Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *B. B. v. Minister of Employment and Social Development*, 2016 SSTGDIS 69

Tribunal File Number: GP-14-3340

BETWEEN:

B. B.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Angela Ryan Bourgeois

HEARD ON: June 2, 2016

DATE OF DECISION: July 23, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

B. B., Appellant

N. B., Appellant's wife, Witness

Leisa MacIntosh, Lawyer, Appearing for Jamie MacGillivray, Representative for the Appellant
Heather Carr, Representative for the Respondent

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on February 7, 2013.

[2] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

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

a) there were gaps in the information in the file and a need for clarification; and

b) to proceed as informally and quickly as circumstances, fairness and natural justice permit as required by the *Social Security Tribunal Regulations*.

PRELIMINARY MATTERS

[4] The Appellant's CPP Questionnaire for Disability Benefits with accompanying certification certificates was missing from the file. It was noted at the hearing on June 2, 2016 that these documents were referred to by both the Appellant and the Respondent but, as stated, were not in the Tribunal's file.

[5] The Tribunal requested these documents and they were provided by the Appellant's counsel on June 3, 2016. On June 6, 2016 the Tribunal forwarded the received documents to

the Respondent for verification that they were the same as reviewed by the Respondent. The Respondent had until June 16, 2016 to provide a response. No response was received.

[6] Because these documents are relevant to the matter before the Tribunal and because they were reviewed by both parties prior to the hearing, the Tribunal allowed these documents into evidence.

THE LAW

[7] 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).

[8] 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.

[9] 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

[10] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the Appellant's MQP ended on December 31, 2012.

[11] 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 his MQP ended on December 31, 2012.

EVIDENCE

[12] The Appellant was only 36 years old when he fell into a manhole in December 2010. The Appellant injured his shoulder, neck and arms in the fall and has since developed chronic pain. He has been assessed by Dr. Watt, Physical Specialist, and Dr. Brien, Orthopedic Surgeon, neither of which identified any specific physical problem that could be treated, but confirmed that the Appellant has chronic pain.

[13] The Appellant has a grade 12 education (general courses), and through on the job training has been able to acquire some certifications.

[14] The certifications that the Appellant has are:

a) Confined Space Monitor – issued August 29, 2011

b) Confined Space Entry – issued August 29, 2011

c) Construction Safety Training System – issued January 18, 2012

d) Gas Detection - expired on July 19, 2015 (no date of issue indicated)

e) OSSA Fall Protection – issued August 14, 2012

[15] In addition to the foregoing, the Appellant indicated at the hearing that he updated one of his certificates last year. He indicated that the course was taken at a garage in Cheticamp and was paid for by his employer. It was a one day course with a true and false test. He indicated to obtain the certificate he had only to attend, take the test and put the harness on.

[16] The Appellant worked as a labourer in the oil industry and also worked in the construction field. At the time of his fall in December 2010 he was working for himself doing carpentry work.

[17] After the December 2010 fall the Appellant returned to work in January 2011, again as a carpenter, but this time for A. P., a local contractor. He took some days off because of soreness. In April 2011 the Appellant indicated that his neck, back and legs were still sore, that he had a lot of discomfort, that his back got tight and he was having spasms from his left shoulder into

his neck. He indicated that he was able to work but he found it hard to lift his arms up and was not able to do things like putting up gyprock or heavy lifting.

[18] Mr. A. P. filed an affidavit with the Tribunal with respect to the Appellant's work. He indicates that he has known the Appellant for some years and that following his 2010 injury the Appellant contacted him seeking work because he needed to start working again to support his family. Mr. A. P. hired the Appellant in January 2011. He indicated that after nine weeks the Appellant had to stop working because he could not tolerate the increased pain caused by the work. He stopped working even though he had not accumulated enough weeks to collect employment insurance. Mr. A. P. indicated that he saw the Appellant's condition deteriorate from when he started working until he finished, with pain being obvious in his facial expressions and in his physical movements.

