Citation: *TC v Minister of Employment and Social Development*, 2023 SST 1817

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	T. C.
Representative:	M. L.
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie

Decision under appeal:	General Division decision dated April 28, 2023 (GP-22-264)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	December 6, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	December 19, 2023
File number:	AD-23-620

Decision

[1] I am dismissing this appeal. The Appellant ceased to be disabled when she returned to work in June 2015. She is disentitled to a Canada Pension Plan (CPP) disability pension as of September 2015.

Overview

[2] The Appellant is 59-year-older former administrator and clerical worker. In her early thirties, she began to experience a variety of debilitating symptoms, including generalized pain, chronic fatigue, and depression. She was later diagnosed with fibromyalgia.

[3] In February 2006, the Appellant applied for a CPP disability pension, claiming that she was no longer capable of work. The Minister of Employment and Social Development initially rejected the application but changed his mind after the Appellant was diagnosed with breast cancer in September 2007. The Minister determined that the Appellant had a severe and prolonged disability and granted her a disability pension.[1]

[4] Years went by. In June 2015, the Appellant took a part-time job as an administrator at X, a division of real estate developer that builds and markets new homes. She worked there for the next 3½ years and then moved to another job, this time as a full-time receptionist for X, a property management company. After three months, she resigned, having found her new duties too difficult.

[5] In September 2019, the Minister received information about the Appellant's earnings from the Canada Revenue Agency. Following an investigation, the Minister determined that the Appellant was no longer disabled and terminated her benefits. The Minister also demanded repayment of pension monies that the Appellant had received going back to May 2016 — an amount totalling nearly $47,000.00.[2]

[6] The Appellant appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division held a hearing by videoconference and dismissed the

[1] See Minister's settlement offer letter dated October 27, 2007, GD2-261.
[2] See Minister's demand letter dated February 21, 2021, GD2-73.

appeal. The General Division found that the Appellant ceased to be disabled as of September 2015 because her earnings after that date were substantially gainful. The General Division also found no evidence that the Appellant was working for a so-called "benevolent employer."

[7] The Appellant then applied for permission to appeal to the Appeal Division. Last July, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Earlier this month, I held a hearing to discuss her case in full.

[8] Now that I have considered submissions from both parties, I have concluded that the Appellant ceased to be disabled as of June 2015. The evidence shows that, while the Appellant may have still experienced health problems at that time, she was no longer disabled from all forms of regular employment.

Preliminary Matter

[9] Just before the hearing, the Appellant's daughter and representative contacted the Tribunal to let it know that the evidentiary record was missing a large package of medical documents. She said that, although she had submitted them to the Tribunal at the end of August, they were not on the document list that was circulated on November 22, 2023.

[10] With the Minister's consent, I agreed to accept the packag provided it was resubmitted within a week of the hearing. The Appellant sent it to my attention soon afterwards, and the Minister's representative filed a brief letter addressing its contents a few days later.[3]

What I had to decide

[11] My task was to decide whether the Appellant stopped being disabled and, if so, when.

[3] See the Appellant's post-hearing submissions received on December 6, 2023 (AD13) and the Minister's post-hearing response letter dated December 12, 2023, (AD14).

[12] When the Minister approved the Appellant's disability application in 2007, he accepted that she had a disability that was severe and prolonged. Under the *Canada Pension Plan*, these words have a very specific meaning:

- A disability is severe if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.[4] 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.[5] The disability must be expected to keep the claimant out of the workforce for a long time.

[13] When the Minister terminates benefits that he 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.[6]

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

Analysis

[15] I have applied the law to the available evidence. I am satisfied that the Minister met the burden of proving that the Appellant ceased to have a severe and prolonged disability as of June 2015. I don't doubt that the Appellant continued to experience symptoms related to fibromyalgia and the after-effects of her cancer treatments. However, the fact remains that she managed to maintain an extended period of substantially gainful employment well after she was found disabled.

