Citation: ***D. H. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 65**

Date: June 26, 2015

File number: GT-120963

GENERAL DIVISION - Income Security Section

Between:

D. H.

Appellant

and

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

Respondent

Decision by: Virginia Saunders, Member, General Division - Income Security

Section Heard In person on May 5, 2015, Nanaimo, British Columbia

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. H.	Appellant
C. H.	Witness

[1] On April 1, 2011 the Respondent cancelled the Appellant's *Canada Pension Plan* (CPP) disability pension as of March 31, 2011. The Respondent maintained this decision on reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) on May 15, 2012.

[2] 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. Accordingly, this appeal was transferred to the Tribunal in April 2013.

[3] This appeal was heard in person for the following reasons:

- Videoconferencing is not available in the area where the Appellant lives; and
- The form of hearing is the most appropriate to address inconsistencies in the evidence.

PRELIMINARY MATTERS

[4] The Appellant brought medical reports dated October 24, 2014; March 6, 2015 and March 31, 2015 to the hearing. He stated that he had obtained these documents from his doctor the previous day. The Tribunal decided to accept the documents into evidence as they were recent and potentially relevant to the decision. After the Appellant's oral evidence and submissions were heard, the hearing was adjourned to allow the Respondent an opportunity to review the documents and make submissions on them. Additional submissions were received from the Respondent on June 8, 2015, and the hearing concluded.

THE LAW

[5] Subsection 70(1) of the CPP provides that a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled.

[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] In this case, the Tribunal must decide if it is more likely than not that the Appellant ceased to be disabled as of March 31, 2011.

EVIDENCE

[8] The Appellant was born in 1960. He lives in X on Vancouver Island. In April 1989 he applied for CPP disability benefits based on lower back pain and migraine headaches caused by stock car racing accidents and falls at home. A disability pension was approved in April 1990 with a date of onset for his disability of November 1988. The Appellant's disability status was put under review in July 1995 because of information that he had received income from another source. He advised the Respondent that he had returned to work and his CPP disability benefits were stopped as of December 1995 pending further review.

[9] The review took several years, for reasons that are unclear. During that time, the Respondent obtained the following information from the Appellant and others:

a) A report dated May 7, 1996 by psychiatrist Dr. K. E. McPherson stated that while working as a first aid attendant at a falling operation the Appellant had witnessed serious accidents, including fatalities, and was now too stressed to consider returning to this line of work. He did not want alternative employment in his field, and had obtained insurance company approval to retrain as a counsellor which he understood would take from six to eight years, given his Grade 9 education. The Appellant reported seeing a counsellor off and on for many years. He did not report vegetative

symptoms of depression, but he had difficulty sleeping and he occasionally used morphine for back pain secondary to vertebral fractures sustained when stock car racing. Dr. McPherson noted the Appellant had chronic disputes with significant people in his life, and that he had attended the interview smelling strongly of alcohol although he insisted that alcohol was not a problem for him. He showed no evidence of thought or perceptual distortion and no specific cognitive impairment, although his record at school made one question whether he was likely to succeed at his planned academic retraining.

b) Dr. McPherson thought it unlikely the Appellant had depression and was reluctant to prescribe antidepressant medication. He noted that it was difficult for someone who worked in a high risk area and who observed significant tragedy to return to work with equanimity, and that there was no therapy for that circumstance. He encouraged the Appellant to continue to work with his counsellor, and stated that at that point the Appellant did not demonstrate specific evidence of major psychiatric illness.

c) An x-ray of the Appellant's lumbar spine dated July 9, 1996 stated "The vertebral bodies are unremarkable. The disc spaces are maintained. The pedicles, spinous and transverse processes are unremarkable. No abnormality is seen."

