried to work at any job since these modified work trials and is now on long-term disability.

[16] Initially, the Appellant underwent a number of investigations in an effort to determine the source of his multiple pains and numbness. While x-rays taken in March 2007 found no abnormalities in his left shoulder, hands and knees, his lumbar spine x-ray showed moderate to advanced degenerative disc disease at L5-S1 with bony spurring, sclerosis and narrowing (GT-57). X-rays of the right shoulder and cervical spine from April 2007 showed no abnormalities (GT-58).

[17] In July 2007, he consulted Dr. John G. Thompson, a rheumatologist he had previously seen in 2002. He ordered further x-rays and blood tests, and suggested the Appellant try Celebrex for his pain. Dr. Thompson is not sure the source of the Appellant's pain, but notes that he says he has had some improvement since leaving work (GT-67). The follow up x-rays are on file. The x-rays of the sacroiliac joints were normal. Bilateral x-rays of the hands and wrists show normal alignment with some small surface pits on heads of the right second and third metatarsals which appear to be degenerative; bilateral feet x-rays show mild osteoarthritis in the first MTP joint in each foot (GT-65).

[18] Also in July 2007, the Appellant had an EMG study performed by Dr. Reda El-Sawy, a physiatrist, which showed no abnormality (GT-59-61). In a follow up report Dr. El-Sawy documents his examination of the Appellant. He found the Appellant to be "pain focused and disability oriented" (GT-63). Dr. El-Sawy notes the Appellant is using a cane on the left side but is able to walk on his tip toes, heels, everted and inverted feet and squat and get up unsupported. Dr. El-Sawy also comments that there is no evidence of wasting of the quadriceps, which is, in his opinion, an indication of good functioning of the knees. The Appellant had a full range of motion in the shoulders. The examination of the spine showed a reduced range of motion of the neck but no other significant abnormalities. The Appellant had full rotation of the dorsal spine in both directions. Dr. El-Sawy did not detect any tenderness over the hand joints. There were no neurological abnormalities identified. Dr. El-Sawy attempted to talk to the Appellant about the stresses in his life, however, the Appellant apparently denied feeling stressed. Dr. El-Sawy referred the Appellant for a sleep study to determine the source of his reported sleep deficits and investigate possible restless leg syndrome.

[19] In December 2007, the Appellant participated in a Functional Abilities Evaluation through CBI Physiotherapy & Rehabilitation Centre (assessor: Rob Karas, physiotherapist). It was organized by his long-term disability insurance provider and scheduled to be a two-day assessment. It was not completed, however, due to the Appellant's elevated resting heart rate. The assessor speculates that this may be due to deconditioning and advises the Appellant to contact his family doctor regarding his cardiovascular health (GT-70-73). At the hearing, the

Appellant confirmed that he has not participated in any further rehabilitation/return to work programs through his insurance company.

[20] The Appellant had a nocturnal polysomnogram study in January 2008 at the Royal Ottawa Hospital conducted by Dr. Alan B. Douglass, Psychiatry. Dr. Douglass diagnosed upper airway resistance syndrome at a moderately severe level with numerous restless leg movements while awake and a long initial insomnia. He recommends that the Appellant try a CPAP machine as well as try to lose weight (GT-74-75). After consulting with the Appellant, Dr. Douglass reports that he is reluctant to try the CPAP machine. In May 2008, there was an attempt to repeat the study using the CPAP machine, however, Dr. Douglass reports that "[the] study was completely unsatisfactory, as he did not fall asleep at all while wearing the CPAP mask" (GT-78). Accordingly, the Appellant was not given a prescription for a CPAP. Dr. Douglass reconfirms his diagnosis of severe upper airway resistance syndrome and questions whether psychiatric insomnia is playing a role in the Appellant's sleep disruption. The Appellant explained at the hearing that the mask "freaked me out" and he was unable to sleep while wearing it.

