



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. T. v Minister of Employment and Social Development*, 2017 SSTGDIS 217

Tribunal File Number: GP-16-2491

BETWEEN:

**E. T.**

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: Brian Rodenhurst

HEARD ON: October 31, 2017

DATE OF DECISION: December 19, 2017

## REASONS AND DECISION

### OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* (CPP) disability pension on October 9, 2015. The Appellant claimed that she was disabled because she cannot use her arm at all due to constant pain; her left arm/wrist was broken requiring surgery. 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 December 31, 2015.

[3] This appeal was heard by Videoconference for the following reasons:

- a) Videoconferencing is available within a reasonable distance of the area where the Appellant lives
- b) There are gaps in the information in the file and/or a need for clarification.
- c) A translator is requested, and experience shows translation is more accurate and efficient when the translator and Appellant are in the same room.

[4] The following people attended the hearing: E. T., Appellant; Alexandra Victoros, Barrister and Solicitor; Melita Popic, Interpreter

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

### EVIDENCE

[6] The Appellant was 57 years of age at the time of the MQP. She obtained a high school education in Hungary. She worked as a dog groomer for 10 years in Hungary running her own

business. She arrived in Canada in 1998 when she was 20 years of age. Upon coming to Canada she spent 6 months in English as a Second Language courses.

[7] The Appellant testified that she worked through the services of a temp. agency and was placed in factories. The assignments changed every three months on the average. She then worked in restaurants including as a dishwasher until she fell on ice in 2012 hurting her arm.

[8] She stated she required surgery two weeks after the fall and engaged in physiotherapy. She noted W.S.I.B. was involved and she was placed in a job first at 30 hours per week then reduced to 20. She noted she was unable to return to factory work at all, and struggled with work at a fast food franchise (Swiss Chalet). The Appellant indicated part of the problem was the employer insisted she do work outside of her restrictions causing her to be unable to keep working there after six months.

[9] The Appellant worked at Arby's making sandwiches for about a month in 2015. She was not hired permanently at Arby's as she testified her employer told her she was too slow. She applied to X Restaurants and underwent interviews and a test and was told the jobs required both hands. She does not believe she could keep to a schedule if she was able to find a job within her restrictions. She further testified she "has a fear of failure" and this interferes with her ability to find and keep employment.

[10] The Appellant testified she applied for other positions such as Value Village but the job required lifting and this was beyond her capabilities. She was interested in pursuing a career in elder care but was not able to obtain a position. She volunteered at a church day care for children one day a week for about 3 months. She was unable to lift the children so this volunteer position ended. She testified that she was informed that she would have to live with her pain.

[11] She indicated the fingers in her left hand do not allow her to hold onto anything. She could not use her left hand for typing. She indicated she never has held a sedentary job.

[12] The Appellant stated she is afraid to drive. She further noted she has problems sleeping since the accident and does not feel rested. She indicated she has been seeing a Psychologist for one year on a weekly basis and finds this helpful. She was told she was diagnosed with major depressive disorder and chronic pain syndrome.

[13] Dr. Chan completed a Functional Abilities Form on April 17, 2014 clearing the Appellant to return to work with restrictions of avoid using left hand. Dr. Chan in May 2015 again wrote restrictions avoiding the use of the left hand.

[14] Dr. Schuringa, Orthopedic Surgeon reported on April 19, 2012 that the Appellant suffered from an Intra articular fracture of the left distal radius. She was an otherwise healthy and fit individual with no major medical issues.

[15] In April 2014 March of Dimes conducted a Psycho-Vocational Assessment Report. Under the heading Analysis of Assessment Results: overall based on her current test scores her employment options are presently limited to entry-level opportunities – prior to entry-level employment it is recommended she participate in literacy training and academic upgrading to improve her math skills. Due to her weak reading, spelling and ability to retrain information it would be expected she would require a much longer than average period to acquire skills. The Appellant disclosed that she had not consulted with a mental health practitioner to date and advised that she did not wish to engage in this type of treatment.

[16] Dr. Moro, Orthopedic Surgeon, in May 2014 noted the Appellant had a recent left wrist strain and left wrist acute on chronic pain secondary to post traumatic arthritis. He opined she did not require further surgery and should not work outside of her permanent restrictions. Dr. Moro noted in November 2015 permanent restrictions were no exposure to cold, limit load handling to light and limit left hand grasping, pulling, and pushing to occasional.

