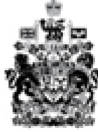

Citation: *SI v Minister of Employment and Social Development*, 2022 SST 1237

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant): S. I.
Representative: G. I.

Respondent: Minister of Employment and Social Development
Representative: Jared Porter

Decision under appeal: General Division decision dated January 6, 2022 (GP-21-752)

Tribunal member: Kate Sellar

Type of hearing: Videoconference
Hearing date: July 21, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative
Decision date: November 14, 2022
File number: AD-22-228

Decision

[1] I am allowing the Claimant's appeal. The General Division made an error. I will give the decision that the General Division should have given: the Minister did not prove that the Claimant stopped being entitled to a disability pension under the *Canada Pension Plan* (CPP). The Claimant continued to be disabled in July 2016 when the Minister stopped the disability pension.

Overview

[2] S. I. (Claimant) worked as a pharmacist until January 2010. He stopped working due to chronic back pain. He applied for a CPP disability pension in August 2010. The Minister of Employment and Social Development (Minister) approved his application effective January 2010.

[3] The Minister stopped (ceased) the Claimant's disability pension payments effective July 31, 2016. The Minister decided that the Claimant's earnings in 2016, 2017, and 2018 were substantially gainful and that his disability was no longer severe within the meaning of the *Canada Pension Plan* (CPP).

[4] At the reconsideration stage, the Minister did not change its decision to stop the pension. The Claimant appealed the Minister's reconsideration decision to this Tribunal.

[5] The General Division decided that the Claimant stopped being disabled within the meaning of the CPP in July 2016 when he successfully returned to part-time work as a business consultant for his son's business. The General Division decided that the Claimant's work in his son's business meant that his disability no longer got in the way of earning a living.

[6] I gave the Claimant permission to appeal. Now I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (Act).[1]

[1] See section 58(1) of the *Department of Employment and Social Development Act* (Act).

[7] The General Division made an error of law by failing to apply relevant considerations to the question of whether the Claimant's work for his son was benevolent. I will give the decision that the General Division should have given: the Claimant was still disabled in July 2016 when he started working for his son.

Issues

[8] The issues in this appeal are as follows:

a) Did the General Division make an error of law in its analysis about whether the Claimant's work for his son was benevolent?

b) Did the General Division make an error of fact or an error of law in the way that it analyzed the Claimant's personal circumstances (like his age, ability to communicate in English, education, and work and life history)?

c) Did the General Division make an error of fact by ignoring any evidence about the Claimant's functional limitations that arose after his initial approval (after his fall)?

Analysis

[9] In this decision, I'll describe the approach the Appeal Division takes when reviewing General Division decisions. I'll explain how I've decided that the General Division made an error of law when deciding whether the Claimant's work was benevolent. Then, I'll give the decision that the General Division should have given.

Reviewing General Division decisions

[10] The Appeal Division does not give the Claimant or the Minister a chance to re-argue their case again from the beginning. Instead, the Appeal Division reviews the General Division's decision to decide whether it contains errors.

– A severe disability

[11] A disability pension stops (ceases) to be payable when a claimant stops being disabled.[2]

[12] Only people who have made sufficient contributions to the Canada Pension Plan and who have a severe and prolonged disability can qualify for a disability pension in the first place. A person has a severe disability if they are incapable regularly of pursuing any substantially gainful occupation.[3] Each part of that definition has meaning.[4]

[13] The first question to consider is whether there is a serious medical condition and whether the Claimant has any capacity to work. To figure out if there is capacity to work, the idea is to consider the medical conditions and the functional limitations, the claimant's personal circumstances, and their efforts to manage their conditions through treatment.

[14] The overarching question is always what any of this evidence says about whether a claimant is incapable regularly of pursuing any substantially gainful occupation.

– What is a benevolent employer?

[15] The CPP Disability Adjudication Framework (Framework) is a document published on the Government of Canada's website. It discusses the idea of a benevolent employer. This document explains that people who are working for a benevolent employer can still be severely disabled under the CPP even if they work regular hours and receive income that is "substantially gainful."

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[2] See section 70(1)(a) of the *Canada Pension Plan*.
[3] See section 42(2) of the *Canada Pension Plan*.
[4] See *Villani v Canada (Attorney General)*, 2001 FCA 248 (*Villani*).