[21] The Appellant continued to see Dr. Thompson in 2008. Dr. Thompson is not sure the cause of the Appellant's ailments and notes it would be an unusual presentation for rheumatoid arthritis. Again, he ordered more blood work as well as x-rays. He also arranged for a neurology assessment (GT-76). Following a second visit in August 2008, Dr. Thompson notes that the Appellant continues to have arthralgias in various areas, including the shoulders, neck, hands and knees. His medication is of some help. His fatigue persists but there is no prolonged morning stiffness and his energy level is fair. He has continuing numbness in hands intermittently. There has been an onset of pain in the neck over the past month or two. Dr. Thompson finds soft tissue tenderness in 10/18 trigger points. He notes the previously ordered x-rays were unremarkable. Again, he comments that he is not sure what is causing the Appellant's discomfort and looks to the neurological assessment for possible answers (GT-80).

[22] On October 28, 2008, the Appellant's family doctor, Dr. David Leduc, completed his CPP medical report. In it he diagnoses the Appellant with atypical rheumatoid arthritis,

chronic polyarthralgia, obstructive sleep apnea, generalized anxiety disorder and depression. He notes that the Appellant had a work injury in the late 1990's that led to an unsuccessful arthroscopy on his left knee. He returned to work with restrictions. His pain continued to spread until 2007 when he was unable to do even sedentary work. Dr. Leduc reports that the Appellant is unstable with 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 time of the application, the Appellant was on Celebrex, Cipralex, Seroquel, and Xanax prn [as required]. Other medications have been tried, including Arthrotec, Codeine contin, Kadian, Elavil, Bextra, Naprosyn, lndocid, all of which did not help. He has also tried physiotherapy without benefit. Dr. Leduc offers the following prognostic statement:

> [The Appellant] is severely limited in his mobility by his chronic pain. It dominates his activities of daily living with slowed walking and [is] only able to walk short distances. He cannot lift, carry or bend without severe pain. No treatment to date has helped. This is a severe and prolonged condition that is very unlikely to improve (GT-44).

[23] In October 2008, the Appellant saw a neurologist, Dr. L. D. Sitwell, for an evaluation. Dr. Sitwell notes that the Appellant complains of intermittent numbness in both arms, radiating down the legs, hands, digits and "patchy" facial numbness. Still, the only abnormality Dr. Sitwell finds is a subjective positive Tinel's sign at the ulnar grooves bilaterally. He decides to send the Appellant to Dr. Pierre Bourque for a second opinion (GT-81-82). As reported by Dr. Sitwell in a letter from March 2009, Dr. Bourque also found normal neurophysiological studies. However, Dr. Bourque thought there was evidence of ulnar nerve subluxation over the epicondyles bilaterally. As such, Dr. Bourque felt that the Appellant might benefit from anterior transposition of the ulnar nerves. Accordingly, Dr. Sitwell referred the Appellant to Dr. Moulton, a neurosurgeon (GT-83). At the hearing, the Appellant confirmed that he never saw Dr. Moulton. He reports that he followed up twice with his office but never heard back.

[24] Dr. Leduc wrote to the Respondent in June 2009 where he reported that the Appellant suffers from significant pain limitations. He walks with difficulty using a cane and can only manage short distances. He sits in a guarded position due to pain in his low back and can only

tolerate sitting for 15 minutes at a time. On examination he showed marked limitations in his movements due to pain. He could raise his left shoulder laterally to 45 degrees and anteriorly to 110 degrees. His pain persists in his neck, knees, ankle and right hand. He is capable of light infrequent lifting as the pain in his hands makes it difficult to manipulate things. While the Appellant has some mild depressive symptoms typical for someone with his level of disability, in Dr. Leduc's opinion, he does not require psychiatric treatment. Dr. Leduc offers the following conclusion:

> He has had major problems with painful joints for last 9 years. This has gradually evolved from being originally just problems with his knees to now involving joints all over his body. The cause of his pain syndrome is likely multifactorial and has not come under control with standard care. At this point, I do not believe he will ever recover (GT-85).

