Citation: ***J. T. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 131**

Date: November 20, 2015

File number: GP-13-3008

GENERAL DIVISION - Income Security Section

Between:

J. T.

Appellant

and

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

Respondent

Decision by: Adam Picotte, Member, General Division - Income Security Section

Heard by Videoconference on October 22, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. T.	Appellant
Peter Beaudin	Representative
C. A.	Support Person

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was approved by the Respondent and he commenced receiving a disability pension in 1996. In 2013 the Respondent conducted a reassessment of the Appellant's disability file. The evidence obtained for the reassessment of his file showed that in 2006 the Appellant started a home-based pet food service. The Respondent determined that the Appellant no longer met the severe and prolonged criteria within the meaning of the *CPP* as of the end of April 2006. As a result the Respondent issued a decision requiring the Appellant to repay his disability benefit from April 2006 to February 2013.

[2] The Appellant requested a reconsideration of this decision. The reconsideration decision affirmed the initial decision that the Appellant was no longer disabled as of April 2006 and was therefore required to reimburse the Respondent for the period of April 2006 to February 2013. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[3] The hearing of this appeal was by Videoconference for the following reasons:

a) The Appellant will be the only party attending the hearing;

b) The method of proceeding is most appropriate to allow for multiple participants;

c) The method of proceeding provides for the accommodations required by the parties or participants;

d) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;

e) The issues under appeal are complex; and

f) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

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

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[5] Section 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.

[6] Section 42(2)(b) sets out that a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner.

[7] Section 70(1)(a) of the CPP sets out that a disability pension ceased to be payable with the payment for the month in which the beneficiary ceases to be disabled.

[8] Where an appellant is contesting a decision of the Minister to cease a disability benefit, the onus is on the Minister to show, on a balance of probabilities, that the appellant is no longer disabled at the time the benefits were ceased.

> *Maria Tesone v. Minister of Human Resources Development, CP03981 , February 20, 1997*

ISSUE

[9] In this case, the Tribunal must decide if the Appellant ceased being disabled within the meaning of the Act.

[10] As a preliminary matter the Appellant`s representative raised the question during the hearing of the extent of the Tribunals jurisdiction on the matter. The representative suggested that the Tribunal should construe jurisdiction narrowly such that the only proper consideration would be whether the Appellant ceased being disabled in April 2006. However, the Tribunal finds that its jurisdiction extends beyond the narrow confines proposed by the Representative. Rather, in reviewing the decision of the Respondent to terminate benefits it is clear that the decision considers the entirety of the period from April 2006 to February 2013. This is supported by the fact that reimbursement of amounts paid to the Appellant by the Respondent were ordered for the entirety of this time period. Therefore, the Tribunal finds that its jurisdiction extends to consider whether the Appellant ceased being disabled at any time between April 2006 and February 2013.

EVIDENCE

[11] In January 2013 CPP-exempt T1 (self-employed) gross business income prompted a reassessment of the Appellant’s disability file. A review of his file showed that in 2006 the Appellant started a home-based pet food service called GemPals Dog and Cat food. The Appellant was the sole proprietor with no employees.

[12] The Appellant detailed in a letter to the Respondent that he bought pet food from a supplier which was delivered to his storage facility where he repackaged it with his own label in sizes of 10, 20, and 40 pounds. The Appellant would then deliver the products to his clients’

homes. The Appellant noted that he worked at his own pace and when he was feeling well enough to do so.

[13] Gross and net business earnings reported to the Canada Revenue Agency detail earnings in the following amounts:

a) 2006 Gross $43,724 Net $2,186

b) 2007 Gross $72,078 Net - $3,698

c) 2008 Gross $91,914 Net - $3,548

d) 2009 Gross $83,815 Net - $9,788

e) 2010 Gross $63,272 Net - $3,240

f) 2011 Gross $52,942 Net - $1,655

g) 2012 Gross $59,831 Net - $13,926

[14] In addition to the Appellant's T1 self-employment, the Appellant also had T4 earnings in 2013 amounting to $7,723.

[15] In a September 9, 2009 discharge summary it is detailed that the Appellant was admitted into the emergency department of Vancouver General Hospital for migrainous vertigo complicated by depression. It was detailed that the Appellant reported 3 days of vertigo and ataxia. It was noted that the Appellant also reported suicidal ideation.

[16] In an August 8, 2012 chart note, Dr. Vipler detailed that the Appellant had commenced receiving prolotherapy for his neck issues from Dr. Panet three weeks prior and that this was very helpful for his condition. As a result the Appellant no longer required the use of chiropractic treatments.

[17] In an October 8, 2012 chart note, Dr. Vipler detailed that the Appellant looked well current and had no recent neck injuries.

