Citation: *J. T. v. Minister of Human Resources and Skills Development*, 2013 SSTAD 9

Appeal No: CP 21837

BETWEEN:

J. T.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Amended Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Valerie HAZLETT PARKER
HEARING DATE:	September ~~22~~ 23, 2013
TYPE OF HEARING:	In Person
DATE OF DECISION:	November 19, 2013

PERSONS IN ATTENDANCE

The Appellant	J. T.
Counsel for the Respondent	Carole Vary
Witness for the Respondent	Dr. Janeen MacDonald

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 18, 2003, a Review Tribunal determined that a *Canada Pension Plan* (the "CPP") disability pension was not payable.

[3] The Appellant originally filed an Application for Leave to Appeal that Review Tribunal decision (the "Leave Application") with the Pension Appeal Board (PAB) on June 6, 2003.

[4] The PAB granted leave to appeal on September 2, 2003. 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.

[5] The hearing of this appeal was conducted in person for the reasons given in the Notice of Hearing dated July 19, 2013.

THE LAW

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

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

a) Be under 65 years of age;

b) Not be in receipt of the CPP retirement pension;

c) Be disabled; and

d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

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

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

[10] The Appellant also argues that his rights guaranteed by sections 2(d) and 2(e) of the *Canadian Bill of Rights* have been violated.

[11] Section 2 of the *Canadian Bill of Rights* provides:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as to not abrograte, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to…

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel …

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations

[12] The Appellant also claims that his rights guaranteed by paragraphs 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms* have been violated.

[13] The Canadian *Charter of Rights and Freedoms* (Charter) provides as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[14] The Respondent argues that the Notice of Constitutional Question has not been properly served, as required by paragraph 57 of the *Federal Courts Act*, which provides:

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board,

commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

ISSUES

[15] The Tribunal must decide whether the provisions of the *Federal Courts Act* have been complied with regarding the Notice of Constitutional Question.

[16] The Tribunal must decide whether the Appellant's rights, as guaranteed by the *Canadian Bill of Rights*, and the *Canadian Charter of Rights and Freedoms* have been violated.

[17] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2000.

[18] 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.

PRELIMINARY MATTER

[19] The Appellant attended at the hearing without his copy of the Hearing file, or any other documents for the hearing. The Tribunal offered to allow him to refer to an unmarked copy of the Hearing file. The Appellant refused. The Appellant agreed to proceed with the hearing in the absence of his having these documents. During the hearing, when various documents were referred to in questioning by counsel for the Respondent, the Appellant refused to look at any document that was proffered to him, even to refresh his memory.

[20] The Appellant stated at the start of the hearing that he would not provide any evidence, as he believed that his rights under the *Canadian Bill of Rights* and the Charter had been violated. The hearing proceeded without any direct evidence from the Appellant. The Appellant did answer some questions posed by counsel for the Respondent.

[21] The Appellant left the hearing during a recess, after counsel for the Respondent completed her cross examination of the Appellant. The hearing concluded in his absence.

EVIDENCE

[22] The Appellant prepared a Notice of Constitutional Question dated September 24, 2004. It was properly served on all of the Attorneys General in Canada. Each of the Attorneys General responded that they would not participate in the hearing before the Pension Appeals Board. The matter has since been adjourned, until the hearing on September ~~22~~ 23, 2013.

[23] The Appellant did not serve the Attorneys General in Canada with a further Notice of Constitutional Question prior to this hearing date. When this was raised by counsel for the Respondent at the hearing, the Appellant refused to do so.

[24] As the Appellant refused to give evidence, I must look to the numerous medical reports in the Hearing file, and the limited information that was obtained in cross-examination by counsel for the Respondent.

[25] The Appellant was 36 years of age at the MQP. He completed Grade 9. He completed a carpentry apprenticeship in 1997. His completion of the apprenticeship was delayed due to a work injury, and he also had subsequent periods without work because of this injury. The Appellant also testified that he worked "under the table" sometimes, which would not be reflected in the Record of Earnings in the Hearing file. The Appellant testified that he also received Employment Insurance and social assistance benefits from time to time when he was not working.