d) Reports by Dr. B.G. Woodruff, an orthopedic surgeon, dated July 17, 1996 and November 6, 1996 indicate that the Appellant had occasional low back pain after surgeries in 1984 and 1989, but in mid-1996 developed pain in the lower back with radiation to the left leg as far down as the foot, accompanied by pins and needles in the foot. He was taking Toradol and Fiorinal, both without much benefit. X-rays of the lumbar spine appeared normal. By November the Appellant had had two epidural injections with no change in his pain. Dr. Woodruff noted that examination of the Appellant's back revealed very limited movement in all directions. There was pain on straight leg raising and weakness of the plantar flexion and dorsiflexion on the left side. He stated "I think there is a lot of functional overlay." He suggested that the Appellant improve his flexibility and abdominal muscles and referred him to physiotherapy for that purpose. He stated that if the Appellant was unable to return

to his usual job in three months "then he should be thinking in terms of finding some suitable employment."

e) The Appellant re-applied for a CPP disability pension in December 1996. In the questionnaire that accompanied the application, he stated that he had worked as a faller's watchman for MacMillan Bloedel in Port Alberni, B.C. from November 1978 until October 31, 1995 when he stopped working due to stress, anxiety, severe chronic lower back and left leg pain, numbness of the left foot, and migraine headaches. He described being unable to walk at times, or being confined to bed and having to crawl to the washroom. He described an inability to sit, stand or walk for more than five to ten minutes; functional limitations with lifting, reaching, lifting and carrying; difficulty with personal needs, housework and sleep; and an inability to drive due to leg and back pain. He was taking Tylenol 3 every four to six hours, and Rhovane (zopiclone) at bedtime. He used crutches, a cane and a wheelchair.

f) The medical report filed with the Appellant's 1996 disability application was completed on December 5, 1996 by a Dr. Wagenaar, the Appellant's family physician who stated that he had known the Appellant since August 1991 and had been treating him for mechanical back pain and pain radiating into his left leg since July 1996. He stated that the Appellant had had two previous surgeries for prolapse of a disc in the lower back. His treatment was physiotherapy and occasional analgesics.

g) An Employer Questionnaire completed by MacMillan Bloedel on February 7, 1997 stated that the Appellant had been off on sick benefits since October 31, 1995. Prior to that he had been working full-time as a faller checker, and "according to Dr. reports he is off due to stress."

h) A Reassessment Case Summary Report indicates that a telephone call by an employee of the Respondent to the Employee Relations Coordinator at MacMillan Bloedel on September 30, 1997 revealed that the Appellant was not receiving long term disability benefits because he had declined to attend a rehabilitation program

and instead went on a holiday. He had been called about returning to work but had advised that his back was bothering him.

i) An x-ray of the Appellant's lumbar spine dated November 7, 1997 showed narrowing at the L5-S1 disc interspace not present on the previous study of July 9, 1996. The narrowing was attributed to surgical intervention or disc degeneration. A CT scan of the lumbar spine dated December 23, 1997 showed severe degenerative disc disease without disc herniation, and minimal disc bulge causing possible slight impingement on the left S1 root.

j) A report by Dr. P. Burton, orthopedic surgeon, dated November 12, 1997 stated that the Appellant had chronic debilitating low back pain associated with some radicular symptoms. Dr. Burton stated "Given the fact that he has been off work for such a long time and has such a chronic level of pain I think it is unlikely that surgery will provide him with any consistent relief."

k) On November 27, 1998 Dr. Wagenaar reported to the Respondent that the Appellant was well-known to him for the past seven years. He provided the Appellant's history of visits to him since October 31, 1995 for a series of issues including stress, anxiety, headache, a fracture of the carpal bone in his right hand, back pain, and difficulty sleeping. He stated that:

> In conclusion Mr. D. H. presented with emotional problems, dysthymia which was regarded not to be an overt depression, (not to the point that would keep him on long term disability according to Dr. McPherson). He has some social problems as far as his previous wife and daughter are concerned and also his relation problems that he seems not to be able to resolve. He has ongoing back problems of pain in the back that radiates down the left leg with some intermittent numbness in the left leg and paresthesia. The nature of his pain is obvious mechanical back pain, the amount of disc disease doesn't warrant him to have any surgery and both Dr. Woodruff and Dr. Burton recommend to avoid any surgery done on his back. He complains though of constant pain and seems to be not able

