



Citation: *Minister of Employment and Social Development v DM*, 2024 SST 51

## **Social Security Tribunal of Canada**

### **Appeal Division**

# **Decision**

**Appellant:** Minister of Employment and Social Development  
**Representative:** Joshua Toews

**Respondent:** D. M.

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**Decision under appeal:** General Division decision dated February 20, 2023  
(GP-22-418)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Videoconference

**Hearing date:** December 22, 2023

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** January 17, 2024

**File number:** AD-23-543

## Decision

[1] I am allowing this appeal. The Respondent ceased to be disabled when he regained the capacity to earn a substantially gainful income. He is disentitled to the Canada Pension Plan (CPP) disability pension as of April 2019.

## Overview

[2] The Respondent is a 63-year-old former schoolteacher. In October 2017, he underwent surgery to remove polyps from his vocal cords. This procedure left him unable to speak for extended periods.

[3] The Respondent resigned from his job and applied for a CPP disability pension. He claimed that he could no longer work because his ability to communicate was impaired. The Minister approved the application effective November 2017.

[4] In January 2018, the Respondent informed the Minister that he had received medical clearance to return to work. In late 2018, he found part-time employment as a rabbinical consultant for a kosher milk processing plant. At around the same time, he began working for a U.S.-based company that provided background screening for landlords.

[5] The Minister later learned that the Respondent had earned a total of more than \$16,000 from both jobs in 2019. Following an investigation, the Minister determined that the Respondent was no longer disabled and terminated his pension as of April 2019.<sup>1</sup> The Minister also assessed an overpayment of benefits that he had received from May 2019 to April 2021.

[6] The Respondent appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and allowed the appeal. The General Division found that the Minister had failed to show that the Respondent ceased to be disabled as of April 2019. The General Division

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<sup>1</sup> See Minister's reassessment notice dated October 20, 2021, GD2-19.

acknowledged that the Respondent had earnings from two jobs in 2019 but found that, after business expenses, they fell below the threshold of substantially gainful.

[7] The Minister then applied for permission to appeal to the Appeal Division. Last June, one of my colleagues on the Appeal Division granted the Minister permission to appeal. Last month, I held a hearing to discuss its case in full.

[8] Now that I have considered submissions from both parties, I have concluded that the Respondent became disentitled to the CPP disability pension as of April 2019. The evidence shows that, while the Respondent still had health problems at that time, he was no longer incapable of all forms of regular employment.

## **What I have to decide**

[9] My task is to decide whether the Respondent stopped being disabled and, if so, when.

[10] When the Minister approved his application for benefits in 2017, it accepted that the Respondent had a disability that was severe and prolonged. Under the *Canada Pension Plan*, these words have a specific meaning:

- A disability is severe if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.<sup>2</sup> A claimant isn't entitled to a disability 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.<sup>3</sup> The disability must be expected to keep the claimant out of the workforce for a long time.

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<sup>2</sup> See section 42(2)(a)(i) of the *Canada Pension Plan*.

<sup>3</sup> See section 42(2)(a)(ii) of the *Canada Pension Plan*.

[11] When the Minister terminates benefits that it had previously approved, the burden lies on the Minister to prove, on a balance of probabilities, that the recipient's disability is no longer severe and prolonged.<sup>4</sup>

[12] In this case, the Minister had to prove that the Respondent's post disability earnings (i) were substantially gainful; (ii) indicated a capacity to pursue regular employment; and (iii) did not come from a "benevolent employer."

## **Analysis**

[13] I have applied the law to the available evidence. I am satisfied that the Minister met the burden of proving that the Respondent ceased to have a severe and prolonged disability as of April 2019. The Respondent continues to have health problems, but he managed to maintain an extended period of substantially gainful employment well after he began receiving the CPP disability pension.

### **The Respondent's earnings were above substantially gainful**

[14] After he was approved for the CPP disability pension, the Respondent only had low-paying, part-time jobs. However, that didn't mean he continued to be disabled or incapable of regularly performing substantially gainful employment.<sup>5</sup>

[15] The Respondent testified that, in late 2018, he began doing occasional work for X. He said that the work was not taxing — all he had to do was go to a dairy and ensure that it was producing milk in accordance with kosher laws. The job required him to observe operations and make notes on a checklist.

[16] The Respondent had already begun working for a friend who ran X, a New Jersey-based company that vets prospective tenants for landlords. The Respondent marketed the company's services from his home in Canada. He was paid a commission for each client that he landed.

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<sup>4</sup> See *Boudreau v Canada (Minister of Human Resources and Development)* (July 26, 2000), CP 11626 (PAB) and *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

<sup>5</sup> See *J.W. v Canada (Minister of Human Resources and Skills Development)*, 2014 SSTAD 12.