[26] The Appellant has taken a number of courses, including AutoCad and other specialty courses for carpentry offered through his union, a Prospector's course, and

financial planning courses offered to the community.

[27] The Appellant was injured at work in 1989, suffering a severe laceration to his leg from a grinder. This wound was treated and healed well (Dr. Sabiston June 27, 1989). When he was cut by the grinder, the Appellant fell, injuring his knee and back. As a result, he has limitations with respect to kneeling, climbing ladders, repetitive bending and twisting.

[28] The Appellant also has a calcium formation in his left knee. On March 10, 1993 Dr. Samaraoo reported that the Appellant had difficulty standing, going up and down stairs and kneeling as a result of this. These limitations are permanent. The Appellant should work in a more sedentary job according to Dr. Samaroo.

[29] On December 7, 1993 the Appellant attended at the Emergency Department of University Hospital. The report from this visit states that the Appellant complained about pain in his right ankle, which interfered with his daily activities and power lifting. The examination revealed a spur and calcification on the anterial distal tibia.

[30] On February 7 1994 the WCB medical advisor reported that the Appellant was still lifting weights of 250 pounds, and had resumed work as a carpenter. He concluded that the Appellant's knees were normal.

[31] The Appellant had surgery in 1994 to remove a calcium build up in his knee. The surgery was not completely successful. The Appellant was, however, able to return to work after this surgery. He testified that when he returned to work after knee surgery, there were no light duties available. He stated that there are no light duties in carpentry.

[32] The Appellant also attended for physiotherapy in 1999 after falling at work and injuring his back. On April 20, 1999 the physiotherapist reported that the Appellant had completed a return to work program. He refused to complete back extension exercises that would manage his low back pain, and cancelled a number of appointments. The report concludes that the Appellant had the functional ability to do his job.

[33] On April 30, 1999 Dr. Koelink, family physician, reported that the Appellant had

been in a motor vehicle accident. This aggravated his back, neck and shoulder pain.

[34] On May 29, 2000 Dr. Rondeau, family physician, reported that the Appellant suffers from chronic left knee pain, and cannot work as a carpenter as he cannot kneel. He also has chronic back pain. He recommended that the Appellant attend for career counselling.

[35] On April 23, 2001 Dr. Rondeau completed the medical report that accompanied the application for CPP disability benefits. This report states that the Appellant has chronic knee pain and inflammation, chronic low back pain, asthma, and is variably depressed and anxious. The low back strain was aggravated by the motor vehicle accident in 1999. Dr. Rondeau opined that the Appellant had a very poor prognosis with respect to his left knee, which is disabling and likely permanent. His back pain would also likely become chronic

[36] On November 2, 2001 Dr. Rondeau reported that the Appellant was disabled by his back and knee problems. He had provided some counselling to the Appellant, which improved his mental health, so no anti-depressants had been prescribed. He states that the Appellant's recurrent bouts of anxiety, frustration and sometimes depression are disabling at times. On January 7, 2002 Dr. Rondeau wrote to the Appellant's advocate and again stated that his situational depression can be disabling at times.

[37] The Appellant attended for an independent medical examination with Dr. Sidky, who reported on September 9, 2004. He stated that the Appellant was restricted in sitting, standing and walking to 1.5 to 2 hours. He sometimes wakes with back pain, and has a dull ache in his knee when kneeling or remaining still. He diagnosed the Appellant with mild depressive state, passive-dependent personality disorder, low back pain and knee bursitis. The report states that the Appellant is not totally disabled, and would be able to work. He could manage a sedentary job or one that is not very physically demanding.

[38] On July 27, 2004 Dr. Weiss reported that the Appellant suffered from deconditioning in his back with diminished mobility. There was no long-term damage from the severe cut to his right leg, and the Appellant had mild to moderate degeneration in both knees. The knee issue was not serious, but does result in limitations. Similarly, Dr. Weiss found that the back

issues were likely degenerative. The Appellant has no restrictions on his upper extremities, and his asthma is stable. He concluded that the Appellant could work in a light or sedentary position.