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[4] See section 42(2)(a)(i) of the *Canada Pension Plan*.
[5] See section 42(2)(a)(ii) of the *Canada Pension Plan*.
[6] 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.

The Appellant's earnings were well above substantially gainful

[16] The Appellant emphasized that she only had a part-time job, but that didn't necessarily mean she was disabled or incapable of regularly performing substantially gainful employment.[7]

[17] The Appellant testified that, after she got divorced, she needed to make money. A friend tipped her off about the job with X. She was hired as an assistant to the manager of the company's décor centre, which displayed finishes to buyers and prospective buyers of new homes. Her role involved answering the phone, tidying up the premises, dealing with customers, and taking orders.

[18] The Appellant said that, at X, she usually worked two or three days a week from 10:00 am to 3:00 pm. Her pay was about $16.00 per hour when she started in June 2015, and she was making $20.50 by the time she left in February 2019.[8]

[19] However, 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.

[20] Both parties agree that the Appellant earned the following amounts after resuming employment:[9]

Year	Reported income	Maximum disability amou
2015	$12,685	$15,175
2016	$26,013	$15,489
2017	$26,972	$15,763
2018	$22,393	$15,029
2019	$10,910	$16,029

[21] It is obvious that the Appellant's earnings significantly exceeded the maximum allowable amount for several years running. And these earnings didn't just represent a

[7] See *J.W. v Canada (Minister of Human Resources and Skills Development)*, 2014 SSTAD 12.
[8] See employer questionnaire completed on September 10, 2021 by A. M., senior payroll coordinator for X (an affiliate of X), GD2-162.
[9] See X employer questionnaire, note 8, GD2-162. See also Record of Earnings History printed on August 6 2019, GD2-138.

failed attempt to return to work. The Appellant testified that she was eventually left X, not because she was fired, but because she resigned.

[22] The Appellant insisted that her job at X was a constant struggle and took a heavy toll on her health. That's because she continued to deal with aftermath of her breast cancer. In 2008, she had a mastectomy that saw the removal of lymph nodes on her left side, weakening her immune system. She also received radiotherapy and chemotherapy that left her with ongoing brain fog.

[23] However, the fact remains that whatever the lingering effects of her cancer treatments, the Appellant nevertheless succeeded in maintaining a reasonably paying job for more than 3½ years. According to the philosophy that governs the CPP, claimants are either regularly capable of a substantially gainful occupation or they aren't. 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 Appellant was capable of regular employment

[24] The Minister had to do more than just show the Appellant 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.

[25] The evidence indicates that the Appellant managed to keep a job at regular hours for 3½ years. Even if I generously assume that the Appellant was making $20.00 per hour throughout her time at X, that still means she was working between 21 and 26 hours per week — significantly more than what she told me at the hearing. The Federal Court of Appeal has said that the capacity of a disability claimant to regularly engage in remunerative employment is the "very antithesis" of a severe and prolonged disability.[10]

[26] The Appellant testified that, after her cancer treatments, she became prone to infections, especially under her left arm. She said that the infections frequently forced her to call off work sick. She recalled that, on maybe eight occasions, she had to be

[10] See *Miller v Canada (Attorney General)*, 2007 FCA 237.

admitted to hospital for stays of up to two or three days. On discharge, she would need to be hooked up to an intravenous (IV) drip, through which antibiotics were administered to her system. This usually required several days of homecare.

[27] However, the medical evidence doesn't quite match up with the Appellant's testimony. A record from Etobicoke General Hospital indicates that, between June 2015 and April 2019, the Appellant was indeed admitted to emergency eight times for, variously, "left arm cellulitis," "localized swelling/pain," "fever," and "upper extremity pain,"[11] Each time, she was discharged the same day except for two overnight stays June 2015 and June 2017 and one two-day stay in June 2016. There is no record of a hospital admission after June 2017.