[16] The Framework is not binding in the same way that legislation is. However, there is a case from the Federal Court of Appeal that discusses and considers the Framework's definitions of concepts like benevolent employment.[5]

[17] The Court in *Atkinson* stated that the definition of benevolent employer in the Framework is not binding but that it can provide insight into the factors that the tribunal considers when assessing whether a person continues to meet the requirements of the CPP (or whether the person continues to be disabled under the CPP).[6]

[18] The CPP doesn't define the term "benevolent employer."

[19] A benevolent employer varies the conditions of a job and modifies their expectation of an employee in keeping with their limitations. The demands of the job may vary, but the "main difference [is] that the performance, output or product" expected from the Claimant is considerably less than the usual performance output or product expected from other employees.[7]

> A benevolent employer accepts that a claimant has reduced ability to perform at a competitive level. **Working for a benevolent employer is not an "occupation" for the purpose of continuing eligibility for a CPP disability benefit**. Benevolent employment involves accommodations that go beyond what is required of an employer in the competitive marketplace.[8] **(my emphasis)**

[20] In *Atkinson*, the Federal Court of Appeal made it clear that while the Framework definition of a benevolent employer in not binding on the Court, it helped them to understand whether the tribunal's decision about benevolent employment was reasonable.

[21] The Court noted that the tribunal considered whether:

[5] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187 (*Atkinson*).
[6] See paragraph 40 in *Atkinson*.
[7] See paragraph 7 in *Atkinson*, quoting from the CPP Disability Adjudication Framework (Framework).
[8] See again paragraph 7 in *Atkinson*.

- the accommodation went beyond what is required from an employer in the competitive marketplace
- the work was productive
- the employer was dissatisfied with the work performance or experienced hardship from the accommodations[9]

Error of law

[22] The General Division made an error of law by failing to analyze and discuss whether the Claimant's work output, performance, and the work expectations meant that his employment was benevolent. Skipping these important questions about benevolent employment means that the General Division made an error of law: it did not really consider and apply the test for benevolent employment.

– Why benevolent employment was an important issue for the Claimant's appeal

[23] The Claimant may have been in a situation in which, although he earned a substantially gainful income, he still had a severe disability within the meaning of the CPP. In rare circumstances, there may be people who "work" regular hours, and the amount they earn is substantially gainful, but they can still be "incapable" of working.[10] The "work" was benevolent.

– The General Division considered the Claimant's employment

[24] The General Division decided that the Claimant ceased having a severe disability by July 31, 2016 when his disability pension payments stopped. The General Division noted that that despite the Claimant's age and functional limitations, he returned to "part-time sedentary work as a business consultant from April 1, 2016 to March 31, 2019."[11] That work was substantially gainful and did not hurt his back. The Claimant was able to work in the real world, the General Division reasoned.

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[9] See paragraph 40 in *Atkinson*.
[10] This is the wording of the Framework. The parties discussed it during the Appeal Division hearing.
[11] See paragraph 42 in the General Division's decision.

[25] The General Division noted that:[12]

- The Claimant's earnings as a business consultant were substantially gainful.
- The Claimant worked from home.
- The business was family-owned.
- The Claimant's son said the Claimant received a salary from a family business as a way to help him out financially. The family did this out of a sense of appreciation and obligation and there was no way the Claimant could have worked anywhere else.
- The work was sedentary and included providing advice and doing paperwork.
- The Claimant couldn't remember his hours but in the Disability Reassessment Questionnaire, he said he worked 5 hours per day, 4 hours (*sic*) per week. He could tolerate the demands of the job and he did not need any special arrangements.

– General Division made an error of law

[26] The General Division made an error of law by failing to consider and discuss the Claimant's performance, productivity, and whether the expectations from the job were considerably less than what is expected in a competitive workforce.

[27] The Claimant stated in a questionnaire for the CPP that he did not require special arrangements. However, the Claimant's son stated that there was no way that the Claimant could have worked anywhere else. The Claimant's son made it clear he only hired the Claimant out of appreciation and obligation. In my view, this helps to explain why he paid the Claimant more than the substantially gainful amount in a situation in which he was unable to pay himself.

[12] See paragraphs 40 to 50 in the General Division's decision.

[28] The General Division does not seem to have reached any conclusions about whether the:

- Claimant's work was productive.
- Claimant was working at a competitive level compared to others.
- Claimant's work requirements were less than the work expected from other employees.
- Claimant's family was satisfied with the work performance or experienced any hardship because of the accommodation they provided.

[29] The Minister argues that the General Division was aware of the idea of a benevolent employer, and reviewed the evidence the Claimant gave on that issue. The General Division referenced the Claimant's son's argument that he only paid the Claimant a salary as a way to help him out financially. The Claimant's son provided these wages out of a sense of appreciation and obligation (and that the Claimant couldn't have worked anywhere else).

