Citation: ***A. A. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 29**

Date: April 9, 2015

File number: GT-119066

GENERAL DIVISION- Income Security Section

Between:

A. A.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Neil Nawaz, Member, General Division - Income Security Section

Heard by Videoconference on April 1, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. A., the Appellant;
Einav Shlomowitz, the Appellant's representative;
John Rose, observer and Social Security Tribunal member in training.

DECISION

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

INTRODUCTION

[2] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on June 14, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[3] As explained in the Notice of Hearing dated, this appeal was heard by videoconference for the following reasons:

- The Appellant was the only party attending the hearing;
- The form of hearing provided for the accommodations required by the parties or participants;
- Videoconferencing was available in the area where the Appellant lives;
- The issues under appeal were complex;
- There were gaps in the information in the file and/or a need for clarification;
- The form of hearing was the most appropriate to address inconsistencies in the evidence; and,

- The form of hearing respected the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] This appeal was previously scheduled for January12, 2015, but the hearing was adjourned on January 6, 2015, at the request of the Appellant's representative, because of a conflict with an unexpected trial at the B. Court.

PRELIMINARY MATTERS

[5] On January 15, 2015, the Tribunal received 278 pages of documents from the office of Justin Linden, the Appellant's representative, more than two months after the November 13, 2014 filing deadline specified in the Notice of Hearing, which also advised the parties that any documents not filed within the appropriate timelines would be admitted only at the Tribunal Member's discretion.

[6] In a letter dated January 21, 2014, the Tribunal Member invited the parties to make written submissions on whether the above-noted documents should be accepted and considered as part of the hearing. The Appellant's representative replied with a letter explaining that his office had only recently discovered the file relating to the Appellant's motor vehicle accident (MVA) claim after the filing deadline. He added that the documents were vital to the Appellant's CPP disability claim and would do no harm to the Respondent's right to fairness if they were admitted. The Respondent sent a brief email merely stating that, as the documents were late, it would not be making any submissions.

[7] Having reviewed the parties' submissions and heard an oral argument from Ms. Shlomowitz, the Tribunal decided with some reluctance to admit the late documents, despite a lingering suspicion that the prior adjournment request had been made in an effort to circumvent the filing deadline. As only three medical reports had been submitted prior to that deadline, the Tribunal agreed that the Appellant's appeal would be likely be damaged if the late package, which contained highly relevant medical assessments addressing the Appellant's vocational capacity, were kept out of the hearing. The Tribunal also agreed that the interests of the Respondent would not be unduly prejudiced by admitting the reports.

THE LAW

[8] 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 Tribunal.

[9] 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).

[10] 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.

[11] 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.

ISSUES

[12] The Tribunal must determine whether:

(a) The Appellant's contributions during his contributory period established a Minimum Qualifying Period ("MQP") and

(b) The Appellant has a disability that is "severe and prolonged" and that consequently prevents him regularly from performing any kind of "substantially gainful" work.

EVIDENCE

Documents

[13] In his Questionnaire for CPP Disability Benefits dated (p. 46), the Appellant disclosed that he was involved in a November 13, 2008 MVA, leaving him disabled him from all forms of work. As a result of his injuries, he reported that he could not walk more than ten minutes or sit or stand more than five to ten minutes before the pain became intolerable. He required a cane and knee brace to walk and could not climb stairs or ladders. He was able to drive for up to 15-20 minutes. He was forgetful and unable to concentrate. He slept poorly.

[14] He was born in X in October 1966 and immigrated to Canada with his family at the age of 12. After completing high school, he studied diamond setting at George Brown College and went into business as a jeweller. He was most recently employed as a heavy equipment operator and dump truck driver for Rafat General Construction, a job he held from 2006 until his automobile accident. He listed among his medications Celebrex, Naproxen, Meloxicam, (all anti- inflammatory pain relievers), Lenoltec #3 (a narcotic pain reliever) and Hydrochlorothiazide (a diuretic used to treat high blood pressure).

