

**Citation: *M. S. v. Minister of Employment and Social Development*, 2015 SSTGDIS 144**

**Date: August 27, 2015**

**File number: GT-125445**

**GENERAL DIVISION- Income Security Section**

**Between:**

**M. S.**

**Appellant**

**and**

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

**Respondent**

**Decision by: Glen Johnson, Member, General Division - Income Security Section**

**Heard by Teleconference on August 27, 2015**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

Appellant: M. S., and his representative Steve Matovic

### **DECISION**

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

### **INTRODUCTION**

[2] The Appellant applied for a CPP disability pension in November 2007 and was denied by the Respondent at the initial level. He did not appeal that decision. The Appellant's current application was date stamped by the Respondent on April 10, 2012. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was set as a telephone hearing for the reasons given in a Notice of Hearing dated April 20, 2015. The Respondent elected not to appear at the Hearing.

### **THE LAW**

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and

- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

### **ISSUE**

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2009.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

### **EVIDENCE**

[10] The Appellant was 32 years old with a grade 12 education at his MQP. In the Questionnaire filed with his current application for a CPP disability pension benefit he said he was employed as a saw filing apprentice when he stopped working in April 2007 due to motor vehicle accident (MVA) crush injuries to his legs. He said he had worked at his job since 1997.

[11] In the Questionnaire filed with his current application he said due to his MVA injuries he has an extremely low capacity for weight bearing, lifting, stamina or movements that require use of his legs. He said he can walk 100 yards slowly, stand for 10-15 minutes, sit for 30 minutes, cannot squat or lift heavy objects. He said he can bend very little, but can perform personal care needs and smaller household chores. He had to stop doing most sporting activities, volunteer work and helping on his parent's farm.

[12] He testified he has not attempted a return to work since 2007, but he completed re-training for work as a graphic designer. He successfully passed a Graphic and Digital Design Program which he attended from April 2013 to September 2014. He said it took about 5 months longer to complete the course due to the effects of his medical condition. He said despite performing an extensive job search, jobs are hard to come by in the field of graphic design, and he has not had success in becoming employed.

[13] At the hearing the Appellant testified that his job as a saw filer involved a lot of physical labor, with heavy lifting, climbing stairs and prolonged standing.

[14] Dr. Kelly, family physician, prepared a report for CPP on November 19, 2007. He said the Appellant had severe open comminuted fractures to both tibias in an MVA in April 2007. He said the Appellant had multiple surgeries, bone grafts and skin grafts, and the prognosis was guarded. The Appellant testified that the surgeries were performed prior to the end of 2009.

[15] A functional capacity assessment performed in April 2008 indicated that the Appellant was not capable of competitive employment in any occupation at that time. The Appellant could weight bear on his right leg, but not his left. A rehabilitation program was recommended.

[16] On September 15, 2009 Dr. Zoffman performed a psychiatric evaluation of the Appellant. She diagnosed moderate chronic Post-Traumatic Stress Disorder (PTSD), partially resolved major depressive episode, and chronic pain. She concludes his current mental state is not consistent with competitive employment. The Appellant testified that he received counselling in late 2009 or into 2010 but has not had psychological counselling or evaluation by a specialist since then.

[17] Dr. Anton, physiatrist, evaluated the Appellant. In a report dated May 17, 2010, Dr. Anton finds that the Appellant continues to have partial disability and will possibly be left with permanent leg pain, generally restricted mobility, and reduced tolerances for prolonged walking, prolonged sitting, and activities that involve impact like running, squatting and kneeling. He said the Appellant is probably capable of sedentary work only,

and must restrict his participation in physically demanding household and recreational activities.

[18] Dr. Kelly wrote a report on September 13, 2010 stating that the Appellant is unlikely to return to his former work as a saw filer, but he should consider retraining for employment as a heavy equipment operator, where there would not be too much strain on his lower limbs.

[19] A functional capacity evaluation was performed on September 7, 2010 by Mary Richardson, Occupational Therapist. She concludes the Appellant is employable on a full-time basis, with some physical restrictions, to work in limited and light strength occupations. She said he would be best suited to sedentary work which has limited demands for standing, walking, climbing, crouching or kneeling. He is capable of reaching and handling tasks.

[20] A vocational assessment report dated March 18, 2011 was prepared by Richard Carlin, rehabilitation consultant. He concludes that while the Appellant has impaired capacity, the Appellant could retrain to obtain suitable employment. This opinion is echoed in a report by Dr. Kelly on March 18, 2011.

[21] In a report to CPP on December 6, 2011, Dr. Kelly indicates the Appellant's PTSD symptoms are improved with medication. He said orthopedic treatment is complete, he will never regain 100% of leg function, and the prognosis for recovery from his PTSD is guarded.

[22] Dr. Oliver, orthopedic surgeon wrote reports on February 24, 2014 and March 27, 2014. He said the Appellant complains of some tenderness around the left knee but Dr. Oliver could not point to the origin of the pain. He said the knee is stable, there is no swelling, and he has range of motion. No surgery was recommended. He said the Appellant should return to the clinic for a knee injection if his knee becomes swollen and tender. The Appellant testified that he has not returned for an injection and he sees his family physician for pain treatment medication. He has not returned to an orthopedic surgeon since March 2014.

