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

Citation: *M. V. v Minister of Employment and Social Development*, 2019 SST 414

Tribunal File Number: GP-17-3159

BETWEEN:

M. V.

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: March 14, 2019

Date of decision: March 22, 2019

DECISION

[1] The Claimant was not entitled to receive a Canada Pension Plan ("CPP") disability pension from September 2013 to December 2016.

OVERVIEW

[2] The Claimant originally applied for CPP disability benefits in 2006. In April 2007, the Minister determined that she was eligible for a CPP disability pension. While she periodically attempted to work over the next couple of years, these jobs did not last long and the Minister considered them failed work trials. As a result, she remained eligible for CPP disability benefits.

[3] In May 2013, however, the Claimant began a new job that lasted until August 2016. The Minister submits that the Claimant did not report this employment. The Claimant said she reported this employment but continued receiving benefits. The Minister investigated this and found that the Claimant had been working at a substantially gainful level since May 2013. The Minister allowed a three-month work trial period until August 31, 2013, but found that the Claimant had not been entitled to the CPP disability benefits she had received from September 2013 until December 2016. The Minister upheld this decision upon reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

PRELIMINARY MATTER

[4] On February 22, 2019, the Minister filed its submissions (indexed as "GD8") in response to the materials filed by the Claimant on January 17, 2019 (indexed as "GD7"). Although filed after the filing deadline of January 17, 2019, I decided to receive GD8. The Claimant had an opportunity to review GD8 in advance of the hearing. GD8 also did not contain any new evidence: it consisted solely of submissions the Minister could have made orally at the hearing. Finally, the GD8 submissions were made within a reasonable period after GD7 was filed.

ISSUES

[5] Did the Claimant continue to have a severe and prolonged disability from September 2013 until December 2016?

[6] If not, is the Claimant obligated to repay the CPP disability benefits she received?

ANALYSIS

[7] Disability is defined as a physical or mental disability that is severe and prolonged.[1] A person is considered to have a severe disability if she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person receiving disability benefits must inform the Minister without delay if she returns to work.[2] When a person contests the Minister's decision to end a disability benefit, the onus is on the Minister to show, on a balance of probabilities, that the Claimant was no longer disabled when her benefits ended.

[8] The Claimant's disability pension was primarily based on her bipolar disorder, although she also had back issues and it appears that borderline personality disorder also played a role. Several short-term periods of employment followed the initial award of a CPP disability pension, but she was unable to sustain any of those positions. As a result, the Minister considered them failed work trials and she was entitled to continue receiving her CPP disability pension.

Did the Claimant continue to have a severe and prolonged disability from September 2013 until December 2016?

[9] On May 22, 2013, the Claimant began working for X (also known as X, or X) as a registered care aide. She worked for more than one "division" of X, but in reality she was working for the same employer. While X described the work as part-time casual employment[3], the Claimant's earnings over the next three years were significant. In 2015, the Claimant also began working privately for X: this resulted from work the Claimant originally did for X. The following chart summaries the Claimant's known earnings, although it appears that there would have been additional income from X in both 2016 and 2017:

Year	Employer	Earnings[4]
2013	X - Surrey	$10,197.00

[1] Paragraph 42(2)(a) of the *Canada Pension Plan*
[2] Section 70.1 of the *Canada Pension Plan Regulations*
[3] GD2-103
[4] GD2-64 and GD2-160

2014	X - Surrey	$27,285.00
2015	X - Surrey	$20,034.00
2015	X	$1,027.00
2015	X – Fraser Valley	$5,773.00
2016	X	$8,006.93[5]

[10] The Claimant has not disputed her earnings. However, she says her earnings were not substantially gainful. If this is true, she says she was severely disabled throughout her X work and therefore was still entitled to CPP disability benefits. The Minister says her earnings were in fact substantially gainful, especially during 2014 ($27,285.00) and 2015 (a total of $26,834.00). As a result, the Minister says she was capable regularly of pursuing a substantially gainful occupation. The Claimant also suggests she did not have real work capacity because X's original owner was a benevolent employer. I will examine each of these arguments.

