Citation: *A. V. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 5

Appeal No. GT-119940

BETWEEN:

A. V.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Raymond Raphael
HEARING DATE:	January 14, 2015
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	January 16, 2015

PERSONS IN ATTENDANCE

A. V. : Appellant

Gary Newhouse: Appellant's representative

Maria Delatorre: Spanish interpreter

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is not payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on June 1, 2011. 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 initially scheduled to be heard by videoconference for the reasons given in the Notice of Hearing dated September 12, 2014. Due to weather conditions and technical issues, the form of hearing was changed to teleconference.

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] The Tribunal finds that the MQP date is December 31, 2013.

[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.

BACKGROUND

[10] The Appellant was 57 years old on the December 31, 2013 MQP date; he is now 59 years old. He was born in Peru, and competed 1 ½ years of university there. He moved to Canada in 1984. In Canada, he initially worked for 2-3 years for a shoe manufacturer gluing shoes. In 1986 he started working for a manufacturer of bed mattresses. He worked there for more than 23 years.

[11] On August 19, 2009 he injured his right arm and shoulder, when he fell backwards while trying to lift a queen size mattress. He was off work for a couple of days, and then returned to work on modified duties making crib mattresses. He stopped working in February 2010, because of his painful and swollen arm. He has not returned to work since that time.

APPLICATION MATERIALS

[12] In his CPP disability questionnaire, date stamped by the Respondent on June 1, 2011, the Appellant indicated that he last worked for Leggett & Platt Canada from October 1, 1986 until August 19, 2009; he stopped working because of neck and right shoulder pain caused by a workplace accident. He noted that after the workplace accident, he continued working on modified duties and hours. He claimed to be disabled as of February 4, 2010, and listed the illnesses and impairments that prevented him from working to be severe pain in the right shoulder, and partial tears of the supraspinatus and infraspinatus tendons. He noted that he suffers from chronic right shoulder pain, and that he was unable to move his arm.

[13] A report dated May 5, 2011 from Dr. Obaji, the Appellant's family doctor, accompanied the CPP application. The report diagnosis supraspinatus tendonopathy of the right shoulder and partial tear of the infra and supra spinatus, carpal tunnel syndrome, and chronic pain syndrome. The report notes that the Appellant injured his right shoulder at work. The prognosis is guarded.

ORAL EVIDENCE

[14] The Appellant reviewed his education and employment history. He last worked was as a machine operator making bed mattresses. He put the wires through the machine to make the wired frames, measured the frames, and then lifted them onto a platform. He did not take any upgrading courses, and his work did not involve speaking to customers. He did not have to speak English, because his manager spoke enough Spanish and he showed him how to do things. He did not have any significant medical issues or problems prior to the workplace accident on August 19, 2009.

[15] The Appellant reported the accident to his manager, and was told to check things out with his family doctor. After being off work for a couple of days, he returned to work doing a lighter job making crib mattresses. He was only working four hours a day, because he was taking time off to go for physiotherapy. He stated that he went for 50-60 sessions of physiotherapy. He stopped working in February 2010, and has not returned to work since then. When asked why he stopped working, he stated, "My arm hurt a lot…it was too

swollen…I could not work." When asked why he has not tried to return to work, he stated, "My arm hurts too much…I can't move it."

[16] He underwent surgery in March 2012, and went for post-surgical therapy. He stated that the surgery hasn't helped. His arm is still inflamed, it hurts around his shoulder, and sometimes his head hurts because he is in so much pain. He takes 2-3 Tylenol #3s a day; this causes stomach problems and makes him sleep. His doctor has prescribed Pantoloc for his stomach problems. He is not undergoing any treatment modalities at this time.

[17] He is right-handed. He can't move his right arm, and it swells up. He stated that his arm is the same today, as it was in November 2010, when the WSIB Shoulder and Elbow Specialty Program, Return to Work Consultation initial assessment report was prepared. When referred to the excerpts from that report (Hearing File: p. 83) which indicate that his employer offered him lighter duties producing numbered stickers in February 2010, the Appellant denied this, and stated all of the modified jobs he was offered required working with heavy metal. When asked whether he would have been able to do this type of work primarily using his left hand, the Appellant stated that he wouldn't have been able to concentrate because of his pain, and that it would have been very difficult to cut the inventory tickets using only one hand. He acknowledged that he didn't look for alternative work between February 2010 and the WSIB decision in July 2013, and that he didn't take any ESL courses during this period. When asked why not, he stated, "I was very confused…my head hurt a lot…I couldn't think clearly."

