Citation: *KS v Minister of Employment and Social Development*, 2024 SST 145

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. S.
Representative:	Justin Chong
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter, Rebekah Ferriss

Decision under appeal:	General Division decision dated September 19, 2022 (GP-21-373)

Tribunal member:	Kate Sellar
Type of hearing:	In person; closing arguments by teleconference
Hearing date:	August 10, 2024 and August 24, 2023
Hearing participants:	Appellant Appellant's representative Respondent Respondent's representative
Decision date:	**February 16, 2024**
File number:	AD-22-932

Decision

[1] I'm dismissing the Claimant's appeal. The Minister of Employment and Social Development (Minister) proved that the Claimant stopped being disabled within the meaning of the Canada Pension Plan (CPP) in April 2011 after a three-month return to work trial.

Overview

[2] K. S. (Claimant) has achondroplasia. She applied for a *Canada Pension Plan* (CPP) disability pension on August 5, 2009.

[3] She had been working as an education assistant beginning in April 2000. She stopped working in June 2009. She stopped working because of pain in her back, legs, and hips. In addition to pain in her low back, leg, and knee, she had tingling and weakness in her feet and legs as well as spinal compression. Her condition causes wear and tear on her joints, and she has had multiple surgeries over the years as a result. She experiences pain and takes medication to try to make that pain more manageable.

[4] The Minister decided that the Claimant had a severe and prolonged disability within the meaning of the CPP. The Minister found that the Claimant's disability started in June 2009 when she stopped working.

[5] After she started receiving CPP disability benefits, the Claimant returned to work as an educational assistant (EA). Her employment was casual, and at the end of each school year, she was laid off and then hired back in September. Generally, EAs supervise and support children, perform feeding and toileting, and complete record keeping. The school bard employer accommodated the Claimant with no repetitive sitting, repetitive climbing, use of ladders, and running. She was also restricted in how much she was required to lift, carry, and push. She made $21.40 an hour in 2020.

[6] In March 2019, the Minister reviewed the Claimant's file and learned through Canada Revenue Agency (CRA) that the Claimant earned income after she started her

disability benefits. In August 2020, the Minister ceased (stopped) the Claimant's disability benefits effective three months after she went back to work, namely April 31, 2011.

[7] The Claimant had an overpayment of more than $70,000. She appealed to this Tribunal. The General Division concluded that the Claimant earned substantially gainful income in 2011 and 2012, and that her employment was not benevolent or a failed work attempt, so the Minister made no error in ceasing the CPP disability pension payments.

Issue

[8] Did the Minister show that the Claimant stopped being disabled within the meaning of the Canada Pension Plan as of April 30, 2011?

Analysis

[9] In this decision,

- First, I'll set out how claimants become eligible for the CPP disability pension, and what happens when they stop being eligible under the CPP.
- Next, I'll explain how I've concluded that the Minister met its burden to show that the Claimant stopped being disabled within the meaning of the CPP in April 2011. I've reached that conclusion based not just on the Claimant's earnings alone, but also considering the nature of the work she completed. The work the Claimant completed means that she was no longer incapable regularly of pursuing any substantially gainful occupation. Her work was not benevolent. It was not a failed work attempt, as she continued it in both 2011 and 2012 and for many years after that.
- The Claimant's work history after 2011 doesn't change my conclusions about the fact that her disability stopped being severe by April 2011 under the CPP.

The law sets out how claimants become eligible for a CPP pension and under what circumstances a pension can stop.

[10] To be eligible for a CPP disability pension, a person must have a severe and prolonged disability on or before the end of their coverage period. A person with a severe disability is "incapable regularly of pursuing any substantially gainful occupation."[1] Each piece of that definition has meaning.[2] A severe disability in the CPP context is connected to what a person can and cannot do (when it comes to work). The things people cannot do because of a disability are sometimes called "functional limitations."

[11] A disability pension stops (ceases) to be payable for the month in which a claimant ceases to be disabled.[3] When the Claimant appeals a decision to stop a disability pension, it's the Minister's job to show that the Claimant stopped being disabled.[4] It isn't the Claimant's job to show that she remained eligible for the disability pension.

The Minister showed that the Claimant stopped being disabled within the meaning of the CPP as of April 30, 2011.

[12] In my view, the Minister showed that the Claimant stopped being disabled within the meaning of the CPP after a three-month work trial in 2011. I considered the following:

- The Claimant earned more than what was substantially gainful within the meaning of the Disability Adjudication Framework as it was in 2011.

