



Citation: *JM v Minister of Employment and Social Development*, 2023 SST 57

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: J. M.

Respondent: Minister of Employment and Social Development

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

Tribunal member: Connie Dyck

Type of hearing: Teleconference

Hearing date: January 10, 2023

Hearing participant: Appellant

Decision date: January 24, 2023

File number: GP-21-1525

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. M., returned to full-time work in February 2017. The Minister allowed him a three-month work trial period. He was no longer disabled by May 31, 2017.

[3] My decision is only about whether the Appellant stopped being disabled. I don't have the power to cancel the overpayment that he owes or make a payment plan.

[4] This decision explains how I came to my decision.

Overview

– Background

[5] The Appellant applied for a disability pension in February 2013¹. He said he couldn't work because of liver disease, common variable immunodeficiency syndrome and lung infections.

[6] The Minister of Employment and Social Development (Minister) agreed the Appellant couldn't work. His disability benefit payments started in December 2012.²

[7] Information from Canada Revenue Agency (CRA) showed the Appellant had employment income. The Minister investigated the Appellant's work activity.

[8] The Minister decided the work activity showed the Appellant was no longer disabled by May 31, 2017.

[9] The Minister allowed a three-month "work trial" from March 1, 2017 to May 31, 2017. The Minister said the Appellant would have to pay back the pension amounts he

¹ The disability application is at GD 2-53.

² The Minister's decision is at GD 2-271.

received from June 1, 2017 to October 31, 2018. This is when the Minister suspended his benefits.³

[10] The Appellant asked the Minister to reconsider its decision. The Minister didn't change its decision. The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division (Tribunal).

What the parties say

[11] The Appellant said he has a lifelong condition. He believed he should be entitled to a reduction in the overpayment. He was unable to work for two months when he was receiving cancer treatments. The three months after he returned to work should be considered his work trial period.

[12] The Minister says the Appellant no longer met the severe and prolonged criteria by May 31, 2017. He was regularly able to return to gainful employment.

What I have to decide

[13] I must decide if the Appellant was still disabled. If I decide he was no longer disabled, I must decide when that happened.

[14] I must decide if the Appellant's disability was severe. This means was he incapable regularly of pursuing any substantially gainful occupation?⁴

[15] I must look at all the Appellant's medical conditions together to see what effect they had on his ability to work. I also must look at his background including his age, language abilities, level of education, and past work and life experience). This is so I can get a realistic or "real world" picture of whether his disability was severe. If the Appellant was regularly able to do some kind of work that he could earn a living from, then he is no longer disabled.

³ The Minister's decision is at GD 2-12.

⁴ Section 42(2)(a) of the *Canada Pension Plan* explains what it means to be disabled under the law.

[16] The Minister must prove it was more likely than not that the Appellant was no longer disabled.⁵

[17] If I decide that the Appellant was no longer disabled, then he isn't eligible for a disability pension. The Minister may also require him to pay back any payments he got when he wasn't eligible.⁶

Reasons for my decision

[18] I find the Minister proved the Appellant was no longer disabled by May 31, 2017.

– The Appellant regained the capacity to work

[19] The Appellant applied for a disability pension in February 2013. The Minister agreed the Appellant couldn't work because of⁷:

- lung infections
- liver disease that required a transplant and
- common variable immunodeficiency syndrome

[20] The Appellant told me that since he moved from Alberta to British Columbia in 2015, he hasn't had **lung infections**.

[21] He had a liver transplant in October 2013. He said that before the **liver transplant** he felt fatigued, had jaundice and confusion. After the transplant, the confusion was gone, and he had less fatigue. He explained that his condition became more manageable. So, he applied for a parts technician job with X.

[22] The Appellant has **common variable immunodeficiency syndrome**. The Appellant explained this is a lifelong condition. He receives immunoglobulin (IVIG) infusions on a regular basis, usually monthly.⁸

⁵ This is called a "balance of probabilities". See *Atkinson v Canada (Attorney General)*, 2014 FCA 187

⁶ See sections 66 and 70(1)(a) of the *Canada Pension Plan*.

⁷ This is at GD 2-7.

⁸ This information is at GD 4-4 – GD 4-15.

[23] I recognize the Appellant has had many medical challenges. The Appellant had several skin infections, chronic diarrhea, and cancer at various times between May 2017 and November 2018.⁹ But the law says it is the Appellant's ability to work, not his medical diagnosis, that determines if he is disabled.¹⁰

[24] Dr. Wright (infectious disease) said the Appellant managed to function and perform his day-to-day activities.¹¹ This was in November 2017. After his six-month probation period ended, he told his employer about his health issues. His employer was willing to accommodate him. In June 2021, the Appellant said he made great improvements and gained better control of his bowels.¹²

[25] The medical evidence shows significant improvement in the Appellant's conditions. In assessing the Appellant's ability to work on a regular basis, it is not the degree of discomfort that he may have suffered that is assessed, but rather his ability to perform a substantially gainful occupation.¹³

– **The Appellant's income from work was substantially gainful**

[26] The Appellant's income from work has been substantially gainful since 2017.

[27] An appellant's income for a year is substantially gainful if it is equal to or more than the maximum amount they could get as a disability pension for that year.¹⁴

⁹ The family doctor's letter is at GD 11-2.

¹⁰ *Dion v. Canada (Attorney General)*, 2019 FC 1552

¹¹ The report is at GD 5-14.

¹² This is at GD 1-7.

