

Citation: *M. Z. v. Minister of Employment and Social Development*, 2015 SSTGDIS 63

Date: June 19, 2015

File number: GP-14-3714

GENERAL DIVISION - Income Security Section

Between:

M. Z.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

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

Heard by Videoconference on June 16, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

M. Z., the Appellant;

T. Z., the Appellant's wife and witness;

Lesley Tough, the Appellant's representative.

DECISION

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

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on July 15, 2010. 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 a hearing was held on February 28, 2013. In a decision issued on March 5, 2013, a three-person panel dismissed the appeal.

[3] In April 2013, all files outstanding with the OCRT were transferred to this Tribunal. On May 15, 2013, the Appellant applied for leave to appeal the decision of the OCRT to the Appeal Division of the SST on the grounds that the earlier Review Tribunal failed to observe the principles of natural justice and made findings of fact without regard to the material before it.

[4] The Appeal Division granted leave and heard the appeal on June 26, 2014. In a decision dated August 29, 2014, the Appeal Division allowed the appeal and referred the matter to the General Division for a hearing *de novo*. The form of hearing was left to the General Division Tribunal's discretion.

[5] As explained in the Notice of Hearing dated March 19, 2015, this appeal was heard by videoconference for the following reasons:

- The Appellant was to be 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.

[6] This is the Appellant's second application for CPP disability benefits. His first, submitted in May 1988, was approved following a diagnosis of embryonal cell carcinoma. The benefit was cancelled as of March 1989, when the Appellant resumed work following treatment.

THE LAW

[7] 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.

[8] 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).

[9] 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.

[10] 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

[11] 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

[12] In his Questionnaire for CPP Disability Benefits dated (p. AD2-138), the Appellant disclosed that he has been diagnosed with various medical conditions, including inflammatory osteoarthritis, hypothyroidism, borderline diabetes and hearing loss, all of which he claims disable him from substantially gainful work. As a result of these conditions, he reported that he limped and needed a cane to walk 50 yards or more. He was able to sit for up to one hour and could not drive for prolonged periods. He was unable to lift heavy objects and could not grasp or hold things properly with his hands. Reaching upwards was painful, and he had trouble bending his knees or kneeling. He was able to dress himself but had difficulty putting on his socks and boots. Ongoing pain left him tired because he was unable to sleep at night. He had been diagnosed with sleep apnea and used a CPAP appliance. He had also been fitted for hearing aids.

[13] He was born in July 1954 and attended school up to Grade 10. He was employed for more than 30 years as a grader and snow plow operator by the Manitoba Department of Infrastructure and Transportation, a job he left on November 20, 2009, when he took early retirement because of severe pain. He listed among his medications Eltroxin (for hypothyroidism), Clonazepam (an anti-convulsant used to treat anxiety) and Hydroxychloroquine (an anti-malarial drug sometimes used to treat autoimmune diseases). In May 2007, he had arthroscopic surgery on his right knee, followed by physiotherapy. He sometimes uses a cane.

[14] In the initial CPP Medical Questionnaire dated June 29, 2010 (p. AD2-129), Michael Gerges, family physician, reported that the Appellant had been diagnosed with osteoarthritis in both hips, knees, shoulders and hands, causing a marked decrease of the range of motion of these joints. He had received physiotherapy to maintain joint flexibility. The prognosis was unknown for the time being; he required medication and a walking aid.

[15] A bone scan dated November 28, 2006 (p. AD2-137) indicated degenerative changes in multiple joints including both hips, both knees, left shoulder and right acromioclavicular joint.

[16] An MRI of the right knee dated February 23, 2007 (p. AD2-136) indicated patellofemoral and medial femorotibial compartment osteoarthritis. There were extensive complex degenerative tears of posterior horns and bodies of both menisci, with an associated small meniscal cyst as an additional finding in relation to the abnormal medial meniscus.