[30] The Minister argues that the General Division weighed that evidence along with all of the rest of the evidence and decided that the Claimant's earnings and hours were important. It's the General Division's job to weigh the evidence, and it's not the Appeal Division's role to weigh it again because the General Division didn't frame the analysis the way the Appeal Division would have.[13] The Minister argues that it's clear that the General Division was thinking about the relevant legal principles when it made its decision.

[31] In my view, the General Division made an error of law by failing to analyze and discuss the Claimant's output, productivity, and the work expectations before deciding that the employment was not benevolent. This is not simply about the General Division framing things differently than I would. This is about the factors that *Atkinson*

[13] See the Federal Court of Appeal's decision in *Garvey v Canada (Attorney General)*, 2018 FCA 118.

acknowledges when dealing with whether work is benevolent. This is based in part on the definition of benevolent employer the Framework provides and that the Court considered as non-binding but insightful in that case.

[32] In *Atkinson*, the Court found that the way the Tribunal applied benevolent employment from the Framework was reasonable. The General Division applies the law to the facts. It's possible to frame an analysis in more than one way and not make a legal error. However, in my view, the General Division decision here strays too far from the legal principles in *Atkinson* to avoid an error of law.

[33] If the General Division ignores items of evidence that the law requires it to consider, then the General Division made an error of law.[14] Missing parts of a legal analysis means that decision maker is no longer applying the law correctly, and has made a legal error.[15]

[34] The General Division discussed some important aspects of the Claimant's work in order to decide whether it was benevolent. But the discussion of productivity, output, expectations, and the hardship the employer may have experienced by accommodating the Claimant fell short. As a result, the General Division made an error of law.

[35] Given that this error goes to the heart of the issue the General Division decided, I will move on to discuss remedy.

Fixing the error

[36] Once I find that the General Division made an error, I can decide how to remedy (fix) the error.

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[14] I'm applying the ideas about errors of law that the Supreme Court of Canada discussed at paragraph 41 of *Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385 (SCC).
[15] See *Teal Cedar Products Ltd. V British Columbia*, 2017 SCC 32 (CanLII).

[37] I can give the decision that the General Division should have given, or I can return the matter to the General Division for reconsideration.[16] I can decide any question of law necessary for dealing with an appeal.[17]

[38] The Claimant and the Minister both agreed that if I were to find an error, I should give the decision that the General Division should have given.

[39] I'll give the decision that the General Division should have given. I listened to the General Division hearing and reviewed the documents in the case. I have the information that I need to decide whether the Minister proved that the Claimant stopped being disabled when he started working for his son. Giving the decision that the General Division should have given is fair, fast, and just in this appeal.

The Claimant didn't stop being disabled in July 2016

[40] The Minister stopped the Claimant's disability pension payments. So, it's the Minister that must prove that it was more likely than not that the Claimant stopped being disabled within the meaning of the CPP in July 2016 when he returned to part-time work as a business consultant for his son's business.

[41] In my view, the Minister didn't prove that it was more likely than not that the Claimant stopped being disabled within the meaning of the CPP. The Minister didn't rely on medical evidence to show that the Claimant's medical diagnoses or functional limitations changed. I see no evidence of improvements in the Claimant's functional limitations that would suggest the Claimant stopped being disabled anytime after he applied.

[42] Instead, the Minister argued that the Claimant's work for his son showed that he had some capacity for work. The Minister also argued that the fact that the Claimant's son paid him more than a substantially gainful salary means that the Claimant is automatically ineligible for the disability pension.

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[16] See section 59 of the Act.
[17] See section 64 of the Act.

[43] In my view, the Claimant didn't stop being disabled within the meaning of the CPP. I've reached two conclusions in this appeal:

1. The Claimant's work for his son was benevolent. It does not mean that anything changed about whether his disability continued to be severe under the CPP.
2. The fact that the Claimant earned substantially gainful amounts from the benevolent employment does not automatically mean that he is ineligible for the disability pension. It is a single factor to consider as part of the definition of a severe disability in the CPP. In this case, the Claimant's disability is still severe.

The Claimant's work for his son was benevolent, that employment does not mean he stopped being disabled under the CPP.

[44] In addition to the Claimant's earnings and hours, in order to decide whether the Claimant's work was benevolent, I need to consider whether:

- The Claimant's work was productive.
- The Claimant was working at a competitive level compared to others.
- The Claimant's work requirements were less than the work expected from other employees.
- The Claimant's son was satisfied with the work performance or experienced any hardship because of the accommodation he provided.