¹³ *Dion v. Canada (Attorney General)*, 2019 FC 1552

¹⁴ See section 68.1 of the *Canada Pension Plan Regulations*

[28] The table below compares the Appellant's income and the substantially gainful income for each year from 2017 to 2020.¹⁵

Year	Appellant's Income from Work	Substantially gainful income
2017	\$43,630	\$15,763.92
2018	\$38,793	\$16,029.96
2019	\$35,842	\$16,347.60
2020	\$70,389	\$16,651.92

[29] The table shows the Appellant earned well above the substantially gainful amount in all four years.

– **The Appellant was capable regularly of substantially gainful work**

[30] Just because an appellant earns a substantially gainful income doesn't mean they are no longer disabled. The Minister must also prove that the appellant is incapable regularly of earning a substantially gainful income from work.

[31] I find that the Appellant has been capable regularly of doing substantially gainful work since May 31, 2017, after his three-month trial period.

[32] The Appellant started working full-time as a parts technician in February 2017. He said he really wanted this job. It was his first good paying job, and he would be doing what he trained for. The Appellant said he worked very hard at managing his conditions while working a full-time position earning a liveable wage.¹⁶

[33] His Record of Employment for February 6, 2017 to May 31, 2018 shows regular and consistent bi-weekly earnings.¹⁷ He also had 2,202 insurance hours during this 15 month period. The Appellant then took two months off work for cancer treatments. He returned to full-time work on August 20, 2018. The Record of Employment from this

¹⁵ See GD 3-14.

¹⁶ This is at GD 2-8.

¹⁷ This ROE is at GD 2-10.

date to March 22, 2019, also shows regular and consistent earnings.¹⁸ During this five-month period, he had 1,243 insurable hours.

[34] This job did not end because of the Appellant's medical condition. He quit to work for another employer.

– **The Appellant didn't have a benevolent employer**

[35] I also considered whether the Appellant had a benevolent employer. This could mean he wasn't capable of working at his job, despite what his income showed.

[36] A benevolent employer will change working conditions and lower their expectations. They expect significantly less from the disabled employee than from other employees. They accept that the employee can't work at a competitive level.¹⁹

○ **Was the Appellant's work productive?**

[37] The Appellant's work was productive. He found this job on-line. He submitted a resume and was hired. The Appellant returned to work after his cancer treatments. He worked full-time doing the same desk job.

○ **Was the employer satisfied with the Appellant's work performance?**

[38] The employer seemed satisfied with the Appellant's work performance. The Appellant said he was very good at his job. His performance reviews were positive. His employer did not complain about the Appellant's performance. The Appellant explained that it was the opposite. He felt like his employer "kept you in the dark to manipulate you".

[39] The Appellant applied for another job in March 2019. This job offered him more money and more vacation. He told his employer about this and asked if they would match this offer. They couldn't match the offer, but they did make him another offer.

¹⁸ This ROE is at GD 2-9.

¹⁹ The Federal Court of Appeal said this in *Atkinson v Canada (Attorney General)*, 2014 FCA 187

This shows me that the employer found the Appellant's work performance satisfactory. They made him a job offer to encourage him to stay employed with them.

- **Was the work expected of the Appellant significantly less than expected of other employees?**

[40] The work expected of the Appellant was not less than what was expected of other employees. The Appellant said took the job of an employee who retired. The job expectations and duties for him were the same as they were for the previous employee. This was a job that was not physically demanding and more sedentary. He said the job was suitable for his limitations.

- **Did the Appellant receive accommodations that went beyond what was required in a competitive marketplace?**

[41] The Appellant told me that he did not receive any accommodations. He didn't initially tell his employer about his health concerns. He did not want that to prevent him from getting the job. His employer didn't notice any health concerns until about six months later when he started having symptoms related to his cancer.

[42] His employer allowed him to go to medical appointments, but they asked that he keep track of the time he was away. He was not paid for this time. This is not an accommodation that goes beyond what is required in a competitive marketplace. This did not cause the employer undue hardship.

[43] The Appellant did not quit his job at X because of his medical condition. Rather, in March 2019, he felt manipulated and unsupported.

– **The Appellant's personal factors are favourable**

[44] When I am deciding whether the Appellant can work, I can't just look at his medical conditions and how they affect what he can do. I must also consider factors such as his age, level of education, language abilities, and past work and life

experience. These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say that he can work.²⁰

[45] These factors support the Appellant's ability to work. In 2017, he turned 29 years old. He had many years before he would reach the normal retirement age of 65. He had some post-secondary education as a parts technician. He found suitable sedentary work as a parts technician in February 2017. He worked for the same employer until March 2019. This shows the Appellant's personal factors worked in his favour.

I can't cancel the overpayment

[46] The Appellant asked for a reduction of his overpayment. Specifically for the months of June to October 2018. He received cancer treatments in June and July 2018. He also asked that August, September, and October 2018 be his three-month work trial.

[47] This would result in a reduction of the overpayment. But I don't have this power. The Minister can decide not to make the Appellant pay back the debt. For example, the Minister has the power to write off or lower the debt if the Appellant would experience undue hardship because of the debt. The Minister can also offer a repayment plan.²¹

[48] I am sympathetic to the Appellant's situation. However, I must follow what the *Canada Pension Plan* says. I must interpret and apply the rules as they are set out in the *Canada Pension Plan*. I cannot make decisions based on fairness, compassion, or special circumstances.

²⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²¹ See section 66(3) of the *Canada Pension Plan*.

Conclusion

[49] The CPP doesn't say anything about work trials. But by May 31, 2017, the Appellant had been working regularly at substantially gainful employment for three months. He has continued to work regularly and predictably since then.

[50] This shows that by May 31, 2017, the Appellant was capable regularly of pursuing a substantially gainful occupation. This is when he stopped being disabled. He wasn't eligible for a CPP disability pension after that.

[51] This means the appeal is dismissed.

Connie Dyck
Member, General Division – Income Security Section