



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. B. v. Minister of Employment and Social Development*, 2015 SSTGDIS 140

Date: December 18, 2015

File number: GP-13-2725

GENERAL DIVISION - Income Security Section

Between:

A. B.

Appellant

and

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

Respondent

Decision by: Jeffrey Steinberg, Member, General Division - Income Security Section

Heard by Teleconference on December 8, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. B., the Appellant

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on April 18, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The hearing of this appeal was by Teleconference for the following reasons:

- a) There are gaps in the information in the file and/or a need for clarification.
- b) 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

[3] 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).

[4] 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.

[5] 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

[6] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2002.

[7] 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

Documentary Evidence

[8] On October 10, 2012, the Appellant completed the Questionnaire in support of his current application. He stated he completed 3 years of college and obtained his Power Engineering Certificate on September 9, 2006. He worked between September 5, 1996 and June 19, 2000 at BR Davidson Mining and Development and X Ready Mix as a mechanic and truck driver. He was injured on the job. More recently, he worked between January 5, 2011 and June 1, 2011 as a taxi driver four hours a day, 16 hours a week for D. Shuttle Service. He found this work too difficult in terms of getting out of a vehicle and hauling baggage. He stated he could not do mechanical work because of his shoulder and knee injuries. He has WSIB claims for his right shoulder (2000) and left knee (1989). He states he could no longer work because of his medical condition as of June 2000. He described the illness or impairment that prevents him from working as follow: his right shoulder was operated on two times to repair rotator cuff tears. His left knee had been totally replaced but his muscles and tendons were stitched up after being torn off. He is unable to lift his arm above 45 degrees and cannot lift heavy objects. It is very painful at all times. His left knee is very limited in terms of bending. He cannot walk on uneven ground and he always uses a cane. He also has diabetes. His drug addiction is being treated at Ontario Addiction Treatment Centres (OATC) with Methadone Maintenance Treatment (MMT). He had to give up his hobbies as of 2000. He stated it is very difficult to stand for long periods of

time. He can walk for short distances but only on level ground with his cane. He can lift and carry objects approximately 10 lbs. with his “bad” arm but not for a long period of time. He cannot reach over 45 degrees with his right arm. He cannot bend much due to his knee. He has trouble brushing/washing his hair with his right arm. He must use his left arm. He has trouble reaching and lifting when performing household maintenance activities. He has some trouble sleeping on account of his arm and knee pain. When driving a car, he cannot use a clutch and has trouble doing up his seat belt. He is prescribed Methadone, Glyburide, Metformin, Indomethacin and Pravastatin. He receives counselling approximately once a month. He regularly visits his doctor and uses a cane everywhere he goes. He also applies tensor bandage every day.

[9] On March 8, 2011, the Appellant completed the Questionnaire in support of his initial application for CPP Disability benefits. He stated he completed his 3 year Power Engineering Certificate on September 9, 2006. He worked between September 5, 1996 and June 19, 2000 as a truck driver and mechanic for BR Davidson Mining and Development. He was injured on the job. He was no longer able to work because of his medical condition as of June 9, 2000. He stated his right shoulder was operated on twice to fix tears in his rotator cuff. His left knee was operated on to fix his patella and ligament, meniscus and tendons which were torn. He cannot lift his arm past 45 degrees over his head. He has trouble grasping, lifting, holding, reaching sleeping, standing, walking, kneeling and squatting. He also has diabetes. He was prescribed Oxycontin and Percocet for pain. He became addicted and is being treated with Methadone. Since his shoulder injury, he cannot ski, bowl, do archery, hunt, canoe, hang glide, curl, run, swim, play darts or baseball, golf, snowmobile, ride his motorcycle, fish, play Frisbee, tennis, badminton, basketball, etc. due to pain and lack of movement. He can sit/stand for short periods with breaks and stretches. He can walk short distances consisting of one to two hours with rests in between. He can lift/carry 12-19 kg occasionally for a short distance. He can reach below 45 degrees with his right arm. He can bend occasionally. In terms of personal needs, he has trouble with his shirts, washing his hair and shaving. In terms of household maintenance, he has trouble reaching and lifting. He has trouble sleeping due to pain in the shoulder and knee. He can drive a car but does not use his right arm. His medications include Methadone, Glyburide, Altace and Metformin. He has received physiotherapy and counselling. He uses a tensor bandage, knee brace and cane.

[10] In his Notice of Appeal to the Tribunal, the Appellant stated he is disabled and unable to work since getting injured at work in 2000. He never completely recovered. While he tried to “work around” the injury, he is unable to return to work. He worked as a heavy equipment mechanic and operator for BR Davidson Mining and Development when he tore his rotator cuff in June 2000. He had surgery in 2001 which did not eliminate his pain and immobility. The shoulder was never properly repaired and he reinjured it in 2009 due to its weakness from the 2000 injury. He required surgery after the 2009 reinjury. He has not been able to work since the original injury in 2000. He tried to work as a cab driver in 2009 and held the job for three weeks but was not able to fulfill his job duties due to his physical limitations. He could not help people in and out of the cab, lift luggage or groceries out of the trunk or back seat, and often had a hard time getting in and out of the vehicle. WSIB required that he attend school in 2003 to preserve his benefits. He had no choice but to attend. He attended Confederation College and managed to finish the 4th Class Power Engineering program after three years. He was never able to work in the field because of his disabilities. While attending Confederation College, he was in constant pain and had to attend physiotherapy at the Regional Hospital on a regular basis. He often missed days of school as he could not sleep the night before due to pain. He would leave classes early every week because he could not concentrate and it was too painful to sit all day in class. After he finished school, he applied for several jobs but was never hired. He was told on several occasions that the job was too physically demanding for someone in his condition. One job required that he pass a medical which he did not pass. WSIB agreed he had looked for work and that he could not get hired due to his medical condition. They deemed him “not suitable for employment in the field”, locked in his pension and closed his file. While he tried to cope with his shoulder pain, he became dependent on Percocet and OxyContin. He had to start a Methadone program to overcome his dependency. He used PT extensively but was told no further progress could be made. He continues to experience pain daily from his shoulder and knee injuries. He had to have knee replacement surgery in 2010 and continues to suffer from nagging pain and discomfort. He cannot walk on uneven ground and has to stop for a break if he has walked too far. He can no longer work around his house. Two years ago, he was diagnosed with diabetes. Although managed, it is an additional stressor as he tries to cope with multiple medical conditions and frustration at not being able to work.

