



Citation: *EW v Minister of Employment and Social Development*, 2022 SST 1364

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

<b>Applicant (Claimant):</b>	E. W.
<b>Representative:</b>	M. W.
<b>Respondent:</b>	Minister of Employment and Social Development

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<b>Decision under appeal:</b>	General Division decision dated August 16, 2022 (GP-21-1691)
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<b>Tribunal member:</b>	Kate Sellar
<b>Decision date:</b>	November 30, 2022
<b>File number:</b>	AD-22-835

## Decision

[1] I am refusing leave (permission) to appeal. The appeal will not go ahead. These reasons explain why.

## Overview

[2] E. W. (Claimant) was receiving a *Canada Pension Plan* (CPP) disability pension. The Minister of Employment and Social Development (Minister) stopped paying the pension as of the end of March 2017.

[3] The Claimant appealed the Minister's reconsideration decision to this Tribunal. The General Division dismissed the Claimant's appeal. The General Division decided that the Claimant's work at the airport as a surface weather observer from 2016 to 2019 showed that she stopped being eligible for the CPP disability pension.

[4] The General Division decided that the work at the airport was not a work attempt that failed because of the Claimant's disability. The work was not for a benevolent employer. The work showed that the Claimant wasn't meeting the definition of a severe disability under the CPP. A severe disability makes a person incapable regularly of pursuing any substantially gainful occupation.<sup>1</sup>

[5] The Claimant appealed to the Appeal Division. I must decide whether the General Division may have made an error under the *Department of Employment and Social Development* (Act) that would justify granting permission to appeal.

[6] The Claimant does not have an argument on appeal that has a reasonable chance of success. I am not granting permission to appeal.

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<sup>1</sup> See section 42(2) of the *Canada Pension Plan* (CPP).

## Issue

[7] Did the General Division make an error (of law or of fact) by finding that the decision to stop the disability pension on January 8, 2020 means that the Claimant's benefits stopped being paid three years earlier as of March 2017, which created an overpayment?

## Analysis

[8] In these reasons, I will explain the approach the Appeal Division must take in reviewing General Division decisions. Then I will explain how I've decided that the Claimant doesn't have a reasonable chance of success on appeal.

### Reviewing General Division decisions

[9] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the documents in the appeal to decide whether the General Division may have made any errors.

[10] That review is based on the wording of the Act, which sets out the "grounds of appeal." The grounds of appeal are the reasons for the appeal. To grant leave to appeal, I must find that it is arguable that the General Division made at least one of the following errors:

- It acted unfairly.
- It failed to decide an issue that it should have, or decided an issue that it should not have.
- It based its decision on an important error regarding the facts in the file.
- It misinterpreted or misapplied the law.<sup>2</sup>

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<sup>2</sup> See section 58(1) of the *Department of Employment and Social Development Act* (Act).

[11] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.<sup>3</sup> To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.<sup>4</sup>

### **Timeline of the General Division's findings of fact**

[12] I've created a timeline of the Claimant's interactions with CPP. The timeline reflects the General Division's findings of fact in the Claimant's appeal.

- November 2014:** The Claimant stops working because of her health conditions.
- June 2015:** Minister grants the Claimant a CPP disability pension, finding her disability started in November 2014.
- August 2016:** The Claimant starts working at a bookstore.
- September 2016:** The Claimant tells Service Canada she's started working. Service Canada advises her that if she makes more than \$1300 a month, they'll have to review her situation.
- 2016:<sup>5</sup>** Claimant returns to her work at the airport.
- March 2017:** The Claimant stops working at the bookstore.
- End of 2017:** Claimant earned \$22,305 this year.
- October 2018:** The Minister tells the Claimant that information from the Canada Revenue Agency (CRA) says she earned more than \$10,000 in 2016 and more than \$22,000 in 2017.
- December 2018:** The Minister suspends the Claimant's CPP disability payments.
- End of 2018:** Claimant earned \$33,686 this year.

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<sup>3</sup> See section 58(2) of the Act.

<sup>4</sup> The Federal Court of Appeal confirmed this in *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>5</sup> No specific month stated.

- January 2019:** The Minister's investigation results in a conclusion about the Claimant's earnings for 2018 (see entry above). Earnings are just over \$33,500.
- August 2019:** The Claimant returned to university and started working at the university bookstore.
- End of 2019:** Claimant earned \$20,660 this year.
- January 2020:** The Minister decides that the Claimant stopped being disabled under the CPP at the end of March 2017. The Minister explains to the Claimant that she owes approximately \$16,000 because of an overpayment of her CPP disability pension since April 2017.

### **No possible error of law or fact about the timing of the Minister's decision to stop benefits.**

[13] The General Division did not make an error (of fact or of law) about the timing of the Minister's decision to stop benefits.

[14] The Claimant argues that there must be a problem with the General Division's decision because it upholds the Minister's decision to stop her benefits in 2020, but the decision is effective back to 2017, which creates an overpayment. The Claimant doesn't understand why her income from 2018 and 2019 is relevant if the decision to stop her benefits is from 2020.<sup>6</sup>

[15] I see no evidence or argument that the General Division got any of the facts wrong about when the Claimant worked, how much she earned, or about the communication between the Claimant and the Minister while the Claimant was receiving the CPP disability pension.

[16] The issue then is whether the General Division made an error of law by failing to find fault with the Minister's 2020 decision that the Claimant stopped being disabled

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<sup>6</sup> See AD1-4.

back in April 2017, and therefore she was not entitled to the benefits she received from April 2017 and on.

[17] There is no arguable case that the General Division made an error of law here.

