



Citation: *EW v Minister of Employment and Social Development*, 2022 SST 841

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: E. W.
Representative: M. W.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 12, 2021 (issued
by Service Canada)

Tribunal member: Carol Wilton

Type of hearing: Videoconference

Hearing date: August 9, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: August 16, 2022

File number: GP-21-1691

Decision

[1] The Minister was entitled to terminate payment of the Appellant's *Canada Pension Plan* (CPP) disability pension as of March 2017.

[2] This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant, E. W., is appealing the Minister's decision to terminate payment of her CPP disability pension as of the end of March 2017.

[4] The Appellant was born in September 1983. She has a Grade 12 education and a two-year diploma in forest resource technology. From 2010 to 2014, she worked as a surface weather observer at an airport.¹ She stopped work in November 2014 because of her health conditions. She had severe depression and anxiety and a rare degenerative lung disease (lymphangionmyomatosis (LAM)).² In June 2015, the Minister granted her a CPP disability pension. Her date of onset was November 2014.³

[5] In September 2016, the Appellant informed Service Canada that she was working. An agent of the Minister told her that if she were earning more than \$1,300 a month, Service Canada would have to review her situation.⁴

[6] In October 2018, Service Canada notified the Appellant that information from the Canada Revenue Agency (CRA) showed that she had earned more than \$10,000 in 2016 and more than \$22,000 in 2017.⁵

[7] In December 2018, the Minister suspended the Appellant's CPP disability payments.⁶ An investigation in January 2019 showed that in 2018 the Appellant earned

¹ GD9-I-75

² GD9-I-77.

³ GD13-4

⁴ GD9-I-68

⁵ GD9-1-64

⁶ GD9-I-46

more than \$33,500.⁷ In January 2020, the Minister notified the Appellant that she owed approximately \$16,000 to the government because of an overpayment of her CPP disability pension since April 2017.⁸

[8] The Minister denied the Appellant's request to reconsider stopping her CPP disability pension.⁹ The Appellant appealed the Minister's reconsideration decision to the General Division of the Social Security Tribunal.

[9] The Minister's position was that when she applied for CPP disability, the Appellant had agreed to notify CPP if she returned to work. The Minister also stated that it had reminded her several times of her reporting obligations. The Minister further stated that the Appellant stopped being disabled under the CPP at the end of March 2017.¹⁰

[10] The Appellant stated that her disability continued to be severe and prolonged. She had not asked for her benefits to be continued to December 2018. She had filed yearly income tax returns and thought that CPP would have access to them. She had to work - the amount CPP disability paid her was not enough to cover her bills. She was not asking for her CPP disability payments to be reinstated.

Matters I must consider first

[11] Although M. W. said she was the Appellant's representative, she is not a legal representative. She is the Appellant's mother. She was helping because her daughter had been very ill in the days before the hearing. I therefore considered M. W. to be only an "administrative" representative, so that she could give evidence too.

⁷ GD29-I-41

⁸ GD9-I-27-29. The Appellant received \$758.82 a month for nine months (she was allowed a 3-month work trial) in 2017 and \$770.20 a month for 12 months in 2018.

⁹ In her letter of January 2020, the Appellant asked that the Minister "come to a different decision." She did not say whether she wanted her CPP disability to continue, or whether she wanted the overpayment forgiven.

¹⁰ GD9-I-5

Issue

[12] After March 2017, did the Appellant's employment earnings establish that she had regained the regular capacity to pursue substantially gainful employment?

Reasons for my decision

[13] In order to terminate a disability pension, the Minister must establish that it is more likely than not that an appellant ceased to be disabled. A disability pension ceases to be payable for the month in which an appellant ceases to be disabled.¹¹

[14] A qualifying disability must be severe and prolonged. A disability is severe if it causes a person to be incapable regularly of pursuing any substantially gainful occupation.¹² If an appellant is able regularly to do some kind of work that she could earn a living from, then she isn't entitled to a disability pension.

[15] A disability is prolonged if it is likely to be long continued and of indefinite duration.¹³ The disability must be expected to keep an appellant out of the workforce for a long time.

[16] The Minister relies on the Appellant's earnings from 2017 and 2018 to establish that, despite her medical condition, the Appellant had regained the regular capacity to pursue substantially gainful employment.