[17] In June 2014 Altum Health noted the Appellant had left wrist strain and left wrist acute chronic pain secondary to posttraumatic arthritis from previous intra-articular distal radius fracture. It was noted she was working 20 hours per week on modified duties but she feels work is too demanding and feels trapped between WSIB and the employer.

[18] Work Transition Specialist – Gap Assessment dated August 25, 2014 noted cognitive gaps and recommended Specialized Vocational Based ESL. Physical precautions were noted to be limit left hand grasping, pushing and pulling to occasional and limit lifting to 20 pounds and no exposure to cold. It was opined she was fit for light/sedentary roles.

[19] The Literacy Group of Waterloo Region issued a progress update on March 6, 2015. The Report noted the Appellant was demonstrating self-confidence in all four competencies (reading, speaking, listening and writing). It was further noted that upon working through English material on a daily basis and she was continuing to demonstrate clearer understanding of the material and easier to provide answers both orally and in writing. She was also showing good progress in NOC and Essential Skills training and is able to demonstrate the skills learnt during practice sessions with some success. Her work placement, with her ongoing training, was proving to be a very beneficial arrangement for her learning progress. It was noted an area of improvement was to find a way to focus on her studies and manage her personal life to stop it from interfering with her learning both in the classroom and in home. The Update also noted she continued to struggle with computer classes and required further practise and repetition of tasks to gain confidence.

[20] An Employment Placement Report dated July 17, 2015 noted the Appellant had been pursuing employment without success to date. She was excited about pursuing an opportunity as an elder care companion. She turned down an opportunity to apply for a cashier position due to travelling distance and she was not sure about working with cash. On July 14, 2015 the Appellant indicated she believed she could work as an office cleaner/light duty from a physical standpoint. Her restrictions were no exposure to cold temperatures, limited left overhead reaching, limited sustained/repetitive left arm activity including grasping, heavy push, pull and twist.

[21] Clinic noted of Dr. Chan in October opined the left hand and wrist x-rays indicated further deterioration and suggested early scapholunate advanced collapse.

[22] The Standard Medical Report was authored by Dr. Chan, Family Physician on October 29, 2015. Under the heading Diagnosis: left wrist status-post distal fracture with intra-articular step deformity. Missed perilunate injury; contracture of fingers. Possible SLAC (scapholunate advanced collapse) wrist and DISI (dorsal intercalated segment instability). Prognosis: guarded. Physical findings and functional limitations: trouble using left hand for activities of daily living, unable to use left hand for work. Treatment: tried physio and medications. Surgery in April 2012 but did not resolve her problems, response has been poor.

[23] Imaging conducted on September 21, 2015 of the left forearm showed no significant bony abnormality; hand and wrist – dorsal radial metaphysical surgical pin and distal radial cortical irregularity and bony remodeling related to prior surgically fixed distal radial fracture.

[24] Dr. Carleton reported the result of an EMG and Nerve Conduction Study to the Family Doctor on October 23, 2015. She opined that studies performed on the left arm were normal with no evidence of nerve damage. She further wrote there was no direct evidence of nerve damage related to her original fracture. Pain seems to be her main symptom and she may have a reflex sympathetic dystrophy although there are not changes in skin colour.

[25] Dr. Peng, WSIB Hand and Wrist Speciality Clinic completed an assessment on December 16, 2015. The Doctor noted there was some concern about complex regional pain syndrome. The Assessment noted the Appellant could not lift anything heavy and although she is right hand dominant she required the use of her left hand for her work. The pain in her left wrist affected her ability to perform her work as a dishwasher. Dr. Peng concluded that overall clinical impression was she does not have complex regional pain syndrome. He suggested opioid based pain medication and Venlafaxine in terms of stress medication. Physical examination showed she has a decrease in wrist and extension but no pain in the metacarpal and CMC area. There is no pain along the tendon or tenderness over the scaphoid bone, and did not elicit any abnormal skin sensitivity.

