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

Citation: *D. A. v Minister of Employment and Social Development*, 2018 SST 1410

Tribunal File Number: GP-16-3523

BETWEEN:

**D. A.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## General Division – Income Security Section

DECISION BY: Tyler Moore

HEARD ON: January 16, 2018

DATE OF DECISION: February 2, 2018

Canada

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant’s application for a *Canada Pension Plan* (CPP) disability pension on October 30, 2015. The Appellant claimed that he was disabled because of a rotator cuff injury, history of right knee and left hip replacements, and a massive head injury following an accident in 1984. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements that are set out in the CPP. More specifically, the Appellant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Appellant’s contributions to the CPP. The Tribunal finds the Appellant’s MQP to be May 31, 2002.

[3] The appeal was heard by Teleconference. The following people attended the hearing:

Appellant: D. A.

Witness for the Appellant: S. A.

[4] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension for the reasons set out below.

### EVIDENCE

[5] The Appellant is currently 54 years of age and lives with his wife in a house in X. He completed a high school education as well as a college diploma as a forestry technician. The Appellant last worked as a self-employed logger/woodlot manager/ firewood producer from November 1986 until July 2014. On his initial application for CPP disability benefits the Appellant indicated that could not continue working because of a torn right rotator cuff, a right prosthetic knee, a left prosthetic hip, and complications from a massive head injury that occurred in 1984. The Appellant has never looked for alternative employment and submitted at the time

of the hearing that his reason for not doing so was because he had a passion for forestry and went to school for that profession.

[6] The Appellant submitted that following his accident he worked as a leather apprentice for a short time before doing odd jobs and small construction projects for local cottages. Then, in 1986 he began logging his own woodlot and did commercial log cutting for other people. The Appellant last did any commercial logging over 5 years ago due to the economic downtown related to house building in the United States. He did report clearing a building site for his brother in 2008.

[7] At the time of the MQP the Appellant testified that he was working 5 hours at a time. He started work early in the morning and continued working as long as he physically could. Once he stopped for the day he could not return to work because of knee, hip, and back pain. The consistency of days worked varied depending on how his physical condition was. Since 1984 the Appellant underwent multiple surgeries, most related to his knees, and a great deal of time to recover was needed following each surgery. He did quantify that he rarely worked 5 days in a week, and his following schedule following the MQP would have been closer to 3 days of work each week. When the Appellant stopped working in July 2014 he testified that he was working less than 15 hours per week. He also testified that at the time he was married in 1987, three years after his accident, he was working 40 hours per week.

[8] The Appellant submitted that at the time of his MQP his leg pain was his chief complaint. It resulted in difficulty crouching and bending to cut trees and the Appellant had to take Oxycodone for his pain. He was not under any active care with regards to memory deficits. In July 2014, the Appellant stopped working completely after he fell and injured his right shoulder. He submitted that he was already slowing down at the time he injured his shoulder. The Appellant testified that his current treatment is medical marijuana. Though he continues to cut wood for the wood stoves which are the primary heat source for his home and his mothers' home, he does so at his own pace and using the machinery used for his logging business.

[9] The Tribunal also heard testimony from the Appellant's wife, S. A.. She is a full-time teacher. According to the Witness the Appellant meets the criteria for a CPP disability benefit because of his permanent brain injury that has not improved since well before 2002. This is

corroborated in the medical reports submitted by Dr. Snow. He is also physically disabled given all of the surgeries he has undergone on his knee, hip, and arm. Following his motorcycle accident in 1984 the Appellant has struggled every day but continued to push himself. For many years his work has been minimal and he has accommodated his condition by working independently. She noted that the Appellant was unable to work with others given his inability to process information. The Witness testified that at present the Appellant spends his time watching television, walking their dogs, puttering around their yard, shoveling snow, and walking around their 35 acre property.

[10] The Witness testified that she looks after the majority of the housekeeping. The Appellant continues to do some simple cooking and looks after cutting wood to keep their primary wood heat source burning. She and the Appellant share the outdoor home maintenance. The Witness reported that the Appellant stopped his business of cutting firewood in July 2014 when he injured his shoulder. Since the time of his accident he had never been able to work consistent full-time hours because of his condition. He might have worked 2 to 3 hours in a day before he had to stop. If he worked consecutive days than he would require a few days to recover physically. Since his accident he has undergone 6 surgeries to his right knee prior to undergoing total knee replacement surgery.

