



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *AC v Minister of Employment and Social Development*, 2020 SST 989

Tribunal File Number: GP-19-1339

BETWEEN:

A. C.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Videoconference hearing on: October 22, 2020

Date of decision: October 26, 2020

DECISION

[1] The Claimant has not qualified for the Canada Pension Plan (“CPP”) disability pension since August 1, 2012. However, this does not necessarily rule out remission of the resulting overpayment by the Minister. The Claimant would need to pursue this directly with the Minister, as remission falls outside the Tribunal’s jurisdiction. Any appeal of the Minister’s remission decision would be to the Federal Court of Canada.

OVERVIEW

[2] The Claimant has treatment-resistant schizophrenia and a mild intellectual disability (“MID”). He lives with his wife in an assisted-living facility. He applied for CPP disability benefits in December 2010. The Minister approved his application, and benefits commenced with the August 2010 payment. However, effective medication enabled the Claimant to return to part-time work at the end of 2011. He still has the same job, and his hours have been essentially full-time. He said he was unaware of any CPP reporting requirements, but reported his earnings to the Ontario Disability Support Program (“ODSP”) and filed annual tax returns with the Canada Revenue Agency (“CRA”). For many years, the Minister was not aware of the Claimant’s significant earnings and continued paying him CPP disability benefits.

[3] In 2017, the Claimant married. He informed both the ODSP and the CPP of his new marital status. The Claimant made persistent efforts to find out the impact on his benefits. The Minister finally investigated, and suspended payments until the investigation was over. Finally, in February 2019, the Minister decided that the Claimant ceased having a severe disability in 2012. Allowing for a brief return-to-work trial, the Minister said the Claimant was not entitled to receive a CPP disability pension after July 31, 2012. However, the Claimant had received a disability pension up to the end of September 2018. As a result, the Minister claimed a \$60,717.14 overpayment from the Claimant. On reconsideration, the Minister upheld that decision. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[4] To continue receiving a CPP disability pension, the Claimant must meet the requirements set out in the CPP. In particular, he must continue having a severe and prolonged disability.¹ He

¹ These definitions appear in paragraph 42(2)(a) of the *Canada Pension Plan*.

cannot receive a CPP disability pension if he is no longer disabled.² The CPP also says that a pension recipient must repay any benefits to which he was not entitled.³

PRELIMINARY MATTERS

[5] Although the Claimant's father, M. C., was listed as the Claimant's representative, I allowed him to give evidence at the hearing. Mark was not acting as a true legal representative. I considered him an "administrative" representative, who was helping with his son's paperwork. This is particularly important because of the Claimant's conditions. He has a MID, and stressful situations worsen his schizophrenia. For clarity, I have generally attributed submissions from the Claimant's father to the Claimant himself.

[6] The Minister filed an updated earnings summary (indexed as "GD6") on October 7, 2020. I elected to admit the document into evidence, as it confirmed the Claimant's earnings up to the current month. In this respect, it was potentially highly relevant. The Claimant also had an opportunity to review GD6 before the hearing.

ISSUES

[7] Did the Claimant continue to have a severe and prolonged disability after July 31, 2012?

[8] If not, is the Claimant obligated to repay the overpayment?

ANALYSIS

[9] The CPP defines "disability" as a physical or mental disability that is severe and prolonged.⁴ The Claimant's disability is severe if he is incapable regularly of pursuing any substantially gainful occupation. His disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death. He must prove, on a balance of probabilities, that his disability meets both parts of the test. If he meets only one part, he does not qualify for disability benefits.

² Subsection 70(1) of the *Canada Pension Plan*.

³ Subsections 66(1) and (2) of the *Canada Pension Plan*.

⁴ Paragraph 42(2)(a) of the *Canada Pension Plan*.

Did the Claimant continue to have a severe and prolonged disability after July 31, 2012?

[10] I must assess the severe part of the test in a real-world context.⁵ This means that when deciding whether the Claimant's disability is severe, I must remember factors such as his age, level of education, language proficiency, and past work and life experience. He was only 25 years old in 2012. He speaks English fluently. While he has a high school education, he was always in a modified program due to his MID.⁶ His work history appears to consist mainly of maintenance and custodial jobs. Without considering his medical conditions, I find he would only be suited to the type of work that he has already done.

[11] I must also assess the Claimant's condition in its totality. This means I must consider all possible impairments, not just the biggest or main impairment.⁷ In this case, the Claimant has both schizophrenia and a MID.

[12] At the hearing, I was impressed with the Claimant's presentation. He carefully considered and answered my questions. He has done very well to maintain the same job for nearly nine years.⁸ His family is very proud of him. I also acknowledge the repeated references his integrity and honesty, made by both his father and Dr. Northcott (Psychiatry).⁹ I will now decide whether his disability was still severe after July 31, 2012.