[28] The Appellant later submitted records documenting her homecare interventions. They reveal that the Appellant received nursing assistance for IV therapy once in 2015 (for 25 days), twice in 2016 (for 11 and 24 days respectively), and once in 2017 (for four days).[12] The Appellant held her job despite these treatments.

[29] It is unclear whether the treatments stopped the Appellant from reporting to work. There are many indications that the Appellant's antibiotic treatment was administered, not in a continuous drip, but by discrete IV doses.[13] For example, there is a note saying that the Appellant had received six of seven doses of Ceftriaxone (an antibiotic).[14] There is another that discusses giving the Appellant seven doses at 8:00 am each morning.[15] Yet another says that, since the Appellant was ambulatory and planning to return to work the following day, she would need to seek treatment in the evening.[16]

[30] Other notes indicate that the Appellant had a degree of flexibility on the time and location of her treatments. On one occasion, the Appellant called in to say that she was now attending a clinic to get her antibiotic injection and no longer needed an IV pole.[17] On another, the Appellant asked to attend a clinic that was on her way to work in

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[11] See Etobicoke General Hospital patient's data record generated October 8, 2019, GD2-97.
[12] See letter dated August 29, 2023 from Home and Community Care Support Services, AD13-2.
[13] See, for example, nurses' notes, AD13-16, AD13-45, AD13-56, and AD13-60.
[14] See Bayshore Home Health memo dated September 26, 2015, AD13-16,
[15] See note dated February 29, 2016, AD13-40.
[16] See intake and initial history memo dated September 21, 2015, AD13-109.
[17] See note dated September 24, 2015, AD13-84.

Mississauga: "Informed patient again that Vaughan Clinic is open from 8:00 am till 10:00 pm, so there should be a time that was convenient to her."[18]

[31] From what I can see, the Appellant's infections were relatively infrequent and did not require treatments that seriously interfered with her work schedule. Moreover, however many days she might have missed work, the Appellant still managed to keep her job for years. The Appellant insisted that she was able to keep working at X thanks only to the unusual kindness of her immediate supervisor. However, as I will explain below, I found that claim unconvincing.

The Appellant did not benefit from a benevolent employer

[32] The Appellant maintained that her job at X was not evidence of capacity. She insisted that her supervisor, the décor centre's manager, was extraordinarily lenient. She said that her supervisor witnessed her struggles and gave her all kinds of accommodations. For instance, she let the Appellant set her own hours. She often ignored the Appellant's late arrivals. She let the Appellant take time off without recording it. Eventually, in February 2019, when the Appellant told her that she couldn't do the job anymore, her supervisor told her that she should probably "pack it in."

[33] 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.[19] The *Canada Pension Plan* contains no reference to benevolent employers, but a case called *Atkinson* also 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.

[34] 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;

[18] See note dated February 28, 2016, AD13-88.
[19] 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.

(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.

[35] Although the overall burden of proof lies with the Minister, there is a presumption, valid until proven otherwise, that an employer is getting something like fair value in return for the wages or salary they pay to their employees.[20] Put another way, it is up to disability claimants to show that their employers are benevolent.

[36] In this case, there was nothing on the record to substantiate the Appellant's claim that her job as an administrative assistant was a form of charity. There was no evidence that X was receiving less than fair market value for its $20.50 an hour.

[37] I asked the Appellant why, if she was such an unreliable employee, her supervisor was willing to keep her in place, even to the point of misrepresenting the number of hours she worked. The Appellant replied that she wasn't sure but that it probably had something to do with her supervisor being under a lot of stress herself.

[38] I found this explanation to be implausible. In an employer questionnaire, X told the Minister that the Appellant worked 20 hours per week with no missed work due to illness, no problems with her performance, and no special arrangements or accommodations.[21] The Appellant herself said that she was able to greet purchasers, answer phones, lift tiles, update reports, deal with inventory, take surveys, and receive company payments. None of these responsibilities strike me as menial or trivial.[22]

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[20] See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.
[21] See X employer questionnaire, note 8, GD2-162.
[22] See Appellant's Return to Work Report completed on October 17, 2019, GD2-188.

