Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *DJ v Minister of Employment and Social Development*, 2021 SST 370

Tribunal File Number: GP-20-536

BETWEEN:

D. J.

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:	L. V.
Minister represented by:	Heather Carr
Teleconference hearing on:	January 20, 2021
Date of decision:	January 26, 2021

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan ("CPP") disability pension.

OVERVIEW

[2] The Claimant is 50 years old. She has owned a tanning salon since 2007. She says she last worked full-time at the end of May 2013. That month, she stood up and suddenly "seized up". She had pain from her waist to her ankles. She could not straighten herself. Her family doctor says she has degenerative disc disease, with disc herniation and severe sciatica. This causes debilitating back pain and prevents prolonged sitting, standing, bending, walking, and lifting.[1] She has tried to work at her salon since then, although the extent of those attempts is disputed. The Minister received her disability pension application on March 16, 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. More specifically, 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, 2013. However, by prorating her 2014 CPP contributions, she could also be entitled to a CPP disability pension if she became disabled between January 1, 2014, and February 28, 2014. This means her appeal can succeed if she can establish the onset of an ongoing disability by February 28, 2014.

PRELIMINARY MATTER

[4] The Claimant's representative filed several documents (GD7 to GD10) shortly before the hearing. GD7 was filed on January 7, 2021, while GD10 was not filed until January 18, 2021. Despite being late, the documents were all potentially relevant to the appeal. I chose to receive them into evidence. I offered the Minister's representative the chance to make written submissions within a short time after the hearing. However, the Minister's representative said she would make oral submissions on the new documents at the end of the hearing.

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[1] GD2-215 to GD2-216

ISSUES

[5] Was the Claimant's disability continuously severe from February 28, 2014, to the hearing date?

[6] If so, is the Claimant's disability also prolonged?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged.[2] The Claimant's disability is severe if she is incapable regularly of pursuing any substantially gainful occupation. Her disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death. She 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 disability benefits.

[8] In this case, the Minister admits that the Claimant had a severe disability by February 28, 2014.[3] The evidence also supports this. The Claimant had invasive surgery in both August 2013 and April 2014. Around that time, Dr. Neil Manson (Orthopedic Surgery) noted that she could only attend her business for a maximum of one hour, but then had to leave due to significant discomfort. Her ability to do anything at work or home was severely limited. She could not walk erect. She had severe back and right leg pain. She could not do any physical therapy. She was tearful during the assessment.[4] She clearly had no work capacity at that time. The question is whether she remained severely disabled between February 28, 2014 and the hearing date.

Was the Claimant's disability continuously severe from February 28, 2014, to the hearing date?

[9] For the reasons set out below, I find that the Claimant did not have a continuously severe disability from February 28, 2014, to the hearing date.

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[2] Paragraph 42(2)(a) of the *Canada Pension Plan.*
[3] The Minister admits this at GD3-12 (paragraph 35), and affirmed that admission at the hearing.
[4] GD2-249 to GD2-251

[10] I must assess the severe part of the test in a real-world context.[5] This means that when deciding whether the Claimant's disability is severe, I must remember factors such as her age, level of education, language proficiency, and past work and life experience. The Claimant was 43 years old at her prorated MQP date. She speaks English fluently. She has a Grade 12 education. She has run her tanning salon since 2007. Before that, she worked in an office as an administrative assistant. Her responsibilities included data entry, payroll, preparing letters, and other general office duties. Without considering her medical conditions, she would be suited for a broad range of sedentary jobs that did not require extensive training or qualifications. She would also be able to run a small business. I will now consider whether her medical conditions left her severely disabled continuously between February 28, 2014, and the hearing date.

[11] As noted, the Claimant clearly had objective medical problems in 2013 and 2014. She continues to report extensive limitations. However, the measure of whether a disability is "severe" is not whether she suffers from severe impairments. The question is whether the disability prevents her from earning a living.[6] That issue is at the heart of this appeal.

The Claimant's employment income

[12] The Claimant's tax records reveal that she had employment income for many years after May 2013, when she claims she was no longer able to work.[7] Here is a summary of her employment income from 2013 until 2018, when she applied for a CPP disability pension[8]:

Year	Employment Income
2013	$3,265.00
2014	$1,225.00
2015	$5,222.00
2016	$4,900.00
2017	$20.775.00
2018	$7,200.00

[13] At the hearing, the Claimant said she would pay herself the minimum wage (between $13.00 and $15.00 per hour) when she worked at the salon. I must now determine whether the Claimant was capable of earning a living since February 2014. To do this, I need to know if she

[5] *Villani v. Canada (A.G.)*, 2001 FCA 248
[6] *Klabouch v. Canada (A.G.)*, 2008 FCA 33
[7] GD2-267
[8] GD7-4 to GD7-8 and GD8-3 to GD8-9

was capable regularly of pursuing a "substantially gainful occupation." Since June 2014, a "substantially gainful occupation" is one that pays at least as much as the maximum CPP disability pension.[9] The maximum CPP disability pension in 2014 was $14,836.20. This increased to $15,763.92 by 2017 and to $16,651.92 by 2020.