[19] In a letter dated September 2012 Mr. A. P. indicated that he would not rehire the Appellant in 2012 because he could not do the labour work and he did not want to take him on until he had received full medical clearance due to the liability he could face if the Appellant further injured himself on the job.

[20] In his affidavit, Mr. A. P. indicates that he and the Appellant lost touch after 2011 but became reacquainted in December 2014 when they both attended a spiritual retreat. Shortly after the retreat the Appellant was having a particularly difficult time and was apparently contemplating suicide. The Appellant's wife contacted Mr. A. P. one evening, as well as the police, because she was scared the Appellant was going to hurt himself. Mr. A. P. attended at the Appellant's house to try to help.

[21] Upon seeing that the Appellant and his family "had nothing", Mr. A. P. states that he and some others put together some money (between $200 and $300) to help the Appellant make his mortgage payment, buy some groceries and some Christmas gifts for his children. He also gave the Appellant some heating oil and a gift certificate so the Appellant and his wife could go out on a date to get away from their stress.

Work in 2015

[22] Mr. A. P. indicates that the Appellant was in poverty so he and his wife talked it over and decided to offer the Appellant enough work so that he could qualify for employment insurance benefits, knowing that he would not be able to work like the other employees because of his mental and physical condition. He knew that the Appellant:

> would not likely be a reliable employee or even a capable one, but I was not offering him a job because of his ability. I offered him work to help him and his family. If I wanted to hire someone who was reliable and able to do the tasks of the job, I would have hired someone other than B. B.

[23] Mr. A. P. states in his affidavit that he does not believe that the Appellant would have been able to find any other work because he simply is not reliable because of his pain.

[24] The Appellant was paid $15/hour but Mr. A. P. raised his hourly rate to $17/hour because he knew the Appellant's family was still struggling to make ends meet. He indicated that the rate of pay was appropriate but he could not pay him more because "he [was] simply not able to do the work". He indicated that hiring the Appellant put a financial strain on him, despite it being a busy year. He worked extra hours on weekends so that the Appellant could get the hours he needed and sometimes paid the Appellant to help him with tasks that he could just as easily done without the Appellant. He stated that he even laid off more capable workers to be able to keep the Appellant on until he got enough weeks.

[25] Mr. A. P. states that it was a "constant battle" to get the Appellant to show up for work and that he picked him up most days and drove him home. He stated that he knew the Appellant was acting as he was because he was in pain, tired or sad because he used to be able to more. He indicated that the Appellant worked at least half of his days in pain and that the Appellant forced himself to go to work to provide for his family.

[26] Mr. A. P. observed that the Appellant's condition appeared to be improving while he was working but that the progress was very slow. He stated that he believed that the Appellant is doing the best he can and that he worked at his maximum capacity but paid for it in the end with pain.

[27] The Appellant testified that when he got home from work he had to take a shower and lie down with a hot pad. Sometimes he would just go to bed and other times he would get a migraine headache which would make him physically sick. He indicated that when he was working he could not help out around the home.

[28] The Appellant earned $16,160 in 2015. A Record of Employment relating to the Appellant's work for Mr. A. P. shows that out of 31 pay periods from April 20, 2015 to November 20, 2015 (31 weeks) the Appellant had no earnings in weeks 5, 6, 7, 9, 16, 18 and 25. Most weeks that he worked he earned $680/week (40 hours at $17/hour).

[29] The Appellant testified that he did not think there was any work that he could do around his community but there could be more options available in the city. However, he indicated that he did not think he could attend any work on a regular basis because he finds it a struggle every day. He testified that around his home he cannot clean, lift or mow the grass.

Employment Insurance Claims

[30] With respect to employment insurance claims, the Appellant testified that he had applied for regular employment insurance benefits when he stopped working in 2011 and in November 2015. When asked by the Respondent's representative why he did not apply for sick employment insurance benefits rather than regular employment insurance benefits, the Appellant indicated that he did not know the difference between the two benefits and that when he stopped working in 2011 he was not actively looking for work.

