



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. T. v Minister of Employment and Social Development*, 2020 SST 539

Tribunal File Number: GP-19-870

BETWEEN:

J. T.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Claimant represented by: Farhan Raouf

Teleconference hearing on: May 27, 2020

Date of decision: June 3, 2020

DECISION

[1] The Claimant is entitled to a Canada Pension Plan (“CPP”) disability pension, to be paid as of November 2017.

OVERVIEW

[2] The Claimant is 41 years old. She lives with her husband B. A.. They have 50% custody of his 10-year-old daughter. From August 1999 to April 2014, she worked full-time for Bell Aliant. While most of that time was in a call centre, she spent the last couple of years in a physically demanding technician role where her duties included the installation of fibre-optic cables. She stopped working due to severe arm pain.¹ A final brief attempt at sedentary work at Bell Aliant was unsuccessful, as she could not use her arms.

[3] The Claimant says she has been unable to work because of her medical condition since April 2014.² Starting in June 2016, she worked part-time at home in a multi-level marketing role. However, she has not earned any income from this since 2019. She also made an unsuccessful return-to-work attempt at a call centre in January 2020. The Minister received the Claimant’s application for the disability pension on September 1, 2017. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. In particular, she must be found disabled (as defined in the CPP) on or before the end of the minimum qualifying period (“MQP”). The MQP calculation is based on her CPP contributions. I find the Claimant’s MQP to be December 31, 2019.

ISSUES

[5] Did the Claimant have a severe disability by December 31, 2019?

[6] If so, was the Claimant’s disability also prolonged by December 31, 2019?

¹ GD2-283

² She said this at the hearing. She did not answer this question in her application materials (at GD2-285).

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged.³ The Claimant has a severe disability if 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. The Claimant must prove, on a balance of probabilities, that her disability meets both parts of the test. If she meets only one part, she does not qualify for benefits.

Did the Claimant have a severe disability by December 31, 2019?

[8] For the reasons set out below, the Claimant has had a severe disability since July 2017.

[9] Many of the Minister's submissions focus on how the Claimant's individual conditions may not be disabling. However, I must assess the totality of her conditions. This means I must consider all her impairments, not just the biggest or main impairment.⁴ She reports many conditions, including lateral epicondylitis (also known as tennis elbow or tendonitis) in both arms, chronic pain syndrome, endometriosis, anxiety, depression, and tachycardia (high heart rate). While she has had eight endometriosis surgeries⁵, this condition is of less concern now. It improved after she stopped doing a desk job. Alas, her other conditions are still present. Her main condition is epicondylitis, but she says her chronic pain is also severe.

[10] I must also assess the severe part of the test in a real-world context.⁶ This means that when deciding whether the Claimant's disability is severe, I must consider factors such as her age, level of education, language proficiency, and past work and life experience. The Claimant was 41 years old at her MQP date. She speaks English fluently. She finished high school and two years of university. She has had several jobs besides her call centre and installation technician experience at Bell Aliant. She transcribed messages for a paging service. She spent a couple of years in a commission-based sales role for Monat Global ("Monat") hair products. As a student, she worked in a movie theatre. She also did maintenance and repairs for a housing authority, and

³ Paragraph 42(2)(a) of the *Canada Pension Plan*.

⁴ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁵ GD2-99

⁶ *Villani v. Canada (A.G.)*, 2001 FCA 248

worked with special needs adults. Without considering her medical conditions, I find that she would be suited for a broad range of service roles. This would include call centre work and more traditional retail jobs. She is also suited for some physical roles, such as those involving repetitive installations and repairs. She could fill roles with moderate training requirements.

[11] I was impressed with the oral evidence from both the Claimant and her husband. A clear picture emerged: she used to be an active and engaged person, who loved her work and being active in all aspects of her life. However, after starting her physically demanding installation job, her arm pain developed quickly and she was unable to continue. Her social and family life diminished as well. The objective medical evidence from specialists such as Dr. Hewins (Orthopedics) supports this version of events.⁷ She was also genuinely excited and hopeful that she had an opportunity to try working again in January 2020.⁸ I will discuss that attempt later.

[12] I accept that the Claimant has been unable to do cable installation work since leaving Bell Aliant in 2014. She soon had invasive surgery on each arm. Her treating physicians have repeatedly affirmed that she could not do such physically demanding work. In May 2017, Dr. Hewins did not think she could do any manual labour.⁹ In May 2019, Dr. Livingstone (Family Physician) accepted a 2018 assessment that said the Claimant would never work at her old job again.¹⁰ Dr. Hewins confirmed his earlier opinion in November 2019.¹¹

[13] However, the Claimant's inability to return to her old job does not establish a severe disability. The measure of whether a disability is "severe" is not whether a person is unable to perform her regular job, but rather her inability to perform any substantially gainful work.¹² I will now look at her medical conditions and functional limitations.