[15] In the initial CPP Medical Questionnaire dated May 11, 2011 (p. 37), Hamid Nourhosseini, an orthopedic surgeon, reported that the Appellant had been involved in an MVA, in which he was trapped under a dashboard and engine for two hours, sustaining an open wound to the patella. He had been diagnosed with high grade chondrosis of the medial femoral condyle and tibial plateau, patellofemoral osteoarthritis and a microfracture of femoral trochlea. On examination, he exhibited significant grinding and effusion (swelling) of the knee, decreased range of motion and an inability to walk without the assistance of a cane or brace. Physiotherapy had produced no improvement. He made use of a custom-made unloader brace, which he needed to wear eight hours per day, five days week.
Dr. Nourhosseini concluded that he would not be able to return to work in construction or any work that involved heavy lifting, standing, walking or use of stairs.

[16] An Ambulance Call Report dated November 13, 2008 (p. GT6-6) indicated that the Appellant was the driver of a vehicle that was T-boned by a truck. He was trapped

on the driver's side and was extracted with difficulty. He suffered no loss of consciousness or obvious injury, other than a small laceration to the right knee. He complained of pain in his back, chest wall and right knee.

[17] An Emergency Report dated November 13, 2008 (p. GT6-11) was nearly unreadable, but it appeared to document the Appellant's complaints of pain in his back, left elbow and right knee. He was otherwise ambulatory.

[18] In an Independent Medical Examination prepared at the request of the Appellant's representative and dated February 9, 2009 (p. GT6-270), Marco Chiodo, a psychologist, wrote that the Appellant complained of symptoms that included a labile mood and anhedonia. Dr. Chiado diagnosed the Appellant with post-traumatic stress disorder (PTSD) and situational phobia. The level of impairment was moderate. He recommended relaxation training and a course of cognitive behavioural therapy.

[19] In a report dated March 10, 2009 (p. GT6-258), Joseph Kwok, an orthopedic surgeon, wrote that he had been asked to conduct an Independent Medical Examination by the Appellant's representative. The Appellant relayed that he lacerated his right knee in the MVA and experienced pain in its anterior aspect. He fractured two ribs in the MVA and felt pain in his chest and with deep breathing. He suffered pain radiating to his left arm and experienced back pain whenever he sat, stood or walked for more than 15 minutes. On examination, he had reduced active and passive range of motion of his left shoulder. His lumbar spine showed slightly reduced extension and flexion. There was patellofemoral tenderness but no effusion in his right knee. He had lost approximately 30 degrees of active and passive range of motion. There was no sign of ligamentous instability. Dr. Kwok diagnosed the Appellant with right knee impairment and other musculoskeletal limitations as a result of the MVA. He would be disabled from lifting, carrying, reaching, lifting, repetitive pushing, pulling, bending, squatting, kneeling, stooping, climbing, running, jumping and prolonged sitting, standing and walking. In Dr. Kwok's opinion, he was unable at present to return to his pre-accident work. He had not yet achieved maximum improvement.

[20] An MRI of the right leg dated April 24, 2009 (p. GT6-29) indicated an incidental bony lesion in distal femoral shaft. There was no sign of joint effusion.

[21] An x-ray of the right knee dated May 14, 2009 (p. GT6-28) indicated no abnormality, other than signs of an old bone infarction.

[22] In a letter dated May 26, 2009 (p. GT6-50), Stephen Wong-Shue, a specialist in sports medicine, wrote that the Appellant presented with pain in his right knee following a November 2008 MVA. There were no fractures, and scans revealed no structural abnormalities. On examination, he showed full passive range of motion. There was some peripetallar tenderness but no effusion, and he complained of tightness in the anterior aspect with motion. There was also some muscle atrophy. Dr. Wong-Shue counselled the Appellant to attempt to walk without cane as much as possible and undertake more aggressive physiotherapy.

[23] A bone scan dated June 26, 2009 (p. GT6-26) indicated multiple foci of increased uptake in the ribs and clavicles, as well as uptake in the right femur worthy of further investigation.