– Position of the Claimant and the representative, who was both the employer and a son

[45] In assessing the arguments and the testimony in this appeal, I am mindful of the unique position both the Claimant and his son as representative were in during this appeal.[18] In 2011 when the Claimant's son became an authorized dealer for a cell phone company, his father game him advice. Later when it was clear that the father's

[18] Considering the position of the parties when assessing their evidence is consistent with cases often cited in administrative law like *Cugliari v Telefficiency Corporation*, 2006 HRTO 7.

income was insufficient to pay his bills, the Claimant's son hired him in a benevolent employment situation. So not only was the Claimant's son his representative in the appeal, he was also his former boss.

[46] As representative, the Claimant's son was trying to explain to the General Division how the employment was benevolent but was in the difficult position of doing that in the presence of his father (and on behalf of his father). For example, it was difficult for the Claimant's son to explain how little his father's contribution meant in terms of productivity for the company. And the Claimant was providing evidence about his own work performance in front of his son, who was also his employer.

– **Work hours and pay**

[47] According to the Claimant's son, the Claimant helped him for two years without pay when he first started his small business as a cell phone dealer in 2011. The Claimant consulted, "from the couch" on issues like bookkeeping, human resources (like reviewing resumes) and inventory management.[19] The Claimant wasn't paid.

[48] Later, the Claimant started receiving a CPP disability pension and his monthly income was not high enough to allow him to meet his monthly expenses. The Claimant's son hired him in 2016.[20]

[49] I find that this work was informal in nature for a small business. The work the father did does not show capacity to work. The Claimant's son performed work, and Claimant consulted. For example, the Claimant was not performing bookkeeping, he was answering questions about it.

[50] In documents he completed after he returned to work, the Claimant stated he worked 5 hours per day, four days a week and was paid $16 per hour.[21] This doesn't seem to accord clearly with any of the earnings he made between 2016 and 2019. Given that the Claimant earned the exact same income in both 2017 and 2018, and

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[19] See GD2-415. See also GD1-5 reference to 2011.
[20] See GD1-9.
[21] See GD2-503.

given the information the Claimant's son provided about the fact that he was paid a salary essentially to assist him to pay his monthly bills, I find that the Claimant was not paid by the hours worked.

[51] I don't understand the amount of his earnings to be at issue.[22]

The Claimant's testimony about his work hours was somewhat confusing, and that part of the recording was difficult to hear. I find that he testified that it was hard for him to remember but that he could work two or three hours a day, five days a week. I find that the Claimant's hours varied depending on his pain: on that question, he was clear in his testimony.[23]

Productivity & working at a competitive level

[52] The Claimant's work was productive only in the sense that the tasks required were light and easy and he could work entirely at his own pace. He completed some consulting and he arranged his son's mail and completed basic paperwork that he could handle quickly. He completed paperwork that was "easy" and that he "could handle" like receipts.[24] It is clear that he could not have done more than that.

[53] I find that the Claimant was not working at a competitive level compared to others. This is difficult to assess of course because there were not other people working at the same job within this workplace. The Claimant's son hired his father out of a sense obligation, not a genuine need to fill in the workplace. However, the Claimant testified and I accept that he worked as able, and not a set number of hours. Whenever he didn't feel well and his back pain was high, he lay down.[25] It would be hard to imagine a salaried position within a competitive workplace in which an employer hires a person to review the mail from home and help with basic paperwork when physically able. In my view, the Claimant's job would not exist in a competitive marketplace. The job became

[22] The General Division stated that the earnings were $23,100 in 2016, $28,600 in 2017, and $28,600 in 2018, and $8,800 in 2019. See paragraph 6 in the General Division's decision.
[23] This testimony is part of the General Division hearing recording, at about the 12-minute mark.
[24] This testimony is part of the General Division hearing recording, at about the 11-minute mark.
[25] This testimony is part of the General Division hearing recording, at about the 12:37 minute mark.

available when his son wanted to address shortfall in his father's income and allow him to participate in and contribute to this small family business.

[54] The Claimant's son stated at the hearing that the job was really more of an "advisory role" and was "really light." He stated that it was paperwork that he could do in ten minutes, and that this work was more for his father's health to receive the message that he was needed and appreciated.[26]

[55] The Claimant testified that when his son needed advice, he would offer it. It could take an hour, or 30 minutes or even 5 minutes. When the General Division member asked whether there were times that his son asked for help and the Claimant couldn't provide it, the Claimant explained that giving advice would not hurt his back.

