



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. P. v Minister of Employment and Social Development*, 2020 SST 439

Tribunal File Number: GP-18-1700

BETWEEN:

D. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Teleconference hearing on: February 18, 2020

Date of decision: April 17, 2020

DECISION

[1] The Minister was not entitled to terminate payment of the Claimant's Canada Pension Plan (CPP) disability pension. He had not regained the capacity to pursue substantially gainful employment.

OVERVIEW

[2] The Minister granted the Claimant a CPP disability pension in October 2010. The Claimant had become an incomplete quadriplegic after a bicycle accident in June 2010.

[3] The Claimant was born in 1966. He finished Grade 12 and completed post-secondary education. He worked in the film industry as a set decorator before his accident.¹

[4] The Minister referred the Claimant to a vocational rehabilitation (VR) program. The Claimant was screened out of this program in July 2015 after several failed attempts to return to work because of his medical condition. The Claimant continued to work occasionally in the film industry. The Claimant advised the Minister that he hoped to get a job with a municipality. The Minister asked the Claimant to contact it if he managed to get this work.²

[5] The Claimant advised the Minister in June 2017 that he returned to part-time work. The Minister stopped paying the Claimant disability benefits effective September 2016, based on the Claimant engaging in substantially gainful work since October 2015.³

[6] The Minister learned that the Claimant earned \$1,540 a month at a part-time job that began in October 2015. The Claimant also earned \$10,236 in 2015, \$1,544 in 2016, \$14,826 in 2017 and \$6,057 in 2018 in the film industry. The Claimant also earned \$18,362 as an accessibility assessor in 2018. This meant that the Claimant earned \$24,419 in 2018 after including the income he earned in the film industry from that year.⁴

¹ See GD2-123

² See GD7-3

³ See GD7-3

⁴ See GD7-10

[7] The Minister asked the Claimant to repay benefits he received in 2016 and 2017 that amounted to \$15,580.41.⁵

[8] The Claimant asked the Minister to reconsider its decision to stop paying him disability benefits. The Minister denied the Claimant's reconsideration request. The Claimant appealed the Minister's denial to the Social Security Tribunal (the Tribunal).

PRELIMINARY MATTERS

[9] A teleconference took place on February 15, 2020. The Tribunal received further medical documents from the Claimant after the hearing took place. The medical documents related to treatment the Claimant had at an anxiety and stress clinic.⁶ The Minister reviewed these documents and did not prepare further submissions.⁷ I am now prepared to make a decision in this case.

ISSUE

[10] Did the Claimant's employment earnings after October 2015 show that he had regained the regular capacity to pursue substantially gainful employment?

ANALYSIS

[11] The Tribunal is created by statute. I only have the power to make decisions that I am allowed to make under my enabling statute.⁸ The *Department of Employment and Social Development Act* (DESD Act) sets out the jurisdiction that I have in relation to a CPP appeal.

[12] The Claimant testified that he left a voicemail with a Minister's representative in August 2016. He advised the representative about his work activity in 2016. He does not believe that he should be stuck with an overpayment because the Minister should have known that he was working. The Minister did not tell him that his work could affect his eligibility for disability benefits. I do not have the jurisdiction to forgive any alleged overpayment on the part of the

⁵ See GD2-10-11

⁶ See GD9

⁷ See GD10

⁸ See the Supreme Court of Canada's decision in *R. v. Conway*, 2010 SCC 22

Claimant because the Minister handled his file negligently. What I do have jurisdiction over is the issue of whether the Minister proved on a balance of probabilities that the Claimant stopped having a disability under the CPP.

[13] In order to stop paying a disability pension, the Minister must establish that it is more likely than not that the Claimant has ceased to be disabled. A disability pension ceases to be payable for the month in which a Claimant ceases to be disabled.⁹

[14] A qualifying disability must be severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration.¹⁰

[15] The Minister relies on the Claimant's earnings since 2015 to establish that he had regained the capacity to pursue substantially gainful employment. The Minister submits that the Claimant ceased to be disabled as of August 31, 2016. The Minister takes the position that despite his medical condition, the Claimant had been able to return to substantially gainful employment and maintain such employment for several years. The Minister also argued that the Claimant's medical condition improved to the point where he regained the capacity to return to regular part-time work by October 2015.¹¹

[16] The Claimant argued that his medical condition did not improve after the initial recovery period after his accident. He argued that the work he engaged in was not substantially gainful. His employers provided him with significant accommodations and he was therefore entitled to continue to receive a CPP disability pension.

