Citation: *KO v Minister of Employment and Social Development*, 2023 SST 1413

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	K. O.
Representative:	Jonathan Burton
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated May 17, 2021 (issued by Service Canada)

Tribunal member:	Virginia Saunders
Type of hearing:	Videoconference
Hearing date:	May 10, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	October 27, 2023
File number:	GP-21-1695

Decision

[1] The appeal is dismissed.

[2] The Appellant, K. O., stopped being disabled in April 2016. This means he wasn't entitled to receive Canada Pension Plan (CPP) disability pension payments after that month.

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

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

Overview

[5] The Appellant was in a car accident in June 2009. Since then, he has had migraines, insomnia, and severe back and neck pain. He hasn't been able to go back to his old job in construction.

[6] The Appellant started getting a CPP disability pension in July 2010. The Minister of Employment and Social Development (Minister) stopped paying the pension in May 2015, because the Appellant had been working at a different job for about six months.[1] He couldn't continue because of his limitations, so the Minister reinstated his disability benefits in July 2015.[2]

[7] In November 2018, the Minister learned that the Appellant had earned income in 2016 and 2017. It started reviewing the Appellant's file. It held back the Appellant's disability payments after December 2018, pending completion of the review.[3]

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[1] See GD2-124.
[2] See GD2-107-108.
[3] See GD2-31-32.

[8] In July 2020, the Minister decided that the Appellant stopped being disabled in April 2016. The Minister said he had to repay $41,559.92 that he had received in CPP disability benefits from May 2016 to December 2018.[4]

[9] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[10] The Appellant says he has had a severe and prolonged disability continuously since he started getting a CPP disability pension, including after April 2016. He says evidence of his income doesn't prove that he stopped being disabled, because he only worked occasionally, and it was for a benevolent employer.

[11] The Minister says the Appellant's earnings show that, despite his medical condition, his disability was no longer severe as of April 2016.

What I have to decide

[12] I have to decide whether the Appellant stopped being disabled. A person stops being disabled when they become **capable regularly** of pursuing any **substantially gainful occupation**. This means that if the Appellant was regularly able to work and earn at least as much as the maximum CPP disability pension, then he stopped being disabled.[5]

[13] If the Appellant stopped being disabled, I have to decide when that happened. I can consider any time from August 2015 (when the Minister last decided he was disabled) up to the hearing date.[6]

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[4] The Minister's initial decision is at GD2-33-36. The reconsideration decision is at GD2-40-45.
[5] Section 42(2) of the *Canada Pension Plan* explains what it means to be disabled under the law. Section 68.1 of the *Canada Pension Plan Regulations* explains what "substantially gainful occupation" means.
[6] Because the Minister decided to grant a disability pension to the Appellant in July 2015 (GD2-107), I can only find that he stopped being disabled in August 2015 or later. See *Kinney v Canada (Attorney General)*, 2009 FCA 158; and *SM v Minister (Employment and Social Development)*, 2022 SST 182.

[14] The Minister must prove on a balance of probabilities that the Appellant stopped being disabled. This means the Minister must show it is more likely than not that the Appellant stopped being disabled.[7]

[15] If I decide the Appellant stopped being disabled, he isn't eligible for a disability pension after that. The disability pension payments he got after that are considered a debt. The Minister may require him to pay back any payments he got when he wasn't disabled.[8]

Matters I have to consider first

What I based the decision on

[16] A different Tribunal Member managed this appeal file and held the hearing on May 10, 2023. However, she has resigned from the Tribunal. She left before she wrote the decision, so the file was assigned to me.

[17] The Vice Chairperson of the Tribunal's General Division – Income Security wrote to both parties. He told them I would consider all the evidence and arguments made in this appeal, whether in writing or at the hearing. He asked if they objected to me relying on the evidence and arguments from the hearing.[9]

[18] Neither party objected. The Appellant's representative asked if I had access to the previous member's opinions or notes.[10] I do not. My decision is based on evidence and arguments that have already been shared with both parties, as well as the recording of the May 10, 2023, hearing.

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[7] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[8] See sections 66 and 70(1)(a) of the *Canada Pension Plan*.
[9] See GD11.
[10] See GD12-1.