> to maintain an exercise programs or to maintain or find a job. The prognosis, I think is guarded in the sense that he is not emotionally able to cope with his environment and work place. I don't know what sort of work he would be suitable for. A vocational assessment and training may be of some benefit. We have no serious plans for future treatments or examinations and we probably will treat him as symptoms appear.

l) On December 13, 1999 Dr. Wagenaar reported that since the previous report of November 1998 he had only seen the Appellant in April 1999, again with complaints of back pain. The Appellant had been to see Dr. Burton who told him that he had arthritis in his back and did not recommend surgery. In December 1998 the Appellant had been referred for an epidural for back pain relief. On August 30, 1999 Dr. Wagenaar saw the Appellant again, complaining of stress. He concluded "His condition is basically still the same as when I wrote to you last year."

[10] A Disability Summary Sheet dated January 20, 2000 by an employee of the Respondent concludes that as the Appellant had returned to work in June 1991, he was ineligible to receive disability benefits from October 1991 to October 1995 inclusive. As he had stopped work in October 1995 "once again due to his disability" he was to be granted benefits with a new date of onset. This decision was confirmed on April 20, 2000.

[11] In August 2000 the above decision was communicated to the Appellant. He was advised that he was not eligible for disability benefits after September 30, 1991 because he had returned to work in June 1991. Because of delays in handling his case he was not required to repay benefits received from October 1991 to July 1995. He was also advised that the Respondent had determined that he "ceased substantially gainful periods of work activity" in October 1995, and so had been granted a second period of disability entitlement effective November 1995.

[12] In April 2005 the Appellant was advised that his file was under review for the period since November 1, 1995. He provided a Reassessment Medical Report dated May 30, 2005 in which Dr. Wagenaar stated that the Appellant had mechanical back pain. Physiotherapy and epidurals had not been successful, and he had pain in both legs. Dr. Wagenaar stated that he saw

the Appellant yearly and he "will not be able to return to work." The Appellant stated on May 27, 2005 that he had chronic back pain that was at times bad enough that he would fall down. His pain was constant, and he needed someone to do his housework. At times he had to use a cane and a back brace. He stated that he had chronic, severe and intense pain and "at times I can hardly walk and have trouble getting dressed, migraines, pinched sciatic nerve." He took Tylenol 1 and Tylenol for Arthritis as needed. He had not engaged in any job training or rehabilitation program and had not returned to school during the period under review. He did not know if he would ever be able to return to work, as "specialist will not sign a release for me to do work of any kind – further lower back surgery is required."

[13] A letter dated July 5, 2005 from Captain J.D. Murray of the British Columbia Rangers stated that the Appellant was a member in good standing of the Canadian Rangers British Columbia Detachment and had been a volunteer since March 5, 2002. He stated that volunteers participated in training including map and compass navigation; GPS; radio operation and procedures and leadership. They were unpaid unless they participated in formal training by a Detachment Ranger Instructor, which on average was four or five days per fiscal year.

[14] A note dated July 11, 2005 by C. Morris, who was conducting the reassessment for the Respondent, states that considering the above information "it is likely the client does lawn care for his apartment complex." She recommended that the Appellant be interviewed "to ascertain exactly what he has been doing."

[15] The Case Summary Report for this review contains nothing to indicate that such an interview ever took place. In addition to the information contained in the preceding three paragraphs, the report states only that Captain Murray advised in a telephone call that there was no medical fitness requirement to join the Ranger unit. The Respondent decided in September 2005 that "medical and non-medical information obtained in this investigation indicate the client remains eligible to receive CPP disability benefits."

[16] In October 2006 the Appellant was advised that his file was again under review for the period since September 6, 2005. He completed a Disability Reassessment Questionnaire dated November 23, 2006, in which he stated that his chief medical complaint was "severe chronic lower back pain and bad headaches – sharp stabbing pain that cause me to fall – difficulty getting

up and moving, bad knees." He stated that his condition had worsened slightly in the period under review; that walking was painful and sometimes he was unable to walk at all; that he had broken sleep and was in constant pain. He also had diminishing eyesight. He took two Tylenol every two to four hours, and one Naproxen. He saw Dr. Wagenaar as needed and had last seen him November 23, 2006 for back pain medication and for his eyesight. He had not engaged in any job training or rehabilitation program and had not returned to school during the period under review. He had not engaged in any work activity and did not expect that he would ever return to work.