[18] In June 2014, he started attending English language upgrading courses through the WSIB. He goes every day, for six hours a day. He stated that his English has improved a little, but he isn't sure how long the WSIB plans on teaching him English, and that he isn't sure what the purpose of this is. The WSIB has not done any physical assessments since the July 2013 decision. He uses the computer a little at home, trying to look for information in both English and Spanish.

MEDICAL EVIDENCE

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

[20] On November 16, 2009 Dr. Veidlinger, neurologist, reported that the Appellant was a machine operator and that a large metal mattress frame fell on his right shoulder and forehead nine weeks ago. The Appellant was experiencing pain in his right shoulder over the supraspinatus area, and his arm could not be fully elevated. The Appellant had all the features of a supraspinatus tendonitis. The biceps and triceps power and reflexes were normal, but the Appellant could not use or move his shoulder well. There was tenderness over the top of the head on the right side. Dr. Veidlinger indicated that the Appellant's findings are organic and related to tendonitis of the supraspinatus. The report concludes that the Appellant is getting better and that he is continuing to work on a modified basis.

[21] On February 5, 2010 Dr. Syed, orthopaedic surgeon, saw the Appellant for right shoulder pain. The Appellant complained of medial type constant pain on the right shoulder radiating to the right neck. The report notes that the Appellant injured his right shoulder in a workplace accident on August 19, 2009, and that he had undergone four months of physiotherapy, which had not been helpful. Dr. Syed explained that there is no surgical procedure for the Appellant's condition, and indicated that he would ask the WSIB for a pain clinic assessment.

[22] On March 13, 2010 Dr. Shakib, clinical fellow in the service of Dr. Syed, noted that they had referred the Appellant to the pain clinic, and that he was waiting for a call from them. Dr. Shakib explained to the Appellant that his pain was mostly related to the partial rotator cuff supraspinatus tear and chronic upper back pain, and that at that time there was no indication for a surgical procedure.

[23] On March 16, 2010 Dr. Sehmi, orthopaedic surgeon, reported that he initially saw the Appellant on December 18, 2009, and that he sent him for a MRI which showed partial tears of the infra and supraspinatus tendons in addition to tendonitis in the supraspinatus..

Dr. Sehmi sent a copy of the MRI to Dr. Obaji, and indicated that the Appellant might benefit from a steroid injection for tendon problems.

[24] On May 17, 2010 Dr. Veidlinger reported to the WSIB. He reported that the Appellant's right hand now feels numb and swollen, particularly at night; that he is holding his entire right limb in a guarded position; that the MRI on January 25, 2010 reveals partial tears of the infra and supraspinatus tendons. Dr. Veidlinger also reported that the Appellant held his entire right upper limb guarded, and that he should have a nerve conduction test because he is developing a carpal tunnel syndrome.

[25] On September 8, 2010 Dr. Sehmi reported that the bone scan did not show any definite fracture. He saw the Appellant on September 7th, and he was continuing to have pain in the right shoulder. The shoulder was almost frozen, secondary to partial rotator cuff tear and tendonitis. Dr. Sehmi injected the shoulder with Depo Medrol, and recommended daily exercises. He noted that the Appellant might have to have the steroid injection repeated in six weeks.

[26] On November 3, 2010 Dr. Gallay, orthopaedic surgeon, and Bev Amey, physical therapist, with the Sunnybrook Shoulder and Elbow Specialty Clinic (WSIB specialty clinic) reported that subsequent to his workplace accident on August 19, 2009, the Appellant had gone on to develop a severe pattern of chronic pain involving his right shoulder and upper extremity. Clinical examination was minimally beneficial because the Appellant could not move, or have his shoulder or arm moved, due to significant pain with any attempt at assessment. The report concludes that the Appellant would benefit from a Functional Restoration Program (FRP). With respect to work, the report concludes that the Appellant is unable to perform any duties with his dominant right shoulder and arm.

