Citation: ***G. M. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 49**

Date: May 28, 2015

File number: GT-123833

GENERAL DIVISION- Income Security Section

Between:

G. M.

Appellant

and

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

Respondent

Decision by: Vikki Mitchell, Member, General Division - Income Security Section

Heard by Questions and answers from March 17, 2015 until May 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on November 10, 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.

[2] The hearing of this appeal was by Questions and answers for the following reason:

There are gaps in the information in the file and/or a need for clarification

THE LAW

[3] 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.

[4] 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).

[5] 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.

[6] 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

[7] The Appellant began receiving CPP retirement benefits in January 2012.

[8] 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 December 31, 2011.

EVIDENCE

[9] The Appellant was 60 years old at his application for CPP disability benefits. He began receiving CPP retirement benefits in January 2012. He has a grade 13 education. At the time of applying, he was working 8 hours per day, 5 days per week, earning $29 per hour. He clarified that he worked in an injured worker shop where all his restrictions are met. He stated that he had been receiving counselling since 2009 for emotional, mental and depression issues. He retired from his job on January 31, 2014.

[10] A letter from the Appellant's family doctor in 1998 indicated the following precautions: - avoid kneeling, squatting, stair climbing, and climbing ramps -avoid standing for prolonged periods -he should be allowed to change positions frequently -he is able to walk on even ground for up to 50 yards.

[11] The Appellant had had his right knee replaced in 2005 and his left knee replaced on September 4, 2008. A follow-up report from Dr. Syed, specialist in joint replacement surgery of the hip and knee, on November 10, 2008 reported that the Appellant was doing well. Continued physiotherapy and use of the prescribed compression stockinette were recommended.

[12] In February 2009 the Appellant was advised that he could return to work with the previous restrictions. In May 2009 the Appellant still noted constant pain over the knee although x-rays showed that everything was stable. In August 2009 the Appellant still had a lot of pain in both knees. He was advised that further therapy should improve his ability to work and do activities. In November 2009 the Appellant was taking 4 Oxycodone per day for pain. In February 2010 the Appellant felt he was unable to return to work and his restrictions were for

sedentary work only. In March 2010 the Appellant was taking Percocet for pain and had complaints of constipation. The Appellant was given Mobicox to solve this problem. In May 2010 the Appellant was still off work and had pain in both knees, and noted lower back pain and bilateral ankle pain due to arthritis

[13] In December 2010 the Appellant still had some pain in his knee. Dr. Syed felt that should improve with time. In February 2011 the Appellant continued to work at a machine shop on modified duties. His was taking Celebrex, Tylenol, Oxycodone and using Zoltrex cream for pain. He did not use any assistive devices for walking but stated he had intractable pain after 15 minutes of continuous walking. His hamstring pain had been improving and steroid injection was offered but declined at that time. The possibility of bilateral knee revisions was discussed but both the Appellant and the staff agreed that this was not the best option at that time.

[14] In June 2011 the Appellant had a hamstring steroid injection. Dr. Syed completed a medical certificate for employment insurance sickness benefits on November 15, 2011. Dr. Syed cited the Appellant's ongoing knee pain and his need of opioid medication.

[15] In January 2012 he received steroid injections in the hamstring and in the right heel. In April 2012 an MRI of the right shoulder was ordered. In June 2012 he reported having been injured in January while carrying a roll of vinyl. In August 2012 the Appellant reported that previous injections for his bilateral thumb arthritis had not helped much and a consultation with a hand surgeon was recommended. In December 2012, the Appellant was seen at the hand clinic. X-rays showed evidence of bilateral carpal metacarpal joint osteoarthritis. Surgery was discussed and the Appellant wanted to wait for an upcoming work stoppage before proceeding with surgery.

[16] A Functional Abilities Form dated January 25, 2012 stated that the Appellant's status was considered "Return to Suitable Work with Restrictions." A similar form was completed on January 8, 2013 regarding the restrictions related to his hands.

[17] The Appellant's employer (Vale Canada Ltd.) completed a questionnaire on May 31, 2012. His job title was repairman. At that time he was working 40 hours per week as a graphic designer in a sign shop earning $29.54 per hour. His attendance was described as fair. On days

when he was in pain his coworkers would help out with his workload. The worksite was described as a disability shop, an ergonomical workshop which catered to individual employee injuries and restrictions. The employer noted that the Appellant did not have the ability to handle the demands of the job and that he was getting progressively worse.