- **The Appellant's health conditions**

[17] The Appellant stated that her disability was severe and prolonged. Therefore, she should not be required to repay the monies the Minister said she owed. However, although she had serious health problems in the period from April 2017 to the end of December 2018, they did not prevent her regularly from pursuing substantially gainful

¹¹ Subsection 70(1) (a) of the CPP

¹² Paragraph 42(2)(a) of the CPP gives this definition of severe disability.

¹³ Paragraph 42(2)(a) of the CPP gives this definition of prolonged disability.

work. Her regular ability to work at a substantially gainful occupation is the test in the CPP, and that is the test I must apply.

[18] The Appellant's major health condition is lung disease. In 2013, she was diagnosed with LAM.¹⁴ However, her lung condition was relatively stable from 2017 to the end of 2019.¹⁵

[19] In January 2021, Dr. Roland Nador, pulmonologist, stated that the Appellant's lung function had been declining for three years. She was now oxygen-dependent (as of June 2020.¹⁶) In May 2021, Dr. Nador scheduled her for pre-lung transplant assessment.¹⁷

[20] The Appellant has received treatment for other concerning physical health conditions. In December 2018, she had a hysterectomy.¹⁸ In August 2019, she had surgery for an infection around her anal canal.¹⁹

[21] The Appellant has been on medication for depression and anxiety since at least 2015.²⁰ She testified that her family doctor gave her prescriptions for antidepressants and anti-anxiety medication. She has only seen a mental health professional (psychiatrist) once, and that was in the remote past.

[22] The key question in a disability pension appeal is not the diagnosis of the appellant's disease, but the functional effect of her health condition on her ability to work.²¹ The measure of whether a disability is "severe" is whether the disability

¹⁴ GD9-1-51

¹⁵ See the reports of the Appellant's pulmonologist, May 2016, October 2017, February 2018, GD9-109-11, 178-10, 182-184.

¹⁶ GD9-III-63. She also had difficulties with her esophagus and a possible sleep disorder.

¹⁷ GD5-29

¹⁸ GD9-II-86; GD9-III-33. The hysterectomy was for heavy periods. She also suffered from psoriasis and chronic headache: G5-5, Dr. Daniel Milne, family doctor.

¹⁹ GD9-III-33

²⁰ GD9-I-80, GD5-5

²¹ See *Ferreira v. Attorney General of Canada*, 2013 FCA 81; and *Klabouch v. Canada (Social Development)*, 2008 FCA 187.

“prevents [an appellant] from earning a living.”²² This means that I must consider the Appellant’s work capacity in 2017 and 2018.

- **The Appellant’s earnings from employment**

[23] The Minister terminated the Appellant’s disability pension as of March 2017. The Appellant worked at a bookstore from August 2016 to March 2017.²³ However, I must focus on the Appellant’s capacity to work from April 2017 to December 2018. The evidence shows that the Appellant was able to perform substantially gainful work during this period. She worked at the airport as a surface weather observer from 2016 until August 2019.²⁴

[24] Since the end of May 2014, a “substantially gainful” occupation is one that provides a salary or wages equal to or greater than the maximum annual amount a person could receive as a disability pension.²⁵

[25] The chart below summarizes the Appellant’s earnings and the maximum CPP disability pension in 2016, 2017, 2018, and 2019. The chart shows that the Appellant’s earnings were above the substantially gainful amount in the last three of those years.

<u>Appellant’s earnings 2016 to 2019</u> ²⁶	<u>Maximum CPP disability pension</u> ²⁷
2016 \$10,625	\$15,489
2017 \$22,305	\$15,763
2018 \$33,686	\$16,029
2019 \$20,660	\$16,350

²² *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

²³ GD9-I-55

²⁴ GD9-I-25-26, 55

²⁵ Section 68.1 of the *CPP Regulations*

²⁶ GD13

²⁷ These figures are approximate.

[26] The evidence shows that the Appellant's earnings in 2017 were 40% above the substantially gainful amount. The following year, they were more than 100% above the substantially gainful amount.