The Claimant's disability was not severe after July 31, 2012

[13] The measure of whether a disability is "severe" is not whether the Claimant suffers from severe impairments, but whether the disability prevents him from earning a living.¹⁰ This distinction is extremely important. I accept that he has schizophrenia, which is a serious condition. He also has a MID. His father said only 5% of people with schizophrenia can maintain steady work.¹¹ I have no reason to doubt this figure. However, I must look at the Claimant as an individual, rather than at his diagnoses.

⁵ *Villani v. Canada (A.G.)*, 2001 FCA 248

⁶ GD2-85

⁷ *Bungay v. Canada (A.G.)*, 2011 FCA 47

⁸ See, for example, GD1-7, GD2-66, GD2-84, GD2-85, and GD4-4

⁹ GD1-8, GD2-84, and GD4-4.

¹⁰ *Klabouch v. Canada (A.G.)*, 2008 FCA 33

¹¹ GD2-85

[14] The Claimant has had the same job for nearly nine years. His earnings over that time have been significant:

<u>Year</u>	<u>Earnings</u> ¹²
2011	\$2,876.00
2012	\$17,981.00
2013	\$21,855.00
2014	\$22,842.00
2015	\$24,957.00
2016	\$27,263.00
2017	\$28,087.00
2018	\$31,415.00
2019	\$29,884.00

[15] The definition of “severe” requires that the Claimant be incapable regularly of pursuing any substantially gainful occupation. However, he has been capable regularly of pursuing work since the end of 2011. Nobody has suggested that he has a benevolent employer. In fact, his employer is not even aware of his condition.¹³

[16] As for whether the Claimant’s work has been “substantially gainful,” the *Canada Pension Plan Regulations* (the “Regulations”) provide guidance. Since June 2014, “substantially gainful” is equal to the maximum annual amount a person could receive as a disability pension.¹⁴ Those maximum annual amounts are:

<u>Year</u>	<u>Maximum Annual CPP Disability Pension</u>
2014	\$14,836.00
2015	\$15,175.08
2016	\$15,489.72
2017	\$15,763.92
2018	\$16,029.96
2019	\$16,347.60
2020	\$16,651.92

[17] The Claimant’s earnings far exceed the “substantially gainful” threshold for each year since 2014. Before 2014, the Regulations did not define “substantially gainful”. However, his 2012 and 2013 earnings exceeded each later threshold for “substantially gainful”, even without

¹² See GD5-10 and GD6-2

¹³ GD2-91 and GD2-96

¹⁴ Section 68.1 of the *Canada Pension Plan Regulations*

adjusting for inflation. Given his steady earnings, I cannot see how he could be severely disabled after July 31, 2012. He has also been working 30-40 hours per week.¹⁵

[18] The Claimant has also clearly displayed work capacity since late 2011. When there is evidence of work capacity, a CPP disability pension recipient must show that efforts at obtaining and maintaining employment have been unsuccessful because of his health condition.¹⁶ The Claimant has not done this. In fact, his efforts at obtaining and maintaining employment have been very successful despite his conditions.

[19] If any additional evidence were necessary, I would refer to Dr. Northcott. She has been the Claimant's specialist since 2010, and has enjoyed success in treating his schizophrenia. In December 2018, she said she was "unaware and surprised" that he qualified for CPP. She thought he might have qualified in 2010-2011, as he had two hospital admissions in 2010, but he has not been admitted since then.¹⁷ His father acknowledged in January 2019 that the Claimant should no longer receive a CPP disability pension as "he doesn't need it anymore."¹⁸ His father became aware of this possibility during a summer 2017 meeting with an ODSP caseworker.¹⁹

[20] I find that the Claimant has not been severely disabled since July 31, 2012. As a result, I do not need to decide whether he still has a prolonged disability. I will now look at the obligation to repay the overpayment of his CPP disability benefits.

Is the Claimant obligated to repay the overpayment?

[21] For the reasons set out below, the Claimant has an obligation to repay the overpayment. While the remission provisions in the *Canada Pension Plan* may ultimately waive some or all of that obligation, the Tribunal does not have the jurisdiction to make a ruling on that issue.

[22] The Claimant's submissions focused heavily on the repayment issue. He argues that he should not have to repay the overpayment. He has limited financial means and works for minimum wage. He lives in geared-to-income housing, where he has extensive supports. His

¹⁵ GD2-66, GD2-91, GD2-96, and GD2-108

¹⁶ *Inclima v. Canada (A.G.)*, 2003 FCA 117

¹⁷ GD2-82

¹⁸ GD2-76

¹⁹ GD1-7

wife also has schizophrenia, and she was recently diagnosed with multiple sclerosis. Their rent increased when they married. Schizophrenia does not go away, and relapse is an ongoing fear. He is also concerned that, if he relapses, any remaining overpayment would be deducted from his disability pension. That would deprive him of the pension when he needed it most.

