Citation: *JG v Minister of Employment and Social Development*, 2022 SST 970

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	J. G.
Representative:	B. C.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated March 3, 2020 (issued by Service Canada)
Tribunal member:	Pierre Vanderhout
Type of hearing:	Teleconference
Hearing date:	August 23, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	August 26, 2022
File number:	GP-20-751

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. G., isn't eligible for a Canada Pension Plan ("CPP") post-retirement disability benefit ("PRDB"). This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant is now 67 years old. He worked most recently for X ("X") in a drug warehouse. He received chemotherapy and a bone marrow transplant as part of his cancer treatment. After that treatment, he developed a paralyzed diaphragm. It causes extreme shortness of breath and greatly limits physical activities such as lifting. However, after developing this condition, he returned to work in the warehouse on July 3, 2017. He retired on October 1, 2021.

[4] The Appellant started getting a CPP retirement pension in July 2015. He applied unsuccessfully for the CPP disability pension twice in 2017. He appealed his second application to the Tribunal, but his appeal was summarily dismissed because he applied for the disability pension more than 15 months after the start of his retirement pension.[1]

[5] The Appellant then applied for a PRDB on January 11, 2019. The Minister of Employment and Social Development ("Minister") refused his application. The Appellant appealed the Minister's decision to the Tribunal.

[6] The Appellant said he only continued working because of his desperate financial circumstances. He said his doctor fully supported his PRDB application. He said X heavily modified his work duties to accommodate his limitations. He said he spent all his time in bed when he wasn't working.

[7] The Minister said the Appellant cannot qualify for the PRDB because he was engaged in full-time employment when the benefit was potentially payable. The Minister

[1] The Tribunal decision on his CPP disability pension, at GD2-22, was issued on April 29, 2018.

said the Appellant even worked more than full-time, when considering his overtime and upholstery work. The Minister further noted that the Appellant planned to work beyond his 65th birthday on May 24, 2020, when any potential PRDB would end.

What the Appellant must prove

[8] For the Appellant to succeed, he must prove he had a disability that was severe and prolonged by May 24, 2020. This date is based on his CPP contributions.[2]

[9] The *Canada Pension Plan* defines "severe" and "prolonged."

[10] A disability is **severe** if it makes an appellant incapable regularly of pursuing any substantially gainful occupation.[3]

[11] This means I must look at all of the Appellant's medical conditions together to see what effect they have on his ability to work. I must also look at his background (including his age, level of education, and past work and life experience). This lets me get a realistic or "real world" picture of whether his disability is severe. If he can regularly do some type of work from which he could earn a living, then he isn't entitled to a disability pension.

[12] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.[4]

[13] This means the Appellant's disability can't have an expected recovery date. The disability must be expected to keep the Appellant out of the workforce for a long time.

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[2] Service Canada uses an appellant's years of CPP contributions to calculate his coverage period, or "minimum qualifying period" ("MQP"). The end of the coverage period is called the MQP date. See s. 44(4) of the *Canada Pension Plan*. The Appellant's CPP contributions up to the end of 2019 are at GD4-17 to GD4-18. The MQP date cannot be later than the Appellant's 65th birthday, as the PRDB ceases to be payable at age 65 (see s. 70.02(b) of the *Canada Pension Plan*).
[3] S. 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[4] S. 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[14] The Appellant must prove he has a severe and prolonged disability. He must prove this on a balance of probabilities. This means he must show it is more likely than not that he is disabled.

[15] The Appellant's spouse, B. C., was shown as his representative. Usually, a representative cannot give evidence. However, Ms. C. is not a legal professional. She did not act as a representative at the hearing. She was not even present for all of the hearing. As her role was essentially just supporting her spouse, I considered her an "administrative" representative only. For that reason, I allowed her to give oral evidence at the hearing.

Reasons for my decision

[16] I find that the Appellant hasn't proven he had a severe and prolonged disability by May 24, 2020.

Was the Appellant's disability severe?

[17] The Appellant's disability wasn't severe. I reached this finding by considering several factors. I explain these factors below.

– The Appellant's functional limitations affected his ability to work

[18] The Appellant continues to have bilateral paralysis of the diaphragm. He also has stage 4A mantle cell lymphoma.[5]

[19] However, I can't focus on the Appellant's diagnoses.[6] Instead, I must focus on whether he had functional limitations that interfered with earning a living.[7] When I do this, I must look at **all** of the Appellant's medical conditions (not just the main one) and think about how they affected his ability to work.[8]

[20] I find that the Appellant had functional limitations that affected his ability to work.

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[5] GD2-161
[6] See *Ferreira v. Canada (Attorney General)*, 2013 FCA 81.
[7] See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.
[8] See *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

– **What the Appellant says about his functional limitations**

[21] The Appellant says that his medical conditions resulted in functional limitations that affected his ability to work up to May 24, 2020.

