



Citation: *TA v Minister of Employment and Social Development*, 2022 SST 1630

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

Decision

Appellant: T. A.

Respondent: Minister of Employment and Social Development

Respondent's representative: Connie Davis

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated January 20, 2020 (issued
by Service Canada)

Tribunal member: Carol Wilton

Type of hearing: Teleconference

Hearing date: November 3, 2021

Hearing participants: Appellant
Representative of the Minister

Decision date: March 9, 2022

File number: GP-20-603

Decision

[1] The Minister was entitled to terminate payment of the Appellant's *Canada Pension Plan* (CPP) disability pension as of April 2009.

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

Overview

[3] The Appellant is appealing the Minister's decision to terminate payment of his CPP disability pension as of April 2009.

[4] The Appellant was born in March 1952. Beginning in 1993 or 1994, he began receiving financial support from the provincial disability agency (Ontario Disability Support Program or ODSP).¹ This continued until he reached the age of 65.²

[5] In September 1998, the Minister granted the Appellant a CPP disability pension with an effective start date of June 1997. The Appellant's main health conditions were rheumatoid arthritis and depression. He stated that the depression was due to post-traumatic stress syndrome (PTSD) caused by political imprisonment and torture in Pakistan during the 1980s.³

[6] Beginning in 2004, the Appellant worked as a parking lot attendant. In November 2017, the Minister stopped his CPP disability benefits for the period from April 2009 to June 2016 (the disputed period).⁴ He had failed to inform the CPP of his earnings once they exceeded the year's allowable earnings. As of June 2016, he had an overpayment of \$49,482.67.⁵

¹ GD1-3; GD19-3

² GD1-3

³ GD2-IV-210

⁴ GD2-I-223. A "trigger list" in October 2015 identified earnings after the date of onset of the Appellant's benefits.

⁵ GD4-5. This included payments to his daughter (Disabled Contributor's Child Benefit). In February 2020, the Minister notified the Appellant that it would recover the amount owing by deducting \$124 monthly from his retirement pension: GD2-I-7.

[7] On reconsideration, the Minister denied the Appellant's request not to stop his CPP disability pension as of May 2009. The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal (Tribunal).

[8] The Appellant stated that he should not have to repay the money that CPP said he owed. Although he had part-time work, he had continued to have a disability.

[9] In addition, he considered ODSP to be the main agency to which he had to report. He submitted all pay stubs to ODSP.⁶ He was unaware of the requirement to report his earnings to CPP disability.

[10] The Appellant asked that the Tribunal direct the Minister to negotiate an arrangement that would allow ODSP to pay back to CPP the money deducted from his ODSP payments.⁷

[11] The Minister says that the Appellant no longer had a disability that was severe and prolonged as of the end of April 2009. He had the regular capacity to work at a substantially gainful occupation beginning in May 2009.

Matters I have to consider first

[12] The Tribunal received the Reconsideration file in April 2020. In July 2020, the Appellant stated that he was ill. He asked that any discussions with Tribunal staff be postponed until late in August 2020.⁸

[13] In May 2021, there was a pre-hearing conference to discuss the Appellant's request for an in-person hearing.⁹

⁶ GD2-I-28: report of CPP investigator, April 2016; GD2-I-34: consent to disclose information, November 2005

⁷ GD1-4

⁸ GD3

⁹ GD7

[14] In June 2021, a second pre-hearing conference took place. The parties agreed to a hearing date in August 2021.¹⁰

[15] In July 2021, the Appellant asked that the hearing be postponed for at least two months.¹¹ In October 2021, the Appellant again asked that the hearing be postponed. He was ill and needed time to find a lawyer.¹² The hearing took place in November 2021. The parties submitted several post-hearing documents after the hearing.

Issue

[16] After April 2009, did the Appellant's employment earnings establish that he had regained the regular capacity to pursue substantially gainful employment?

Reasons for my decision

[17] 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.¹³

[18] 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.¹⁴ If an appellant is able regularly to do some kind of work that he could earn a living from, then he isn't entitled to a disability pension.

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

¹⁰ GD11-1

¹¹ GD14

¹² GD16

¹³ Subsection 70(1) (a) of the CPP

¹⁴ Paragraph 42(2)(a) of the CPP gives this definition of severe disability.

¹⁵ Paragraph 42(2)(a) of the CPP gives this definition of prolonged disability.

[20] The Minister relies on the Appellant's earnings from 2009 to 2016 to establish that, despite his medical condition, he had regained the regular capacity to pursue substantially gainful employment.

The Appellant's health conditions

[21] The Appellant stated that his disability was severe and prolonged. He maintained that his health steadily worsened from 2008 to 2016.¹⁶ Therefore, he should not be required to repay the monies the Minister said he owed.