[27] A WSIB specialty clinic initial return to work assessment report dated November 3, 2010 indicated that the Appellant had been working modified duties, but stopped working in February 2010 due to his pain. The report indicates that based on the Appellant's description of his job, his regular duties as a machine operator exceed his current work restrictions. The report notes that the multidisciplinary team had recommend referral to a FRP. The Appellant was not scheduled to return to the clinic for follow up.

[28] When describing the modified work duties, the assessment report noted:

- He was working modified duties for 5 months until February 2010;
- His modified work involved producing a mattress for baby cribs. Worked 4 hours per day because he attended physiotherapy daily.
- Documentation indicates that the employer had suitable duties or was willing to find other duties if it was determined that these were not suitable.
- On February 23, 2010 a WSIB Return to Work Specialist came to assess the suitability of this job.
- The employer offered him a lighter job producing numbered stickers. He worked for ½ day. He reports that he was unable to continue this job due to his continued difficulties.
- He has not worked since February 24, 2010.

[29] On April 5, 2011 Dr. Lee, rheumatologist, reported that the Appellant appears to have developed a chronic pain condition which may be limiting his recovery. Dr. Lee started the Appellant on Surgam, added Pariet for gastric protection, requested a MRI, and ordered routine blood work.

[30] On December 16, 2011 Dr. Rajamanickam, on behalf of Dr. Syed, reported that Dr. Syed had offered the Appellant surgery, but because he would need post-operative physiotherapy and his WSIB entitlement was still up in the air, it was better to wait until his WSIB case was resolved so that post-operative protocols could be put in place.

[31] On March 29, 2012 Dr. Syed performed a right a complex right shoulder cuff repair, an arthroscopic debridement of the labrum and SLAP (Superior Labral from Anterior to Posterior) lesion.

[32] Dr. Syed saw the Appellant in follow up on April 12, 2012. The Appellant was to continue using a sling and to start physiotherapy. On June 18, 2012 Dr. Laban, on behalf of Dr. Syed, noted that the Appellant was doing well, but he could not do forward abduction beyond 90 degrees.

WSIB Tribunal Decision

[33] On July 31, 2013 the WSIB Appeals Tribunal released its decision with respect to the Appellant's appeal from the decision of the Appeals Resolution Officer (ARO). The Appellant withdrew his claim for entitlement for chronic pain disability (CPD) since he took the position that he has an organic condition, and he also withdrew his request for a specific order for entitlement to a FRP. At paragraph 13, the decision states as follows:

> The WSIB assigned a Return to Work (RTW) Specialist to the file. On March 1, 2010, a meeting took place at the employer's premises to discuss the employer's offer of modified work. The meeting was attended by the worker, an interpreter, the human resources manager, the worker's supervisor, and the RTW specialist. At that meeting, the employer stated that modified duties were available with the accident employer. The jobs offered were "inventory ticket count" and "machine operator-baby crib." The RTW Specialist was of the opinion that the modified work offered was suitable.

[34] In making its determination that the Appellant was not able to continue working, the WSIB Tribunal gave little weight to the conclusion of the RTW specialist regarding the suitability of modified work, and indicated that this was contrary to the opinions of qualified health specialists including a letter dated February 5, 2010 from Dr. Obaji, family physician, stating that Dr. Syed had suggested that the Appellant should not work; a note dated February 19, 2010 from Dr. Obaji indicating that the worker was not able to do any kind of work until further notice; a note from Dr. Veidlinger dated March 4, 2010 stating that the Appellant was not able to work; and a note from Dr. Obaji dated March 3, 2010 indicating the he agreed with Dr. Veidlinger that the Appellant was not able to return to work until further assessment. *This Tribunal noted that none of these reports were included in the Hearing File.*

[35] The WSIB Tribunal decision concluded as follows:

> In view of the severity of the worker's compensable injury, his language barrier, limited transferable skills, lack of suitable and available employment with the accident employer, I find that the worker was unlikely to earn any employment income after February 10, 2010. He is therefore entitled to full LOE benefits from February 10, 2010 until the date of this decision. He is also entitled to a Labour Market Re-Entry/Work (LMR) Transition Assessment pursuant to section 42 of the Act.