[17] The Respondent sent a request for information to Dr. Wagenaar, who advised on December 20, 2006 that he had seen the Appellant very infrequently. He saw him in May 2005 and then did not see him again until November 23, 2006. He stated that the Appellant had ongoing back problems since 1986 and no further surgery was recommended. He stated that Appellant was using painkillers that he bought over the counter or that he obtained from walk-in-clinics. In November 2006 Dr. Wagenaar provided him with a three-week supply of Naproxen to use as needed. He saw the Appellant again on December 12, 2006 and sent him for routine blood tests which revealed H. Pylori for which he was given antibiotics. His blood work was otherwise fine. Dr. Wagenaar stated:

> So in conclusion, he is a man with long-standing history of back problems and the last few visits to my office he was using a cane. I think he will definitely be going on having back problems as he gets older. I have never done an assessment on the patient to see what his functional capacity actually is and how long this will continue.

[18] The Case Summary report for the 2006 review contains the information referred to in the above two paragraphs and notes that it was started as a result of a third party complaint similar to one received in 2005. The report contains a note that the complaint was investigated in 2005 and that the Appellant denied doing odd jobs and no evidence was found to show that he was working. It stated "The current information indicates the client's situation/medical condition has not changed or has worsened slightly (according to the client) since 2005. There remains no

objective information to show that the client's condition has improved to the point that he could return to regular SGO work." It was recommended that his benefits be continued.

[19] A third reassessment began in August 2009. The Case Summary Report indicates that a third party complaint had been received alleging the Appellant was doing work repairing cars and receiving money from the Armed Forces Reserve. The report noted tax information for 2005 through 2007 revealed the Appellant had $975 in T-4 earnings in 2005; $1,522 in 2006 and $3,193 in 2007. This income was also shown in the CPP Exempt Register, as were amounts for 2004 ($517) and 2008 ($6498). The author of the report noted that previous allegations of work activity had been found to be without merit, and that it was already known that the Appellant worked with the Rangers and "received a small stipend when participating." It stated that no additional medical evidence was requested because "the nature of the client's condition appears to be such that steady visits to the doctor are not required." A decision was made dated October 30, 2009 to continue payment of disability benefits.

[20] The Respondent began another reassessment of the Appellant in September 2010 for the period since October 30, 2009. The Case Summary Report indicates that since the Appellant's disability pension was re-instated in 1995 he had been reassessed on three occasions following receipt of third party complaints. It was noted that the allegations could not be proven and the Appellant continued to receive benefits. The current reassessment was triggered by reported gainful income in 2009. The Case Summary report noted the following information based on documents contained in the hearing file:

a) The Appellant's Disability Reassessment Questionnaire dated December 22, 2010 stating that his main medical complaints include chronic lower back pain, plantar fasciitis, problems with the left knee, hip and left shoulder as well as loss of balance. He reported hypertension, dizzy spells, migraine headaches and blurred vision during a headache. He took Tylenol as needed, Coversyl and low dose aspirin. He saw Dr. Wagenaar as needed. He had not attended retraining, rehabilitation or a return to school. He stated that he had engaged in work activity as a volunteer for the Rangers. He indicated that his return to work date

was unknown as he had a permanent disability, and he would never be able to return to full-time work.

b) The Appellant's Return to Work Report Form dated December 22, 2010 stating that he was employed by the Rangers, with no hours of work per day or week. He did not provide information about his pay rate or total earnings. He stated that he participated "as requested" and that he did part-time work as this was all he was medically capable of doing. Under "special arrangements made . . . to accommodate", he indicated he did not do heavy lifting. He stated that he does not tolerate the demands of the job due to back pain and leg and knee pain.

