



Citation: *AM v Minister of Employment and Social Development*, 2024 SST 356

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** A. M.  
**Representative:** Mehran Yazdani

**Respondent:** Minister of Employment and Social Development  
**Representative:** Dylan Edmonds

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**Decision under appeal:** General Division decision dated September 11, 2023  
(GP-22-1215)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** In Writing  
**Decision date:** April 11, 2024  
**File number:** AD-23-989

## Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

## Overview

[2] The Appellant is a 41-year-old former medical receptionist who has been diagnosed with dermatitis, a condition that causes blistering rashes. She hasn't worked since September 2021.

[3] The Appellant applied for a CPP disability pension in October 2021.<sup>1</sup> In her application, she said that she could no longer use a computer because of swelling, cracking, and bleeding in both hands.

[4] The Minister of Employment and Social Development (Minister) refused the application after finding that the Appellant did not have a severe and prolonged disability.

[5] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. It held a hearing by teleconference and dismissed the appeal. It found insufficient evidence that the Appellant was regularly incapable of substantially gainful employment. Among other things, it found that the Appellant hadn't yet tried all treatment options.

[6] The Appellant then applied for permission to appeal to the Appeal Division. Late last year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. At the Appellant's request, I conducted a hearing by reviewing the existing record.

[7] Now that I have considered submissions from both parties, I have concluded that the Appellant does not qualify for a CPP disability pension. The evidence shows that, although the Appellant is subject to some functional limitations, she does not have a severe or prolonged disability.

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<sup>1</sup> See Appellant's Application for Canada Pension Plan Disability Benefits dated October 6, 2021, GD2-27.

## Preliminary Matter

[8] In December 2022, the law governing the appeals to the Social Security Tribunal changed.<sup>2</sup> Under the new law, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division.<sup>3</sup> That means I am not bound by any of the General Division's findings. I can also consider all available evidence, including new evidence, about whether the Appellant is disabled.

## Issue

[9] For the Appellant to succeed, she had to prove that, more likely than not, she had a severe and prolonged disability during her coverage period. The parties agreed that the Appellant's coverage period will end on December 31, 2024.<sup>4</sup>

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>5</sup> A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.
- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.<sup>6</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

[10] In this appeal, I had to decide whether the Appellant had severe and prolonged disability as of the decision date.

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<sup>2</sup> See section 58.3 of the *Department of Employment and Social Development Act*. This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on October 30, 2023, after the new law came into force.

<sup>3</sup> The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.

<sup>4</sup> Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Appellant's CPP contributions are listed on her record of earnings at GD2-6.

<sup>5</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>6</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

## Analysis

[11] I have applied the law to the available evidence and concluded that the Appellant does not have a severe and prolonged disability. I am satisfied that the Appellant's medical conditions don't prevent her from regularly pursuing substantially gainful employment.

### **The Appellant does not have severe and prolonged disability**

[12] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.<sup>7</sup> I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant has an impairment, I couldn't find enough evidence to show that it prevents her from working.

[13] In her application for benefits, the Appellant said that her main disabling condition was pain and swelling caused by a combination of eczema and dermatitis in both hands. She said that on good days, she could continuously use her hands for four to six hours, but on bad days, she could barely open and close them.

[14] The Appellant later wrote that she first developed dermatitis as a teenager, but it got worse after the birth of her son in 2016.<sup>8</sup> She said that it became increasingly difficult to type for seven hours a day. Her hands were sore and itchy, cracked and swollen. She lost her protective layer of skin, forcing her to wear cloth gloves. She had difficulty taking a shower since her hands couldn't get wet. Even as simple a task as sweeping the kitchen floor left her in pain.

[15] The Appellant said that, over the years, she has seen many specialists and tried many treatments. None has worked. Her condition made her anxious and depressed. She began seeing a therapist in 2022, although she has not yet taken any medications for her mental health. She wants to return to work, but she is no longer capable of using her hands on a consistent basis; she would not be a reliable employee.

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<sup>7</sup> See *Canada Pension Plan*, section 44(1).

<sup>8</sup> See the Appellant's letter dated January 16, 2022, GD2-18.

[16] Although the Appellant may feel that she is disabled, I must base my decision on more than just her subjective view of her capacity.<sup>9</sup> In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevents her from performing suitable work.

[17] I base this conclusion on the following factors:

– **The Appellant’s family physician does not rule out a return to work**

[18] Dr. Makary has been the Appellant’s primary caregiver for many years. As such, he is well positioned to comment on her condition and her prospects for recovery. He has provided numerous notes and reports in support of his patient, but they tell a mixed story, one that doesn’t necessarily point to a severe disability.