[39] The Appellant also testified that since he last worked in 1998 he has not attempted any sedentary job. He has completed financial planning courses offered to the community, and a prospector's course. These were not full-time courses, but only once or twice each week for a short period of time. He did not receive any diploma or certificate on completion.

[40] The Appellant last worked in carpentry in 1998, although he also testified that he has done "the basics" for a family friend in exchange for her help with household chores he could not manage (for example cleaning lower cupboards).

[41] The Appellant left the hearing of his own accord after his evidence was given, including his answers to some questions from counsel for the Respondent. Dr. MacDonald then testified on behalf of the Respondent, in the Appellant's absence. She was accepted as an expert witness in general medicine. She has not examined the Appellant. Her testimony and opinions are based on a review of the medical reports in the Hearing file.

[42] Dr. MacDonald summarized the findings in the medical reports in the hearing file. She concluded that the Appellant has no limitations with respect to his upper extremities. He does, however, have a long history of leg injuries, including burns as a child, being struck by a car, and a severe laceration by machinery, all of which have healed.

[43] When the Appellant was cut by the grinder, he fell on rock and also injured his left knee. This injury resulted in some work restrictions with respect to kneeling, and climbing.

[44] The Appellant had a bony spur removed from his right ankle in November 1994 and has fully recovered from this procedure.

[45] The Appellant has suffered from situational depression, and has a mild personality disorder, which was diagnosed by Dr. Sidky. The recommended treatment was counselling.

SUBMISSIONS

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

a) Very little weight should be given to reports by doctors retained by WCB, as they are paid based on the type of report they write;

b) He suffers from knee and back injuries that render him disabled;

c) He has been denied a fair hearing because his rights under the Canadian *Bill of Rights* and *Canadian Charter of Rights and Freedoms* have been violated.

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

a) There has been no violation of any rights under the Canadian *Bill of Rights* or *Canadian Charter of Rights and Freedoms*;

b) The Appellant does not suffer from a severe and prolonged disability since the MQP and continuously thereafter;

c) While the Appellant has some physical limitations he would be able to do light or sedentary work.

ANALYSIS

Service of Notice of Constitutional Question

[48] The *Federal Courts Act* requires that a Notice of Constitutional Question be served on each of the Attorneys General in Canada in a matter where the constitutionality of any legislation is brought into question. The Appellant properly completed and served such a Notice, dated September 24, 2004. At that time, this matter was scheduled to be heard by the Pension Appeals Board. That hearing did not take place at that time. It was adjourned, and was heard by this Tribunal on September ~~22~~ 23, 2013.

[49] When the Notice of Constitutional Question was served each of the Attorneys General responded that they would not participate in the hearing of this matter.

[50] No new constitutional issues have been raised in this matter since the Notice was served.

[51] Since this is the same proceeding, and the Attorneys General had proper notice pursuant to the *Federal Courts Act*, I find that this Tribunal has jurisdiction to deal with all matters raised.

Canadian Bill of Rights Claims

[52] The Appellant argues that he was denied the right guaranteed him in paragraph 2(d) of the *Bill of Rights*. This provision provides that no tribunal can compel a person to give evidence if he is denied counsel. The Appellant argues that he has been denied counsel because this Tribunal will not pay for counsel to represent him. He also argued that he is without legal training, and therefore unable to present himself adequately at the hearing without counsel. Finally, he argued that the decision of the Supreme Court of Canada in the *British Columbia (Attorney General) v. Christie* 2007 SCC 2 case is not applicable as it deals with the interpretation of the Charter, not the Bill of Rights.

[53] The Respondent argued that section 2(d) of the *Canadian Bill of Rights* does not guarantee a right to counsel. Counsel referred me to the decision in *British Columbia (Attorney General) v. Christie* 2007 SCC 2, which was a decision that considered whether the right to counsel in a matter that was not a criminal proceeding is protected by the Charter. This decision concludes that while access to legal services is fundamentally important in any free and democratic society, the Charter does not guarantee the general constitutional right to legal assistance in non-criminal matters. The rule of law also does not historically encompass a general right to have a lawyer in a court or tribunal proceeding that affects rights and obligations.