c) The July 5, 2005 letter from Captain J. Murray referred to above indicating that members were unpaid except when an instructor visits a patrol and conducts formal training. The author of the Case Summary Report stated: The observation, therefore, is that the client's 2009 income in the amount of $14,490, as a Ranger, would lead one to believe that he is actively involved as a paid training instructor during that year. It would appear that the degree of his participation with the Rangers is more than a minor unpaid role. The income amount has also increased considerably from the previous years of service.

d) Medical records from Dr. Wagenaar, including a letter dated February 14, 2011 indicating that he had seen the Appellant very infrequently throughout the years, and that the Appellant had ongoing constant pain in his back with documented back surgery in 1986. Further back surgery was not recommended. He used over the counter pain killers and also got some at walk-in clinics. He saw the Appellant in August 2010 for tinea of both feet. X-rays in August 2010 revealed no bone spurs in the foot; the Appellant likely had plantar fasciitis. In February 2011 he was sent for updated lumbar and SI joint x-rays which showed narrowing, sclerosis and degenerative disease at L5/S1. The remaining results were normal. He had used a cane on his last few office visits and he would definitely have continued back problems as he gets older. An ophthalmology consult of March 2007 noted an unremarkable exam other than a posterior

vitreous detachment in the right eye which may have been related to an old injury. On February 9, 2011 the Appellant reported that he still gets dizzy spells and blurred vision but a CT scan of the brain from November 2010 was normal. In December 2008 forms were completed to allow the Appellant to attend a snowmobile trip to Manitoba with the Rangers. The Appellant was stated to be fit to go.

e) An Employer Questionnaire dated March 2, 2011 from Warrant Officer E. Peeters of the Rangers indicated that tasks included travel, camping, reporting and basic outdoor skills. Employment was part-time and was based on availability. The Appellant would be re-hired for the next season. The Rangers had no record that the Appellant was not available for medical reasons, and no special equipment or arrangements had been made for him.

[21] Earnings Details for the Appellant indicate that in 2008, 2009, 2010 and 2011 he had earnings from employment by the Government of Canada of $6948.00, $14,490.00; $7825.00 and $2368.00 respectively.

[22] The Appellant was informed by letter dated March 10, 2011 that his disability benefits would cease after the payment for February 2011.

[23] In September 2011 the Appellant requested reconsideration of the decision. This was beyond the 90-day limitation period set out in the CPP, but the late request was accepted. The Appellant then provided a list of physicians he had seen between 1988 and 1996, and clinic notes from Dr. Wagenaar indicating that in 2011 he saw him as follows: March 1 and March 18 for essential hypertension; April 21 for palpitations on exertion and it was noted that he had stress due to his disability pension being stopped and would need a new assessment by a surgeon; October 3 for medication and to have welfare forms filled out, and November 22 for pains and blanching of the left hand, and not sleeping well. He had no prescriptions during this period other than Coversyl for his hypertension and Restoril for sleep. His diagnoses were essential hypertension and “osetoarthrosis and allied disorders.”

[24] The decision to maintain the cancellation of benefits on reconsideration was dated March 6, 2012. The reasons given were that:

> The information on your file shows that since 2008 you have been a member of the Canadian Ranger Patrol Group and that while the nature of the work is not always regular and substantially gainful, the medical information reveals you have the capacity for some work. Given the requirements to do the duties of a Ranger Patrol, it is evident that you have the capacity for regular and substantially gainful light duty or sedentary work.

[25] The Appellant submitted a new application for disability benefits in May 2013, along with medical reports already in the file as well as a new disability questionnaire and a new medical report from Dr. Wagenaar.

[26] Dr. Wagenaar's report dated April 29, 2013 states that the Appellant has hypertension and mechanical low back pain. Surgery many years ago had failed. It had been determined that he would not benefit from further surgery, and he had exhausted treatment modalities. His only benefit might be referral to a pain clinic.

[27] The Appellant completed his disability questionnaire on March 14, 2013. He stated that he had worked as a "General Duties Driver – Transportation" from June 1999 to September 2011, when he stopped because of "more intense back issues and high blood pressure." He worked as a janitor at a Dairy Queen for two hours a day, seven days a week from August to November 2012, when he stopped because of severe back and neck pain, stress and high blood pressure.

