



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *J. W. v. Minister of Employment and Social Development*, 2018 SST 915

Tribunal File Number: GP-17-1866

BETWEEN:

**J. W.**

Appellant (Claimant)

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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Decision by: Susan Smith

Appellant represented by: H. W.

Teleconference hearing on: July 4, 2018

Date of decision: July 9, 2018

## **DECISION**

[1] The Appellant continued to be disabled in October 2009, and onward.

## **OVERVIEW**

[2] The Appellant applied for a Canada Pension Plan (CPP) disability pension. He claimed he was disabled because of the symptoms associated with traumatic brain injury, including, short-term memory loss, vertigo, chronic headaches, and fatigue.

[3] The Minister granted the Appellant's application for the disability pension with a start date of October 2003. The Minister reassessed the Appellant's entitlement on January 27, 2012, and determined he ceased to be disabled by September 30, 2009. The Appellant was assessed an overpayment of \$22,074.47. The Appellant requested reconsideration of the reassessment, and upon reconsideration the Minister maintained the decision. The Appellant appealed the reconsideration decision to the Social Security Tribunal. The General Division initially denied the appeal. On July 13, 2017, the Appeal Division determined the General Division had made an error of law and referred the case back to the General Division for redetermination on the merits.

## **ISSUES**

[4] Did the Appellant's medical condition for which he was first granted a disability pension beginning October 2003, undergo such improvement that the Appellant was no longer incapable regularly of pursuing substantially gainful occupation by September 30, 2009?

[5] Do the Appellant's earnings after September 30, 2009, present an insurmountable barrier to a determination that he continued to be disabled?

## **ANALYSIS**

[6] Disability is defined as a physical or mental disability that is severe and prolonged.<sup>1</sup> A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and

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<sup>1</sup> Paragraph 42(2)(a) *Canada Pension Plan*

of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test.

[7] Once a person has been granted a disability pension, in order to cease benefits and assess an overpayment, the Minister must show on the balance of probability that the Appellant no longer meets the criteria of a severe and prolonged disability.<sup>2</sup> To meet the burden of proof the Minister must show that the Appellant's condition has undergone such improvement, or the Appellant has adapted sufficiently to his limitations, that he is no longer incapable regularly of pursuing substantially gainful occupation.

### **Severe disability**

[8] I find the Appellant continued to have a severe disability that rendered him incapable regularly of substantially gainful occupation from October 2009 onward.

### **The Appellant's medical symptoms have limited his capacity to work continuously since he was first granted a disability pension**

[9] The medical evidence and the Appellant's testimony do not support a conclusion he ceased to be disabled within the meaning of the CPP by October 2009. The conclusion that he ceased to be disabled is based solely on the assumption that the salary he was paid while employed by his mother prove he was not disabled. The Employer's Questionnaire was completed by the Appellant's mother. Although she did indicate his performance was satisfactory, the form does not address what her level of expectation may have been given his limitations. She specified he was not capable of working full time; he missed work due to his medical condition; he needed assistance for some tasks; and his job duties were as a "gopher". Unfortunately the Appellant's elderly mother has passed away.

[10] In November 2010, Dr. Paniak, a neuropsychologist, reviewed the Appellant to assess his functional capacity.<sup>3</sup> He was familiar with the Appellant because he had assessed him in 2005, two years after his traumatic brain injury. Dr. Paniak indicated the Appellant had sustained a very significant traumatic brain injury when he was assaulted with a baseball bat in October

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<sup>2</sup> Atkinson v. Canada (A.G.), 2014 FCA 187

<sup>3</sup> GT1-93-101, November 3, 2010, Dr. Paniak, Clinical Neuropsychologist, and Registered Psychologist

2003. He administered testing and determined the Appellant had not achieved any significant improvement in his scores since his testing in June 2005. He concluded the Appellant would continue to be limited by his ongoing fatigue issues and his cognitive deficits with organizational skills and math beyond junior high school level. He indicated the Appellant continued to deserve to receive CPP disability and that he should also apply for AISH to top up his income. At best he felt the Appellant might be capable of some type of part-time work within his limitations and in a job that did not require mathematical abilities.

[11] Dr. Paniak's report is in keeping with the Appellant's testimony that he was not capable of performing the tasks associated with property management and that fatigue has been a continuous problem since he was first injured in 2003. It is further in keeping with his testimony that he continued to be paid by his mother even when he did not work at all because he had stopped working completely by August 2010 but he was paid continuously until August 2011 when the business was sold. Dr. Paniak confirmed that the Appellant did not undergo improvement in his functional abilities and it was not expected he would undergo improvement in his functional abilities given the severity of his traumatic brain injury.

[12] The Appellant testified that he continued to be paid by his mother at the same monthly sum regardless of the number of hours he was able to work. He testified that the tasks he performed were not more than entry level minimum wage tasks in a very part-time schedule at best. He believes he was paid at a higher rate than his contribution warranted. In 2009 and 2010 the minimum wage in Alberta was less than \$9.00 per hour. Based on the questionnaire completed by his mother, than Appellant worked only 20 hours a week and missed work due to his medical condition. His earnings at minimum wage twenty hours per week would have been \$720.00 per month, not the \$2000.00 a month he was paid by his mother. She was in the unique position of owning a corporation where she could pay her disabled son to help him make ends meet.

