



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *V. N. v. Minister of Employment and Social Development*, 2017 SSTGDIS 87

Tribunal File Number: GP-17-497

BETWEEN:

**V. N.**

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: Susan Smith

DATE OF DECISION: July 7, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 19, 2012. The Appellant claimed that he was disabled because of a workplace accident that resulted in chronic back and bilateral knee osteoarthritis causing knee pain and constant leg tremors. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Tribunal entered a decision on the appeal to the General Division dated October 1, 2015. The Respondent applied to the Appeal Division of the Tribunal for leave to appeal. Leave to appeal was granted by decision dated September 13, 2016. The Appeal Division heard the appeal and rendered a decision dated February 15, 2017. The appeal was granted on the basis that the General Division failed to take steps to include the Minister's submissions in the file and thereby ensure the member hearing the appeal had an opportunity to consider the Minister's submissions prior to General Division rendering a final decision. The Appeal Division determined such omission amounted to a failure of natural justice and referred the matter back to the General Division for redetermination by a different member.

[3] 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 December 31, 2015.

[4] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

- a) The member has decided that a further hearing is not required.
- b) The method of proceeding provides for the accommodations required by the parties or participants.

- c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.
- d) The Appellant indicated in his Hearing Information Form, dated February 24, 2017, that he was unable to participate in written question and answer, teleconference, videoconference or in person hearing due to poor communication skills and language barriers.

[5] The Tribunal has decided that the Appellant is eligible for a CPP disability pension for the reasons set out below.

## **EVIDENCE**

### **Oral**

[6] The Appellant is fifty-four-year-old man who was born in Vietnam and attended school to grade seven before the communists took over the government in his home country. He immigrated to Canada in 1980 at age eighteen years and has worked at labouring and construction type jobs since he first landed in Canada. He worked as a house painter for many years, both self-employed and as an employee of a painting company. He attended English Second Language classes for about two months upon his arrival in Canada. His language skills were sufficient for labouring types of work but his language proficiency is quite low with limited ability to read or to communicate in writing or orally. He had no real job experience before coming to Canada other than occasionally working on the family farm to help out. The Appellant was self-employed when he stopped working in early 2011 due to a workplace accident. He attempted to return to work in May 2012 as an employee of a painting company working in the same role as previously while self-employed as a house painter. In October 2012 he was unable to continue working due to the limitations of his medical condition and he has not made any other attempt to return to work since.

[7] The Appellant indicated he was not able to participate in any form of hearing on this appeal. As a result I listened to the official recording of the original in person hearing previously conducted in order to have the benefit of hearing the Appellant's oral evidence first hand.

[8] The Appellant stated both in writing and during his original hearing that he had help in filling out the forms associated with his application for disability benefits and with his appeal to the SST. He indicated that language skills presented as a barrier to effective communication and mistakes were made in recording his answers. He clarified during his original hearing that he was unable to stand for more than 30 minutes at a time before pain requires him to sit; his sleep is interrupted by pain; his ability to drive is limited to short trips within his community; his sleeping medication is not effective; and he has limited ability to concentrate or remember. The Appellant wrote submissions dated February 19, 2013 and indicated that since becoming unable to work he has also been suffering from severe depression and anxiety. He confirmed in oral testimony that he suffers from depression and anxiety and that his cognitive function is impaired.

[9] The Appellant stated that he was injured about 20 years ago when a rock fell from a roof during a wind storm and struck him on the head. He was injured again six years ago when he was working on a ladder and when he attempted to adjust the extension of the ladder the paint gun fell from above striking him on the head and causing him to fall from the ladder. He fell 3.5 to 4 metres. He did go to the hospital on his own to be examined for his head injury. Since then he has found it difficult to focus or concentrate. He finds that he gives up and it is difficult to become motivated. He has difficulty walking and has pain in his feet, legs, elbow and back. His pain is made worse by activity such as carrying or holding anything that is heavy. He experiences frequent headaches that cause dizziness and nausea and they wake him up during the night.

[10] The Appellant stated that he stopped running his own painting business after his injury. When he tried to return to work it was as an employee of a painting company in May 2012. The tasks associated with his job were essentially the same as when he ran his own company but he did have co-workers to help him with difficult tasks. He stopped work October 2012 because the limitations of his medical condition prevented him from performing the tasks associated with the job for which he was hired.

