



Citation: *AP v Minister of Employment and Social Development*, 2023 SST 213

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant:	A. P.
Representative:	C. P.
Respondent:	Minister of Employment and Social Development
Representative:	Jennifer Hurley
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 5, 2021 (issued by Service Canada)
Tribunal member:	George Tsakalis
Type of hearing:	Teleconference
Hearing date:	March 8, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	March 8, 2023
File number:	GP-22-229

Decision

[1] The appeal is allowed.

[2] The Minister of Employment and Social Development (Minister) failed to prove that the Appellant, A. P., stopped having a disability under the Canada Pension Plan (CPP) as of September 30, 2019. The Minister shouldn't have stopped paying the Appellant CPP disability benefits as of September 30, 2019. This means the Appellant doesn't owe the Minister money for CPP disability pension benefits she received from October 2013 to June 2019.

Overview

[3] The Appellant was born in 1966. She began working with the federal government in 1995. But she stopped work because of her medical condition in January 2005. The Appellant suffered from severe depression and anxiety. She applied for a CPP disability pension in May 2009. The Minister awarded her a disability pension in January 2010, with a date of onset of February 2008.¹

[4] The Minister learned that the Appellant had returned to work and had earned the following income:

YEAR	AMOUNT
2013	\$24,216
2014	\$27,176
2015	\$26,871
2016	\$28,091
2017	\$32,530

¹ See GD2R-81

2018	\$28,663
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[5] The Minister decided to stop paying the Appellant a CPP disability pension as of September 30, 2013. The Minister advised the Appellant that she owed it money for disability benefits that she had received from October 2013 to June 2019.²

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

[7] The Appellant says the Minister made the wrong decision. She says that the work she performed from October 2013 to June 2019 wasn't productive work.

[8] The Minister says the Appellant wasn't eligible to receive CPP disability benefits from October 2013 to June 2019 because she performed substantially gainful work.

What the Minister must prove

[9] To stop paying the disability pension, the Minister must show that it is more likely than not that the Appellant stopped being disabled under the CPP as of September 30, 2013.³

[10] To be disabled under the CPP, the 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. A disability is prolonged if it is likely to be long continued and of indefinite duration.⁴

[11] The CPP Regulations were amended in 2014 to include a definition of the term "substantially gainful" that described an occupation that provides a salary or wages

² See GD2-114

³ See *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

⁴ See paragraph 42(2)(a) of the CPP

equal to or greater than the maximum annual amount a person could receive as a disability pension.⁵

[12] Work for a benevolent employer is not considered an occupation for the purposes of continuing eligibility for a CPP disability benefit. The Federal Court of Appeal has ruled that a finding of whether an employer is benevolent depended on a number of relevant factors, including:

- Whether the appellant's work was productive;
- Whether the employer was satisfied with the appellant's work performance;
- Whether the work expected of the appellant was significantly less than the work expected of other employees;
- Whether the appellant had received accommodations that went beyond what was required of an employer in a competitive marketplace; and
- Whether the employer had experienced hardship as a result of those accommodations.⁶

Reasons for my decision

[13] I find that the Minister failed to prove that the Appellant stopped having a disability under the CPP as of September 30, 2013. I reached this decision by considering the following issues:

- Did the Appellant work for a benevolent employer while collecting CPP disability benefits?
- Did the Appellant's health improve to the extent she was capable of regularly engaging in a substantially gainful occupation?

⁵ See section 68.1 of the CPP Regulations

⁶ See *Atkinson v. Canada (Attorney General)*, 2014 FCA 187

– **The Appellant worked for a benevolent employer while collecting CPP disability benefits**

[14] I find that that the Appellant worked for a benevolent employer while she collected CPP disability benefits because:

- Her work wasn't productive.
- Her employer wasn't satisfied with her work performance.
- Her work expectations were significantly less than the work expected of other employees.
- Her employer provided her with excessive accommodations in a rehabilitation program with the knowledge of Sun Life, her long-term disability plan insurer.

- **The Appellant says she worked for a benevolent employer**

[15] The Appellant says she went to university for two years and studied languages. She dropped out of the program and entered the work force. She performed administrative work at a construction company. She also worked in retail. She began working as a clerk with the federal government. She then began working as a collection agent for a federal agency in around 2001 or 2002.

[16] The Appellant's duties as a collection agent included sending out notices, making phone calls, advising clients about outstanding debts, and making payment arrangements.

[17] The Appellant's health deteriorated. She stopped working in 2005 because of major depression.

[18] The Appellant's psychiatrist recommended a return to work in 2011. He recommended that the Appellant work part-time hours from home. She began working 12 hours a week at the federal agency in April 2012. She worked four hours shifts, three days a week. Her work hours increased to 16 hours a week in 2013. She worked four

hours shifts, four days a week. She continued working 16 hours a week until she went back to full-time work in October 2019.

[19] The Appellant says that she couldn't work 16 hours a week. She reviewed her attendance records from April 2013 to April 2014. She says these records showed she only worked 560 hours from April 2013 to April 2014, and used a total of 228 hours of sick leave, vacation leave, and family leave.⁷ The Appellant says poor attendance was an issue for her from 2013 to 2019. The Appellant says she never took a vacation. She used her vacation leave and family leave because she was frequently too sick to work.

