



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. M. v Minister of Employment and Social Development*, 2019 SST 1662

Tribunal File Number: GP-18-843

BETWEEN:

L. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Teleconference hearing on: July 2, 2019

Date of decision: July 25, 2019

DECISION

[1] I am dismissing the appeal. The Claimant ceased to be disabled under the *Canada Pension Plan* (CPP) in January 2014. She was not eligible to receive a CPP disability pension after that month.

OVERVIEW

[2] The Claimant is 60 years old. She is originally from Romania, where she earned a Master's degree in physical education and worked as a swim coach. She continued to coach and teach swimming after she immigrated to Canada in 1993. Starting in 2001 she was employed by a non-profit swim club she founded with her husband.

[3] The Claimant stopped working after she was injured in a car accident in October 2005. She was granted a CPP disability pension, which was paid to her until June 2017. The Minister suspended payment after that, because it was reassessing the Claimant's disability status.

[4] In August 2017, the Minister decided the Claimant ceased to be disabled in January 2014. That meant the Claimant was not entitled to receive her disability pension as of February 2014.¹ The Minister told her she had to repay \$28,017.02, which is the amount she received for her pension from February 2014 to June 2017.² The Minister maintained this decision on reconsideration,³ and the Claimant appealed to the Tribunal.

ISSUE

[5] I have to decide if the Claimant ceased to be disabled under the CPP and, if so, when.

ANALYSIS

[6] The CPP defines disability as a physical or mental disability that is severe and prolonged. A disability is severe if a person is incapable regularly of pursuing any substantially gainful

¹ Subsection 70(1) of the *Canada Pension Plan* says a disability pension cannot be paid after the month in which the recipient ceases to be disabled.

² GD2-521-525

³ GD2-512-514

occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.⁴

[7] The Minister says the Claimant was no longer disabled by January 2014 because the medical evidence shows she had regained the capacity to work by then, and because she had substantially gainful earnings in 2015 and 2016.⁵

[8] The Claimant told me her condition has improved and she has been able to work since April 2017, but she does not think she should have to return any of the pension that was paid to her before then. She claims she was still disabled, and that the money she received in 2015 and 2016 was for work performed in 2005 and earlier.

The Minister has to prove the Claimant is no longer disabled

[9] A person who applies for a CPP disability pension must prove she is disabled. However, if the Minister wants to cancel a disability pension, the burden of proof changes. The Minister has to prove the Claimant stopped being disabled.⁶

[10] The Minister reviewed the Claimant's disability status in 2011, and decided she was still disabled as of December of that year.⁷ I have to treat that decision as correct. That means the Minister has to convince me the Claimant improved after that, to the point where she could no longer be considered disabled.⁸

[11] The Claimant and her husband, S. M., testified at the hearing. They answered my questions thoroughly and spontaneously. I think they genuinely believe the Claimant was disabled and was entitled to receive a disability pension until April 2017, when she resumed her previous duties full-time. I also think they genuinely believe the Claimant's income in 2015 and 2016 was for work she did before she became disabled.

[12] However, I have to base my decision on the law and the evidence, not on what the Claimant believes. The law says the question of whether a disability is severe does not depend on

⁴ Paragraph 42(2)(a) *Canada Pension Plan*

⁵ Minister's submission GD3-3

⁶ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

⁷ GD2-666

⁸ *Kinney v. Canada (Attorney General)*, 2009 FCA 158; *Boudreau v. MHRD*, 2000 CP 1162

whether a person has a particular diagnosis or impairment, or cannot do her usual work. Her limitations must prevent her from earning a living at any type of job.⁹ The evidence tells me the Claimant was capable regularly of pursuing a substantially gainful occupation as of January 2014. Her condition was no longer severe.

The medical evidence shows the Claimant regained work capacity

[13] The Minister granted the Claimant's disability application because of her headaches, widespread soft tissue pain, depression, and PTSD, which had not improved despite treatment over several years.¹⁰

[14] The Claimant told me she had all these symptoms until early 2017. She wanted to go back to work, but did not feel well enough. Sometimes she volunteered at the pool to see how much she could manage and because she wanted to be around people, but there were some years where she did not do anything. She told me that in 2014, 2015, and 2016, she spent five to ten hours a week at the pool. She would meet other coaches for one or two hours, teach private lessons, and do paperwork like scheduling, taking phone calls, and working on the computer to enter the club in swim competitions. She did everything on short notice. Everyone understood she might have to cancel or reschedule because of her health, which happened occasionally.