[18] In a July 15, 2013 medical legal opinion Dr. Parker, chiropractor, detailed that he had been treating the Appellant since 2010 and in that three year period had seen the appellant 123 times. Dr. Parker detailed that without fail the Appellant presented during that time with debilitating headaches and neck pain.

[19] Dr. Parker further detailed that there is no pattern to when the Appellant requires treatment but that when he attends he usually requires two visits in a single day as his neck is too hypertonic to allow for a complete treatment in a single visit.

[20] Dr. Parker commented further in respect of the Appellant`s attempts to return to employment and how doing so increased the Appellant`s pain flare-ups and thereby worsened his ability to function.

[21] Dr. Parker opined that the Appellant was not able to hold down any steady employment between the time of his assault and present day due to his headaches and discomfort.

[22] In a July 16, 2013 (misdated initially as July 16, 2012) medical opinion Dr. Panet, naturopath, detailed that he had initially seen the Appellant in July 2012 due to his chronic neck and upper back pain. Dr. Panet further detailed that he had provided the Appellant cervical thoracic spine utilizing prolotherapy and neural prolotherapy.

[23] Dr. Panet provided his opinion that the Appellant was likely able to work part-time with some accommodations.

[24] In a July 18, 2013 medical letter, Dr. Vipler, family physician detailed his opinion that the Appellant had an ability to work in a part-time low stress environment with flexible accommodations for breaks and self-paced work to adjust for any flares in his symptoms.

[25] In an August 29, 2013 submission the Appellant’s representative detailed that between 2006 and 2012, the Appellant’s costs accounted for 70% of his gross earnings.

Testimony of the Appellant

[26] The Appellant was asked about his memory. He stated that in the last year he had a very bad case of vertigo. He almost died of dehydration. As a result of the vertigo condition he has a difficult time remembering things.

[27] The Appellant was asked about the incident that initially gave rise to the onset of his symptoms. He detailed that he was attacked by a colleague in 1994.

[28] The Appellant was asked why he started a pet-food business. He stated that there was nothing else he could do because his neck pain was very severe. He stated that he could not keep a proper schedule and it was the only thing he could do that was useful as he would otherwise just watch television all day.

[29] The Appellant was asked how much effort he initially put into his business. He stated that there was no consistent amount of effort and that his pain level controlled how often and for what length of time he was able to work. The Appellant stated he could do it because there was no actual schedule. He could rest with his neck and his depression. The Appellant stated that there were days when he would be unable to make deliveries or participate in his business in any way.

[30] The Appellant was asked how many hours he worked. He stated that he could not recall the exact number of hours but that there were times when he could not work. With his customers he would often ask if he could bring the food the next day. He never kept an exact schedule and none was required. He stated that his customers were his friends and understanding of his medical condition.

[31] The Appellant stated that he did not start the business to make money. He stated that he wanted to get off of government money but because he has always been in a cycle of medical treatment and being inefficient, he wanted to try something on his own. He stated that he would have loved for it to have succeeded but he could never make enough money to survive with his pet-food operation.

[32] The Appellant`s representative asked him if he could have worked in 2006 for an employer on a regular basis. He stated that he could not because with his disability, he is limited such that after one or two hours his body becomes unreliable. He then needs to lie down. If he lies down right away he needs to rest for 15 – 20 minutes. He stated on average he will need to rest for approximately 1 hour after doing light activities for an hour or two.

[33] The Appellant stated there were lots of days when he could not work at all and there was no regularity or consistency to those dates. He stated that his ability to work was governed by his level of pain on that particular day.

[34] The Appellant stated that he would only do a few deliveries a day. He stated that he would do one delivery and then rest for 30 to 40 minutes and if he was not feeling well including having severe pain in his neck, he would go home and lie down and do the next delivery later.

[35] The Appellant was asked to review a table of gross and net earnings found at GD 142 – his tax return for 2010. He was asked what the percentage of the gross earnings was the cost of product. He stated he would not know if he made a profit until his bookkeeper did his receipts at the end of the year. The Appellant confirmed that his expenses for dog food accounted for approximately 70 percent of his gross earnings. The Appellant confirmed that his net earnings for the year were his profits.

[36] The Appellant was asked if it was his pattern from 2006 – 2012 to work intermittently and without any reliability and he confirmed that was the case.

[37] The Appellant was asked if he experienced any change to his medical condition since 2006. He stated that his condition is constantly degenerating. He stated that with his neck as bad as it is his days have a monkey-wrench and his condition has continued to get worse.

[38] The Appellant was asked about commencing to see Dr. Panet in 2012. He stated that his condition was so bad in 2012 that he was required to start getting injections for prolotherapy. The Appellant confirmed that the prolotherapy assisted him in his ability to function. He stated that if he is cautious and guards against poor movements he remains pain free.