[31] There is evidence on file that the Appellant had various violations under the employment insurance scheme through the years where he did not report work that he did as required by the legislation. The effect of his violations was that at one point he was required to have additional hours to qualify for employment insurance benefits.

Medical

[32] In May 2012 Dr. Brien, Orthopedic Surgeon noted that the Appellant had been having musculoskeletal and neurological pain since his fall in December 2010. He was having migraine headaches and pain in his back, neck and leg. The constant pain in his neck and shoulder on the

left was worse with the back pain and spasms in his back and down his leg being intermittent. He noted that at times the Appellant was unable to do even minimal activity or play with his children and that at times he had difficulty walking. Dr. Brien stated that the Appellant "obviously" had chronic pain as a result of his fall in December 2010. He recommended that he try to increase his physical activity and get involved in physiotherapy or fitness program.

[33] The Appellant attend physiotherapy but found that it increased his symptoms.

[34] In June 2012 Dr. Watt, Physical Medicine and Rehabilitation, stated that the Appellant had a chronic pain problem with no specific physical problem that could be treated to resolve his complaints. He indicated that the Appellant could increase his amitriptyline to 100 mg at bedtime and try gabapentin or Lyrica. He strongly encouraged the Appellant to remain active and indicated that it would not hurt him.

[35] According to his family doctor, Dr. Aucoin, in July 2012 the Appellant was taking amitriptyline (100 mg) at bedtime.

[36] In September 2012 Dr. Aucoin indicated that the Appellant had significant improvement but remained disabled.

[37] In February 2013 Dr. Aucoin indicated that he had known the Appellant since June 2011 and that he had chronic shoulder and back pain due to a whiplash type injury, that his pain was chronic and that it was very unlikely that any therapy or treatment would allow him to return to any type of work.

[38] In April 2013 the Appellant had a home maintenance evaluation completed by an occupational therapist. The report indicated that he was taking Elavil and Cymbalta at that time. He reported constant neck pain that referred to both arms intermittently, headaches (several a week), constant left-sided low back pain, constant left hip pain with intermittent pain referring down his left leg to his foot, right hip pain with prolonged walking and intermittent left shoulder pain. The report indicated that the Appellant used a heating pad and hot showers for pain control and that when the pain gets severe he gets nauseous. The report indicated that he could do some light housework but he had to pace himself and did not do things like mopping, shoveling, mowing, painting or renovations.

[39] In April 2013 Dr. Bond opined that the Appellant was unable to reasonably perform the substantial duties of any full time occupation for which he was reasonably suited by education, training or experience *secondary to the pain* that he experiences. He confirmed that work would not exacerbate any injury but that he was unable to work because of the pain that he had with standing or sitting for any period of time and any activity requiring physical exertion. He further opined that the Appellant would have to endure an unreasonable amount of pain if he returned to any work. Dr. Bond stated that he felt that the Appellant's subjective reporting was sincere and credible. Dr. Bond stated that the Appellant's condition should be regarded as permanent.

[40] In February 2014 Dr. Aucoin indicated that the Appellant remained totally disabled from his back injury, that he has severe posterior left shoulder pain radiating down the left side of his back, that his pain was made worse by standing or walking for even short periods. Dr. Aucoin indicated that the Appellant tried light work without success. At the hearing the Appellant indicated that he believed Dr. Aucoin was referring to the work he did in 2011 preparing quotes for construction work, getting the worksite ready and doing clean-up work. The Appellant earned $5,640 in 2011.

[41] In July 2015 Dr. Aucoin wrote to the Appellant's lawyer. He indicated that the Appellant suffered from neuropathic pain in his left shoulder and arm since his 2010 accident. He stated that the Appellant was not employable because his symptoms significantly limit his activities most of the time. He stated that he had no reason to believe that the Appellant's symptoms were not genuine.