[17] An x-ray of the cervical spine dated March 25, 2009 (p. AD2-135) indicated small marginal osteophytes at several levels, although the disc spaces were preserved and the facet joints and spinous processes were unremarkable. In the lumbar spine, multi-level degenerative changes were noted, in addition to small marginal osteophyte disc space narrowing at several levels, particularly L2-3 and L4-5.

[18] An x-ray of both hands dated February 18, 2010 (p. AD2-123) indicated the presence of a metallic foreign body along the distal phalangeal base of the left thumb. Otherwise, there were no other abnormalities.

[19] An x-ray of the cervical spine dated May 6, 2010 (p. AD2-134) indicated minor disc degeneration from C4-7 inclusively. As well, minor degenerative narrowing was seen involving the posterior aspect of the C2-3 facet joints.

[20] In a letter dated June 8, 2010 (p. AD2-121), Tim McCarthy, a rheumatologist, wrote that he saw the Appellant, a retired grader who was now farming, for complaints of widespread musculoskeletal pain primarily affecting the small joints of his hands, as well as shoulders, neck, hips and knees. He had tried various NSAIDs with varying relief. He had a right-side carpal tunnel release in 2005, left-side in 2006 and right knee arthroscopy in 2007. On examination, he used a cane for walking. He had Heberden's nodes at the DIP joints of both hands, as well as swelling and tenderness at the third MCP joint of both hands. He was only able to form 85 percent of a fist bilaterally. There was an extension lag of five percent at the elbows. Abduction was limited to 120 degrees at both shoulders and flexion to 130 degrees. Dr. McCarthy's impression was widespread osteoarthritis, with a possible inflammatory component, especially affecting small joints of **hands**. The Appellant was prescribed Plaquenil and offered intramuscular injections, although he expressed concern about side effects and wished to hold off for the time being.

[21] An x-ray of the right hip dated June 28, 2010 (p. AD2-133) showed well-maintained joint spaces with only minor degenerative changes.

[22] In a Self-Employment Questionnaire dated April 6, 2011 (p. AD2-95), the Appellant described his trapping business. He had run it as seasonal business since 1964, from November to April. Since 1976, he had been in partnership with his wife. If there was nothing to trap or the season was not open, then no trapping took place. He estimated that he worked ten hours per week. He would set traps, check them and skin and board the animals, although since November 2009 he had required help from his partner because of pain in his hand and feet. His condition affected his ability to carry on the business, and he had to purchase special equipment for setting and checking. He also performed nuisance control for the government between May and July, trapping and shooting beavers on a bounty basis. He had a canoe to retrieve the carcasses but now required the help of his wife to unload it.

[23] In a Self-Employment Questionnaire dated April 6, 2011 (p. AD2-99), the Appellant elaborated on his farming activities. He took over the family farm in 1975 and raises grain, hay and poultry. The Appellant, in partnership with his wife, manages all aspects of the farm, including maintenance of buildings and property, buying and selling of produce, feed, chemicals and maintenance of machinery. She also helps him order and pick up supplies. They have 125 chickens, and his wife is exclusively responsible for raising and selling poultry. She also does the bookkeeping, and an accountant does income tax. Their son helps them with the farm, sometimes operating machinery. They hire professionals to spray weeds, but cutting, raking and baling hay are done jointly by the Appellant and his wife. In 2010, the Appellant described himself as a full-time farmer, as he resided on the farm, although he was unable to calculate his hours because it now takes much longer to accomplish tasks because of pain. He had to devise alternatives or wait for help. They rented 110 acres of their cropland in 2009 but could not rent it in 2010 due to excessive moisture. That same year, they seeded 72 acres of hay but could only cut 40 acres, again due to moisture. The farm will not be sold but will be handed down to their children.

[24] An MRI of the left knee dated July 15, 2011 (p. AD2-4) indicated severe chondromalacia affecting the patellapatella and femoral condyles. The medial meniscus contained a degenerative complex tear with a radial component in the posterior body. There was also a tear in the lateral meniscus and high grade partial tear of anterior cruciate ligament.

