



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *E. B. v Minister of Employment and Social Development*, 2019 SST 1591

Tribunal File Number: GP-18-2621

BETWEEN:

**E. B.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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

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Decision by: Heather Hamilton

Claimant represented by: Sepideh Alimirzaee

Teleconference hearing on: September 11, 2019

Date of decision: September 16, 2019

## **DECISION**

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension. I am dismissing the appeal. These are my reasons why.

## **OVERVIEW**

[2] The Claimant was 57 years old at the date of her application. She has a Grade 12 education from Hungary. She immigrated to Canada in 2000 and in 2003 she was living in Toronto and completed a one year diploma course as a Care Aide. She moved to Vancouver in 2006 to be closer to family.

[3] The Claimant last worked as a health care assistant from November 2006 until December 18, 2015 when she was involved in a MVA. She also worked as a general helper for a plumbing company until the MVA. She is receiving temporary disability. The Claimant bases her claim for CPP disability on regional chronic pain. She feels she could no longer work as of the date of the accident. She noted on her questionnaire in October 2017 that she has limited range of motion in her right arm, and persistent pain and swelling in right arm, shoulder and neck. She is able to walk for an hour, sit and stand for a less than two hours. The Claimant takes Tylenol as needed for pain.<sup>1</sup> She prefers to manage her symptoms herself and uses alternate measurements such as yoga, herbal medicines, and breathing techniques instead of using prescribed medications.

[4] The Minister received the Claimant's application for the disability pension on October 31, 2017.<sup>2</sup> The Minister denied the application initially and on reconsideration. The Minister submitted that the Claimant was not able to return to her previous occupations; however, the medical evidence does not support limitations that precluded her from lighter or more suitable types of work. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[5] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant 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

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<sup>1</sup> Questionnaire GD2 pages 174-180

<sup>2</sup> Application GD2 pages 26-30

based on the Claimant's contributions to the CPP.<sup>3</sup> I find the Claimant's MQP to be December 31, 2017.

## ISSUES

[6] Did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2017?

[7] If so, was the Claimant's disability also long continued and of indefinite duration?

[8] I have to decide if she has a severe and prolonged disability, and if she was disabled by December 31, 2017. It is the Claimant's responsibility to prove this.<sup>4</sup>

## ANALYSIS

[9] Disability is defined as a physical or mental disability that is severe and prolonged.<sup>5</sup> A person is considered to have a severe disability if 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. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

### **The Claimant's condition**

[10] My decision about whether the Claimant's disability is severe is not based on what impairments or diagnosis she has. The important thing is whether her condition prevents her from earning a living at any type of job.<sup>6</sup> In deciding this, I have to consider all health issues that might affect her employability.<sup>7</sup> I also have to look at things like age, level of education, language proficiency, and past work and life experience.<sup>8</sup>

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<sup>3</sup> GD2-32

<sup>4</sup> The legal test is that the Claimant must prove she is disabled on a balance of probabilities; in other words, she must show it is more likely than not that she is disabled.

<sup>5</sup> Paragraph 42(2)(a) *Canada Pension Plan*

<sup>6</sup> *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

<sup>7</sup> *Bungay v. Canada (A.G.)*, 2011 FCA 47

<sup>8</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

[11] The Claimant told me that she does not know what each day will be like. She can be up and functioning for one to three hours and then she needs to rest. She explained she cannot lift her arm above her shoulder, and she cannot do any lifting of heavy items. The Claimant can sit for one or two hours, but then her head gets heavy and she has to lie down. At night she has difficulty sleeping and feels pressure on her shoulder. She places a pillow under her shoulder and that helps. Sometimes she gets five hours of sleep and sometimes she only gets two. She recalled that her condition in 2017 is the same as 2019.

[12] She used Extra-Strength Tylenol for three years after the MVA for pain. Sometimes she went without taking any Extra-Strength Tylenol for a week, and then there were some weeks she took it every day. It was taken on an as needs basis. She explained that she also used creams on her shoulder for pain such as Voltaren and some weeks that provided enough relief that she did not have to take any Tylenol. She also uses herbal medications and ice to help the pain and swelling. She told me that family physician Dr. Ervine prescribed Tramacet in April 2018 when the pain started to get worse. In the CPP Medical Report Dr. Ervine noted that in January 2018 the Claimant was using Voltaren gel 10% and prior she had tried Elevil.<sup>9</sup>

[13] Her primary condition is her regional chronic pain. The Claimant went to physiotherapy and rehabilitation. She could not return to work. She was referred to a pain clinic and was seen in 2018 at "Change Pain" with Dr. Berkman she had four to six treatments with injections. She stopped the injections because the injections were not helping. She went to eight group workshops on how to relieve pain, and a psychologist led the group. Her symptoms for her medical condition are pain in the middle of her back and neck. She sometimes feels a burning sensation. Her arm on the right side is worse than the left. Depending on the particular day there could be occasions when the pain is greater and depending on the day she may have more swelling in her right hand. If she moves the wrong way she could be in pain.