[22] From 2010 to 2013, clinical notes from Dr. John Thomson, rheumatologist, showed that the Appellant continued to suffer from rheumatoid arthritis.¹⁷ In addition, the Appellant received treatment for latent tuberculosis beginning in May 2010.¹⁸

[23] The Appellant stated that there was a "sharp deterioration" in his condition starting in November 2014. He developed septic arthritis in his right elbow and was on intravenous antibiotics for about a month.¹⁹ In August 2015, he spent the night in hospital with a possible septic right elbow and gout.²⁰ Afterwards, he was on intravenous antibiotics for three weeks.²¹

[24] At the end of October 2015, the Appellant had another episode with septic arthritis in his right elbow.²² In December 2015, he continued to have pain in his right elbow.²³ He was on antibiotics until February 2016.²⁴

[25] In December 2015, the Appellant completed a Disability Reassessment Questionnaire. He said he had new medical conditions. These were high blood

¹⁶ GD19-1

¹⁷ GD2-II-68-78

¹⁸ GD2-II-68

¹⁹ GD2-II-88

²⁰ GD2-II-99

²¹ GD2-II-103

²² GD2-II-109

²³ GD2-II-117

²⁴ GD2-II-125

pressure, an enlarged prostate, septic arthritis, gout, gallbladder cysts, finger and toe numbness, and a transient ischemic attack in 2004.²⁵

[26] In November 2021, Dr. Thomson wrote “To whom it may concern” that the Appellant had suffered from rheumatoid arthritis for more than 30 years. He had suffered from many flare-ups of the disease over the years. He had a significant degree of joint damage. It had been difficult for the Appellant to maintain employment.²⁶

[27] The Minister has acknowledged that during the period from April 2009 to June 2016, the Appellant suffered from a chronic illness. The illness meant restrictions in his employment and activities of daily living.

[28] As the Appellant pointed out, the Minister did not take into consideration his PTSD and depression in determining that he had ceased to be disabled.²⁷

[29] However, the key question in a disability pension appeal is the functional effect of that condition on an appellant’s ability to work.²⁸ The measure of whether a disability is “severe” is whether the disability “prevents [an appellant] from earning a living.”²⁹ An appellant’s capacity to work, not the diagnosis of his disease, determines the severity of his disability under the CPP.³⁰

The Appellant’s earnings from employment

[30] Since the Minister terminated the Appellant’s disability pension as of May 2009, I must focus on his capacity to work after the end of April 2009.

[31] The Appellant began working for his employer in October 2008 and continued to do so past June 2016.

²⁵ GD2-II-173 ff.

²⁶ GD18-2-3. See also GD2-II-64, report of Dr. Ambika Dewan, family doctor, April 2017.

²⁷ GD21-7. But see GD2-III-222, report of Dr. Thomson on these conditions in March 2000.

²⁸ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

²⁹ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

³⁰ *Klabouch v. Canada (Social Development)*, 2008 FCA 187

[32] The Appellant stated that in 2010, 2011, 2015 and 2016, his income was “below the CPP calculations that would have satisfied the requirement for substantially gainful income.”³¹

[33] Before May 2014, the test for “substantially gainful” was that payment for the services rendered was not merely “nominal, token or illusory.” Instead, the payment reflected the appropriate award for the nature of the work performed.³²

[34] 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.³³ This definition also provides guidance as to what qualified as substantially gainful employment before the end of May 2014.

[35] The Appellant’s earnings 2009 to 2016	Maximum CPP disability pension ³⁴
2009: \$16,563	\$13,300
2010: \$11,375	\$13,500
2011: \$12,870	\$13,800
2012: \$18,232	\$14,200
2013: \$15,977	\$14,500
2014: \$15,568	\$14,800
2015: \$13,847	\$15,100
2016: \$15,006 ³⁵	\$15,500

³¹ GD19-6-7

³² *Poole v. The Minister of Human Resources Development*, CP20748, 2003.

³³ Section 68.1 of the *CPP Regulations*

³⁴ These figures are approximate. The Minister also provided the figures it had used for “substantially gainful” before the end of May 2014. They were: 2009: \$10,905; 2010: \$11,210; 2011: \$11,520; 2012: \$11,840; 2013: \$12,150; 2014: \$12,460. This is at GD26-5.

³⁵ GD4-8

[36] In the period up to the end of May 2014, the Appellant's earnings were not nominal, token, or illusory. They reflected an appropriate award for the work performed. The Appellant's earnings were greater than the maximum CPP disability pension amount in 2009, 2012, 2013, and 2014. In 2016, his earnings were only \$500 less than the maximum CPP disability amount.

