Citation: ***I. R. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 102**

Date: September 4, 2015

File number: GT-120179

GENERAL DIVISION - Income Security Section

Between:

I. R.

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

Originally Scheduled To Be Heard by Videoconference on August 11, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on March 22, 2011. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.}

PRELIMINARY MATTERS

[2] The hearing of this appeal was originally scheduled to be held by videoconference for the reasons given in the Notice of Hearing (the "Notice") dated October 14, 2014.

[3] On balance, the Tribunal is satisfied that the Appellant received the Notice. The Tribunal records confirm that the Notice was signed for by someone at the Appellant's last address of record communicated to the Tribunal. It was also signed for at the address provided for by the Appellant's representative (the representative). The Tribunal notes that the address provided for by the representative is the address listed for the Royal College of Dental Surgeons of Ontario.
The Notice was signed for as follows: "Royal Surgeon".

[4] A review of the record further indicates that the Tribunal Case Management Officer (CMO) contacted the representative in advance of setting a hearing date to confirm his and the Appellant's availability for the date and time specified in the Notice.

[5] On August 11, 2015, the date of hearing, the Tribunal Member waited until one-half hour after the appointed time of hearing, however neither the Appellant nor the representative attended the hearing or contacted the Tribunal either before or after the hearing to explain their absence.

[6] The same day of the hearing, the CMO contacted the representative and left him a voice mail message inquiring as to why he and the Appellant did not appear. The CMO requested a return call ASAP. He also contacted the Appellant twice by telephone and spoke with her son, who stated he would get the Appellant to return the call the next day. The following day, i.e., August 12, 2015, the CMO left another voice mail message with the representative and again asked him to return his call about the missed hearing. The CMO also called the Appellant, however she does not have voice mail and he could not leave a message. On August 20, 2015, the CMO phoned both the Appellant and the representative. Once again, he could not leave the Appellant a voice mail message (no voice mail) and he left a 3rd voice mail message for the representative. On August 25, 2015, the CMO contacted the Appellant and representative. He was unable to leave a voice mail message for the Appellant. He did not leave another message for the representative, who had not returned any of his previous calls.

[7] S. 12 (1) of the Social Security Tribunal Regulations (the "Regulations") provides that if a party fails to appear at a hearing, the Tribunal may proceed in the party's absence if the Tribunal is satisfied that the party received the notice of hearing. In this case, the Tribunal is satisfied that it is more likely than not that the Appellant and her representative received the Notice. The Tribunal has decided to proceed in the Appellant's absence and make its determination on the basis of the documents and submissions contained in the hearing file for the following reasons:

- The representative agreed to the time and date of hearing in advance of the date being set by the Tribunal
- The Notices sent to the Appellant and representative were signed for at the addresses they both supplied the Tribunal;
- The Tribunal has had multiple efforts to contact the Appellant and representative to ascertain the basis of their non-attendance on the date of hearing. Neither has seen fit to contact the Tribunal to provide an explanation.

[8] Section 3(1) (a) of the Social Security Tribunal Regulations requires the Tribunal to conduct proceedings as informally and quickly as the circumstances and the consideration of

fairness and natural justice permit. The Tribunal finds that it is neither unfair to the Appellant nor a denial of natural justice to proceed with the hearing given the failure of the Appellant and the representative to attend the hearing or provide an explanation (either before or within a reasonable time of the hearing date) why they were unable to attend.

THE LAW

[9] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[10] 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).

[11] 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.

[12] 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

[13] The Tribunal must decide the Appellant's MQP, which it finds to be December 31, 2006. The Tribunal must also 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

[14] In the CPP Questionnaire dated February 8, 2011, the Appellant indicated she worked between February 2, 2004 and January 18, 2005 as a general labourer. She completed Grade 12. She stopped working due to chronic pain in her left and right hand. She established a WSIB claim in 2005 for left-hand Carpal Tunnel Syndrome (CTS). She stated she cannot make full or partial use of her left hand and that her right hand also suffers. She has trouble concentrating and is nervous in social situations. She also has trouble sleeping and suffers from depression. She has difficulty washing her hair and showering with her left hand. She relies on her spouse to do any household maintenance chores. She has difficulty hearing out of both ears and has problems with concentration and memory. She only drives short distances due to pain and problems with concentration. She is prescribed Lenoltec, Zopiclone, Arthrotec-Diclofenac, Ranitidine and Bromazepam.

