



Citation: *SB v Minister of Employment and Social Development*, 2023 SST 655

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

Decision

Appellant: S. B.
Representative: G. D.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated April 8, 2021 (issued by
Service Canada)

Tribunal member: Connie Dyck

Type of hearing: Videoconference

Hearing date: May 17, 2023

Hearing participants: Appellant
Appellant's representative

Decision date: June 6, 2023

File number: GP-21-2286

Decision

[1] The appeal is allowed.

[2] The Minister was not entitled to terminate payment of the Appellant's Canada Pension Plan (CPP) disability pension as of September 2013. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant, S. B., is appealing the Minister's decision to cease her CPP disability pension. The Minister says the Appellant wasn't entitled to receive the disability pension from September 2013 to August 2020.

[4] The Appellant was 52 years old when she applied for a CPP disability pension in January 2013. She said she was unable to work since April 2007 because of high anxiety, inability to focus, and feeling overwhelmed with stress.¹

[5] The Appellant's application was granted and she began receiving a CPP disability pension. The date of onset was October 2011. This was 15 months prior to the date of her application and the most retroactivity allowed.²

[6] In August 2020, Service Canada contacted the Appellant.³ A file review showed that she had earned income while collecting CPP disability. The Minister considered that she was no longer disabled as of the end of August 2013, following a three-month work trial. She had earned more than she was entitled to. She had an overpayment of \$86,907.40 for the period from September 2013 to August 2020.

¹ GD2-172

² GD2-48

³ GD2-37

What the Minister must prove

[7] The Minister must prove that it is more likely than not that the Appellant stopped being disabled as of September 2013.⁴ A disability pension ceases to be payable for the month in which an appellant stops being disabled.⁵

[8] 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.⁶ If the appellant is able regularly to earn a living from some kind of work, then she isn't entitled to a disability pension.

[9] A disability is prolonged if it is likely to be long continued and of indefinite duration.⁷ The disability must be expected to keep the appellant out of the workforce for a long time.

[10] The Minister relies on the Appellant's 2012 - 2017 earnings to establish that she had regained the regular capacity to pursue substantially gainful employment.

Reasons for my decision

– The Appellant's health conditions did not change

[11] The Claimant's medical conditions did not change between May 2013 when the Minister granted the CPP disability pension and September 2013 when the Minister said the Appellant was no longer disabled.

[12] Based on the medical evidence, including the documents identified in the Minister's submissions, I find that the Appellant's condition had not changed. She continued to suffer from the same conditions and functional limitations in September 2013 as she did when the Minister approved her disability application.

⁴ Doyle v. Minister of Human Resources Development, (2001) CP 16627 (PAB), and Perrotta v. Minister of Social Development, (2004) CP 19598 (PAB), decisions that are not binding on me but that are persuasive

⁵ Subsection 70(1)(a) of the *Canada Pension Plan*

⁶ Paragraph 42(2)(a) of the *Canada Pension Plan*

⁷ Paragraph 42(2)(a) of the *Canada Pension Plan*

[13] Dr. Daisin completed a report in November 2012.⁸ This was in support of the Appellant's CPP disability application. She said the Appellant had major depression that was treatment resistant. She had poor sleep, low mood, high anxiety and low motivation. She also had insomnia, inability to concentrate, over-reaction to minor stressors and pervasive anxiety. It was Dr. Daisin's opinion that because the Appellant had been in psychiatric care, but her condition didn't improve, the prognosis was poor.

[14] In February 2015, Dr. Rachapalli (rheumatologist) noted he diagnosed the Appellant with Fibromyalgia in 2013. She started on Lyrica then and continues using Lyrica today. It has helped her with sleep, but she still had ongoing pain, fatigue and "brain fog".⁹ This condition has not improved, and the Appellant's functional ability has remained essentially the same as it was in 2013.

