



Citation: *EH v Minister of Employment and Social Development*, 2023 SST 1390

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: E. H.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated February 21, 2022 (issued by Service Canada)

Tribunal member: James Beaton

Type of hearing: Teleconference

Hearing date: October 3, 2023

Hearing participant: Appellant

Decision date: October 6, 2023

File number: GP-22-1332

Decision

[1] The appeal is dismissed.

[2] The Appellant, E. H., stopped being disabled as of November 2015. He was only eligible for a Canada Pension Plan (CPP) disability pension when he was disabled. The disability pension payments he got when he wasn't disabled are considered an overpayment (debt). He must pay back that debt to the Minister of Employment and Social Development.

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

Overview

[4] In July 2015, the Appellant applied for a CPP disability pension.¹ In October 2015, the Minister approved the Appellant's application.² The Minister found the Appellant disabled as of April 2014, which meant that he was entitled to payments beginning in August 2014. This is because there is a four-month waiting period before payments start.³

[5] In August 2021, following an investigation,⁴ the Minister decided that the Appellant stopped being disabled in January 2015. It allowed the Appellant three extra months of benefits for cooperating with the investigation. Therefore, the Minister determined that the Appellant wasn't eligible for the benefits he got after April 2015. The Minister required the Appellant to repay benefits that he got from May 2015 to August 2021. This amounted to just under \$100,000.⁵

¹ See GD2-124.

² See GD2-30 to 32, 107 to 109, 118, and 119.

³ See section 69 of the *Canada Pension Plan*.

⁴ See GD2-90 and 91.

⁵ See GD2-22 to 24.

[6] The Appellant asked the Minister to reconsider its decision. The Minister maintained its decision.⁶ The Appellant appealed that decision to the Social Security Tribunal's General Division.

[7] I made an interlocutory decision on July 14, 2023, following a case conference and written submissions from the parties. That decision considered whether the Minister could require the Appellant to repay benefits for the months of May to October 2015. I decided that the Minister could not demand repayment of those benefits because it approved his application in October 2015. In doing so, it affirmed that he was disabled up to and including that month. It can't change its mind now. It could only consider whether the Appellant stopped being disabled after October 2015.

[8] After the hearing on October 3, 2023, I decided that the Appellant stopped being disabled as of November 2015.

What I have to decide

[9] I have to decide whether the Appellant stopped being disabled. An appellant stops being disabled when they become regularly capable of pursuing any substantially gainful occupation.⁷

[10] This means I must look at all of the Appellant's medical conditions together to see what effect they have on his ability to work. I must also look at his background (including his age, level of education, language abilities, 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 work and earn at least the same as what he could get from a disability pension, then he stopped being disabled.

[11] If the Appellant stopped being disabled, then I also have to decide when.

⁶ See GD2-6 to 10.

⁷ Section 42(2) of the *Canada Pension Plan* explains what it means to be disabled under the law.

[12] The Minister must prove that the Appellant stopped being disabled. The Minister must prove this on a balance of probabilities. This means the Minister must show it is more likely than not that the Appellant stopped being disabled.⁸

Reasons for my decision

[13] To explain my decision, I first need to outline the Appellant's work history.

– The Appellant's work history

[14] The Appellant owns a transportation business called "X." He incorporated the business with one other business partner in 2011, 2012 or 2013.⁹ Originally, it was called "X." In 2014 or 2015, his business partner gave up his share in the company, making the Appellant the sole shareholder.¹⁰

[15] In April 2014, the Appellant suffered a concussion and stopped working his regular job as a police officer. However, he remained the owner of X.

[16] Much of the parties' arguments focus on the Appellant's business.

[17] The Appellant says he wasn't an employee of X until after the Minister stopped paying him a disability pension. (He is now both a shareholder and an employee receiving a salary of \$800 per week.)¹¹ Before that, he was only a volunteer. He contributed the hours that he could in order to support the business. But the business mostly ran without him.

