



Citation: *DA v Minister of Employment and Social Development*, 2021 SST 703

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: D. A.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 15, 2019 (issued by
Service Canada)

Tribunal member: Tyler Moore

Type of hearing: Teleconference

Hearing date: September 22, 2021

Hearing participant: Appellant

Decision date: October 19, 2021

File number: GP-19-1879

Decision

[1] The appeal is dismissed.

[2] The Claimant, D. A., did not continue to be eligible for a Canada Pension Plan (CPP) disability pension after August 31, 2012. This decision explains why I am dismissing the appeal.

Overview

[3] The Claimant is 51 years old. She first applied for a CPP disability pension in November 1993, after stopping work as a pastry chef because of chronic fatigue syndrome. She stopped working in March 1991. In May 1994, she was granted a CPP disability pension with a date of onset of August 1992. In April 2003, she reported a return to work. In May 2003, a decision was made to continue her CPP disability pension payments. She was also reminded of her ongoing income reporting responsibilities.

[4] In June 2017, a re-assessment of the Claimant's eligibility for a CPP disability pension was initiated by the Minister. This was done based on business earnings the Claimant had between 2004 and 2016 that were not reported.

[5] In January 2019, the Minister of Employment and Social Development (Minister) decided to stop the Claimant's CPP disability pension. The Minister based this on the fact that the Claimant had returned to gainful work in May 2012. Because income tax records cannot be expected to be kept for more than 8 years, the Minister did not review earnings before 2011. The Claimant was also allowed a 3 month work trial period beginning June 1, 2012 and ending August 31, 2012. Her pension ceased to be effective as of September 1, 2012.

[6] The Claimant argues that it would be impossible for her to be able to repay the CPP disability pension she received after August 31, 2012. She was under the impression from Service Canada after conversations in 2004 and 2007, that it was her net income and not her gross income that was considered. Based on the conversations

she reported that she had with Service Canada, she pursued a small business opportunity.

[7] The Minister says that the Claimant was no longer eligible to receive a CPP disability pension after August 31, 2012. She was able to secure work despite her limitations. She started her own landscaping company in 2004 and she earned substantial gross business income from it. She owned the business, took breaks as needed, and set her own work schedule. The Claimant had also been reminded twice a year about her reporting and return to work responsibilities while receiving a CPP disability pension. There was no indication that those notices were undeliverable. There was also no record of any conversation between the Claimant and Service Canada in 2004. There was a record of a conversation in 2007, but the call log indicates that it was only to change her address and discuss a duplicate T4.

[8] The Minister refused the Claimant's request for reconsideration to cease her CPP disability pension. She appealed the Minister's decision to the Social Security Tribunal's General Division.

Issues

[9] Did the Claimant cease to be disabled within the meaning of the CPP after August 31, 2012?

[10] Does the SST have jurisdiction to review the Minister's decision that the Claimant must repay the disability pension payments she received after August 31, 2012?

Analysis

[11] The onus is on the Minister to prove that it is more likely than not that the Claimant ceased to be disabled because the eligibility requirements for a CPP disability pension were no longer met at the time her CPP disability benefits were terminated.¹

¹ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

[12] Disability is defined as a physical or mental disability that is both severe and prolonged. The *Canada Pension Plan* defines “severe” and “prolonged.”

[13] A disability is **severe** if it makes a Claimant incapable regularly of pursuing any substantially gainful occupation.²

[14] If the Claimant was able to regularly do some kind of work that she could earn a living from, then she wasn’t entitled to a disability pension.

[15] A disability is **prolonged** if it is likely to be long continued and of indefinite duration, or is likely to result in death.³

[16] This means the Claimant’s disability can’t have an expected recovery date. The disability must be expected to keep the Claimant out of the workforce for a long time.

Reasons for my decision

[17] I find that the Claimant did not continue to meet the criteria for a severe and prolonged disability after August 31, 2012. I reached this decision by considering the following issues:

- Did the Claimant’s disability continue to be severe?
- Did the Claimant’s disability continue to be prolonged?

[18] I find that the Minister has established that it is more likely than not that the Claimant no longer met the definition for a severe and prolonged disability after August 31, 2012.

The Claimant was not incapable regularly of pursuing any substantially gainful occupation as of September 1, 2012

[19] The Claimant’s disability didn’t continue to be severe, as defined by the CPP after August 31, 2012. I explain the factors that I have considered below.

² Section 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.

³ Section 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[20] From 2000 to 2003, the Claimant worked part-time at a greenhouse for X. She worked seasonally for one of her former landscaping teachers. That business closed permanently in 2004.

[21] The Claimant argues that she called Service Canada in July 2004 after a few previous clients from X. wanted her to continue doing landscaping work for them. She testified that she was advised by Service Canada at the time that she could do the work as long as she didn't make more than the yearly earnings cut-off. There is no record of that 2004 conversation. There is, however, record of correspondence between the Claimant and Service Canada in 2003. The Minister confirmed the Claimant's earnings reporting responsibilities at that time.