[25] In a letter dated December 8, 2011 (p. AD2-252), Dr. Gerges wrote that the Appellant suffered a non-ST elevation myocardial infarction (heart attack) in October 2011, which was followed by the insertion of two stents. He had been “doing great” since then.

[26] In a letter dated January 16, 2012 (p. AD2-248), Peiman Malek-Marzban, a cardiologist, wrote that the Appellant had an NSTEMI in November and ended up in Emergency. He was doing well with no chest discomfort or shortness of breath during ordinary physical activity.

[27] In a letter dated June 5, 2012 (p. AD2-246), Dr. Malek-Marzban wrote that the Appellant was a known case of metabolic syndrome who had an acute coronary in October

2011, for which he received an angiogram and stenting. There was no significant ventricular damage, but he was recently having exertional chest discomfort, possibly because of restenosis of his stents. He was limited to his daily physical activities and regular walking or slow jogging. A MIBI scan was still pending, but regardless, he needed a “great deal of attention” to healthy lifestyle, diet and exercise.

[28] In a letter to the Appellant’s representative dated July 11, 2012 (p. AD2-245), Dr. Gerges wrote that the Appellant had a long history of widespread musculoskeletal pain primarily affecting the small joints of his hands as well as his shoulder, neck, hips knees and lower back. He also suffered from hypothyroidism, pre-diabetes and diverticulitis. He had recently developed coronary artery disease, for which two stents were inserted in October 2011. In Dr. Gerges’ opinion, the Appellant qualified for a disability pension.

[29] A CT scan of the lumbar spine dated July 28, 2012 (p. AD2-241) indicated degenerative changes causing narrowing of the bilateral foramina at L3-4, L4-5 and L5-S1. There was a possibility of nerve root irritation at L4-S1.

[30] In a letter dated July 13, 2012 (p. AD2-236), Robert Glacken, a general practitioner with the Pan Am Clinic, wrote that the Appellant was seen for lumbar pain of four months duration. On examination, he exhibited point tenderness at L5. Range of motion was flexion with fingertips to mid tibia, extension to five inches. Straight leg raising on the right was 70 degrees, on the left 80 degrees. Hip range of motion was decreased. Dr. Glacken noted a diagnosis of lumbar facet syndrome, lumbar disc herniation at L5-S1 and spondylosis.

[31] An x-ray of the lumbar spine dated July 13, 2012 (p. AD2-237) indicated shallow right scoliosis, as well as multilevel disc narrowing with plate spurring.

[32] In a letter dated December 12, 2012 (p. AD2-235), Mario Paskvalin, a specialist in physical medicine and rehabilitation, wrote that he saw Appellant for lower back pain occasionally radiating to the right leg. It had developed gradually and was not preceded by an injury. Activity aggravated the pain, rest alleviated it. Physiotherapy offered limited relief. On examination, range of motion was limited, power was normal and sensation mildly decreased at one level. It was Dr. Paskvalin’s impression that the pain was mostly due to

osteoarthritis, but it was possible there was nerve root irritation. He recommended epidural steroid injections, gentle stretching and weight loss. He also suggested a trial of Gabapentin if the referred leg pain persisted.

[33] In a letter dated February 1, 2013 (p. AD2-5), Hillel M. Sommer, a specialist in physical medicine and rehabilitation, wrote that the Appellant presented with a morbidly increased body mass index, but was otherwise well looking. The range of motion of his lumbosacral spine was within normal limits in all directions and pain free. There was full reversal of the lumbar lordosis. While seated, straight leg raise was neikgative bilaterally. Reflexes were absent at the patellar and achilles tendons bilaterally. Manual muscle testing revealed grade 5/5 bilaterally. The sensory examination indicated a proximal distal gradient over both lower limbs with sensitivity over the souls of both feet. Dr. Sommer concluded that the Appellant had a longstanding history of non-specific spinal pain. He also had underlying diabetic neuropathy and might have peripheral vascular ocular disease. No spinal procedures were indicated.

