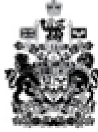

Citation: *RF v Minister of Employment and Social Development*, 2023 SST 1737

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. F.
Respondent:	Minister of Employment and Social Development
Representative:	Dylan Edmonds

Decision under appeal:	General Division decision dated December 11, 2022 (GP-22-841)

Tribunal member:	Neil Nawaz
Type of hearing:	In person
Hearing date:	November 14, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	November 30, 2023
File number:	AD-23-587

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 64-year-old carpenter. In December 2018, he injured his back on a construction site. His employer placed him on light duties and arranged for him to take computer courses but then laid him off in February 2019. In August 2019, the Nova Scotia Workers' Compensation Board (WCB) ruled that his employer should not have let the Appellant go while he was injured.

[3] The Employer called the Appellant back the following month. It placed him in an accommodated position as a security guard at one of its construction sites. In March 2020, the employer laid the Appellant off again. He began receiving a CPP retirement pension that same month.

[4] By that time, the Appellant had already applied for a regular CPP disability pension.[1] The Minister of Employment and Social Development (Minister) ultimately refused the application but awarded him a post-retirement disability benefit (PRDB). In doing so, the Minister determined that the Appellant became disabled as of March 2020, the month he stopped working.

[5] The Appellant appealed the Minister's decision to this Tribunal. He argued that, in addition to the PRDB, he was also entitled to the regular disability pension. He claimed that he had actually been disabled since his original workplace injury in December 2018.

[6] The Tribunal's General Division held a hearing by teleconference and dismissed the appeal. It decided that the Appellant didn't have a severe and prolonged disability as of February 29, 2020, the last time he had coverage for the regular disability pension.

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[1] See Appellant's application for the CPP disability pension dated January 25, 2021, GD2-24.

[7] The Appellant then applied for permission to appeal to the Appeal Division. One of my colleagues on the Appeal Division granted the Appellant permission to appeal and, earlier this month, I held a hearing to discuss his claim in full.

[8] Now that I have considered submissions from both parties, I have concluded that the Appellant failed to show that he is eligible for a regular CPP disability pension. The evidence shows that the Appellant, while subject to some functional limitations, did not have a severe and prolonged disability as of February 29, 2020.

Preliminary Matter

[9] In December 2022, the law governing the appeals to the Social Security Tribunal changed.[2] Under the new law, the Appeal Division, once it has granted permission to proceed, must now hold a *de novo*, or fresh, hearing about the same issues that were before the General Division.[3] As I explained at the outset of the hearing, that meant I would not be bound by any of the General Division's findings. I also made it clear that I would be considering all available evidence, including new evidence, about whether the Appellant was entitled to the regular CPP disability pension.

Issue

[10] For the Appellant to succeed, he had to prove that, more likely than not, he had a severe and prolonged disability as of February 29, 2020. That's because the Appellant began receiving a CPP retirement pension in March 2020, and claimants cannot receive a retirement pension and a regular disability pension at the same time.[4]

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.[5] A claimant isn't entitled to a disability

[2] See section 58.3 of the *Department of Employment and Social Development Act*. This appeal is subject to the new law, because the Appellant's application for permission to appeal was filed with the Tribunal on June 5, 2023, after the new law came into force.
[3] The Appeal Division was previously restricted to considering three types of error that the General Division might have made in coming to its decision.
[4] See *Canada Pension Plan*, section 44(1)(b).
[5] See *Canada Pension Plan,* section 42(2)(a)(i).

pension if they are regularly able to do some kind of work that allows them to earn a living.

- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.[6] The disability must be expected to keep the claimant out of the workforce for a long time.

[11] In this appeal, I had to decide whether the Appellant developed a severe and prolonged disability before February 29, 2020.

Analysis

[12] I have applied the law to the available evidence and concluded that, for the purposes of the regular disability pension, the Appellant did not have a severe and prolonged disability during his coverage period. I am satisfied that the Appellant's medical conditions at the time did not prevent him from regularly pursuing substantially gainful employment.