[26] A Comprehensive Assessment Report by WSIB Function and Pain Speciality Program was conducted on January 20, 2016. The Appellant complained of no specific pain on the day of assessment. She reported that when pain was there it is sharp in nature which comes and goes. She scored her pain as 0/10 that day and at worse 5/10 with an average of 4/10. There was no pain or discomfort when the assessor touched her left hand and wrist. The team psychologist and team physician noted moderate severity major depressive disorder, pain disorder, chronic left wrist pain and left shoulder pain with psychosocial stressors of financial problems and stress related to WSIB. The GAF (Global Assessment of Functioning) was 55-60. Recommended functional precautions were limit exposure to cold, limit load handling to high level, limit left hand grasping and pushing to occasional basis.

[27] A referral to social work was noted on January 18, 2016 with an appointment booked for February 25, 2016. The referral was noted as non-urgent and was due to anxiety/stress.

[28] Altum Health authored a number of treatment reports culminating in a Discharge Report, WSIB Function and Pain Speciality Program on April 6, 2016. Diagnosis: Axis I: pain disorder with both Psychological and a General Medical Condition (Chronic); Axis III: chronic left wrist pain, left shoulder pain: Global Assessment of Functioning (GAF): 61-65. The Report opined that based on objective testing the Appellant currently demonstrated the ability to perform activities that fall within the sedentary waist to crown lifting and carrying activities and sedentary to light floor to waist lifting activities. A number of permanent functional limitations were recommended including repetitive grasping with left hand, exposure to cold, limit left hand grasping, pulling and pushing to occasional basis, and weight limits on lifting. Under the heading Vocational Re-entry: no contraindications were identified that would preclude return to work.

[29] Jasna Mudrinic, M.S.W. authored a report on March 11, 2017. The Report noted that counselling was commenced in December 2016 and since then she attended eight individual therapy sessions. The personal history conveyed to the author indicated the Appellant was in constant pain in the left wrist, left arm and shoulder that interfered with her sleep pattern leaving her fatigued throughout the day. The Report opined the Appellant experiences significant symptoms associated with depression, and multiple anxiety symptoms. The author opined that her ongoing psychosocial and physical symptoms are chronic in nature and have persisted since 2012. The Report concluded that even with continued access to therapy the Appellant will continue to experience reduced capability in managing her life and in clinical opinion she is a good candidate for CPP Disability benefits which would reduce her overall stress level.

[30] Dr. Cletus Okonkwo issued a consultation report on April 28, 2017. He noted chief complaint: ongoing pain in her hand and such could not work. She disclosed she tried repeatedly to do work but they would lay her off complaining that she had one hand and she has been struggling with WSIB. Since her accident she has not been able to be retained in any job as people were discriminating against her due to limitation of her physical ability. She is frustrated and gets about three panic attacks per week. She has not done any counselling since the accident.

Diagnostic Impression: major depressive disorder; chronic pain disorder; history of fracture of left wrist. He recommended counselling and daily Effexor and increase dosage of Pregabalin.

## **SUBMISSIONS**

[31] The Appellant's lawyer submitted that the Appellant qualifies for a disability pension because:

- a) The Appellant injured her left wrist in March 2012 and this has had a profound effect on her psychologically. She has an enviable work ethic working 60 hours per week before her accident.
- b) The real world (Villani) factors indicate she is incapable regularly of pursuing any substantially gainful occupation. She has low skills with limited transferable skills, is 58 years of age and a limited education. She is incapable of physical work the only work she has any experience.
- c) She attempted to return to work at a fast food franchise and even in this low skill position she was deemed too slow and her attempt at a return to work was terminated by the potential employer.

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

- a) The Appellant is right hand dominant and thus able to remain capable of working. She is able to work part time which demonstrates capacity for work.
- b) Despite limitations pertaining to the Appellant's left wrist and finger potential suitable occupations have been identified. She can learn new skills through occupational training and was capable of entry level positions at the time of the MQP.
- c) The Literacy Group indicated the Appellant demonstrated increased self-confidence in English and was now comfortable answering the phone. The Appellant has made good progress to augment her existing skills and this will assist her with vocational pursuits.



The Appellant has permanent restrictions however she is capable of engaging in light physical demand level.

## **ANALYSIS**

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

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

[34] 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.

[35] 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.

