



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *MM v Minister of Employment and Social Development*, 2020 SST 1190

Tribunal File Number: GP-20-823

BETWEEN:

M. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Teleconference hearing on: October 13, 2020

Date of decision: October 20, 2020

DECISION

[1] The Minister did not calculate the Claimant's Canada Pension Plan ("CPP") contributory period correctly. Her contributory period consists of 274 months, rather than 278 months. This means that her CPP retirement pension must be recalculated, with four more months removed. These months should be June 2012 and three months in 1995.

OVERVIEW

[2] The Claimant's 65th birthday was in June 2019. She received a CPP disability pension from October 2012 to June 2019, although she was found disabled as of June 2012. When her CPP retirement pension started in July 2019, it was considerably less than what she had been receiving as a CPP disability pension. She asked the Minister to reconsider her CPP retirement pension amount. The Minister upheld the previous decision. The Claimant then appealed the reconsideration decision to the Tribunal.

[3] A critical step in calculating a CPP retirement pension is determining an applicant's contributory period. The CPP retirement pension is based on the applicant's average earnings during the contributory period. The Minister can exclude certain months with low earnings from an applicant's contributory period. The essence of this appeal is whether the Minister has correctly calculated the Claimant's contributory period. The Claimant has not identified any issues with the income amounts attributed to her during her potential contributory period.

ISSUES

1. Did the Minister correctly apply the CPP disability exclusion, when determining the Claimant's contributory period?
2. Did the Minister correctly apply the Child-Rearing Provisions ("CRP") exclusion, when determining the Claimant's contributory period?
3. For the Claimant's contributory period, did the Minister correctly consider other times during which the Claimant was injured, undergoing medical treatment, laid off, supporting her husband, or attending school?

4. Given the answers to the first three questions, has the Minister correctly calculated the Claimant's contributory period?

ANALYSIS

[4] The Claimant started receiving her CPP retirement pension in the month after her 65th birthday. This means her contributory period originally consisted of the period between her 18th and 65th birthdays.¹ This 47-year period includes 564 months. However, she can exclude some months from her contributory period. By removing certain months with low earnings, her average earnings increase and the resulting CPP retirement pension is higher. The *Canada Pension Plan* explicitly excludes certain periods of disability and child-rearing. The CPP also has a "general" exclusion, which excludes a limited number of low-earning months that the CRP and disability exclusions do not cover. I will examine those two exclusions first.

1. Did the Minister correctly apply the CPP disability exclusion, when determining the Claimant's contributory period?

[5] The Minister incorrectly applied the CPP disability exclusion. This error will affect other aspects of the retirement pension calculation.

[6] The Minister admits that the Claimant was disabled under the CPP as of June 2012. However, because of the four-month waiting period, the Claimant did not start receiving a CPP disability pension until October 2012.² She then received the CPP disability pension up to and including June 2019.

[7] The Minister also admits that the Claimant can exclude the months in her contributory period for which she was "approved" for a CPP disability benefit.³ As the Claimant was found disabled in June 2012 and received the CPP disability pension until June 2019, it appears that those 85 months should be excluded from her contributory period. However, the Minister did not remove 85 months. The Minister indicated that either 81 months (starting with October 2012) or

¹ Subsection 49(b) of the *Canada Pension Plan*.

² GD2-21

³ GD3-4. The disability exclusion is also referenced at subsection 49(c) of the *Canada Pension Plan*.

84 months (starting with July 2012) should be removed.⁴ The Minister's reference to 84 months appears to be an error, as no disability finding relates to July 2012. The 81-month period appears to cover only the period when the Claimant received the CPP disability pension.

[8] To resolve this issue, I adopt the Tribunal's Appeal Division decision in a 2019 case called *L.A.*⁵ While such decisions are not binding on me, they can be persuasive. I find the *L.A.* decision persuasive in this case.

[9] In *L.A.*, the Appeal Division noted that the CPP disability exclusion provisions contained the words "by reason of disability".⁶ The Appeal Division said if Parliament had intended the exclusion to apply only to months in which the disability pension was actually being paid, Parliament would have used more precise language than "by reason of disability". Instead, the Appeal Division said the exclusion should start when the disability started. This makes intuitive sense: if a person is disabled under the *Canada Pension Plan* during a particular month, then it is not reasonable to expect that she could make full CPP contributions during that month.

[10] As the Claimant was disabled from June 2012 to June 2019, she is entitled to exclude those 85 months from her contributory period. This includes the four-month waiting period before her CPP disability payments started, from June 2012 to September 2012. This reduces the length of her contributory period from 564 months to 479 months.

2. Did the Minister correctly apply the CRP exclusion, when determining the Claimant's contributory period?

[11] The Minister correctly applied the CRP exclusion.

[12] The Claimant was the primary caregiver for four children. They were born in July 1978, April 1980, February 1982, and November 1983.⁷ The CRP exclusion applies from the month after the child's birth to the child's seventh birthday.⁸ The Claimant can therefore apply the CRP exclusion from August 1978 to November 1990 inclusively. This covers the period starting one

⁴ GD5-4

⁵ *Minister of Employment and Social Development v. L.A.*, 2019 SST 965, at paragraphs 40 and 41.

⁶ Subsection 49(c) of the *Canada Pension Plan*.

⁷ GD2-33

⁸ S. 49(d) of the *Canada Pension Plan* sets out the exclusion.

month after the Claimant's first child was born, and ending when her fourth child reached age seven. The Minister did exactly that.⁹ This removes a further 148 months from the contributory period. The contributory period therefore shrinks from 479 months to 331 months.