[37] In March 2017, the Appellant's employer completed a questionnaire from the Minister. The questionnaire stated that the Appellant had worked for the company since October 2008. His job involved completing parking transactions while accepting money, credit and debit forms of payment. He was a casual employee until July 2016, when he obtained a part-time position. He worked 20 hours a week for \$13.32 an hour. His work was satisfactory. Although he attended many appointments, his attendance at work was good. He was never absent for more than two weeks at a time. He worked independently with minimal supervision. No special arrangements were in place and he required no help from co-workers.³⁶

[38] The Appellant referred to the CPP Disability Adjudication Framework – Canada (Adjudication Framework) in maintaining that his earnings in the disputed period were not substantially gainful. The Adjudication Framework provides guidance to the CPP staff on how to assess disability applications. However, I am bound by the provisions of the CPP. I cannot be guided by the Adjudication Framework in arriving at my decision.

[39] The evidence fails to show that the Appellant worked for a benevolent employer. A "benevolent employer" varies the conditions of the job and modifies expectations of in keeping with the employee's limitations.³⁷ There is no evidence of variation in the conditions of the job or modified expectations for the Appellant's job as a parking lot attendant.

³⁶ GD2-II-141-143. The Appellant stated that the person who filled in the Employer Questionnaire only consulted one manager at a site where the Appellant did some brief cashiering in 2016-2017. . The questionnaire, he said, was not a reliable measure of his work capacity.

³⁷ *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, at para. 7

[40] The Appellant stated that the Minister failed to prove that he regularly engaged in “substantially gainful work” during the years in question.³⁸ By “substantially gainful work,” the Appellant meant an amount equal to the maximum payment of a CPP disability pension for the years in question.

[41] However, the Minister does not have to show this. For the period from May 2009 to May 2014, the issue is whether the Appellant gave value for the work he did. There is no evidence that he did not.

[42] In addition, in order to be prolonged, the disability must be expected to last indefinitely. It is true that in some years the Appellant failed to earn an amount equal to the maximum payment of a CPP disability pension. However, evidence is lacking that this was expected to continue indefinitely. In fact, it was in 2019 that the Appellant had his highest earnings.³⁹

[43] The Appellant was able to work from 2009 to 2016, earning more than the maximum amount of the CPP disability pension in half the years. He required no special accommodations. There is no evidence that he failed to provide market value for his services compared to other employees in the same position. There is no suggestion that he was not providing his employer with “value for its money.” His employer was not benevolent.

The Appellant’s explanations for failing to notify CPP of his earnings

[44] The Appellant stated that he was unaware of the requirement to report his earnings to the Minister.

[45] The Minister stated that in 2000-2005, the Appellant had extensive contact with a CPP vocational rehabilitation case manager. This would have involved counselling on reporting obligations involved in a return to work. In addition, in every tax year, the

³⁸ GD25-1

³⁹ \$23,475: GD2-I-5

Minister informed the Appellant that he had to tell Service Canada if his earnings were greater than a certain amount.⁴⁰

[46] The Minister also stated that, given the Appellant's level of education (M.A. in political science and diploma in journalism), it was reasonable to expect that he would have understood his obligation to report work activity to CPP during these years.

[47] The Appellant stated that he had cognitive issues arising from his PTSD. These prevented him from reporting his income to the CPP authorities, especially given that he wasn't told to do so. However, as noted above, the Minister sent him information every year telling him to report his income to the Minister. In addition, as the Minister pointed out, the Appellant's job involved keeping track of money. It required a significant degree of cognitive awareness.

[48] I find the Minister's arguments persuasive. The Appellant was frequently informed of his obligation to report his income to the Minister. He did not do so.

[49] The Appellant asked that the Tribunal direct the Minister to negotiate an arrangement that would allow ODSP to repay to CPP the money deducted from his ODSP payments.⁴¹ The Tribunal does not have the authority to do this. The Minister stated that if ODSP reviews their benefit information and determines that there is money owing to the Appellant, they could send payment directly to CPP or to the Appellant, who could then repay CPP.⁴²

[50] I am sympathetic to the Appellant's circumstances. He continued working for many years in spite of health challenges. However, I am a statutory decision-maker. I can only make decisions based on the CPP. I cannot make decisions based on compassion or extenuating circumstances.

⁴⁰ GD2-I-14, 18-19; GD10-2. The amount was \$4,600 in 2009 and \$5,500 in 2016.

⁴¹ GD1-4

⁴² GD10-1

[51] The Appellant may choose to apply to the Minister for cancellation of all or a portion of the amount owing under section 66(3) of the CPP.

Conclusion

[52] I find that the Minister has established that it is more likely than not that the Appellant ceased to be disabled by the end of April 2009. The Minister was entitled to terminate his disability pension as of May 2009.

[53] This means the appeal is dismissed.

Carol Wilton
Member, General Division – Income Security Section