



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *B. H. v Minister of Employment and Social Development*, 2020 SST 535

Tribunal File Number: GP-19-248

BETWEEN:

**B. H.**

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: George Tsakalis

Claimant represented by: Brian Frerichs

Teleconference hearing on: May 26, 2020

Date of decision: May 28, 2020

## **DECISION**

[1] B. H. is the Claimant in this case. The Minister of Employment and Social Development (the Minister) granted the Claimant a Canada Pension Plan (CPP) disability pension with a date of onset of February 2009.

[2] The Minister stopped paying the disability pension. It took the position that the Claimant stopped having a disability under the CPP as of September 30, 2012.

[3] The Claimant appealed the Minister's decision to the Social Security Tribunal (the Tribunal).

[4] I am allowing the Claimant's appeal. I find that the Minister should not have stopped paying the Claimant's disability pension.

[5] These reasons explain why.

## **OVERVIEW**

[6] The Claimant was born in 1960. She has a Grade 10 education. She worked as a gravel truck driver until she had a stroke in November 2008. She stopped working. She applied for a CPP disability pension, which the Minister granted.

[7] The Claimant tried rehabilitation after her stroke. She got her driver's licence back. She contacted the Minister and advised that she was returning to work in June 2011. She worked with her previous employer as a truck driver.

[8] The Claimant worked from June to November 2011, when the construction season ended. She told the Minister working caused fatigue. The Minister allowed the Claimant to keep her CPP disability benefits for the period when she worked in 2011 because she had not completed a work trial. The Minister asked the Claimant to contact it if she returned to work in 2012 and made more than \$5,000.00.<sup>1</sup> The Claimant earned \$24,171.00 with her previous employer in 2011. The Minister allowed her to continue receiving her CPP disability pension in 2011 because she did not complete her work trial.

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<sup>1</sup> See GD6-7

[9] The Claimant worked in 2012. The Minister reviewed her file and learned that the Claimant earned \$10,130.00 from a trucking company and \$13,301.00 from a municipality in 2012. The Minister asked the Claimant for more information about her 2012 earnings.<sup>2</sup> The Claimant completed questionnaires at the Minister's request in July and August 2014.

[10] The Claimant advised the Minister in the questionnaires that her condition remain unchanged in 2012. She was still recovering from her stroke and had developed heart problems.<sup>3</sup> She acknowledged working in 2012, but the work overwhelmed her.<sup>4</sup>

[11] The Minister told the Claimant that it was stopping her CPP disability benefits in a letter dated January 19, 2015. The Minister took the position that the Claimant began working for the trucking company in December 2011 and performed regular gainful work from June 2012 to August 2012. She also performed seasonal work for a municipality from August to December 2012. The Claimant earned \$23,431.00 in 2012. The Minister concluded that the Claimant was no longer disabled under the CPP. The Minister terminated her CPP disability benefits as of September 30, 2012. The Minister informed the Claimant that she owed CPP \$18,287.64 for disability benefits that she received from October 2012 to June 30, 2014.<sup>5</sup>

[12] The Claimant argued that all her work attempts after her stroke failed and she can never work again.<sup>6</sup>

## **ISSUE**

[13] Did the Minister prove that the Claimant stopped having a disability under the CPP after September 30, 2012?

## **ANALYSIS**

[14] The Minister has to prove that it is more likely than not that the Claimant stopped having a disability under the CPP after September 30, 2012.<sup>7</sup>

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<sup>2</sup> See GD6-8

<sup>3</sup> See GD2-168

<sup>4</sup> See GD2-172

<sup>5</sup> See GD2-54

<sup>6</sup> See GD1-1-2

[15] In order to have a disability under the CPP, the disability must be both 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 or is likely to result in death.<sup>8</sup>

[16] The Minister relies on the Claimant's earnings to establish that she regained the capacity to regularly pursue substantially gainful employment.