[28] A report by Dr. C. Matwijecky, neurosurgeon, dated March 6, 2015 repeats the Appellant's history of procedures and symptoms. Dr. Matwijecky notes that the Appellant is taking morphine sulfate in addition to medication for his high blood pressure. After a physical and neurological examination Dr. Matwijecky concluded that the Appellant had chronic mechanical back pain secondary to lumbar degenerative disc disease and facet arthropathy. There was no evidence of any nerve root compression lesion. He was to have new CT bone scans and an MRI of the lumbar spine. Dr. Matwijecky discussed proper posture and good back

mechanics with the Appellant, and encouraged him to see if he could find some kind of work that he could do from home over the computer or by telephone although "he is unable to do any heavy or medium PDL type of work."

[29] The Appellant and his wife C. H. gave evidence under oath at the hearing.

[30] The Appellant testified that he was told that the Respondent could not cancel disability benefits once they had been granted.

[31] The Appellant testified that around 1999 he joined the Rangers unofficially because his father was involved and he did not like the idea of his father travelling back and forth to X, where the patrol was based, by himself. Initially his involvement was limited to target practice once a month, along with camping for "a couple of days." This was done on a volunteer basis. Eventually participants were reimbursed by the Government of Canada for mileage and meals and they began to be paid for some of their time as well. The Appellant signed up with a number of other people. The process involved filling out some forms. No medical certificate or examination was required.

[32] The Appellant testified that he was then classified as a general duties driver. Generally this involved driving down to the training facility at X outside X from his home in X, and then shuttling participants from their accommodations on the base to the shooting range approximately half a mile away. He also performed duties such as airport pick up, setting up classrooms, and making sure the instructors had all their materials. He testified that he spent a lot of time sitting in his truck near the range, or on the base, waiting to drive. He was paid from the time he left his home until he returned, regardless of whether or not he was doing anything. He testified that he worked when he was called, which was usually a couple of times a year for driving and once a year for helping set up for instruction. Sometimes he would be unable to go because he was busy with other things, including doctor's appointments. He missed a couple of times because of his back pain. He testified that he did not think he would have been able to attend more often had he been called to do so. He feels he pushed himself too far and perhaps over-did it because he could feel pain in the back as if had been stabbed.

[33] The Appellant testified that during the snowmobile trip for which he received medical clearance in December 2008 he was never on a snowmobile and had no intention of being on one. His job was to be in a one-ton cube van and then a freight truck that accompanied the snowmobilers on their trip, to hand out supplies. The Appellant had signed on for the B.C. portion of the trip. He was a passenger in the van that drove from X to X, crossed to the mainland on the ferry and then met with the snowmobilers beginning in Terrace. He then rode as a passenger in the freight truck until the group reached X, after which the Appellant went home. He testified that he had not intended to go beyond B.C. and in any case his arthritis was causing him difficulty because of the extreme cold.

[34] The Appellant testified that in the summer of 2009 he worked at and in connection with competitions and exercises in X, Alberta and X. He spent about one month in X, returned home for about two days, went to X to assist with training and then travelled to X to work at a two-week competition. He estimated that he was either in X, X or X for about seven or eight weeks.

[35] While the Appellant was in X he lived in accommodation that was provided to him. He worked with three others in the supply room, handing out items such as jackets, sleeping bags and box lunches to Junior Rangers. He testified that he was able to manage this work because there was a lot of down time during which he could lie down in his room or sit and read. He testified that he probably went to lie down three or four times a day.

[36] After returning to B.C. from X the Appellant went almost immediately to X for a week, where his duties consisted of driving competitors from their accommodation to the shooting range that was ten or twelve miles away, and then back again. He made this trip once a day, and while waiting at the range he would “hang around” or do sentry duty, which involved either walking around or sitting in a truck making sure people stayed off the range. He stated that there were very few people around and so this job was not a very busy one.

[37] The Appellant testified that he then flew to X to work at a competition at the Connaught Range. He worked as a general duties driver again, driving competitors from barracks to the range that was about half a mile away. He did two return trips per day. In his down time he “sat around or walked around” and watched the competitions.