Documents not included in Hearing File

[36] When the Tribunal asked Mr. Newhouse why the March 2010 Return to Work (RTW) Specialist report (referred to at Hearing File: GT2-20) was not included in the hearing file, he indicated that this was through inadvertence. When asked why the Appellant dropped his request for an order of entitlement to a FRP (Hearing File: GT2- 19), Mr. Newhouse indicated that this was a tactical decision because this was subsumed under the request for a Labour Market Re-Entry/Work Transition (LMR) assessment, and that the board would order this as part of the LMR assessment if it felt that this was needed. When asked why there were no reports from the WSIB with respect to the LMR program in the Hearing file, Mr. Newhouse indicated that these reports aren't needed because of the Appellant's oral evidence that he is diligently attending the English language upgrading course, and that the WSIB has not done any physical or functional capacity assessments since the July 2013 decision. When asked why the medical notes (see paragraph 34, supra),were not included in the Hearing File, Mr. Newhouse indicated that the medical notes would just say that the Appellant should be off work, and that the medical documentation that was included clearly establishes that the Appellant was not able to work in 2010.

SUBMISSIONS

[37] Mr. Newhouse submitted that the Appellant qualifies for a disability pension because:

a) The medical evidence clearly establishes that the Appellant has suffered a complete loss of the use of his dominant right arm and shoulder, and that he has been incapable of working since 2010;

b) The Tribunal should consider the Appellant's personal circumstances including his age, his language barriers, his narrow work history in which he was not required to communicate in English, and his lack of transferable skills;

c) The Appellant's ability to attend English language courses on a regular basis is not equivalent to the ability to work in real world environment;

d) Due to the cumulative effect of the Appellant's loss of the use of his dominant right hand and the barriers created by his personal circumstances, there is no realistic chance that the Appellant will be able to pursue substantially gainful employment.

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

a) Although the Appellant was successful in his appeal for ongoing entitlement to WSIB benefits, this is not indicative of qualifying for CPP, since each regime has its own legislative criteria;

b) Although the medical evidence supports that the Appellant cannot return to his previous employment, it does not establish that he is incapable of pursuing any form of gainful employment;

c) There is no evidence of efforts by the Appellant to pursue alternative employment, suitable to his limitations.

ANALYSIS

[39] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

Severe

[40] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of

pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[41] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[42] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before December 31, 2013 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General,* 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[43] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada* (Attorney General), 2003 FCA 117.

[44] The measure of whether a disability is “severe” is not whether the Appellant suffers from severe impairments, but whether his disability “prevents him from earning a living” *Granovsky v. Canada (Minister of Employment and Immigration),* [2001] 1 S.C.R. 703. It is the Appellant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP: *Klabouch v. Canada (MSD),* [2008] FCA 33.

[45] 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).

[46] It is not sufficient for chronic pain syndrome to be found to exist; the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation. It

is also incumbent upon a person who has applied for benefits, to show that treatment has been sought and that efforts have been made to cope with the pain: *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB).

[47] It is the duty and responsibility of the Tribunal to act only on credible and supporting evidence and not on speculation: *MHRD v S.S.* (December 3, 2007) CP 25013 (PAB).

Application of Guiding Principles

[48] The medical evidence establishes that the Appellant's right shoulder injuries preclude him from pursuing any gainful employment which requires significant use of his right shoulder and arm. This precluded him from returning to his previous employment as a machine operator manufacturing bed mattresses, and the Tribunal is satisfied that this also precluded him from the attempted modified duties of manufacturing lighter crib mattresses.

[49] The Tribunal must determine whether the Appellant has established on the balance of probabilities that he is precluded from all forms of gainful employment, and whether he has made reasonable efforts to pursue alternative employment. For the reasons set out below, the Tribunal had resolved these issues in favour of the Respondent.

[50] The Appellant has the burden of proof, and the Tribunal is troubled by the Appellant's failure to include in the Hearing File critical documentation which is clearly in his possession and control (see paragraph 36, supra). The nature of the modified duties offered by the Appellant, and the failure of the Appellant to pursue the offered modified duties after February 2010, is a significant issue in this proceeding. The Tribunal recognizes that the WSIB Tribunal determined that the offered modified duties were not suitable; however, the WSIB applies different criteria and has a different focus than the CPP, and this Tribunal is not bound by that decision.