[18] The Minister argues that the Appellant's "volunteer" work is "comparable to part-time work managing a business. If [he] liquidated his business he would be the sole recipient of the retained earnings." X became profitable in 2015, so that is when he stopped being disabled.¹²

⁸ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

⁹ See GD2-14, 15, 33 to 46, 150, 151, 153, and 154.

¹⁰ See GD4-19 and the hearing recording.

¹¹ See GD2-155 to 157 and the hearing recording.

¹² The Minister's submissions are at GD4-1 to 18.

[19] In my view, focusing on the nature of the Appellant's work—whether he was a shareholder, employee or volunteer—is unhelpful, as is focusing on X's profitability. A person might contribute many hours to their business without turning a profit. There could be multiple reasons for this. A person might be unsuited to running a business. They might have to invest a lot of money (and perhaps borrow money) to get the business to a point where it can generate income. Even then, that income might be reinvested in the business so that, on paper, it is unprofitable.

[20] Instead, my focus must be on the Appellant's work **capacity**. That is, was he regularly able to do substantially gainful work? When I consider all of the evidence, I conclude that the Appellant was regularly able to do substantially gainful work as of November 2015.

– **The Appellant's functional limitations affect his ability to work**

[21] Ever since his concussion in 2014, the Appellant has had functional limitations that affect his ability to work. He has a constant headache, which he describes as a feeling of pressure, like someone is squeezing his head. Long periods of driving, focusing or looking at a computer make his headache worse. Sometimes he is dizzy, especially when bending. He is tired by the end of the day. In addition, he says he has blood on his brain and another concussion could be disastrous.¹³

– **What the medical evidence says about the Appellant's functional limitations**

[22] The medical evidence supports that the Appellant has functional limitations that affect his ability to work. They began in April 2014 and improved by November 2015, although they haven't completely resolved.

[23] In August 2014, Dr. Fotti (his family doctor) completed an insurance form. He documented symptoms of post-concussion syndrome and an inner-ear imbalance beginning in April 2014. These conditions resulted in severe dizziness (at times), lack of balance, and headaches. Reading, using a computer, and watching TV made his

¹³ See GD1-12; GD2-14, 15, 33 to 46, 124 to 128, and 415 to 423; GD4-19; and GD14.

symptoms worse.¹⁴ An MRI from December 2014 confirmed a past “micro-hemorrhage” (bleeding) of the brain.¹⁵

[24] In January 2015, Dr. Eggertson (a neurologist) documented ongoing headaches and positional vertigo, with increased symptoms brought on by computer work.¹⁶ In May, he reported no major changes. He noted that the Appellant experienced two severe headaches per month, and that his vertigo was worse with heights and rapid changes in head position.¹⁷

[25] In July 2015, Dr. Fotti completed a medical report to support the Appellant’s disability pension application. In addition to mentioning concussion symptoms, Dr. Fotti stated that the Appellant had sleep apnea.¹⁸ However, elsewhere he wrote that this was well-treated with no resulting limitations.¹⁹

[26] By November 2015, the evidence suggests that the Appellant’s symptoms were improved and stable. Indeed, according to Dr. Eggertson, the Appellant’s headaches weren’t that severe. Although the Appellant had a pressure-like headache every day, it was mild and the Appellant did nothing to treat it.²⁰ The Appellant’s concussion symptoms remained stable after that.²¹

– **The Appellant can work in the real world**

[27] The Appellant doesn’t need to prove that he can’t work. Rather, the Minister needs to prove that the Appellant **can** work. Although I disagree with the Minister’s approach, as discussed earlier in this decision, I do agree with the Minister that the Appellant can work.

¹⁴ See GD2-214 to 217. See also Dr. Fotti’s 2014 clinic notes at GD2-218 and 229.

¹⁵ See GD4-33.

¹⁶ See GD2-231.

¹⁷ See GD2-233.

¹⁸ See GD2-408 to 411.

¹⁹ See GD2-228 and 263.

²⁰ See GD2-252.

²¹ See, for example, GD2-235, 263, 271, 275, 323, 332, 333, 335, and 364 to 366.