[11] In his April 3, 2013 Reconsideration request, the Appellant took issue with the Respondent's assertion that he would have been able to do some type of work since December 31, 2002 (the MQP date). He states he injured his rotator cuff at work in June 2000. He had surgery following which he had therapy for about six months at X Hospital. It ended when the therapist thought he reached maximum medical recovery. As his shoulder had limited movement, WSIB decided along with the doctors that he could not return to work. They entered him in a Labour Market Re-entry Program. He was told to take a Power Engineering Course. Before the course, he took upgrading at Reading Plus in his hometown of X and the Sylvain Learning Centre in X. On weekends, he returned home to X where he resides with his spouse and two children. While in school, his case was managed by Cascade Disability. The purpose of the program was to help him find employment. When he completed Confederation College, he obtained a 5th Class Power Engineering Certificate, which is a labour position that involves running boiler systems. He could not do the job because of the amount of physical labour involved such as ladders, turning valves, heavy lifting. While living in his apartment in X, he injured his knee on the stairs. He previously injured it while working for A&T Logging in 1989. In 2007, he attended a six week pain management program in Toronto sponsored by WSIB, to help manage pain without medication. He was taking Percocet and Oxycontin at the time and was worried about becoming addicted. In 2007, he was put through another Labour Market Reentry (LMR) program. He made applications, resumes, covering letters, etc., to help him get a job. He submitted applications to about 30 different businesses, such as gas stations, convenience stores. They all said he was not fit enough and had too many restrictions such as standing and walking, lifting. On March 23, 2009, he slipped on some ice, split open his head (requiring stitches) and reinjured his shoulder. In July 2009, he had a second shoulder operation and also underwent surgery for carpal tunnel syndrome on his right wrist. He then had therapy at Victoriaville Therapy Clinic in X. At this time, he was addicted to Oxycontin. On May 10, 2010, with the assistance of WSIB and Dr. Campanaro, he was started on a Methadone Maintenance Program at Ontario Addiction Treatment Centre (OATC) in Fort Frances with Dr. Yermus. In or around June 2010, he had an MRI performed on his left knee. Dr. Porter stated he needed a knee replacement but should wait as long as he can. In February 2012, he had a total knee replacement on his left knee. On February 22, 2012, he slipped and fell on ice and split his knee wide open. He was taken to the hospital for stitches. On April 12, 2012, Dr. Porter operated on his knee

again. The muscle had been torn off the knee and he tried to stitch the muscles back. The surgery did not work and the muscles are currently halfway up his thigh and not properly attached. He uses a cane full time and has a handicap parking permit. Due to operations, accidents and injuries, he is in a lot more pain now than 12 years ago. He has a hard time getting enough sleep. He tried to find employment but was told he has too many limitations. He cannot pass a medical. Had he known his CPP benefits were not being paid by WSIB, he would have paid for them personally.

[12] On October 1, 2012, Dr. Campanaro, family physician, completed the CPP Medical Report in support of the Appellant's current application. He stated he knew the Appellant for more than 10 years and started treating him for his main medical condition in March 2007. He diagnosed 1) chronic right shoulder pain following rotator cuff tear/repair; 2) OA left knee and total knee replacement (TKR) January 12 complicated by fall with extensor mechanism disruption requiring surgical repair April 2012; 3) narcotic addiction, stable on MMT; and 4) Diabetes Mellitus II. He described the Appellant as a 55 year old with orthopedic conditions complicated by narcotic addiction. He has been stable since May 2010 on methadone maintenance treatment (MMT). He has limited use of his right upper extremity (UE) due to decreased range of motion and pain at the shoulder. He is recovering from left TKR complicated by extensor mechanism tear with repair April 2012. He currently requires a cane to assist with ambulation. He underwent left TKR for severe OA on January 9, 2012 and repair of disrupted left knee extensor mechanism on April 10, 2012. He has reduced range of motion of the right shoulder with pain and reduced left quadriceps strength. He is prescribed Methadone, Glyburide and Metformin. He is stable in terms of narcotic addiction and diabetes. Under Prognosis, Dr. Campanaro stated: "R shoulder pain and decreased function is long term and not likely to improve. Left knee replacement extensor mechanism tear should show improvement re: quads strength/mobility but will likely have permanent restrictions as per Dr. Porter's note of June 18, 2012".

[13] On March 14, 2011 Dr. Campanaro completed the CPP Medical Report in support of the Appellant's initial application. He indicated he knew the Appellant for over 10 years and stated he started to treat him for his main medical condition in June 2000. He diagnosed 1) Chronic right shoulder pain: decreased range of motion and reduced functional use of right shoulder and

right upper limb following a rotator cuff tear June 2000. Repaired in 2001 and again in 2009 following re-injury; 2) narcotic addiction as complication of above. Currently stable on methadone maintenance therapy (MMT); 3) Diabetes Type II; 4) HTN; 5) Hypercholesterolemia; 6) Left knee medical meniscal tear. He stated the Appellant was a 53 year old with right shoulder related disability. He has significant functional limitations of use of his right shoulder due to pain and markedly reduced tear. His narcotic addiction complication was stable on MMT and his other medical conditions were controlled with restrictions. On July 10, 2009, he had day surgery for right shoulder revision and right wrist carpal tunnel decompression. His limitations relate to right shoulder with range of motion limited to between 45-60 degrees in flexion and abduction with pain and stiffness at end range of motion; and significant left knee medical osteoarthritis with medial meniscal tear. He has reduced range of motion to 90 degrees flexion with effusion and pain with weight bearing with a limping gait. He has follow- up planned with Dr. Porter, orthopedic surgeon, for visco- supplementation injections to the left knee. He is prescribed Methadone, Glyburide, Altace and Pravachol. His narcotic addiction and, to some degree, his pain are well controlled on MMT. His HTN and DM and cholesterol are controlled on respective medications. Under Prognosis, Dr. Campanaro stated the Appellant will have permanent restrictions on his ability to use his right shoulder and right upper limb. He stated: "He will likely (illegible) long term limitations on his ability to do any prolonged standing/walking due to his left knee OA and may eventually require knee replacement surgery".