[51] The WSIB decision on this issue focused on a review of the report from the RTW specialist which opined that the offered duties were suitable, and of the notes from various physicians purportedly indicating that the Appellant was not able to continue working in any capacity (see paragraphs 33 & 34, supra). The Appellant chose not to provide copies of any of these reports to the Tribunal, and the failure of the Appellant to produce these reports was

a significant factor in this Tribunal's determination that the Appeal should be dismissed. The medical reports that were produced covering 2010 (see paragraphs 21-28, supra) establish that the Appellant was not able to perform duties with his right shoulder and arm, and that his duties as a machine operator exceed his restrictions. This does not, however, preclude all employment and the medical notes and reports that purportedly support the position that the Appellant was precluded from all employment, were not produced.

[52] In considering the evidence presented in this hearing, the Tribunal is not satisfied that the loss of use of the Appellant's right dominant arm precludes all forms of gainful employment. The Tribunal is not satisfied that the Appellant was unable to pursue the modified duties that his employer was apparently prepared to offer (see paragraph 28, supra) which seem to require minimal right arm use. The evidence suggests that the Appellant made no serious efforts to pursue such modified duties. Further in his oral evidence, the Appellant acknowledged that after February 2010, he made no efforts to pursue alternative employment, and that he made no efforts to upgrade his English language skills until he started to attend courses through the WSIB in June 2014. The Tribunal also noted that none of the LMR documentation covering the period after the July 2013 WSIB decision has been produced. The Tribunal is left to rely solely on the Appellant's oral evidence concerning his English language school attendances, when obviously relevant documentation relating to the LMR process has not been provided. As the *MHRD v S.S.* decision, supra, indicates, the Tribunal should act only on credible and supporting evidence and not on speculation.

[53] The primary issue that the Tribunal must determine is whether the Appellant's inability to perform work duties with his dominant right arm constitutes a severe disability in accordance with the CPP criteria. In considering this issue, the Tribunal was guided by the decision of the Pension Appeals Board in *B.G. v MHRSD* (April 1, 2008) CP25254 (PAB) that determined that on the facts of that particular case, the loss of the full use of the Appellant's dominant right hand did not constituted a severe disability. When discussing other PAB cases on this issue, the PAB commented as follows:

> The Board has often considered cases where claimants did not have the full use of their dominant hand. In the following cases, the Board has held that it was not a disability that was "severe".

(a) *Vaughn v. Minister of Health and Welfare*, CP 1971 (May 1992):

> It is common knowledge arising out of human observation and experience, that it is not all unusual for a person who has lost all capacity in his dominant hand or arm or, indeed, who has lost through accident or amputation, his entire dominant limb, to retrain and recondition the other extremity or limb, to perform virtually all physical functions which he was formerly able to carry out.

(b) *Brunet v. Minister of Employment and Immigration*, CP 3476 (March 1990):

> It is not unreasonable that, in today's work place, there do exist jobs which an otherwise reasonably fit middle-aged man, even lacking full use of his dominant arm, would have the physical capacity to perform.

c) *Kathy Bines v. Minister of Human Resources Development*, CP 14261 (November 2001):

> We are bound by the Plan to consider the term "severe" in terms of the Appellant's capacity to work. It is not based on her ability to perform her usual job but rather any job whatsoever. Capacity to perform part-time work, modified activities or sedentary occupations have been held to preclude a finding of severity. We are of the view that the loss of the full use of one hand by a person who is otherwise able bodied does not prevent that person from seeking and obtaining employment in the real world.

[54] Although the Appellant is not able to perform work duties with his dominant right hand, there is no suggestion that he is disabled in any other way. The Tribunal recognizes that he suffers from chronic right shoulder pain, but this in itself is not sufficient, and the pain must be such as to prevent the sufferer from regularly pursuing a substantially gainful occupation (see *Densmore*, supra). The Appellant has made minimal efforts to retrain and/or

pursue alternative light employment and, accordingly, has failed to meet the test set out in *Inclima* (supra).

[55] After a careful review of the whole of the evidence, the Tribunal has determined that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

Prolonged

[56] Having found that the Appellant's disability is not severe, it is not necessary for the Tribunal to make a determination on the prolonged criteria.

CONCLUSION

[57] The appeal is dismissed.

Raymond Raphael
Member, General Division