[19] In November 2021, Dr. Makary prepared a medical report to accompany the Appellant’s CPP disability application.<sup>10</sup> In it, he listed her diagnosis as severe eczema/atopic dermatitis, which he said left her unable to use her hands for fine motor functioning, such as typing, writing, and other manual tasks. He noted that she exhibited pain, weakness, and reduced dexterity in both hands. He disclosed that she had been taking Methotrexate (a medication used to treat eczema that does not respond sufficiently to topical treatments alone) since November 2021, with a response yet to be determined. He recommended that the Appellant stop working in September 2021, but he anticipated that she would be capable of returning to her old job within one or two years.

[20] At that point, Dr. Makary did not believe the Appellant’s disability was of “indefinite duration,” perhaps because he thought Methotrexate would be effective. As we will see, it was effective, but it also brought the Appellant unwanted side effects.

[21] In a clinical note from later in November 2021, Dr. Makary wrote that, after three weeks on Methotrexate, the Appellant was experiencing fatigue and would have to wait

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<sup>9</sup> A CPP disability claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations*.

<sup>10</sup> See CPP initial medical report dated November 9, 2021 by Dr. David Makary, family physician, GD2-76.

for at least another three weeks for any positive effect to be seen.<sup>11</sup> In his next clinical note, from April 2022, noted that the Appellant's Methotrexate dosage had been increased and that her hands were looking well. However, she said that, although her eczema had improved, she was tired and felt like she had been "hit by a truck" for two days after taking the medication. She also said that she was open to trying Methotrexate by injection.<sup>12</sup>

[22] At that point, Dr. Makary had already written a letter supporting the Appellant's CPP disability application, declaring her condition "severe and prolonged."<sup>13</sup> However, only a few months later, in June 2022, he completed a form for the Ontario Disability Support Program, in which he described the Appellant's limitations as "mild" to "moderate."<sup>14</sup>

[23] Dr. Makary also noted that the Appellant's eczema affected all aspects of her life and work: "Of particular concern is how irritative **hand sanitizer products** are which she must use with high volume/frequency due to current pandemic [emphasis added]." This tells me that the Appellant's condition during the COVID-19 crisis might have been aggravated by situational factors that no longer exist or carry the same urgency as they did two or three years ago.

[24] Dr. Makary's next report raises questions about the severity and duration of the Appellant's condition. In September 2022, he noted that the Appellant was still taking Methotrexate pills but did not like them. He mentioned her complaints of extreme fatigue and speculated that it might not be due to the Methotrexate but to obstructive sleep apnea or a depressive episode or anxiety from reading about possible medication side effects.<sup>15</sup>

[25] Dr. Makary then suggested that the Appellant's condition was highly variable. He wrote a letter in January 2023 saying that her disease routinely fluctuated from mild to severe. In the same month, he reported that, while her hand eczema was well

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<sup>11</sup> See Dr. Makary's clinical note dated November 25, 2021, GD4-10.

<sup>12</sup> See Dr. Makary's clinical note dated April 7, 2022, GD4-12.

<sup>13</sup> See Dr. Makary's letter dated January 13, 2022, GD2-19.

<sup>14</sup> See Ontario Disability Support Program form completed by Dr. Makary on June 28, 2022, GD4-16.

<sup>15</sup> See Dr. Makary's clinical note dated September 23, 2022, GD4-29.

controlled, she presented with a “flare” on her forearms and trunk, which usually became worse in the spring.<sup>16</sup>

[26] In July 2023, Dr. Makary wrote that the Appellant’s dermatitis was severe, preventing her from reliably working at any job, whether full-time, part-time or seasonal, that required the use of her hands.<sup>17</sup> But Dr. Makary also made it clear that the Appellant’s treatment was still ongoing and that there were still options left to be tried:

– The primary barrier at this time is finding a medication that provides disease remission and an acceptable level of side-effects... [She] has tried various treatments. Creams such as diprolene, betamethasone, hydrocortisone, protopic and eucrisa have all been tried with minimal benefit. [She] is now on an injectable medication called methotrexate however the **benefits are mild to moderate** and the **side effects are significant**. She is currently seeing dermatology and looking at a new medication in the fall. **We are hopeful that new treatments** will help control her severe dermatitis [emphasis added].

[27] Dr. Makary’s most recent evidence is a letter in response to the Appellant’s counsel, who sought an update about her condition as well as clarification about some of his previous statements.<sup>18</sup> He confirmed that the Appellant was no longer on Methotrexate and said that she had been started on another medication, Cibinqo, as of September 2023. He said that, according to the Appellant, this medication also produced side effects: dizziness, nausea, twitching in her right eye, tingling in her hands and feet, and locking in her hands and fingers. She remained under observation by her specialist, Dr. Siddha.