[22] I have to decide whether the Claimant was able to regularly work after August 31, 2012. For her disability to have continued to be severe, her functional limitations must have prevented her from earning a living at any type of work, not just her usual job.⁴

[23] The Minister argues that the Claimant operated a self-employed landscaping company called 'X' since July 2004. On May 13, 2003, she was informed by way of letter that she needed to report her earnings once they reached a gross income of \$3900. That was the earnings cut-off for that year. The Claimant's gross self-employed earnings in 2012 were \$30,175, in 2013 they were \$36,348, in 2014 they were \$33,418, in 2015, they were \$33,923, and 2016 they were \$27,153.01. According to the Claimant, her net earnings were only about a third of her gross business income.

[24] The Claimant submitted that her role in her landscaping business was limited because of her health condition. After she started the business in 2004, word of mouth did travel and her client base grew. She reported that she was trying to build her business so that she wouldn't have to rely on the government for support. According to her testimony, she generally worked more than 20 hours each week until the end of 2016. In 2016/2017, she spent less time working on her business because her parents were in the hospital and she was visiting/assisting them regularly. She tried to maintain

⁴ See *Klabouch v Canada (Attorney General)*, 2008 FCA 33.

her regular clients, but she had to rely on friends and family to do the majority physical work for her. She did not work at all after 2017. Her health condition deteriorated in 2018 and she could barely walk.

[25] The Claimant's business was seasonal and she only worked between April and October/November. She bought bulk landscaping materials/plants and then she would hire young labourers to do the heavy physical work. She shaped, designed, and maintained gardens for clients. She supervised her labourers, provided them with instruction, did administrative duties, and went to garden centres to pick out plans/trees, or order items from tree farms. She didn't work when she didn't feel up to it.

[26] In the off-season, the Claimant didn't do any other work at all. She spent each off-season with her parents at a trailer they owned in California. She visited friends there in her golf cart, did some golfing, and helped her parents with duties around the trailer. Her parents fell ill after 2009, and she supported them as much as she could. They sold the trailer in 2018 after her father passed away.

[27] If a person who has who has been determined to be disabled within the meaning of the CPP returns to work, the person shall so inform the Minister without delay.⁵ The Claimant confirmed that she received regular communications from Service Canada and that they included her reporting responsibilities for earnings. Unfortunately, there is no evidence that she advised Service Canada when her employment status changed from a part-time employee at X, to running her own landscaping business in 2004. Again, there is a record that she had contact with Service Canada in 2003, but that was before she started her own business.

[28] I recognize that the Claimant's health condition is chronic, and she continues to have limitations. She submitted that she has not been able to do any work since 2017. She suffers from chronic fatigue/fibromyalgia, muscle pain, irritable bowel, and pain secondary to scoliosis. In March 2018, she lost her mobility and was hardly able to walk.

⁵ Paragraph 70(1) CPP Regulations

[29] The Claimant was not taking any regular medications between 2012 and 2017. She has an irritable bowel, and so her medication options were limited. She tried acupuncture, chiropractic, prolotherapy, and some physiotherapy. She started a specific therapy for scoliosis in 2018. She would swim in her parent's pool for exercise in the summer. She lived alone in a house and looked after the home maintenance and housekeeping duties. Her house was not as clean as she would have liked it. She could drive.

[30] I recognize that the Claimant had help from staff and friends to run her landscaping business. I find, however, that her gross earnings were substantially gainful between at least 2012 and 2017. The Claimant testified that she worked at least 20 hours per week on the business and that her time was divided between supervising, shopping/ordering product, working with clients, and doing some labour as she felt up to it.

[31] Based on the evidence at hand, I find that it is more likely than not that the Claimant capable regularly of substantially gainful work after August 31, 2012.

The Tribunal cannot review a Minister's decision about a pension repayment

[32] Where a person has received a benefit payment to which they are not entitled, the Minister may, in certain circumstances remit all or any portion of the amount the person received to which they were not entitled.⁶

[33] It is outside of my jurisdiction as a Tribunal member to review a decision of the Minister regarding the remission of an overpayment.⁷ The only remedy that is available to the Claimant in this case is to apply to the Federal Court for judicial review of the Minister's decision.

[34] The Minister may remit all or any portion of the overpayment, but I cannot.

⁶ Section 66(3) CPP

⁷ *Canada (MHRD) v. Tucker*, 2003 FCA 278 and *Nanka v. Canada (Attorney General)*, 2018 FC 959

Conclusion

[35] I find that the Claimant wasn't eligible for a CPP disability pension after August 31, 2012. She did not continue to meet the criteria for a severe disability. She was capable regularly of substantially gainful work. Because I have found that her disability did not continue to meet the definition of severe, I didn't have to consider whether it continued to be prolonged.

[36] This means the appeal is dismissed.

Tyler Moore

Member, General Division – Income Security Section