[15] On February 1, 2011, Dr. Fernandez, family physician, completed the CPP Medical Report. He stated he knew the Appellant since 2010 and diagnosed 1) anxiety disorder; 2) chronic depression; 3) fibromyalgia; 4) left lateral epicondylitis; 5) Left carpal tunnel pain post-surgery; 6) chronic pain disorder and 7) left rotator cuff tendinitis. He stated she sustained a work related accident in 2005 to her left hand and developed left rotator cuff tendinitis, fibromyalgia, anxiety disorder, depression and chronic pain disorder. She is prescribed Mirtazepine, Bromazepam, Tylenol and Zopiclone. Under Prognosis, he stated she suffers from

a prolonged, severe and substantial disability that renders her totally disabled to return to any kind of gainful employment.

[16] On September 22, 2006, Andrea Sidon, Registered Physiotherapist, indicated the Appellant was unable to use her left hand and presented with significant swelling, decrease range of motion and hypersensitivity and pain. A follow-up appointment was scheduled in 2-3 days for physiotherapy proposed for 2-3 times per week for 10-12 weeks.

[17] According to an October 23, 2006 and November 13, 2006 Worker's Progress Report, the Appellant continued to experience ongoing pain, particularly when her hand was not in motion, and ongoing finger numbness.

[18] According to an October 20, 2006 Health Professional's Progress Report and a November 28, 2006 Physiotherapist's Treatment Extension Request completed by Ms. Sidon, the Appellant was unable to work. A significant factor delaying recovery was "poor response to surgery."

[19] On December 30, 2008, Dr. Arbitman, psychiatry, reported that he saw the Appellant. He indicated she suffered an injury to her left upper extremity on January 2005 and underwent surgery to her left hand. She complained of pain in her left upper extremity, poor sleep and poor appetite. She was withdrawn, irritable and had difficulties with her activities of daily living. Dr. Arbitman diagnosed Adjustment Disorder and Pain Disorder with anxiety and depression. He increased her Paroxetine and stated he would see her in supportive psychotherapy.

[20] On October 9, 2009, Dr. Ngan wrote to the WSIB. She reported that the Appellant injured her left forearm at work. In September 2005, electro diagnostic studies confirmed bilateral medial nerve entrapment. The Appellant underwent a decompression procedure in August 2006. She was laid off in February 2006 and since then has not been able to work. She constantly has pain on the left side more than the right wrist area. She was treated with NSAID, and was seen by the Toronto Western Hospital Hand Clinic, which did not suggest any more treatment. On examination, she had pain in the left arm ventral part from the palm to below the elbow with radiating pain proximally to the upper extremity, aggravated by left hand and wrist movement and lifting, pushing and pulling. Her left wrist had restricted range of motion

including flexion and extension. Raising the left arm above shoulder level also produced pain. She also had pain in her right wrist and forearm with extreme ROM.

[21] On January 17, 2010, Dr. Couperthwaite, MA Phd, Psychology Intern and Dr. Bacchiochi, PhD. C. Psych, Assessment Team Head, Psychological Trauma Program, Centre for Addiction and Mental Health, reported on their assessment of the Appellant. They evaluated her psychological status as it pertained to her work-related accident. The Appellant reported she sustained injury at work on January 18, 2005 and had not worked in any capacity since June 18, 2005. However, WSIB sent her for ESL training "for many months" although she could not recall exactly when or for how long she attended. She indicated her family physician had referred her for psychiatric treatment with Dr. Arbitman less than one year earlier and that she saw him once a month for medication. She described current difficulties with pain in her hand, inability to work, low mood, feeling worthless and loss of hair. She was also experiencing headaches. According to Drs. Couperthwaite and Bacchiochi, results on a Test of Memory Malingering (TOMM), to discriminate between bona-fide and malingered memory impairment, raised concern that the Appellant was not putting forth maximum effort and was presenting herself as more cognitively impaired than her current symptoms would suggest. However, they also indicated that although examination of her Structured Inventory of Reported Symptoms (SIRS) used to assess malingering, suggested variability in her response pattern, a determination of her overall response style as either honest or malingering was not possible. Based on psychological testing, they concluded the Appellant met the DSM-IV criteria for Major Depressive Disorder, Single Episode, Moderate Pain Disorder, Associated with Both Psychological Factors and a General Medical Condition, Malingering (Memory Impairment) and a GAF of 55. She also presented with a wide variety of other psychological symptoms (phobias of heights and darkness, obsessive-compulsive behaviors and hypochondriacal fears). They stated, however, that their confidence in the accuracy of these additional symptoms was limited because they reportedly developed after the injury, were numerous and were not thematically congruent with the injury itself. They stated: "It is felt that these symptoms may be influenced by other motivational issues". They concluded the Appellant was unable to return to work "at this time given her experience of pain, perception of disability, and the severity of depressive symptoms. The prognosis for return to work/LMR is thought to be poor. Negative indicators include comorbid pain and depression, reported limited English language abilities,