[34] The Appellant's T1 Income Tax Return Summary for 2009 (p. AD2-117) showed employment income of \$48,339, gross farm income of \$4,231 and a farming net loss of \$7,755. In 2010 (p. AD2-110), the Appellant reported no employment income, gross farm income of \$18,767 and a farming net loss of \$5,587. Gross income for other business totaled \$3,350 (an annotation indicated it was for nuisance beaver control).

[35] The Appellant's T1 Income Tax Return Summary for 2011 (p. AD2-6) indicated gross business income of \$1,750, gross farming income of \$18,920 and a net farming loss of \$4,664. Also included was a five-year comparative report detailing revenues and expenses for the Appellant's farm from 2007-11.

Testimony

[36] The Appellant told the Tribunal that he has lived on his family farm all his life. He attended school up to Grade 10, and from 1975 to 1979 took up farming as a full-time occupation. However, he was unable to make a living at it, so he took a job in highway maintenance with the government of Manitoba. After a few years, he was certified to

operate heavy equipment, and for the next 30 years he graded rural roads in summers and plowed them in winters.

[37] He always enjoyed his work. It was a full-time job with lots of overtime. He was often on call. Around 2006, he started feeling pain in his right knee. He suspects that the chemotherapy treatment he received in the late 1980s caused his arthritis. In May 2007, Dr. Hubert, an orthopedic surgeon, performed an arthroscopic repair of his knee. He received physiotherapy and was off work for ten weeks. The surgery did not make him 100 percent better, but it did improve his pain, and he returned to work.

[38] At that point, he started to feel back pain. His job required him to sit in a cab all day driving heavy equipment on poor roads. There was a lot of bouncing. Sometimes he had to drive 40 or 50 miles just to get to a work site. His hips began hurting and so, once again, did his knees. He began taking painkillers, but they made him drowsy. He couldn't sleep at night and woke up tired in the morning. He carried on with his job despite the pain, but by November 2009 he couldn't take it anymore. He tried to hang on as long as he could, but he asked himself the question, "Why suffer for a paycheck?" He took his pension, which now amounts to around \$13,000 per year. He has not been employed since, nor has he looked for a job.

[39] Since 2009, they have rented out a portion of their farm, although it hasn't been possible for the past few years because of excessive moisture in the soil. They also raise hay on 50 acres that they keep for themselves. It is seasonal work—he spends two weeks in the fall cutting and baling it for sale. He operates a baler to accomplish these tasks and his wife helps. During the rest of the year, he does a lot of little things around the farm, such as repairing equipment, much of which is old. They used to raise chickens, mainly for their own use, but gave it up because it became too much trouble for his wife.

[40] In 2009, they reported a net loss from farming of \$7,755. The comparable losses for 2010, 2011 and 2012 respectively were \$5,578, \$4,460 and \$8,640. Asked why they carry on farming their land if all it does is net losses for them, the Appellant replied that he had to do something. He intends to hand the land down to his children, and it is his obligation to maintain it.

[41] In addition to farming, he and his wife maintain trap lines. In the summer, they trap nuisance beavers for the government for bounty. From September to May, they trap martens and fishers and sell the pelts, although not much happens during the height of winter. They have a defined territory under government permit and they maintain their lines by snowmobile. In 2013, they earned \$2,800 in gross revenue from private trapping, and in 2014, they earned \$895. Those figures were reported as a component of their gross farming revenues.

[42] The Appellant also earns money by mowing the lawn of a hunting lodge near their farm. He operates a sit-down mower and gets \$65 each time he does it—maybe four times per summer.

[43] Chemotherapy has reduced his ability to tolerate medications, including painkillers and Metformin, which he takes for a diabetic condition. Medications make his stomach act up.

[44] He uses a cane to walk short distances and also wears a back brace. His hands are arthritic, and he uses special devices to open and close his traps. He is able to drive but only does so for short distances. He has been using hearing aids for the last ten years.