[22] While the Appellant's cancer may be in remission, both sides of his diaphragm are paralyzed. He says he cannot inhale or expel air. He is tired and short of breath all the time. He cannot bend his waist. This means he cannot tie his shoelaces. He must take breaks from tasks such as driving, as he must get out and breathe. He lacks the energy to engage in activities. He uses an EPAP machine to help him breathe, but it irritates his throat and gives him headaches, rhinitis, and nasal congestion.[9]

[23] Ms. C. added that sports such as bowling used to part of the Appellant's life. Now, he just stays home and tries to breathe. She said he cannot go shopping or sit for long periods.

– **What the medical evidence says about the Appellant's functional limitations**

[24] The Appellant must provide some medical evidence to support that his functional limitations affected his ability to work by May 24, 2020.[10]

[25] The medical evidence supports what the Appellant says. In October 2019, Dr. Danforth (Family Doctor) said the Appellant had severe shortness of breath and limited exercise tolerance. Dr. Danforth said he could walk no more than 50 yards without a rest. He was winded after climbing just one flight of stairs.[11]

[26] In September 2019, Dr. Fitzpatrick (Respirology) said the Appellant could not lie down or bend forward to pick weights off the floor, due to his diaphragm weakness. He needed ventilation at night to help him breathe while lying down.[12]

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[9] See GD1-5 to GD1-6 and GD2-10 to GD2-14.
[10] See *Warren v. Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v. Dean*, 2020 FC 206.
[11] GD2-102
[12] GD2-164

[27] The medical evidence supports that the Appellant's diaphragm issues prevented him from doing any work involving physical exertion. Nor could he bend forward or lift items from the floor. His limitations would rule out his pre-cancer warehouse duties.

[28] I now have to decide whether the Appellant can regularly do other types of work. To be severe, the Appellant's functional limitations must prevent him from earning a living at any type of work, not just his usual job.[13]

– **The Appellant can work in the real world**

[29] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his:

- age
- level of education
- language ability
- past work and life experience

[30] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.[14]

[31] I find that the Appellant can work in the real world.

[32] The Appellant was nearly 64 years old when the PRDB first came into effect. He has a Grade 12 education. He is a certified upholsterer. He speaks English fluently, although he said that "I am not good at written stuff."[15] He worked as an upholsterer in the past, although he says he limited such work to friends and family members for the past 15 years. He worked in X's warehouse for many years. Other jobs included worm-picking, cutting fish, sorting garbage (at a recycling plant), and various jobs through short-term work agencies. These jobs included moving things around at a meat plant and monitoring machines on a box company's assembly line.

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[13] See *Klabouch v. Canada (Attorney General)*, 2008 FCA 33.
[14] See *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[15] GD1-4

[33] The Appellant has never worked in an office. He said he has no office or computer skills. While he used a computer at the warehouse, it was only to scan items. At the hearing, he said, “I’m programmed to use my hands, not my brain.”

[34] I find that the Appellant was limited to light work that did not require special qualifications or skills. I further find that such work was limited to work he was already doing or had done in the past. Given his age, retraining would not be appropriate. In reality, the only work he could do would have been a job like his latest warehouse role. While most warehouse roles require significant physical exertion, X accommodated his limitations. He only had to handle and track small bottles of medicine. He did not have to lift items off the floor.

– **The Appellant tried to find and keep a suitable job**

[35] If the Appellant can work in the real world, he must show that he tried to find and keep a job. He must also show his efforts weren’t successful because of his medical conditions.[16]

[36] The Appellant made efforts to work. But these efforts don’t show that his disability got in the way of earning a living.

[37] As noted, the Appellant resumed full-time work at X in July 2017. He worked full-time until retiring on October 1, 2021. This was well after the last date he could receive the PRDB.

[38] The Appellant’s earnings show he was capable of earning a living. In 2018, he earned $41,018.00. In 2019, he earned $43,675.00.[17] The Minister didn’t file information about his earnings in 2020. The Appellant wasn’t sure how much money he made that year. He said he started to work a bit less in 2020, and X had some work shortages that year. However, he was still considered a full-time employee. His income in 2020 may have been closer to $30,000.00, but he was reluctant to commit to an exact figure.

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[16] See *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[17] GD4-18

[39] The Appellant's earnings are significant because of the CPP's "severe disability" definition. A person has a severe disability if he is "incapable regularly of pursuing a substantially gainful occupation." Since June 2014, the CPP has defined a "substantially gainful occupation." It refers to an occupation paying wages of at least the maximum annual amount a person could receive as a disability pension.[18] In 2018, the maximum CPP disability pension was $16,029.96. In 2019, the maximum was $16,347.60. In 2020, the maximum was $16,651.92.

[40] The Appellant's earnings in 2019 and 2020 far exceeded the threshold of "substantially gainful." Unless X was benevolent, I cannot find him severely disabled between January 1, 2019, and May 24, 2020.