### **Minimum Qualifying Period**

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

### **Severe**

[37] 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 has restrictions that preclude her from

performing work involving significant physical labour especially occupations involving use of her left arm/wrist/ and hand. The Appellant actively sought employment within her restrictions without success. She believed she was capable of light cleaning duties (July 2015) and was excited about pursuing an opportunity as an elder care companion. The occupations she sought may be difficult to obtain given socio-economic conditions however the evidence indicates she was capable of light/sedentary occupations. She attempted to maintain employment at Arby's but was not hired as she was told she was too slow at making sandwiches. Her inability to get a full time position at Arby's does not result in a finding she is incapable of "any" occupation within her restrictions. She also struggled with W.S.I.B. and believed she was being discriminated against due to limitations of her physical ability. These factors are not the test for a disability pension. The issue is whether the Appellant was capable regularly of pursuing any substantially gainful occupation. The Tribunal finds that the Appellant's effort at obtaining employment has been unsuccessful by reasons other than her health condition.

[38] 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). The Appellant in her Questionnaire dated October 7, 2015 under the heading Illnesses or Impairments that Prevent You from Working: left arm/wrist. She does not indicate the word depression anywhere in the Questionnaire. The Standard Medical Report authored by the Family Physician (October 2015) who treated the Appellant since February 2008 does not indicate the Appellant may suffer from depression. In April 2014 the Psycho-Vocational Report noted the Appellant had not consulted with a mental health practitioner and did not wish to. Reports dated after the MQP noted her GAF in January 2016 as 55-60 which is the moderate range and in April 2016 her GAF as 61-65 which is mild. The WSIB Function and Pain Specialty Program noting both her psychological and general medical condition (including chronic left wrist pain) opined there were no contraindications that would preclude her return to work.

[39] Jasna Mudrinic, M.S.W. commenced counselling the Appellant in December 2016 a years after the MQP. She opined the Appellant suffered from ongoing psychological and physical symptoms since 2012. The Tribunal does not place significant weight on her opinion as she relies on the subjective information provided by the Appellant and not objective criteria as

she did not attend with the Appellant since 2012. She further opined that granting of a CPP disability benefit would reduce her overall stress level. Financial need is not a relevant consideration for CPP.

[40] Acceptance of the medical evidence that she cannot regularly use her hands in any repetitive capacity does not preclude a subsequent conclusion that the applicant has some capacity to work (*Kiraly v. Canada (Attorney General) 2015 FCA 66*). The Federal Court of Appeal rejected the submission that the finding regarding the inability to use her hands contradicted the analytical framework set out in *Villani*. The Court noted the case was mostly fact driven. The Appellant injured her left wrist in a slip and fall on ice in 2012 and has struggled with limitations and pain as a result of this injury since. Her dominant hand is the right hand and she does not have any significant restrictions with regards to the use of her dominant hand. The Appellant demonstrated the ability to perform activities that fall within the sedentary activities of lifting and carrying (Altum Health, April, 2016). This ability indicates the Appellant is capable regularly of pursuing any substantially gainful occupation within her physical restrictions due to her left wrist/hand.

[41] 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.

[42] The Appellant was 57 years of age at the time of the MQP. She has work experience including running a small business in Hungary. She has experience in a number of occupations that gives her some transferable skills. She does not have a great deal of experience in skilled employment or office environment however she does have a back ground in entry level positions. English is not her first language but she has worked in environments where English was the language of the workplace and maintained employment. The Literacy Group of Waterloo noted the Appellant was demonstrating self-confidence in all four English competencies. She also showed good progress in Essential Skills training. The Appellant at the age of 57 years has illustrated the ability to retrain for entry level positions and expressed an interest in pursuing occupations such as elder care. She may take more time than average to learn/retrain but exhibits

the ability. The limitations noted on or before the MQP were to limit exposure to cold and limit use of her left hand and wrist. These are not limitations that would preclude her from being capable regularly of pursuing any substantially gainful occupation at the time of the MQP. The Appellant has restrictions at the time of the MQP that prevents her from repetitive use of her left hand/wrist. She did not have any restrictions with her right hand/wrist and would be a reliable predictable employee with a real world employer in an occupation within her left hand/wrist restrictions. The Tribunal finds the Appellant did not prove on a balance of probabilities she suffered from a severe disability as defined in the CPP at the time of the MQP when assessed in a real world context.

### **Prolonged**

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

### **CONCLUSION**

[44] The appeal is dismissed.

Brian Rodenhurst  
Member, General Division - Income Security