



Citation: *TM v Minister of Employment and Social Development*, 2022 SST 332

## **Social Security Tribunal of Canada General Division – Income Security Section**

# **Decision**

**Appellant:** T. M.

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** Minister of Employment and Social Development  
reconsideration decision dated December 23, 2020 (issued  
by Service Canada)

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**Tribunal member:** Michael Medeiros

**Type of hearing:** Teleconference

**Hearing date:** March 2, 2022

**Hearing participant:** Appellant

**Decision date:** March 22, 2022

**File number:** GP-21-1330

## Decision

[1] The appeal is dismissed.

[2] The Appellant, T. M., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

## Overview

[3] The Appellant is 43 years old. Her back and right thigh have been causing her pain for years. She stopped working as a cashier in 2012 because of the pain from standing all day. She started training to be a nail technician in 2013, so that she could work from home to help manage her condition. She started her own nail care business in January 2015. In May 2015, her condition got really bad, but she kept pushing herself until she couldn't work anymore in December 2016.

[4] The Appellant applied for a CPP disability pension on January 8, 2020. The Minister of Employment and Social Development (Minister) refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Appellant says she has a severe and prolonged disability. She has been dealing with severe back and thigh pain for a long time and it is only going to get worse. She can't walk, stand, or sit for any length of time. She tried working from home in 2015 and 2016, but she wasn't able to earn much. She had to take many breaks and found it very painful.

[6] The Minister says that the evidence does not support a medical condition that would have prevented the Appellant from performing work within her capacity by December 31, 2014. The Appellant said in her application that it was in May 2015 that her condition became so severe that she could no longer work. The medical evidence does not support that she was disabled by the end of December 2014. The fact that her condition has deteriorated since then is irrelevant when deciding if she is disabled under the CPP.

## What the Appellant must prove

[7] For the Appellant to succeed, she must prove she had a disability that was severe and prolonged by December 31, 2014. This date, referred to as the “minimum qualifying period” (MQP) date, is based on her contributions to the CPP.<sup>1</sup>

[8] The *Canada Pension Plan* defines “severe” and “prolonged.”

[9] A disability is **severe** if it makes an Appellant incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup>

[10] This means I have to look at all of the Appellant’s medical conditions together to see what effect they have on her ability to work. I also have to look at her background (including her age, level of education, and past work and life experience). This is so I can get a realistic or “real world” picture of whether her disability is severe. If the Appellant is able to regularly do some kind of work that she could earn a living from, then she isn’t entitled to a disability pension.

[11] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.<sup>3</sup>

[12] This means the Appellant’s disability can’t have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

[13] The Appellant has to prove she has a severe and prolonged disability. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not she is disabled.

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<sup>1</sup> Service Canada uses an Appellant’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See section 44(2) of the *Canada Pension Plan*. The Appellant’s CPP contributions are at GD2-61 to 68.

<sup>2</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

<sup>3</sup> Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

## **Matter I have to consider first**

### **The hearing was adjourned and further documents from the Appellant were accepted**

[14] The hearing was originally scheduled for January 19, 2022. The hearing was adjourned on that date because of an issue that came up regarding the Appellant's earnings in 2015 and 2016. After the Appellant submitted further documents, the hearing was rescheduled for March 2, 2022.

[15] At the start of the hearing on January 19, 2022, I explained to the Appellant the meaning of her MQP date of December 31, 2014. I had understood from the appeal file that she worked in 2015 and 2016. I explained that if she had earnings above the disability basic exemption amounts for those years, that it could change her MQP. I suggested that the Tribunal could refer her matter to the Tax Court of Canada if she wished to have those earnings addressed. The Appellant said that she wanted some time to think about it and consult with her accountant.

[16] On January 20, 2022, I followed-up with the parties by letter.<sup>4</sup> I explained that upon further review, a referral to the Tax Court of Canada was not appropriate, and that section 26.1 of the *Canada Pension Plan* governed in the circumstances. That section allows the Minister to request at any time that an officer of the Canada Revenue Agency make a ruling on the question of what is the amount of any earnings from pensionable employment. I asked the Appellant to communicate to the Tribunal whether she wanted to take any further steps to address income she earned in 2015 and 2016 that may be above the disability basic exemption amount for those years. If she did, I said I would schedule a pre-hearing conference with all parties.

[17] On February 1, 2022, the Appellant emailed the Tribunal her tax forms for 2015 and 2016.<sup>5</sup>

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<sup>4</sup> See follow-up letter to January 19, 2022, hearing which did not proceed, dated January 20, 2022, at GD6.

<sup>5</sup> See Appellant's additional documents – 2015 and 2016 earnings, dated February 1, 2022, at GD8.