The Claimant's current medical conditions and functional limitations

[14] The Claimant has had major problems with her arms. In addition to physiotherapy, massage, acupuncture, injections, and arm braces, she has had three surgical procedures since

⁷ See, for example, Dr. Hewins' January 2015 report at GD2-258.

⁸ See also GD6-10.

⁹ GD2-232

¹⁰ GD4-8 and GD2-174

¹¹ GD4-6

¹² *Klabouch v. Canada (A.G.)*, 2008 FCA 33

she stopped working for Bell Aliant. She had tennis elbow releases on the right elbow in 2015 and on the left elbow in 2016.¹³ Her left elbow became dangerously infected after the 2016 surgery and she needed another urgent surgery on that elbow just three weeks later.¹⁴ She was concerned that she might lose her arm.

[15] The Claimant cannot hold her arms in one position. Burning pain wakes her at night. Her right arm is neither better nor worse since her surgery. Her left arm is getting worse, as the infection caused permanent damage. Her main treatment is injections in her right arm. They usually only provide a bit of relief. Dr. Hewins cannot inject her left arm because of the history of infection. She has chronic pain daily in her lower back, SI joint, hips, shoulders, knees, and feet. Her anxiety and depression have worsened, although a recent medication change appears to have helped. Her heart issue causes chest pain, palpitations, and shortness of breath. Fortunately, medication seems to be managing this condition.

[16] The Claimant's functional limitations are significant. She said her conditions have had a severe impact on social interactions, maintaining routines, sleep, mobility, balance, prolonged standing, prolonged sitting, squatting, typing, and repetitive reaching, lifting, pushing, and pulling. Her conditions have had a moderate impact on her self-care and emotional stability. She suffers pain when she handles paperwork, uses a mouse, or writes with a pen.

[17] The Claimant needs frequent rest. She often gets no sleep because of her arm pain. This makes it hard for her to be mentally alert. She cannot do laundry because the basket is too heavy. Her husband bought a water cooler to dispense water, because she cannot handle a regular water jug. He does most of the housework, and sometimes washes her hair. As money is tight, he also works overtime and sells eggs from their chickens. She cannot carry a 5 kg feed bag for the chickens. She must cancel events if the weather is bad or if she has slept poorly. She often sleeps during the day, but might make supper if she has had a good day. However, she only has one or two good days per week. If she does too much, she will be out of commission the next day. These limitations persist, even though she still gets regular injections.

¹³ GD2-260 and GD2-266

¹⁴ GD2-269 to GD2-270

[18] The Claimant's limitations result in little or no current work capacity. Her January 2020 attempt to return to work at the X call centre affirmed this. She started paid training on January 13. She had to miss half of the first day so she could get an injection. Her husband said she was crying and had to go to bed after each day of work. She was unable to move her arms. However, it was also hard for her to sleep because of her pain levels.

[19] The Claimant said the training mostly involved sitting in the training room, with a little bit of writing, "mousing", and typing. However, she only lasted nine days. She resigned on January 23, 2020, because she could not move her arms when she got up that morning.

[20] E. R., who also attended the training, confirmed this account. E. R. said typing and "mousing" gave the Claimant extreme pain. She saw the Claimant leave the training area every day to take pain medication. The Claimant told her that the January 13 cortisone injection did nothing for her pain. E. R. tried to help by taking notes and adjusting the Claimant's workstation, but the Claimant was still unable to continue. I will now explore her limitations and work capacity starting in mid-2017.¹⁵

Limitations and work capacity since mid-2017

[21] The Claimant has had negligible work capacity since the middle of 2017. In August 2017, she reported pain in her arms daily. Repetitive movements or lifting made the pain worse. She did not sleep well, as she woke many times each night with pain from having her arms in the same position. She had problems with reaching and carrying bags. Her arms hurt when attending to personal needs such as brushing her hair or teeth. Her arms hurt within 0–20 minutes of driving. She could only do household tasks such as vacuuming, peeling vegetables, and laundry in small steps.¹⁶ In October 2017, Dr. Hewins reported swelling and tenderness in both elbows, and weak grip strength in both arms.¹⁷

[22] The evidence supports a finding that the Claimant's condition worsened around mid-2017 and had a negative effect on her work capacity. In April 2017, she reported a slight improvement

¹⁵ GD6-10

¹⁶ GD2-285 and GD2-286

¹⁷ GD2-254

in her right arm symptoms after surgery, but little improvement in her left arm.¹⁸ In October 2017, Dr. Hewins thought she had reached maximal medical recovery.¹⁹ In November 2019, Dr. Hewins said her symptoms recurred significantly in both arms in early 2017, and was back to her pre-surgical condition by May 2018. In January 2020, an occupational therapist said the Claimant’s functional abilities had worsened since the November 2016 and August 2017 assessments.²⁰

[23] Some evidence suggests that the Claimant may have lacked work capacity before mid-2017. However, her Monat work from mid-2016 to mid-2017 stops me from further exploring that possibility.