[15] Dr. Campbell (psychiatrist) noted in July 2015 that the Appellant was not able to do her housework because of fatigue. The Appellant reported sleeping 18 hours a day at times. The GAD-7 (General Anxiety Disorder) questionnaire showed moderate anxiety, the PHQ-9 (Patient Health Questionnaire) showed mild to moderate depression, the Sheehan Disability Scale showed high perceived disability, and the Social Phobia Inventory score was high. Dr. Campbell said that the Appellant was still very disabled by her depression, anxiety, and fibromyalgia, and not able to work in any capacity at that time.¹⁰

[16] In August 2015, Dr. Trottershaw (family physician) increased the dose of Cymbalta because the Appellant had increased anxiety and neuropathic pain.¹¹

[17] In April 2017, Dr. Trottershaw noted the Appellant had fatigue and was sleeping for large parts of the day and night.¹²

⁸ GD2-300

⁹ GD2-256

¹⁰ GD2-260

¹¹ GD2-224

¹² GD2-220

[18] In January 2018, she had increased anxiety and pain.¹³

[19] The medical evidence shows me that the Appellant's conditions and functional ability have not changed since the Minister granted her disability pension in 2013. She's incapable regularly of working. She continues to have fatigue and often sleeps 18 hours a day. She continues to rely on others to help her with daily chores. Her anxiety has not improved and in fact worsened in 2015, requiring an increase in medication. In July 2015, the psychiatrist said the Appellant was still very disabled by her depression, anxiety, and fibromyalgia, and not able to work in any capacity at that time.¹⁴

– **The Appellant's income**

[20] On the surface, the Record of Employment seems to show the Appellant had earnings from 2012 to 2017 that were above the amount allowed while receiving a CPP disability pension. The earnings would be considered "substantially gainful".¹⁵

[21] After May 2014, the words "substantially gainful" became defined as work that provides a salary or wages at least equal to the maximum amount of the annual CPP disability pension.¹⁶ The Appellant's income is not "substantially gainful".

[22] However, this income is not all from employment activities. I explain below why I believe the Appellant's income is not evidence that she ceased to be disabled.

○ **The annual payment of \$12,000.00**

[23] The Appellant declared self-employment business earnings in 2012 to 2016. These amounts include an annual payment of \$12,000 she received from her husband's company. This was not earned income. Her husband explained at the hearing this was strictly to give the Appellant some spending money and for tax purposes. In previous years 2008 – 2011, the Appellant's husband also gave her money, which was not for any work she did, but again for tax purposes and spending money.¹⁷ The Appellant's

¹³ GD2-217

¹⁴ GD2-260

¹⁵ *Canada Pension Plan Regulations* section 68.1

¹⁶ Section 68.1 of the *Canada Pension Plan Regulations*

¹⁷ GD2-293

husband explained that this \$12,000 payment was put in the category of self-employment business earnings, because there really was nowhere else to declare it on the tax form. In any event, I believe the Appellant and her husband, that the \$12,000 was not paid to the Appellant for any work that she did.

- **Other declared self-employment earnings**

[24] When the annual \$12,000 payment is deducted from the Appellant's declared self-employment business earnings, the amount is significantly less.

Year	Amount on Contributions Record	Amount after \$12,000 is deducted
2013	\$20,838	\$8,838
2014	\$23,706	\$11,706
2015	\$22,900	\$10,900
2016	\$20,000	\$8,000

[25] These earnings are still more than the Appellant is allowed to earn while receiving a CPP disability pension. But I don't believe they are evidence of work capacity or that the Appellant ceased to be disabled. I explain why below.

- **The Appellant's earnings**

[26] In its submissions, the Minister addressed the Appellant's 2012 earnings. The Minister argued the evidence as a whole supports the Appellant was regularly and gainfully self-employed in her business "X" in 2012 and at the date of her January 2013 application.

[27] The problem I have with this argument is that the Appellant showed similar work capacity in May 2013 when the Minister decided she was disabled. She operated the website "X" when she applied for her disability benefit and when the Minister approved the benefit finding she was disabled. Nothing changed from May 2013 to September 2013. The Appellant still maintained the website.