[54] Counsel argued, further, that if a general right to have counsel in a proceeding is

guaranteed in the *Bill of Rights* or the Charter, there would be no need for section 10(b) of the Charter which specifically guarantees the right to retain and instruct counsel on arrest or detention.

[55] The wording of this provision of the *Bill of Rights* is clear. It states that a person can not be compelled to give evidence if he is **denied** counsel (emphasis added). This does not impose an obligation on governments or the Tribunal to provide counsel to a party in a legal matter, but only that if they choose to have counsel, they are entitled to have counsel represent them. In this case, the Appellant was not denied counsel. He had an advocate at one time, as is evidenced by the letter written by Dr. Rondeau on November 7, 2002. This advocate was retained, and instructed during this hearing process. The advocate did not appear with the Appellant at the hearing, and no evidence was put forward as to why.

[56] In addition, there is no guarantee in the CPP, nor any other legislation that counsel will be provided for an Appellant in a disability hearing. Such a right to counsel is not a principle of fundamental justice. Therefore I find that there has been no breach of section 2(d) of the *Bill of Rights*

[57] The Appellant also argued that his right guaranteed by section 2(e) of the *Bill of Rights* has been violated. He claims that he can not have a fair hearing without counsel being provided for him. In his written submissions, the Appellant relied on the decision in *Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201*, which decided that legal fees and interest can be awarded to non-lawyer representatives in a legal proceeding.

[58] The Respondent relied on section 86(2) of the CPP which provides for payment of legal fees to persons "represented by counsel" at a hearing if successful, with the payment to be approved by the Minister (which provision has been repealed).

[59] This provision of the CPP is clear. Not all parties are entitled to payment of legal fees, as only fees approved by the Minister will be paid. In addition, non-payment of legal fees for an Appellant does not deny them a fair hearing, nor deprive them of any of the principles of fundamental justice. An Appellant is able to present his case, respond to the

case of the opposing party and be heard fully whether he has counsel or not.

[60] The *Skidmore* case involved a situation where there was no legislative provision regarding payment of legal fees. It was a civil lawsuit, which is substantially different than a proceeding before this Tribunal. On that basis, it is distinguished from the case before me, and I do not find the reasoning persuasive.

[61] In addition, the Appellant has fully and competently made written argument. His case has been presented clearly and completely. He was not denied any opportunity to do so. He chose not to make oral argument at the hearing; he was not denied the opportunity to do so.

[62] Therefore I find that the Appellant's right under paragraph 2(e) of the *Bill of Rights* has not been violated.

Charter Claims

[63] In his written submissions that were presented in 2004, the Appellant argued that his rights, guaranteed by sections 7, 12, and 15 of the Charter have been breached.

[64] Regarding section 7 of the Charter, the Appellant argued that the CPP should be amended so that periods of time when an injured worker cannot work and contribute to the Plan because of a temporary disability should be "dropped out" of his/her contributory period the same as is done for those with a permanent disability. If this is not done, an injured worker's ability to receive income is affected, which in turn affects his/her right to have a secure income.

[65] The Appellant also stated in his written submissions that the British Columbia workers' compensation scheme, when determining the amount of benefit payable to an injured worker, automatically increases the deemed contributions for an injured worker to account for increases in income he/she would have earned as he/she progressed through an apprenticeship program had he/she not been injured. This results in regular increases in the benefit payable to those injured during an apprenticeship. The Appellant argued that since the CPP does not provide for such regular increases based on assumed increases in income,

section 7 of the Charter has been violated, as this affects a claimant's physical and mental integrity.

[66] The Appellant also argues that his right not to be subjected to any cruel and unusual treatment or punishment (s. 12 Charter) was violated, as indentured apprentices who are injured are not protected.

[67] The Respondent argued that the Appellant did not put forward the necessary factual basis for these arguments. Without such a factual basis, these arguments cannot be properly addressed and decided.