[17] The Respondent hasn't done any work for X since 2019, but he continues to be employed as an independent contractor for X.

[18] Section 68.1 of the *Canada Pension Plan Regulations* associates "substantially gainful" with a specific dollar value, depending on the year. Any amount earned over the maximum annual amount that a person can receive as a disability pension is deemed to be substantially gainful.

[19] The available evidence shows that the Respondent earned the following amounts in the years after the Minister found him disabled:<sup>6</sup>

Year	Employment Income	Gross Business Income	Net Business Income	Maximum Disability Amount
2018	\$287	\$3,250	\$2,224	\$16,029
2019	\$9,352	\$7,197	\$563	\$16,353
2020	-	-	-	\$16,652
2021	-	\$18,927	\$10,571	\$16,964

[20] The Respondent testified that he earned nothing in 2020 because "things essentially shut down" during the COVID-19 pandemic's first year.<sup>7</sup> However, his combined employment and gross business earnings exceeded the maximum disability amounts for 2019 and 2021.

[21] These excess amounts do not decide the matter by themselves, but they do suggest that the Respondent regained the capacity to perform substantially gainful work in early 2019.

<sup>6</sup> See Respondent's T1 Income Tax and Benefit Returns for 2019 (GD2-247) and 2021 (GD23-36)

<sup>7</sup> The Respondent reported a total income of \$28,886 in 2020 (see CRA Electronic Filing Information Return, GD2-27). He later testified that, to his knowledge, this money was entirely made up of the Canada Emergency Relief Benefit.

## **The Respondent's gross business earnings reflect capacity**

[22] The Respondent maintained that his gross business earnings told only part of the story. He insisted that, to make those earnings, he had to incur business expenses. He argued that his net business earnings, which were well below the statutory threshold, were a better measure of his capacity.

[23] When a disability claimant registers business income, there is always the question of whether to give more weight to gross or net earnings. The Minister usually focuses on gross earnings, but there are cases that also consider net earnings.<sup>8</sup> Those cases work on the logic that a job can't exist without financial outlays of some kind, whether they come from oneself or from an external party.

[24] In this case, the Respondent's net earnings are relevant, but his business expenses raise questions. On his 2019 income tax return, the Respondent claimed \$6,634 in travel expenses against gross earnings of \$7,197, leaving him with only \$563 in net earnings.<sup>9</sup> Asked why his travel expenses were so high, the Respondent replied that his boss called him to New Jersey for training and briefing sessions eight times that year.<sup>10</sup> He said that he had to pay for air tickets, hotel accommodation, and car rentals out of his own pocket. He said that his boss refused to consider holding these sessions online and insisted on holding them in person.

[25] The Respondent told a similar story for 2021. He said that, after the pandemic year, "everything started over," prompting his boss to recall him to New Jersey for more training and briefing. He reported travel expenses associated with those trips amounting to \$8,356, leaving him with net business earnings of \$10,571.<sup>11</sup>

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<sup>8</sup> See for example *Minister of Employment and Social Development v PC*, 2021 SST 53 and *SW v Minister of Employment and Social Development*, 2022 SST 952.

<sup>9</sup> See the Respondent's Statement of Business and Professional Activities from his 2019 T1 return, GD2-273. The Respondent listed all expenses for 2019 and 2021 under the heading "Office." At the hearing, he explained that they were in fact all related to travel.

<sup>10</sup> See also the Respondent's email dated November 27, 2022, GD23-1.

<sup>11</sup> See the Respondent's Statement of Business and Professional Activities from his 2021 T1 return, GD23-51.

[26] In this case, I find that the Respondent's gross business earnings are a better reflection of his capacity than his net business earnings. That is because his business expenses appear to be anomalous. In the two years for which we have numbers, the Respondent reported no other business expenses except for travel. Oddly enough, the travel was for a job that was otherwise supposed to be performed remotely.

[27] Moreover, the fact that the Respondent undertook these trips is by itself evidence that he (i) believed he could work and (ii) could in fact work. The Respondent insisted that his boss required his physical presence in New Jersey as a condition of his continued employment. That may be so, but I don't find it likely that the Respondent would have incurred such large outlays in travelling to New Jersey unless there was a reasonable prospect of later getting a significant return on his investments.

[28] I saw nothing to suggest that the Respondent's relatively modest business earnings were linked to any impairment. The Respondent testified that he continues to work for X to this day. Although he did not provide any information about his gross or net business earnings for 2022 or 2023, I must assume that he would not have persisted in carrying on this activity unless it was generating something like a substantially gainful income.