[56] The Claimant testified that he could not have done this job for someone else. This was working from home, whenever he felt well, and the hours were flexible. He testified that no one would accept that.

– **Satisfied with work performance**

[57] The Claimant's son did not express any dissatisfaction with the quality of the advice the Claimant gave, or with his organizing of the mail. It seems from the record that the Claimant's son was nothing but respectful and grateful towards his father. I see no evidence of more formal attempts at documented performance through a review process as might take place in other workplaces.

– **Hardship**

[58] I find that the employment relationship with his father contributed in some way to hardship for the Claimant's son. It seems to me that the Claimant's son was not filling a role at his company as much as he created a role for his father. I conclude this because the decision to hire his father to complete these tasks does not seem to have been a business decision. The Claimant's son stated and I accept that in 2011, cash was too tight for him to simply support his father out of his own pocket each month. So his father

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[26] This testimony is part of the General Division hearing recording, at about the 1 hour and 28 minute mark.

helped him some with his business for free for two years first when he was setting up the business. Later when the father was experiencing financial difficulty, the Claimant's son "hired" him.

[59] I find that the arrangement the Claimant's son made to put his father on the payroll ultimately caused financial hardship to the business. This was a family-run small business. In December 2017, the Claimant's son was worried that the business would run out of operational cash, and he stopped paying himself a salary in order to continue paying his father.[27]

[60] In view of all of these factors about the Claimant's work, I conclude that this employment for his son was benevolent. It was salaried and he worked when he could. The Claimant's job was specifically tailored by his own son to his disability-related needs. The Claimant worked when he was able from home and received a salary. There were no performance reviews. It does not appear to be anything like a job in the competitive workforce. It contributed to financial hardship to the company.

The Claimant earned more than a substantially gainful income, but that does not mean he stopped being disabled under the CPP.

[61] To have a severe disability, the CPP says that a claimant must be incapable regularly of pursing any substantially gainful occupation. In 2014, a new regulation defined what "substantially gainful" means in this part of the CPP.

[62] The regulation says that the reference to "substantially gainful" in the definition of a severe disability is a job that provides a salary or wages that are as high or higher than the maximum yearly amount a person could receive as a disability pension.[28]

[63] There is no dispute in this case about how much money the Claimant's son paid him: from 2016 to 2018, it was more than the amount the regulation calls substantially gainful.[29]

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[27] See GD1-9 and 10.
[28] See section 68.1(1) of the *Canada Pension Plan Regulations*
[29] He earned $23,100 in 2016, $28,600 in 2017, $28,600 in 2018, and $8,800 in 2019.

[64] The question I need to answer is what impact the Claimant's substantially gainful earnings should have on my decision about whether the Claimant's disability stopped when he started working for his son in 2016.

[65] There are several steps involved in deciding what any part of a law, like the regulation about substantially gainful earnings, actually means.[30]

[66] If there is no decision from a higher court that I have to follow about how to understand certain parts of the CPP, then I must decide myself what the words mean.

[67] There are cases in which the General Division has applied the regulation and decided that where a claimant made more than the dollar amount in the regulation, they are not entitled to a disability pension.

[68] However, these cases do not answer the question about whether a person is eligible for a disability pension when they made those substantially gainful earnings in a benevolent employment situation.

[69] As a result, to decide what the substantially gainful regulation means, I need to consider the text, context and purpose:

- **Text:** what the words of the regulation say
- **Context**: what the words say in relation to the rest of the CPP
- **Purpose**: what the words say in relation to the purpose of the CPP as a whole.

[70] When the words are precise and clear, the ordinary meaning of the words is most important. But even when the meaning of the words seems obvious, it is still important to look at the purpose of the CPP and its context. Sometimes, even words that seem easily understandable at first are less clear in light of other parts of the same law. In contrast, considering that purpose and context is not a license to "overlook legislative

[30] See paragraph 18 in *Hillier v Canada (Attorney General)*, 2019 FCA 44.

text that is genuinely clear and unambiguous. Nor can the purpose of the legislation be used to extend the meaning of a legislative provision beyond what its plain, unambiguous words will allow."[31]

[71] And what if the words in the regulation are not so precise and clear? If the meaning is not certain (if it is ambiguous), then I need to interpret the meaning in a way that is consistent with the fact that the CPP is what is called a "benefits-conferring" law.[32] A benefits-conferring law creates the rules for a government program that pays people benefits.