conflict with the accident employer, underutilization of social network, perception of profound disability, passive coping style, long duration of disability, limited occupational skill set, and fear of re-injury." Barriers to recovery included the Appellant's high level of fear of pain, perception of profound disability and chronicity of pain. They recommended psychotherapeutic intervention in the form of cognitive behavioural therapy for depression. Alternatively, the Appellant could be referred to a multidisciplinary pain management program. In their report, Drs. Couperthwaite and Bacchiochi summarized the following medical reports:

a) A September 20, 2005 Neurophysiology Report from Dr. Chaiton indicated the Appellant was injured by a broom striking her left forearm, wrist and hand. Electrodiagnostic studies were noted to be abnormal confirming the presence of bilateral median nerve entrapment (CTS) of the left side of moderate severity. Dr. Chaiton diagnosed chronic regional wrist pain in a post-traumatic work-related setting. He stated that surgery would likely not provide relief because her symptoms were "not typical of those typically expressed with carpal tunnel median nerve entrapment". He found no other neuro muscular problem that might explain her ongoing complaints of chronic aching and pain unrelated to time of day, position or activity;

b) A November 9, 2005 letter from Dr. Samuel, Plastic and Cosmetic Surgeon, indicating the Appellant reported that her accident resulted from being struck by a piece of metal that resulted in bruises. He felt her nerve conduction study confirmed the presence of moderately severe CTS. Dr. Samuel recommended surgical decompression of the left medial nerve.

c) An August 29, 2006 Operative Report from Humber River Regional Hospital indicated the Appellant underwent CTS surgery. Her subsequent condition was noted to be satisfactory.

d) An October 23, 2006 Consultation Report from Humber River Regional Hospital completed by Dr. Samuel stated the Appellant's sutures were removed and that she would be able to perform light duties if available in about one to two weeks.

e) A September 22, 2006 Health Professional's Report completed by A. Sidon, Registered Physiotherapist, indicated the Appellant was unable to use her left hand and presented with significant swelling, decreased range of motion and hypersensitivity and pain.

f) October 23, 2006 and November 13, 2006 Worker's Progress Reports indicating the Appellant continued to experience ongoing pain, particularly when her hand was not in motion and ongoing finger numbness.

g) An October 20, 2006 Health Professional's Progress Report and a November 28, 2006 Physiotherapist's Treatment Extension Request completed by Ms. Sidon stating the Appellant was unable to work and that a significant factor delaying recovery was "poor response to surgery."

h) A December 30, 2006 Worker's Report completed by the Appellant indicated that her areas of injury included her left arm, wrist, hand and finger. She stated her lower arm and left hand became hurt while working on a machine. Filling the molds with a liquid chemical mixture caused pain because she had to reach to about chest/shoulder height and pull down on a dispenser shute. After the foam was completed, she had to remove it, which caused pain since she did that on an ongoing basis, alluding to a repetitive strain injury.

i) A December 30, 2008 letter from Dr. Arbitman, psychiatrist, reported she was suffering from psychological impairments including "Adjustment Disorder and Pain Disorder with anxiety and depression"

j) A February 4, 2009 Emergency Record from York Central Emergency Dept. indicated she sustained a head injury after falling down two stairs following an episode of vertigo with vomiting. She complained of severe headache and a stiff neck.

[22] On February 24, 2010, Dr. Bender, Psychological Trauma Program, Staff Psychiatrist, Mood and Anxiety Program, Centre for Addiction and Mental Health, reported on his January

26, 2010 assessment of the Appellant. He reported she had not worked since her January 18, 2005 injury at work and was currently receiving WSIB benefits. The Appellant reported she developed depression as a result of physical limitations and the inability to work or attend to her family. She reported not being able to do anything due to pain resulting in increased marital strain and significant concerns over loss of functioning. She reported she remained sad most of the time with episodic periods of anxiety. She also reported increased irritability and anger and rumination about her loss of work. She also reported variable concentration and forgetfulness in conversations, low energy and constant pain in her left arm and hand. She was currently prescribed Celebrex, Amitriptyline, an antidepressant and a sleeping pill. Dr. Bender diagnosed Major Depressive Disorder, Single Episode, Moderate to Severe, Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, Chronic. She indicated the Appellant had not reached maximum medical recovery and recommended blood work, medication, a CBT based pain program and good sleep hygiene. In her report. Dr. Bender summarized a series of medical reports including the following:

a) On October 3, 2005, Dr. Ngan documented that a broom struck the Appellant's left forearm resulting in contusion and hematoma of the forearm.

b) On October 13, 2005, Dr. Ngan diagnosed bilateral medial nerve entrapment.

c) A November 9, 2005 Consultation Report completed by Dr. Samuel indicated there was no evidence of a broom and that the Appellant incurred a bruise. Recommendations were made for release of the median nerve.

d) A June 6, 2006 Progress Report completed by Dr. Ngan diagnosed CTS.