[68] I find that the Appellant has not provided any real facts upon which I can decide the issue of whether section 7or 12 of the Charter have been breached. While financial security is important, the Appellant has provided no evidence or law to support his proposition that this is a right that is protected by section 7 of the Charter (security of the person). There is also no evidence that this right, if it exists, has been breached. The right not to be subjected to cruel and unusual treatment is also important, however, in this case there is no evidentiary basis on which I can determine whether this right has been breached. In the decision of *MacKay v. Manitoba* ([1989] 2 S.C.R. 357) the Supreme Court of Canada concluded as follows:

> The courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> Charter decisions should not and must not be made in a factual vacuum

[69] There was no evidence of any economic or social nature put forward by this Appellant. There was no mention of the future impact of the legislation or any change as a result of it being found to have violated section 7 or 12 of the Charter.

[70] Without this evidence, and a fully developed argument, including a detailed factual basis for the argument, these claims by the Appellant fail.

[71] The Appellant also submitted that his right to equal treatment and benefit of the law, as set out in section 15 of the Charter had been violated. He stated that he was disabled from time to time, after the work injuries set out in the evidence. He was not found to be disabled under the CPP. These periods of time were still included in his contributory period when calculating his eligibility for CPP disability benefits. The Appellant argued that the periods that he did not work were still included as part of his contributory period to qualify for CPP disability benefits. This resulted in differential treatment from someone who is found to be disabled under the CPP, who is permitted to "drop out" from their contributory period any time that they received CPP disability benefits. This allows them to still qualify for CPP disability benefits based on their contributions prior to being found to be disabled and after.

[72] Counsel for the Respondent argued that the Appellant had not presented a factual basis from which any breach of the Charter can be established.

[73] Counsel also submitted that the Appellant worked and contributed to the CPP for some years. He also worked "under the table", received Employment Insurance and Social Assistance benefits at times, and did not make contributions to CPP. The Respondent submitted that there may have also been times when the Appellant was unable to work, although I find that there is little specific evidence on this. If all of the times that the Appellant did not contribute to the CPP were "dropped out" of his contributory period, he would not have sufficient contributions for an MQP to be found.
I agree with counsel that he would then not be eligible to receive any benefits.

[74] An analysis of any claim of discrimination pursuant to section 15 of the Charter is a three-step process. First, I must determine whether a distinction between groups has been made based on one of the enumerated grounds of discrimination set out in section 15. Then, I must determine whether this distinction creates a disadvantage to one group by perpetuating prejudice or stereotyping against them. If I find that both these have occurred, I must consider whether the legislation that creates this distinction does so in a way that it is saved

by section 1 of the Charter.

[75] I am bound by the decision of the Supreme Court of Canada in the decision of *Granovsky v. Canaas (Minister of Employment and Immigration)* 2000 SCC 28 where this same issue was decided. Mr. Granovsky injured his back at work, and was thereafter employed on an irregular basis. He then applied for CPP disability benefits. The Minister denied his application because he had not contributed to the CPP as required to qualify for this benefit. He argued that the failure of the CPP to take his disability into account in considering his lack of contributions was contrary to section 15 of the Charter.

[76] The Court concluded that the CPP did not violate this right. The CPP "drop out provision" relaxes the contribution requirements for someone with a permanent disability but not a temporary disability. The Supreme Court of Canada stated in the decision that the CPP is designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability or the death of a wage-earning spouse. It is not a social welfare scheme. The CPP imposes the same burden of contributions on all claimants and the criteria for the benefit are the same for all. These criteria are not based on stereotypical views of disabled individuals, and are not designed to exclude disabled persons from participation in the Plan. The government, through the design of the CPP or its application, does not demean a person with a temporary disability, or cast any doubt on their worthiness as a human being.

[77] The same arguments were made in this case. The reasoning of the Supreme Court of Canada applies here, and is binding on me. Therefore, I find that there has been no violation of section 15 of the Charter, and this argument fails.

[78] I need not consider section 1 of the Charter as I have found no breach of Charter rights.

[79] The Appellant also argued that this Tribunal should change the CPP so that it determines the amount of disability pension awarded based on an assumed increase in income over time, as is done by the workers' compensation scheme in British Columbia. I find no basis on which I have authority to make such an order and decline to do so.