[14] The Claimant's reported income from employment is well below the "substantially gainful" threshold for each year except 2017. Alas, in 2017, her reported income exceeds that threshold by more than $5,000.00. At first, this seems to demonstrate that she was capable of pursuing a substantially gainful occupation for at least a year. This would prevent a finding that she continuously had a severe disability since February 2014. It is reasonable to equate actual earnings with work capacity. As the Claimant runs her own business, her actual work hours may have significantly exceeded what her employment income suggests.

[15] However, there is more to the story. The Claimant denies having any work capacity since she stopped working in May 2013. She said she could only attend work for 1-2 hours at a time, and maybe once or twice a week. Her duties at work were limited. She could not be there alone. She essentially went for some social contact. Many weeks, she would not go to work at all. Her common-law husband B. M. and her daughter S. J. affirmed this at the hearing. Most notably, the Claimant says her husband actually did the work for which she was paid in 2017. This appears to conflict with the medical evidence. I need to decide whether her explanation is reasonable. I will first look at the objective medical evidence from 2014 to 2018.

The objective evidence

[16] The medical evidence supports the Claimant's inability to work through the first several months of 2014. She had surgery in August 2013. She then had revision surgery in April 2014. By November 4, 2014, however, Dr. Reid (Family Doctor) said the Claimant was "running her tanning salon and working full days."[10] On the same day, Dr. Manson confirmed that the Claimant had returned to work.[11] Later that month, Dr. Reid said she needed to increase her

[9] Subsection 68.1(1) of the *Canada Pension Plan Regulations*.
[10] GD2-99
[11] GD2-263

fitness and activity, but it was hard because "she is working prolonged houses [sic] in her tanning bed salon." She continued to attend her workplace regularly in December 2014.[12]

[17] The Claimant told Dr. Manson she continued to work in May 2015. She also had a "high level of activity."[13] In June 2015, she told Dr. Reid she could work regularly. In December 2015, she told Dr. Reid she stopped taking medication but was stable and continued to work.[14]

[18] The Claimant appeared to regress in early 2016. In January 2016, she was in bed for four days after a couple of days of work at the salon.[15] In April 2016, she told Dr. Cox (Trauma Healing Centre) that she worked from home "for her own business and stresses the need to be cognizant and aware."[16] In July 2016, however, she told Dr. Reid that she didn't have time to come in for blood work (for her thyroid condition) because she continued to "run her tanning bed salon 7 days/week."[17] She then suffered a broken foot from a fall at the end of July 2016. In the short-term, this added to her pain levels.[18] The medical documents from October 2016 to May 2017 focused almost exclusively on her thyroid condition and a breast cyst.[19]

[19] In June 2017, the Claimant told Dr. Reid she had nighttime pain in her back, but admitted working 70 hours/week in her tanning salon because her husband had been in an accident and was not employed full-time.[20] While she attended emergency for back pain in August 2017, she told Dr. Frank MacDonald (Family Doctor) in September 2017 that she was living with the pain. She managed well at work, and kept herself mobile as it helped with the pain. She was "working long hours at the salon."[21] However, in February 2018, she told Dr. MacDonald that she felt she could no longer run her tanning salon. She thought she would have to sell the business or go on disability. She had wanted to avoid stopping work at all costs and "has done a pretty good job of doing so." Alas, she felt the time had come that she was no longer able to do it.[22]

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[12] GD2-99, GD2-101 and GD2-102
[13] GD2-68
[14] GD2-104 and GD2-106
[15] GD2-107
[16] GD2-116
[17] GD2-108 to GD2-109
[18] GD2-108
[19] GD2-89, GD2-95, and GD2-110 to GD2-112
[20] GD2-112
[21] GD2-113
[22] GD2-114

[20] The medical evidence suggests that the Claimant worked far more than one or two hours, once or twice per week. She was repeatedly described as working long hours, perhaps as much as 70 hours per week, from late 2014 to at least late 2017. In October 2018, she did not respond when asked about her 70 hours/week of work in June 2017 and her husband's decreased work capacity at that time.[23] However, at the hearing, the Claimant asked me not to place much weight on the medical reports that showed such extensive work.

