



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. P. v Minister of Employment and Social Development*, 2020 SST 321

Tribunal File Number: GP-19-639

BETWEEN:

J. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Adam Picotte

Videoconference hearing on: February 13, 2020

Date of decision: February 17, 2020

DECISION

The Claimant remains entitled to a Canada Pension Plan (CPP) disability pension after May 2014.

OVERVIEW

[1] The Claimant first applied for a CPP disability benefit in 2012. She was approved on a reconsideration decision and provided with payment retroactive to 2010. The Minister received Canada Revenue Agency (CRA) earnings information about the worker and conducted a review of her file. The Minister concluded that the Claimant was no longer disabled within the meaning of the CPP effective May 2014. The effect of this was that the Claimant's entitlement to CPP disability benefits was retroactively terminated to May 2014. She was required to repay approximately \$53,000. The Minister upheld its decision on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[2] In order to maintain a CPP disability benefit, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found to be continuously disabled as defined in the CPP.

ISSUE(S)

[3] Did the Claimant cease to have a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation as of May 2014?

Did the Claimant cease to have a prolonged disability as of May 2014?

ANALYSIS

[4] Disability is defined as a physical or mental disability that is severe and prolonged¹. 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 of indefinite duration or is likely to result in death.

¹ Paragraph 42(2)(a) *Canada Pension Plan*

[5] Under subsection 70(1)(a) of the CPP legislation, a disability pension ceases to be payable for the month in which a beneficiary ceases to be disabled. Pursuant to subsection 42(2)(b), “a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in prescribed manner. The relevant legislation made pursuant to subsection 42(2)(b) are subsection 69(1) and section 70.

[6] Where a claimant is contesting a decision of the Minister to cease a disability pension, the onus is on the Minister to show, on a balance of probabilities, that the Claimant is no longer disabled at the time the benefits were ceased.

Severe disability

Did the Claimant cease to have a severe disability as of May 2014?

[7] I must assess the severe part of the test in a real world context². This means that when deciding whether a person’s disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[8] I am going to explain why the Claimant did not cease to have a severe disability as of May 2014. There are a number of facts that are important for me to set out before I can explain my reasoning.

[9] The Claimant is highly educated. She has a bachelor of arts degree, a bachelor of education degree, and a masters of education degree.³ However, the usefulness of her education and the skills she has acquired from her time spent as a teacher are no longer helpful for her in an employment setting.

[10] Following the suicide of her son, the Claimant was limited by anxiety, decreased memory, and concentration.⁴ The best evidence with respect to any residual capacity was that the Claimant might be able to work part-time in a setting not involving youths.⁵ It is clear that the Claimant continued to have issues with memory and concentration. This was noted in chart notes

² *Villani v. Canada (A.G.)*, 2001 FCA 248

³ GD2-162

⁴ GD2-292

⁵ GD2-310

from her treating physician.⁶ The lack of concentration, and memory excludes the Claimant from mentally demanding forms of employment. It is also clear from the medical evidence that she was limited in the amount of time she could work. The treating psychologist suggested she might be able to work part time.

[11] After the Claimant was accepted onto disability benefits she continued to see a psychologist. The psychologist advised her that it would be beneficial to her mental health to try to engage in some form of work. She tried that. She entered into a business with a friend. Together they opened a small storefront and sold knickknacks, mostly during the summer months, in a resort town in the interior of British Columbia.

[12] The business had gross earnings as follows:

- a) 2013 \$71,866.00
- b) 2014 \$121,646.00
- c) 2015 \$80,029.00
- d) 2016 \$79,535.00
- e) 2017 \$23,425.00⁷

[13] Any earnings paid for the cost of additional stock for the store. From 2014 to 2017 (when the store closed down) the Claimant's tax receipts demonstrate a personal loss in every year.

[14] This was confirmed by her accountant who noted the following losses:

- a) 2013 a loss of \$8,002
- b) 2014 a loss of \$3,539
- c) 2015 a loss of \$10,079
- d) 2016 a loss of \$6,456
- e) 2017 a loss of \$19,625⁸

⁶ GD2-108

⁷ GD2-48

⁸ GD2-15

[15] I asked the Claimant about her work there. She told me that she did little. She would work 3-4 days a week and an average of 4 hours a day. She told me over an average month she would work 15 days. Her duties would be to open or close turning the lights on or off, unloading a bit of stock, and helping a few customers that came in on a daily basis. I understood that she spent most of her time puttering around her store. She told me that she saw it as an opportunity to get out of her house. She did not take a salary. The primary reason she did not take a salary was because the business did not make a profit. The Claimant also told me that she found her time there miserable. She eventually stopped working there because the work made her miserable, and her psychological disability made it difficult to get along with any one.