[18] A letter from Dr. Syed, dated July 4, 2012 indicated that the Appellant still had ongoing pain in both knees. The Appellant was working in a shop which specialized in providing modified work duties to injured workers.

[19] A letter dated November 22, 2013 from the Appellant's family doctor to the Appellant's employer reiterated the 1998 precautions and listed the restrictions in place after the November 22, 2013 assessment: -Totally restricted from hand use: gripping/grasping (left and right hand)- Totally restricted from using vibrating hand tools (left and right hand)-Limit to occasional -light effort pushing/pulling (left and right hand)-Totally restricted from climbing ladders-Totally restricted from lifting floor to waist, waist to shoulder, above shoulder.-Carrying with both hands: No more than 10 lbs -Carrying with one hand: No more than 5 lbs (left and right)

[20] A letter from Mr. Keaney, social worker, dated December 4, 2013 stated that he first began therapeutic sessions with the Appellant in November 2009. The Appellant's main issue has been his ongoing physical pain which has affected both his work life and his personal life.

[21] Dr. Garrioch, the Appellant's family doctor wrote a letter dated March 11, 2014 indicating that he had been the Appellant's doctor since 1993. He described the Appellant's medical history of multiple orthopedic conditions and prostate cancer. Dr. Garrioch stated that the Appellant had been working at a local mining company until recently. He had worked in a reconditioning shop for 15 years and progressive restrictions have been required. Dr. Garrioch viewed the Appellant as disabled from working in any position for which he was suited by training, experience or education.

[22] In a note accompanying additional information sent by the Appellant he stated that he has been receiving the Disability Tax Credit since 2011.

SUBMISSIONS

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

a) He works for a benevolent employer who has provided a worksite and working conditions appropriate to his medical condition.

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

a) He was still working in substantially gainful employment when he began receiving CPP retirement benefits in January 2012.

ANALYSIS

[25] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2011.

Severe

[26] *Frankum v. MHRD* (July 13, 2000), CP 9271 (PAB) provides some guidance regarding the consideration of the disability tax credit in analyzing an Appellant's disability under the CPP. This decision indicated that the criteria for the tax credit are not related to the capacity to perform substantially gainful employment. The Tribunal cannot give weight to this evidence provided by the Appellant.

[27] The Appellant was earning $29.54 per hour while working in 2012 and 2013. His earnings according to the record of contributions were $50,100 in 2012 and $51,100 in 2013. *G.T. v Minister of Human Resources and Skills Development,* 2013 SSTAD 5 provides guidance regarding the issue of substantially gainful employment. "While this term is not defined in the CPP, decisions have consistently concluded that this term includes occupations where the remuneration for the services rendered is not merely nominal, token or illusory compensation, but compensation that reflects the appropriate award for the nature of the work performed."

[28] The Tribunal finds that the Appellant's employment in the 2 years after the date on which he must be considered disabled, was substantially gainful.

[29] In *MSD v Kuipers (July 12, 2007), CPP24448 (PAB,)* the Pension Appeals Board found that employment on a casual part-time basis by a benevolent employer, when the person is able, cannot be classified as substantially gainful employment.

[30] The Appellant worked on a full-time basis and although the employer adapted the working conditions to the Appellant's restrictions, the Tribunal does not find that the employer can be classified as benevolent as described in *Kuipers.*

[31] 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).

[32] The information in the file shows that 2 Functional abilities assessments in 2012 and 2013 indicate that the Appellant could return to suitable work with restrictions. At the time of application he was working 8 hours per day, 5 days per week. Although the employer questionnaire in May 2012 stated that the Appellant was not able to handle the demands of the job, there is no indication that he was incapable of performing any substantially gainful employment.

[33] The Tribunal finds that the Appellant showed evidence of work capacity at December 31, 2011 and that he continued to work at substantially gainful employment until he retired in January 2014.

[34] The Appellant has not satisfied the Tribunal that on a balance of probabilities he had a severe disability as defined in the CPP at the time of the MQP.

Prolonged

[35] Since the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

CONCLUSION

[36] The appeal is dismissed.

Vikki Mitchell
Member, General Division - Income Security