



Citation: *F. A. v. Minister of Employment and Social Development*, 2018 SST 203

Tribunal File Number: GP-17-45

BETWEEN:

**F. A.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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

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DECISION BY: Raymond Raphael

HEARD BY TELECONFERENCE ON: March 27, 2018

DATE OF DECISION: April 2, 2018

IN ATTENDANCE: F. A., Appellant

Allison Schmidt, Appellant's representative

## REASONS AND DECISION

### DECISION

[1] The Appellant is not eligible for a CPP disability pension.

### OVERVIEW

[2] The Appellant applied for a CPP disability pension in May 2016. He claims that he was disabled as of September 2012 because of bilateral knee and back pain. The Respondent denied the application initially and upon reconsideration, and the Appellant appealed to the Social Security Tribunal.

[3] This is the Appellant's second disability application. His initial application was made in September 2014 and denied by the Respondent in October 2014. His request for reconsideration was denied in October 2015, and he did not appeal the reconsideration decision.

[4] The Appellant must prove on a balance of probabilities that he became disabled on or before the end of his Minimum Qualifying Period (MQP), which is calculated based on his contributions to the CPP.<sup>1</sup> The Appellant's MQP ended on December 31, 2014.

[5] The Appellant also has earnings of \$1,193 in 2015.<sup>2</sup> This amount is below the minimum level of earnings required to make valid contributions to the CPP. In this situation the law allows for proration of the minimum level of earnings to help a person meet contributory requirements. If the Appellant became disabled commencing in 2015, he will qualify for the disability pension if he became disabled before the end of February 2015.

### ISSUES

1. Did the Appellant's medical conditions result in his being incapable regularly of pursuing any substantially gainful employment by February 28, 2015?
2. Is his disability long continued and of indefinite duration?

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<sup>1</sup> Record of Earnings: GD5-18

<sup>2</sup> GD2-109

## ANALYSIS

### Test for a Disability Pension

[6] Subsection 42(2) of the CPP provides that a qualifying disability must be severe and prolonged. A disability is severe if a person 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.

### *Severe Disability*

#### *The Appellant's conditions and treatment*

[7] I should assess the Appellant's condition as a whole and consider all of his impairments that affect employability, not just his biggest impairments or his main impairment.<sup>3</sup>

#### *i. Oral evidence*

[8] The Appellant testified that he injured his left knee in 2011 when he slipped through a gap in plywood at work. After this, he developed pain in both knees and in his back. Although he had previously injured his knee playing soccer, he did not experience any significant pain before this injury. He has undergone physiotherapy, injections, and knee surgeries with no pain relief. His only treatment for his back has been physiotherapy and massage therapy which he took about one year ago.

[9] When he walks he has pain in both knees, they swell up, and sometime they give out. His legs become "very sore" after he sits for 45 minutes to an hour, and he then has to "put up" his leg. Sometimes his knees hurt at night and he has to take Tylenol #4 to sleep; the Tylenol makes him nauseous and dizzy. He can't bend down because his back "locks".

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<sup>3</sup> *Bungay* 2011 FCA 47

*ii Most significant medical evidence*

[10] On May 30, 2012 Dr. Chang, orthopaedic surgeon, reported that the Appellant had complex left medial and lateral meniscus tears, along with several lateral compartment degenerative changes.<sup>4</sup> On June 25, 2012 Dr. Chang performed a left knee arthroscopy and partial medial and lateral meniscectomies.<sup>5</sup> On July 31, 2012 Dr. Chang reported that the Appellant's chronic knee pain had not improved after the surgery.<sup>6</sup> On September 21, 2012 Dr. Chang stated that the Appellant had difficulty working because he had to stand for eight hours at a time. He also stated that the Appellant did better when he was able to walk around the job, but his work did not involve a lot of walking.<sup>7</sup> On February 28, 2013 Dr. Chang reported that the Appellant was a heavy laborer who was off work because of bilateral knee problems. He stated that the Appellant had early osteoarthritis in both knees, along with chronic ACL tears and a right medial meniscal tear.<sup>8</sup> On June 17, 2014 Dr. Chang performed a right knee arthroscopy, debridement of medial femoral condyle, debridement of intracondylar notch, and debridement of the medial meniscus.<sup>9</sup>