[15] This level of activity is similar to what the Claimant reported to the Minister when she was reassessed in 2011. The Minister decided it was not enough to show the Claimant was no longer disabled. That may have been true in December 2011, but the medical evidence after that tells me the Claimant improved and was likely capable of doing more work, even if she was still limiting her hours.

[16] First, by January 2014 the Claimant had not seen anyone for her mental health for over two years. She had been seeing a psychiatrist, Dr. Jiwa. Her last visit to him was in November 2011, when he recommended she go back on anti-depressants, and prescribed Cymbalta for her.¹¹ He scheduled a follow-up appointment, but the Claimant did not return. She told me she

⁹ *Klabouch v. Canada (A.G.)*, 2008 FCA 33; *Ferreira v. Canada (A.G.)*, 2013 FCA 81

¹⁰ Reconsideration Adjudication Summary, GD2-794 -797

¹¹ Dr. Jiwa, November 4, 2011, GD2-27-28

has not seen a psychiatrist, counsellor or therapist for her mental health since then. She stopped going because discussing her situation made her feel worse, and Dr. Jiwa told her not to talk about it so much. She thought she would be able to manage by seeing her family doctor, Dr. Albrecht, for anything she needed.

[17] The evidence from Dr. Albrecht shows the Claimant only saw her twice in 2014: for pneumonia in January and for heel pain in July.¹² At the July visit Dr. Albrecht signed the Claimant's application for a "Person with Disabilities Toll Exemption". The fact that the Claimant obtained the exemption does not tell me she was disabled, since her only supporting evidence was that she was receiving a CPP disability pension.¹³

[18] The only other medical visits the Claimant had in 2014 were to a specialist for her pneumonia, which she had recovered from and was "feeling very well" by March;¹⁴ and for an x-ray for her right heel pain in July. The x-ray showed calcaneal spurs and very early arthritis. There is no evidence of any follow-up or treatment for the heel pain.¹⁵

[19] Second, by January 2014 the Claimant was not taking prescription medication for any of her conditions. She saw a cardiologist in March 2012, who reported her only medication was Advil as needed.¹⁶ She told me she stopped taking anti-depressants because they weren't helping her, but she could not remember when. She also stopped taking Imitrex for her headaches, because they were no longer as severe. Again, she could not remember when.

[20] There is no medical evidence after March 2012 until January 2014, because the Minister did not ask for it.¹⁷ While I acknowledge the Claimant might have re-started prescription medication during this period, she was not taking it by January 2014, when Dr. MacCarthy reported she had "no chronic medication intake."¹⁸

¹² Dr. Albrecht notes GD2-10, 19

¹³ GD2-6-9

¹⁴ Dr. MacCarthy, March 6, 2014, GD2-12-13

¹⁵ GD2-11

¹⁶ Dr. Rupka, March 13, 2012, GD2-24-25

¹⁷ GD2-632-633

¹⁸ GD2-21

[21] The Claimant continued to have infrequent contact with health care providers after 2014. She saw Dr. Albrecht once in 2015, for a sore throat,¹⁹ and once in 2016.²⁰ Dr. Albrecht retired in June 2016, but the Claimant did not see a new family doctor for almost a year.²¹ I acknowledge that it is often difficult to find family doctors where the Claimant lives, but I think if she had significant health issues she would have gone to a walk-in clinic for specialist referral, or to the ER. There is no evidence she did either.

[22] In summary, the Claimant was not taking medication and was not having regular medical visits in 2014 or 2015. I do not think this was because there was nothing anyone could do for her. I saw nothing in Dr. Jiwa's November 2011 report to suggest he thought the Claimant was better off not talking about her mental health issues. There is no evidence the Claimant discussed pain medication or anti-depressants with anyone, as might be expected if she was suffering from side effects or the medication was not working. I think it is more likely that the Claimant simply felt better, and did not see the need for medical engagement.

[23] The Claimant told me that she stopped getting as many headaches in early 2017. She was able to go to the gym more often. She improved her fitness level, and thought she should try working more. She decided to start working full-time.

[24] Even if the Claimant did not increase her hours until 2017, I think she could have done so by January 2014. I realize that, at her age and with her limited work experience, she would have had difficulty finding work outside the swimming community. However, she was well-regarded in her field and she had the advantage of being one of the operators of a swim club that was happy to employ her and to accommodate her so that she could do her job.