[42] In January 2016 Dr. Bond, Anesthesia and Chronic Pain Management, indicated that there were some minor improvements in the Appellant's clinical function and pain since his last assessment and that although he had undertaken work for a compassionate employer his opinion remained that the Appellant was unable to return to his pre-injury job.

[43] Dr. Bond indicated that the Appellant's ability to do a sedentary or light job would be limited by his reduced functional abilities if the job required him to exceed his demonstrated abilities as set out in the December 2015 Functional Capacity Evaluation.

[44] Dr. Bond indicated that there continued to be no clinical or psychological restrictions on the Appellant's ability to work and that work would not cause or exacerbate any injury. He stated "[i]mpairment of his ability to work is *secondary to the pain* that he experiences with *standing, sitting, reaching or bending* for any period of time and any activity requiring physical exertion".

[45] Dr. Bond indicated that the Appellant would experience increased pain if he returned to *any* occupation. He opined that the Appellant's subjective reporting was sincere and credible.

Functional Capacity Evaluations

[46] The Appellant participated in two Functional Capacity Evaluations (FCE), one in March 2013 and one in December 2015.

[47] The 2013 FCE states that it is important to consider the Appellant's capabilities of non-exertional activities, as these would be required for sedentary to light jobs. It was noted that the Appellant had restrictions with non-exertional activities, specifically reaching postures and with handling tasks, stooping, kneeling and crouching. It states that because these non-exertional activities are restricted the Appellant has a very narrow range of work and that his reduced functional abilities prevent him from performing sedentary to light occupations if the predominant non-exertional job demands required reaching beyond his demonstrated ability. It was noted that with his restrictions of non-exertional activities, specifically, reaching and handling, that his workday tolerance was 2.5 to 3 hours a day. The report states that the Appellant's sitting (30 minutes), standing and walking (5 minutes) tolerances indicate a 4-6 hour workday tolerance at the light to medium degrees for strenuousness allowing for postural flexibility between weight bearing and sitting postures.

[48] The Functional Capacity Evaluation completed in December 2015 states that the Appellant's 2015 work was beyond his demonstrated functional abilities and therefore he had elevated pain levels and a decrease in function in tasks outside of work. Otherwise, the Appellant's results were similar to those in 2013, with the exception of his upper body

activities, where he was able to do less in 2015 than in 2013. Restrictions were noted in reaching postures, handling tasks, stooping, kneeling and crouching.

SUBMISSIONS

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

a) The medical legal documents on file are reliable because doctors have a duty to provide an accurate opinion and assessment;

b) Dr. Watt and Dr. Bond were providing medical opinions and therefore their lack of comments on employability should not be construed against the Appellant; they both support a finding that the Appellant has chronic pain;

c) Mr. A. P. was a benevolent employer and it was clear from his evidence that the Appellant was not a consistent or reliable employee;

d) The Appellant lives in rural Nova Scotia and his lack of access to treatment should not be held against him; and

e) The certificates he acquired were necessary for him to be on the job site.

[50] The Respondent submitted that the Appellant does not qualify for a disability pension for the following reasons:

a) It is not sufficient for the Appellant to prove that he has chronic pain, he must also show that it prevents him from regularly pursuing a substantially gainful occupation, that treatment has been sought and efforts have been made to cope with the pain. Further, Dr. Brien and Dr. Watt have stated that there are no medical restrictions preventing the Appellant from working and recommend that he stay active.

b) The Appellant did not report his work activity to the Respondent as required, he is collecting regular employment insurance benefits and these reporting inconsistencies to two different government departments is evidence as to his work capacity. Further, he acquired certificates around 2012 which suggests that he retained a capacity for work. In

light of this work capacity, because he did not try retraining or lighter work he does not meet the test set out in *Inclima*.

c) The Functional Capacity Evaluations indicate that he has a 4-6 hour workday tolerance and should be given considerable weight.

d) The evidence does not support a finding that Mr. A. P. was a benevolent employer because the Appellant worked within his limitations and he stopped working when the work ended, not because of medical reasons.