– **The Appellant was incapable regularly of working**

[28] The Appellant explained that she is part of the art community. She has a website X for her to compile her artwork. This allows her to direct other members of the art community to her website to see her work all in one place. She testified that she has not sold any artwork from this website.

[29] The Appellant explained that painting is therapeutic for her. While it helps her mental state, it makes her physical pain worse. She can't focus very long and needs to stop after painting for only one-two hours. She can't consistently paint every day either. Many days she lays on the couch all day because of pain and fatigue. She can't even read a book because she can't concentrate or focus. This functional limitation is the same as when she applied for the disability benefit in 2013.¹⁸

[30] Because of her experience in the art world, the Appellant thought she might be able to organize some workshops. She explained that the money she declared as self-employment earnings was in fact the admission people paid to attend the workshop. From these proceeds, she paid the guest artists for their time, lodging and transportation. She paid for the hall rental and any other costs. These were the expenses she declared on her income tax returns. She explained that it was essentially an "in and out". She collected the fees and paid the expenses.

[31] Other than making a few phone calls to arrange the workshop, the Appellant did very little else. She relied on friends and family to set up the tables and chairs. She hired a caterer and her husband brought and set up the food. She would only introduce the speaker. She would sit for a short time, but then had to leave early because of her pain, anxiety and fatigue. Her husband did the clean-up. I don't believe this is evidence of work capacity.

[32] The Appellant also had earnings from work with X. Her husband explained this was a client of his. The Appellant was hired as a "favour" to him. She was supposed to make a website for the company. She testified that she worked 160 hours over a two-

¹⁸ GD2-173 and GD2-301

year period. Of the 160 hours, she worked about 80 hours at the office. She would do filing and answer the phone. However, because of her cognitive difficulties including with focus and concentration, she “messed up” many things and caused a “major screw-up”. She couldn’t continue this work even though it was only periodic, for a few hours, several times a year.

[33] The Appellant was not a reliable employee. There were many periods of time when her anxiety was overwhelming. Without warning, she would lay in bed for days or months at a time. Despite being able to work when she felt able, she was still only able to work 160 hours in 2 years. And she was still unable to complete the job of creating a website.

[34] Predictability is the essence of regularity within the meaning of the CPP definition of disability. The Appellant could not regularly commit to working. She only managed 160 hours sporadically over two years. Her anxiety and pain can keep her in bed for days. She quit the church choir because she couldn’t commit to attend practices. The Appellant would not be a reliable employee and able to commit to any type of schedule, even part-time.¹⁹

[35] The Appellant also had earnings of \$3,700 from instructing seniors how to use water colours. She did this about two hours a week for five weeks. This was only a temporary assignment as she was filling in for someone. The Appellant testified she found it very stressful and wouldn’t have been able to continue or commit to going 2 hours a week.

[36] To the Appellant’s credit, she also tried to volunteer at her church. During COVID, her church recorded the service. She went to the church on Friday morning for two hours to record the sermon and upload it to YouTube and Facebook. She only did this for a few Fridays before she was fired from the volunteer position because of

¹⁹ This is explained in the Federal Court of Appeal decision called *Atkinson v. Canada (A.G.)*, 2014 FCA 187.

“messaging it up”. Just as in 2013 when the Minister said the Appellant was disabled, she still has cognitive difficulties with focus and concentration.

[37] In 2017, the Appellant started to receive a return on her investment with X. She started paying into this investment in 2005.²⁰ However, this was not earnings from employment. She did no work to earn this money. The Appellant was simply receiving money from an investment.

Conclusion

[38] I find it more likely than not that the Appellant was unable regularly to pursue any substantially gainful occupation since May 2013 when the Minister determined the Appellant was disabled. The Minister has failed to prove that the Appellant regained work capacity as of September 2013.

[39] I therefore find that the Minister was not entitled to terminate payment of the Appellant’s CPP disability pension as of September 2013.

[40] This means the appeal is allowed.

Connie Dyck
Member, General Division – Income Security Section

²⁰ GD2-20