[38] The Appellant testified that almost all of his income of $14,490 in 2009 was for the X-X-X work. He testified that he was paid $120 per day, and that his mileage and his meals and accommodation expenses (if he had any) were reimbursed. He did not report this work activity to the Respondent because he did not know how much he had earned.

[39] Mrs. C. H. is also a member of the Rangers. Both she and the Appellant were adamant that all of the money they received from the Government – whether for pay or for reimbursement of expenses – was regarded as income and that the amounts shown as income for the Appellant in the Earnings Details include these reimbursement amounts.

[40] The Appellant testified that his 2010 earnings were lower because he was not involved in any big events as he had been the previous year. They were lower still in 2011 because by then he was not being called as much for work, and that in any event his back and knees "were going" and he was developing arthritis in his hands. He does not know if he would have turned down more work had he been called more often in 2011. The last work he did for the Rangers was checking serial numbers on weapons at X in September 2011. He obtained a voluntary release from the Rangers because he was not being called for work and he felt he had overdone it in the past.

[41] The Appellant testified that he began working as a janitor at a Dairy Queen in August 2012. It was a small outfit that took only two hours to clean. He performed only light duties and found it very hard to make any twisting motion. He took Tylenol 3 or morphine to manage his pain while he was working at this job. He testified that when he went to see Dr. Matwijecky he was told not to do any janitorial work. By November 2012 he felt unable to perform this work anymore and he quit. He has not worked at any type of job since then.

[42] The Appellant testified that he is unable to do any kind of sedentary work on a computer or otherwise. He stated that he is not particularly "computer-savvy" and in any case he cannot sit or stand for long without having to lie down. He does not feel that he would be able to work for any length of time that would be regular or remunerative.

[43] The Appellant denied doing any general automobile repair after the 1970s, and stated that he has been unable to work on his own vehicle for the past two or three years. He does not

camp or do any outdoor activities and has not for many years. He has never mowed lawns for any apartment complex, and in fact is even unable to mow his parents' lawn. He has never acted as a custodian for an apartment complex. He and Mrs. C. H. testified that their lack of income now and in the past has limited the Appellant's ability to obtain prescriptions, to travel for health care, and to train for another career. When he does have medication he rations it. He spends time soaking in a hot tub and otherwise doesn't do much.

SUBMISSIONS

[44] The Appellant submitted that having granted disability benefits in the past, the Respondent should not be able to cancel them; and that in any event he has continued to be disabled since November 1995.

[45] The Respondent submitted that the Appellant ceased to be disabled in March 2011 because:

a) while he was not able to continue working with his former employer as a result of his back problems, there is no indication that he tried any other type of lighter work that might have been more suited to his limitations;

b) he participated and received remuneration as an active member of the Rangers in 2008 through 2011 and this activity shows he is able to regularly perform some type of suitable substantially gainful work; and

c) he has had few medical visits for ongoing assessment or treatment of his back problem, and he indicated that he has not seen a specialist since the 1990s.

ANALYSIS

[46] The Appellant submitted that the Respondent could not cancel disability benefits after they had been granted. If in fact he was given that information, it was incorrect. Paragraph 70(1)(a) of the CPP expressly provides that a disability pension ceases to be payable with the payment for the month in which the beneficiary ceases to be disabled.

[47] 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.

[48] It is a mystery as to why the Appellant was found to have a severe and prolonged disability as of November 1995. There was minimal objective evidence to support his claim that he was disabled at that date, even in the retrospective accounts the Respondent obtained in the five years it took to make the decision. In addition, the Appellant was only 35 years old, was reported to have declined to attend rehabilitation, and appears to have made no attempt to upgrade his education or to pursue sedentary work up to the time the decision was made in 2000.

[49] Nevertheless, after several years of investigation the Respondent determined that the Appellant was disabled as of November 1995, and in three subsequent reviews it maintained that decision. Those decisions must be dealt with as having been correct, up to the last determination to continue benefits that was made on October 30, 2009 (*Kinney v. Canada (Attorney General)* 2009 FCA 158).