[24] In an Independent Medical Examination report dated November 30, 2009 (p. GT6-250), Ali T. Ghouse, a physiatrist, wrote that the Appellant self-described his activity tolerance as being able to sit for 30-40 minutes, stand for 10-15 minutes and walk for about 10-15 minutes at a time. He was able to climb a flight of stairs but avoided lifting and carrying. He felt pain with bending and turning. He was independent in personal care. On examination, his shoulders were normal except for a left abduction limited by pain to 135 degrees. On the right knee, there were healed lacerations and there was patellofemoral crepitus but no effusion. The grinding test was positive. Range of movement was normal. Dr. Ghouse diagnosed the Appellant with chronic myofascial pain, musculigamentous cervical and lumbar strain and a right knee patellofemoral contusion with arthralgia. He would be limited in using his left shoulder and arm in reaching, lifting and carrying. His right knee would limit him in kneeling, squatting and frequent climbing. Dr. Ghouse recommended that the Appellant be enrolled in multidisciplinary rehabilitation therapy program. By the Appellant's own estimation, he had already improved 50 to 60 percent and further progress was expected.

[25] In a letter dated May 13, 2010 (p. GT6-19), Shahira Boulos, a general practitioner, wrote that the Appellant was unable to go to work.

[26] Dr. Boulos' clinical notes from July 19, 2004 to October 8, 2008 to (pp. GT6-60-76) and November 18, 2008 to April 27, 2010 (pp. GT6-31-49) were reproduced for the hearing file and duly reviewed.

[27] In a Pre-operative Consultation Report dated June 3, 2010 (p. GT6-248), Dr. Nourhosseini wrote that there was significant grinding and effusion in the Appellant's right knee. An arthroscopic assessment would be booked for October.

[28] An MRI of the right leg dated August 5, 2010 (p. GT1-43) indicated normal articular cartilage and bone signal in the patellofemoral joint, with no joint effusion. Enchondroma was seen in the distal femoral shaft.

[29] In an Operative Report dated October 26, 2010 (p. GT1-42), Dr. Nourhosseini documented his diagnostic arthroscopy and surgical repair of the Appellant's right knee. He was found to have grade II chondrosis (cartilage loss and/or damage) of the patellofemoral joint, which was debrided using an arthroscopic shaver. The medial and lateral compartments were well preserved, except for a small area of 3 x 4 mm of grade II chondrosis on the medial femoral condyle, which was debrided. The Appellant also had a small tear to the base of the body of the medial meniscus close to the capsule, which was repaired using sutures.

[30] In a letter to the Appellant's representative dated December 30, 2010 (p. GT1-41), Dr. Nourhosseini wrote that the Appellant underwent arthroscopic surgery of the right knee in October for high grade chondrosis of the medial femoral condyle and tibial plateau and also the patella. Since the operation, he had not showed any improvement because of his overall varus alignment of the lower extremity and advancement of his chondrosis. He might benefit from unloading the compartment and realigning the knee through surgery with high tibial osteotomy, which he would eventually need, or through an unloader brace. Dr. Nourhosseini did not see the Appellant going back to heavy construction work anytime soon, if ever.

[31] In a Past and Future Income Loss Analysis prepared for the Appellant's legal representative dated April 30, 2011 (p. GT6-228), Ian Wallach, a chartered accountant, described eight scenarios for the Appellant's post-MVA residual earnings capacity. They ranged from no earnings to full-time earnings as a clerical worker.

[32] In a Home Accessibility Report dated May 31, 2011 (p. GT6-171), Jeffrey Baum, an occupational therapist, recommended that a mechanized stair lift be installed in the Appellant's home.