Were the Claimant's earnings between May 22, 2013, and early July 2016 substantially gainful?

[11] During the hearing, the Claimant suggested that a "substantially gainful occupation" actually meant "something I could do for the rest of my life". As she was not able to continue with her employment at X in 2016, she said she could not have been pursuing a substantially gainful occupation there. However, her interpretation is not consistent with the law.

[12] Before 2014, there was no fixed definition of "substantially gainful". In 2014, a new regulation said the meaning of "substantially gainful" was the maximum annual amount a person could receive as a disability pension.[6] As a result, "substantially gainful" would be $14,836.20 for 2014 and $15,175.08 for 2015. The Claimant's earnings for both of those years were much more than "substantially gainful". While that "substantially gainful" definition was not in effect yet in 2013, the Claimant earned $10,197.00 in just over 60% of that year. Had she worked for the entire year, her income would have been approximately $16,800.00. It therefore appears that the Claimant was also earning at a substantially gainful level commencing in May 2013 as well.

[13] While the Claimant earned only $8,006.93 from X in 2016, this was over a period of only about six months. She did not appear to work after the start of July 2016, as X was investigating

[5] GD2-108
[6] Section 68.1 of the *Canada Pension Plan Regulations*

concerns about her performance.[7] During her 2016 employment, she therefore was earning at a rate of about $16,000.00 per year. For 2016, the most a person could have received as a CPP disability pension was $15,489.72. Thus, she also appears to have had "substantially gainful" earnings throughout her three years of active work with X. This demonstrated capacity appears to preclude a finding that she was severely disabled during this period. However, I will first consider whether X could be considered a benevolent employer.

Was X a benevolent employer?

[14] Although We Care documented concerns with the Claimant's performance starting in May 2016, there is no objective evidence of problems before that date. In a subsequent questionnaire, X said she worked independently and did not need supervision on a day-to-day basis, nor did she require help from her co-workers. However, X said it did not have information to comment on her attendance or whether she needed any special arrangements.[8]

[15] At the hearing, the Claimant said X was under different ownership and was not unionized when she started working there in 2013. She said the previous owner was aware of her medical condition, but still wanted to work with her and accommodate her. She said she had occasional issues with lateness and getting along with people, but these were not written down by the previous owner. She said this changed with the new ownership. However, she previously wrote that she only started to get "written up" once "M." started working in Human Resources. She said "the whole time prior to M.'s arrival I had never been written up". She also said that everything was "good" until the change of ownership and unionization.[9]

[16] While X's previous owner may have been aware of the Claimant's condition, I am not persuaded that the previous owner varied her job conditions and modified his expectations of the Claimant in keeping with her limitations. I also am not persuaded that the performance expected from her was considerably less than the performance expected from other employees.[10] It is unlikely that a private business would continue to employ her for so long, if that were the case. The Claimant said her work hours were very irregular, but she was working on a part-time casual

[7] GD2-20 to GD2-22, and GD2-110
[8] GD2-20, and GD2-102 to GD2-104
[9] GD5-6 to GD5-7
[10] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

basis and X said this was the only work available.[11] It is also consistent with the nature of being a care aide, as work hours clearly depend on how many clients require services.

[17] As a result, I am unable to find that X was a benevolent employer. This means that her work from X is still considered to be an "occupation" when assessing whether the Claimant was still eligible for CPP disability benefits.[12]

The Claimant's disability status after early July 2016

[18] I accept that the Claimant stopped actively working for X in July 2016 and her employment was terminated in August 2016. As for the brief period between her active employment with We Care and her formal termination at the end of August 2016, Dr. Bushra (Family Physician) completed a form on August 11, 2016, certifying that the Claimant could return to work. Although the Claimant said Dr. Bushra did not really know her, it appears that the Claimant believed she could work and asked Dr. Bushra to complete the form for her.[13]

[19] While the Claimant continued to be privately engaged by X, it appears this was only for about one hour per day. In September 2016, the Claimant estimated that her income from X would be only $500.00 per month. This work continued well into 2017.[14] However, I accept that her employment income during this time was not substantially gainful.