[20] The Appellant disputed the assertion that she was a part-time employee. She was classified as an indeterminate employee after she returned to work in 2012. She wasn't paid every two weeks like a regular part-time or full-time employee. She had to report her hours, and she wasn't paid until her submitted hours were approved. She said that her work from 2012 to 2019 was considered a work trial. Her employer confirmed that she was on approved rehabilitation from April 2012 to October 2019. The Appellant said that Sun Life was heavily involved in her work rehabilitation efforts. Sun Life continued to pay her disability benefits during her rehabilitation work effort. Sun Life monitored her earnings carefully in order to pay her the proper amount of disability benefits.

[21] The Appellant says she receive multiple accommodations from her employer. She was allowed to work from home. She couldn't work four straight hours because of her health, so her employer allowed her 7.5 hours to complete her four-hour shift. She was allowed to take frequent breaks. She was allowed to choose which of the four days of the week that she worked. She called in sick frequently. She was always scheduled to work Monday to Thursday, but she was allowed to work on Friday if she called in sick during the week.

[22] The Appellant says that her employer didn't require her to do any field calls. A field call involved going to private residences or business places to deliver notices. She

⁷ The Appellant's calculations are based on documents found at GD2-211-214.

never did a field call on her own while collecting CPP disability benefits. She remembered going on only one field call with one of her colleagues.

[23] The Appellant says she struggled so much at her job that her employer allowed a co-worker to come to her house. The co-worker would assist the Appellant with her work duties. She especially needed help with reviewing and preparing legal documents.

[24] The Appellant says that her employer was dissatisfied with her work performance because she wasn't meeting standards. She was placed on a Performance Improvement Plan. She only handled 13 accounts at a time. A typical employee handled 100. She was expected to submit 10 write offs or debt remissions each week. The Appellant thinks she may have completed only 10 write offs from 2012 to 2019.

[25] The Appellant also says some employees were expected to complete three or four summaries a day. She frequently didn't do any summaries on a daily basis. A summary included all actions on an account. But the Appellant couldn't complete summaries because of her severe depression. The Appellant also handled lower dollar value accounts than her co-workers. There were also periods where she made no collections whatsoever.

[26] The Appellant was told that she received accommodations that other employees had never received. Other employees weren't working from home from 2012 to 2019. Her employer had to go to the expense of setting up her home office. Her employer had a policy that employees couldn't shred documents. Documents began piling up at home. Her employer ended up sending couriers or other employees to her house to pick up files.

[27] The Appellant says she struggled with working from 2012 to 2019. She couldn't concentrate. She slept poorly and couldn't focus. She could only concentrate on a task for about 15 minutes before having to take a break. She had stomach problems because of anxiety. She had difficulty driving because of anxiety. She lacked motivation to complete her housekeeping tasks. She also lacked motivation to take care of her personal care tasks.

[28] The Appellant says her medical condition never improved while she collected CPP disability benefits. She continued taking anti-depressant medications. She took sleeping pills. She continued receiving psychiatric counselling. She also received counselling through her family doctor and a social worker.

[29] The Appellant says she eventually returned to full-time work in October 2019. But she was still accommodated by her employer. She never met expectations. Her employer allowed her to do what she could. She recently stopped working for medical reasons. Sun Life approved her claim for long-term disability benefits in January 2023.⁸

- **The documents show that the Appellant worked for a benevolent employer while collecting CPP disability benefits**

[30] The Minister relies on the Appellant's earnings as evidence that the Appellant stopped having a disability under the CPP.

[31] I agree with the Minister that the Appellant's earnings exceeded the amount she could have received on a disability pension.

[32] I also agree that significant earnings might be strong evidence that an appellant has regained regular capacity to pursue substantially gainful employment. But it's only one factor to be considered. The determination of whether an appellant's employment is substantially gainful can't be decided by a one-size fits all approach and each case should be assessed on its own special facts.⁹

[33] The Appellant's evidence supports a finding that her employment while she collected CPP disability benefits was irregular and unproductive. The documents also support such a finding.

[34] The Appellant's attendance records showed multiple sick leaves.¹⁰ The Appellant completed a Return to Work Report saying that she returned to work in 2012 and only

⁸ See GD22-3

⁹ See *Boles v. Minister of Employment and Immigration* (March 14, 1994), CP 2795 (PAB); *Minister of Human Resources Development v. Porter* (December 3, 1998), CP 05616 (PAB); *Minister of Social Development v. Nicholson* (April 10, 2007), CP 24143 (PAB).