***The Claimant earnings do not show that she stopped having a severe disability under the CPP.***

[17] I agree that significant earnings can show that a claimant has regained the capacity to regularly pursue substantially gainful employment. But it is one factor that I have to consider. The determination of whether a claimant's employment is substantially gainful cannot be decided by a one-size fits all approach. Each case should be assessed on its own specific facts.<sup>9</sup>

[18] The Claimant gave evidence. She received help from her former common-law partner at the hearing because of her memory issues.

[19] The Claimant testified that she dropped out of school in Grade 10. She worked as a warehouse employee. She worked as a bus driver. She then worked as truck driver from September 2005 to November 2008, when she had a severe stroke. She had to relearn how to use the washroom. She lost all of her regular and commercial driver's licences.

[20] The Claimant collected long-term disability benefits after her stroke. Her private insurance company told her to apply for a CPP disability pension after her long-term disability benefits expired.

[21] The Claimant wanted to return to work. She got her regular driver's licence back in 2010. Her examiner did not believe that she would be able to drive a bus again because of her medical condition. But she eventually got her licence back to drive a gravel truck.

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<sup>7</sup> See *Atkinson v. Canada (A.G.)*, 2014 FCA 187

<sup>8</sup> See paragraph 42(2)(a) *Canada Pension Plan*

<sup>9</sup> See *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.

[22] The Claimant testified that she never fully recovered from her stroke. The Claimant completed a questionnaire in support of her CPP disability application in 2010. She stated on her questionnaire that she had problems with her attention. She had severe cognitive and problem solving skills. She had difficulty concentrating. She had problems with sitting, standing, walking, lifting, bending, sleeping, driving, and completing her household tasks.<sup>10</sup> The Claimant testified that she still has these impairments. She still has problems with her short-term memory.

[23] The Claimant testified about her work efforts after her stroke. I do not consider the Claimant's work after her stroke as evidence of capacity to regularly work at a substantially gainful occupation. Instead, I view them as failed return to work efforts.

[24] A summary of the Claimant's return to work efforts after her stroke are set out below:

- In June 2011, she returned to work with her previous employer as a gravel truck driver. She found stressful. Driving caused her anxiety. She suffered from poor concentration and frequently had an urgent need to go to the washroom. She was laid off in November 2011, when the construction season ended.
- The Claimant testified that she returned to her job with the trucking company in May 2012. She continued to struggle. Her employer offered her accommodation. She did not have to work more than six hours per shift. She still had to quit this job for medical reasons in August 2012.
- The Claimant testified that she began working as a labourer for a municipality in August 2012. She stopped working there in December 2012. She was hired in the road maintenance department. But her position was modified. She was not allowed to operate equipment. The person who hired her knew her and was aware of her condition. This was supposed to be a full-time position, but she was generally not given full-time hours. Her boss gave her light cleaning duties. However, she still struggled with this job. She was laid off at the end of the work season. She moved from that community and did not return to this job.

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<sup>10</sup> See GD2-222-229

- She also worked in 2016 or 2017 at a school bus company as an attendant. She did not drive a bus. She watched over children who had behavioural problems. She quit this job because the school board terminated its contract with her employer, and she was also repeatedly assaulted on this job.

[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.<sup>11</sup> In this case, it is important to look at the Claimant's medical condition and functional limitations, her work history, and her work conditions and circumstances.

[26] I am satisfied that the Claimant's employment after her stroke has been accommodated and irregular.

[27] The trucking company issued a Record of Employment that said that she worked from December 2011 to August 2012. The Claimant's former common-law partner thought that many of those hours were "banked hours". The Record of Employment shows that the Claimant worked very nominal hours until May 2012. The Record of Employment shows that the Claimant generally worked par-time hours before she quit this job in August 2012.

[28] The Record of Employment issued by the municipality seems to show that she worked close to full-time hours from August to December 2012. But I do not consider this to be a successful work attempt. The Claimant found it difficult to work at this job. The Minister relies on the fact that municipality issued the Record of Employment because the work season had ended. This suggests that the Claimant did not leave this job for medical reasons. The Claimant testified that she would have tried to return to this job if she had not moved to another municipality.