[33] In a letter addressed to the Appellant's lawyer dated July 19, 2011 (p. GT6-162), David J. G. Stephen, an orthopedic surgeon, wrote that the Appellant underwent a right knee arthroscopy in October 2010, which revealed a high grade chondrosis of the medial femoral condyle, tibial plateau and the patella. On examination, his left shoulder was tender along the left clavicle, particularly into the AC joint and to a lesser extent medially. His right knee showed decreased (approximately 3/5) power in extension and flexion. He had pain at the extremes of motion and a range of motion from 0 to 100 degrees, as compared to 0 to 130 degrees on the left. His cruciate and collateral ligaments were stable. In Dr. Stephen's opinion, the Appellant would have ongoing limitations with walking, standing and climbing. It would be unlikely that he could return to work as heavy equipment operator. Therefore retraining to a sedentary occupation would seem appropriate in light of the fact that he had an educational background in business administration. Although Dr. Nourhosseini referred to a varus malalignment, Dr. Stephen did not see any evidence of it, but offered to review standing films of the lower extremities to confirm this clinical picture. Over the long term, the Appellant was at risk to develop more advanced degenerative arthritis that would require a total knee arthroplasty. The exact probability was indeterminate but would be certainly be greater than ten percent during his lifetime.

[34] In a Vocational Assessment Report, apparently addressed to the legal counsel of the Appellant's automobile insurer and dated November 15, 2011 (p. GT6-127), Sean FitzGerald, a vocational assessor, reviewed the Appellant's medical history and outlined the results of psychometric testing. The assessor observed pain behaviours during psychometric testing and felt the Appellant "took an inefficient approach" that produced results that were not in keeping with his pre-MVA functioning. There was some doubt about the extent to which the Appellant operated heavy equipment prior to the MVA, but he would be best described as an inexperienced worker. The assessor concluded that while the Appellant would be unlikely to resume work as heavy equipment operator, he could function in a full-time clerical occupation, such as a retail, office or purchasing clerk.

[35] In a Vocational Assessment Report dated January, 31, 2012 and addressed to the Appellant's representative (p. GT6-104), Reva Katz-Ulster and Robert Katz, both social workers and vocational assessors, summarized the Appellant's vocational history, noting that he was a customer service representative at a jewellery retailer and later owned and operated jewellery booths in several locations. At the same time, he also became a Subway sandwich franchisee and spent three years running a restaurant before selling it in 1994. In 1998, he gave up the booths and opened a full-service store in a mall, but the economic downturn after 9/11 caused sales to suffer and he closed it in early 2002. He then took a nine-month inventory control contract with Phillips Canada and later a temporary placement as a production assembler and quality control inspector for Magna International. At the end of 2005, he began working for Rafat General Contracting as a small equipment operator. The next year, he obtained a transport truck driver's license and began on the job training as a heavy equipment operator. In November 2008, the Appellant was involved in an MVA, sustaining fractures to two of his ribs and injuring his back, neck, right thigh and knee. Despite two years of treatment, he never fully recovered. The assessors specifically rebutted Sean FitzGerald's report, declaring that it was "not a vocational assessment" because it neither explored the reasons for the Appellant's inability to work, nor offered alternative employment suggestions. Mr. FitzGerald unreasonably dismissed the results of standardized tests that indicated the Appellant's aptitudes were borderline, not considering the possibility his score were low because of his injuries. He understated the Appellant's lost earning capacity as a heavy equipment operator and overstated his ability to earn a living as an office clerk:

> Even if he had never been injured, there would be no prospect of [the Appellant] maintaining competitive employment as a clerk. He is not proficient in English and the ability to write English is the *sine qua non* for virtually every clerical job in Toronto. As noted above, his writing skills would be completely inadequate for office duties—he would have difficulty even working as a receptionist since he would not be able to prepare clearly written messages.

The assessors concluded that there remained the possibility that he could recover to the point where he could work competitively at a light or sedentary job:

> With his limited English and highly specialized training, he will require some upgrading if he is to avoid being relegated to the low-level minimum wage jobs that we are loathe to recommend. Simply put, [the Appellant] is too accomplished for anyone to expect him to become a parking lot attendant or security guard in an office tower.

If he started to recover, he might be a candidate for retraining for positions such as denturist, podiatrist, x-ray technician, precision instrument repairer, hearing aid dispensing technician or optical dispensing technician. As a last resort, he could return to selling jewellery, although he "hated" this option because he rued the long hours he spent developing his businesses, and did not want to be reminded of past failures. "Still, selling jewellery from behind a counter would be a better option than none at all."