e) An August 10, 2006 Operative Report prepared by Dr. Samuel documented left median nerve decompression.

f) On August 23, 2006, Dr. Samuel reported that the Appellant was able to perform light duties if they were available in about 1 to 2 weeks.

g) On January 8, 2007, a Hand Clinic Consultation completed by Dr. Binhammer, documented inflammatory tenosynovitis of the index and long finger, post carpal

tunnel surgery scar tenderness and some residual CTS. Dr. Binhammer recommended cortisone or steroid injection with the option of surgical release of trigger digits or repeat carpal tunnel release. He indicated the Appellant was capable of sedentary non-repetitive activities with her left hand.

h) On April 9, 2008, Dr. Pilowsky requested a psychological assessment due to feelings of shock denial, depression and anxiety on the part of the Appellant related to the January 18, 2005 workplace injury.

i) On November 26, 2008, Dr. Binhammer noted his previous assessment in January 2007 for a persistent CTS and inflammatory tenosynovitis. He stated the Appellant continued to present with the same problems including intermittent pain over the left index and long finger and constant numbness. The Appellant's diagnosis remained unchanged with her carpal tunnel syndrome on release since surgery. He stated she had dysfunctional hand posture with the ability to do self-care activities only with her left hand.

j) On December 30, 2008, Dr. Arbitman, psychiatrist, documented complaints of poor sleep and appetite associated with anxiety and depression. The Appellant was withdrawn and irritable with activities of daily living. Diagnosis included Adjustment Disorder and Pain Disorder with anxiety and depression.

k) A February 14, 2009 Progress Report completed by Dr. Ngan documented ongoing problems with the left wrist and hand treated with Celebrex.

l) On October 9, 2009, Dr. Ngan reported that the Appellant was laid off work in February 2006 and had been unable to return since that time. She had constant pain in her left hand and right wrist area.

[23] On September 23, 2010, Dr. Arbitman provided a progress note. He indicated the Appellant complained of being depressed. Her pain was the same. She had poor sleep and appetite. He increased her Paroxetine and renewed her Bromazepam. He stated the diagnosis remained Adjustment Disorder, chronic type and Pain Disorder with anxiety and depression.

SUBMISSIONS

[24] The Appellant submitted in her April 16, 2012 Reconsideration request that she qualifies for a disability pension because:

a) She experiences chronic pain in her left hand despite numerous conservative and surgical interventions;

b) In a January 17, 2010 CAMH report, Dr. Bender stated: "(The Appellant) appears to be experiencing persistent pain following an injury to her left hand while working as a labourer".

c) In her October 9, 2009 report, Dr. Ngan stated that the Appellant has incessant pain and discomfort in her left lower arm and hand with minimal movement. Also, the left wrist ROM is significantly restricted with pain.

d) Her left hand pain and symptomatology have been identified and diagnosed by numerous physicians to possess a causal correlation to her compensable workplace injury sustained on or about January 18, 2005.

e) She is treated by Dr. Arbitman, psychiatrist, for depression and marked life disruption. He has formally diagnosed her with an Adjustment Disorder as well as Chronic Pain Disorder with anxiety and depression. Dr. Arbitman maintains that the diagnosis is derivative of her compensable left lower arm/hand impairment and affirms, given her overall organic and psychological impairment, that she is unemployable in any capacity.

f) The medical evidence provides demonstrative objective proof of marked life disruption as a result of chronic pain stemming from a workplace incident.

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

a) According to the family doctor's report, he first began treating the main medical conditions in May 2010.

b) Notes indicate a suggestion for psychotherapy for her fragile psychological status, and counselling and pain management for her symptoms of pain. However, the medical evidence indicates that treatment consists only of medications. There is no indication she participated in any of the recommended treatment modalities.

c) Her doctor supports her application for disability but did not comment on her medical condition in December 2006.

d) She had earnings in 2013 and 2014, indicating she returned to work after the MQP. She had earnings of $1,778.00 in 2013 and $17,758.00 in 2014. This additional evidence does not support an incapacity for all work at the MQP or thereafter.

ANALYSIS

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

[27] In its Addendum Submission, the Respondent provided a copy of the Appellant's updated Record of Earnings. It indicates she earned $1,778.00 in 2013 and $17,758.00 in 2014 from Distinct Printing and Labelling.

[28] The Appellant did not appear before the Tribunal to dispute the above earnings or explain why, despite their existence, her disability was both severe and prolonged at the MQP.

[29] Absent evidence from the Appellant which would explain why the above earnings (especially the 2014 earnings) do not constitute evidence of ongoing work capacity beyond the

MQP, the Appellant has not satisfied her onus to establish on a balance of probabilities that her disability is both severe and prolonged.

CONCLUSION

[30] The appeal is dismissed.

Jeffrey Steinberg
Member, General Division - Income Security