[28] Asked for a prognosis, Dr. Makary replied that, since the new medication had only been recently started, it was difficult to assess its efficacy. For now, her outlook remained guarded.

[29] In all, Dr. Makary’s evidence suggests that the Appellant’s condition is serious, but that it is also variable and potentially treatable. Her blistering flares up from time to time, but it has responded to at least one medication, even though the Appellant says

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<sup>16</sup> See Dr. Makary’s letter dated January 30, 2023 and his clinical note of the same date, both at GD4-31.

<sup>17</sup> See Dr. Makary’s letter dated July 5, 2023, GD5-3.

<sup>18</sup> See Dr. Makary’s letter dated December 16, 2023, AD4-14.

that side effects outweighed the benefits. However, there remain other medications that the Appellant has yet to fully explore and, for that reason, I cannot say that her condition is prolonged.

– **The Appellant’s specialists continue to explore treatment options**

[30] The Appellant has seen, and been treated by, a number of specialists for her skin condition. Like Dr. Makary, they have all suggested that treatment is an ongoing process of trial and error. Like Dr. Makary, none of them have ruled out a future return to work.

[31] In October 2018, Dr. Sims, an allergist, reported that the Appellant had moderately severe hand eczema, especially involving her palms. Dr. Sims noted that the condition had partially responded to a topical steroid, but he nevertheless sent her for allergy testing and suggested a referral to a dermatologist.<sup>19</sup>

[32] On examination, the dermatologist, Dr. DeKoven, observed moderate focal erythematous fissured plaques (open lesions) over the palm and back of both hands.<sup>20</sup> He noted that the Appellant was using only hand cream to address the irritation and that her use of liquid hand sanitizer aggravated her immediate symptoms. Dr. DeKoven set out a range of treatment options, including topicals, phototherapy, and a medication called Toctino.

[33] In July 2019, the Appellant saw another dermatologist, Dr. Siddha, who set out a treatment plan that included topical ointments and a Toctino trial.<sup>21</sup> Dr. Siddha planned a follow-up in six weeks, but it’s unclear whether it ever happened; the file contains no specialist reports, with Dr. Siddha or anyone else, for the next two years.

[34] In October 2021, the same month in which she applied for CPP disability benefits, the Appellant saw Dr. Raman, another dermatologist.<sup>22</sup> In his report, he noted that the Appellant’s hands exhibited reddish scaly patches with “excoriations, impetiginization, lichenification.”<sup>23</sup> He did not comment on the Appellant’s functionality or

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<sup>19</sup> See report dated October 22, 2018 by Dr. R. Greg Simms, allergist, GD2-86.

<sup>20</sup> See report dated April 22, 2019 by Dr. Joel DeKoven, dermatologist, GD2-91.

<sup>21</sup> See report dated July 29, 2019 by Dr. Sanjay Siddha, dermatologist, GD2-94.

<sup>22</sup> See report dated October 14, 2021 by Dr. Mani Raman, dermatologist, GD2-105

<sup>23</sup> These are technical terms that describe the secondary effects of scratching.



her prognosis, but he did outline a wide array of available treatment options, including continuing topical creams; trying oral medications such as Methotrexate and Tactino, intramuscular Kenalog (an injectable corticosteroid), Dupilumab (a biological); or entering a clinical trial for a new class of drugs known as Janus kinase inhibitors.

[35] The Appellant returned to Dr. Siddha the same month. He promptly placed her on Methotrexate oral tablets and continued seeing her regularly, roughly every three months, for the next two years.<sup>24</sup> Unfortunately, Dr. Siddha's reports are terse. For the most part, they merely list diagnoses of hand dermatitis or eczema, with two mentions of "flares" in the forearms and torso. The reports contain no insights into the severity of the Appellant's dermatitis, no discussion about what limitations she might face with her condition, no indication of her response to medication.

[36] In sum, the available specialist reports are short on detail and say very little about the severity of the Appellant's condition. They confirm that the Appellant has dermatitis, but they contain almost no information about how that condition affects her ability to regularly work. A diagnosis cannot be equated with a disability,<sup>25</sup> and I am reluctant to grant a disability pension based largely on a claimant's subjective account of her capacity.

[37] The available specialist reports are also silent about the effectiveness of the Appellant's treatments to date, but they do suggest that, even if Methotrexate produced too many side effects, many other treatment options remain.

– **The Appellant's background and personal characteristics didn't affect her employability**

[38] Based on the medical evidence, I find that the Appellant had work capacity. I am reinforced in this belief when I look at her overall employability.