[36] In a Housekeeping and Home Maintenance Needs Assessment Report dated February 16, 2012 (p. GT6-84), Stacey Bergman, an occupational therapist, described her observations of the Appellant's functional limitations in his home, which he shared with his parents. Ms. Bergman recommended a range of maintenance services, including cleaning, homemaking, lawn care and snow removal.

Testimony

[37] The Appellant recalled his November 2008 MVA, in which he was struck by another vehicle and trapped in the driver's seat for more than an hour. His knee was crushed against the dashboard and blood was coming out of his mouth. He felt a lot of pain in his shoulder, back and knee.

[38] He was born in Iraq and came to Canada with his family at the age of 12. He was trained as a jeweller but at the time of his MVA had started a new career in the construction industry. He planned to work his way up and eventually become a supervisor. At the time of his MVA, he was driving a dump truck for a living. He never returned to work and still can't sit or stand for any length of time.

[39] He lives with his parents. His mother has hired people to do household maintenance because he is no longer capable of it. His father is not well and requires kidney dialysis three times per week. He is under a lot of stress. He did not expect this from his life.

[40] The Appellant told the Tribunal that he did attempt to search for alternative employment. Maybe two years ago, he went to "a few places"—small convenience stores, Canadian Tire, Shoppers Drug Mart—and asked if they needed light duty help, but they

always required eight hours per day. He never filled out any applications but just talked to the managers. He would be mentally and physically unable to perform a desk job. He can't sit for any length of time because of tailbone pain and can't write or type because of arthritis.

[41] The Appellant was asked if he had been formally diagnosed with arthritis. He replied that he takes pills for this condition and they make him drowsy. He acknowledged being able to write, but not for long periods. He can sit for 15 to 20 minutes at a time at most. At that point, he has to get up to walk around, but he can't walk because he wears a brace. In addition, he has constant pain in his back, as well as recurrent migraines. He has never seen a neurologist, although he has seen many doctors. He regularly sees his family physician, Dr. Boyrizian, who has sent him to hospital a few times. He regularly sees another GP, Dr. Boulos, who handles his medications.

[42] The Appellant was asked about Dr. Ghouse's November 2009 observation (p. GT6-252) that he could sit for 30 to 40 minutes—a considerably longer time than what he was claiming he was capable of at the hearing. He replied that he was receiving physiotherapy at the time. It stopped when his insurance company cut him off. In response to questioning, the Appellant confirmed that he was cut off when his accident benefits claim was settled and he received a lump sum payment. He was asked why a portion of those funds had not been directed to physiotherapy, since it was apparently beneficial. He replied that he had lots of debts to pay at the time.

[43] The Appellant's attention was then directed towards the home accessibility report (p. GT6-171), in which it was recommended that a mechanized home stair lift be installed. He replied that it hadn't, in part because his parents' house was on two levels and they thought it was too expensive. Asked whether there had been any thought of moving, he replied that he was planning to because it was very hard to climb the stairs.

[44] The Appellant was asked about the vocational assessor's comment (p. GT6-122) that he was "not proficient in English." How was that possible when he had been in Canada from the age of 12 and graduated from high school? The Appellant replied that it was more accurate to say that he found it hard to write in English because he was unable to concentrate on account of this pain. He wouldn't be able to work at a desk and would need many breaks. He

would always be agitated, never comfortable. For that reason, he would never be able to return to his previous occupation as a jeweller, nor would he be suited to a retail job. He would need to focus but he can't concentrate. It is extremely annoying.

[45] He currently takes medications for his migraines, high blood pressure, stress and knee swelling. He can't remember their names. He has not had further surgery on his right knee since the October 2010 arthroscopy, but he has been told he will eventually require knee replacement. He doesn't see any other specialists. Asked whether he had ever been referred to a psychiatrist or other mental health counselor, he replied that it had been talked about, but no appointment was ever made. He saw someone in Vaughan for a few months, but he can't remember her name. He doesn't remember how many times he saw her.

