



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *VM v Minister of Employment and Social Development*, 2021 SST 394

Tribunal File Number: GP-19-495

BETWEEN:

V. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Videoconference hearing on: March 16, 2021

Date of decision: March 26, 2021

DECISION

[1] The Minister was entitled to terminate the Claimant's *Canada Pension Plan* (CPP) disability pension as of November 2010.

OVERVIEW

[2] The Claimant was born in India. She came to Canada in April 2005. She worked as an account specialist. In December 2007, she stopped working because of complications from meningitis. Her complications included visual impairment, tuberculosis, sacroiliitis (inflammation of her sacroiliac joint), lymphedema (swelling in her arms and legs), sleep apnea, depression, and Crohn's disease.¹

[3] In April 2010, the Minister granted her a CPP disability pension with payment effective as of May 2008.² In April 2018, the Minister reassessed her disability claim. It determined that she had ceased to be disabled in accordance with the CPP as of October 2010. It also determined that she had been overpaid \$44,144.40.³ This was because the Claimant had returned to work in July 2010 and had earnings until March 2016.

[4] The Minister denied the Claimant's request for reconsideration. She appealed to the Social Security Tribunal.

ISSUE

[5] Do the Claimant's employment earnings starting in July 2010 establish that she had regained the regular capacity to pursue substantially gainful employment?

¹ GD2-273 to 275

² GD2-185

³ The overpayment was from November 2010 to August 2017, when the Minister suspended her payments. The Claimant had returned to work on July 2, 2010. The Minister allowed a three-month work trial from August 1, 2010 to October 31, 2010. It determined that her benefits should have stopped as of the end of October 2010.

ANALYSIS

[6] A qualifying disability must be severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.⁴

[7] In order to terminate a disability pension, the Minister must establish that it is more likely than not that the Claimant ceased to be disabled. A disability pension ceases to be payable for the month in which a Claimant ceases to be disabled.⁵

[8] The Minister relies on the Claimant's earnings from 2010 to 2016 to establish that, despite her medical condition, she had regained the regular capacity to pursue substantially gainful employment.

[9] On the other hand, the Claimant states that she was not able to work consistently and continuously because of her medical condition.⁶ At the hearing, she described her numerous disabling conditions. She stated that her condition progressively worsened after she was granted CPP disability in April 2010. She did not notify CPP of her earnings because she thought the CPP disability pension was for her visual impairment.

[10] She testified that she suffered from numerous conditions that kept "adding to each other." She is now hunched over completely, has lost her sight, is bedridden because of constant severe pain, and is severely restricted in using her hands.

[11] The Claimant's husband S. stated that the Claimant tried to work through her pain. She would often come home in pain in the middle of the day. He saw her struggling to climb stairs at one job. This was because there was no elevator or other accommodation for her, so she could get up to the second floor. Her eye doctor told her not work just before she was approved for CPP disability.

⁴ Subsection 42(2) of the CPP

⁵ Subsection 70(1) (a) of the CPP

⁶ GD1-5

The Claimant's employment after she was granted CPP disability in April 2010

[12] I am setting out below in chronological sequence the Claimant's evidence about the details of her employment from July 2010 to March 2016:

July 2010 to August 2011

- In July 2010, the Claimant returned to work as an account specialist for her former employer. Her employer accommodated her visual impairment with Zoom Tech (a software program that increased the text size on her computer) and Kurzweil software (an audio program that converts text to speech). Her husband drove her to and from the office initially, and then she used Trans Help (a public service for persons with disabilities).
- She missed a lot of time because of flare-ups. She stated that on average she left work early 3-5 days a month. She also missed about two days a month. Her manager knew about her condition. Her employer did not raise any issues even though she was a lot less productive than she had previously been. She stopped working in August 2011 because they closed the business – everyone was laid off. She worked 37.5 hours a week at a weekly salary of \$689. She earned \$14,473 in 2010 and \$25,825 in 2011.

August 2011 to April 2013

- The Claimant did not work during this period. The Claimant stated that she was “drained out” and her medications were causing serious side effects.

April 2013 to December 2013

- In April 2013, the Claimant started to work as a sales coordinator. She found the job through the CNIB. She worked from home for 15 hours a week. She coordinated the distribution of products for a trucking company. She had flexible work times, and was able to adjust her work hours. Despite this flexibility, there were times when she was unable to log in because of health issues. She stopped working in December 2013, because the work was seasonal – there were no shipments in the summer months. She earned \$15 an hour. Her total earnings in 2013 were \$8,325.

March 2014

- In March 2014, the Claimant worked for less than a month at a call centre for political parties. She had to stop because there were no accommodations. She had

to climb stairs to get to the second floor, had to sit on a folding chair, and had no accommodations for her computer. She earned \$11.40 an hour. Her total earnings were \$463.

May 2014 to May 2015

- In May 2014, the Claimant started working as a claims processing agent. She told her employer about her limitations when she was hired. She worked full time, but missed a lot of time because of pain. She was able to use an elevator to get to the office. The company did not provide any accommodations. She used her own Zoom Tech software on the computer. She stated that she stopped working in May 2015 because she “couldn’t do it any more.” She worked 37.5 hours a week and earned \$12.85 an hour. She earned \$15,920 in 2014 and \$9,090 in 2015.