[39] As for the Appellant's supervisor, I saw nothing to indicate that she went to unusual lengths to accommodate her subordinate. The Appellant recalled her supervisor urging her to stretch or elevate her left arm and not to lift heavy items. The supervisor wrote a letter of support acknowledging the Appellant's impairments, but she did not provide any examples of formal accommodations.[23]

[40] I am unwilling to find that X was a benevolent employer based on acts of kindness or an occasional favour. The Appellant may have had a supportive supervisor, but a supportive supervisor is not the same thing as a benevolent employer. More to the point, the Appellant has not produced any other evidence to counter the presumption that she was providing market value to X. There is nothing on the record to suggest that the Appellant was overcompensated for her work or that her employer's productivity expectations were significantly lower than what they might have been for someone else with similar qualifications in the same position.

The Appellant felt capable of full-time employment even after 3½ years at X

[41] The Appellant testified that she worked at X for as long as she did only because she received extraordinary accommodations. She said that she resigned because, despite those accommodations, she had increasing difficulty performing her duties. Yet immediately after resigning, she took another job that, on paper, was more challenging than the one she had left behind.

[42] It was a full-time position at a property management company called X. There, she worked as a receptionist, answering phones, and making entries on a computer. She said that she found it extremely difficult because she wasn't familiar with the company's systems and couldn't get up to speed on them. After three months, she resigned. Asked why she thought she could manage such a job, if she had so much difficulty at her previous one, the Appellant replied that she "clearly wasn't thinking straight."

[23] See letter by Nina Ramirez dated April 27, 2022, GD7-2

[43] I don't regard the Appellant's short time at X as evidence of continuing disability. It is, after all, outweighed by her demonstrated ability to maintain her job at X for more than three years before that. However, the fact that the Appellant took the X job tells me something about her state of mind in 2019. To be specific, it tells me that she **believed** she was capable of a full-time job more than 13 years after she was deemed disabled. This is yet another indication that the Appellant was disqualified from receiving the CPP disability pension.

The Appellant's disability was not prolonged

[44] Under the CPP, disability must be severe and prolonged. I have already found that the Appellant's disability ceased to be severe when she returned to work in June 2015. Although it is not, strictly speaking, necessary for me to do so, I also find that her disability was not prolonged. To be prolonged, a disability must be of indefinite duration; the Appellant's disability came to a definite end when she commenced substantially gainful employment as an administrative assistant.

[45] It is unfortunate that the Appellant must return four years of benefits, and I regret that my decision will cause her financial hardship. However, she received those benefits after she had ceased to be disabled. She knew, or should have known, that she was obliged to immediately report any return to work to the Minister.[24] She did not meet that obligation. Years later, when the Minister learned of the Appellant's employment earnings, it had the right to investigate whether she had regained her ability to work, and it had the right to terminate her benefits once it decided that her disability was no longer severe and prolonged. I am satisfied that, in doing so, the Minister acted in compliance with the law.

Conclusion

[46] I am dismissing this appeal. I don't doubt that the Appellant has limitations, but they didn't prevent her from making a substantially gainful living from 2015 to 2019. I find that the Appellant ceased to be disabled in June 2015, the month she began

[24] See section 70.1 of the *Canada Pension Plan Regulations.*

working at X. Taking into account a three-month work trial period, that means her disability pension should be properly terminated as of September 2015.[25]

Member, Appeal Division

[25] When the Minister and, later, the General Division found that the Appellant had ceased to be disabled, they both recognized a three-month "work-trial period." While such a period may reflect a Ministerial policy or guideline, it has no basis in law. Nevertheless, I am willing to recognize a three-month period as well, since to do otherwise might disincentivize or penalize other disability recipients from making an attempt to re-enter the workforce.