[16] I found the Claimant credible in respect of this testimony.

[17] What is left is a Claimant that could not work in her previous employment as a teacher. She was unable to utilize her skills acquired through education and teaching. She had significant functional limitations but some residual capacity. The question I am left to answer is whether that residual capacity is substantially gainful as that term is understood in the CPP.

[18] Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful because of the person's health condition⁹.

[19] Here the capacity that the Claimant has evidenced is working 4 hours a few times a week. She told me that on average she would work 15 days a month. This is equal to 12 hours a week. I believed her evidence. This assertion has been maintained in her documents that she provided to the Minister. She has not wavered in this respect.

[20] I am going to refer to a few cases now. It is important for me to refer to these cases because the reasoning is helpful in understanding why I have come to my conclusion.

[21] A number of cases from the Pension Appeal Board (PAB) considered what hours worked would be required to determine substantially gainful employment.

⁹ *Inclima v. Canada (A.G.)*, 2003 FCA 117

[22] The PAB noted that it is patently ridiculous to consider part-time employment well short of a regular workweek to constitute the capacity to regularly pursue gainful employment. The average workweek in Canada is between 37-40 hours. Therefore, working 14-16 hours per week at a low wage is not gainful employment.¹⁰

[23] The PAB noted that the Claimant's ability to work twelve hours each week did not preclude a finding that she was disabled under the CPP.¹¹

[24] The PAB similarly noted a worker able to work 16 hours a week was not in a substantially gainful occupation.¹²

[25] These cases are not binding on me but are persuasive when considering what regularly pursuing a substantially gainful occupation means.

[26] I also note section 68.1 of the CPP Regulations. It provides a formula for a threshold for 'substantially gainful occupation', which is essentially 12 times the maximum monthly retirement benefit.

[27] In the Claimant's case, there are no personal earnings. She took no salary and had a personal loss on her income taxes throughout the relevant time. However, Section 68.1 of the CPP Regulation can still be informative.

[28] I make a finding of fact that the type of work the Claimant was and continues to be capable of performing is a basic sales position for which minimum wage would be the likely remuneration.

[29] In British Columbia the relevant minimum wages were as follows:

- a) 2014 \$10.25;
- b) 2015 \$10.45;
- c) 2016 \$10.85; and
- d) 2017 \$11.25.

¹⁰ *Carvery v. MHRD* (April 28, 2003), CP 18772 (PAB)

¹¹ *A.K. v. MHRSD* (September 2, 2009) CP 25905 (PAB)

¹² *R.B. v. MHRD* April 29, 2003 CP18508 (PAB)

[30] As a result, I make the following findings of what the Claimant would have been able to make if she had been employed and working what she was able to at her store. Working 15 days per month for four hour a day over a 12 month period, as follows:

- a) 2014: $15 \times 4 \times 12 \times 10.25 = \$7,380$;
- b) 2015: $15 \times 4 \times 12 \times 10.45 = \$7,524$;
- c) 2016 $15 \times 4 \times 12 \times 10.85 = \$7,812$; and
- d) 2017 $15 \times 4 \times 12 \times 11.25 = \$8,100$.

[31] The following amounts were the approximate deemed substantially gainful earnings amounts in accordance with Section 68.1 of the CPP Regulations:

- a) 2014: \$14,836;
- b) 2015: \$15,175;
- c) 2016: \$15,489; and
- d) 2017: \$15,763.

[32] What is clear from these numbers is that the Claimant's implied earnings were well below the substantially gainful amounts as set out in section 68.1 of the CPP regulations. I find these facts persuasive that the Claimant continues to suffer from a severe disability within the meaning of the CPP.

[33] I also find the reasoning from the above noted PAB decisions persuasive. In all three cases, the Claimants were able to work approximately the same number of hours as the Claimant in the present matter. In all three cases, the PAB found this was not a barrier to obtaining a CPP disability benefit.

[34] As noted above the Minister has the onus of proving on a balance of probabilities that the Claimant is no longer disabled within the meaning of the CPP. The Minister accepted that up until April 2014 the Claimant was disabled. As such, I have limited my consideration to the circumstances following that date. I find, given the residual capacity, hours worked, and

potential remuneration available, that the Claimant continues to be disabled and remains entitled to a CPP disability benefit.

Prolonged disability

[35] The Claimant continues to suffer from her depression with symptoms of anxiety. There is no indication that this condition has improved. Again, the minister bears the onus of proving the disability is no longer prolonged. The Minister has not proven this and as such I find that the Claimant's disability remains prolonged.

CONCLUSION

[36] The appeal is allowed.

Adam Picotte
Member, General Division - Income Security