The Appellant did not have severe and prolonged disability before March 2020

[13] Claimants for disability benefits bear the burden of proving that they have a severe and prolonged disability.[7] I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant might have suffered from impairments during his coverage period, I couldn't find enough evidence to suggest that they rendered him incapable of work.

[14] In his application for benefits, the Appellant rated many of his physical and behavioural functional abilities as "fair" to "poor." Referring to his doctors' reports, he claimed that he had been disabled from work since March 2020.[8] He later amended that date to December 2018.

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[6] See *Canada Pension Plan*, section 42(2)(a)(ii).
[7] See *Canada Pension Plan*, section 44(1).
[8] See Appellant's application for CPP disability benefits dated September 21, 2020, GD2-23.

[15] Although the Appellant may feel that he has been disabled since then, I must base my decision on more than just his subjective view of his capacity at that time.[9] In this case, the evidence, looked at as a whole, suggests that the Appellant was capable of performing suitable work between December 2018 and March 2020.

[16] I base this conclusion on the following factors:

– The medical evidence suggests the Appellant had work capacity during the relevant period

[17] The Appellant sustained an on-the-job back injury after falling into a ditch in December 2018. Following the accident, an MRI of the lumbar spine showed disc bulging with nerve impingement from L3 to L5.[10] In March 2019, his family doctor reported that, despite physiotherapy, the Appellant continued to experience pain radiating to both legs.[11] At around the same time, the Appellant was treated for high blood pressure and immune thrombocytopenia, a blood platelet disorder that causes bleeding and bruising.

[18] The Appellant was laid off in March 2019. In the following months, the Appellant took action to force his employer to rehire him — an indication that he himself felt capable of employment. Despite his health problems, the Appellant's treatment providers later cleared him for low impact work.

[19] The Appellant's WCB progress reports from February to March 2019 assessed his work capability from light to medium and underscored some improvements to his condition.[12] In March 2019, an occupational therapist approved a transitional work plan

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[9] A CPP disability claimant has to provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations.* In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

[10] See MRI of the lumbar spine dated February 5, 2019, GD2-152. However, I note that previous imaging showed similar damage as far back as 2008, yet the Appellant continued to work as a carpenter for many more years – see Independent Medical Examination dated February 27, 2020 by Dr. Edvin Koshi, specialist in physical medicine and rehabilitation, GD2-174.

[11] See WCB physician's report dated March 5, 2019 by Dr. Bradley MacDougall, general practitioner, GD2-124.

[12] See WCB progress reports at GD2-134, GD2-147, GD2-130, and GD2-139.

that included the fabrication of safety boards and sedentary office duties.[13] In August 2019, an interdisciplinary team of health professionals endorsed the plan after finding that the Appellant demonstrated an ability to work at a light to medium level.[14] A doctor also said that the proposal for the Appellant to return to work as a security guard was achievable, so long as restrictions were put in place.

[20] Later WCB reports demonstrated the Appellant's objective and subjective improvement while participating in his transitional work plan.[15] As late as February 2020, a physiatrist said that the Appellant had not reached maximum medical recovery.[16]

[21] The Appellant himself said that the work plan's sedentary nature helped him with his tolerance.[17] It is notable that none of the Appellant's assessors and treatment providers barred him from working during the relevant period. Even his family physician's early reports contemplated an eventual return to work. Dr. MacDougall eventually backed the Appellant's claim that had been unable to work since his injury, but this declaration wasn't made until 2021 and wasn't consistent with his earlier position.[18]

– The Appellant had substantially gainful earnings after his injury

[22] Whatever the Appellant's condition, the fact remains that he recorded significant earnings in the period when he was supposedly disabled. He testified that, from September 2019 to March 2020, he earned something like $35 an hour as security guard. He said that he started at four hours per shift and within a month was up to eight hours, five days a week.