[14] She does not feel she is depressed and she does not take any medication for depression. She is not a believer in taking prescribed medication. She told me that she does cry during the day but that "life changes" cause her to cry, not depression. She has not seen a psychiatrist or

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<sup>9</sup> Medical Report GD2 pages 65-68

psychologist and feels there is a stigma attached to seeing a physician for your mental health and she does think that she needs to see one at this time.

[15] The Claimant mentioned that she used to be able to multi-task but she cannot do that now. Her cognitive function has changed. She is not as socially active as before; however, she goes to church once a week. She explained that she has nine grandchildren and she does sometimes to look after some of the grandchildren after school. They range in different ages and when they come the older teenagers are very helpful with looking after the youngest grandchild which is about 5 years old. She does know how to use a cell phone and she owns a computer. She does her banking on-line and is able to transfer money from one account to another. Her husband pays the bills.

[16] The Claimant's view of how her condition affects her ability to work is important. She feels she has been disabled for quite some time now, as the MVA occurred in December 2015. There has to be objective evidence showing she was disabled at December 31, 2017.<sup>10</sup> That means I have to look at what doctors and other professionals said about her condition around that time.

[17] There is no doubt the Claimant's medical condition affected her ability to go back to her old jobs. Her medical record shows she had persistent neck back and shoulder pain since the accident. In late 2016 she presented to Dr. Dawson with neck, shoulder and right arm symptoms. She had restricted range of motion through the shoulder, primarily in abduction, and was stiff and tight on movement. He noted it was important to work with a therapist to improve range and movement through the shoulder to help free up movement and lessen her peripheral symptoms. All these symptoms were still present at December 2017. The problem is that the medical information tells me the Claimant likely had the capacity to perform some type of work at that time, even if she could not do her usual job.

***Report of Ms. J. Smyl, occupational therapist, Reactive Injury Management***

[18] Ms. Smyl completed an assessment report in March 2016 and saw the Claimant on March 11, 2016. She was assessing her rehabilitation needs, coordination of active rehabilitation

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<sup>10</sup> Warren v. Canada (A.G.), 2008 FCA 377

program, education regarding injury management and recovery, and return to work intervention. The Claimant's program consisted of occupational therapy, physiotherapy, kinesiology, and massage therapy. Ms. Smyl had access to the Claimant's insurance file, so her report is useful and an accurate summary of the Claimant's situation.<sup>11</sup>

[19] The report noted the Claimant gradually continued to recover from her injuries sustained in the MVA but had ongoing limitations with heavier homemaking tasks, return to work and travel. The Claimant expressed concern about not working full time and the associated wage loss. She had increased pain with increased activation of her right arm and required extra time to get dressed. She had no limitations with the lower extremities or balance and demonstrated she could sit for over one hour. She walked without concerns and was able to manage postures required of standing, squatting, bending, lying and sitting. There were no concerns with respect to cognitive functioning.

[20] On January 13, 2017 Ms. Smyl completed another OT case management report. She continues to recover from injuries from MVA December 2015. The Claimant can sit for 1 to 1.5 hours, and perform light to moderate physical tasks. She is able to go for walks during the day and go to the gym on good days. Spends time with her husband, grandchildren, and friends. No cognitive concerns. She has not returned to work as a care aide or plumbing labourer.

[21] In October 2017, Ms. Smyl reported the Claimant was able to travel twice internationally in January and May 2017. She reported the Claimant was noted to return to light to moderate household tasks independently without expressed concern. The evidence with regards to functional analysis does not support she had significant limitations with regards to light to sedentary activities. She could drive short distances. She was able to sit over an hour. She reported no pain in the upper extremities at rest. She had no difficulties with the lower extremities.

***Report by Mr. Dhindas, occupational therapist, Canadian Back Institute***

[22] In November 2017 Mr. Dhindas supported consistent findings to the OT report from Ms. Smyl. He reported difficulties with activities that required lifting/carrying, pushing/pulling,

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<sup>11</sup> J. Smyl, March 11, 2016 GD2-87-100

climbing and reaching. She did not have limitations related to bending/stooping or sitting and she was able to walk and stand for 20 minutes. Pre and post MVA the functional status supported a mild degree of difficulty using the right arm use in personal care tasks and with driving on occasion. The Claimant does not meet the critical demands of her occupation as a care aide or plumbing labourer.