ANALYSIS

[51] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2012.

Severe

[52] The Tribunal finds that the Appellant has chronic pain based on the reports of Dr. Brien (May 2012), Dr. Aucoin (February 2013) and Dr. Watt (June 2012). These reports are consistent in the Appellant's diagnosis of chronic pain.

[53] The Appellant's chronic pain causes him functional limitations with respect to sitting, standing, reaching postures, and handling tasks, as well as with stooping, kneeling and crouching.

[54] The Tribunal carefully reviewed the Functional Capacity Evaluations (FCE) from March 2013 and December 2015. The Tribunal acknowledges the submission of the Respondent that these reports indicate that the Appellant demonstrated a 4-6 hour workday tolerance but it does not agree with his interpretation of the reports.

[55] The FCE's indicate that the maximum sitting that the Appellant demonstrated was 30 minutes with occasional weight shifting and demonstrated a maximum of 5 minutes of standing. It is noted that the Appellant reported similar tolerances. The FCE report states that given the Appellant's sitting and standing abilities that he would have a 4-6 hour workday tolerance, at the light to medium degrees of strenuousness *provided* that he be allowed to change positions

between standing and sitting. Without these accommodations, the Appellant's workday tolerance would be less. However, the report does not end there. It goes on to state that his workday tolerance would be further limited if he were performing sedentary to light work because of his non-exertional restrictions of reaching, handling, stooping, kneeling and crouching. With these restrictions the Appellant had a workday tolerance of 2.5 to 3 hours per day.

[56] The Appellant attempted work at light to medium degrees of strenuousness in 2011 when he did the set up and clean-up work for the construction sites and he was not able to sustain this level work. He had to stop working before he was able to get enough weeks to obtain employment insurance.

[57] The Tribunal finds that the restrictions set out in the FCE are so limiting that the reported work day tolerances do not represent any real work that the Appellant could do in a real world sense. The Appellant is limited to sitting for 30 minutes, to standing for 5 minutes and is further limited by reaching, handling, stooping, kneeling and crouching. The Tribunal finds that no real world employer would hire the Appellant given these restrictions. In a real world commercial setting, employers simply do not want to deal with employees with such extreme functional limitations. The Appellant is not employable within the commercial realities that exist because of the limitations caused by his chronic pain.

[58] The Federal Court in *Villani* v. *Canada (A.G.)*, 2001 FCA 248 stated that the severe criterion must be assessed in a real world context and that the severity test involves an aspect of *employability*, which occurs in the context of commercial realities and the particular circumstances of the Appellant, which includes factors such as age, level of education, language proficiency, and past work and life experience.

[59] The Tribunal has considered the Appellant in a real world context and has taken into consideration his relatively young age, his grade 12 education, his proficiency in English and his past work experience in labour type jobs. The Tribunal finds that despite the factors in his favour (age, education and language) the limitations created by his pain render him incapable regularly of pursuing any substantially gainful occupation.

[60] The Tribunal notes that in *Nova Scotia (Workers' Compensation Board)* v. *Martin; Nova Scotia (Workers' Compensation Board) v. Laseur* [2003] 2 S.C.R. 504, 2003 SCC 54 the Supreme Court of Canada recognized that it is an unfortunate reality that despite the best available treatment, chronic pain frequently evolves into a permanent and debilitating condition.

[61] The Tribunal finds that this is the case with the Appellant. The medical reports indicate no condition that can be treated and confirm the Appellant's diagnosis of chronic pain. The reports indicate that his subjective reports of pain and limitations are genuine and that the effort he put forth in his evaluations was reasonable.

[62] The Appellant's family doctor stated that no therapy or treatment would help the Appellant get back to work. Despite this, the Appellant tried physiotherapy and pain medications which provided no real improvement. Therefore, the Tribunal finds that the Appellant has reasonably complied with all recommended treatment.