[39] The leading case on the interpretation of "severe" is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability Appellant as a "whole person"

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<sup>24</sup> See Dr. Siddha's reports dated October 4, 2021 (GD4-93), October 22, 2021 (GD4-92), November 3, 2021 (GD4-91), November 26, 2021 (GD4-91), January 31, 2022 (GD4-90), March 18, 2022 (GD4-90), June 22, 2022 (GD4-87), August 19, 2022 (GD4-88), November 14, 2022 (GD4-88), April 3, 2023 (GD4-32), and May 8, 2023 (GD4-32).

<sup>25</sup> See *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

in a real-world context.<sup>26</sup> Employability is not to be assessed in the abstract, but rather in light of “all of the circumstances.”

[40] When deciding whether the Appellant can work, I can’t just look at her medical conditions. I must also consider factors such as her age, level of education, language abilities, and past work and life experience. These factors help me decide whether the Appellant could work in the real world when she had coverage.

[41] The Appellant has several assets that would benefit her in a job search. She is currently 41 years old — far from the typical age of retirement — and is a native English-speaker. She has only a high school education, but she has long and varied experience in the retail and service sectors.<sup>27</sup> This history would likely demonstrate her reliability and adaptability to a prospective employer.

[42] Given her background, the Appellant is well equipped to attempt to return to the labour market should she wish to do so. I find that, even with her skin condition, she has the residual capacity to at least attempt a job that might be easier on her hands than the ones she had been doing previously.

– **The Appellant has not attempted alternative employment**

[43] The Appellant’s residual capacity imposes on her an obligation.

[44] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.<sup>28</sup>

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<sup>26</sup> See *Villani v Canada (Attorney General)* 2001 FCA 248.

<sup>27</sup> See the Appellant’s record of earnings (GD2-6), which show relatively consistent earnings every year going back to 2001.

<sup>28</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[45] This passage suggests that, if a claimant retains at least **some** work capacity, the General Division must conduct an analysis to determine (i) whether they attempted to find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

[46] On top of that, disability claimants must make **meaningful** attempts to return to work.<sup>29</sup> They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.<sup>30</sup> Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[47] The Appellant worked as a customer service representative at Walmart for eight years and as a receptionist in a chiropractor's office for another six. When she stopped working in September 2021, she was employed as a business development agent for an automotive dealership, a job that she said required her to use a computer keyboard for seven to eight hours per day.<sup>31</sup>

[48] The Appellant said that she had to leave her job because she was unable to type for more than an hour without her feeling a strong burning sensation in her hands.<sup>32</sup> When asked why she couldn't work in an alternative retail or office, she replied:

To be honest, there is no job that I would be able not to use my hands. Unfortunately my hands are unpredictable and because of how my hands are, I'm unreliable. I don't believe any employer would hire someone, if you tell them honestly upfront I can't guarantee that I will be here every day because I don't know how my hands are going to be in the morning. I could come in to work for an hour and then have to leave.<sup>33</sup>

[49] The Appellant may no longer be able to type for eight hours straight, much less one, but that doesn't necessarily mean she is disabled from all forms of employment. I

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<sup>29</sup> See *Tracey v Canada (Attorney General)*, 2015 FC 1300, in which the Federal Court stated that the onus is on claimants to show that they made "sincere" efforts to meet the employment efforts test.

<sup>30</sup> See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

<sup>31</sup> See Appellant's submissions dated February 5, 2024, GD4-10.

<sup>32</sup> See Appellant's submissions dated February 5, 2024, GD4-3.

<sup>33</sup> See Appellant's submissions dated February 5, 2024, GD4-9, quoting testimony at 54:00 of the recording of the General division hearing.

acknowledge that just about every conceivable job has at least some manual element. However, there are many jobs that don't require fine motor skills or the kind of sustained and intensive use of one's hands that the Appellant's last position demanded. The Appellant says that she can no longer offer reliable performance in any job, but how can she be sure if she hasn't first tried a lower impact job?

[50] In the end, I was unable to properly assess the severity of the Appellant's disability. That's because she never made an effort to look for employment that might have been better suited to her functional limitations. For that reason, her claim must fail.

## **Conclusion**

[51] The Appellant has a skin condition, but the available evidence suggests that it did not prevent her from regularly pursuing a substantially gainful occupation. What's more, the Appellant has not explored all treatment options, nor has she made a real effort to seek alternative employment that might have been better suited to her limitations. For these reasons, I am not convinced that the Appellant has a severe or prolonged disability.

[52] The appeal is dismissed.



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Member, Appeal Division