[23] The Claimant suggests that the Minister's failure to clearly communicate his reporting obligations caused the large overpayment. He says he would have reported his earnings to the Minister, had he been aware of the obligation. This would likely have ended the CPP disability pension much earlier, and he wouldn't face such a large overpayment now. He adds that he was regularly reporting earnings to ODSP, and filed annual tax returns that disclosed his employment income. To the extent that any reporting to the Minister was necessary, he suggests (as does Dr. Northcott) that reporting to ODSP and the CRA should have sufficed.²⁰

[24] The Claimant says the CPP and ODSP applications were filed on his behalf at about the same time. They were prepared by psychiatric nurses, rather than the Claimant, as his illness was in an acute stage.²¹ He said he did not understand the separation between the provincial ODSP and the federal CPP.²² He said it was reasonable to expect that the (federal) CRA would share information with the federal department responsible for the CPP.

[25] The Minister said the Claimant's obligation to report income starting in 2011 was clear. The Minister said this was set out in the original CPP disability award letter, the "post-grant" letter sent about a year after disability payments began, and the "Staying in Touch" newsletter included with his T4A slip every February. The Minister purported to include these documents with the May 2019 reconsideration decision, but the Tribunal file only appears to contain a sample of the "post-grant" letter.²³ At the hearing, neither the Claimant nor his father recalled seeing the newsletters the Minister claims were sent annually with the Claimant's T4A slip.

[26] In my view, section 70.1 of the *Canada Pension Plan Regulations* is clear about the Claimant's obligation: a CPP disability recipient must inform the Minister, without delay, of any

²⁰ GD1-7, GD2-67, GD2-75 to GD2-76, GD2-82, GD2-84, and GD4-4

²¹ GD1-6, GD1-8, and GD4-3

²² The Claimant said this at the hearing. However, the confusion went as far back as January 2011, when the Claimant mistakenly sent the Minister materials that should have been sent to the ODSP. See GD2-33 and GD4-4.

²³ GD2-12 to GD2-18

return to work. The Tribunal has also previously said that the Minister does not need to remind a recipient of this, and that signing the CPP disability application also acknowledges the obligation to report a return to work.²⁴ The Claimant suggests he did not know what he was signing. However, even if that were true, section 70.1 would still apply to him. Being unaware of the law is not a complete defence.

[27] Due to his schizophrenia and MID, the Claimant also thought it was unreasonable for him to fully understand the reporting obligations. Dr. Northcott confirmed his difficulties with verbal learning and comprehension, although she also said he was financially capable from a legal perspective. She believed any mistake would have been an honest one: he would have been either uninformed or did not appreciate the need to report to CPP as well.²⁵ Nonetheless, this does not assist the Claimant. The statutory obligation remains.

[28] While I have sympathy for the Claimant's situation, there appears to be only one way to address the repayment. This would involve the Minister's "remission" of the overpayment.

Remission of the Overpayment

[29] Subsection 66(3) of the *Canada Pension Plan* says that, under certain circumstances, the Minister can "remit" part or all of an overpayment. This means the benefit recipient is no longer responsible for the part of the overpayment that has been "remitted". The Minister can remit part or all of an overpayment in four situations. Those situations are when: (1) the overpayment cannot be collected within the reasonably foreseeable future, (2) the costs of collecting the overpayment are likely to equal or exceed the amount to be collected, (3) repayment would cause undue hardship, or (4) the overpayment is the result of the Minister's erroneous advice or administrative error.²⁶

[30] The Claimant says some of those grounds may apply to him. However, remission is considered an exercise of the Minister's discretion. This means that the Tribunal does not have the jurisdiction to order the remission of the overpayment. The Tribunal is created by statute, and

²⁴ See the Tribunal's persuasive Appeal Division decision in *Minister of Human Resources and Skills Development v. E.D.*, 2014 SSTAD 122, (2014) CP 29015.

²⁵ GD2-82, GD2-84, GD4-3, and GD4-4

²⁶ Subsection 66(3) of the *Canada Pension Plan*

its powers are limited to the powers set out in the enabling statute.²⁷ The Claimant must raise the remission issue directly with the Minister. If he is unhappy with the Minister's discretionary ruling on remission, his recourse is a judicial review application to the Federal Court.²⁸ The Tribunal cannot help him with this, or even offer an opinion on whether he would be successful.

[31] Besides subsection 66(3), one other CPP provision mentions administrative error and erroneous advice by the Minister. However, as it only applies when the error caused the denial of a benefit that should have been paid, it does not help the Claimant.²⁹ That is not what happened here. In this case, any error by the Minister resulted in the payment of a benefit, rather than the denial of a benefit.

CONCLUSION

[32] The appeal is dismissed. The Claimant was not entitled to receive a CPP disability pension after July 31, 2012. An overpayment has resulted, and the Tribunal does not have the authority to waive the repayment obligation. The Claimant's recourse appears to be pursuing remission directly with the Minister. Any dispute with the Minister's remission decision would require an application to the Federal Court.

Pierre Vanderhout
Member, General Division - Income Security

²⁷ See the Supreme Court of Canada's decision in *R. v. Conway*, 2010 SCC 22

²⁸ See the Federal Court of Appeal's decision in *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

²⁹ Subsection 66(4) of the *Canada Pension Plan*,