[45] He suffered a heart attack in 2011. He had two stents inserted, but one collapsed in July 2013 and it was replaced. He experiences shortness of breath and occasional chest pain. He has been told his heart capacity is only 65 percent. He has never had a cardio rehabilitation program because it is not available in his area.

[46] He last received physiotherapy in 2012, but it actually made his back pain worse. Dr. Barron, his orthopedic surgeon, has told him that arthroscopic scraping won't do anything to help his knee anymore. They have discussed knee replacement, but Dr. Barron wanted him to lose weight first. He has lost 25 pounds by changing his diet and is now down to 288 pounds. He gets steroid shots every two or three months.

[47] He feels constant pain in his back and knees, although the latter are a bigger problem. He tries to exercise by taking walks around the yard. He is usually outdoors for a couple of hours each day, fixing something or taking his dog for a walk or a drive. He was asked

whether he could envision himself working in a part-time job. He replied that it would depend on what it was, “but I doubt it.” If he had to stand behind a counter, his knees and back would get sore. Moreover, he has a limited education and has never done desk work or used a computer.

[48] The Appellant’s wife said a few words on his behalf. She said he is suffering and has seen numerous doctors over the years. She is responsible for managing the farm and does all the paperwork. However, she knows farming from the bottom up and helps him in all aspects of their businesses.

SUBMISSIONS

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

- (a) He suffers from a variety of significant health problems, principally osteoarthritis and mechanical lower back pain, meniscal tears in both knees and a complex of lifestyle-related conditions sometimes referred to as “metabolic syndrome;”
- (b) As a result of these conditions, he suffers from constant and severe pain, particularly in his back and knees, that renders him incapable of any substantially gainful work for which he might be qualified by background and training;
- (c) He has made a genuine attempt to remain gainfully employed, maintaining trap lines and farming his ancestral land, but neither pursuit has generated significant income;
- (d) He has attempted numerous treatment options, including surgery, physiotherapy and use of assistive devices and prescription painkillers, but none has provided any significant or long-term relief.

[50] The Respondent did not appear at the hearing, but in previous submissions dated January 18, 2013 (p. AD2-268) and February 7, 2013 (p. AD2-270), it argued that that the Appellant does not qualify for a disability pension because:

- (a) The radiographic results on file do not indicate severe pathology in any joint;
- (b) While his back and knee pain may limit him from doing some types of activities, he has nevertheless been engaged in physically and remunerative businesses that, even with the assistance of his wife, would require significant effort;
- (c) He has been advised to undertake lifestyle changes such as exercising regularly and eating healthier, but there is no evidence that either of these recommendations have been followed.

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 with 25 or more years or reported earnings to show valid contributions in at least three of six calendar years. In written submissions, the Respondent proposed that the applicable MQP in this case ended on December 31, 2012, as the Appellant last had valid contributions over a six-year window in the three years of 2007-09 inclusively (see Record of Employment, p. AD2-70). The Tribunal made the same analysis and the Appellant 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 2012 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, the balance of the evidence indicates that the Appellant does have a severe disability. The Tribunal began its analysis by looking for evidence of an objective physiological basis underlying the Appellant's pain symptoms and found that his complaints largely corresponded with changes seen on the available imaging reports. An MRI of the right knee from February 2007 showed osteoarthritis and extensive complex tears of both menisci, findings that prompted his arthroscopic surgery later that year. By the Appellant's account, the procedure was only partly effective, and he eventually began feeling pain in his left knee, perhaps as a result of compensating for his right side. A July 2011 MRI of the left knee indicated severe chondromalacia (inflammation) and tears in the menisci and ACL. At the same time, he started to feel pain in his lower back, and multiple x-rays, MRIs and CT scans of the lumbar region confirmed multilevel disc degeneration and, more significantly, narrowing of the vertebral column causing involvement with the adjacent nerve roots at L4-S1.