The Tribunal accepted the late documents

[19] Both parties sent in documents after the filing deadlines.[11] I considered all of them in making my decision. Here is why.

[20] First, the Tribunal didn't handle the late documents in a consistent or timely way.[12] This suggested to the parties that lateness was an administrative issue they didn't have to be overly concerned with.

[21] Second, neither party raised issues about the relevance of any late documents, their timing, whether it would be unfair to consider them, or whether it would cause delay. This might have been because the Vice Chairperson told them I would consider **all** the evidence and arguments. However, they didn't raise any concerns before the Vice Chairperson said this.

[22] Third, after considering all relevant factors—including that the parties may have relied on the Tribunal's failure to communicate or explain its decisions about the documents—I decided it would be unfair not to accept them.[13]

Reasons for my decision

[23] I find that the Appellant stopped being disabled as of April 2016. This is when his disability stopped being severe.

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[11] See section 62 of the *Social Security Tribunal Rules of Procedure* and section 27 of the *Social Security Tribunal Regulations* (2013 version). The Appellant's filing deadline was August 9, 2022—365 days after he filed the appeal. Because he filed a document within the last 30 days of that period, the Minister's filing deadline was September 9, 2022. Everything filed after that (GD6, GD8, GD9, and GD10) was late.
[12] GD6 was shared with the parties without comment. At the hearing, the Tribunal Member said she would accept GD8, but she didn't give reasons. After the hearing, the parties were told that the Tribunal Member had accepted GD9 and would consider it in making her decision. No reasons were given. The parties were then told that the Tribunal Member had decided to accept GD10 and would provide her reasons in the final decision. However, I don't know what those reasons were.
[13] Section 42(2) of the *Social Security Tribunal Rules of Procedure* sets out what factors I must consider when deciding whether to accept late evidence. Under section 8(5) of the Rules, I can apply these factors to late submissions (arguments) as well, even though these aren't considered evidence. Section 5 of the Rules defines "evidence."

[24] To explain the reasons for my decision, I will:

- show that the Appellant's income from work was substantially gainful
- show that he was capable regularly of doing that work by April 2016
- discuss his medical condition and personal factors
- address his other arguments

The Appellant's income from work was substantially gainful

[25] The Appellant's income from work since 2016 has been substantially gainful.

[26] A person'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]

[27] The table below compares the Appellant's income and the substantially gainful income for each year from 2016 to 2019.[15] This is the period the Minister looked at in making its decision.[16]

Year	Appellant's income from work	Substantially gainful income
2016	$30, 828.00	$15,489.72
2017	$26,770.00	$15,763.92
2018	$23,396.00	$16,029.96
2019	$22,346.00	$16,353.54

[28] The table shows the Appellant earned more than the substantially gainful amount in all four years.

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[14] See section 68.1 of the *Canada Pension Plan Regulations*.
[15] See GD4-21-22.
[16] See the decision at GD2-33. See GD6-4 for the Appellant's earnings details. See *Canada.ca* > *Open Government* > *Statistics on CPP monthly maximum amounts for new benefits* for maximum amounts for a disability pension.

[29] The Appellant argues that, for him, gainful employment should be similar to what he earned before the accident. In 2008 he earned $87,151. In the five months he worked in 2009 (before the accident), he earned $41,155.[17]

[30] The Appellant referred me to *DP v Minister of Employment and Social Development* (DP). In that decision, the Tribunal said the question of whether employment is substantially gainful can't be decided by a one-size-fits-all approach. Each case should be assessed on its own facts.[18]

[31] I don't accept the Appellant's argument. I don't agree with the Tribunal's statement in DP.[19] The three Pension Appeals Board decisions it cited as support for the statement were decided in 1994, 1998, and 2007.[20] That was before the law changed in 2014. The law now sets out the amount of income that is substantially gainful for CPP disability purposes.[21] I can only look at that amount. It doesn't matter that, for many people, it isn't even close to what they used to earn.

[32] I also note that the appellant in DP didn't have substantially gainful income for most of the years in the disputed period. The decision is based on the Tribunal's finding that the appellant wasn't regularly capable of working and that, when he did work, he had a benevolent employer. Those are different issues, which I consider below. The decision doesn't persuade me that I should ignore the substantially gainful amount that is set out in the *Canada Pension Plan Regulations*.