[11] At the time of the MQP, the Witness submitted that the Appellant did get their now 22 and 25 year old children ready and off to school on the bus each morning. He also took them to all of their extracurricular activities. To be able to do so the Appellant relied heavily on a daily planner. As their children got older they assisted the Appellant with making wood deliveries and loading wood. The Appellant used a log splitter and chainsaw to make the job easier.

[12] With respect to the Appellant's memory issues, the Witness testified that he really should have applied for CPP disability benefits prior to 2002. He has struggled with cognitive deficits but wanted to continue to contribute to society. The Appellant was also in denial as to the extent of his condition. It was not until 2013 that he finally sought medical help for his memory as it was becoming even more of a challenge. Though he was initially assessed by Dr. Ursell following the accident in 1984, not treatment was ever offered. The Witness submitted that it is the Appellant's cognitive issues that preclude him from being able to participate in any type of

work. She provided the example that the Appellant might drive to town to get gas and forget where he is going and have to return home. The same would occur around the time of the MQP.

[13] There are several medical reports in the Hearing File, all of which have been reviewed in detail by the Tribunal.

[14] On February 6, 1985, Dr. Snow, psychologist, reported that in comparison to his performance of October 1984, the Appellant has shown some significant improvement in psychological ability functioning. The Appellant's most significant aspect of his test results is impairment in learning and recall. While it was not profound , the Appellant would be slower to learn material than he was prior to his accident. His ability to profit from further education, or to learn a new job, would therefore be jeopardized somewhat because of his learning impairment.

[15] On October 16, 1986, Dr. Catton, radiation, reported that the Appellant sustained a fracture of his right femoral shaft which required pinning at the age of 17. He was then involved in a more serious motorcycle accident in 1984, during which time the Appellant fractured his left radius and ulna and underwent surgical plating. He also fractured his left hip and had severe injuries to both knees. The Appellant also sustained a severe head injury and had amnesia for 1 month following his accident.

[16] On June 26, 2013, Dr. Ursell, neurologist, reported that the Appellant was self-employed as a logger. He worked his own hours and controlled his environment. Dr. Ursell noted that the Appellant cognitive dysfunction was static and likely would not worsen and the small episodic worsening of memory was likely related to natural aging. Dr. Ursell did not note a significant issue with the Appellant's mood.

[17] On July 23, 2013, an MRI of the brain revealed mild brain atrophy and non-specific white matter foci which could be areas of ischemia or demyelination.

[18] On October 14, 2015, Dr. Gair, family physician, reported that he had known the Appellant for 15 years, but began treating the Appellant for his main medical condition in July 2013. Diagnoses included cognitive dysfunction secondary to a remote head injury in 1984 and multiple musculoskeletal issues. Dr. Gair noted that the Appellant's cognitive impairment and depression limited his ability to function on the job. He had a left hip replacement in 2006 and a

right knee replacement in 2008. In 2014 the Appellant underwent right rotator cuff repair which made heavy work impossible. Dr. Gair opined that the Appellant's cognitive issues were unlikely to improve and he would not regain the strength to return to work as a logger.

[19] On August 10, 2016, Dr. Gair reported that due to the cumulative musculoskeletal issues and the age related progression of his restrictive physical symptoms, the Appellant's condition was severe and prolonged. He had worked his entire life doing extremely physically demanding work as a logger and was no longer able to do so in a safe manner. The Appellant did not have the necessary skills, education, or training to do any other type of work. This was further complicated by ongoing cognitive issues due to a head injury at the age of 21.

## SUBMISSIONS

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

a) The Appellant relies on the credible oral testimony presented and on the evidence contained within the Hearing File.

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

a) The Appellant's injuries sustained in a 1984 accident which included a 'mild' head injury did not prevent the Appellant from ultimately opening his own business two years later and running it for the next 28 years. The Appellant worked in self-employed logging and firewood production from 1986 until July 2014 in the capacity as sole owner/operator.

b) The disposition of the Appellant business occurred in 2014 when his last income tax return on the operation of his business was filed.

c) The Appellant has demonstrated capacity for work by being able to continue working despite his injuries and mild cognitive impairment.

## ANALYSIS

### Test for a Disability Pension

[22] The Appellant must prove on a balance of probabilities, or that it is more likely than not, that he was disabled as defined in the CPP on or before the end of the MQP.

[23] 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 MQP.

[24] 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.

**Severe**

[25] I found both the Appellant and Witness to be credible. They testified in a forthright fashion, answering questions related to the Appellant's work and health history as well as the impact that his condition has had on his day to day life.