[14] On February 11, 2013, February 14, 2013, and June 7, 2013. Dr. Campanaro sent letters to the Respondent. He stated the Appellant had two causes for disability: a right-shoulder rotator cuff tear obtained in 2000 and repaired surgically twice, the second time was in 2009 with suboptimal results in terms of pain and function. He has pain with abduction or flexion with more than 45 deg and with extension more than about 10 to 15 deg. He writes: "This significantly restricted range of motion affects his ability to use his right upper limb for anything other than light, brief, desk-level activity. I note that he is right-handed". The second condition is ongoing left knee pain following left total knee replacement in January 2012 complicated by a severe post -surgical fall resulting in a major tear of his extensor mechanism which also required surgical repair. He continues approximately one year post-surgery to have a small effusion, reduced ranged of motion to about 90 deg and pain with standing and walking for more than about one hour maximum. He has difficulty climbing stairs and continues to require use of a

cane for ambulation. Dr. Campanaro writes: “These two conditions render (the Appellant) to be quite severely impacted in mobility and function and the disability has been prolonged and is likely to continue into the foreseeable future. I do not think it is reasonable to expect that he will be able to return to gainful employment and I note that his orthopedic surgeon, Dr. Porter, concurs with that assessment”.

[15] A November 8, 2000 right shoulder MRI revealed a small focal partial thickness tear involving the humeral surface of the supraspinatus tendon anteriorly. There was also a large partial thickness tear involving the subscapularis tendon. The infraspinatus and teres minor appeared intact. There was also a small joint effusion present. There was a small amount of fluid in the subdeltoid bursa.

[16] On April 4, 2001, Dr. Axelrod, orthopedic surgery, reported on his assessment of the Appellant: a 43 year old right handed truck driver/heavy equipment mechanic with BR Davidson Mining. On June 28, 2000, he was trying to loosen a hydraulic fitting with a wrench under a large grader and felt something pull in his right shoulder. A few days later, he went to X General Hospital outside X because of right shoulder pain. He was felt to have a clinical diagnosis of a right rotator cuff tear and was treated with physiotherapy, rest, ice and Naprosyn. Follow up x-ray showed minor osteoarthritis of the acromioclavicular joint. Physiotherapy was restarted in August. An August 2001 steroid injection was performed with no help. An MRI showed a partial tear of the supraspinatus and possibly subscapularis tendon. Towards Christmas, he stopped physiotherapy since it was no longer helpful. He was awaiting surgery. He was off work since July 19, 2000. He complained of shoulder pain as 6/10 with activities at or above chest height. Activities done with his arms at his sides were less painful. The moment he has to elevate it hurts quite significantly. He also complained of some dysesthesia in the ulnar digits. Shoulder flexion was 130 deg. Abduction was 110 deg. There was a painful arc present and he had great difficulty lowering the arm. Internal rotation was only to the buttock. External rotation was 45 deg bilaterally. There was pain at the extremes of movement. Horizontal adduction test was positive. Impingement signs were positive and there was a click with inferior glide of the glenohumeral joint. Dr. Axelrod stated the Appellant had a traumatic partial tear of the rotator cuff. He stated he believed he would benefit from an acromioplasty, A/C joint excision and open rotator cuff repair.

[17] On January 24, 2002, Dr. Campanaro reported to WSIB that the Appellant had a history of a partial rotator cuff tear of the right shoulder sustained at work in June 2000. Following confirmation of his injury, he underwent surgery in June 2001. He stated it was approximately 8 months since surgery. Despite absence of operative complications and ongoing physiotherapy, he continued to be symptomatic with significant restricted range of motion of the right shoulder with abduction limited to approximately 90 deg. flexion to about the same, and extension to about 20 deg. He had pain at end range of motion and pain with letting the arm down to neutral position. His ongoing symptoms meant he had difficulty with normal use of the right upper extremity, and many of his non-work-related recreational activities involving use of that arm, e.g. golfing, hockey, baseball, had to be stopped or curtailed. The other finding was that of a right ulnar sensory neuropathy with decreased sensation in the 5th finger and the ulnar aspect of the 4th finger. These symptoms were present since about a couple of months following his injury. His November 2000 MRI showed a significant partial rotator cuff tear. Given his ongoing symptoms and the time since surgery, Dr. Campanaro thought a repeat MRI would be useful to determine further management and prognosis.

[18] According to an April 2002 WSIB Memo: the Medical Advisor confirmed the Appellant had a permanent impairment. The Appellant had completed physiotherapy on March 20, 2002. Dr. Campanaro's April 11, 2002 report noted that the MRI supported subacromial bursitis. WSIB indicated that the Appellant achieved Maximum Medical Rehabilitation as of April 11, 2002. A Permanent Impairment was evident and referral for a Non-Economic Loss assessment was recommended. A Labour Market Assessment (LMA) was noted to be almost completed and due that month.

[19] On April 2, 2003, Cascade Disability Management issued its Labour Market Re-Entry (LMR) Progress/Addendum Report #13. According to the report, the Appellant was currently participating in the second semester of the Pre-Technology program through Confederation College. His timetable for the semester was as follows: Tues: 12-2; 4-6; Wed: 9-11; 12-2; 4-5; Thurs: 9-11; 12-3; 3-6; and Friday 11-3. It was noted he would upgrade math during the summer of 2003 and commence the Mechanical Engineering Technician Program in September 2003. Following successful completion of the program, he would participate in a Job Search Training Program, to give him the skills to secure employment as a Mechanical Engineer Technologist.