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[17] See GD8-10.
[18] See 2022 SST 439 at paragraph 17.
[19] I don't have to follow other Tribunal decisions.
[20] The Pension Appeals Board heard appeals from Review Tribunal decisions until both were replaced by the Social Security Tribunal in 2013. The decisions were *Boles v. Minister of Employment and Immigration* (March 14, 1994), CP 2794 (PAB); *Minister of Human Resources Development v. Porter* (December 3, 1998), CP05616 (PAB); *Minister of Social Development v Nicholson* (April 17, 2007), CP 24143 (PAB).
[21] See section 68.1 of the *Canada Pension Plan Regulations*.

The Appellant was capable regularly of substantially gainful work

[33] A person can earn a substantially gainful income and still be disabled. The Minister must also prove that the Appellant is **capable regularly** of earning a substantially gainful income from work.

[34] I find that the Appellant has been capable regularly of doing substantially gainful work since April 2016. By then, he had been working consistently and often enough to earn a substantially gainful income for several months.

[35] To explain why I decided this, I will:

- summarize his relevant work history
- show that, since April 2016, he has been regularly able to work at a job that is suited to his medical conditions and personal circumstances
- show that his employer wasn't benevolent

– The Appellant's relevant work history

[36] The Appellant had worked in construction for many years. It was physically demanding. Because of his chronic pain and headaches, he couldn't do that job after the accident in June 2009.

[37] In January 2011, the Appellant started working as an instructor for his union, X. He told Service Canada about this work. It didn't affect his disability benefits because he wasn't working often enough, and his income wasn't very high.

[38] In October 2014, the Appellant found a full-time job as a safety coordinator for a construction company. Service Canada stopped his disability pension in May 2015. They told him that if it didn't work out, they would reinstate his benefits. And that is what happened. The job turned out to be more physical than the Appellant could manage. He resigned. He started getting his disability pension again in July 2015.

[39] The Appellant then went back to teaching courses for his union. He is still doing this work. The job is mostly sitting down. He uses a Power Point and talks to union

members. He gives them worksheets, and he can relax while they fill them out. There are plenty of breaks, during which he can stand up or go for a walk.[22]

– **The Appellant was capable regularly of working at a suitable job**

[40] By April 2016, the Appellant was working regularly and predictably at a substantially gainful rate.

[41] The Appellant suggests that "regularly" in his case should be based on the fact that, until the accident, he worked full-time, five days a week, with overtime opportunities. By contrast, his job as an instructor is "extremely limited and part-time, often one day a week."[23]

[42] But it is the Appellant's capacity to work that must be regular, not the employment itself.[24] His pre-accident work schedule doesn't matter to this analysis. What matters is whether, after the accident, he could work with consistent frequency when he was scheduled to do so.[25]

[43] The parties have different views on what the evidence says about this.

[44] The Appellant argued that his work is occasional and inconsistent. He said he taught courses for four to six hours on Saturdays. He did this about twice a month, unless there weren't any courses scheduled. While he was teaching, he didn't take any pain medications. As a result, he had to spend the next day or so doing nothing so he could recover.[26]

[45] The Appellant said he started working more than just Saturdays because a change in the law meant the union had to retrain all its members in a short period. To help out, he taught two to three classes a week with a break in between so he could recover. Then his hours went back to what they had been previously. He increased

[22] See GD2-37-39 and the hearing recording.
[23] See GD8-10.
[24] See *Balkanyi v Canada (Attorney General)*, 2021 FCA 164.
[25] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[26] See GD2-37.

them again after the Minister suspended his benefits, to compensate for the loss of his disability pension. He said he endures more pain than he should have to.[27]

[46] The Minister relies primarily on three pieces of evidence. The first is a disability reassessment questionnaire the Appellant completed in January 2019. He said he had been working as a part-time instructor for X since 2010. He said that normally he is scheduled to teach one class a week, three or four times a month. The classes are six to eight hours long. If he works during the week, he is paid on average $317.31 per day ($45.33 per hour). On weekends he is paid $504.98 per day ($67.33 per hour).[28]

[47] The second piece of evidence is an employer questionnaire completed by "V. S." at X in March 2019. They said:

- The Appellant started working for X in January 2011.
- His income of $15,518.00 (2015), $30,828.00 (2016), and $26,770.00 (2017) was from his work as an instructor. He was still doing this work.
- He worked part-time because that was all that was available. He worked 24 hours per month at $42.76 per hour.
- They would offer him a full-time job if it was available.
- His attendance was good.
- He had no absences for medical reasons.
- The quality of his work was satisfactory.
- He worked independently and needed minimal supervision.
- He did not need special equipment or arrangements.
- He did not require help from his co-workers.[29]

[48] The Appellant filed a revised questionnaire completed by T. G., the director of training at X, in April 2023.[30] T. G. said that "V. S." was an accounts payable employee who completed the questionnaire without his knowledge, input or consent. T. G. said he

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[27] See GD2-37-39.
[28] See GD2-315.
[29] See GD2-262-264. The discrepancy between the Appellant's hourly rate and his reported income is explained at GD2-183-184.
[30] See GD8-18-20.

had known the Appellant for 12 years, and he had the most information about his role with X.[31]

[49] The revised questionnaire added new information about the Appellant's attendance. T. G. said:

- The Appellant worked part-time because that was all he was capable of.
- He wouldn't be offered a full-time job if one was available because he had physical restrictions.
- He had absences for medical reasons.
- He required help from his co-workers.
- The union created a schedule that worked with his ability to perform the work.

[50] Those were the only significant differences between the two questionnaires. T. G. did not dispute what the first questionnaire said about the Appellant's income, the quality of his work, or that his attendance was good.

[51] The third piece of evidence is a printout of the dates and times the Appellant worked between 2015 and 2018, and what he was paid. It shows that:

- In 2015 his hourly wage was $42.76 and $61.73. He worked between four and nine hours per day. He worked at least three times in every month except March (when he worked twice), and May and June (when he didn't work at all). The number of times he worked increased as the year went on: he worked 6 times in October, 10 times in November, and 9 times in December. He was paid $16,775.78 in total.[32]

- In 2016 his hourly wage was the same as in 2015. Most of his shifts were six or seven hours. He worked 7 times in January, 12 times in February, 10 times in March, and 12 times in April. He continued to work at about this rate for the

[31] See GD8-21.
[32] See GD2-219.

rest of the year, although he worked slightly less in the summer and in December. He was paid $28,880.30 in total.[33]

- This work pattern continued in 2017 and 2018. He worked multiple times in each month at a similar hourly rate. He earned $26,509.18 in 2017 and $23,680.25 in 2018.[34]

[52] I recognize that the Appellant missed some days because of his medical condition. But the employer questionnaires and the instructor fee printout show that he went to work most of the time he was scheduled to. His attendance from October 2015 on was regular and predictable. It was not, as he argues, occasional, inconsistent, or extremely limited.

[53] The Appellant argues that his work for X has never changed.[35] If the Minister accepted that he was disabled despite doing this work before April 2016, it should accept that he continued to be disabled after that date. I agree that what he was doing didn't change. But starting in October 2015, he was able to do it regularly and more often. That was a significant change.

[54] Although the Appellant worked just one or two days a week, he was still able to earn a substantially gainful income. It's true that he wouldn't have reached that threshold if he was paid a lower wage. But he wasn't paid a lower wage. Because of his work experience he was an attractive candidate for a job that he could do despite his medical conditions. The job paid him well enough to earn more than the maximum CPP disability pension.

– **The Appellant's employer wasn't benevolent**

[55] The Appellant's employer wasn't benevolent.

[56] A job with a benevolent employer might not be a real occupation. A benevolent employer will change working conditions and lower their expectations if an employee

[33] See GD2-220-221.
[34] See GD2-222-225.
[35] See Mr. Gedney's statement at GD8-21.

has limitations. They expect significantly less from the disabled employee than from other employees. They accept that the employee can't work at a competitive level.[36]

[57] I recognize that X created a schedule the Appellant could handle. He was able to do this work because it was part-time. His schedule was flexible and other instructors could fill in for him on short notice. The Appellant argues that this is a one-of-a-kind job. No one else would hire him to work in these conditions.