[18] On February 7, 2022, I responded by letter.<sup>6</sup> I provided the following explanation, including direction on next steps:

- I had reviewed the Appellant's tax forms and found they confirmed that she did not earn above the disability basic exemption in 2015 and 2016. Therefore, those years can't count in her MQP calculation.
- There was no reason to take further steps to address 2015 and 2016 earnings.
- I would consider the tax forms in assessing whether she was incapable regularly of pursuing any substantially gainful occupation by the end of her MQP date of December 31, 2014.
- The hearing would be rescheduled in approximately four weeks, which would allow enough time for the Minister to respond to the Appellant's documents, if they wanted to.

## Reasons for my decision

[19] I find that the Appellant hasn't proven she had a severe and prolonged disability by December 31, 2014.

### Was the Appellant's disability severe?

[20] The Appellant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– **The Appellant did not prove functional limitations that were severe by December 31, 2014**

[21] The Appellant has degenerative disc disease, degenerative joint disease, and spinal stenosis of the lumbar region. However, I can't focus on the Appellant's diagnoses.<sup>7</sup> Instead, I must focus on whether she had functional limitations that get in

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<sup>6</sup> See response to GD-8 and direction to reschedule hearing, dated February 7, 2022, at GD-9.

<sup>7</sup> See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

the way of her earning a living.<sup>8</sup> When I do this, I have to look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affect her ability to work.<sup>9</sup>

[22] I find that the Appellant hasn't proven that she had functional limitations that made her incapable regularly of pursuing any substantially gainful occupation by December 31, 2014. The medical evidence doesn't show that she had a severe disability by her MQP date.

– **What the Appellant says about her functional limitations**

[23] The Appellant says that her medical conditions have resulted in functional limitations that affect her ability to work. She has been dealing with lower back pain since around 1998. In 2002, she had a child, which made her back pain worse. Her condition gradually deteriorated. She eventually started to feel pain in her right leg as well. She told her family doctor, Dr. Dowling, that the pain and numbness in her right leg has been going on since 2014.<sup>10</sup>

[24] She feels constant, severe back and right thigh/leg pain. She can't stand, walk, or sit for any length of time. Standing is the worst for her. She has a hard time managing housework and other chores, like shopping.

[25] She says she has the following limitations because of her back and leg pain:

- **Standing** – She can only stand for five minutes at a time. She then needs to walk around for 10 to 15 minutes before standing again. On a scale of 1 to 10, she rates her pain a 10 after standing for five minutes.
- **Walking** – She can walk for only 10 to 15 minutes at a time before she needs to sit down and take a break.

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<sup>8</sup> See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

<sup>9</sup> See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>10</sup> See Dr. Dowling's letter, dated February 8, 2021, at GD1-12.

- **Sitting** – She can sit for 15 to 20 minutes at a time. She then needs to get up and walk around for five to ten minutes before sitting again. However, she also said that after five minutes of sitting, she rates her pain a 10 out of 10.

[26] The Appellant had a few different jobs between 2009 and 2011, including at a liquor store, grocery store, and cleaning for a rental management company. From September 2011 to July 2012, she worked full-time as a cashier at a grocery store. She stopped working because standing all day was too painful. Also, she wasn't making much money and had to pay for a babysitter. She tried a part-time job at the grocery store, but it involved lifting heavy boxes, which was too much for her.

[27] The Appellant saw a chiropractor regularly from 2012 to 2015. She went every day, then every couple of days, and eventually every week. However, she says that it didn't do any good, as she still felt pain. It would help with the kinks, but not the burning. She would also treat her pain with over the counter medication.

[28] The Appellant decided that she would try a different job working from home. That way she wouldn't have to pay for a babysitter or stand all day. She took a six week course in June 2013 to learn how to do nails. She started a home-based business called All Unique Nails in January 2015.<sup>11</sup> However, at the hearing she said that she had been doing nails since after she finished her course in 2013. She was "training" and not doing a lot. In January 2015, she picked up a little more business, and that's when she was able to "file amounts," which I understand to mean file income taxes.

[29] By January 2015, the Appellant had anywhere from eight to twelve clients a month. She was not making a lot of money. It would take her up to four and a half hours to do a set of nails because of the breaks she would have to take to deal with her back pain. Most technicians would take about two hours. Her prices were lower than normal because it would take her longer. She did not turn business away, but lost clients

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<sup>11</sup> See 2015 Statement of Business or Professional Activities, at GD8-3. The Appellant's original application for CPP disability benefits, dated January 2, 2020, did not include that she was self-employed as a nail technician in 2015 and 2016. The last job she listed was the grocery store job that ended in 2012: see GD2-52 to 53. The Appellant disclosed that she worked from January 2015 to December 2016 in her response to a work questionnaire from Service Canada, dated May 14, 2020: see GD2-22 to 26.

because of how long it would take her. She estimates that she lost 30 clients within six months of January 2015.