The target completion dates were: Pre-Technology Program: May 30, 2003; Mechanical Engineer Technician Program: May 30, 2006; and Job Search Training Program: June 28, 2006. According to the assessor, the Appellant indicated he was very stressed out. He stated he had “wiped out” on a patch of ice about one month earlier and aggravated his shoulder. He stated his shoulder was still very sore and that his fingers had gone numb. Also, he stated his eyes were very aggravated by “staring” at the computer. He stated he was doing excellent in Shop course but indicated his computer teacher stated that course was too advanced. He stated he was struggling in math oriented courses. He noted he was doing well in English. He stated he had missed some time from school due to his recent injury. The action plan was as follows: to continue full-time effort and participation in the second semester of the Pre-Technology Program; pursue math upgrading in the summer of 2003; to meet with a counselor at Confederation College to discuss alternative programs to the Mechanical Engineer Technician Program, or request WSIB sponsorship in an additional year of upgrading, or in an alternative retraining program, given his difficulties in his current retraining program.

[20] On March 10, 2007, a right shoulder MRI was taken to rule out recurrent right rotator cuff tear. It revealed a small partial thickness bursal surface tear seen involving the anterior aspect of the supraspinatus tendon. There was no evidence of any full thickness tear or musculotendinous retraction. There was thinning seen of the subscapularis tendon though it appeared grossly intact. There was a small undersurface acromial spur with curving seen of the acromion laterally. There were post-surgical changes noted within the region of the acromioclavicular joint, likely relating to previous AC joint resection. The biceps tendon was dislocated medially from the expected location within the bicipital groove.

[21] On September 5, 2007, B. Nicholl, Senior Vocational Rehabilitation Consultant, Cascade Disability Management Inc, sent the Appellant a letter summarizing the Appellant’s participation. He stated WSIB referred him to Cascade for LMR services on March 25, 2002. After meetings, it was recommended to WSIB that he be sponsored to become a mechanical engineering technician. WSIB approved the objective. Effective May 2002, he began an academic upgrading program through the Reading Plus Centre in X. On completion, he participated in a Pre-technology program at Confederation College which was to prepare him for post-secondary school. He had difficulties in his pre-technology program especially with

math/physics subjects and required further upgrading. He asked to be allowed to change from the Mechanical Engineering Technician program to the Power Engineering Technician program. He started that program September 2005 at Confederation College and was provided with extensive tutoring services. He was able to obtain the hours required for fourth class standing, but was not successful in passing the required government exams. In May 2007, he successfully graduated and obtained his Power Engineering Technician diploma. He then attended a Job Search Training program to prepare for employment. However, as there was a downturn in the economy for Power Engineering Technicians, it was recommended to WSIB that a placement be provided to further develop his transferable skills. From May 2007 to August 31, 2007, he attempted to obtain a placement with employers in X. It was noted he experienced a significant flare-up to his compensable injury and was diagnosed as having a further tear to his shoulder. He indicated he was being referred to a specialist for consultation regarding further surgery. As a result of the flare-up, he was even more limited with regard to his physical abilities. Employers were not willing to take him for placement or subsequent employment. As he had successfully completed his LMR Plan, services through Cascade Disability were being withdrawn.

[22] An October 14, 2007 MRI of the right shoulder was taken to assess rotator cuff tear. It was compared with the March 10, 2007 MRI. There was again a tiny partial thickness bursal surface tear seen involving the anterior aspect of the supraspinatus tendon. There was no evidence of any full thickness tear or musculotendinous retraction. The remaining tendons of the rotator cuff appeared intact. The subscapularis tendon appeared thin. The biceps tendon was seen to be dislocated medially and appeared grossly thinned. There was note made of a small under – surface acromial spur. The appearance had not significantly changed.

[23] On July 10, 2009, Dr. Payandeh performed a right shoulder revision and rotator cuff decompression repair with biceps tenodesis and carpal tunnel decompression.

[24] On October 26, 2009, Dr. Payandeh reported on his assessment of the Appellant 3 months following his rotator cuff decompression and repair with biceps tenodesis. He stated he was doing physiotherapy in X and had a lot of pain and stiffness in his shoulder. He stated the deltoid was functioning but weak. He could not assess the rotator cuff. His passive motion was about 90 degrees but was quite difficult. He reported good relief of symptoms in his hand from

his carpal tunnel decompression. He stated he thought the Appellant should continue to improve slowly and that he expected maximal recovery at the 12 to 18 month mark. He stated: "He is certainly not capable of any kind of work at the current time".

[25] A March 23, 2010 left knee x-ray revealed severe OA.

[26] On April 22, 2010, Dr. Payandeh reported he saw the Appellant in follow up of his revised rotator cuff decompression and repair with biceps tenodesis. He stated the Appellant was having a lot of trouble with his shoulder and that surgery had not improved his situation. He had a tremendous amount of pain and very little active or passive motion. He had a recent change in his narcotic medications, tapered them off and was considering Methadone treatment. According to Dr. Payandeh, this had exacerbated his shoulder pain which was not surprising. He stated: "In terms of (the Appellant's) shoulder, I am fairly certain that it is unlikely to improve in a material way at this point. He has a permanent partial disability. This would prevent him from any significant work that involves the use of his right shoulder".

[27] On December 8, 2010, Dr. Porter reported on the Appellant's status one month following his arthroscopic medical meniscectomy of his left knee. He advised the Appellant to get on a weight reduction program. He stated he may experience vague achiness in the knee periodically because of the degenerative arthritis, but stated that with the use of an off the shelf non-steroid anti-inflammatory, his knee should be functional. He stated: "In many years to come he may be a candidate for a joint arthroplasty but this is in the distant future. I advised him that he can return to full activities within a month from today's date".