- The work itself was unique in some ways, but it was an occupation. It was a real job that wasn't benevolent. It wasn't a failed work attempt. The Claimant received accommodation, but the work was not benevolent.

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[1] See section 42(2)(a) of the CPP.
[2] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[3] See section 70(1)(a) of the CPP.
[4] See paragraph 39 in *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

- The Claimant's work history after 2011 doesn't help the Claimant to show that she continued to be disabled within the meaning of the CPP.

– **In 2011 when the Minister stopped the benefit, the Claimant was working in a position that was substantially gainful within the meaning of the Disability Adjudication Framework at the time.**

[13] The Minister argues that it has proven that the Claimant stopped being disabled in 2011 because the Claimant started doing substantially gainful work in 2011. That year, she earned $21,041 which was above the amount set by policy at the time as being substantially gainful. The Minister relies on a policy document it provided as evidence in other cases stating that in 2011, allowable earnings were $4,800.[5]

[14] In 2011 when the Minister stopped the Claimant's pension payments, there was no regulation that defined what "substantially gainful" meant in relation to an occupation in the definition of a severe disability.[6]

[15] The Claimant concedes that in 2011, the Disability Adjudicative Framework (a document used by decision makers for the Minister) suggested that substantially gainful income in any given year meant 12 times the monthly maximum of regular CPP.[7]

[16] But the Claimant also argues that in 2011, the Disability Adjudication Framework suggested that where a claimant earned between substantially gainful and twice substantially gainful income, decision makers should consider other factors like productivity and performance to better understand the relationship between the claimant's earnings and their capacity to work. While the Disability Adjudication Framework isn't binding, the Claimant argues it is relevant. She adds that it even created a legitimate expectation for claimants in terms of how their pensions would be adjudicated in 2011.[8]

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[5] See AD8-18.
[6] Section 68.1 of the *Canada Pension Plan Regulations*, which came into force in 2014.
[7] See AD1-6.
[8] For more on legitimate expectations, see *Baker v Canada (Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

[17] The Claimant argues that her income was never twice substantially gainful, and that her average yearly earnings over a nine-year period starting in 2011 was only $9,837.66.[9]

[18] I cannot find that the Disability Adjudication Framework is binding on the Appeal Division as it is policy and not law. However, I accept the Claimant's argument that it's relevant to consider productivity and performance to better understand the relationship between the Claimant's earnings and her capacity for work. In my view, that's the case regardless of what the Claimant's income was under the Disability Adjudication Framework.

[19] Consistent with the CPP, if the Minister relies on the Claimant's earnings to show that the Claimant stopped being disabled, I must consider what those earnings tell me about the Claimant's capacity to work and whether the disability was severe. There is no one aspect of the test for a disability pension that automatically trumps another. The existence of income above the threshold in the Disability Adjudication Framework will not decide fully the question – I must consider what the earnings tell me about whether the Claimant was still incapable regularly of pursuing any substantially gainful occupation. Every part of that test has meaning. I must consider all the evidence about the Claimant's capacity to work: medical evidence (from 2011), the Claimant's testimony, and her earnings.

[20] The Claimant argues that there is no reason to consider only the income in 2011 and 2012, when the record shows that she couldn't sustain that level of income in 2013 to 2019.

[21] In my view, the reason that 2011 is key is that this is the date that the Minister must show that the Claimant regained the capacity to work at any substantially gainful job and stopped being disabled. That is the question before me in this appeal.

[22] I must decide whether the Minister proved that the Claimant stopped being disabled in 2011. There are many years of earnings and work history between 2011 and

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[9] See AD1-7.

2019 when the Minister learned about the Claimant's earnings. But the Minister argues, and I accept, that it is the Claimant's earnings in 2011 that are relevant in showing that she no longer met the test for having a severe disability within the meaning of the CPP.

[23] I cannot accept the Claimant's view of my task. The task isn't for me to determine whether the Claimant can show that her disability was severe and prolonged throughout the period that she has been assessed with an overpayment. I must decide whether the Minister can show that the Claimant stopped being disabled within the meaning of the CPP in 2011. Averaging the Claimant's income over a seven-year period to show fluctuations is not as helpful to me in the task I must complete: I must determine whether the Claimant stopped being incapable regularly of pursuing any substantially gainful occupation in 2011.

[24] Next, I'll consider whether work the Claimant completed was benevolent.

– **The Claimant had the capacity to work in a substantially gainful job. The work the Claimant did was unique in some ways, but it was a real job. The job wasn't benevolent.**

[25] After the Claimant's back surgery in 2008, she had to be off work to recover in hospital. In 2009, she decided to try to return to work. The Claimant testified that she was trying to support her family after her long hospitalization.