[72] The Minister argues that carving out an exception by finding a claimant eligible for a disability pension when they earned substantially gainful income is not consistent with the plain wording, purpose, and context of the regulation.

[73] The Minister argues that when a claimant starts earning substantially gainful money according to the dollar amount set out in the regulation, then the Claimant is not eligible for the disability pension anymore. It doesn't matter whether the work is benevolent at that point, it only matters that the payment they received was over the dollar amount set out by the regulation. In other words, in no case should a claimant who makes over the amount in the regulation receive a disability pension.

[74] I disagree. To be eligible for a disability pension, a Claimant must be incapable regularly of pursuing any substantially gainful occupation. Each part of that definition has meaning. A benevolent employment situation does not count as a substantially gainful occupation in the definition of a severe disability in the CPP. In some situations, a person can have a severe disability even if they received income that is substantially gainful. There is nothing about the definition of substantially gainful in the regulations that changes or modifies what counts as an occupation under the CPP.

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[31] See paragraph 25 in *Hillier v Canada (Attorney General)*, 2019 FCA 44.
[32] See paragraph 28 in *Villani*.

– **The words in the substantially gainful regulation (their ordinary meaning)**

[75] The CPP says that a disability is severe when a person is incapable regularly of pursuing any substantially gainful occupation. It does not define what substantially gainful means.

[76] The regulation says that salary or wages earned in an occupation that is more than the maximum amount a person could receive in benefits that year with CPP disability benefits is substantially gainful.[33]

[77] The regulation defines substantially gainful for the purpose of the CPP definition of a severe disability. The Regulation does **not** provide a definition of occupation or any guidance about any part of the definition of a severe disability except for the part about how much money is substantially gainful.

[78] The regulation helps Service Canada to decide whether an amount is substantially gainful by considering the amounts shown in a claimant's record of earnings. That record provides for yearly earnings and contributions made to the CPP.

[79] So substantially gainful income is not about the cost of living, or about how money a person was used to earning before their disability started. It also isn't about income from any other sources, like gifts or investments. It's about earnings from an occupation, and it is a yearly calculation.

– **The purpose of the substantially gainful regulation**

[80] The Minister rightly argues that the dollar value threshold that the regulation sets is important, and it brings clarity to what substantially gainful actually means.

[81] To understand the purpose of the regulation defining substantially gainful occupation, the Minister points to two important documents. I accepted these documents as new evidence because they are relevant to the text, context and purpose

[33] See section 68.1 of the *Canada Pension Plan Regulations*.

of the legislation, which is the key issue that I need to decide. This is an exception to rule against accepting new evidence at the Appeal Division level.[34]

[82] First, the Regulatory Impact Analysis statement says that the purpose behind attaching a formula to define what a substantially gainful occupation is was to ensure consistency and transparency for the Minister, this tribunal, courts, claimants and their beneficiaries.[35]

[83] Second, the transcript of the testimony of the Standing Senate Committee on National Finance heard that one of the purposes behind the formula was to improve "consistency and sustainability of decisions and will be used by the department, appeals bodies and courts."[36]

[84] The point was to be consistent about exactly how high earnings have to be before they are considered substantially gainful. There would otherwise be situations in which the tribunal, courts, and claimants were not sure how much money was or was not substantially gainful.

[85] I have no doubt that the purpose of the regulation was to ensure consistency about what counts as substantially gainful amounts in the definition of a severe disability. This is not a phrase that is commonly understood generally: one person's substantially gainful job might be another person's understanding of low income.

[86] It's not clear to me from the two documents that the Minister provided that the purpose of the regulation was to ensure that substantially gainful amounts would trump other aspects of the test for a severe disability in order to promote consistency.

[87] The Minister has not pointed to any evidence supporting the idea that the purpose of the substantially gainful regulation was to ensure consistency in the sense

[34] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[35] See AD5-10.
[36] See AD5-11.

that in no case would a claimant be eligible for a disability pension when their earnings are substantially gainful.

[88] Addressing inconsistencies about: (i) what counts as a substantially gainful **occupation**, and (ii) whether receiving substantially gainful amounts will always mean a person is not disabled within the meaning of the CPP, is a much bigger task. In my view, that task isn't completed simply by defining the term substantially gainful in a regulation.

– **The purpose of the substantially gainful regulation when it comes to the CPP more broadly**

[89] The purpose of the substantially gainful regulation was to bring some consistency to the definition of a severe disability in the CPP.