[58] I don't agree with the Appellant. His work activity shows that he can do a part-time, sedentary job as an instructor. X has employed him for more than 10 years. There's no evidence it hired him as a favour or that he wasn't doing a real job. He was paid at competitive rates.[37]

[59] X might be accommodating, but it didn't accommodate the Appellant more than what is required in the competitive marketplace. It gave him a work schedule that suited his limitations. He went to work reliably and did his job well. He may have needed help from co-workers, but it was only to fill in when he was absent or to move equipment before the class. There is no evidence that this caused X any concern or hardship.

The Appellant's medical conditions and other factors

[60] I agree with the Appellant that his medical condition hadn't changed in April 2016 or after that. He still has chronic pain and headaches.[38] And I recognize that he finds his work difficult. He has to rest the next day or so and he is uncomfortable and achy.[39] He feels he pushes himself to do more than he should. But there is no evidence that working made his condition worse in the long term or that his doctor told him to work

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[36] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187. In this decision, the Federal Court of Appeal also said the Minister doesn't have to prove that an employer **isn't** benevolent. The issue is one factor to be considered in deciding whether an appellant is "incapable regularly of pursuing any substantially gainful occupation."
[37] He was paid the same rate as the other instructors. See the hearing recording.
[38] See GD1-18-19.
[39] See GD2-232.

less.[40] Despite his challenges, he is capable regularly of doing the work and earning a substantially gainful income.

[61] 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.[41]

[62] These factors support the Appellant's ability to work. In April 2016, he was 42 years old. He has a college diploma in computer literacy. He hasn't claimed to have any issues with English literacy. Most importantly, he has significant work experience that helped him get the job he has been doing since 2011.

[63] The law says it is the Appellant's ability to work, not his medical diagnosis, that determines whether he is disabled. I sympathize with him, but I must follow the law.

[64] By the end of April 2016, the Appellant had been working at substantially gainful employment for the past six months. He continued to work regularly and predictably after that. This shows that, by April 2016, he was capable regularly of pursuing a substantially gainful occupation. That is when he stopped being disabled.

The Appellant's other arguments

[65] I can't allow the appeal based on the Appellant's other arguments.

– The Minister doesn't have to attend a hearing

[66] The Appellant argued that the Minister's failure to attend the hearing was something I should consider, because he wasn't able to ask the Minister questions.[42]

[67] A party doesn't have to go to a hearing. Nor do they have to send witnesses or a representative. In some cases, their failure to attend might lead to gaps in their

[40] See GD1-18-19 and GD8-41, 43, 45.
[41] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[42] See GD10-2.

evidence or arguments, or an adverse inference being drawn. But the Appellant didn't point to anything in particular that the Minister should have addressed in this case. The Minister relied on the evidence in the file and its written submissions. That was enough for it to prove its case.

– I can't do anything about the Appellant's overpayment

[68] I understand how the Appellant's experience in 2014-2015 led him to believe that Service Canada knew about his job at X and didn't have a problem with it. He thought they would contact him if it affected his disability status, because he had made it clear that he didn't want to be in a position where he had to pay money back.[43]

[69] But my opinion about this doesn't matter. The Minister can decide not to make the Appellant pay back the debt if it was caused by a mistake or an oversight by government employees.[44] However, the Tribunal doesn't have this power.[45] It appears the Appellant has already pursued this with the Minister.

– I can't decide if the Appellant became disabled again

[70] This appeal is only about whether the Appellant stopped being disabled. I decided that he stopped being disabled. I don't have the power to decide that he became disabled again at a later date. He has to apply to the Minister for a new determination about his disability.[46]

Conclusion

[71] I find that the Appellant stopped being disabled in April 2016.

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[43] See GD2-37-38.
[44] See section 66(3) of the *Canada Pension Plan*.
[45] See *Pincombe v Canada (Attorney General)*, [1995] FCJ. No. 1320 (FCA). This decision was about mistakes that caused a person to lose a benefit. Its reasoning also applies to mistakes that result in an overpayment.
[46] A person who stops being disabled can apply to the Minister for automatic reinstatement or to have their application fast-tracked if they meet certain conditions. If they don't meet those conditions, they have to submit a new disability application. If the Minister refuses their application and maintains the refusal on reconsideration, they can appeal the reconsideration decision to the Tribunal.

[72] This means the appeal is dismissed.

Virginia Saunders

Member, General Division – Income Security Section