May 2015 to March 2016

- In May 2015, she started working for a bank as a customer contact agent. The bank accommodated her by providing an ergonomic chair and a larger computer screen. She used Trans Help to get to and from the office – but this meant she could not leave early because the time for pick up was fixed. Her manager accommodated her by giving her a table closer to the elevator and the washroom. She told the bank about the limitations when she was hired. At the beginning, she did not have any significant problems. But, over time, her condition worsened. She could not sit or walk. Her hands swelled. Her incontinence became severe. She stopped working in March 2016 because she could not continue working. She has not worked since. She worked 37.5 hours a week and earned \$17.89 an hour. She earned \$24,209 in 2015 and \$24,402 in 2016. She is now on Long Term Disability benefits with the bank’s disability insurer.

My Findings

[13] The Federal Court of Appeal teaches that the key question in a disability pension appeal is not the nature or name of a condition, but the functional effect of that condition on a claimant’s ability to work.⁷ The measure of whether a disability is “severe” is not whether the Claimant suffers from severe impairments, but whether her disability “prevents her from earning a living.”⁸ The Claimant’s capacity to work, not the diagnosis of her disease, determines the severity of her disability under the CPP.⁹

⁷ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

⁸ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

⁹ *Klabouch v. Canada (Social Development)*, 2008 FCA 187

[14] Since the Minister terminated the Claimant's disability pension as of November 2010, I must focus on her capacity to work as of the end of October 2010.

[15] In her August 2017 Disability Reassessment Questionnaire, the Claimant stated that her condition improved in June 2010 and that it started getting worse in 2012.¹⁰ Although she continued to suffer from numerous serious conditions, she was able to return to work for her pre-disability employer in July 2010. She continued working for that employer until August 2011, when the business closed down. She collected Regular Employment Insurance from April 1, 2012 to February 1, 2013.¹¹ To collect Regular Employment Insurance she had to declare that she was ready, willing, and able to work. Starting in April 2013, she worked for different employers until March 2016, when she stopped working because of her deteriorating medical condition.

[16] She earned substantial gainful amounts during 2010 and 2011 and from 2014 to 2016.¹² Her earnings and the applicable substantially gainful amounts are¹³:

Year	Reported Income	Substantially gainful amount
2010	\$14,473.00 (for six months from July to December)	\$13,521
2011	\$25, 825	\$13,840
2013	\$8,325	\$14,554
2014	\$16,473 (three employers)	\$14,836
2015	\$33,299 (two employers)	\$15,175
2016	\$24,402	\$15,489

¹⁰ GD2-102

¹¹ GD2-105

¹² Subsection 68.1(1) of the CPP Regulations came into force on May 29, 2014. That subsection defines as substantially gainful any occupation that provides a salary or wages equal to or greater than then the maximum amount received for a CPP disability pension. Prior to May 29, 2014, there was no statutory definition for substantially gainful. However, the statutory definition provides guidance as to what qualifies as substantially gainful with respect to applications made before May 29, 2014.

¹³ GD2-7

[17] By the end of October 2010, the Claimant had returned to work for her pre-disability employer for over three months. Her employer provided her accommodations by providing software programs because of her loss of vision. However, this in itself does not mean that her employer was a benevolent employer. I must consider factors such as whether:

- Her work was productive,
- Her employer was satisfied with her work performance,
- The work expected of the her was significantly less than the work expected of other employees,
- She had received accommodations that went beyond what was required of an employer in a competitive marketplace, and
- She had experienced hardship because of those accommodations.¹⁴

[18] Providing software programs to an employee who is visually impaired does not go beyond what is required from an employer in a competitive marketplace. There is no evidence that the Claimant did not provide market value for her services compared to other employees in her same position. Although she may not have been as productive as she previously was, this does not mean that she did not provide market value for her services. There is no suggestion that she was not providing her employer “value for its money.” Significantly, she continued to work for her pre-disability employer for more than a year. She only stopped working as part of a general layoff because the employer closed its business – not because of her medical condition.¹⁵

[19] Although her condition worsened in 2012¹⁶, by April 2013 she was able to do part-time work. From May 2014 to March 2016, she was able to work full-time hours for two different employers. Although these employers provided her with some accommodations, there is no

¹⁴ *Atkinson v. Attorney General of Canada*, 2014 FCA 187, para 40; This decision was followed by the Appeal Division of this Tribunal in *Minister of Employment and Social Development v T.D.*, 2020 SST 1021, paras 14, 17.

¹⁵ *Return to Work report: GD2-110*. No employer questionnaire is available because the business closed.

¹⁶ See para 15, above

evidence to suggest they were dissatisfied with her performance, or that they experienced any hardships from the accommodations provided.

[20] I find that the Minister has established that it is more likely than not that the Claimant ceased to be disabled by the end of October 2010. The Minister was entitled to terminate her disability pension as of November 2010.

[21] I am sympathetic to the Claimant's situation. She has had to face many serious health challenges at an early age. Based on the medical evidence, it would appear that she has been severely disabled since at least March 2016, when she last worked. Regrettably, she is now faced with having to repay about \$44,000. However, the CPP provisions bind me. I have no authority to make exceptions to the provisions of the CPP nor can I render decisions based on fairness, compassion, or extenuating circumstances.

Possible next steps for the Claimant

[22] My decision relates only to the Minister's termination of the Claimant's entitlement to the CPP disability pension as of November 2010. It does not decide whether she became disabled again afterwards. She may choose to make a new application for the CPP disability pension.

[23] She may also choose to apply to the Minister for cancellation of all or a portion of the amount owing under section 66(3) of the CPP.

CONCLUSION

[24] The appeal is dismissed.

Raymond Raphael
Member, General Division - Income Security