[28] According to a January 9, 2012 operative note, the Appellant underwent a left total knee arthroplasty for degenerative arthritis of the left knee. It was noted that previous surgery had been carried out extensively in the knee and that the capsule on the lateral side of the joint was markedly fibrotic. Previous ACL repair appeared to be markedly attenuated. The lateral meniscus was absent and a previous full lateral meniscectomy had not been carried out. The medial meniscus was intact but macerated. Degenerative changes were mainly in the lateral compartment posteriorly on the femur and corresponding area on the tibia. The medial compartment showed areas of partial thickness cartilage erosion on the weight bearing surface, and there were large peripheral marginal osteophytes on the patella.

[29] On March 8, 2012, Dr. Campanaro wrote to Dr. Porter. He noted Dr. Porter performed a left total knee replacement in January of that year. He reported the Appellant slipped on some ice and fell heavily on his left leg, suffered acute severe pain of the left knee and tore open the anterior portion of his incision. He was finding that if he put weight on the left leg, it threatened to give way. As a result, he was unable to walk without a walker. On examination, there was moderate effusion, reduced range of motion from about 10-80 deg.

[30] On April 9, 2012, Dr. Porter reported that he reviewed the Appellant who was doing exceedingly well. It was about 3 months following the knee replacement and six weeks since he slipped on some ice at which time he sustained a forced flexion injury to the left knee opening the mid portion of his wound. He felt tremendous pain in his thigh when he fell. The pain had persisted and he had extreme difficulty maintaining his knee in 10 degrees of extension against gravity. Dr. Porter felt there was a palpable gap in the extensor mechanism above his patella and he had at least partially and probably completely disrupted his quadriceps tendon. He believed the Appellant had disrupted his extensor mechanism and that surgical exploration and repair should be carried out ASAP.

[31] On June 19, 2012 Dr. Porter wrote to the WSIB and stated the Appellant was recovering from his knee arthroplasty and sustained a serious injury when he slipped and fell on some ice. This necessitated further surgery to repair a disrupted extensor mechanism. His progress, although slow, was improving. He still had residual pain in the area of the repair and knee, and his range of motion was from 0 to almost 90 degrees of flexion. His extensor mechanism appeared to be functioning normally. Dr. Porter stated: "I expect that (the Appellant) never will be able to return to any activity that involves hard physical labor or repetitively climbing in and out of vehicles and in particular driving trucks, etc". He stated the Appellant had a long way to go until he got over the second procedure and developed a better range of motion and muscle power that would allow him to ambulate and climb stairs without a cane. He stated the knee pain could be expected to continue for a few more months. He took the position the present difficulty should be compensable, since the reason the Appellant had the knee arthroplasty in the first place was a compensable problem. If he had not had the knee replacement, he never would have fallen and disrupted his extensor mechanism.

[32] On April 22, 2014, Dr. Porter sent a letter to WSIB. He stated the Appellant had a left total knee arthroplasty carried out in Fort Frances on January 9, 2012. He then slipped and fell on ice early in April 2012. As a result, he disrupted his extensor mechanism which required further surgery to repair the disrupted extensor mechanism. Subsequently, he required extensive physiotherapy and has been able to ambulate without much difficulty. However, on April 9, 2014, although the extensor mechanism was fully functional, he still had weakness which would be of a permanent nature. With regard to his Non-Economic Loss, Dr. Porter stated there was no doubt he qualified for the full amount as his disability was “severe and prolonged” and will be permanent. He stated: “In combination with his back and shoulder issues, it should be easy to determine that (the Appellant) will be unemployable in the future”.

[33] In an October 16, 2014 letter sent to the Tribunal, the Appellant stated it appeared he was being denied CPP Disability pension because he completed a college course after December 31, 2002. He took the position the fact he eventually completed the course was no indication of his being able to work. He stated he experienced physical pain and discomfort sitting all day. He could not manage the course work, needed extra tutoring and time to finish the course. He not only had to leave early some days but also missed entire days at school as he was in too much pain to sit and focus.

Oral Testimony

[34] Between September 1996 and June 2000, he worked at BR Davidson as a truck driver and mechanic although he also performed other jobs.

[35] Prior to BR Davidson, he worked for a logging company in the bush cutting trees, running a skidder and other equipment. Prior to that, he injured his knee on a motorcycle and injured himself at work in or around 1984 or 1986. WSIB put him through a heavy equipment operating course. He eventually got back into the workforce and did odd jobs. He finally found work at the logging company where he worked for approximately 3 years until he reinjured his knee.

[36] He stopped working in June 2000 after he injured his right shoulder. He had right shoulder surgery in June 2001 and then had physiotherapy until March 2002.

[37] He started attending a post-secondary school upgrading program in May 2002 at Reading Plus in X. Cascade Disability Management (Cascade) managed his case. WSIB sponsored his enrollment. He took basic upgrading in math, English and computer skills. The program ran for about four months. He attended daily for 1.5 hours in the morning and afternoon for a total of about 3 hours daily. He then took a course at Confederation College to test his aptitude. It determined he had about Grade 8 education. Therefore, he attended Sylvan Learning Centre (Sylvan) in X for further extensive upgrading. He attended Sylvan between approximately October 2002 and March 2003. He subsequently revised this to June 2003. He attended Sylvan four days a week for 5-6 hours daily. He studied basic math, English, some basic physics and basic computer courses. He would take his own notes by writing down the information. On weekends he would travel back to X where his family resides. Each weekend, he would drive 247 kilometres each way between X and X.

[38] He started the pre-technology program at Confederation College in X in September 2003. He continued to commute home to X on weekends. He would have to stop many times to relax and stretch. He could not have driven a standard car which would have required shifting the gears. The course ran from September 2003 to June 2004. It was full-time. Class hours consisted of approximately 18 hours weekly. He studied math, computers and physics. Because he was going to take an engineering class, the pre-technology classes were oriented towards this. He would take his own notes. He had a computer with Dragon dictation, however he would jot down his notes in a notebook. Some of the professors indicated they did not like students using that program in the classroom. The course was set up to last one year to get him to the level where he could take a technology course.