[25] In November 2009, Dr. Thompson makes a diagnosis of fibromyalgia – by exclusion. He finds soft tissue tenderness in 12/18 tender points. He notes that the Appellant continues to have pain in various areas, including his shoulders, neck, hands, feet and back. A new medication, Gabapentin, has been introduced. As a result, the Appellant is somewhat improved. The plan is to increase the dosage from 100 mg twice daily to 300 mg twice daily (GT-88). At the hearing, the Appellant reported that he stopped taking Gabapentin due to side effects. When asked specifically about capacity to work by the Respondent, Dr. Thompson replied in a letter dated January 2010 that the Appellant's "functional capacity is markedly limited because of severe musculoskeletal pain. He would be unable to do any job requiring even mild physical exertion" (GT-90).

[26] A second letter from Dr. Leduc was received in December 2009 following the Appellant's fibromyalgia diagnosis. In it, he confirms that the Appellant is being treated for chronic musculoskeletal pain syndrome/fibromyalgia and that new medications are being attempted to reduce his pain (Gabapentin). He writes:

> Mr. R. has now been suffering for many years. I know of no treatment that has not been tried or contemplated by myself or his specialist that would improve his condition. I do not believe that he will ever recover sufficiently so that he could return to any meaningful occupation (GT-89).

[27] The Appellant was asked about the gap in the medical reports as his file ends nine months before his MQP in December 2010. As well, there is a reference on file to the Appellant asking the former tribunal (the OCRT) not to contact him between April and October 2010 (GT-115). The Appellant explained that a miscommunication between his employer and insurer had caused an overpayment of approximately $9,000. Due to his reduced income he had no way to repay the money. He was put into a bankruptcy situation and his telephone service was disconnected for a number of months.

[28] His condition today is stable. After trying so many medications, the Appellant has returned to Tylenol Arthritis for pain relief. He continues to take Escitalopram for his anxiety/depression. He sees his family doctor every two months for prescription refills. He also sees Dr. Thompson every six months for follow up visits.

[29] The Appellant believes that the same conditions that prevented him from working in February 2007 still prevent him from working today. He continues to have a "pins and needles" effect in his hands. His face feels numb. He has knee problems that limit his mobility. His back and neck cause him pain that make it difficult to sit. He typically spends his day lying on his back. He explained that he conducted the hearing while lying in his bed.

[30] He relies on his daughter or father to drive him to appointments or get his groceries. He is unable to walk even short distances. He cannot use public transportation as he cannot walk to the bus stop. Occasionally, he will borrow his daughter's car to drive across the street to Tim Horton's. He admitted that he spends most of the day watching television. He described his life as "boring" and wishes that he could work. He has no social life whereas he used to go out frequently to play pool with friends or ride his bike.

[31] His says that he has asked his doctor repeatedly about returning to work but his doctor has advised him not to work as he does not believe the Appellant would last for longer than a few days in the workplace.

SUBMISSIONS

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

a) His employer was willing to accommodate him and he was agreeable to perform light work, but he was unable to do it due to his illness;

b) His regular doctors (Drs. Leduc and Thompson) are clear that he has exhausted all treatment options and still he cannot work;

c) For at least 10 years, he has found it very difficult and painful to walk, sit, stand and even lie down or sleep. Moreover, his condition has not improved since leaving work; and

d) His condition is unpredictable and would make him an unreliable employee.

[33] The Respondent submitted while it is recognized that the Appellant has limitations, the investigations have not identified any serious pathology that would prevent Mr. R. from pursuing work suitable to his condition. Specifically in the Explanation of the Decision Under Appeal (GT-117-119), the Respondent cites evidence that includes:

a) an x-ray report of the left shoulder, both hands and both knees from March 2007, which showed no significant bony or joint abnormality while the x-ray of the lumbar spine showed degenerative disc disease of L5-S1;

b) Dr. El-Sawy's letter, which describes the Appellant as "pain focused and disability oriented";

c) the abandoned Functional Abilities Evaluation, which describes the Appellant as "deconditioned";

d) His refusal to accept a CPAP machine as offered by Dr. Douglass; and

e) Although his rheumatologist indicates he has difficulties due to pain, the Respondent argues that the medical evidence on file does not support a medical condition that would prevent him from all types of work, including part-time sedentary work.