- **The Appellant's employers were not benevolent**

[27] Whether an appellant works for a benevolent employer is one factor for me to consider.²⁸

[28] An appellant may be considered disabled even if she is working, if she works for a benevolent employer. A "benevolent employer" varies the conditions of the job and modifies expectations in keeping with the employee's limitations. The accommodations, however, must go beyond what would be expected in the marketplace. In addition, an employer is not benevolent when its expectations of the employee's work performance are similar to the expectations for other employees.²⁹ The evidence fails to show that the Appellant worked for a benevolent employer.

[29] Every case turns on its own facts. However, a decision called *Atkinson*, which involved an overpayment, illustrates a situation when the Federal Court of Appeal decided that an appellant's employer was not benevolent. The appellant in that case had numbness and atrophy in her right arm and leg and limited use of her left hand. She was unsteady on her feet.

[30] Ms. Atkinson had a job with the police. She attended work only 70% of the time. Her employer provided a number of accommodations, like a special parking space, and a headset for talking on the phone. All meetings she had to attend took place in the building where she worked. Other people set up the meetings and carried binders for her. Ms. Atkinson earned \$43,000 to \$45,000 a year. The Federal Court of Appeal determined that she was not disabled under the CPP requirements.

²⁸ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

²⁹ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187; and *A.B. v. Minister of Employment and Social Development*, 2016 SSTADIS 412.

[31] In April 2022, the Appellant's supervisor at the airport job wrote that the Appellant's attendance was fair. The employer arranged a modified shift pattern for her. The Appellant did not need help from coworkers and was able to handle the demands of the job. However, she had breathing difficulties and occasionally took extra days off.³⁰

[32] At the bookstore in 2016-2017, there were no special arrangements to accommodate the Appellant. She had lost time from work due to illness, but had not kept track of the dates.³¹ In March 20, 2022, the Appellant stated that when she worked at the bookstore, she was not allowed to work in dusty areas of the store. In addition, she was allowed to work on slower days.³² She stated that her doctor advised her to stop working at the store because she was continuously getting sick.³³

[33] In 2017 to 2018, the Appellant was able to work sufficiently regularly to keep her jobs at the airport and the bookstore. She left both jobs by her own choice. There is no indication that the accommodations her employers offered her went beyond what would be required in the commercial marketplace. There is no indication that her employers expected less of her than of other employees. In addition, there is no evidence that her employers took disciplinary action against her because of missed time. Further, she did not need help to do her job. I find that the Appellant's employers were not benevolent.

- The Appellant's work in 2017 to 2018 was not a failed work attempt

[34] I have considered whether the Appellant's employment in 2017 and 2018 was a failed work attempt. There is no clear definition of the term "failed work attempt." A period of only a few weeks would most likely qualify when the work had to be terminated because of an appellant's health condition.³⁴ In this case, however, the Appellant was able to work from August 2016 to August 2019, when she returned to school.³⁵ I find that her period of work was too long to be considered a failed work attempt.

³⁰ GD13-17-19. The Appellant missed 42 days on sick leave from 2010 to 2019: GD13-18.

³¹ GD9-I-55

³² GD11-2-4

³³ GD9-I-55

³⁴ See *Monk v. Canada (Attorney General)*, 2010 FC 48.

³⁵ While attending university, she worked at the university book store.

[35] The Appellant continued to have work capacity. In August 2019, she returned to school. Her mother testified that she completed a 4-year degree with distinction in 2 ½ years while working at the university bookstore. She graduated in June 2022.

[36] The Appellant had concerning medical conditions in 2017 and 2018. However, she had the regular capacity to work. Her earnings were above the substantially gainful amount in these years. Her employers were not benevolent and her work was not a failed attempt. For these reasons, I find that in 2017 and 2018, her disability had ceased to be “severe” as defined in the CPP.

The Minister’s process on overpayment cases

[37] In January 2020, a letter from Service Canada informed the Appellant that it had reviewed her file to see whether she was still eligible for CPP disability. The letter stated that she had returned to work in 2016 at two different jobs. Service Canada allowed her a paid three-month work trial from January to March 2017. The work trial had been successful. The Appellant had earned more than \$20,000 in 2017 and more than \$30,000 in 2018. Therefore “your disability benefits stopped the end of March 2017.”³⁶

[38] The letter stated that the Appellant was not entitled to the CPP disability payments she received from April 2017 to December 2018, “when we stopped your benefit while investigating your account.”³⁷