The Claimant’s Monat work precludes a finding of “severe” up to the end of June 2017

[24] The Claimant said financial pressures forced her to consider part-time work, after her disability insurer decided to stop paying benefits. This led her to Monat, which sold its products through a multi-level marketing (“MLM”) framework. The Claimant earned a commission for products she sold herself. She also earned a commission for products sold by “partners” working under her. Her Monat work resulted in the following income from June 2016 to October 2018:²¹

<u>Year</u>	<u>Total Sales</u>	<u>Personal Sales</u>	<u>“Downline” Sales</u>	<u>Months involved</u>
2016	\$10,070.08	\$1,616.14	\$8,453.94	June-December only
2017	\$15,224.29	\$2,714.66	\$12,509.63	All year
2018	\$3,228.49	\$548.32	\$2,680.17	Only to mid-October

[25] As the Claimant only started her Monat work in June 2016, her 2016 income would have been about \$17,260.00 if it had been prorated over the entire year. Her 2017 income was not evenly distributed. She earned about \$9,075.00 in the first six months, but only about \$6,150.00 in the final six months.²² This means she was earning at an annual rate of more than \$18,000.00 for the first six months of 2017. Monat rewarded her efforts with trips to attend conferences in

¹⁸ GD2-222
¹⁹ GD2-255 and GD2-256
²⁰ GD4-6 and GD4-21
²¹ GD6-2 to GD6-9
²² GD2-6 to GD2-9

Las Vegas (October 2017) and Toronto (2018).²³ However, sales and commissions dried up rapidly after 2017, and she has had no income at all since 2019.

[26] The Claimant's income from June 2016 to the end of June 2017 was at the "substantially gainful" level. In the CPP Regulations, "substantially gainful" means the amount equal to or greater than the maximum annual amount a person could receive as a disability pension. The maximum CPP disability pension was \$15,489.72 in 2016, and \$15,763.92 in 2017.²⁴ As the Claimant's income was above the substantially gainful level from June 2016 to the end of June 2017, I cannot find that she was severely disabled during that time.

[27] The Claimant says her Monat income should not interfere with a "severe" finding. She says she did this work because she could not follow a schedule, had support from the person who enrolled her, and only had to spend about 30 minutes each day on Facebook. The demands were not comparable to a "real" job: most of her income came from sales made by others. While the sales figures support this, she still enlisted and supported those who worked under her. This is the nature of MLM systems: part of the reward comes from setting up a lucrative sales network. This applies to any business operator who assembles a strong sales team. The CPP Regulations define "substantially gainful" by considering income, rather than the number of hours worked. A 2007 Pension Appeals Board decision supports this. The Board found that income from an MLM structure could constitute substantially gainful work, even if the applicant did not work much.²⁵

[28] The Claimant said her Monat income paled in comparison to what she made at Bell Aliant. However, for determining whether her Monat income was "substantially gainful", her Bell Aliant income is irrelevant. Her Monat income does not need to be comparable to her former income. The key is whether it met the threshold in the CPP Regulations.

The Claimant's Monat activities after June 2017 do not preclude a "severe" finding

[29] Although the Claimant continued to earn money from Monat after June 2017, it decreased consistently and was below the substantially gainful threshold. Some of this may be

²³ The Las Vegas date is at GD2-80. The Claimant thought the Toronto trip took place about eight months later.

²⁴ Section 68.1 of the *Canada Pension Plan Regulations*.

²⁵ See *Minister of Social Development v. J.H.*, (2007) CP 24266. Although not binding in the Tribunal, decisions of the Pension Appeals Board can have persuasive value.

blamed on inability to sustain the product's initial novelty and hype.²⁶ There also seem to have been some problems with the products, and it was difficult to keep signing up new people. However, in January 2020, the Claimant told an assessor that she "tried really hard" but she "wasn't making any money from it after a while".²⁷ She also submitted that she was unable to put a lot of effort into her Monat work in 2017 and 2018.²⁸

[30] Considering the Claimant's limitations from mid-2017 forward, I am satisfied that she was not capable of earning any more than she did. Essentially, home-based MLM work was all she could do. Once she could no longer earn at a substantially gainful level in that role, her disability became severe. Her diminishing income and failed 2020 work attempt affirm this.