[11] On September 17, 2015 Dr. Luykenaar, family doctor, asked Dr. Chang to see the Appellant again because his knees were "so bad that he is unable to do any work."<sup>10</sup> On March 8, 2016 Dr. Chang reported that the Appellant had not been working because of the combination of his knee and back pain; that he had difficulty sitting for a long period and standing for longer than five minutes; that he had some night symptoms; and that he mainly walked around the house.<sup>11</sup> In his May 19, 2016 CPP medical report in support the current application Dr. Luykenaar reported that the Appellant had been unable to do physical work since 2011 because of end-stage osteoarthritis in both knees.<sup>12</sup>

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<sup>4</sup> GD2-177 to 178

<sup>5</sup> GD2-175 to 176

<sup>6</sup> GD2-174

<sup>7</sup> GD2-122

<sup>8</sup> GD2-163 to 164

<sup>9</sup> GD2-145

<sup>10</sup> GD2-142

<sup>11</sup> GD2-140

<sup>12</sup> GD2-136

*iii Not able to return to physically demanding work*

[12] I am satisfied that the Appellant is not able to return to physically demanding employment because of his bilateral knee osteoarthritis. I am also satisfied that he has explored all reasonably treatment options for this condition.

***Although the Appellant's functional limitations prevent physically demanding work, he retains work capacity***

[13] 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 employment.<sup>13</sup>

[14] In a May 15, 2012 attending physician's statement for Sun Life Dr. Nsisi, family and sports medicine physician, indicated that that the Appellant had no impairment in cognition and sensation, slight impairment in dexterity, moderate impairment in driving, severe impairment in walking, standing and climbing, and slight impairment in sitting. He also indicated that the Appellant had no impairment in above and below shoulder reaching, moderate impairment in squatting and bending, and slight impairment in lifting.<sup>14</sup> In an April 30, 2013 Sun Life form Dr. Nsisi indicated that the Appellant was suitable for an interim work placement until he could resume his pre-illness position.<sup>15</sup>

[15] In a March 14, 2014 vocational evaluation report prepared for Sun Life, Jennifer Griffiths, health consultant, stated that the Appellant's functional abilities were limited to the sedentary/limited strength level and that he was limited in walking, standing, crouching, crawling, lifting less than 50 pounds, and carrying/pushing/pulling less than 10 pounds. This is consistent with the Appellant's self-reported limitations in his CPP disability questionnaires.<sup>16</sup>

[16] In the questionnaire signed on September 13, 2014 in support of his first disability application, the Appellant stated that he could stand for about an hour but not stand still; that he could sit for about ½ hour; that he could walk leisurely for 45 minutes; that he had difficulty

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<sup>13</sup> *Klabouch* 2008 FCA 33

<sup>14</sup> GD8-28

<sup>15</sup> GD8-33

<sup>16</sup> May 2, 2016, GD2-200; September 13, 2014, GD2-233

concentrating when he is in pain; that he doesn't get a good sleep when his knees hurt; and that he gets restless after driving for one half hour.<sup>17</sup> In the questionnaire signed on May 22, 2016 in support of the current application he stated that he could sit or stand for 30 to 60 minutes; that he could walk for 15 to 30 minutes; that at times he had difficulty focusing on tasks; that he slept for a maximum of four hours; and that he could drive for 30 minutes to one hour.<sup>18</sup> In both questionnaires he indicated that he had no difficulties with speaking, hearing, or remembering.

[17] Although the Appellant's physical limitations preclude him from heavy physical work as well as work requiring prolonged standing or walking, he can sit for a significant period of time, has no serious difficulties with memory or concentration, and is able drive for 30 to 60 minutes.