[39] The Tribunal asked the Appellant about a letter he filed dated September 5, 2007 from B. Nicholl, Cascade, (GD5-13) who indicated that the Appellant resumed upgrading at Confederation College in 2003. According to Mr. Nicholl, it was later recognized the Appellant required additional individualized attention and should be transferred to the Sylvan Learning Centre. The Appellant confirmed he returned to Sylvan in the summer of 2004. He also attended Sylvan two nights a week for two hours each while attending the pre-technology program at Confederation College in 2004. While attending the pre-technology course, his attendance was not very good. He was very sore and did not sleep well. He had difficulty focusing and paying

attention. He was on pain medication which made it hard to concentrate and stay awake. At times when he could not sleep at night, he would sleep in and arrive late at school. Other days he would leave school early. At least once a week, he would leave school early or arrive late. He would fall asleep in class. He was absent at least 10 percent of the time. He later revised this estimate to 15 percent and then indicated it was between 10-20 percent, stating it is hard to say. He would have pain in his right shoulder. While sitting at the desk, the note pad would be placed on the desk and he would rest his elbow on the desk. He could not let his elbow hang over the side of the desk or he would experience pain. He could manage to write okay but would move the paper up and down.

[40] In September 2004, he started the technology program at Confederation College, i.e., the Power Engineering Technician Program. The Tribunal asked the Appellant whether the start date he provided was accurate noting that in his September 2007 letter, B. Nicoll, Cascade, reported he enrolled in the Power Engineering Technician Program between September 2005 and May 2007. The Appellant reiterated he started the program in September 2004 and asserted that Mr. Nicoll was in error. He stated the program was 3 years duration and agreed with Mr. Nicoll that he completed the program in May 2007 (note: Mr. Nicholl indicated it was a two year program). He completed the program on time, i.e., within three years. He would spend approximately 25 hours a week in class. The first year was all lectures. The second year was more hands- on e.g. welding and pipe fitting. Third year had even more hands-on. He even took a carpentry course. The teacher exempted him from a lot of the hands- on activity and would ask him questions instead. He tried some of the hands- on activities e.g., welding if he could prop his arm up. Mostly, though, he was asked questions. His answers showed the teachers that he knew what he was talking about and doing. The instructors also took his age into account and recognized his work history. During the first year, he found the longer hours difficult. He would fall asleep and have problems with concentration. A few other students would give him their notes, which helped him out. He would mainly get their notes if he missed class. He would take his own notes if he was in class. He was “pretty much” okay taking his own notes although as the day went on, he would get more sore and his writing would become less legible. He was never failed due to being absent even though he missed at least a day a week. Two days a week, he would come in late or leave early. At times, he would go out to his car and rest his head and then return to the classroom. He would do this once every couple of weeks or once in a while. The teacher knew he

was trying hard and his tests were okay. He participated in class. Therefore, he does not believe he was failed on account of his absences.

[41] During the first year, he would also have to work on computers and take computer aided exams. He found this difficult not only due to his lack of knowledge of computers but he also because he could not really rest his elbow anywhere.

[42] While driving back and forth each weekend between X and X, he could rest his arm on the console and drive with his left arm.

[43] He graduated in May 2007 and obtained his diploma. After he graduated, Cascade gave him another placement during which he attempted to find jobs and sent out resumes. He applied to places like conveniences stores and gas stations. He applied for a few office jobs but states he was illiterate when it comes to office work and that his computer skills were not up to par. X is a small town and there are not a lot of businesses. A prospective employer in a convenience store told him he would be fine to run the till but could not stock shelves, sweep the floors or shovel snow. He also had a flare up of his shoulder around this time after he fell on some ice and jarred his shoulder for a couple of months. He does not believe it would have been easier to find a job if he did not have the flare up. When employers see an individual on WSIB and as disabled, their attitudes change significantly.

[44] The Appellant clarified that he tried driving a cab for three weeks, not six month. He did this in 2011, not 2009. Although he could drive the cab okay, he would have difficulty lifting customer packages such as groceries and loading them in the cab. He also would have difficulty providing assistance to individuals getting into the cab.

[45] The Tribunal asked the Appellant some questions about the time frame he stated he was enrolled in the pre-technology course at Confederation College. He previously testified he was enrolled between September 2003 and June 2004. However, the Tribunal notes that on April 2, 2003, Cascade Disability Management issued its Labour Market Re-Entry (LMR) Progress Addendum Report #13(GD5-12) . The caseworker indicated the Appellant was then participating in his second semester of the pre-technology program at Confederation College. The Tribunal asked the Appellant if, in fact, he was enrolled in the pre-technology course at an earlier point in

time than he previously testified. The Appellant indicated there was no second semester in pre-tech. He subsequently indicated that there were three semesters, that he thought the caseworker was referring to years, not semesters, and stated that perhaps he was enrolled in the pre-technology course April 2003.

[46] The Tribunal asked the Appellant about the entry in LMR Addendum Report #13, in which the caseworker indicated the Appellant stated he wiped out on a patch of ice about one month earlier and aggravated his shoulder and stated he had missed some time from school due to his recent injury. The Appellant testified he thought he was absent from school for around a week or nine days due to the recent injury. The Tribunal asked the Appellant if he could explain why the caseworker linked his absence from school solely to the recent slip and fall and did not confirm general ongoing absence from school due to pain or regular late attendance or early departure from class. The Appellant stated he told the caseworker more than once that he was absent from class, was leaving early and was arriving late. He stated he did not know why she did not write this down.