The Appellant's warehouse employment

[41] In a 2014 decision called *Atkinson*, the Federal Court of Appeal said working regular hours and earning a substantially gainful income might not prevent a finding of severity. However, the employer would have to be considered "benevolent."[19]

[42] In *Atkinson*, the court said a "benevolent employer" will vary the conditions of the job and modify their expectations of the employee. The job demands might vary from other employees, but the performance or output expected from the employee must still be considerably less than the performance or output expected from other employees. The employer must accept this reduced ability to perform, and the employee must be incapable regularly of pursuing any work in a competitive workplace.[20] I will now consider whether X was a benevolent employer.

[43] The Appellant was scheduled to work full-time at the warehouse. However, he was allowed to leave work early as long as he had completed his work. X would sometimes ask him to work an extra shift on the weekend if somebody couldn't make it.

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[18] Section 68.1 of the *Canada Pension Plan Regulations*.
[19] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.
[20] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

[44] The Appellant's didn't have the same duties as the other warehouse workers. He didn't have to do heavy lifting. He mostly did "fridge duty," which involved moving and tracking refrigerated medication bottles. X was happy to have him do this work. X needed a reliable and honest employee to work with the time-sensitive drugs. Although the Appellant stopped working nearly a year ago, X continues to think highly of him. They called him last month to see if he'd be interested in a job at the warehouse. While he turned down the offer, it is not hard to see why X made it. The Appellant said he never missed a day of work, although he sometimes left early.

[45] While X accommodated the Appellant's limitations and allowed him to leave early from time to time, X only paid him for the hours he worked. But his hours must have been substantial. He said he earned $17.80 per hour. With a 40-hour work week and 50 weeks per year of employment, his earnings should only have been $35,600.00 per year if he worked all his shifts but no overtime. However, his income in 2018 and 2019 far surpassed that level. He must have done a lot of overtime, as he also testified that he earned no income from his upholstery work. While I see no precise information on his 2020 earnings, they were likely close to that full-time level as well.

[46] Other file evidence affirms the Appellant's capacity for both full-time and overtime work. In November 2018, shortly before the PRDB started, Dr. Baetz (Oncology) said he continued to work two jobs: he worked all night in a warehouse and as an upholsterer during the day. Earlier that year, Dr. Baetz noted he worked at two jobs and was "feeling great."[21] In March 2019, Dr. Fitzpatrick said he worked 6 nights/week.[22] In May 2019, Dr. Lawlor (Oncology) said he continued to work two jobs, totalling more than 60 hours per week.[23] In March 2020, the Appellant told the Minister he was working full-time (40 hours per week), plus "all the overtime he can work."[24]

[21] GD2-153
[22] GD2-161
[23] GD2-162
[24] GD2-86

[47] At the hearing, the Appellant said his upholstery work was more like 10 hours per week. He said he exaggerated his ability to his doctors, because he didn't want to slow down. He also wanted people to know that he was trying to get better.

[48] The Appellant's compensation was limited to the actual hours worked. This is an important factor in deciding whether X was benevolent. X also received value from him, as he worked in a time-sensitive role and was even given a significant amount of overtime. To this day, his X still wants to employ him. While it is not determinative, I also note that his supervisors were not friends or family members. He had no relationship with them outside work. He underwent regular performance reviews.

[49] I conclude that X was not benevolent. The Appellant may not have worked as quickly as other employees. However, I cannot find that the performance or output expected from him was considerably less than the performance or output expected from other employees. He did highly valued work with time-sensitive products, and was offered a lot of overtime. This happened even before the labour shortages brought about by the COVID-19 pandemic.

[50] The Appellant's dedication to work has been exemplary. In September 2019, Dr. Fitzpatrick described him as the most stoic patient he had ever encountered. Dr. Fitzpatrick didn't know of any other patients with the same condition who fought through breath shortness to perform manual work.[25] The Appellant said his oncologist told him he had the highest pain tolerance she'd ever seen.

[51] However, I can't ignore the Appellant's performance over more than four years after his diaphragm injury. He never missed a day of work. He worked a lot of overtime. He seems to have done upholstery work too. The *Atkinson* decision confirms that people who suffer from significant and prolonged health challenges might not qualify for a disability pension, if they are capable regularly of pursuing a substantially gainful occupation.[26] The Appellant had that capacity.

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[25] GD2-164
[26] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187.

[52] Similarly, the Appellant cannot rely on the fact that he felt compelled to work for financial reasons. The PRDB is not based on financial need. It is based on work capacity.[27] In any case, I note that the Appellant also did upholstery work for free.

[53] I find that the Appellant did not have a severe disability by May 24, 2020.

Conclusion

[54] I find that the Appellant isn't eligible for a PRDB under the CPP. This is because his disability wasn't severe by May 24, 2020. As I found that his disability wasn't severe, I don't have to decide whether it was prolonged.

[55] This means the appeal is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section

[27] See, for example, *Granovsky v. Canada*, [2000] 1 S.C.R. 703. In that decision, the Supreme Court of Canada said the CPP was not a social welfare scheme.