[46] He was asked about various courses he had taken at Seneca College (p. GT 6-139). He replied that he couldn't remember. He thinks he registered but then had to go to Alberta for family reasons.

[47] He still drives but only for very short distances. He does it very carefully. He can't cope. He can't sit. He had to drive to today's hearing because he had no choice. Taking a cab would have been too expensive.

[48] All he knows is that he is not normal like he used to be. He has come to realize that he has no choice but to except his life as it is.

SUBMISSIONS

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

(a) He was seriously injured in a January 2008 MVA and has been diagnosed high grade chondrosis and patellofemoral osteoarthritis of the right knee;

(b) As a result of these injuries, he suffers from severe and ongoing pain in his back and right knee, rendering him incapable of any job for which he might be qualified by background and training;

(c) He has explored numerous treatment options, including arthroscopic surgery, physiotherapy and use of prescription painkillers, but none has provided any significant or long-term relief;

(d) Several independent medical examinations, including those commissioned by his long term disability insurer, have confirmed that he is no longer capable of substantially gainful employment.

[50] The Respondent did not appear at the hearing, but in previous written submissions dated September 12, 2013 (p. GT2-4) and February 2, 2015 (p. GT7-1), it argued that that the Appellant does not qualify for a disability pension because:

(a) No diagnostic tests or imaging reports have been made available to indicate the Appellant has a severe underlying pathology;

(b) While his back pain and right knee may limit him from doing some types of tasks, there is nothing in the evidence to indicate that he is prevented from performing all forms of work;

(c) He has received physiotherapy with positive results and is now managed conservatively with medication;

(d) Although he has good experience in the retail sector, there is no evidence that he has attempted alternative work or retraining for a job more suitable to his limitations.

ANALYSIS

[51] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the end of the MQP.

MQP and Contributions

[52] In order to qualify for the CPP disability pension, the Appellant must have made sufficient valid contributions during his contributory period to establish an MQP. To establish

an MQP after 1998, the CPP requires an applicant to show valid contributions in at least four of six calendar years. In written submissions, the Respondent proposed that the applicable MQP in this case ended on December 31, 2010, as the Appellant last had valid contributions over a six-year window in the four years of 2005-08 inclusively (see Record of Employment, p. 21). The Tribunal made the same analysis and the Appellant and his representative understood and agreed that, in order for him to qualify for the CPP disability pension, the evidence would have to show that he became disabled prior to the end of 2010 and has remained so since.

Severe

[53] 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.

[54] 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).

[55] In this case, evidence of a severe medical disability as of the MQP date was unpersuasive. While the Tribunal does not doubt that the Appellant has experienced pain in his right knee and other regions in recent years, he was unable to present compelling evidence that he was incapacitated from regularly pursuing substantially gainful employment as of December 31, 2010.

[56] The Appellant was involved in a November 2008 MVA that he claims rendered him completely disabled from all forms of work. Over the years, he has given varying accounts of the injuries he suffered in this accident, but the ambulance and emergency reports make it clear that he did not lose consciousness and sustained a small laceration to his right knee. He did not, as was relayed to some of his assessors, fracture his ribs. While he was trapped under the dashboard, it took approximately 35 minutes to extract him from the vehicle (p. GT6-7),

not two hours as was indicated in Dr. Nourhosseini's CPP medical questionnaire of May 2011. At the ER, he was ambulatory.

[57] Less than one week after the MVA, the Appellant saw his family physician, Dr. Boulos (p. GT6-31), complaining that he had neck and back pain and could not sit. The Appellant's right knee later emerged as the focus of the Appellant's disability claims, but at that time, Dr. Boulos noted only that he had a small laceration and was complaining of stiffness. In his next visit (date unknown), Dr. Boulos relayed that while his knee still felt "something," he was "walking and sitting much better."