[47] He does not believe that his school attendance means he could work. He does not have the skills to do an office job. Also, he was in constant pain in school, lacked concentration and was groggy. He wanted to finish the program and prove to WSIB and himself that he could obtain a ticket of some sort. Once he obtained the 4th class ticket, his main objective was to get his first class ticket, which would enable him to sit in a control room and monitor gauges and run equipment. When the Tribunal asked him how the pain, difficulties with concentration and grogginess would affect his ability to sit in the control room and run gauges, he indicated he would have liked to try it. He ran control rooms before and stated he could use his left hand to push buttons. He has operated them before. It is a pretty simple job. There is not a lot of writing in the control room. The gauges and flashing lights would keep him alert and busy. He believes he would be kept alert by the busy activity and nature of the work. The work would not allow him to become groggy.

[48] He does not believe there is any kind of a driving job he could do. He has his A Class driver's licence. Getting in and out of the truck is difficult. One has to strap down loads and place them in the back of the truck. There is physical labour involved.

[49] He was unable to come up with a job which involves only sitting and driving. It was not an easy task to drive to X. He would have to take breaks in order not to fall asleep.

[50] There is no job he believes he would have been able to perform. He has not been able to come up with anything that does not involve his right arm and the constant pain.

[51] He has college English and math because he passed all the courses. He has basic proficiency on a computer. He goes on the internet.

[52] He has been pensioned off on WSIB.

[53] In the future, he hopes that WSIB will contribute to CPP on behalf of WSIB recipients or advise the WSIB recipients that CPP contributions are not being made. Alternatively, he wishes CPP would have alerted him to the fact that CPP contributions were not being made on his behalf.

[54] Being on WSIB, taking the courses he did and having to agree with everything WSIB requested was stressful. WSIB did not take into account his family and stress issues. He has a family to support and children to put through college. He can no longer change his own tires or repair his own vehicles. He had to sell his tools and vehicles to make ends meet. He is no longer active. He was unable to tie his children's skates when they were younger. He has stress and cannot sleep. He has been a diabetic for about four years now likely because he is no longer active. His house was under construction prior to his injury. He has not been able to afford people to complete the job. The house remains under construction.

SUBMISSIONS

[55] The Appellant submitted that he qualifies for a disability pension because he has a severe and prolonged disability.

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

- a) The Respondent acknowledges he would have had limitations with the types of work he was able to perform at his MQP due to his shoulder and knee conditions. However, in

letters to the Department from April 2013, he states he was involved in academic upgrading to obtain Grade 12 in 2002 and beginning in 2003, he successfully completed a 3 year college program as a 5th Class Power Engineer.

- b) While he says he was unable to work as a 5th Class Power Engineer because of the physical demands of the job, nonetheless, he completed retraining at and well past his MQP, which CPP considers comparable to sedentary work. As such, a finding of disability is precluded.
- c) No medical evidence was submitted which was relevant to the MQP. It is irrelevant if his condition deteriorated after the MQP.
- d) The evidence does not show any serious pathology of impairment, which would have prevented him from doing suitable lighter work. In fact, at his MQP and well past, he was participating in and successfully completed a 3 year college program. The capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability as it is an indication of capacity to work. He demonstrated the capacity for work at the MQP and beyond, which precludes a finding of disability.
- e) The additional information provided by the Appellant , inclusive of a WSIB note, family physician's report, two Cascade Management reports, a letter from the client and an orthopedic surgeon report, while informative, fail to support that he was disabled from all types of work, including sedentary or part-time at his MQP.
- f) It was recognized in an April 2002 WSIB note he had an assessable permanent impairment. An impairment does not preclude one from all employment. A Cascade Management report (January 2002) recorded that he continued to have significant range of motion issues with his right shoulder. While acknowledged, this limitation does not preclude one from all types of work.
- g) In terms of the difficulties he had during upgrading (2005-2007) the reports (see Cascade Management reports dated April 2, 2003 and September 5, 2007) indicate that he was stressed and did not have the upgrading to pursue a college program. He was

referred to the Sylvan Learning Centre for additional tutoring to upgrade necessary math, physics, and computer skills in order to pursue his college program. He was successful in completing his Power Engineering Technician course. He had a subsequent injury in which he aggravated his prior shoulder injury and was not able to pursue a work placement. While he may not have secured a placement after his LMR, his ability to pursue his upgrading supports a finding he retained capacity for some type of work at his MQP and after. Although he is unable to pursue heavy labour type work, the evidence failed to support that he is precluded from all types of employment.

- h) While it was noted in April 22, 2014 that Dr. Porter was supportive of the Appellant's disability due to his fall and subsequent surgery in January 2012, the injury occurred well after the MQP.

ANALYSIS

[57] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before the MQP.

Severe and Prolonged

[58] The Tribunal is satisfied based on the strength of the medical record and the Appellant's testimony that the Appellant was incapable regularly of pursuing his previous physical work resulting from his chronic right shoulder condition with limited range of motion and restrictions involving heavy lifting and repetitive motion, on or before the MQP.

[59] The more difficult question confronting the Tribunal is whether the Appellant was capable at the MQP and continuously thereafter of pursuing sedentary work within his physical restrictions and whether, as contended by the Respondent, his participation in and successful completion of a three year college program evidenced such capacity.

[60] Specifically, the Respondent notes the Appellant stated he was involved in academic upgrading to obtain his Grade 12 in 2002 and beginning in 2003, he successfully completed a 3 year college program as a 5th Class Power Engineer. According to the Respondent, even though the Appellant states he was unable to work as a 5th Class Power Engineer due to the physical

demands of the job (note: the Appellant states it was a 4th Class Power Engineering program), nevertheless, he completed the retraining beyond his MQP, which the Respondent considers to be comparable to sedentary work.