[25] I think the Claimant was capable regularly of working increased hours by January 2014. She had no significant medical setbacks in or after January 2014. Although she was diagnosed with pneumonia that month, she was not hospitalized. She was able to travel to Mexico for a vacation, which she told me her doctor advised her to take so that she could get better. She described working regularly, with few cancellations, in 2014, 2015 and 2016.

¹⁹ GD2-5

²⁰ Claimant's questionnaire at GD2-621

²¹ Dr. Aguilar notes GD2-602

The Claimant had substantially gainful earnings in 2015 and 2016

[26] The medical evidence is enough to persuade me that the Claimant was not disabled by January 2014. Her earnings details and the club's financial statements reinforce that conclusion.

[27] S. M. told me the Claimant's salary from the swim club is \$45,000.00 per year, plus whatever she earns from teaching private lessons. That was true in 2005 as well. The Claimant was paid from whatever was left after other expenses were looked after. If she was not paid in full the balance was carried over and paid when the club could afford it.

[28] The Claimant reported the income when it was paid to her, not when she earned it. S. M. told me the Claimant's earnings of \$22,500.00 in 2006 and \$35,696.00 in 2007²² were an example of this, as she did not work in those years except to give occasional private swimming lessons when she felt well enough. Most of what she was paid in those years was from work done before October 2005.

[29] The Claimant had no earnings from 2008 through 2014. In the next four years she was paid as follows:²³

- \$27,000.00 in 2015
- \$59,000.00 in 2016
- \$98,000.00 in 2017
- \$65,500.00 in 2018.

[30] The Claimant and S. M. told me that everything she was paid in 2015 and 2016 was for work she did before October 2005. I adjourned the hearing so they could find documents to support this. The Claimant then filed the swim club's financial statements for 2015 through 2018.²⁴ S. M. told me he could not get statements for the years before that because they were prepared by a volunteer.

²² Claimant's Earnings Details GD3-16

²³ Claimant's Earnings Details GD3-16

²⁴ GD5 and GD6

[31] S. M. told me the club has used an accountant for several years now, and he and the Claimant rely on the accountant to do everything properly. Because the financial statements were prepared by a professional, I am going to assume they are transparent and accurate.

[32] S. M. told me the item in the statements called “Amounts payable to L. M.” shows nothing but the Claimant’s unpaid salary carried over from previous years. The Claimant sometimes loaned money to the club, but that debt is shown under “Accrued Liabilities”. According to the financial statements, then, the Claimant’s unpaid salary at the end of each fiscal year was this:²⁵

- \$99,965.00 at August 31, 2014
- \$110,159.00 at August 31, 2015
- \$66,861.00 at August 31, 2016
- \$69,010.00 at August 31, 2017
- \$50,567.00 at August 31, 2018.

[33] Because there is no financial information before August 31, 2014, I have no way of knowing what portion of the \$99,965.00 owing to the Claimant at that date had been carried over, and what portion might have been for work she did in 2014.

[34] I know the club did not pay any of this \$99,965.00 to the Claimant between September and December 2014, because she did not report any income that year.²⁶ So as of January 1, 2015, it was still owing. Twenty months later, at the end of August 2016, the Claimant’s unpaid salary was \$66,861.00. Because the debt went up slightly in the following year, it is logical to assume the club owed her at least \$66,861.00 at December 31, 2016.

[35] That means that, at the most, \$33,104.00 of the income the Claimant reported in 2015 and 2016 was for work she did before October 2005. Yet she reported income of \$27,000.00 in 2015 and \$59,000.00 in 2016, a total of \$86,000. The difference - \$52,896 – could only have been for work she did in 2015 and 2016. At least \$10,194.00 of that work must have been between

²⁵ GD6-12, 14, 16. The club’s fiscal year was from September 1 to August 31.

²⁶ Claimant’s Earnings Details GD3-16

January 1 and August 31, 2015, because the amount of unpaid salary owing to her increased by that amount in those eight months.

[36] This shows the Claimant was paid a substantially gainful salary in 2015 and 2016.²⁷ Based on the information I have about her health and her work capacity, the most logical conclusion for me to reach is that she was paid this amount because she earned it regularly by working at the swim club. As I stated above, although she may not have been paid in 2014, I think she was capable of working then as well.

CONCLUSION

[37] The Claimant has been capable regularly of pursuing a substantially gainful occupation since January 2014. Her condition was not severe, so she was no longer disabled.

[38] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

²⁷ Section 68.1 of the *Canada Pension Plan Regulations* says “substantially gainful” means a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension. In 2015 this amount was \$15,175.08; and in 2016 it was \$15,489.72.