### **The Respondent was capable of regular employment**

[29] The Minister had to do more than just show the Respondent had substantially gainful earnings. The Minister also had to show that those earnings came from **regular** employment. In my view, the Minister fulfilled that obligation.

[30] The Respondent testified that, in his first year with X, he worked for four or five hours per day, rising to six hours by 2021. He had previously disclosed that, following the termination of his CPP disability pension in May 2021, he intended to increase his work hours.<sup>12</sup>

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<sup>12</sup> See Respondent's CPP Disability Self-Employment Questionnaire completed on August 20, 2021, GD2-234.

[31] Furthermore, the Respondent candidly admitted that, if the milk inspection job, or something like it, were still available as a full-time job, he would and could do it. This admission, combined with the many other indicators of capacity on the record, satisfied me that the Respondent was regularly capable of a substantially gainful occupation.

[32] To his credit, the Respondent has never denied that he can work. But he has asked the government to consider his modest resources before going after his benefits: “I literally do not have a dollar left over after paying for food, drugs etc. I take full responsibility.”<sup>13</sup>

[33] Unfortunately, the law prevents me from taking into account such extenuating circumstances when assessing disability. I have to follow the letter of the law, and nothing in the *Canada Pension Plan* or its associated regulations allows me to base my decision on a claimant’s financial need.

[34] The fact remains that, despite ongoing health conditions, the Respondent has maintained a modest career over the past four years. According to the philosophy that governs the CPP, claimants are either regularly capable of a substantially gainful occupation or they are not. The legislation makes no allowances for how difficult a claimant finds their job; it only cares about whether the claimant is able to perform the job on a sustained basis and whether that job earns them some kind of living.

### **The Respondent did not benefit from a benevolent employer**

[35] If a claimant has a so-called “benevolent employer,” then they can argue that they are not actually capable of pursuing a substantially gainful occupation, despite what their income shows.

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<sup>13</sup> See Respondent’s letter dated December 7, 2021, GD2-15.



[36] A benevolent employer is one who will change working conditions and lower performance standards for an employee who has limitations. A benevolent employer expects significantly less from the disabled employee than from other employees. A benevolent employer accepts that the employee can't work at a competitive level.<sup>14</sup>

[37] The Respondent testified that X was owned and operated by an old friend, who saw him as a "good fit" for an internet marketing job that he had available. The Respondent never claimed that his friend was a benevolent employer. However, I considered the question anyway.

[38] The evidence doesn't show the Respondent's employer was benevolent. I saw nothing to indicate that X received less than fair market value for the commissions it paid the Respondent. The Respondent's job was designed to be performed from home. The Respondent did not receive special accommodations that were unavailable to other employees. There is no evidence that the Respondent was held to a lower performance standard than other contractors in similar positions.

[39] In short, I am unwilling to find that X was a benevolent employer merely because it was headed by a friend of the Respondent.

### **The Respondent's disability was not prolonged**

[40] Under the CPP, disability must be severe and prolonged. I have already found that the Respondent's disability ceased to be severe when he returned to work in 2019. Although it is not, strictly speaking, necessary for me to do so, I also find that his disability was not prolonged. To be prolonged, a disability must be of indefinite duration; the Respondent's disability came to a definite end when he commenced substantially gainful employment in separate jobs as a consultant and internet marketer.

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<sup>14</sup> See *Atkinson v Canada (Attorney General)*, 2014 FCA 187. The principles from *Atkinson* were recently reiterated by a case called *Canada (Attorney General) v Ibrahim*, 2023 FCA 204.

## Conclusion

[41] It is unfortunate that the Respondent must return two years of benefits, and I regret that my decision will cause him financial hardship. However, he received those benefits after he ceased to be disabled. He knew, or should have known, that he was obliged to immediately report any employment income to the Minister.<sup>15</sup> He did not meet that obligation. Later, when the Minister learned of the Respondent's employment earnings, it had the right to investigate whether he had regained his ability to work. It had the right to terminate his benefits once it decided that his disability was no longer severe and prolonged. I am satisfied that, in doing so, the Minister acted in compliance with the law.

[42] I find that the Respondent stopped being disabled as of January 2019, around the time he took on two jobs. Taking into account a three-month work trial period, that means his disability pension should be properly terminated as of April 2019.<sup>16</sup>

[43] The appeal is allowed.



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Member, Appeal Division

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<sup>15</sup> See section 70.1 of the CPP Regulations.

<sup>16</sup> When the Minister, finds that a pension recipient has ceased to be disabled, it typically waits three months before cutting off payment. While this so-called "work trial period" period may reflect a Ministerial policy or guideline, it has no basis in law. Nevertheless, I am willing to recognize the three-month period as well, since to do otherwise might disincentivize or penalize other disability recipients from attempting to re-enter the workforce.