[11] The Appellant stated that he sees a psychiatrist approximately every three months. The psychiatrist prescribes medication for his depression but refers him back to his family doctor for pain and headache medication. He said that his psychiatrist speaks Vietnamese and he does talk

to the psychiatrist each visit. The Appellant stated that he is troubled because “I do not know who I am”. He was unable to recall if the psychiatrist sent him for any form of testing or if he has been given any diagnosis regarding the psychiatrists concern that he suffers post-concussion syndrome.

[12] The Appellant’s representative read the Appellant’s current medications into the record from prescription receipts that the Appellant brought to the hearing. The Appellant is presently taking gabapentin, Nortriptyline, ibuprofen and flunarazine. He testified that these improve his back pain a little but they do not help with his leg weakness.

[13] The Appellant testified that he sees Dr. Yang, his family doctor, every month. He said that Dr. Yang also speaks Vietnamese so when he goes to see his doctors they communicate with him in Vietnamese. Dr. Yang has told the Appellant that his legs are weak. Dr. Yang prescribed back and leg braces, which the Appellant continues to use whenever he is moving. He has also prescribed medications for pain and headaches and written notes to say the Appellant is unable to work. He does not remember if Dr. Yang gave him back exercises but he thinks he has only been given medication and braces to wear.

[14] The Appellant stated that he lives alone. He has no children and no spouse. He lives in a garage that he converted to a carriage house dwelling many years ago with a kitchen and bathroom. He is able to prepare his own meals and keep his household in order. He does his own grocery shopping as the store is just a few minutes from home. He has never owned or used a computer. His work experience has only been manual labour and his language skills required to work in manual labour were minimal. Throughout the process of his application and appeal for CPP benefits he has relied on others to assist with communication.

### **Documented and Medical**

[15] October 5, 1998, Dr. Phan, reported on the Appellant’s X-ray results. He indicated there is asymmetrical sacralization of L5. There is a large lateral mass on the left side which forms a pseudo-articulation of the adjacent sacrum. This is a congenital variant but may be symptomatic. No other abnormalities are seen (GD2-19).

[16] October 2, 2012, Dr. Timko, radiologist, reported on the Appellant's lumbar spine X-ray results. He indicated the vertebrae are normal in height and alignment. There is minimal scoliosis convex left. There is a wide left transverse process of L5 vertebrae with pseudoarthrosis on the left sacral wing. L4-L5 disc space is narrow due to moderate degenerative disc disease. L5-S1 disc space is normal. Comment: left sided sacralization of the L5 vertebra; and degenerative disc disease at L4-L5 level (GD2-46).

[17] October 6, 2012, Dr. Yang, family physician, wrote a handwritten note indicating the Appellant had backache and both knees pain. He required knee braces. He was unable to work indefinitely (GD2-21).

[18] October 9, 2012, the Appellant completed the standard questionnaire in support of his application for disability benefits. He indicated that he had worked as a painter in his own painting business from March 2008 until December 31, 2010, when he stopped work due to a work injury. He stated that between May and October 2012 he was employed as a painter, and that he stopped working "due to a medical condition". His physician had not told him when he could return to work, and he did not plan to return to work in the near future. He listed a previous head injury for which he was receiving provincial workers' compensation benefits. He stated that he was unable to work as of October 5, 2012, because of a lumbar spine injury and knee injuries, which caused backache and pain in both knees. He indicated his limitations impacted his ability to sit, stand, or walk for extended periods. He was unable to lift, carry, reach, or bend easily. He had no difficulty with personal needs or household tasks and maintenance. He stated that he used a knee brace (GD2-47-53).

[19] October 17, 2012, Dr. Yang, family physician, completed the standard medical report in support of the Appellant's application for benefits. He indicated having known the Appellant since March 7, 2007, and having begun treating him for his main disabling condition in June 2008. He indicated the Appellant's main disabling condition as: backache with L5 lateral mass & osteoarthritis; and osteoarthritis and pain in both knees with constant left leg tremors. He indicated significant medical history as a fall four years previous and severe back ache since 2008. Physical finding included severe pain and difficulty walking especially the lumbar back and left knee due to osteoarthritis. He was currently on Ibuprofen, Gabapentin and Flexeril with

no obvious response to treatment. His prognosis was guarded. Additional information was included indicating the Appellant still has severity of aches, pain, and stiffness. He was unable to walk easily especially with left knee pain and backache (GD2-42-45).