[58] The Tribunal reviewed the available imaging reports for evidence of an "objective" basis underlying the Appellant's complaints. All scans conducted in the immediate aftermath of the incident were essentially normal, save for what appeared to be a pre-existing enchondroma (cyst in the cartilage) in the distal femoral shaft. An MRI of the right knee from April 2009 was essentially normal, as was an x-ray taken the following month. An August 2010 MRI showed the enchondroma and indicated normal articular cartilage and bone signals in the patellofemoral joint.

[59] There were indications in the file that the Appellant may suffer from depression and PTSD. However, it did not appear that his psychological condition has significantly contributed to his disability, as the available reports (both Dr. Chiodo's and Dr. Gladshteyn's February 2009 assessments [the latter referred to on p. GT6-114] suggested only moderate impairment). Moreover, it does not appear that he has ever received regular mental health counselling or been on a sustained course of antidepressant or anti-anxiety medications.

[60] Assessing the medical evidence in this appeal presented the Tribunal with a special challenge. Many of the reports were generated pursuant to a highly adversarial accident benefits claim between the Appellant and his automobile insurer. During this process, he was assessed by numerous specialists commissioned by both sides, and the resulting reports often come to widely divergent conclusions. Many of the reports appeared to have an agenda and were prepared specifically to apply legal criteria that have limited relevance to the CPP's test of "severe and prolonged." Other reports were focused on the Appellant's earning capacity prior to the MVA with a view to assessing his post-accident losses, an issue that was not of

direct interest to the Tribunal. It was also evident, from summaries contained in the available documents, that selected reports, possibly those unfavourable to the Appellant, were not submitted with the CPP disability application.

[61] For this reason, the Tribunal paid particular attention to the comments of medical professionals who were actually providing treatment to the Appellant, as opposed to assessing him on a one-time basis pursuant to litigation or claims processes. Dr. Nourhosseini, the orthopedic surgeon who first examined the Appellant in June 2010, noted significant grinding and swelling in the right knee and subsequently performed arthroscopic surgery in which he repaired a small tear of the meniscus. Although Dr. Nourhosseini later referred to a finding of "high grade" chondrosis in letters written pursuant to the CPP application, in his operative report he noted only grade II chondrosis (grade IV being the most serious), which he treated with debridement. Despite the surgery, the Appellant reported no improvement in his symptoms, which Dr. Nourhosseini attributed in part to a varus malalignment of the lower extremity. It is notable, however, that Dr. Stephen, another orthopedic surgeon who was commissioned by the Appellant's representative, saw no such malalignment.

[62] The only other report on file that was generated in a purely clinical context was Dr. Wong-Shue's May 2009 physiatry report, which noted the Appellant's right knee pain complaints, but found no locking or swelling and only peripatellar tenderness. As no structural abnormalities were detected, the Appellant was advised to begin walking without his cane and commence more aggressive physiotherapy. The Appellant's subsequent history, however, shows that Dr. Wong-Shue's recommendations were ignored. Far from becoming less reliant on his cane, the Appellant now also wears a knee brace. He testified that physiotherapy had in the past improved his pain and enabled him to sit for up to 30 to 40 minutes at a time (as compared to the five or ten minutes he claims now), yet he stopped taking physiotherapy when his insurance company "cut him off" following a settlement of his accident benefits claim. Although he was paid a lump sum, a portion of which was presumably earmarked to pay for future therapy, he elected instead to pay down his debts. Prior case law has consistently held that an applicant for a CPP disability pension has an obligation to mitigate his debilities by pursuing treatment that offers a reasonable prospect of medical benefit.