[90] A person with a severe disability under the CPP is incapable regularly of pursuing any **substantially gainful occupation.**

[91] **Occupation** isn't defined in the legislation or any other regulation, and the Federal Court in *Atkinson* referenced the idea that the Framework interpreted benevolent employment to be distinct from an occupation.[37]

[92] The Minister's view of the substantially gainful regulation fundamentally changes the overarching test for a severe disability, which is always interpreted in the real world context. Regulations are more detailed rules that support existing laws; they don't change existing laws.[38] The regulation describes substantially gainful in respect of an occupation. There is no corresponding regulation that defines occupation. I conclude that the use of the term occupation in the CPP definition still has meaning.

[93] Before the substantially gainful regulation came out, the Federal Court of Appeal issued clear guidance to decision makers about how to decide whether a disability is severe.[39] The *Villani* decision says that every part of the definition for a severe disability

[37] See paragraph 7 of *Atkinson*.
[38] See *Ontario Hydro v Canada*, 1997 CanLII 5299 (FCA).
[39] See *Villani*.

has meaning. *Villani* does not say that any one part of the definition automatically decides the issue of whether a disability is severe. The Minister did not change the definition of a severe disability after the regulation about substantially gainful amounts passed. The definition remains intact. It is a real world assessment with multiple parts, including whether a person is “incapable regularly” of “pursuing” “any” “substantially gainful” “occupation”. Each part of the definition has meaning.

[94] The test in the legislation and the case law that interprets it still applies – every part of the definition of a severe disability has meaning. There may be situations in which a person earns more than a substantially gainful amount in a given year but could still qualify for a disability pension because they were incapable regularly, or because the earnings they received were not really from an occupation.

[95] A person can be incapable regularly of pursuing any substantially gainful occupation and still have a friend or family member who creates a “job” for them or pays them more than the market requires for their work. The CPP disability pension is there to supplement income when people are incapable regularly of pursuing any substantially gainful occupation. It doesn’t and shouldn’t discourage people with disabilities from entering into benevolent employment situations. Just like other sources of income such as inheritance, truly benevolent employment doesn’t tell us anything about a claimant’s capacity for pursuing any substantially gainful occupation.

[96] A benevolent employer situation doesn’t excuse the Minister from providing a disability pension to a claimant who made sufficient contributions to the Canada Pension Plan and is incapable regularly of pursuing any substantially gainful occupation.

[97] Maybe this is also why the word **pursuing** matters in the definition of a severe disability. A claimant can be receiving a substantially gainful income from someone who is benevolent but not have the capacity to **pursue** that level of earnings in the competitive marketplace (any substantially gainful occupation).

[98] The parties discussed the Framework it during the Appeal Division hearing in light of *Atkinson*. I will refer only to parts of the Framework as they have been discussed by the Court.

[99] The Minister argues that the regulation controls the situation and decides the matter: if a person earns substantially gainful amounts, they are not entitled to a disability pension, regardless of what the Framework document says. The Minister pointed me to the Federal Court's decision in *Zhang*.[40]

[100] In that case, the Federal Court was reviewing whether an immigration officer's decision to refuse a study permit to Ms. Zhang was reasonable. Ms. Zhang argued that the immigration officer's decision wasn't reasonable because it didn't interpret the law the same way that the government described it on a website. The Federal Court found that it is the law that the immigration officer must follow, not the wording describing that law on a government website.

[101] The Minister notes that the Framework might be different because it's designed to assist initial decision makers in their work, so it isn't just information on a website for the public. It notes that the General Division provides an independent and new hearing on eligibility based on the law.[41]

[102] I agree with the Minister that failing to follow what the Minister set out for its decision makers in the Framework is not necessarily an error of law.[42] The question, I suppose, is whether the Framework, to the extent that it has been interpreted by the court in *Atikinson*, provides insight when applying definition of benevolent employer.

[103] *Atkinson* presents information from the Framework. *Atkinson* quoted the Framework as saying that benevolent employment is not an occupation for the purpose of the definition of a severe disability.[43] The Claimant only faced the argument from the

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[40] See *Zhang v Canada (Citizenship and Immigration)*, 2016 FC 964.
[41] Sometimes called a *de novo* hearing.
[42] Policy isn't binding in the way that legislation is, see *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[43] See paragraph 7 in *Atkinson*.

Minister that the regulation about substantially gainful earnings trumps other aspects of the test for a severe disability for the first time at the Appeal Division. The Minister didn't ask for a summary dismissal once the Claimant filed the appeal to the General Division and took the position that the Claimant's earnings were substantially gainful.