[20] October 19, 2012, Dr. Timko, radiologist, reported on the Appellant's X-ray results of his left knee. The articular surfaces are smooth. There is no degenerative arthritis. Patella, patellofemoral joint and soft tissue is also normal (GD2-18).

[21] February 11, 2013, Dr. Yang, family physician, wrote a handwritten note indicating the Appellant had: left shoulder pain; left and right knee pain; and backache. He cannot work (GD2- 20).

[22] February 19, 2013, the Appellant wrote to the Respondent. He listed many points in support of his application for benefits. Among the points raised he indicated that although he was prescribed medication for his chronic back pain he received no relief to his severe pain. He has no transferrable skills having worked as a labourer or painter all his life. He stopped school in Grade 7 and had limited English language skills. He requires leg braces to walk. Since becoming unable to work he was experiencing severe depression and anxiety. He noted that contrary to the misinformation given in his questionnaire for benefits he was unable to sleep; he could sit and stand only briefly and, he suffered cognitive issues. He indicated that he was limited by both physical and mental health issues and he was unable to retrain to a new position (GD2-16).

[23] May 28, 2013, Dr. Ganesan, psychiatrist, wrote To Whom It May Concern, regarding the referral of the Appellant for assessment. He indicated it was his impression the Appellant was suffering from multiple injuries, including a head injury, which he felt had led to post-concussion syndrome. He had ordered further testing and the Appellant was waiting for an EEG and a CT scan of his head. He indicated the Appellant was not fit for work (GD2-8).

[24] June 3, 2013, the Appellant submitted a statement in support of his appeal to indicate he disagrees with the decision to deny him benefits because: he gets little out of every conversation; he is mentally handicapped; his legs are feeble and hard to walk upon; he is not fit for work; he needs help to assist with basic living necessities; and he has a mental health condition in addition to his physical health conditions (GD2-6).

## **SUBMISSIONS**

[25] The Appellant's representative submitted that he qualifies for a disability pension because:

- a) He suffers chronic back and leg pain that has been resistant to treatment;
- b) He has severe depression and anxiety;
- c) He has chronic headaches;
- d) His sleep is interrupted and is not restorative;
- e) His ability to function is unpredictable;
- f) He is cognitively disabled;
- g) He does not have sufficient language skills or computer literacy or any other transferable skills to retrain for light duty work;
- h) He has met the burden of proof in showing he met the criteria of a severe and prolonged disability by December 31, 2015, and onward.

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

- a) Although the Appellant may be limited by the symptoms of his condition in performing physically demanding work, the objective medical evidence does not support a finding of a severe and prolonged condition that would prevent suitable work;
- b) The objective evidence does not reveal any significant pathology or impairment that would prevent the Appellant from engaging in alternate work;
- c) Where there is evidence of work capacity the Appellant must demonstrate that effort at obtaining and maintaining employment has been unsuccessful due to the limitations of his medical conditions;



- d) Although the Appellant indicated deficits in his command of the English language his young age, education, and conversational English language skills would prove favourable attributes for obtaining work suitable to his limitations;
- e) The Appellant has failed to meet the burden of proof in demonstrating that he met the criteria of a severe and prolonged disability, within the CPP, by December 31, 2015, and onward.

## **ANALYSIS**

### **Test for a Disability Pension**

[27] 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.

[28] 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.

[29] 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.

[30] The Tribunal finds that the MQP is December 31, 2015.

### **Severe**

[31] 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.

[32] 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 (*Klabouch v. Canada (Social Development)*, 2008 FCA 33).

[33] 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).

[34] 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).

[35] The Tribunal did not have the benefit of attending in person to conduct the hearing. Rather, the Tribunal was limited to listening to the previously recorded hearing due to the Appellant’s inability to attend a second hearing of his appeal. Based on the Tribunal’s assessment of the previously recorded hearing the Tribunal finds that the Appellant did his best to provide evidence and to answer all questions to the best of his ability. The Tribunal finds that the Appellant’s ability in that regard was significantly limited, despite the participation of interpretation services to assist the Appellant, by both his mental health disorder and his limited language skills. Despite the many challenges in obtaining oral evidence the Tribunal is satisfied that sufficient reliable oral evidence was successfully obtained, in combination with the documented evidence, to make a decision that is fair, unbiased and in accordance with the law. Although the Appellant was challenged in his ability to communicate he was able to provide testimony regarding his limitations and his testimony was compelling and supported by the reports of his treating physicians.