[30] In her application for CPP disability benefits, the Appellant listed May 2015 as the date she could no longer work because of her medical conditions.<sup>12</sup> In May 2015, she started to feel severe back and thigh pain during a trip to Saskatchewan. She couldn't walk, sleep, or even sit in a car. She was put on painkillers, which didn't help. The doctor took x-rays and they discovered the problem.

[31] She says that before May 2015, she could work, but it was hard. However, she says that she feels the same now as she did before May 2015, which I understand to mean severe pain that prevents her from working. In fact, she says that she feels better now than she did at the end of 2014, because of the pain relief she gets from injections every three months since January 2021.<sup>13</sup>

[32] She nonetheless continued to operate her business despite her condition. She was prescribed different medication for pain. She was leery about taking painkillers unless in "massive pain." The pills made her sleepy and made it difficult to function.

[33] In October 2015, she travelled out of town for a one day nail technician update course. She worked until December 2016, when she says she could no longer continue because of the pain from sitting. Also, her hands would go numb because of carpal tunnel in her hands.<sup>14</sup> The pain had started before then, but by December 2016, it got to be too much.

[34] The Appellant's earnings from her nail business were low. The Appellant's tax forms from 2015 listed her business net income for the year as \$3,574.90.<sup>15</sup> Her 2016 net income was \$1,431.95.<sup>16</sup>

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<sup>12</sup> See CPP application, dated January 2, 2020, at GD2-44. See also Appellant's letter, dated July 9, 2020, at GD2-18.

<sup>13</sup> See spinal intervention request form, dated January 14, 2021, at GD1-13.

<sup>14</sup> The first time the Appellant mentioned carpal tunnel in her hands and it impacting her ability to work was during the hearing. She said it was diagnosed six years ago.

<sup>15</sup> See 2015 Statement of Business or Professional Activities, at GD8-5.

<sup>16</sup> See 2016 Statement of Business or Professional Activities, at GD8-10.



[35] She got pregnant in the fall of 2016. She had to stop taking pain medication. She says her back pain actually subsided while pregnant, as the baby growing would “spread her spine.” Her child was born in April 2017. She waited at least a year before going back on medication. However, her condition continued to decline.

[36] She saw a spinal physician, Dr. Fleck, in September 2020. Dr. Fleck recommended injections to treat the pain.<sup>17</sup> She continues to receive these injections every three months. The injections help with the pain. When she receives the injection, it reduces the pain from a “24 out of 10,” to a 3 or 4. The injections help her function about “80 percent” better. The pain gets progressively worse until the next injection.

– **What the medical evidence says about the Appellant’s functional limitations**

[37] The Appellant must provide medical evidence that shows that her functional limitations affected her ability to work by December 31, 2014.<sup>18</sup>

[38] The medical evidence doesn’t support a finding that, by December 31, 2014, the Appellant’s medical conditions made her incapable regularly of pursuing any substantially gainful employment.

[39] There is no medical evidence that by her MQP date she had functional limitations that would have prevented her from working. There is some medical evidence that her condition became severe around May 2015 for at least a period of time, but that is several months past her MQP date of December 31, 2014, in any event.

[40] The Appellant’s family doctor, Dr. Dowling, provided the bulk of the evidence about her medical condition. Dr. Dowling submitted a medical report, dated February 28, 2020, that said the following:<sup>19</sup>

- She was in his care for the last one to two years.

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<sup>17</sup> See spine assessment report, dated September 4, 2020, at GD2-103 to 105. See also spinal intervention request form, dated January 14, 2021, at GD1-13.

<sup>18</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>19</sup> See Dr. Dowling’s medical report, dated February 28, 2020, at GD2-113 to 121.

- She was impaired by constant daily back pain with radicular pain down her leg, with a symptom onset date of “plus or minus 2017.”
- She was “unable to do repetitive bending” and had “pain with twisting motion.”
- From a strictly medical standpoint, he expected that the Appellant would return to “usual work” in the future.

[41] On April 23, 2020, Service Canada requested by letter further information from Dr. Dowling about the Appellant’s medical condition around the time of her MQP date of December 31, 2014.<sup>20</sup>

[42] On June 10, 2020, Dr. Dowling responded by letter.<sup>21</sup> Dr. Dowling noted that he was not the Appellant’s physician in December 2014. He reviewed the medical notes from previous physicians. The main concerns in 2014 were obesity, dysfunctional uterine bleeding, and degenerative back pain.