[23] The Appellant testified that in 2014 he was able to embark on a trip to X for 2 months for a family reunion. He said that he sits in front of a computer a lot to improve his online presence for his job search. He said he drives his motor vehicle. He said no further surgeries are presently planned.

[24] The Appellant's brother testified. He said although he has not resided with the Appellant from the time of the MVA to present, he is in regular contact with the Appellant by telephone. He said the Appellant's physical and emotional condition have not progressed in the last couple of years as he would have hoped. He said the Appellant is suited to the graphic design field due to his creativity, and he is aware of the Appellant's unsuccessful job search to the present due to the fact that jobs are hard to come by in that field. He is also aware the Appellant spends a lot of time at the computer.

## **SUBMISSIONS**

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

- a) He has a severe and prolonged disability that stops him from doing any type of work;
- b) He has completed re-training in Graphic Arts, in an effort to become employable in light of his ongoing limitations, but work in that field is hard to come by and he has been unsuccessful;
- c) Despite complying with physical, psychological and vocational rehabilitation, he has been unable to engage in suitable employment because of significant ongoing functional impairments.

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

- a) The Appellant does not meet the criteria of "severe and prolonged" disability and cannot be considered disabled as defined by the CPP;

- b) While it is acknowledged that the Appellant may have difficulty performing his previous labor job it is reasonable to expect that with re-training he would be capable of some type of work;
- c) The Appellant's capacity to complete re-training indicates he should also have the capacity for some type of work;
- d) Orthopedic assessment after the MQP does not show the presence of a disabling condition.

## **ANALYSIS**

[27] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2009.

[28] The Respondent is not required to prove that the Appellant is capable of working; a claimant bears the onus of proving that he or she suffers from a severe and prolonged disability prior to his or her MQP (*Dossa v. Canada (PAB)*, 2005 FCA 387).

### **Severe**

[29] 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.

[30] The Appellant was 30 years old with a grade 12 education when he stopped working his labor job as a saw filer in April 2007 due to MVA injuries. He sustained comminuted fractures to both tibia requiring multiple surgeries, bone grafts and skin grafts. He developed PTSD. The Appellant has a considerable remaining work life and has English proficiency.

[31] The Tribunal finds that at his MQP in December 2009, the Appellant was not severely disabled. Although Dr. Zoffman concludes that the Appellant may not be competitively employable from a mental health perspective in September 2009, Drs. Anton and Kelley, and occupational therapist, Mary Richardson, all confirm he is capable of sedentary work

suiting to his limitations in 2010. There is no further evidence from Dr. Zoffman as to the Appellant's employability.

[32] The Appellant submits despite complying with physical, psychological and vocational rehabilitation, he has been unable to engage in suitable employment because of significant ongoing functional impairment. However, the Appellant has not established he is incapable regularly of pursuing any substantially gainful occupation. He was able to complete a graphic design program. The Appellant and his brother acknowledge the ability to spend a lot of time at the computer. He continues to drive. In 2014 he was able to embark on a trip to X for 2 months. Also in 2014 Dr. Oliver finds the knee is stable, there is no swelling, and he has range of motion. No surgery was recommended. The Appellant has not returned for a knee injection as offered by Dr. Oliver, and the Appellant has not returned to an orthopedic surgeon since March 2014.

[33] In May 2010, Dr. Anton found the Appellant to have a partial disability only. In September 2010 Mary Richardson's functional capacity evaluation said he would be best suited to sedentary work on a full-time basis which has limited demands for standing, walking, climbing, crouching or kneeling.

[34] In March 2011 a rehabilitation consultant and Dr. Kelley confirm the Appellant's capacity to re-train for suitable employment.

[35] The Respondent submits the Appellant's capacity to complete re-training indicates he should also have the capacity for some type of work. The Appellant demonstrated significant intellectual, physical and psychological capacities by successfully completing the re-training program in Graphic Design in 2014.

[36] While the Appellant may not be able to return to his former job or other labor job, his limitations do not preclude all types of employment including sedentary work. The severity of a disability is not premised upon an individual's inability to perform his or her regular job, but rather his or her inability to perform any work (*Klabouch v. Canada (MSD)*, 2008 FCA 33).



[37] The Appellant submits he completed re-training in Graphic Arts, in an effort to become employable in light of his ongoing limitations, but work in that field is hard to come by and he has been unsuccessful. 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). There is no evidence of a failed attempt to return to work.

[38] Socio-economic factors such as labor market conditions are irrelevant in a determination of whether an individual is disabled. The focus should be on any substantially gainful occupation having regard to the Appellant's personal circumstances and not on whether real jobs are available in the labor market (*Canada (MHRD) v. Rice*, 2002 FCA 47).

[39] While there is no question that the Appellant's physical and psychological condition significantly limits the Appellant and causes functional limitations, having considered the totality of the evidence submitted, the Tribunal is not satisfied on a balance of probabilities that the Appellant suffers from a severe disability in accordance with the CPP criteria.

### **Prolonged**

[40] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criterion;

### **CONCLUSION**

[41] The appeal is not allowed.

*Glen J. Johnson*

Member, General Division - Income Security