[31] I note that the Claimant attended two conferences after June 2017. Monat paid for both, to recognize her past sales performance. She confirmed that the Las Vegas conference lasted only three days, and she spontaneously decided to marry her husband while there. The ceremony took 15 minutes. The Toronto conference was only for two nights. Her participation in the conferences was passive: she just listened to the presentations. Her husband went to both conferences and carried her luggage. She said she would not have been able to travel on her own. She took pain medication on both trips. She has not taken any other trips since 2014. It is difficult to travel because she needs to plan for rest and to lie down. Considering all these factors, I accept that her two conferences are not indicative of any significant work capacity. I will now briefly comment on the Minister's written submissions.

Comments on the Minister's submissions

[32] The Minister relies on Ms. Landry's April 2017 Functional Capacity Evaluation. However, I do not find this report's observations or conclusions persuasive. It predates the Claimant's severe disability and I found that her condition worsened over time.²⁹ The Minister also suggests that Dr. Boucher's 2018 recommendations may provide some benefits. The Claimant addressed this at the hearing. For example, she said she had previously attended a multidisciplinary pain program for her severe endometrial pain. It did not help her pain: she only

²⁶ GD6-18

²⁷ GD4-25

²⁸ GD6-18

²⁹ GD2-221

learned to pace herself. Dr. Livingstone did not recommend further attendance, and he would have known about her past attempt. Dr. Livingstone was aware of Dr. Boucher's recommendations, and the Claimant may rely on his judgment about pursuing any of them. She said she had pursued all treatments recommended by her treating physicians.

[33] Finally, some submissions refer to the Claimant's upcoming 2020 work attempt. The Minister was not aware that her attempt had failed. I find that the Claimant's attempt speaks more to her desire to work than to her actual work capacity. It was very clear, from both the Claimant and her husband, that she would have continued with this work if she had the capacity.

Conclusions on severity

[34] While the Claimant has had some work capacity, it was confined to the MLM work she did for Monat. In a real-world context, she did not have the capacity for any other kind of work. She could only work for very brief periods, and would rely on her "sponsor" when her symptoms flared. Once she was no longer able to earn a substantially gainful income from her Monat work, her disability became severe. As her income dropped below the substantially gainful level after June 2017, I find that her disability became severe in July 2017.

Did the Claimant have a prolonged disability by December 31, 2019?

[35] The Claimant has not suggested that her disability is likely to result in death. This means that her disability is prolonged only if it is likely to be long continued and of indefinite duration.

[36] At the hearing, the Claimant said her symptoms are consistently present and she has progressively worsened. She believes she has done everything she can to get better, and a return to any kind of work is simply not possible. She has exhausted her treatment options, and she has not had any improvement. Her ongoing treatment may give some symptom relief, but not any functional improvement. Dr. Hewins is reluctant to do further surgery because her past procedures were unsuccessful and one of them led to a very dangerous infection.

[37] The Claimant's self-assessment is consistent with the opinions of her long-term treating physicians. In November 2019, Dr. Hewins said the Claimant had regressed significantly by early 2017 and was back at her pre-operative condition by May 2018. Both he and the Claimant

were frustrated by the failure to obtain a better outcome. He thought she would experience pain with any repetitive work.³⁰

[38] In May 2019, Dr. Livingstone said the Claimant's chronic pain alone made any employment unrealistic. In addition, as she had reached maximal medical improvement, her treatment would now focus on trying to improve her functional and social abilities. This would help her perform her activities of daily living. Dr. Livingstone based his opinion on Dr. Boucher's 2018 report. Dr. Livingstone accepted Dr. Boucher as an expert in chronic pain medicine.³¹ Even in 2017, Dr. Livingstone said she had a permanent disability.³²

[39] Given the above, I accept that the Claimant's disability is likely to be long continued and of indefinite duration. I further accept that this has been the case since her disability became severe. This means she has had a prolonged disability since July 2017.

CONCLUSION

[40] The Claimant had a severe and prolonged disability in July 2017. Payments start four months after the date of disability, as of November 2017.³³

[41] The appeal is allowed.

Pierre Vanderhout
Member, General Division — Income Security

³⁰ GD4-6 to GD4-7

³¹ GD4-8

³² GD2-256

³³ Section 69 of the *Canada Pension Plan*.