[20] It is unclear if the Claimant would have been capable of more work after August 2016. She suggested that X made substantial accommodations for her but, in September 2016, she said she was tolerating the job demands.[15] However, even if her actual earnings after X were not substantially gainful, this does not necessarily mean that she was once again severely disabled as of the date of her termination.

[21] Critically, the Claimant started a claim for regular employment insurance ("EI") benefits on August 21, 2016. She received 19 weeks of regular EI benefits, continuing into January 2017. This is important because a person can only receive regular EI benefits if she is "capable of and

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[11] GD2-103
[12] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187
[13] GD2-110
[14] GD2-18 and GD2-150
[15] GD2-149

available for work".[16] When combined with Dr. Bushra's evidence and the evidence about the work for X, I must find that the Claimant was not severely disabled between her dismissal from X and the end of December 2016.

Conclusion on the Claimant's disability status

[22] I find that the Minister has established, on a balance of probabilities, that the Claimant was not severely disabled from September 2013 to December 2016. She was not incapable regularly of pursuing a substantially gainful occupation during this period. I will now consider whether she must repay the benefits she received during this period.

Is the Claimant obligated to repay the CPP disability benefits she received between September 2013 and December 2016?

[23] The Claimant says she should not have to repay any overpayment, because she told the Minister about her new job on two occasions in 2013 but the Minister continued to pay her benefits. As a result, she assumed that she was entitled to continue receiving those benefits.

[24] There is conflicting evidence about the Claimant's reporting of her new work. She says she called the Minister in June 2013, but there is no record of such a call. She also says she told the Minister about her job on August 23, 2013. While she did call the Minister that day, the only recorded purpose was to change the bank account for direct deposit of her benefits.[17]

[25] I find it difficult to accept that the Minister failed, on two occasions, to record the fact that the Claimant was working at a new job. This would have been essential information for the Minister to record. I also find it hard to accept the Claimant's evidence that she actually changed her banking information in August 2013 "to see if they would stop sending payment".[18] If she wanted the Minister to stop sending the payment, it does not make sense to ask the Minister to send the payments to a different bank account that was still in her name.

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[16] Subsection 18(1) of the *Employment Insurance Act*
[17] GD2-18, GD4-21, and GD5-6
[18] GD5-6

[26] Alas, it does not appear to matter whether the Claimant actually made the calls she claims to have made. She was paid a benefit to which she was not entitled. The Minister can recover overpayments if there was no entitlement to the benefits.[19] However, the Claimant suggests that the overpayments resulted from the Minister's erroneous advice or administrative error.

Can the overpayments be forgiven?

[27] The *Canada Pension Plan* allows the Minister to "remit" (on behalf of a recipient) an overpayment of disability benefits caused by the Minister's erroneous advice or administrative error.[20] In effect, this means that the overpayment amount is no longer owed by the recipient.

[28] However, the Tribunal does not have the authority to make an order concerning erroneous advice or administrative errors. This is entirely at the Minister's discretion. If the Claimant believes that the overpayment is the result of the Minister's erroneous advice or administrative error, she needs to raise this directly with the Minister. If she is not satisfied with the outcome, her remedy lies with the Federal Court and not with the Tribunal.[21]

[29] I therefore find that the Minister can require the Claimant to repay the overpayments she received. Forgiveness of this overpayment is outside the Tribunal's jurisdiction.

CONCLUSION

[30] The appeal is dismissed.

[31] This decision does not preclude a subsequent application (or a fast-track application, if applicable) for CPP disability benefits, for periods subsequent to December 2016.

Pierre Vanderhout
Member, General Division - Income Security

[19] Subsection 66(2) of the *Canada Pension Plan*
[20] Paragraph 66(3)(d) of the *Canada Pension Plan*
[21] *Pincombe* v. *Canada (Attorney General)*, [1995] F.C.J. No, 1320