[63] The Tribunal has considered the Appellant's post-MQP work and the substantial earnings he made in 2015. Having carefully considered Mr. A. P.'s affidavit the Tribunal finds that Mr. A. P. was what is sometimes called a "benevolent employer". The mere fact that the Appellant was able to earn some income in 2015 does not automatically preclude the Appellant from entitlement to a disability pension. The Appellant should be commended for trying to return to the workforce even when on many days it was clear to his employer that he was suffering greatly by being at work and was unable to do anything when he got home.

[64] "Benevolent employer" is not defined in the CPP. However, in *Atkinson* v. *Canada (Attorney General)* 2014 FCA 187, the Federal Court of Appeal writes at paragraph 7:

> The Government of Canada's website also sets out a "Canada Pension Plan Adjudication Framework" in order to assist CPP decision-makers interpreting and applying subsection 42(2) of the CPP. Importantly for the purposes of this case, this document explains that individuals who are working for a "benevolent employer" could still be considered severely disabled under subparagraph 42(2)(a)(i), even if they work regular hours and receive income that is considered "substantially gainful." It defines "benevolent employer" as follows:
>
> > A "benevolent employer" is someone who will vary the conditions of the job and modify their expectations of the employee, in keeping with her or his limitations. The demands of the job may vary, the main difference being that the performance, output or product expected from the client, are considerably less than the usual performance output or product expected from other employees. This reduced ability to perform at a competitive level is accepted by the "benevolent" employer and the client is incapable

> regularly of pursuing any work in a competitive workforce. Work for a benevolent employer is not considered to be an "occupation" for the purposes of eligibility or continuing eligibility for a CPP disability benefit (http://www.esdc.gc.ca/eng/disability/benefits/framework.shtml).

[65] The Pensions Appeal Board in *MHRD* v. *Bennett* (July 10, 1997) CP 4757 found that it was not reasonable to require an employer to be supportive with a flexible work schedule or flexible productivity requirements in today's competitive market. The Board stated that such an employer had been referred to as a "philanthropic employer" in other cases. They found that if such a benevolent figure was required for a person to return to the work force, then it could be reasonably said that such a person was "incapable regularly of pursuing any substantially gainful occupation."

[66] It is clear from the evidence on file that the Appellant's performance and output was not the same as was expected from the other workers. The work the Appellant did was real work, but it was not to the standard that would be required by an employer who was not sympathetic to the Appellant's personal situation. Only a sympathetic employer would chauffeur their employee, collect money for Christmas gifts, give them oil and grocery money, try to help them spiritually and work extra hours to so that the employee could get enough hours/weeks for employment insurance. It is clear from the evidence on file that Mr. A. P. was guided by purely altruistic goals, and although he did benefit from work the Appellant did, the work was not of the quality or quantity that an employer expects and requires in real world commercial settings. Mr. A. P. was a "benevolent employer"; any other employer required to deal with the realities of commercial enterprise would not hire the Appellant because he is not capable of consistent, reliable work, including sedentary, light and medium levels of work. .

[67] The Tribunal finds that the implication by the Respondent that the Appellant could successfully do lighter work is contrary to the objective limitations set out in the 2013 and 2015 FCEs which state that the Appellant's ability to do sedentary to light work would be not only limited by his sitting limitations (30 minutes) but also by his non-exertional limitations. The medical reports are clear that the Appellant is limited by his pain and that the Appellant's reporting is genuine. The Tribunal finds that sedentary and light employment is not a reasonable expectation for the Appellant because of his pain and the limitations it causes.

[68] The Tribunal notes the Respondent's submissions with respect to the Appellant's inconsistent reporting, for example, stating that he was ready, able and capable of working when he was applying for employment insurance and stating that he was incapable of working when applying a CPP disability pension. The Tribunal further notes that the Appellant's applications for employment insurance on file pose the question "Why are you no longer working?" and in all instances he indicated it was because of a shortage of work. One of the other options was illness, injury or surgery. The Tribunal also notes the violations under the employment insurance regime for unreported income.