[23] I find the reports from the two occupational therapists support the Claimant was capable of some type of work.

***The Claimant had work capacity***

[24] The Claimant's representative urged me to place more weight on the reports by the family physician, Dr. Ervine, and the reports from Dr. Cameron. I recognize that the Claimant saw her family doctor more frequently than the occupational therapists. However, I have no clinical office notes from Dr. Ervine to review at her MQP. I took into consideration Dr. Cameron's report dated August 31, 2017.<sup>12</sup> However, the Claimant was not seeing Dr. Cameron on a regular basis as a patient. The Claimant is not a believer in prescribed medication and prefers to take herbal medication and managed at her MQP with taking herbal medications, creams on her shoulder, and Extra-Strength Tylenol on an as needs basis. Dr. Cameron's second report was dated March 26, 2019, which is well after December 2017.

[25] I place more weight on the OT reports as their reports show the Claimant had multiple ongoing concerns and took note of all of these complaints. They considered the Claimant's overall medical condition in reaching their conclusions and saw the Claimant several times in a two year period, including the year of her MQP. The OT reports show the Claimant had a mild degree of difficulty using her right arm and she could not return to her previous physical employment of care aide and plumbing labourer. The reports from Ms. Smyl and Mr. Dhindras did not establish her medical limitations and conditions precluded all work, including lighter or sedentary employment even on a part-time basis.

[26] The medical evidence and her testimony tells me the Claimant had some work capacity at December 2017. She was taking Extra-Strength Tylenol at her MQP on an as needed basis. She

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<sup>12</sup> Dr. Camerons report GD1 pages 14 to 19

was choosing to manage her pain with yoga, meditation and herbal medications. She told me she was not depressed and felt she did not need to see a psychiatrist or psychologist at that time or now. She was taking no medication for depression because she was not depressed. Her concern was her shoulder and arm and the limitations and pain she was having. She testified that she could sit for one to two hours, walk and stand for 20 minutes. She had no balance issues. She had difficulty with overhead lifting and reaching with her right arm.

[27] Her last jobs were very physical. She had to stand on a ladder as a plumbing labourer and hold equipment and she also did some overhead painting and carrying of equipment. As a care aide she had to transfer clients from one bed to another bed or transfer them from wheelchairs. It involved a lot of heavy lifting. She could not return to her previous employment in December 2017. But she likely could have done a seated job with her capacity to sit for an hour or more, that did not involve heavy use of her shoulder and arm and work within her limitations.

[28] In deciding if the Claimant had work capacity I have to look at things like her age, level of education, language proficiency, and past work and life experience.<sup>13</sup> In December 2017 she was 57 years old with a Grade 12 education with a diploma from College as a care aide. She was 43 when she took her care aide course which demonstrated that she had an ability to make change and retrain. She has been a hard worker. She had work and life experience and was adaptable and resilient. She was proficient in the English language. She also immigrated to Canada in 2000 and moved from Toronto to Vancouver in 2006, which again showed me she was adaptable to change and had a willingness to try new things. I do not think she was unemployable. I think education, language proficiency, work and life experience, flexibility and adaptability traits outweigh the Claimant's age. She may not have as many employment options. However, I do not think this means she has no work capacity. She told me she owns a cell phone and computer and does her own on-line banking.

[29] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition<sup>14</sup>.

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<sup>13</sup> *Villani v. Canada (A.G.)*, 2001 FCA 248

<sup>14</sup> *Inclima v. Canada (A.G.)*, 2003 FCA 117



[30] She told me she looked for work but could not find any. She considered sharing her home with someone but then decided she would not be able to do that because of her limitations. She has not made any attempts at working since her MVA in 2015.

[31] If she had tried lighter, sedentary work and failed, that might have persuaded me her condition was severe despite what the medical evidence showed. As it is, I have to weigh the medical evidence against her own recollection of how she was feeling at that time at her MQP. I think the medical evidence is more reliable than the Claimant's memory, particularly the occupational therapist reports and what she was telling them and what they observed up to December 31, 2017. That evidence tells me the Claimant did not have a severe disability at that time.

### **Prolonged disability**

[32] Because I found that the Claimant's disability was not severe, it was not necessary to decide if it was prolonged.

### **CONCLUSION**

[33] I understand the Claimant believes she is totally disabled. However, she has to prove her case on a balance of probabilities, and she has not done so. I cannot find she was incapable regularly of pursuing any substantially gainful occupation by December 31, 2017.

[34] The appeal is dismissed.

Heather Hamilton  
Member, General Division - Income Security