[29] The Minister also relied on a questionnaire completed by the municipality to support its position that the Claimant stopped having a disability under the CPP. The employer advised the Minister that the Claimant did not have any special arrangements at work.<sup>12</sup> However, I do not place much weight on this document. The Minister asked the municipality of the Claimants'

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<sup>11</sup> See *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

<sup>12</sup> See GD2-156-158

work was unsatisfactory because of her medical condition. The municipality replied that it did not know the answer to this question. It had lost the Claimant's file.

[30] I do not believe that the Claimant was able to work in a real world context since her 2008 stroke. I accept her hearing evidence that she lacks arm strength and her ability sit or stand is limited. I also believe that she has severe cognitive problems that stop her from performing substantially gainful employment.

[31] The Claimant testified that she might have reapplied for a job with the municipality had she not moved. But I do not believe that the Claimant could realistically have continued working as a labourer because of her severe impairments. I believe the Claimant engaged in wishful thinking when she testified about her work abilities. She acknowledged at her hearing that she worked with tremendous difficulty after her stroke. I do not believe that any of her return to work efforts were successful.

[32] I find that the Minister failed to prove that the Claimant's earnings after her stroke showed that she regained the capacity to regularly pursue substantially gainful employment.

***The Minister failed to show that the Claimant stopped being disabled under the CPP after September 30, 2012.***

[33] I have considered the entire context of the Claimant's condition and ability to work since her 2008 stroke.

[34] 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 stopped being disabled under the CPP.

[35] The Claimant's medical records showed that she had a stroke in 2008. Her family doctor completed a medical report for the Minister in June 2010. The Claimant still suffered from left sided weakness. The Claimant had rehabilitation but she had been deemed unable to drive a truck.<sup>13</sup>

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<sup>13</sup> See GD2-203 and 215-218

[36] The Claimant advised the Minister in July 2014 that her condition remained unchanged and she had developed a heart condition.<sup>14</sup>

[37] The Claimant's family doctor provided clinical notes from 2012 and 2013. The Claimant complained of hip pain in 2012 and he saw the Claimant in 2013 for a driver's medical.<sup>15</sup> The Claimant may not have seen her family doctor frequently in 2012 and 2013. But I do not place much significance on this. The Claimant's family doctor stated in June 2010 that her condition had plateaued.<sup>16</sup> I do not believe that the Claimant's medical condition ever improved to the point where she could regularly engage in substantially gainful work.

[38] I also found the Claimant to be a credible witness. She had difficulty giving testimony and had problems remembering dates. Her former common law spouse had to fill in details for her. I am satisfied that the Claimant still suffers from severe impairments because of her stroke.

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

[40] The Claimant earned more in 2012 than the substantially gainful amount under Ministry guidelines.<sup>17</sup> However, I do not believe that this fact by itself is enough to show that the Claimant stopped being disabled under the CPP. I do not believe that the Claimant's work efforts in 2012 were successful. In addition, the Claimant earned much more than the substantially gainful amount in 2011. But the Minister allowed her to keep her disability benefits that year. I do not see much of a difference in the Claimant's circumstances in 2011 and 2012. She earned roughly the same amount of income and she struggled while working.

[41] It seems that the Minister had a policy in place that claimants could keep their CPP disability benefits if they did not pass a work trial. However, the Minister's policies or guidelines do not bind me. What binds me is the working of the legislation and judicial decisions that have looked at the definition of a disability under the CPP. I do not believe that the Claimant ever

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<sup>14</sup> See GD2-167-173

<sup>15</sup> See GD2-114-116

<sup>16</sup> See GD2-218

<sup>17</sup> The substantially gainful amount under the Minister's guidelines in 2012 was \$11,840.00.



regained the capacity to regularly pursue a substantially gainful occupation after her stroke. She worked sporadically, irregularly, and unsuccessfully after her stroke.

[42] I find that the work that she performed for the school bus company was not substantially gainful. Her return to work effort ended in failure because she could not handle the job. She also earned less than the substantially gainful amount at this job in 2016 and 2017.

[43] I find that the Minister failed to prove on a balance of probabilities that the Claimant stopped being disabled under the CPP.

## **CONCLUSION**

[44] The appeal is allowed.

George Tsakalis  
Member, General Division - Income Security