



Citation: *D. L. v Minister of Employment and Social Development*, 2018 SST 1395

Tribunal File Number: GP-17-466

BETWEEN:

D. L.

Claimant (Appellant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Kelley Sherwood

Minister represented by: Philippe Sarazin

Videoconference hearing on: May 15, 2018

Date of decision: June 25, 2018

DECISION

[1] The Minister has established that the Claimant ceased to be disabled within the meaning of the Canada Pension Plan (CPP) by the end of April 2002.

OVERVIEW

[2] The Claimant applied for a CPP disability pension in June 2000 after he stopped working in July 1999 due to complications stemming from AIDS¹. The Minister allowed his application upon review in November 2001. In December 2012, the Minister notified the Claimant that it was reviewing his eligibility for the disability pension as he appeared to have returned to work. After completing its review, the Minister determined that the Claimant no longer met the eligibility criteria for a disability pension. His pension was ceased retroactive to April 30, 2002, which followed a three-month work trial. It determined that the Claimant had incurred an overpayment of \$92,083.04 for the period between May 2002 and December 2012.

[3] The Claimant appealed the decision to the Minister, but was denied initially and on reconsideration. The Claimant then appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

ISSUE

[4] Did the Minister establish that the Claimant ceased to be disabled by the end of April 2002?

ANALYSIS

[5] A disability pension ceases to be payable the month in which a Claimant ceases to be disabled². The Minister has the onus to prove on a balance of probabilities that the Claimant ceased to be disabled at the time his benefits were terminated³.

¹ GD2 – 682

² Subsection 70(1)(a) of the CPP Regulations

³ *Atkinson v. Canada (A.G.)* 2014 FCA 187

The Claimant returned to substantially gainful work in February 2002

[6] Claimants who experience significant and prolonged health challenges may not qualify for a disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation⁴. For the occupation to be substantially gainful, it must be real and remunerative, the person must be performing a useful function, and the compensation must reflect an appropriate award for the nature of the work performed⁵.

[7] The Claimant was diagnosed with HIV in 1994⁶. His condition deteriorated rapidly to severe illness. He was started on antiretroviral therapy and has had a good response to medication since. However, his doctor stated that permanent changes in neurocognitive function can occur in patients who were as ill as the Claimant. He has ongoing difficulty with concentration, insomnia, fatigue and multitasking. While acknowledging his significant and prolonged health challenges, I find that the evidence supports the Minister's position that he returned to substantially gainful employment in February 2002.

[8] While he was off work for approximately two-and-a-half years, the evidence is overwhelming that he returned to substantially gainful employment at the beginning of February 2002 when he took a job as a case manager for X⁷. He completed a three-month work trial by the end of April 2002. Moreover, the evidence confirms that the Claimant has maintained steady employment in the field of employee benefits since 2002 – albeit with a few short gaps and a short-term disability leave in late 2003. His earnings ranged from a low of \$49,397 in 2002 to a high of \$97,691 in 2014⁸. In questionnaires, the Claimant's former employers confirmed that he worked on average between 35 and 40 hours per week. The questionnaires do not suggest that his employment was "benevolent". It is true the Claimant has had multiple employers since 2002, including two documented terminations and one departure by mutual agreement; however, he nonetheless maintained a steady employment history. One employer, X, indicated that his skill set did not match the job requirements⁹. Still, this employer noted that the Claimant did not

⁴ *Atkinson*, supra

⁵ *MSD v. Nicholson* (2007), CP 24143 (PAB); *Boles v. MEI* (1994), CP 2794 (PAB)

⁶ GD2 – 90

⁷ GD2 – 313

⁸ GD2 – 104 to 106

⁹ GD2 – 385 to 387

require help from his co-workers, worked independently, only required occasional supervision and had good attendance. The Claimant argued that his health condition affected his earning potential¹⁰; however, a person's earnings' trajectory prior to the onset of a disability is not relevant within the CPP.

[9] I find the evidence supports the Minister's position that the Claimant returned to substantially gainful work in February 2002 despite his significant and prolonged health condition.

The Claimant did not inform the Minister that he had returned to work as required under the CPP

[10] A person who has been determined to be disabled within the meaning of the CPP must inform the Minister without delay if he or she returns to work¹¹.