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[13] See physiotherapy job site visit report dated March 8, 2019 by Bobi MacKinnon, occupational therapist, GD2-127.
[14] See CBI Health Group Tier 3 assessment report dated August 19, 2019 by Sarah Morgan, kinesiologist, GD2-239.
[15] See WCB Tier 3 progress report dated September 6, 2019, GD2-161.
[16] See Dr. Edvin Koshi's report dated February 27, 2020, GD2-174
[17] See WCB Tier 3 progress report dated September 16, 2019, GD2-166.
[18] See Dr. MacDougall's CPP medical questionnaire dated February 16, 2021, GD2-174.

[23] The Appellant earned $44,381 in 2019 and $11,382 in 2020. The *Canada Pension Plan Regulations* contain a definition of the term “substantially gainful” that is benchmarked to the maximum amount a person can receive for a disability pension.[19] In 2019 and 2020, those amounts were $16,348 and $16,652, respectively. The Appellant’s earnings in 2019 significantly exceeded the benchmark and would have done so in 2020 had his employment not been terminated three months into the year.

[24] These earnings do not by themselves decide the matter, but they create a presumption that the Appellant was regularly capable of a substantially gainful occupation before March 2020. As we will see, the Appellant attempted to rebut this presumption by arguing that his employer did not hold him to the normal standards of the labour market.

– **The Appellant’s employer was not “benevolent”**

[25] The Appellant insisted that his last job as a security guard was not evidence of capacity. He said that, after being forced to rehire him, his employer placed him at a service station that was under construction at a Native reserve. His shift started at 3:00 p.m., and he would spend the following hours sitting in a trailer by himself. He was told not to walk around the construction site because of safety hazards. He was told to let in delivery trucks but, during the six months he was there, he only saw three of them. He said that the only thing he did was attach the chain across the entrance when his shift was over. He said that no one came to take over once he left and, as far as he knew, the site was untended all night. He said that he was given notice when the reserve’s leadership told his employer that it wanted one of its own to take the job.

[26] Asked why his employer would pay him a good wage to do nothing for six months, the Appellant replied that he had no idea. However, he theorized that his employer made up a job for him solely for the purpose of fulfilling its obligations under workers’ compensation. He thought it possible that his employer kept him on to prevent its WCB premiums from rising.

[19] See *Canada Pension Plan Regulations*, section 68.1.

[27] I find these theories to be just that — theories. I don't find them plausible, and the Appellant provided no evidence to support them.

[28] There is a body of case law that says evidence of a benevolent employer must be taken into account where a pension claimant remains in the workforce despite their claimed disability.[20] The *Canada Pension Plan* contains no reference to benevolent employers, but a case called *Atkinson* says that accommodating an employee does not necessarily mean that an employer is benevolent. For an employer to be found benevolent, the accommodation must go beyond what would be expected in the broader employment market.

[29] The *Canada Pension Plan* does not require the Minister to prove that an employer is not benevolent.[21] Rather, it is up to disability claimants to show that their employers **are** benevolent. Put another way, employers are presumed, until proven otherwise, to be getting fair value in return for the wages or salary they pay to their employees.

[30] In *Atkinson*, the Federal Court of Appeal held that a finding of "benevolence" depended on a number of relevant criteria, including:

(i) whether the claimant's work was productive;

(ii) whether the employer was satisfied with the claimant's work performance;

(iii) whether the work expected of the claimant was significantly less than the work expected of other employees;

(iv) whether the claimant had received accommodations that went beyond what was required of an employer in a competitive marketplace; and

(v) whether the employer had experienced hardship as a result of those accommodations.