Human Rights Act

The Appellant, in his written material, makes a brief reference to his rights under the *Canadian Human Rights Act* having been breached. At the hearing of this matter, the Appellant stated that he was relying on his claims under the *Canadian Bill of Rights* and the Charter. Therefore, any claim under the *Canadian Human Rights Act* is abandoned, and I need not deal with it further.

Disability

[80] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 21, 2000.

a.Severe

[81] 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. The Appellant was 36 at the MQP. He has limited education. He has worked as a carpenter, and also taken courses in a variety of subjects. The Appellant is fluent in English and was able to compose lengthy and complex legal arguments for this matter.

[82] The Appellant has suffered some significant injuries to his legs. These include burns, lacerations, and knee calcification. While the burns and laceration have healed, the calcification has left the Appellant with restrictions related to kneeling, climbing stairs and ladders, twisting and bending. The Appellant did work after this condition was diagnosed, and after surgery was performed which did not remove the entire calcification. He returned to regular heavy duties. The Appellant testified that there is no light duty work in carpentry. He still does basic carpentry work for a friend. I therefore find that the Appellant was able to return to regular carpentry work from time to time despite these limitations.

[83] The Appellant also complains of back pain. This resulted after he fell when cut by

the grinder, and was exacerbated by a fall at work in 1998 and a motor vehicle accident in 1999. The only medical evidence with respect to this is that the Appellant attended physiotherapy for this injury. The physiotherapist reported that the Appellant completed a return to work program and did not comply with all stretching recommendations. The Appellant gave no evidence of any ongoing treatment for back pain, nor of any referrals to specialists for further treatment or diagnosis.

[84] The Appellant wrote in his application for benefits that he suffers from asthma. He gave no evidence regarding this condition at the hearing. It is only mentioned briefly in the voluminous medical records in the hearing file, where it is described as stable. I therefore conclude that this is not a disabling condition for the Appellant.

[85] The Appellant has also been diagnosed with situational depression and a mild personality disorder. The Appellant received some counseling for this from his family doctor, who stated that there was some improvement with counseling. The doctor did not believe that anti-depressant medication was necessary. Similarly, when Dr. Sidky reported on the independent medical examination that he performed, he did not recommend any medication or treatment for this condition.

[86] In fact, all of the doctors who examined the Appellant, except for his most recent family doctor, stated that the Appellant retains the capacity for sedentary work. The Appellant also testified that he has been disabled on an intermittent basis, which is the basis for his claim of discrimination under the Charter. Therefore, I place more weight on the reports of the independent doctors, than that of Dr. Rondeau, who reported that the Appellant was disabled.

[87] The Appellant urged me not to place weight on medical reports prepared by those retained by WCB as the reports would favour those who retained them. I have examined all of the medical reports in the file. The medical professionals retained through the Appellant's WCB process stated opinions that were supported by objective medical evidence. There was no reason to disregard these reports. Their conclusion that the Appellant was able to complete light or sedentary work was also consistent with the Appellant's testimony that he is

not completely and permanently disabled.

[88] For these reasons, I find that the Appellant retains some capacity for light or sedentary work. The Federal Court of Appeal concluded that 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). The Appellant has not done so. His testimony was consistent that there are no light duties in carpentry. The Appellant attended courses to learn about prospecting. He has made no effort to work in this field. There was no evidence whether this would be considered light work. The Appellant has also completed courses in the community in financial planning/investing. He has made no effort to work in this field, which would likely be sedentary. There was no evidence that he has made any effort to work in any other sedentary position. Therefore, he has not satisfied is obligation to demonstrate that he could not obtain and maintain work within his limitations due to his disability.

[89] For the reasons above, I find that the Appellant did not have a severe disability at the MQP. None of his medical conditions were severe, and are not severe when viewed cumulatively.

b.Prolonged

[90] Because I found that the Appellant did not have a severe disability at the MQP, there is no need for me to determine whether it is prolonged.

CONCLUSION

[91] The appeal is dismissed.

Valerie Hazlett Parker
Member, Appeal Division