[18] The Minister only has the power to make decisions about disability pensions that are consistent with the CPP and its regulations. There is no argument here that the Minister failed to follow those rules. It is a combination of several rules that allow the Minister to investigate the Claimant's work, decide to stop the benefit from the day she stopped being disabled (even if that date is in the past), and then collect an overpayment for pension amounts the Claimant received when she wasn't eligible.

– **The Minister can stop a disability pension when a claimant is no longer disabled**

[19] The CPP sets out the general rules about when disability pension payments start and end. It says that a disability pension ceases (stops) being paid with the payment for the month in which the claimant stops being disabled.<sup>7</sup> This allowed the Minister to decide that the Claimant stopped being disabled in 2017 when she was capable regularly of pursuing a substantially gainful occupation.<sup>8</sup> Stopping the benefit is linked to when the claimant regains the capacity to work and stops being disabled, not when the Minister reaches a decision about that issue. The CPP does not allow the Minister to choose any other date for stopping the pension simply because a claimant stopped being disabled some time before the Minister made its decision.

– **If claimants return to work they must inform the Minister without delay**

[20] The CPP regulations say that the Minister can require claimants from time to time to provide statements of their jobs and earnings for any period.<sup>9</sup> The regulations also

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<sup>7</sup> See section 70(1) of the CPP.

<sup>8</sup> The Minister decided on April 2017 because it allowed for a "work trial" period. This means that the Minister holds off on finding the Claimant to have stopped being disabled for the first three months that she was earning substantially gainful income in 2017, just in case she isn't able to maintain that employment. If she can't maintain it, it might be a failed work attempt. Failed work attempts are not evidence of capacity to work. A severe disability is all about being incapable regularly of pursuing substantially gainful work.

<sup>9</sup> See section 68(1)(b) of the CPP Regulations.

state that if a person who is receiving the CPP disability pension returns to work, they must inform the Minister without delay.<sup>10</sup>

[21] This rule allows the Minister to have up-to-date information that can inform any decision the Minister makes about whether to stop the Claimant's disability benefits.

[22] The Claimant assumed that reporting her income to the Canada Revenue Agency (CRA) each year was sufficient for the federal government generally to know that she was back to work. However, the CPP is set up to put the responsibility on claimants to report directly to the Minister when they return to work. In this case, the Minister means the Minister of Employment and Social Development through Service Canada. Not the federal government generally or the CRA specifically.

– **The Minister can recover payments after the fact if claimants were not entitled to them.**

[23] When a person has received a disability pension payment that they were not entitled to, they are required to return the amount immediately. It creates a debt that the government can then take steps to collect.<sup>11</sup>

[24] The Minister can cancel (remit) all or part of the amount owing (in this case, the overpayment based on the disability pension payments the Claimant received from April 2017) in any of the following situations:

- The amount owing cannot be collected within the reasonably foreseeable future.
- The administrative costs of collecting it are the same or more than what is owing.
- The repayment would cause undue hardship to the Claimant.

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<sup>10</sup> See section 70.1 of the CPP Regulations.

<sup>11</sup> See section 66(1) and (2) of the CPP.

- The amount owing is the result of an error or bad advice by the Minister.<sup>12</sup>

[25] This Tribunal doesn't have the authority to decide whether an amount owing should be remitted. Claimants need to ask the Service Canada office that issued the disability pension for remission of the overpayment.

– **The rules are imperfect, but I cannot change them**

[26] These rules aren't perfect. The operation of the current law leads to claimants who, for a variety of reasons, do not report that they have returned to work. Often, claimants assume that reporting their income to the CRA by filing taxes is sufficient to report that they are working while receiving a disability pension. However, it is not. This leads to investigations by the Minister, sometimes years after claimants stopped being disabled. In some situations, the investigations conclude that claimants haven't been disabled within the meaning of the CPP for years, and can create overpayments that are difficult for claimants to repay.

[27] I take official notice of the fact that low income cut off after tax in current dollars in 2017 for a single person was \$17,758 in populations 100,000 to 499,000.<sup>13</sup> The maximum CPP disability pension a person could receive that year was about \$15,700.<sup>14</sup> So "substantially gainful income" for the purpose of the CPP is close to the low income cut off in this situation. The Claimant earned \$22,305 in 2017.<sup>15</sup>

[28] In other words, in 2017 the Claimant earned just above what the CPP considers "substantially gainful." But for context, those earnings are also very close to the low income cut off for that year. The Claimant also received the CPP disability pension in 2017, namely \$758.82 per month. The rules are clear: the Minister can legally collect back the \$6,829.38 it paid over nine months in 2017 to the Claimant.

[29] It seems to me that the real question the Claimant raises is about hardship. Collecting overpayments years later from people with terminal medical conditions who

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<sup>12</sup> See section 66(3) of the CPP.

<sup>13</sup> See <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110024101>

<sup>14</sup> See paragraph 25 in the General Division decision.

<sup>15</sup> See GD9-48.



earned just above the low income cut off (even if that amount is referred to as “substantially gainful” for the purpose of the CPP) is very likely to cause those people hardship.

[30] The Claimant can contact the Service Canada she deals with about applying to cancel all or a part of the overpayment. Appealing to the Appeal Division is not the way to apply for the cancellation.

[31] The General Division’s decision is only about the Claimant’s CPP disability pension from April 2017 to December 2018. The Claimant can reapply for a disability pension if her medical situation changes.

## **Conclusion**

[32] I am refusing permission to appeal. This means that the appeal will not go ahead to the next step.

Kate Sellar  
Member, Appeal Division