[13] The Claimant says she had significant earnings in some of those years. She says those years should not be excluded, because the income might increase her average earnings. The Claimant is correct that the Minister should apply the CRP exclusion carefully. The exclusion should only apply when it results in a higher pension benefit.¹⁰ However, in this case, applying the CRP exclusion to all eligible months does indeed help the Claimant.

[14] In 1990, the Claimant earned \$6891. Even after accounting for inflation, this is her highest earnings level from 1978 to 1990. Her 1990 earnings equal an adjusted income of \$941.08 per month.¹¹ However, this is still well below her average earnings over the rest of her contributory period.¹² This means that including 11 months of her 1990 earnings, or any other earnings during her CRP years, would actually lower her average earnings. That would lower her CPP retirement pension. This means the CRP exclusion was correctly applied.

3. For the Claimant's contributory period, did the Minister correctly consider periods during which the Claimant was injured, undergoing medical treatment, laid off, supporting her husband, or attending school?

[15] The Minister correctly considered the situations identified by the Claimant.

[16] The Claimant wanted several other periods removed from her contributory period. For example, long before her 2012 disability, she underwent back surgery and leg surgery. She was laid off from previous work. She worked part-time to help put her husband through school. She also worked part-time while attending full-time post-secondary education for six years.¹³

⁹ The Minister first excluded all months with "zero" earnings during this period (see GD8-6). The Minister then excluded the rest of the months during this period because the earnings were low (see GD8-6 to GD8-7).

¹⁰ *Runchey v. Canada (A.G.)*, 2013 FCA 16.

¹¹ GD8-5

¹² The Minister's disability exclusion error comes into play here. The Minister's chart at GD8-7 shows 332 months with total indexed earnings of \$428,194. This should be 331 months with total indexed earnings of \$427,521, because June 2012 should be excluded too. This results in average monthly earnings of \$1,291.60.

¹³ GD1-2 and GD9-1

[17] All these factors would have had a negative impact on the Claimant's income, and in turn on her CPP retirement pension. However, the *Canada Pension Plan* has no provisions for any of these situations. Instead, the *Canada Pension Plan* contains a "general" exclusion to remove a certain percentage of months from an applicant's contributory period. The reason for the low income in those months is not important.¹⁴

[18] The Minister applied the general exclusion to the Claimant's situation. The Minister started by considering the number of months remaining in her contributory period. The Minister then excluded 16% of those months from her contributory period. In the Claimant's case, the Minister found that the Claimant's contributory period contained 332 months after applying the child-rearing and disability exclusions. This meant the Claimant could exclude a further 54 months from her contributory period.¹⁵ This left a contributory period of 278 months. A July 2020 observation sheet sets out the months remaining in her contributory period.¹⁶

[19] Alas, the Minister's calculation has two problems. Firstly, the Claimant's contributory period should be 331 months instead of 332 months. Because of the disability exclusion, June 2012 should be excluded. Secondly, the Minister used the wrong percentage. For a CPP retirement pension that starts after December 2013, the Minister should exclude 17% of the remaining months in the contributory period. The Minister used 16%, but that percentage only applies to retirement pensions starting in 2012 or 2013.¹⁷ As the Minister should have excluded 17% of 331 months, 57 months should be excluded under the "general" exclusion provisions.¹⁸ This leaves a contributory period of 274 months.

4. Given the answers to the first three questions, has the Minister correctly calculated the Claimant's contributory period?

[20] The Minister has not correctly calculated the Claimant's contributory period. The Minister set the contributory period at 278 months. However, the Minister should have excluded

¹⁴ Paragraph 48(4)(a)(i) of the *Canada Pension Plan*. See also the persuasive Pension Appeals Board decision in *Taylor v. MSD*, (2006) CP 22241, at paragraph 165. In 2006, the "general" exclusion was 15%.

¹⁵ Paragraph 48(4)(a)(i) of the *Canada Pension Plan*. Fractions of a month are rounded up.

¹⁶ See pages GD8-7 to GD8-8.

¹⁷ Paragraph 48(4)(a)(i) of the *Canada Pension Plan*.

¹⁸ Fractions of a month are rounded up, as per paragraph 48(4)(a)(i) of the *Canada Pension Plan*.

four more months, so that only 274 were included. One of those months is June 2012, because of the disability exclusion. The other three newly excluded months should be from 1995, which is the year with the lowest remaining average monthly pensionable earnings.¹⁹ This results in a slight increase in the Claimant's average monthly pensionable earnings. This should cause a slight increase in the Claimant's retirement pension. To ensure that the calculation properly accounts for cost-of-living increases, I leave the formal calculation to the Minister.

[21] I will briefly comment on the underlying premise of the Claimant's appeal: she did not feel it was fair that her CPP retirement pension was much less than her CPP disability pension. Alas, CPP pensions cannot be considered in isolation from Old Age Security ("OAS") benefits. Many CPP disability pension recipients experience a CPP income drop when their retirement pension replaces their disability pension at age 65. At that time, however, most CPP disability recipients (including the Claimant) then become eligible for the OAS pension. This generally compensates for any CPP income loss. In addition, the OAS program provides an additional income-tested benefit (the Guaranteed Income Supplement, or "GIS") to low-income seniors.

CONCLUSION

[22] The appeal is allowed, in part.

Pierre Vanderhout
Member, General Division - Income Security

¹⁹ GD8-7 to GD8-8