[43] Dr. Dowling said that “based on the findings in her chart, I cannot confirm that she was disabled continuously since December 2014. She had a period of significant problems in 2015, but I am unsure how long this truly lasted.”<sup>22</sup>

[44] Dr. Dowling’s letter summarized the medical notes relevant to whether the Appellant was disabled in December 2014. He said the following:<sup>23</sup>

- **May 28, 2015** – She saw a physician with severe back and thigh pain. She saw several physicians around the next couple of months for a diagnosis. She was diagnosed with severe meralgia paresthetica (entrapment of lateral cutaneous nerve of the thigh). She was placed on narcotics and tricyclic antidepressants for neuropathic pain.
- **September 2015** – Note made in her chart that pain well controlled.

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<sup>20</sup> See Service Canada letter to Dr. Dowling, dated April 23, 2020, at GD2-28 to 29.

<sup>21</sup> See Dr. Dowling’s letter to Service Canada, dated June 10, 2020, at GD2-106 to 107.

<sup>22</sup> See Dr. Dowling’s letter to Service Canada, dated June 10, 2020, at GD2-106.

<sup>23</sup> See Dr. Dowling’s letter to Service Canada, dated June 10, 2020, at GD2-106.

- **February and June 2016** – Notes made that the condition was stable and that she had no more concerns. At the time there was no mention of functional abilities or disabilities.
- **October 2016** – She got pregnant and the focus of her medical appointments went away from back discomfort to the wellbeing of her pregnancy.
- **2018** – Previous physician noted that her condition is permanent and she struggles to walk.
- **November 2019** – She made an appointment to specifically discuss back pain. She was able to get up and move without difficulty. She carried her child in the appointment and did not appear to be in disabling pain.

[45] There is also evidence of x-rays taken in May 2015.<sup>24</sup> They showed mild to moderate narrowing of the L1-2 through L4-5 disc spaces. Her spine was otherwise normal. The sacroiliac joints were normal. The impression from the x-rays was L1-2 through L4-5 degenerative disc disease. However, this evidence doesn't address the severity of her symptoms and possible related functional limitations, either at that time, or by December 31, 2014.

[46] There is also some evidence from the Appellant's chiropractor of symptoms prior to December 31, 2014. However, this evidence doesn't address the severity of her symptoms (other than requiring frequent treatment) or related functional limitations. Her chiropractor, Mr. Gehrke, said the following about her treatment history:<sup>25</sup>

- She first came to his office in January 2002. She was pregnant, which exacerbated an existing low back condition.
- She was treated in 2002, then sporadically in 2003, 2004, and 2007.

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<sup>24</sup> See spine assessment report, dated September 4, 2020, at GD2-104.

<sup>25</sup> See Mr. Gehrke's (chiropractor) letter, dated February 19, 2021, at GD1-11.

- She presented again in 2012, with symptoms of headache/vertigo, and generalized thoracic and low back complaints.
- She was treated frequently from 2012 to 2015, at which time her low back symptoms were accompanied by lingering right leg sciatic like symptoms.
- Her symptoms lingered through 2016 and 2017, at which time she was pregnant, and this appeared to again exacerbate her low back/sciatic symptoms.
- They last saw her in November 2018.

[47] The Appellant was assessed more recently in September 2020 by Dr. Fleck, spinal physician. She was diagnosed with lumbar degenerative disc disease, facet arthrosis (degenerative joint disease), and spinal stenosis of lumbar region (moderate).<sup>26</sup> However, this evidence doesn't address her condition by December 31, 2014.

[48] The medical evidence doesn't show that the Appellant had functional limitations that made her incapable regularly of pursuing any substantially gainful occupation by December 31, 2014. As a result, she hasn't proven she had a severe disability.

[49] When I am deciding whether a disability is severe, I usually have to consider an Appellant's personal characteristics.

[50] This allows me to realistically assess an Appellant's ability to work.<sup>27</sup>

[51] I don't have to do that here because the Appellant hasn't proven that her functional limitations made her incapable regularly of pursuing any substantially gainful occupation by December 31, 2014. This means she didn't prove her disability was severe by then.<sup>28</sup>

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<sup>26</sup> See spine assessment report, dated September 4, 2020, at GD2-103.

<sup>27</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>28</sup> See *Giannaros v Minister of Social Development*, 2005 FCA 187.

## **Conclusion**

[52] I find that the Appellant isn't eligible for a CPP disability pension because she didn't prove that her disability was severe by December 31, 2014. Because I have found that her disability isn't severe, I didn't have to consider whether it is prolonged.

[53] This means the appeal is dismissed.

Michael Medeiros  
Member, General Division – Income Security Section