The Claimant's earnings after October 2015 do not show that he had regained the regular capacity to pursue substantially gainful employment.

[17] I agree that significant earnings may be a strong indication that the Claimant has regained the regular capacity to pursue substantially gainful employment. But it is only one factor to be considered. The determination of whether a claimant's employment is substantially gainful

⁹ See paragraph 70(1)(a) of the CPP

¹⁰ See subsection 42(2) of the CPP

¹¹ See GD7-13

cannot be decided by a one-size fits all approach and each case should be assessed on its own specific facts.¹²

[18] The Claimant's main disabling condition is his incomplete quadriplegia. His partial paralysis means that he cannot move walk or move his hands freely.

[19] The Claimant testified that he continues to suffer from severe impairments. Walking is hard for him. He uses a cane around the house. He dresses very slowly. He continues to have toileting issues. He has to digitally stimulate himself to have a bowel movement. His bowel movements are unpredictable. He has soiled himself. He gets fatigued with walking and completing any task. He continues to have problems with sitting. He has memory and concentration difficulties that he relates to an undiagnosed concussion that he suffered in his bicycle accident. He has problems sleeping because of neuropathic pain. He continues to significantly rely upon his partner to perform housekeeping tasks. His health has not improved since 2013 or 2014.

[20] His treating physiatrist in a report dated August 4, 2010, stated that the Claimant sustained a neck fracture in a bicycle accident. The Claimant had decreased sensation and weakness in his arms, legs, and hands. He also had a neurogenic bladder.¹³

[21] The Claimant's family doctor in a May 22, 2012 report to the Minister noted that the Claimant had reached a plateau in recovering from his spinal cord injury. The Claimant still had significant weakness on the right side of his body. The Claimant fatigued quickly. The Claimant had not recovered dexterity in his right hand. His family doctor believed that the Claimant could return to near full-time work with the help of a qualified rehabilitation consultant.¹⁴

[22] The Claimant testified about his work in the film industry prior to his June 2010 accident. He worked as a set a decorator. He used to supervise 10 to 20 people. He worked 12-hour days.

¹² *Boles v. Minister of Employment and Immigration* (March 14, 1994), CP 2794 (PAB); *Minister of Human Resources Development v. Porter* (December 3, 1998), CP05616 (PAB); *Minister of Social Development v. Nicholson* (April 17, 2007), CP 24143 (PAB). These decisions are not binding but I find them persuasive.

¹³ See GD2-116-119

¹⁴ See GD2-83-84

He had to stop working after his accident. But he made numerous return to work efforts since his accident.

[23] A summary of his part-time employment since June 2010 is set out below:

- He has continued working in the film industry. But this work is very casual and inconsistent. His friends hire him. He does not work the standard 12 hour days that are required in that industry. His friends provide him with heavily accommodated employment. He does not do any heavy lifting. He is able to take breaks whenever needed. He can leave a shift early if he wishes. He is severely fatigued after one day of work.
- He started working as a concierge in 2012. He did this work for about 1-1.5 years on a part-time basis. His hours varied. Some weeks he had work. In others weeks he did not work at all. He worked up to 20 hours per week. He was placed on a night shift. But he struggled on the night shift. He needed a muscle relaxer to get through the night shift. He could not stand for long periods. He did not do well on the day shift either. It was a lot busier during the day and he could not take breaks as needed. He ended up quitting this job.
- The Claimant worked at a community service organization from October 2015 to April 2018. This organization helped link people with physical disabilities to activities and programs. He stopped working at this job when his contract expired. This was a part-time job. He was expected work 22 hours a week. But he usually worked seven to 15 hours per week. He was paid \$1,400 to \$1,500 a month as an independent contractor. He also had expenses, which included his car, travel, and cellphone. He worked from home. He had to purchase a computer. His job was heavily accommodated. His work hours were spread out. He never had to work regular hours.
- The Claimant worked at another community service organization from May 2018 to October 2019 as an accessibility assessor. He stopped working when his contract expired. He worked 18 to 24 hours per week. He earned \$500 per week.