[39] The Appellant was asked about starting another job in 2012. He stated that he started to work at a gas station. He stated that because of the prolotherapy he could go consistently work 2 – 5 hours. He had a timeframe through the day that was pain free and he could actually do something. The Appellant confirmed that he has continued to have the 2 – 5 hour window being pain free to date.

[40] The Appellant was asked about when and why he stopped taking antidepressants. He stated he could not remember when but that at some point the antidepressants stopped working and the side-effects were so strong that it was no longer worth taking the pills.

[41] The Appellant was asked why he did not see a psychologist or psychiatrist. He stated that he has focused on counselling as psychiatry has not worked for him.

[42] The Appellant was asked if he was helped by friends when he started his business. His customers were largely his friends and that they were very kind to him. Further they accommodated his schedule for their deliveries.

SUBMISSIONS

[43] The Appellant submitted that he continues to be disabled because his pet-food operation was more a hobby than a business and it never afforded him substantially gainful employment. The Appellant further stated that his disability remains severe and prolonged and therefore prevents him from returning to substantially gainful employment.

[44] The Respondent submitted that a disability is severe only if by reason thereof the person is incapable regularly of pursuing any substantially gainful occupation. While it recognized that the Appellant`s medical condition was ongoing and had imposed functional limitations; it did not prevent him from building and maintaining a business that he continued to successfully operate on a part-time basis.

[45] Finally, the Appellant stated that in his life he’s always tried to do the right things for the right reasons. He has tried to do the best he can to survive. He hopes that his prolotherapy will help him get back to work because that is his goal. He further stated that the pet food thing

was not what he wanted to do in his life but that it was all he could do. He wanted to be a good tax paying citizen instead of drinking or not doing anything.

[46] The Respondent further submitted that Part-time work is considered “regular” if one is able to pursue its demands on an ongoing basis. The Appellant built up his business independently and was able to maintain it successfully. Such success positively impacted his mental health and sense of self-worth. He has demonstrated his capacity by lifting up to 40 pound bags of pet food, driving a vehicle an average of 20,000 kilometers a year and making up to 80 deliveries per month.

ANALYSIS

[47] The Respondent must prove on a balance of probabilities that the Appellant ceased being disabled within the meaning of paragraph 42(2)(a) of the CPP.

[48] In this respect the Tribunal notes that the measure of whether a disability is “severe” is not whether the applicant suffers from severe impairments, but whether his disability “prevents him from earning a living”.

> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, paragraphs 28 and 29

[49] The Tribunal is also mindful that the determination of the severity of the disability is not premised upon an applicant`s inability to perform his regular job, but rather on his inability to perform any work, i.e. “any substantially gainful occupation”.

> *Canada Minister of Human Resources Development v. Scott*, 2003 FCA 34, paragraphs 7 and 8

[50] Further the Tribunal notes that the test as set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248 at paragraph 50 is that ``Claimants still must be able to demonstrate that they suffer from a `serious and prolonged disability` that renders them incapable regularly of pursuing any substantially gainful occupation.``

[51] As such, the question in the present matter that must be addressed is whether in April 2006, and thereafter, the Appellant was suffering from a severe and prolonged disability. To

answer this question, the Tribunal must address whether the pet-food business of the Appellant and his role in its operation from 2006 to 2013 inclusive, support, sustain, and show cause for termination of disability benefits to him. In other words the matter here concerns whether the Appellant had the physical and mental capacity to pursue any substantially gainful employment.

[52] In answer to this question, the Tribunal finds that the Appellant did regain the capacity to pursue substantially gainful employment but not in 2006. Rather the Tribunal finds that the Appellant regained the physical and mental capacity to pursue substantially gainful employment in July 2012.

[53] The reasons for this conclusion follow.

Period from April 2006 to June 2012

[54] With respect to the period of April 2006 to June 2012, the Tribunal accepts that the Appellant at no time had substantially gainful employment. Throughout this time period, the Appellant had extensive gross earnings from his pet-food business. His earnings ranged from $43,724 in 2006 to 91,914.00 in 2008. However, during this same time period, the Appellant also had net earnings in all but one year below the allowable earnings exemption. In two years he had net losses. These facts are explained through both the testimony of the Appellant as well as his tax returns. Both confirm that the bulk of his gross earnings was spent on the cost of acquiring the pet-food for distribution. A majority of his gross earnings and up to 70% was spent on the purchase of the pet-food.

[55] The question remains whether the receipt of high gross earnings is determinative of an ability to regularly pursue substantially gainful employment. The Tribunal finds that it is not. To rely upon the gross earnings does not take into account the true measure of capacity. To assess the true measure of capacity, consideration needs to be made to the Appellant's net earnings in conjunction with his physical and mental ability to maintain substantially gainful employment.