ANALYSIS

[34] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2010.

Severe

[35] The Appellant provided the Tribunal with a thorough history of his condition. He clarified his prior knee injuries and surgery, which were not well documented on file. He also chronicled his long work history and how he worked for many years with his disability using different modifications to remain in the workforce. He presented a picture of a very accommodating employer who provided him with a golf cart when he could no longer walk the floor of the warehouse, and then tried to train him for a desk job when he could no longer do physical work.

[36] 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). While the respondent argues that the Appellant should be able to do part-time, sedentary work, it should be noted that his employer made part-time, sedentary work available to the Appellant, which he tried but could not do. In this situation, the Tribunal is reminded of *Boyle v. MHRD* (June 10, 2003), CP 18508 (PAB), where it was found that:

> The usual suggestions for the Appellant's retraining or the seeking of other employment, although attempted to some extent by [the Appellant], was perceived to be unnecessary as [he] understood a job was always open to him at [his employer], if he could handle it.

Therefore the Tribunal accepts that it was reasonable that the Appellant did not make efforts to seek other employment.

[37] The Respondent's Explanation of the Decision Under Appeal portrays an Appellant who is pain focused and less than proactive in his treatment. While the report from Dr. El-Sawy raises questions about the Appellant's condition, his comment about the Appellant being "pain focused and disability oriented" is based on a single visit and does not represent the consensus of the other treating physicians. Therefore, on a balance of probabilities, the

Tribunal does not believe Dr. El-Sawy's comments are sufficient to dismiss a finding of severe.

[38] The Tribunal also considered whether the Appellant could have been more proactive in his treatment. On this point, the Tribunal agrees that there were some instances where he could have done more. For example, he should have continued to pursue an appointment with Dr. Moulton and he should have attempted the CPAP machine on a trial basis.

[39] Nonetheless, when considering the totality of the evidence, the Tribunal does not believe the evidence upholds a finding of an Appellant who routinely disengaged from medical treatment. He has tried an exhaustive list of medications, gone to physiotherapy, seen a number of specialists and undergone numerous tests and investigations. His Functional Abilities Evaluation was cancelled not for reasons of malingering, but instead due to an elevated resting heart rate. In fact, Dr. Leduc is clear that the Appellant has exhausted all treatment options when he writes "I know of no treatment that has not been tried or contemplated by myself or his specialist that would improve his condition" (GT-89). Accordingly, the Tribunal accepts that the Appellant has been compliant with treatment.

[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), the Tribunal is satisfied that the Appellant's disability is severe since he left work in February 2007.

Prolonged

[41] The Tribunal must also determine whether a disability is prolonged as per CPP legislation. To that point, the Tribunal looked to the oral evidence and the documentation on file.

[42] The Appellant detailed a long history starting with knee pain and eventual surgery. For a number of years, he worked with modifications to his job. His knees gradually continued to worsen and his pain spread to other areas of his body. In addition, he developed numbness and a "pins and needles" sensation in his hands and on his face. The Appellant asserts that his condition is largely unchanged since he left work, including at the time of his MQP.

[43] Dr. Leduc is clear that the Appellant suffers from ongoing pain and it is not anticipated that he will recover at any time in the future. In his letter of June 2009 to the Respondent, he stresses the prolonged and indefinite nature of the Appellant's disability when he writes:

> He has had major problems with painful joints for last 9 years. This has gradually evolved from being originally just problems with his knees to now involving joints all over his body. The cause of his pain syndrome is likely multifactorial and has not come under control with standard care. At this point, I do not believe he will ever recover (GT-85).

[44] It is on this basis that the Tribunal finds the Appellant's disability is prolonged as per CPP legislation since he left work in February 2007.

CONCLUSION

[45] The Tribunal finds that the Appellant had a severe and prolonged disability in February 2007, when he left his job at Canada Post. 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 October 2008; therefore the Appellant is deemed disabled in July 2007. According to section 69 of the CPP,

payments start four months after the deemed date of disability. Payments will start as of November 2007.

[46] The appeal is allowed.

Kelley Sherwood
Member, General Division