[39] The Appellant responded by stating that she did not understand why Service Canada continued to pay her after March 2017 if it considered that she was no longer disabled after that date. It was Service Canada’s choice to keep paying her; it was not something that she asked for.³⁸

[40] The Appellant’s argument fails to take into account that Service Canada was unaware until January 2020 that the Appellant had, under the CPP, ceased to become

³⁶ GD9-I-27

³⁷ GD9-I-28

³⁸ GD9-I-25-26

disabled.³⁹ Although the Appellant evidently filed tax returns, the CRA does not routinely share these with Service Canada. Therefore, when a person receiving a disability pension returns to substantially gainful employment without notifying the Minister, there is usually a delay in Service Canada finding out and taking action.

[41] The Appellant's mother made a version of the Appellant's argument at the hearing. She stated that if the Appellant's disability benefits were, as the Minister said, "stopped" at the end of March 2017, the Appellant did not receive any benefits after that date. However, neither the Appellant nor the Minister disputes that the Appellant received CPP disability in the period April 2017 to December 2018.

Why the Appellant failed to notify CPP of her earnings

[42] A disability pension ceases to be payable with the payment for the month in which the recipient ceases to be disabled.⁴⁰

[43] A person receiving CPP disability benefits has a legal obligation to inform the Minister without delay if she returns to work. If she fails to do so without good cause, the Minister may determine that she was no longer disabled at such time as the Minister may specify.⁴¹

[44] The Appellant stated that she was unaware of the requirement to report her return to substantially gainful work to the Minister.

[45] The Minister stated that the Appellant signed information in 2015 stating that she was aware she would have to report any return to work to the Minister.⁴² CPP reminded her of this in a phone call in June 2015, and in a Notice of Entitlement letter sent shortly after the granting of her benefit. Every year afterwards, the Appellant was reminded to report when her gross employment earnings reached the allowable limit in each calendar year. This information was included with the CPP T4A tax slip sent every

³⁹ I infer this from Service Canada's letter to the Appellant at GD9-I-27.

⁴⁰ Subsection 70(1) of the CPP.

⁴¹ Subsection 70(1) *CPP Regulations*.

⁴² GD9-I-71-74

February. In addition, the fact that the Appellant reported her return to work in September 2016 suggests that she understood this responsibility. At that time, she was again reminded of her duty to report future work earnings over the allowable limit.⁴³

[46] I find the Minister's arguments persuasive. The Appellant had signed documents in the past stating that she would tell CPP of any return to work. In addition, she was frequently informed of her obligation to report her work status to the Minister. Apart from her report in September 2016, she did not do so.

Other considerations

[47] I am sympathetic to the Appellant's circumstances. She continued working in 2017-2019 in spite of significant health challenges. In 2019, she returned to school, completing her degree very quickly. She hopes to obtain a doctorate and work in the field of repatriating Indigenous art.

[48] However, I cannot make decisions based on compassion or extenuating circumstances. I am a statutory decision-maker. I can only make decisions based on the CPP.

[49] The Appellant may choose to apply to the Minister for cancellation of all or a part of the overpayment of her CPP disability pension. The law allows her to ask for this when repayment would cause her undue hardship.⁴⁴ At the hearing, we discussed at length exactly how she can do this.

[50] My decision relates only to the Minister's termination of the Appellant's entitlement to the CPP disability pension from April 2017 to December 2018. It does not decide whether she has become disabled again afterwards.

[51] At the hearing, M. W. stated that in September 2022, the Appellant would go on the wait list for a double lung transplant. This means that she will have to wait for a suitable pair of lungs to become available. After the surgery, the Appellant will spend

⁴³ GD13-14. The allowable limit in 2016 was \$5,400: GD9-I-68

⁴⁴ Subsection 66(3) of the CPP

three to four weeks in the intensive care unit, and then another month or two in hospital, depending on her condition. Her lung disease could recur, even with a new set of lungs.

[52] In future, the Appellant may choose to make a new application for a CPP disability pension.

Conclusion

[53] I find that the Minister has established that it is more likely than not that the Appellant ceased to be disabled as defined in the CPP by the end of March 2017. The Minister was entitled to terminate her disability pension as of April 2017.

[54] This means the appeal is dismissed.

Carol Wilton
Member, General Division – Income Security Section