[61] The Tribunal notes that it was not provided all or even most of the Appellant's Labour Market Re-Entry (LMR) Progress Reports. The Appellant filed only LMR Progress/Addendum Report #13 dated April 2, 2003 with the Tribunal, which is the only contemporaneous document dating from the time the Appellant was involved in upgrading and training which addresses his function. (see GD5-12)

[62] Based on that report, alone, the Tribunal notes the following:

- The Appellant participated in the second semester of the Pre-Technologist program through Confederation College. His timetable for the semester consisted of 4 hours on Tuesday; 5 hours on Wednesday; 5 hours on Thursday and 4 hours on Friday for a total of 18 hours weekly;
- The Appellant told his caseworker that he was "very stressed out". He stated he had "wiped out" on a patch of ice approximately one month earlier and aggravated his shoulder. He stated his shoulder was still very sore. He indicated his marks in Computers had been terrible but he was still likely passing the course. He was doing excellent in Shop course and had been receiving 100% on everything. Although experiencing grave difficulties in Electrical and Physics courses, he had received over 80% in all assignments and a test in English.
- The Appellant admitted he had missed some time from school due to his recent injury.
- Under Barriers/Issues and Possible Resolutions, the caseworker noted the Appellant was not math oriented and was not doing well in his Electrical or Physics courses. He was also having trouble in his Computer courses due to lack of computer skills going into the program.

[63] The Tribunal finds the above factors to be significant for the following reasons.

[64] Given the stated hours of class attendance, the Tribunal is satisfied that regular weekly attendance at school consisting of 18 hours weekly would at least translate or equate to a capacity regularly to perform part-time sedentary work.

[65] Although the Appellant had difficulty in those substantive subjects in which he did not have a background or aptitude, he did well in other subjects for which he had some aptitude. This suggests to the Tribunal that his pain levels and/or side-effects from medication and absence from school due to pain, did not ultimately impact on his capacity to succeed in those courses for which he had aptitude.

[66] Of further significance, according to the caseworker, the Appellant admitted to having missed some time from school due to his recent injury. The case worker did not mention overall poor attendance due to the Appellant's shoulder condition prior to his recent injury in March 2003 after he fell on a patch of ice. The Tribunal notes that the slip and fall occurred after the December 31, 2002 MQP. This contemporaneous report supports a finding that the Appellant's school attendance post MQP was not generally poor prior to the March 2003 slip and fall.

[67] If the Tribunal is in error on this point, even accepting the Appellant's oral testimony that he would generally arrive late at school and leave early on occasion and was absent between 10 percent (later revised to 10-20 percent) of the time, he was able to attend educational upgrading and then attend a full-time technology program school between 80 to 90 percent of the time.

[68] The Tribunal further notes that between September 2004 and May 2007, the Appellant was enrolled in the Power Engineering Technician Program at Confederation College. He obtained the hours required for fourth class standing and completed the three year program on time. In May 2007, he successfully graduated and obtained his Power Engineering Technician Diploma.

[69] The Tribunal is satisfied that the Appellant's capacity to pursue pre post-secondary upgrading, attend the pre-technology course and then attend and successfully complete a full-time three year degree program at Confederation College was equivalent in demand to engaging in sedentary employment.

[70] Although the Appellant received accommodation in the more physical courses such as welding, pipefitting and carpentry, he completed the course on time, passed the course, took his own notes in class and was not failed due to poor attendance or absenteeism. As previously acknowledged by the Tribunal, although the Appellant arrived late and left early on occasion and was absent from school between 10 to 20 percent of the time, the fact remains he was present during approximately 80 to 90 percent of the time. The Tribunal finds this translates into a capacity regularly to attend sedentary work at minimum on a part-time basis.

[71] The Tribunal has further considered the contents of the September 5, 2007 letter of Blayne Nicholl, Senior Vocational Rehabilitation Consultant, who summarized the Appellant's Labour Market Re-entry (LMR) Services. He noted that following graduation in May 2007, the Appellant attended a Job Search Training Program to prepare for employment. He wrote: "However as there was a downturn in the economy for Power Engineering Technicians as result of the deterioration to the forestry industry and several mills closures it was recommended to the WSIB that a placement be provided to you to further develop your transferable skill". This suggests that difficulty in finding a job had to do with socio-economic factors as opposed to the Appellant's capacity *per se*. Mr. Nicholl proceeded to note that between May and August 2007, the Appellant attempted to obtain a placement with employers in X, however he experienced a significant flare-up to his compensable injury and had been diagnosed as having a further tear to his shoulder. He wrote: "As a result of the flare-up to your compensable injury you were even more limited with regard to your physical abilities. Unfortunately as result of this, employers were not willing to take you for a placement or subsequent employment." This further indicates to the Tribunal that the Appellant's post- MQP shoulder flare up in or around 2007 impeded his capacity to find work.

[72] Finally, the Tribunal notes that the Appellant indicated that his goal was to eventually obtain his 1st class ticket in order to work in the control room, monitor gauges and run equipment. He indicated he did so in the past and that he would have liked to try it. He testified it is a pretty simple job that does not involve a lot of writing. Although he has some issues with lack of concentration, pain and feeling groggy, he believes that the job duties in a control room would keep him alert and functioning.

[73] 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).

[74] Given the Appellant's evidence that he has previously worked in a control room and would be able to manage such work with his left hand, the Tribunal is not satisfied that as of December 2002 and on a continuous basis since then, he has shown that effort at obtaining and maintaining employment has been unsuccessful by reason of his health condition. Clearly, there is some work that the Appellant is able to perform in a control room or employment of a similar nature. Also, given his involving driving a taxi and a truck, sedentary work doing dispatch may be a possibility, which would not involve repetitive use of the Appellant's right upper limb.

[75] The Tribunal is satisfied the Appellant retained some residual capacity following the MQP for lighter work such as the previous control room work he performed. Although he stated he never performed office work and is not proficient on a computer, the fact remains the Appellant completed college level English and math and has a basic degree of proficiency on a computer. The Appellant was approximately age 45 at the MQP. The Tribunal is not satisfied the Appellant was incapable regularly at the MQP and continuously thereafter from pursuing light sedentary work or retraining for work within his physical restrictions.

[76] Given all of the above factors, on balance, the Tribunal is not satisfied the Appellant suffered from a severe and prolonged disability at the MQP date.

CONCLUSION

The appeal is dismissed.

Jeffrey Steinberg
Member, General Division - Income Security