[21] The Claimant suggested that her doctors were confusing the salon's operating hours with her actual work.[24] Her representative suggested that the Claimant's evidence should be preferred to her doctors' evidence, as the medical records were in error.[25]

[22] At the hearing, the Claimant did not remember the discussion with Dr. Reid on November 4, 2014. When asked why he said she was working full days, she said she might have had an argument with him. She also said he would ask questions about the business's hours in general, rather than the number of hours she worked. She said Dr. Reid's December 2014 note about attending work regularly only reflected her social visits. As for Dr. Manson's May 2015 statement about continuing to work in the salon, the Claimant said she was only happy to be going from bed confinement to social visits. A "high level of activity" was just walking around her yard twice a day for 15 minutes.

[23] In response to Dr. Reid's comment about working regularly in June 2015, the Claimant said this was not discussed. She said Dr. Reid was always asking about the tanning industry generally. She even denied going to work "for a few days" in January 2016. The Claimant was asked about being too busy to get blood work in July 2016 (due to working 7 days per week). She said Dr. Reid was again referring to the salon's operating hours and not her own working hours. She could not get a ride to have blood work done because her daughter and husband were always working.

[24] When asked about Dr. Reid's June 2017 statement that she worked 70 hours per week because her husband was limited by his recent accident, the Claimant said she never worked 70

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[23] GD2-64 to GD2-65
[24] The representative also suggested this at GD2-12.
[25] GD1-11 and GD1-13

hours per week. Once again, she said the salon was open 70 hours per week. She again said this stemmed from an argument she had with Dr. Reid, because her stress level was very high. She said she yelled at him and asked, "What the f--- do you want me to do, work 70 hours per week?" She said Dr. Reid was not a good listener toward the end of his career.

[25] I will now look at the evidence about the Claimant's husband, B. M.

The evidence about B. M.'s work

[26] In July 2018, the Claimant said her husband started helping at the salon in 2017. However, she received the pay for the hours her husband worked.[26] Later that month, she said she hired staff and relied on family and friends to work without pay.[27] The Claimant's written submissions suggest that her husband started working at the salon at the end of 2013, and remained primarily responsible for the salon's day-to-day operations in 2017.[28] A written statement from K. T. said she worked at the salon from 2016 to 2018. During the peak season, K. T. would work with the Claimant's husband.[29] At the hearing, the Claimant said she was unable to get blood work in July 2016 because her husband was "always working".

[27] The Claimant was asked about her June 2017 statement that her husband was not working full-time due to an accident. She said her husband was not working anywhere else, but could work at the salon's desk. He was unable to do his usual construction work. She then said he started doing occasional maintenance in 2013 or 2014, then moved between part-time and full-time work. She said he received Employment Insurance ("EI") for a year after the accident, but then had no income.

[28] When asked at the hearing why she was paid for work that her husband did, the Claimant said it was "easier" to do it that way. She said she was already set up as an employee, but her husband was not. As she did not think he would be staying for any length of time and he only worked evenings and weekends, she paid herself instead. She then said if her husband were an employee, "it would look like he all of a sudden had an income and I didn't." She also said if her

[26] GD2-210
[27] GD2-123
[28] GD1-3 and GD1-5
[29] GD9-3

husband were put in as an employee, it would "look like I was trying to do something that I wasn't doing." She said she wasn't thinking long-term, she just was trying to figure out how to pay their bills. She then said he had worked at the salon since 2007, but he was never in the payroll system. However, he was eventually added to the payroll system after 2017.

[29] The Minister's representative asked the Claimant to clarify why she would pay herself for work done by somebody else. The Claimant thought, by claiming the income herself, she could show she was "not hiding anything" and "wasn't doing anything she shouldn't be doing."

[30] At the hearing, the Claimant's husband said he started working for the salon in 2007. At first, it was just repairs and cleaning work in the evenings and on weekends. He started doing desk work in 2010, although he still did his own work (painting and sandblasting) then. He had surgery in January 2015, after his August 2014 motorcycle accident. He could still work in the salon, but was unable to go to job sites. At first, he seemed to say that he was on the salon payroll in 2015, right after his accident. With considerable difficulty, he then revised that answer to "2017 or 2018". He said he wasn't paid for his work at the salon, "in the beginning". As he could not work at his usual job, he thought it would be "easier" for their taxes if the Claimant received the income that he earned in 2017. He confirmed that the Claimant didn't do the work.

[31] The Minister's representative asked the Claimant's husband why he wasn't paid for his work, as neither of them had any other income in 2017. He replied that it was "dealing with the accident, the insurance part of it." He then explained that after his sick benefits ran out, his insurance payments ran out in late 2016, and that was how they decided to "bring in the income." He said there was no insurance involvement after 2016, but the Claimant kept getting paid for his work in 2017 because the payroll system was already set up for full-time hours for the Claimant. He estimated that he worked about 50 hours per week.

Reconciling the evidence

[32] I prefer the objective evidence set out in the medical documents. This is not a case where one doctor made a single error. There are multiple references, from multiple doctors, that point to regular, full-time work, or even more than full-time work. Dr. Reid made references to such work in November 2014, December 2014, June 2015, December 2015, July 2016, and June

2017. Dr. MacDonald noted in September 2017 that she was working long hours at the salon. Dr. Manson remarked twice on her resumed work.