[26] The severe criterion must be assessed in a real world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The Appellant was 39 years of age at the time of his MQP in 2002. He completed high school as well as a college diploma in forestry. The Appellant is fluent in English, but possesses limited transferable skills given the uniformity of his employment primarily as a self-employed logger/woodlot owner. I find that although he had limitations at the time of his MQP related to his knees and hip as well as some memory deficits, he was relatively young, educated, and the fact remains that continued to regularly work in a self-employed substantially gainful role at that time. This continued for many years following

the expiration of his MQP. He did not look into potential re-training options or more sedentary accommodated work within his limitations. I find that the Appellant retained the capacity regularly to participate in substantially gainful work as of the expiration of his MQP in 2002.

[27] I have placed significant weight on the oral testimony presented. More limited weight has been given to the more recent medical reports submitted by Dr. Gair and Dr. Ursell given the fact that those reports were written well over 10 years after the expiration of the MQP. The oral testimony has been clear that while the Appellant may not have been able to work 40 hours per week in a physically demanding role as of the time of the MQP, he continued to regularly operate a logging and firewood business at that time and for several years afterwards. I have considered only the Appellant's capacity at the time of his MQP in 2002 as it is irrelevant whether or not there was a significant deterioration in his condition subsequent to that time.

[28] I also find that while the Appellant was under active care related to his knees and hip at the time of his MQP, treatment options had far from been exhausted. His pain medication remained unchanged for many years and he had yet to consult a memory specialist.

[29] The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work, i.e. any substantially gainful occupation (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). Dr. Catton's report in 1986 outlined the details of the Appellant's extensive injuries related his accidents. The Appellant's chief complaints since that time have consistently related to pain and poor memory. As those symptoms are highly subjective and difficult to measure, I have carefully considered their subjective impact on his day to day life when making my decision.

[30] The oral testimony revealed that at the time of the MQP the Appellant shared the maintenance of the home with his wife who was working full-time. He also cooked simple meals for the family, he continued to drive, worked at least 3 days per week, got his then 7 and 10 year old children ready for school in the morning, and he also took them to their extra-curricular activities. The Appellant also cut wood to supply the only heat source for his home as well as the home of his mother. He did rely heavily on lists and had to write things down related to his

business, but there was no indication that his business suffered as a result of any cognitive deficits or that he was unable to continue working. Functionally, he did report difficulty with crouching and bending at work. While his physical injuries and memory issues did impact certain aspects of his day to day life, I find the evidence to be indicative of capacity and that he was not precluded regularly from all substantially gainful work.

[31] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant opened his own business 2 years after his accident and testified that when he was married in 1987 that he worked full-time hours. He went on to testify that in 2002 it was his physical condition related to his legs that had the greatest impact on his ability to work. As a result, he gradually decreased his work to approximately 5 hours each shift, at least 3 days per week. He testified that he was not physically capable of working more. The Appellant's business was extremely physically demanding. There has been no attempt to seek less physically demanding work or to re-train.

[32] I am cognizant of Dr. Snow's report from 1985 which indicated that the Appellant's mild impairment in learning and recall may decrease his ability to profit from further education or learning a new job. Again, two years after that report was written, the Appellant was running his own business successfully and working 40 hours per week. The Appellant has failed to establish that he was precluded from obtaining and maintaining employment as of the expiration of his MQP. He continued to run his own business until July 2014 when he stopped working completely following an injury to his dominant right shoulder.

[33] A claimant's condition is to be assessed in its totality. All of the possible impairments are to be considered, not just the biggest impairments or the main impairment (*Bungay v. Canada (Attorney General)*, 2011 FCA 47). Even when considering the cumulative impact the Appellant's physical injuries related primarily to his knees, hip and head injury, the Appellant continued to work well beyond the expiration of his MQP. Factors such as his regular basis, participation in household maintenance, and his active role in raising his children were all considered. Though he may have required lists to remember tasks and orders as well as

prompting from time to time he persevered in a physically demanding role despite his limitations.

[34] On a balance of probabilities, I have concluded that the Appellant was not suffering from a severe disability, as defined by the CPP, as of the expiration of his MQP.

**Prolonged**

[35] As the Tribunal found that the disability was not severe, it is not necessary to make a finding on the prolonged criterion.

## CONCLUSION

[36] The appeal is dismissed.

Tyler Moore
Member, General Division - Income Security