[63] The bulk of the remaining documentary evidence consisted of medical-legal reports. All of them were in broad agreement that the Appellant would no longer be capable of working as a heavy equipment operator because the job demanded repeated walking, bending, reaching and reaching. However, the Tribunal found it interesting that none of the reports, whether commissioned by the Appellant's legal counsel or his insurer, ruled out the possibility that he would be capable of some alternative sedentary occupation. Dr. Kwok and Dr. Stephens, orthopedic surgeons hired by the Appellant's representative, both found at most minor loss of range of motion and outlined a range of physical limitations that would prevent him from returning to his previous heavy job. Dr. Stephens thought the Appellant was fit enough to specifically recommend that he undergo retraining for a sedentary occupation in view of his business administration background. Dr. Ghouse, a physiatrist, relayed a fairly high tolerance for extended sitting and found that his right knee range of motion was normal. Contrary to what he told other assessors and the Tribunal, the Appellant told Dr. Ghouse that he was able to climb stairs. Like the other assessors, Dr. Ghouse agreed that the Appellant would be unable to return to physical work, as his left shoulder and arm pain prevented him from reaching, lifting and carrying, while his right knee pain prevented kneeling, squatting and frequent climbing. However, none of these limitations suggested that the Appellant would be precluded from sitting at a desk or counter and using his hands to occasionally keyboard or answer a telephone.

[64] Even Robert Katz and Reva Katz-Ulster, the vocational assessors who were the most forceful advocates for the Appellant's disability claim, conceded that there was a chance he might be able to return to the workforce provided he made a recovery. In their point-by-point rebuttal of the insurer-sponsored FitzGerald report (which concluded the Appellant was capable of full-time work as a clerk or jewellery salesperson), Mr. Katz and Ms. Katz-Ulster were "loathe" to suggest the Appellant resort to a minimum wage job because they felt he was too accomplished to be a parking lot attendant or security guard. Yet, perhaps paradoxically, they also expressed doubt that he would be capable of retraining because his oral and written English skills were so poor, even though the Appellant came to Canada at the age of 12 and graduated from high school in this country. While the assessors noted that his English was poorer than "one might expect from someone who attended school in Canada," they accepted his explanation that his knee pain contributed to his unimpressive

presentation. They also speculated that the Appellant's injuries were responsible for his low-to-borderline scores in vocational and aptitude testing and criticized the FitzGerald report for concluding that the results were likely an underestimation of his actual demonstrated vocational aptitudes. In doing so, Mr. Katz and Ms. Katz-Ulster were apparently taking the Appellant's complaints at face value, minimizing the weight of medical evidence that suggested his pain and functional limitations were tolerable. The Tribunal also noted that Mr. Katz and Ms. Katz-Ulster did not administer any psychometric testing themselves, raising the question of how would they know better than Mr. FitzGerald whether the Appellant's poor results were due to pain or suboptimal effort.

[65] At the hearing, the Appellant's testimony suggested that he sincerely believes himself disabled, but the many inconsistencies in his descriptions of his symptoms—conveyed in varying accounts over the years to medical practitioners, to independent assessors and to this Tribunal— left doubt about the degree of severity of his pain and its disabling effects. The Tribunal was also troubled by indications that the Appellant has made little or no effort to retrain or find alternative work that might better accommodate his debilities. In testimony, he described approaching managers of retail stores such as Canadian Tire and Shoppers Drug Mart, but he also said he never felt capable of the jobs on offer because they all demanded full-time hours. This frankly struck the Tribunal as unlikely. It appears that the Appellant rather precipitously gave up on the idea of work almost immediately after his MVA. While there can be little doubt that he is currently unable to work as a heavy equipment operator or in any capacity in the construction industry, there may have been more sedentary jobs available to him that would be less likely to aggravate his right knee—the predominant source of his pain and discomfort.

[66] In the end, the Tribunal was unwilling to accept that what appears to be a moderate injury to the right knee would so completely disable an individual. The CPP demands that an applicant show an inability to pursue regularly *any* kind of substantially gainful employment— commensurate with his background and training—and this is a fairly difficult standard to meet. In the circumstances, it is possible to imagine that the Appellant, who was only 44 years old at the time of MQP, might be able to find and maintain some form of sedentary employment more compatible with his condition. Looking at the "whole person,"

the Tribunal was compelled to conclude that there simply wasn't enough evidence to show that the Appellant's disability crossed the threshold to "severe."

Prolonged

[67] As the Appellant's complaints of musculoskeletal pain fall short of "severe," there is no need to consider whether his disability can be termed "prolonged."

CONCLUSION

[68] The appeal is therefore dismissed.

Member, General Division