[13] I find the condition for which he was granted a disability pension did not undergo such improvement that he became capable regularly of substantially gainful occupation. I find that the arrangement between the Appellant and his mother must be characterized as benevolent employment because his compensation was far greater than his contribution warranted.

**The Appellant's work efforts demonstrate repeated failed attempts to return to gainful occupation**

[14] The evidence shows the Appellant's effort at obtaining and maintaining employment has been unsuccessful by reason of his health condition. He has not been successful at maintaining employment for any appreciable period. He attempted to return to his previous occupation as a property manager by approaching people with whom his previous reputation carried some weight and they were willing to extend the opportunity. In each of these cases he was unable to complete the necessary tasks associated with the position due to his cognitive deficits. He was dismissed from his position in each case after only weeks of employment with just a single exception. Employer questionnaires support the Appellant's testimony.

[15] In 2013 he was not dismissed until after six months but he was dismissed because he was not able to do the job properly. He testified that the particular property management company was not of the highest quality and they simply failed to notice he was not completing his job correctly until months after he began. He explained that this was because they used electronic tracking to create spread sheets and as long as numbers were put into the system the accuracy was not discovered immediately.

[16] The Appellant testified that all of his attempts to return to work during 2012 and 2013 were not made because his symptoms of vertigo, fatigue, short-term memory loss, and headaches had diminished, but because of financial desperation when his benefits were ceased.

**The Appellant's earnings after October 2009 are not an absolute barrier to finding he remained disabled by his medical condition**

[17] In the past the Pension Appeals Board (PAB) determined that significant remuneration should never be an absolute bar to the receipt of disability benefits.<sup>4</sup> Earnings are just one factor of many that must be considered in reaching a conclusion. Although I am not bound by the decisions of the PAB, I find the overriding principles are the same, and the rationale applied is compelling.

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<sup>4</sup> Porter 1998 CP 5616

[18] In considering appeals under the CPP the overriding consideration is that the interests of justice be served.<sup>5</sup> The Appellant felt he had no other choice than to return to work despite his severe disability because he had no source of income. His continuing inability to earn a living placed undue stress and hardship on his elderly parents as they felt obligated to provide for him.

[19] The Appellant testified that he was not capable of performing the tasks associated with property management even on a part time basis because he no longer possessed the functional abilities for the complexity of work as property management. His testimony is supported by the employer questionnaire his former employer completed.<sup>6</sup> His earnings while working at Larlyn Property Management, though significant, do not accurately reflect his capacity regularly for substantially gainful occupation. I find the Appellant's explanation as to why he was able to generate the earnings he did, despite his limitations, to be compelling.

**CPP Regulation 68.1 applies only to applications after May 29, 2014, and is one factor to be weighed in the circumstances together with all other factors**

[20] Under the CPP Regulations "substantially gainful", in respect of an occupation, means an occupation that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.<sup>7</sup>

[21] The Appellant's application for benefits predates coming into force of the above regulation and the regulation does not apply in such circumstances, but it is a valid benchmark. In the circumstances of the Appellant's case the benchmark for substantially gainful is one factor to consider. I am satisfied that the other factors outweigh the benchmark for substantially gainful occupation and the evidence demonstrates the Appellant did not regain the capacity regularly for substantially gainful occupation.

**The Appellant's failure to report a return to work is an error of judgement**

[22] The Appellant agrees that he made a mistake in not reporting his return to work when he began receiving monthly salary from his mother. He contacted vocational rehabilitation services

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<sup>5</sup> Larkman 2012 FCA 204

<sup>6</sup> GT2-27-29, Simco Management

<sup>7</sup> Section 68.1 of the CPP Regulations

regarding his desire to attempt to further his education. His contact is documented and details of the conversation are recorded in accordance with the perceptions of the agent taking the call. The Appellant has documented difficulty with word finding and he fatigues easily due to the inordinate effort he requires to converse. I find it is equally likely the Appellant simply was not able to maintain the conversation long enough to understand the necessity for reporting his work at the time as not. There is no evidence the Appellant has been less than forthright with appropriate information. He testified that he simply became confused because he was simultaneously dealing with a proposed return to post-secondary education.

[23] The CPP requires that a person report a return to work. When a person fails to do so potentially punitive consequences may occur. In the Appellant's circumstances where his disability is related to cognitive function it is unreasonable to hold him to a higher standard of compliance than he may have the capacity to deliver. He explained that in retrospect he sees he made a mistake. The work he performed was for his own mother. It is reasonable to conclude he did not understand he needed to report his part-time participation in his mother's corporation in order to stay in compliance with his obligations under the CPP. I find this is not a situation where his unreported work activity can reasonably lead to the conclusion his work activity demonstrates regained work capacity. This is simply not the case. His disabling condition remains unchanged. His disabling condition has not improved and he has not adapted to his condition to such an extent that he is capable regularly of substantially gainful occupation.

## **CONCLUSION**

[24] I find that the Appellant continued to have a severe and prolonged disability in October 2009, when his disability pension was ceased, and onward. His pension should be reinstated and his overpayment cancelled.

[25] The appeal is allowed.

Susan Smith  
Member, General Division - Income Security