[50] In deciding whether the Appellant ceased to be disabled, the Tribunal may not simply embark on the type of analysis suggested by the Respondent in its submission. The onus is on the Respondent to prove on a balance of probabilities that the Appellant has ceased to be disabled because the requirements of paragraph 42(2)(*a*) were no longer met (*Atkinson v. Canada (Attorney General)* 2014 FCA 187). In order to do so the Respondent must show that the conditions upon which disability payments were made had improved such that the Appellant no longer qualified (*Boudreau v. MHRD* 2000 CP 11626).

[51] The Respondent must therefore prove that the Appellant's condition changed in some way after October 30, 2009. This may be an improvement medically, an improvement in symptoms and limitations, or an improvement in work capacity.

[52] The Respondent does not rely on any objective medical evidence to support its claim that the Appellant's condition has improved. In fact x-rays from 1997 and later show degeneration of the lumbar spine since 1996. Notes and reports of medical visits indicate that the

Appellant continued to complain of back pain and that he had a variety of minor unrelated ailments as well. He saw his doctor infrequently. There was never any serious investigation into his psychological condition although there are periodic references to functional overlay and an emotional inability to cope with his environment and work place. This has been the case since November 1995. There is no medical evidence of improvement in the Appellant's condition after October 2009.

[53] At all times the Appellant has described symptoms and limitations of a magnitude that was never supported by the objective medical reports. His subjective reports have not indicated any improvement in these after October 2009.

[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). The Respondent submits that there is no evidence that the Appellant tried other types of lighter work more suited to his limitations.

[55] When the decision to grant disability benefits as of November 1995 was made, the evidence before the Respondent was that the Appellant had not attempted work although the possibility had been suggested to him by his doctor. The Respondent determined that he was disabled at that time, in spite of there being no objective evidence that the Appellant lacked the capacity to attempt some type of work. The Respondent made three subsequent decisions that the Appellant was disabled – in 2005, 2006 and 2009 – and although it was not stated explicitly these must have included a determination that he lacked residual work capacity and therefore was not obliged to show attempts to obtain or maintain employment as set out in the case law. The Respondent cannot now argue that the Appellant ought to have attempted a lighter job after he stopped working at MacMillan Bloedel in 1995. It is implicit in the four decisions it made since that time that he was incapable of doing so at least up until the date of the last decision to maintain his benefits, which was made on October 30, 2009.

[56] The Respondent must show that the Appellant's work capacity improved after October 30, 2009. The evidence is that in 2009 and for several years before that, the Appellant was capable of working and volunteering for the Rangers when asked to do so. His duties were not particularly strenuous but they were not sedentary. He worked full-time days for approximately

eight weeks in 2009, albeit in favourable conditions that allowed him to rest his back periodically.

[57] This evidence must be considered by the Tribunal whether or not it was known to or considered by the Respondent when it made its decision in October 2009. The Respondent knew the Appellant was earning income from activities with the Rangers up to and including 2008. The fact that it did not make detailed inquiries as to the extent of his involvement, or that the Appellant had not reported his 2009 earnings at that time, are not relevant to this decision. If the Respondent wished to re-visit the basis upon which its earlier decisions were made, it could have done so on new facts as provided in subsection 81(3) of the CPP. It cannot do so in this proceeding.

[58] There is no evidence that the Appellant's work capacity changed for the better after October 30, 2009. He remained involved with the Rangers, performing general driver duties when called. His earnings in 2010 were similar to what he earned in 2008. In 2011 they were significantly less. He withdrew from the Rangers for health reasons after 2011. In 2012 he worked two-hour days at a light cleaner's job and had to quit three months later. He has not worked since then.

[59] The Tribunal finds that there is no evidence of an improvement in the Appellant's medical condition, his symptoms and limitations, or his work capacity since the last determination that he is disabled was made in October 2009.

CONCLUSION

[60] The Tribunal finds that the Respondent has failed to establish on a balance of probabilities that the Appellant ceased to be disabled under the *Canada Pension Plan* (CPP) at any time after October 2009 up to the time of this hearing.

[61] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security