– **What the words say in light of the purpose of the CPP more generally**

[104] As the Minister points out, the CPP is meant as a partial income replacement. In other words, if a person has a severe disability (they are incapable regularly of pursuing any substantially gainful occupation) they can collect a pension that partially replaces the income they made when they were working and contributing to the Canada Pension Plan.

[105] The financial means of the person applying for a CPP disability pension is not relevant. For eligibility, the issue is whether the Claimant has sufficient contributions and whether they can show that they had a severe and prolonged disability during their coverage period.

[106] **Substantially gainful** is defined in the regulation with reference to salary or wages in respect of an **occupation**. That means that people can have money that comes from multiple sources over the substantially gainful threshold that don't impact on eligibility for the disability pension – gifts from family members, inheritances, playing the stock market or other investments, for example. Strictly speaking, receiving money does not tell us anything about whether a person is still eligible for a disability pension. The focus in the law is on earnings from an **occupation**. Why? Because the definition of a severe disability is grounded in limitations that impact the Claimant's ability to work, not in diagnoses.

[107] It may be that working after the end of the MQP shows that a claimant is capable regularly of pursuing substantially gainful employment, but not always.[44] A person could earn less than the substantially gainful amount in the regulation, but something about the work that they are doing tells us that they would be capable of pursuing any

[44] See *Monk v Canada (Attorney General)*, 2010 FC 48.

substantially gainful occupation (possibly at another job or type of job, for example). The work tells us something about the tasks they are regularly capable of completing in exchange for pay.

[108] The question then is whether the opposite is true: might a claimant be receiving a substantially gainful amount and yet something about the work itself suggests it's not really work at all? The tasks that a claimant is assigned, the ability of the claimant to perform those tasks well or reliably, and the expectations of the employer might tell us much more about the employer than the Claimant. They might tell us that the employer is benevolent and the Claimant still has a severe disability.

[109] In other words, some work situations are benevolent, so they aren't an occupation at all. A person with a disability might work for an uncle or a close friend. That means that a person in the community chooses to pay a person with a disability a substantially gainful wage. But it does not tell us anything about what the disabled person is capable of in terms of pursuing any substantially gainful occupation. Working for a benevolent employer says nothing about employability more broadly.

[110] Benevolent employment situations can end abruptly, and may not provide the supplemented income all the way to retirement that CPP disability pension provides for people with severe and prolonged disabilities. In my view, working for a benevolent employer is working in name only. It's a special situation. It improves the Claimant's financial position in a way that working does, but it doesn't demonstrate that a claimant has an ability to work outside of that special situation. The CPP definition of disability does not consider the financial arrangements of claimants generally. CPP disability pensions are not welfare schemes of last resort in which assets and other financial information more generally is relevant.

[111] In my view, interpreting substantially gainful amounts as being the controlling issue for the purpose of deciding whether a disability is severe is not anticipated clearly by the regulation or the CPP. Interpreting the regulation in the way the Minister argues is not consistent with the way a severe disability has been interpreted so far, including by the court in *Villani*.

– **The Claimant's benevolent employment with his son doesn't mean he stopped being disabled**

[112] The fact that the Claimant's income was above the substantially gainful threshold does not mean that his disability stopped being severe. The work was benevolent. There is nothing about the wording of the regulation that defines substantially gainful occupation, its context or purpose, that tells me that the income threshold alone was meant to be controlling of the definition of a severe disability.

[113] *Atkinson* does not contain an opinion about whether benevolent employment is an occupation, but it does quote from the part of the Framework that says benevolent employment is not an occupation. The Claimant earned substantially gainful earnings from his son. It was benevolent employment. It wasn't an occupation.

[114] The fact that he consulted with his son about his business, and that he opened his mail and completed paperwork for him does not mean he stopped having a severe disability.

[115] It meant that his son respected his father, wanted to give him an opportunity to contribute and participate in some tasks to support his mental health, appreciated his help with the small business he started, and wanted to be sure that he was meeting his monthly bills. Nothing about this work tells me that that the Claimant was employable in the real world.

[116] As a result, the fact that the Claimant did this work for his son does not mean he stopped being incapable regularly of pursuing any substantially gainful occupation. I see no other changes in the record to the Claimant's conditions and functional limitations, treatment, or personal circumstances that require analysis.

Conclusion

[117] The appeal is allowed. The General Division made an error. I gave the decision that the General Division should have given. The Claimant did not stop being disabled in July 2016.

Kate Sellar
Member, Appeal Division