[26] She was a casual employee with the school board, which involves securing hours to work by calling in to an automated central phone line and confirming whether you are available to work. The Claimant stated she was available, and she accepted casual work in a classroom supporting a group of low learners and a child with autism. She worked a full school day each day from Monday to Friday. She knew the principal of the school and there weren't problems with her performance.

[27] To decide whether work was benevolent, I will consider the following questions:

- Was the work productive in terms of output and product?

[28] The Claimant's work was productive. The Claimant supported children's learning and participation in the classroom, and she didn't meaningfully challenge that in her evidence.

[29] In addition, a letter from a teacher makes it clear that the Claimant supported her class as an educational assistant (EA) on and off for a period of nine years.[10] The students knew her and enjoyed working with her. The class included ten developmentally challenged students, none of whom required physical support in terms of lifting, toileting, feeding. None of the students used wheelchairs or strollers. None of the students were at risk of running from the room. The Claimant supported the students with life skills, activities, academics, and emotional needs. There was another EA in the classroom who supported the students when they were in gym.

[30] As an EA, output and work product can be awkward to consider in the sense that the job is supporting students rather than creating a particular product. The Claimant worked in a placement that was within her restrictions since the children didn't have the types of physical needs she couldn't fulfil. But she also received accommodations in her job so that some of her duties were not precisely the same as other EAs (who may have supported students in gym class too, for example). The Claimant testified and I accept that other staff members covered yard duty for her, and that she could not restrain or lift a child. She couldn't run to the bus if a child was running late.

[31] However, in my view, these accommodations did not materially change her work output as an EA. Ultimately, she still supervised and supported the children in a classroom, and the modifications to the work weren't major in nature. She sustained the work over many years.

[32] The Claimant's work was productive. She provided educational support to students at school for many years as evidenced by her own testimony and the evidence she provided from the teacher she worked with.

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[10] See AD9-60.

- Was the work at a competitive level compared to others?

[33] The Claimant received accommodations at her workplace, but her work was still at a competitive level compared to other EAs. The Claimant's job was a casual EA, but the class she supported was a specific situation in the sense that she did not work upstairs, and the students she supported did not require physical supports which wouldn't have been well equipped to provide.

[34] The Claimant argued that as the years went on, there were fewer school placements that she could agree to take as a casual employee because some aspects of the placement would exceed her physical restrictions. For example, the physical needs of the children were too great, or the location of the classroom wasn't accessible.

[35] I find that even though the Claimant remained a casual employee of the school board, she was working at a competitive level compared to other EAs, who also supervised and supported children in the classroom. I cannot conclude that because she remained a casual employee for multiple years, that she wasn't working at a competitive level.

[36] I must focus especially on whether the work the Claimant did in 2011 was at a competitive level compared to other casual EA's. I find that it was. She required accommodations in terms of class assignment, but the essential job of supervising and supporting the children was competitive compared to other EA's and she was selected to continue in the classroom throughout 2011 and following.

- Were the work requirements less than the work expected from other employees?

[37] The Claimant's work requirements were modified in some ways. The Claimant received accommodations, so she didn't have precisely same job duties as an EA who didn't require accommodation.

[38] The Claimant had restrictions in terms of the length of time that she could sit or stand. She could not take the stairs or use a ladder, and she was restricted in her ability to lift and walk. She testified about using some assistive devices at times, like a chair to push down the hallway, or a stool when she was seated in the classroom. She wasn't

required to support the classroom students when they were at gym class. She wasn't expected to run a child to bus if they were late. The Claimant used an accessible chair in the classroom, which accommodated her ability to sit, stand and move about in the room as needed. She used a step stool when she needed it. There was a phone in the classroom that the Claimant used to access the other classroom and the office for support if she needed it.

[39] Clearly, some of the Claimant 's accommodations involved changes to job duties, but they weren't modified to the extent that her work requirements were less than others in any significant way. The Claimant was expected to work as any other EA would, and she used some accommodations to complete that work.

- Was the employer satisfied with the work performance or experienced any hardship because of the accommodation they provided?

[40] I have no evidence to suggest that that the Claimant's work performance was a problem, or that the school board experienced hardship because of the accommodation they provided.

[41] The Claimant's performance was such that in 2019, the teacher she worked with wanted her to fill in permanently for the EA in the classroom who was retiring.