[18] I am satisfied that the Appellant retains the capacity to pursue non-physically demanding sedentary type employment.

***The Appellant has failed to pursue alternative less physically demanding employment***

[19] In addition to showing a serious health problem, where there is evidence of work capacity, an appellant must establish that he has made efforts to find and keep employment that were unsuccessful because of his health.<sup>19</sup>

[20] The Appellant initially stopped working in April 2012. He attempted to return to work in September 2012 (after his initial arthroscopic surgery in June 2012), but was only able to work for one day because his knee gave out. Other than a one month contract position in 2016 making deliveries to a salon in Calgary, he hasn't worked since. He stated that the contract expired, that this work was "not easy for him", and that he had to have a friend help him load and unload the truck.

[21] He hasn't looked for other work. When asked why not, he stated that he can't stand or sit because of his back and knee pain. With respect to upgrading his work skills, he stated that he made inquiries about training to be a health care aid and also about working in the oil fields, but he didn't pursue these because of his knee and back problems. He acknowledged that since he stopped working he hasn't made any efforts to upgrade his education and work skills for

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<sup>17</sup> GD2-333

<sup>18</sup> GD2-200

<sup>19</sup> *Inclima* 2003 FCA 117

alternative less physically demanding employment: he has made no efforts to upgrade his speaking, reading, writing, office, and/or computer skills.

[22] I find that the Appellant has not made reasonable efforts to find alternative less physically demanding employment even though he retains the residual capacity to do so.

***The Appellant has failed to establish a severe disability***

[23] A disability should be considered severe if it renders an appellant incapable of pursuing with consistent frequency any truly remunerative occupation. I should assesses the severity requirement in a “real world context” and consider such factors as the Appellant’s age, education level, language proficiency, and past work and life experiences when determining his "employability" with regard his disability.<sup>20</sup>

[24] Ms. Schmidt relies on Jennifer Griffith’s March 2014 vocational evaluation which stated that there are no recommended direct-entry or short-term training occupations for the Appellant; that he did not demonstrate “sufficient academic, or aptitude skills (specifically speaking and reading English)” to pursue competitive sedentary employment; and that he needed significant upgrading of English speaking and writing (beyond 1 year) to demonstrate sedentary level employability.<sup>21</sup>

[25] She submits that the Appellant lacks the capacity to upgrade his skills because of his “unfortunate unique background” which involved an unstructured and limited education and work history in a refugee camp from the age of eight to 23; a narrow work history which has primarily involved physically demanding work; limited English language proficiency; and physical and pain barriers.

[26] I disagree.

[27] The Appellant was only 29 years old on the MQP and he was only 27 years old when he stopped working in April 2012. Although he has an accent and spoke slowly, he was able to communicate reasonably in English during the hearing; he attended English as a second language

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<sup>20</sup> Villani 2001 FCA 248

<sup>21</sup> GD2-147

courses for one year after he came to Canada; he is able to key board emails and searches on his iPhone and iPad; although his physical and pain barriers exclude physically demanding employment they do not rule out alternative less physically demanding employment; and there is no evidence of any learning or psychological disability that would preclude him from upgrading his education and employment skills.

[28] I find that there is no reasonable justification in a “real world context” for the Appellant’s failure to upgrade his education and work skills since he stopped working. I recognize that he suffers from chronic pain; however, it is not sufficient for chronic pain to be found to exist, the pain must be such as to prevent the appellant from regularly pursuing a substantially gainful occupation.<sup>22</sup>

[29] The Appellant has the burden of proof and I find that he has failed to establish, on the balance of probabilities, a severe disability in accordance with the CPP requirements.

### **Prolonged Disability**

[30] Since I found that the disability is not severe, I do not need to make a finding on the prolonged criterion.

### **CONCLUSION**

[31] The appeal is dismissed.

Raymond Raphael  
Member, General Division - Income Security

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<sup>22</sup> *MNH v. Densmore* (June 2, 1993), CP 2389 (PAB). This decision is not binding on me but I find it persuasive.