[20] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187. The principles from Atkinson were recently reinforced by a case called *Canada (Attorney General) v Ibrahim* 2023 FCA 204.
[21] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

[31] In this case, there was nothing on the record to substantiate the Appellant's assertion that his job as a security guard was a form of charity. There was no evidence that the employer was receiving less than fair market value for its $35 an hour. The Appellant testified that tools and building materials were stored in another trailer, and they presumably needed someone to mind them in the evening. The very presence of a guard is often enough to deter thieves. The Appellant had no direct knowledge of what other security arrangements (for instance, spot patrols, video surveillance) X might have made for the rest of the night. The Appellant was not required to walk around the site, but this does not strike me as an accommodation that went beyond what was required of an employer in a competitive marketplace.

[32] The Appellant is obviously not arguing that his employer was benevolent in a literal sense. He does not pretend that his employer, a large construction company, was his "friend" or that it harboured any particular goodwill toward him. Instead, he claims that his employer had a financial interest — vague and undefined — in keeping him on as a not-very-productive employee. However, I think it's unlikely that a business would pay an employee tens of thousands of dollars just to save on workers' compensation premiums.

The Appellant's claim for regular disability benefits jeopardized his PRDB

[33] The Appellant was approved for the PRDB as of March 2020. Not surprisingly, the Appellant does not dispute that approval, but he believes that he is also entitled to regular disability benefits between December 2018, when he injured his back and March 2020, when his CPP retirement pension and PRDB commenced.

[34] At the end of my hearing with the Appellant, I observed that, if I were to find him disabled as of December 2018, the Minister might have reason to revisit its earlier decision to find him disabled as of March 2020. Why? Because it would make no sense to find that someone had become disabled for the same injuries on two different occasions.

[35] The PRDB provides disability protection for CPP retirement pensioners who become disabled on or after their retirement pension start date and who have not reached aged 65.[22] In order to receive a PRDB, a claimant must be under 65 and have made sufficient CPP contributions to establish a qualifying period. The Minister awarded the Appellant a PRDB after determining that he (i) was under 65; (ii) was receiving a retirement pension; and (iii) became disabled just as his retirement pension started.

[36] I told the Appellant that this pursuit of a regular CPP disability pension might wind up doing him more harm than good: if I did what he wanted me to do (that is, find him disabled as of December 2018), then the Minister's earlier finding that he became disabled as of March 2020 (for the purpose of the PRDB) would become logically impossible. In such a scenario, there was a chance that the Minister would cancel his PRDB and seek reimbursement of the benefits that it had been paying him since July 2020.[23]

[37] To be more specific, if the Appellant had succeeded in this appeal, I would have found him disabled as of December 2018. Since he didn't apply for regular disability benefits until January 2021, the earliest that he could have been deemed disabled was October 2019,[24] which means that payments would have started February 2020. Since his PRDB started in July 2020, he would have received only five months of regular disability payments but been potentially liable for more than three years of PRDB payments.

[38] The only subject of this appeal was the Appellant's entitlement to the regular disability pension. I had no authority to decide whether the Appellant was rightly granted the PRDB. I can't be sure whether granting him a regular disability pension would have put his PRDB at risk, but I think it was a possibility. Since I have decided that the

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[22] See section 44(1)(h) of the *Canada Pension Plan.*
[23] There is a mandatory four-month waiting period for any disability benefit payable under the CPP. The Appellant became entitled to the PRDB in March 2020, but he was not owed his first benefit payment until July 2020. See section 69 of the *Canada Pension Plan*.
[24] Under section 42(2)(b) of the *Canada Pension Plan*, the earliest that a disability applicant can be deemed disabled is 15 months before the date of application.

Appellant was not disabled before March 2020, his PRDB is safe. But I want him to know that succeeding in this appeal might have been a mixed blessing.

Conclusion

[39] The Appellant sustained a significant back injury in December 2018, but it did not prevent him from returning to modified duties at a substantially gainful wage. The Appellant had impairments when he last qualified for regular disability benefits, but I am not convinced that they amounted to a severe and prolonged disability.

[40] The appeal is dismissed.

Member, Appeal Division