[11] At the hearing, the Claimant did not dispute that he returned to work. Instead, he argued that he did not know he was in receipt of a disability pension due to his decreased cognitive functioning stemming from his medical condition. He did not recall receiving a letter notifying him that his disability pension had been approved. He stated that he may have been hospitalized at the time. Moreover, due to his diagnosis, he is unsure that he would have understood the letter. He does not recall ever receiving the annual "Stay In Touch" newsletters from Service Canada. In support of his position, he supplied letters from his doctors asking that the Claimant's neurocognitive dysfunction be considered when considering his duty to disclose to Service Canada that he had returned to work¹².

[12] While the Claimant's submissions are noted, the evidence supports that Service Canada sent the Claimant a letter confirming that he had been approved for a disability pension in November 2001¹³. The letter advised that he must inform Service Canada as soon as possible if his health condition improved or he returned to work. Moreover, the evidence shows that the Claimant withdrew his appeal to the Office of the Commissioner of Review Tribunals (OCRT) in

¹⁰ GD2 – 117

¹¹ Subsection 70(1) of the CPP Regulations

¹² GD2 – 103

¹³ GD2 – 635

December 2001 signing a declaration that the Minister's decision had been varied to his satisfaction¹⁴. As such, I am satisfied that the Minister informed the Claimant of the approval of his disability pension and his obligation to report future work activity.

[13] The Claimant acknowledged receiving money from CPP, but stated he assumed it was from his CPP survivor benefit, which he had been awarded effective July 1988. As he only received one cheque/deposit, he did not realize that he had been receiving both benefits. However, the Minister correctly pointed out that the Claimant's yearly T4 slips clearly broke down his CPP income showing the survivor benefit and disability pension¹⁵. While the Claimant argued that he was a poor record keeper and relied on assistance to file his taxes, his explanations do not negate his obligation under the CPP to report the fact that he had returned to work.

[14] In addition, I am further persuaded by the Minister's evidence that he received the annual "Stay In Touch" brochure annually beginning in 2004¹⁶.

[15] Accordingly, I find that the evidence shows that the Claimant did not inform the Minister that he had returned to work in February 2002 despite being made aware of his obligation to do so.

The Tribunal has no jurisdiction to remedy administrative error

[16] The CPP clearly states that only the Minister can remedy administrative error; the Tribunal has no jurisdiction in this area¹⁷.

[17] The Claimant alleges administrative error on the part of the Minister. He argued that he never tried to hide his sources of income from the government. He was audited by the Canada Revenue Agency (CRA) in 2007, 2010 and 2012. As part of these audits, he disclosed all of his income, including his T4s that showed employment income and a CPP disability pension. Audited statements show that the CRA was aware of his income sources, yet did not flag a problem. As a result, the overpayment is substantially larger than it would have been had the

¹⁴ GD2 – 632

¹⁵ GD2 – 440, 454, 471

¹⁶ GD2 – 124 to 125

¹⁷ Subsection 66(4) of the *Canada Pension Plan*

government noticed the problem earlier. He states that the overpayment occurred due to a lack of computer system integration between the CRA and Service Canada. He submitted that the government should be accountable for the missed opportunities to make him aware of the overpayment.

[18] Moreover, the Claimant stated that he is in declining health with a shortened life expectancy due to his illness. He has been working part-time from home in recent months to accommodate his health condition. He anticipates applying for a disability pension within the next six months. His health condition significantly limits his ability to repay Service Canada.

[19] I find that the Claimant has raised some compelling arguments. The government, be it the CRA or Service Canada, has not adequately explained why it took over 10 years to flag this problem when the Claimant appears to have reported all of his income sources. The Claimant requested that Service Canada review his case for administrative errors, but an internal review determined that it had not committed any errors¹⁸. Unfortunately, the Claimant did not seek a judicial review of that decision to the Federal Court of Canada.

[20] Nonetheless, I have no authority to remedy the situation in favour of the Claimant; nor can I reduce the overpayment burden on the Claimant in light of his declining health. My scope is limited to making a determination as to whether the Minister has proven that the Claimant ceased to be disabled as of the end of April 2002. On that question, I find that the evidence clearly supports the Minister's position.

CONCLUSION

[21] Accordingly, I concluded that the Minister has proven on a balance of probabilities that the Claimant ceased to be disabled within the meaning of the CPP as of the end of April 2002, following a three-month work trial that started at the beginning of February 2002.

[22] The appeal is dismissed.

Kelley Sherwood
Member, General Division - Income Security

¹⁸ GD2 – 18 to 19