[56] In *T.C. v. MHRSD* (June 1, 2011) CP 26949 Pensions Appeal Board ("PAB"), the claimant, while collecting a disability pension, owned and operated a fishing and hunting lodge for four years. He reported nil net income despite gross earnings of around $80,000.00 a year.

The PAB determined that the failure to generate a profitable venture did not substantiate a severe and prolonged incapacity to regularly pursue substantially gainful work. The PAB further determined that the claimant's active involvement in the operations of the business over four years was indicative that he had residual capacity to work as of the commencement of the business.

[57] PAB decisions are not binding upon the Tribunal however the principles from same are used as guidance in adjudicating appeals. While both *T.C. v. MHRSD* and the present matter involve high gross earnings and similar reported net earnings, the Tribunal finds that the case is distinguishable on the facts.

[58] In *T.C. v. MHRSD* the claimant worked 15-20 hours a week, had several employees and contractors that reported to him. Moreover, there was evidence in that case that the claimant in addition to operating the fishing and hunting lodge was actively participating as a volunteer firefighter throughout the relevant period of disability. Finally, the medical evidence indicated that the claimant was certified as healthy in a physical assessment and could engage in fire-fighting.

[59] In contrast the Appellant in the present matter was able to work 2-4 hours a week, had no employees, and kept irregular hours throughout. Further, and keeping in mind that the Respondent bears the burden of proof, there is no evidence to suggest the Appellant was able to engage in any hobbies or volunteer activities as the claimant did in *T.C. v. MHRSD*. Moreover, the medical evidence is undisputed for the years between 2006 and up to July 2012 that the Appellant was not well and suffered from daily neck pain.

[60] In considering the Appellant's functional capacity, the Tribunal is also persuaded that between April 2006 and June 2012, he remained disabled within the meaning of the CPP. The Tribunal accepts, as detailed in the Appellant`s testimony that he did not work on a regular basis. He would work 2-4 days a week for 2-4 hours. Built into this work period were significant breaks and a requirement for rest. Moreover, there were entire days when he was unable to work due to severe neck pain. The rate at which the Appellant worked is not suggestive of substantially gainful employment. The Appellant made a limited number of

deliveries a day and took breaks between deliveries of up to 45 minutes. When he felt very unwell, he would go home and rest.

[61] Finally, the Tribunal accepts that the medical evidence during this period of time also substantiates that the Appellant remained disabled within the meaning of the CPP. All three reports provided from Dr. Vipler, Dr. Panet, and Dr. Parker detailed that the Appellant continuously sought medical treatment for his ongoing symptoms related to his neck condition. Dr. Parker detailed that from 2010 to 2013, the Appellant sought treatment 123 times. Moreover, the Chart notes of Dr. Vipler detail ongoing treatment for the Appellant`s neck condition. These reports confirm significant pain and physical impairments including a requirement to seek treatment from allied medical professions and emergency treatment.

[62] For these reasons, the Tribunal finds that the Appellant did not cease being disabled within the meaning of the CPP between April 2006 and June 2012.

July 2012 to February 2013

[63] In considering this period of time, the Tribunal accepts that the Appellant ceased being disabled within the meaning of the CPP.

[64] First, in his tax returns for the year 2012, the Appellant reported net earnings from his pet-food business of $13,926. This amount is a marked departure from previous years when the Appellant experienced negligible and net-negative earnings.

[65] Second, the Appellant`s testimony during his oral hearing was that as a result of receiving prolotherapy in July 2012 and onward, he was able to increase his functional ability such that he was able to work 2-5 hours daily pain free without requiring significant breaks. This again is supportive of the Appellant having ceased being disabled. The Tribunal notes the importance of and accords significant weight to the period of time in July 2012 as it was only with the introduction of the prolotherapy therapy treatment that the Appellant exhibited an improvement in his condition.

[66] Finally, the medical opinions of Dr. Vipler and Dr. Panet in 2013 detailed that the Appellant was now able to work on a limited part-time basis. Given the fact that Dr. Vipler had

been treating the Appellant continuously throughout his disability, the Tribunal accords significant weight to his opinion.

[67] For these reasons, the Tribunal finds that the Appellant ceased being disabled in July 2012.

CONCLUSION

[68] The Tribunal finds that the Appellant ceased being disabled in July 2012 when he regained an ability to work 2-5 hours without pain flare-ups. This is also the period of time when the Appellant commenced receiving prolotherapy which he evidenced provides him with relief and an increased functional ability. Finally, this is also the year wherein the Appellant obtained earnings from his business that were greater than all previous years.

[69] The appeal is allowed in part. The Appellant is not required to repay the Respondent for the period of time between April 2006 and June 2012. The Appellant is responsible for repaying the Respondent for the period of time between July 2012 and February 2013.

Adam Picotte
Member, General Division - Income Security