[33] For the same reasons, I also do not accept that an argument with Dr. Reid explains all these work references. I do not see why multiple doctors would repeatedly exaggerate the Claimant's work capacity in their notes and letters. Even if they wanted to sabotage her benefits, which I do not accept, it would have been pointless. She did not apply for CPP disability benefits until March 2018. I also find it hard to understand why Dr. Reid would repeatedly confuse the salon's hours, or the industry's hours generally, with her actual work hours.

[34] Further, I do not accept the submission that the evidence of five witnesses should outweigh the objective medical evidence. The Claimant, her husband, and her daughter are not truly objective witnesses. The written evidence from K. T. and T. K. was very brief, was given in 2021, and could not be cross-examined. Further, K. T. eventually got to know the Claimant's husband and S. J. "very well," and T. K. was a client before she started working at the salon. I place much more weight on the contemporaneous, consistent, and objective evidence from the Claimant's doctors. In 2018, the Claimant also said remembering things was difficult when her pain was bad. Medications also made her memory bad.[30]

[35] The repeated references to extensive work capacity, particularly those from two different doctors in 2017, are also supported by the Claimant's substantially gainful earnings in 2017. While I also saw references to full-time work in years when her employment earnings were not substantially gainful, one must remember that the Claimant runs her own business. She may derive funds from the business in other ways.

[36] The explanations offered at (and before) the hearing, particularly about the 2017 work allegedly done by the Claimant's husband, do not persuade me. The evidence about his work for the salon was very inconsistent. In July 2018, the Claimant said he started working for the salon in 2017. However, her written submissions indicate it was in 2013 or 2014. Her oral evidence also suggested 2013 or 2014, and said he did occasional maintenance at the time. These are not

[30] GD2-268

internally consistent, nor are they consistent with his evidence. The Claimant's husband said he had been helping out at the salon since 2007, and started doing desk work in 2010.

[37] The explanations for paying the Claimant instead of her husband were also inconsistent. The Claimant said it was easier, because she was already set up "in the system," and she did not think he would be staying for long. She then explained her fear that paying her husband would make it look like he suddenly started having an income, and would make it look like she was trying to do something that she wasn't. She said she wanted to show that she was not hiding anything. I find these explanations puzzling. If he did the work, and if she were not hiding anything, I do not see why it would be wrong to pay him.

[38] The answers from the Claimant's husband added more confusion. He had much difficulty stating when he first went on the payroll, eventually settling on 2017 or 2018. While he said it would be "easier" for their taxes if the Claimant received the income for his work, 2017 was a year in which he had no other income. He also said he wasn't paid for his 2017 work due to the insurance aspects of his 2014 accident. But he also said his insurance payments ran out in 2016, and the insurer was not involved after that. Finally, he said the Claimant was paid for his work because "the system was already set up" for her full-time work. Yet the Claimant and her husband, as well as their daughter, all said she had not worked full-time since at least 2013.

[39] When combined with the unequivocal medical evidence describing extensive work by the Claimant in both June and September of 2017, the explanation about the Claimant's earnings is not at all persuasive. Her substantially gainful earnings in 2017 are not consistent with a severe disability. This means her appeal cannot succeed.

[40] In reaching this conclusion, I acknowledge that the Claimant likely had periods of severe disability. Dr. Oxner (Orthopedic Surgery) said she was "in dire straits" immediately before her August 2013 surgery. She also was in considerable distress right before her April 2014 surgery.[31] Dr. MacDonald's March 4, 2018, evidence is consistent with a severe disability at that time.[32] However, she must prove a continuous disability since February 2014.

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[31] GD2-223 and GD2-249 to GD2-251
[32] GD2-215 to GD2-219

[41] In addition to the evidence pointing to extensive work capacity in 2017, Dr. MacDonald's February 2018 notes suggest the Claimant deteriorated at that time. She told him she was no longer able to run her business. She felt "the time has come that she's no longer able to go on." She thought she was "going to have to go on disability."[33] On March 1, 2018, Dr. MacDonald said she was at a point where she couldn't manage her business. She had a lot of responsibility and had to do a lot of bending. She again felt that she would have to "go on disability." Dr. MacDonald did not think she could spend "any prolonged time" on her business. She also had low mood about what she was facing.[34] All this evidence supports a conclusion that the Claimant had been able to run her business for a while, and had made significant efforts to continue, but could no longer do so in early 2018.

Is the Claimant's disability also prolonged?

[42] As I found that the Claimant has not had a continuously severe disability since at least February 2014, I do not need to answer this question.

CONCLUSION

[43] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

[33] GD2-114
[34] GD2-115 and GD2-114