[42] I accept the Claimant's evidence that the school board did not ever make her a permanent EA. She testified and I understand that it became increasingly difficult to find a placement that would fit her needs as the years progressed. However, I cannot conclude that this was connected to her inability to perform the work, or a lack of employability connected to her disability. Similarly, I don't have information to suggest that the school board experienced hardship because of the accommodation it provided to the Claimant, either in the built environment or in terms of the minor re-bundling of some job tasks.

The Claimant was employable in the real world beginning in 2011.

[43] The Claimant argues that if the Minister must prove that her disability stopped being severe, it's important to consider whether she was employable in the real world.

[44] Real world employability is part of whether a disability is severe.[11] In cases where a claimant needs to establish eligibility for the disability pension, the focus is on the work history before the end of the minimum qualifying period, or MQP.

[45] But in this case, it's the Minister who needs to show that the Claimant stopped being disabled. The Claimant argues that part of why the Minister cannot meet that burden of proof is that the work she did in 2011 must be considered in context of all the work that followed: her work history as a casual EA while she was also receiving CPP disability pension shows that she is and (has always has) been disabled.

[46] I don't doubt that the Claimant's work history from 2011 forward shows the following:

- The Claimant received accommodations from her employer that she needed to complete her work. The Claimant has medical evidence that documents her need for those accommodations to work continue working.[12]
- The Claimant made a real contribution in the classroom.
- The Claimant secured only casual work and was never hired as a permanent EA (the Claimant notes her employer issued 24 records of employment between 2011 and 2019 and her employment status was casual).
- The Claimant continued to have challenges related to her medical condition, including several more surgeries, including in 2015, 2017, and 2018.[13]
- The Claimant found it increasingly hard to find casual jobs with the school board as the years progressed, and this was related to some of the accommodations she needed (like working on the first floor).
- The Claimant's income decreased from 2013 to 2019.

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[11] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[12] See GD4-78 and AD19.
[13] See GD4-25, 27, 217, and 293.

- The Claimant testified and I accept that in 2016 and 2017 she was having trouble accessing educational assistant jobs.

- The Claimant tried to work a retail position during the holiday season in 2016 at a toy store. The Claimant's physical restrictions made this job too difficult for her to maintain, even on a part-time basis.

[47] These findings aren't inconsistent with the Minister's position that she stopped being disabled in 2011. The Claimant may not have been able to do some other jobs from 2011 forward. But that doesn't matter because the work she secured, although casual and accommodated, was real work and she made substantially gainful income in 2011.

[48] The Claimant wasn't incapable regularly of pursuing any substantially gainful occupation as of April 2011. She was a reliable casual worker for the school board in 2011 and she contributed to the classroom in a meaningful way.

[49] The Claimant has a lifelong congenital medical condition. She tried to stay connected to employment over a period of many years. She needed accommodations to succeed and participate. She had physical restrictions that impacted her ability to work, but those restrictions didn't preclude work.

[50] The Claimant argued that fluctuations in her income that came after 2011, along with surgeries and other challenges during her working life in the years following 2011 show that her disability remained severe. However, these factors cannot change my view about whether her disability stopped being severe within the meaning of the CPP in April 2011. The Claimant was settled back into her work by April 2011 and was earning a living. She was a dependable employee that year. Her disability stopped being severe by April 30, 2011.

[51] Since the Minister showed that the Claimant's disability stopped being severe in 2011, I don't have to consider whether the disability also stopped being prolonged within the meaning of the CPP, or whether the disability became severe again later.

Final Note

[52] I've decided that the Minister showed that the Claimant stopped being disabled within the meaning of the CPP in April 2011. This means that the decision to stop her disability pension payments in April 2011 remains unchanged.

[53] The Claimant has raised important problems she's experienced with Service Canada as a person with a lifelong medical condition. I don't have the ability to remedy general policy or process problems in the application and review process for the CPP disability pension. The problem here is glaring, even if I cannot impose a solution.

[54] The Claimant was supposed to report her earnings to the Minister, not just to CRA. But the Minister also seems to have lacked a robust process to identify promptly when a person receiving CPP disability pension reports income to CRA. Such a process would allow the Minister to complete a timely investigation. Such a process would be especially beneficial as a fail safe in cases where staff approve a disability pension but also suggest or consider conducting a review after a year of benefits, and then the review doesn't happen. The later the review or investigation, the higher the overpayment.

[55] I don't have the power to decide about remitting any part of the Claimant's overpayment. I also don't have the power to decide that the Claimant's disability became severe and prolonged within the meaning of the CPP sometime after 2011.

Conclusion

[56] I dismissed the Claimant's appeal. The Claimant stopped being disabled within the meaning of the CPP as of April 30, 2011.

Kate Sellar
Member, Appeal Division