¹⁰ See GD2R-201-227

worked 12 hours a week. She said she worked from home with a specialized workload and reduced inventory.¹¹

[35] The Appellant's treating psychiatrist didn't endorse a return to productive employment. He recommended in August 2011 that the Appellant could return to a 12 hour work week.¹² He also informed the Appellant's employer that she had a reduced ability to concentrate, retain information, problem solve, make decisions, and interact socially. He said the Appellant had a poor memory and had a restricted ability to multi-task. He described these restrictions as being permanent. He also said the Appellant had to work from home.¹³

[36] The Appellant's employer in May 2013, confirmed that the Appellant had received extensive accommodation. The Appellant was only working 12 hours a week. The Appellant was allowed to work from home, and only had to come to the office from time to time to attend meetings or training sessions. The Appellant wasn't required to make field calls. The Appellant's employer also confirmed the Appellant had difficulty working. The Appellant found it difficult to retain information from one work period to the next. Her work schedule was changed from Monday, Wednesday, and Friday to Tuesday, Wednesday, and Thursday.¹⁴

[37] The Appellant's psychiatrist completed a form for the Appellant's employer in June 2013. He endorsed the Appellant increasing her work hours to 16 hours a week. But he also said the Appellant had multiple restrictions, which showed her work was irregular and unproductive. He said the Appellant had limits with noise exposure, following a schedule, meeting deadlines, and maintaining stamina/pace of work. He recommended that the Appellant be allowed to work at her own pace with short breaks every two to three hours. He didn't know when the Appellant would be able to return to full duties.¹⁵

¹¹ See GD2R-248

¹² See GD21-2

¹³ See GD23-6

¹⁴ See GD16-3

¹⁵ See GD16-5

[38] The Appellant's psychiatrist said in November 2015 that the Appellant had to continue working four hours a day, but with a condition that the Appellant be allowed to complete her work over a seven-hour period.¹⁶

[39] The documents showed that the Appellant's work from 2012 to 2019 wasn't productive employment, but rather a rehabilitation work effort with Sun Life's heavy involvement. Sun Life adjusted the amount of benefits it paid to the Appellant based on her employment income.¹⁷ Sun Life continued to pay the Appellant disability benefits until September 2019, which was when the Appellant returned to full-time work.¹⁸

[40] The documents confirm the Appellant's employer was dissatisfied with her work. A Performance Improvement Plan identified gaps in the Appellant's performance caused by her not completing expected work tasks. Her employer told her she needed to organize herself so that more than one account could be worked on each day. The Appellant's employer also confirmed that the Appellant had a reduced workload.¹⁹

[41] The Appellant's employer completed a questionnaire for the Minister in December 2019. The Appellant's employer described the Appellant's attendance as being fair. But the employer also confirmed that the Appellant used medical sick leave credits. The Appellant's employer also said that the Appellant was on "approved rehabilitation" from April 2012 to October 2019.²⁰ The employer's comments about "approved rehabilitation" doesn't suggest that the Appellant performed regular substantially gainful work during that time period.

– **The Appellant's health didn't improve to the extent she was capable of regularly engaging in a substantially gainful occupation while she collected CPP disability benefits**

[42] The medical evidence showed the Appellant continued to suffer from chronic depression from 2012 to 2019.

¹⁶ See GD23-108

¹⁷ See for example GD21-10

¹⁸ See GD23-122

¹⁹ See GD21-3

²⁰ See GD2R-194-197

[43] Depression stopped the Appellant from working in 2005.²¹ She also experienced extreme anxiety.²² Her psychiatrist said in 2008 that the Appellant experienced fatigued, had difficulty concentrating, and her functional capacity was severely limited²³ He said in September 2009 that the Appellant was unfit to return to any form of work for an indefinite period of time for many reasons including difficulty concentrating, memory problems, and poor sleep.

[44] The Appellant's psychiatrist said in several reports from 2011 to 2015 that the Appellant continued to have difficulty with her concentration, memory, and sleep. Another psychiatrist said in 2017 that the Appellant had agoraphobia and employment problems.²⁴ The Appellant saw a social worker in 2017. He described the Appellant's work as being part of a "special accommodation". The Appellant wanted to work full-time from home. But the social worker believed that this was an unrealistic goal.²⁵

Final Comments

[45] The Minister failed to prove that the Appellant stopped having a disability under the CPP as of September 2013.

[46] The work that the Appellant performed while she collected CPP disability benefits was for a benevolent employer. It wasn't productive employment. Her employer wasn't satisfied with her work performance. The work expected from the Appellant was significantly less than required by other employees. The Appellant participated in a rehabilitation work effort in which her disability carrier had heavy involvement. The fact that she returned to full-time work around September or October 2019 doesn't help the Minister. The period that I was reviewing was from October 2013 to June 2019, where the Minister said the Appellant was overpaid benefits. I don't see evidence that the

²¹ See GD23-57

²² See GD23-55-56

²³ See GD2R-293-296

²⁴ See GD23-182

²⁵ See GD23-197

Appellant regained the capacity to regularly pursue a substantially gainful occupation during that time.

Conclusion

[47] The Minister failed to prove the Appellant stopped having a disability under the CPP as of September 30, 2019. The Minister shouldn't have stopped paying the Appellant CPP disability benefits as of September 30, 2019. This means the Appellant doesn't owe the Minister money for CPP disability pension benefits she received from October 2013 to June 2019.

[48] This means the appeal is allowed.

George Tsakalis
Member, General Division – Income Security Section