[36] The Appellant was able to provide testimony regarding the limitations of function with respect to his legs. His understanding as to the reasons his legs are too weak for him to walk

without the use of leg braces and a back brace is less important than the fact that he cannot walk properly. The Appellant was quite clear that his ability to function is severely limited due to his leg issues and his chronic back pain. He is equally clear that the treatment he has received has not resulted in any significant or sustained relief. He is clear that he can no longer perform the duties associated with his job as a house painter.

[37] The Tribunal has carefully reviewed the objective medical evidence provided. It is true, as the Respondent has submitted, that the objective evidence does not disclose clear evidence of a severely disabling condition. This is not a particularly unusual circumstance. Chronic pain is often not explained by the objective medical evidence. What is less usual is the possibility that the Appellant's ability to advocate for himself has been compromised by the post-concussion syndrome in addition to language barriers. The Tribunal accepts that the Appellant did not submit the results of the testing alluded to by Dr. Ganesan, however, this fact does not demonstrate that those tests were negative, or that the Appellant did not attend the testing, or that the results were otherwise unfavourable to the Appellant's claim. Dr. Ganesan felt certain enough of his opinion that post-concussion syndrome was at play to put it in writing and to request testing to confirm his suspicions. In the Tribunal's view the absence of those results shows nothing more than that the Appellant is and has been significantly limited in his ability to present his appeal. The Tribunal is not prepared to draw any adverse inference based on the absence of those reports. It is reasonable to conclude that the Appellant's treating physicians were convinced that the Appellant was experiencing significant enough limitations resulting from his medical conditions to make unequivocal statements that the Appellant is not fit for work and this is to continue indefinitely. Neither Dr. Yang nor Dr. Ganesan felt compelled to put any limitation on their respective statements that the Appellant is unfit for work.

[38] The Tribunal finds that the Appellant is significantly limited by his chronic back pain and leg weakness in his ability to function in any physically demanding work.

[39] The Respondent has submitted that the Appellant's age, education and conversational English language skills would present as favourable attributes in his ability to retrain for alternate employment within his limitations. The Tribunal has considered a real-world context and considered the Appellant's age, education, language proficiency and work and life

experience in assessing his likelihood of successfully retraining to a suitable position. The Tribunal respectfully disagrees with the submission made by the Respondent. The Appellant has worked in physically demanding work all of his working life; his education stopped at grade 7; he lived in rural Vietnam and only worked as a child helping out on the family farm; his English Second Language classes lasted only two months; he went only to doctors that spoke Vietnamese; he is fifty-five years old; and he has only limited conversational English language skills and was entirely reliant on the interpreter during his hearing. The Tribunal finds that the Appellant would be very limited by his age, education, language skills and life and work experience in his effort to retrain to suitable employment within his limitations.

[40] The Tribunal finds that real world considerations in combination with the Appellant's combined mental and physical health limitations would make him a highly unlikely candidate for successfully retraining to any light duty occupation and should he succeed in completing retraining he is very unlikely to be hired by any reasonable employer in a competitive work environment. The Tribunal finds the Appellant's combined barriers to successfully obtaining and maintaining alternate employment to be insurmountable in a competitive work environment.

[41] The Tribunal finds the Appellant has met the burden of proof in showing he met the criteria of a severe disability, within the CPP, by December 31, 2015, and onward.

### **Prolonged**

[42] The Appellant stopped work over six years ago after the symptoms of his chronic back pain stemming from a work place accident became too much for him to continue working. He was off work for approximately one year, and then he attempted to return to work. He was unsuccessful in his attempt to return to work. He has not attempted any further return to work. He has followed all his doctors recommended treatment programs but he has not achieved any significant or sustained relief of his chronic pain. His doctors have said he is unfit for work. He has continued to see his treating physicians on a regular basis. There is no further treatment being offered to him. The Tribunal finds the Appellant has done all he can to improve his condition. Despite his best efforts he has remained disabled by the symptoms of his multiple physical and mental health conditions for nearly five years and there is no expectation he will

improve in the near future. His condition is therefore likely to be long continued and of indefinite duration.

[43] The Tribunal finds the Appellant has met the burden of proof I showing he met the criteria of a prolonged disability, within the CPP, by December 31, 2015, and onward.

### **CONCLUSION**

[44] The Tribunal finds that the Appellant had a severe and prolonged disability in October 2012, when he was unable to continue working as a painter. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of February 2013.

[45] The appeal is allowed.

Susan Smith  
Member, General Division - Income Security