[56] These changes indicated the presence of pathologies associated with the Appellant's reported pain symptoms, but the Appellant has also been assessed and treated by several medical specialists in recent years (not all of whom were represented by reports in the hearing file), and none has questioned his credibility. Dr. McCarthy, the rheumatologist, found signs of widespread arthritis, particularly in his hands, shoulders, hips and knees, with limitations noted in his ranges of movement. The Appellant was also examined by two physiatrists. While Dr. Sommer found good strength and range of motion in the lumbar spine, Dr. Paskvalin

detected limitations in all four planes and attributed the Appellant's subjective pain to osteoarthritis and secondary nerve root irritation. In 2012, the Appellant was assessed at the Pan Am Back Clinic by Dr. Glacken, who also noted functional restrictions. The Appellant indicated in testimony that he had also seen an orthopedic surgeon at Pan Am, Dr. Laurie Barron, for a consultation regarding possible knee replacement. For the Tribunal, the fact that this option was placed under consideration was yet another indication that the Appellant's knee condition was severe. While it is true that no knee replacement surgery as yet has been performed or even scheduled, if and when the Appellant is given artificial knees, it is unreasonable to expect that he, now deconditioned and middle-aged, will be restored to anything approaching peak physical function. Even in a best-case scenario, it strikes the Tribunal as unlikely that he will ever be able to return to the kind of active work that occupied his entire working life.

[57] The Appellant's physical incapacity is compounded by a constellation of other documented conditions, including diabetes and coronary artery disease, for which the Appellant's cardiologist, Dr. Malek-Marzban used the umbrella term, "metabolic syndrome." Dr. Sommer suspected that at least some of the Appellant's pain symptoms were related to diabetic neuropathy. The Appellant had a heart attack in October 2011 that was serious enough to require immediate stenting in two arteries. While his cardiologist noted that he was "doing well" with no chest discomfort or shortness of breath during regular physical activity, the Appellant's stamina would inevitably be diminished and his risk profile raised.

[58] The evidence indicates that the Appellant was a viable participant in the labour market for his entire adult life until he began to feel arthritic symptoms about ten years ago. By the time he reached his fifties, his body, which he had always relied on for his livelihood, was in effect worn out. Given the Appellant's ongoing joint pain and diminishing endurance, the Tribunal contemplated whether there was any other type of substantially gainful work that might have accommodated his physical limitations. He attended school only up to Grade 10 and spent his entire working life doing physical work, whether farming, trapping or operating heavy machinery. He was 58 years old at the time of MQP, and it is difficult to imagine him retraining for a sedentary job in the service or retail sector.

[59] It is clear that the Respondent partially based its decision to deny the Appellant's application on his ongoing trapping and farming, but the Tribunal regarded these activities, not so much as evidence of functionality, but as laudable efforts to remain active and useful despite his debilities. Having carefully reviewed the relevant facts, the Tribunal felt that neither enterprise could be fairly characterized as "substantially gainful." The Appellant's written submissions and testimony made it clear that his "nuisance" and "private" trapping were seasonal activities, the former taking place in summer, the latter in early winter and spring. Neither took up more than ten hours per week of his time and, most importantly, neither earned him any significant income. The evidence indicates that he earned \$3,350 in 2010 for killing beavers on behalf of the provincial government and no more than \$3,000 per year from his private trap lines, with those amounts reported as a component of his gross revenues from farming.

[60] In its submissions, the Respondent focused on the Appellant's reported gross farming revenues of \$18,766 in 2010 and farming expenses exceeding \$24,000, but it failed to note the obvious result of these facts—that the farm lost \$5,578 that year. Indeed, the farm appears to have consistently operated in deficit, having recorded net losses of \$7,755 in 2009, \$4,460 in 2011 and \$8,640 in 2012. The Appellant may be contributing to the running of the farm, but it is by no means "substantially gainful." This conclusion is further reinforced by peering into the details of the farm's financial statement, which indicate that in most years the Appellant claimed between \$5,000 and \$6,000 in capital cost allowance (in effect depreciation on capital assets), suggesting that, even on a cash basis, the farm was still generating net negative outflows or at best marginal net positive inflows. All of the foregoing assumes that the Appellant was managing and operating the farm by himself, which of course he was not. While the Appellant clearly does have some residual capacity, the evidence shows that his wife is a full partner in the farm, contributing not just mental, but also physical, energy. Why these partners devoted any time at all to an enterprise that brought them so little monetary gain was unclear to the Tribunal, but it accepted the Appellant's explanation that he wanted his agricultural land well maintained when it came time to hand it down to his children. In the end, the Tribunal concluded that the Appellant's farming was more akin to a hobby than a substantially gainful occupation.