His employment was accommodated. He inputted data onto a computer. He would conduct site surveys to help determine a building's accessibility. He worked his own hours.

- The Claimant started his own business in August or September 2019. He works as an accessibility assessor.

[24] The Claimant also tried some schooling and training after his June 2010 accident. He tried to get a job as a 311 operator for a municipality. But he struggled with training. He is a poor typist because of his hand dexterity issues. He was never able to type at 40 words per minute to obtain this position. He tried to complete a recreational diploma. But he stopped attending the program after a 2014 car accident. He also took a two-week accessibility course in April 2018 at a community college.

[25] Claimants who earn some income may still be disabled if they are accommodated at work or their productivity requirements are different from those of their colleagues.¹⁵ In this case, it is important to look at the Claimant's medical condition and functional limitations, his efforts to upgrade his vocational skills, his employment history, and his work conditions and circumstances.

[26] I am satisfied that the Claimant's employment since June 2010 has been accommodated and irregular. He was generally able to work his own hours, work short shifts, and take breaks when needed. Friends arranged his work in the film industry and he did not earn a substantial income. Despite the accommodations he received, he was never able to work more than on a part-time basis with irregular hours at any of his post June 2010 accident jobs.

[27] I find that the Minister failed to prove, on a balance of probabilities, that the Claimant's earnings after October 2015 showed that he had regained the regular capacity to pursue substantially gainful employment.

The Minister failed to show that the Claimant ceased to be disabled.

¹⁵ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

[28] I have considered the entire context of the Claimant's medical condition and ability to work since his June 2010 accident.

[29] The Minister has not provided evidence of any material change of circumstances in the Claimant's medical condition that would justify a finding that the Claimant ceased to be disabled under the CPP.

[30] The Minister relies heavily on the Claimant's earnings since 2015 to justify its decision to stop paying the Claimant disability benefits.

[31] Section 68.1 of the *CPP Regulations* contain a definition of "substantially gainful", which describes 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.¹⁶

[32] The Minister argued that the Claimant earned \$24,419 in 2018, which exceeded the maximum the Claimant could have received that year as a disability pension in that year. But I do not believe that this fact by itself is enough to show that the Claimant ceased being disabled under the CPP.

[33] The Minister failed to show that the Claimant earned more than the substantially gainful amount under the *CPP Regulations* in 2015, 2016, and 2017. The Tribunal file shows that the Claimant had T4 earnings of \$10,943 in 2015, which amounts to less than the maximum amount the Claimant could have earned that year with a disability pension.¹⁷ The Tribunal file contains a tax assessment for 2016 that shows that the Claimant earned \$16,866.00 in 2016.¹⁸ However, the Claimant only had \$1,544 in T4 earnings in 2016, which came from his film industry work. The Claimant also had gross business income in of \$20,114 and net business income of \$3,541 in 2016.¹⁹ This supports the Claimant's hearing evidence that he had expenses and his employment was not substantially gainful when he worked with the non-profit organization. I know that the Claimant earned \$14,826 in 2017 in the film industry, but I do not have an exact figure for how much he earned with the non-profit organization. The Minister has the onus of proving that the

¹⁶ See 68.1 *CPP Regulations*

¹⁷ The maximum amount the Claimant could have received as a disability pension in 2015 was \$15,175

¹⁸ See GD2-21

¹⁹ See GD2-64-66

Claimant stopped being disabled under the CPP, and it is difficult for the Minister to prove its case when income information is lacking in the file for a given year when the Claimant alleged engaged in substantially gainful employment.

[34] I have already determined that the Claimant's work was irregular and accommodated. This finding is supported by two letters contained in the Tribunal file from the non-profit organization that the Claimant worked at from 2015 to 2018. These letters stated that the Claimant's disability restricted his ability to work and perform all duties, the Claimant had a flexible work schedule, and his medical condition hampered his ability to communicate because of sleeplessness.²⁰ Despite these limitations, his employer was flexible because they wanted to offer the Claimant the opportunity to work with his disability.

[35] The Minister failed to prove on a balance of probabilities that the Claimant ceased being disabled under the CPP.

CONCLUSION

[36] The appeal is allowed.

George Tsakalis
Member, General Division - Income Security

²⁰ See GD2-22-23