[28] 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
- past work and life experience

[29] These factors help me decide whether the Appellant can work in the real world—in other words, whether it is realistic to say he can work.²²

[30] The Appellant is probably not suited to work that would expose him to the risk of suffering another concussion. Neither is he suited to working on ladders or doing jobs that require a lot of bending.

[31] But he can still do a semi-physical job—he still drives and works on X's trucks. He does other physical tasks for X like sweeping.²³ He took seasonal employment as a farm labourer in 2020 and 2021.²⁴

[32] He also has a high school diploma and is fluent in English, so he could do a sedentary job. While his work history as a mechanic, truck driver, and police officer isn't particularly relevant to sedentary employment, his experience running a business is. He answers all the phone calls for the business, does all the paperwork, and directs the work of X's employees.²⁵ Furthermore, he was only 49 years old in November 2015—that isn't too old to retrain or upgrade skills.

[33] The Appellant currently works an average of four hours per day running his own business, excluding breaks.²⁶ He testified that he can generally work on a computer for

²² See *Villani v Canada (Attorney General)*, 2001 FCA 248.

²³ See the hearing recording.

²⁴ See GD2-33 to 46, 150, 151, 153, and 154.

²⁵ See GD2-33 to 46, 150, 151, 153, and 154; and GD4-19.

²⁶ The Appellant told Service Canada that he works an average of four to five hours per day (GD2-150, 151, 153, and 154). At the hearing, he said he works between two and six hours.

a couple hours before needing to take a break for 15 to 20 minutes. He typically takes a morning and an afternoon break. It isn't unusual for employees to take a morning break of that length, so this would not keep him from working for someone else (as opposed to himself) in a sedentary role for at least four hours each weekday.

[34] Assuming he missed two days of work per month due to severe headaches, he would only have to earn about \$16 per hour in 2015 to earn a substantially gainful income.²⁷ That isn't unrealistic given his education and skills.

[35] In summary, the Appellant was regularly able to do substantially gainful work (either for himself or for someone else) as of November 2015, the month after he was last deemed disabled. This means he stopped being disabled as of November 2015. That was the last month of benefits to which he was entitled.²⁸

The Appellant's other arguments

[36] The Appellant says he had to work because a disability pension isn't enough to live off of. He also says he could not work for another employer until 2021 because it would have jeopardized his police pension. However, this doesn't change the fact that he was regularly able to do substantially gainful work as of November 2015.

[37] The Appellant says Service Canada employees told him that any money he got from his company would not affect his disability pension. He also pointed to a Service Canada publication that says volunteer work doesn't need to be reported to the Minister.²⁹ He considers the work he did for his business before 2021 to be volunteer work.

[38] The Appellant could ask the Minister to investigate whether it gave him erroneous advice (incorrect information). If he disagrees with the outcome of that

²⁷ A substantially gainful income in 2015 was \$15,157.08, according to section 68.1 of the *Canada Pension Plan Regulations*.

²⁸ See section 70(1)(a) of the *Canada Pension Plan*.

²⁹ See GD14-2.

investigation, he could appeal to the Federal Court through a process called “judicial review.” But I don’t have the jurisdiction (authority) to make a decision on that issue.³⁰

[39] Similarly, I don’t have the authority to force a settlement between the parties as to the amount that the Appellant must repay. (The Appellant offered to repay a portion of the debt.) I can only decide whether the Appellant stopped being disabled. However, the Minister has the ability to forgive debt in certain circumstances.³¹ I leave the issue of debt forgiveness for the Minister (that is, Service Canada) and the Appellant to determine between them.

Conclusion

[40] I find that the Appellant stopped being disabled as of November 2015. The disability pension payments he got when he wasn’t disabled are considered a debt. He must pay back that debt to the Minister.

[41] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section

³⁰ The Federal Court said this in *Pincombe v Canada (Attorney General)*, [1995] FCJ No 1320.

³¹ See section 66(3) of the *Canada Pension Plan*.