[61] The Tribunal found that the Appellant had taken all reasonable steps to seek treatment. He has consulted numerous treatment providers over the years, undergone multiple surgeries, including two carpal tunnel releases a right knee arthroscopic repair and two cardiac stent insertions, received several rounds of physiotherapy and experimented with various pain relievers and other medications, although they have produced only limited benefit. The Tribunal accepted the Appellant's explanation that he did not look for more sedentary employment, because he had a genuine belief that it would have been a pointless exercise given his debilities and lack of qualifications.

[62] The Respondent noted that Dr. Sommer and Dr. Paskvalin strongly urged the Appellant to adopt exercise and a healthier diet and pointed to a lack of progress in making such lifestyle changes to justify its denial of the Appellant's claims. The Appellant's representative cited *Bulger v. Minister of Human Resources Development* (March 30, 2006), CP0916 (PAB) to argue that failure to fully engage or pursue rehabilitation programs is not always unreasonable and compliance must be viewed in the context of Appellants' circumstances. Furthermore, even if he did manage to lose weight, it would a leap in logic to suggest that it would necessarily make him more functional or employable. On this question, the Tribunal was inclined to agree with the Appellant, as it is the rare individual who can simply will into being wholesale changes in an entrenched lifestyle. As it happens, it appears the Appellant has made some progress in these areas, having lost 25 pounds in the last two years, presumably in anticipation of his planned knee replacement.

[63] The Tribunal also gave weight to the Appellant's work history, which included more than 30 continuous years of employment for a single employer. There are three documented instances where he returned to work after significant illness or injury—in 1989 , after his cancer went into remission, in 2005-06, following his carpal tunnel releases and in 2007, after his right knee arthroscopy. One can reasonably surmise that an individual with this kind of demonstrated work ethic would not have left the employment market when he did unless there was some substantive underlying cause.

[64] A significant factor in the Appellant's favour was his own testimony, which was unguarded and credible. He conveyed a certain stoicism and convincingly put his trapping

and farming activities in their proper contexts. He admitted to being able to accomplish selected chores around his property but cautioned he was excessively slow and required downtime to renew himself. The Appellant's wife also contributed some helpful details about the running of the family farm that assisted the Tribunal making its decision.

[65] For the foregoing reasons, the Tribunal finds the Appellant's ongoing symptoms of back and knee pain are "severe" and render him unfit for gainful employment. Given his limited education and age at the time of MQP, one cannot realistically see how the Appellant could have maintained any kind of reasonably remunerative occupation.

Prolonged

[66] The Appellant's testimony, corroborated by histories documented in the medical reports, indicates that he suffers from several documented chronic medical conditions, among them osteoarthritis, mechanical back pain, coronary artery disease, incipient diabetes and hypothyroidism. The evidence indicates that he had back and knee pain, the immediate precipitants to his giving up employment, as early as 2006. It appears his condition has only declined since then, and it is difficult to see how he will significantly improve, even with new medications, alternative therapies or more surgery. In the Tribunal's view, these circumstances qualify the Appellant's disability as "prolonged."

CONCLUSION

[67] The Tribunal finds that the Appellant had a severe and prolonged disability as of November 2009, his last full month working for Manitoba Infrastructure and Transportation. According to section 69 of the CPP, payments start four months after the date of disability. Payments will therefore start as of March 2010.

[68] The appeal is allowed.



Member, General Division