[69] The Tribunal recognizes that the Appellant was trying to qualify for employment insurance when he completed his applications and therefore puts no weight on the statements in his applications that he was ready, able and capable of working.

[70] In assessing the Appellant's credibility, the Tribunal has considered these inconsistent statements, the Appellant's reporting violations under the employment insurance scheme, as well as how closely the medical and other evidence corroborates the Appellant's evidence as to how his chronic pain impacts his ability to work. The Tribunal has also considered that the Appellant has been found to be sincere by his doctors in his reports of his pain and functional limitations. On the totality of the evidence before it the Tribunal accepts the Appellant's evidence as to the functional limitations caused by his chronic pain.

[71] The Tribunal notes the Respondent's submission that the Appellant did not stop working in 2015 because of his medical condition, but rather because the work had come to an end. The Tribunal finds that this is not a relevant consideration given the benevolent nature of the employment relationship, the main purpose of which was to allow the Appellant to get enough weeks to obtain employment insurance. There is no evidence before the Tribunal that the Appellant worked longer than necessary to obtain employment insurance benefits.

[72] With respect to the Respondent's submission that the Appellant has demonstrated a capacity to work, having considered all of the evidence before it, the Tribunal finds that there is no evidence of work capacity after June 2011. Reasons for this finding include:

a) As detailed above, the FCEs do not indicate that the Appellant could do any real work in a real life setting because the restrictions are unrealistic in our commercial reality; and

b) The Appellant would not have been able to work in 2015 without a benevolent employer.

[73] With respect to the certifications that the Appellant has obtained since 2011 the Tribunal finds that these courses do not represent a capacity to work because they are one day courses that do not indicate in any way that the Appellant would be capable regularly of pursuing substantially gainful occupation. They are only evidence that he could manage in a class room setting one day at a time for 4 to 8 hours. This is not evidence that he was capable of regular and reliable attendance in a real work environment.

[74] Further, if there had been evidence of a capacity to work the Tribunal would have found that the test in *Inclima* v. *Canada (A.G.)*, 2003 FCA 117 (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) was met by the Appellant through his work in 2015. The work done by the Appellant in 2015 was not heavy labour. The Appellant's work was described as being that of a "helper" or "job site runner", passing tools and plugging in cords; he did some lifting, but not heavy lifting (page 6 of Mr. A. P.'s affidavit). It was light to medium type work with frequent changes in position with no prolonged sitting or heavy lifting. However, according to his employer, the Appellant was not able to do this work because of his pain; he missed considerable time, weeks at a time, and could not do anything at the end of the workday. The Appellant tried to return to work but was unable to be successful because of his health condition.

[75] The Tribunal notes that the Appellant lives in an economically depressed area; however, because socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP (*Canada (MHRD) v. Rice*, 2002 FCA 47) the Tribunal did not consider such factors in its decision.

[76] On the totality of the evidence before it the Tribunal finds that the Appellant had a severe disability under the CPP since June 2011 that continues.

Prolonged

[77] Dr. Bond indicated that he thought that the Appellant's condition was permanent and Dr. Aucoin stated that no therapy or treatment would allow the Appellant to return to work.

[78] There is some indication in the file by Dr. Aucoin and Mr. A. P. that the Appellant's condition may be improving, however, there is no indication in the file that the Appellant's condition will improve to the point where his condition will not be severe.

[79] On the totality of the evidence before it, including Dr. Bond and Dr. Aucoin's prognoses, the Tribunal finds that the Appellant has a prolonged disability under the CPP.

CONCLUSION

[80] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2011 when he stopped working.

[81] For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in February 2013; therefore the Appellant is deemed disabled in November 2011.

[82] According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of March 2012.

[83] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division - Income Security