



Citation: *Minister of Employment and Social Development v JT*, 2024 SST 268

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Yanick Bélanger

Respondent: J. T.

Decision under appeal: General Division decision dated May 19, 2023
(GP-21-2546)

Tribunal member: Neil Nawaz

Type of hearing: Teleconference

Hearing date: February 20, 2024

Hearing participants: Appellant's representative
Respondent

Decision date: March 14, 2024

Corrigendum date: March 18, 2024

File number: AD-23-753

Decision

[1] I am allowing this appeal. The Respondent ceased to be disabled as of January 2016. She is disentitled to a Canada Pension Plan (CPP) disability pension as of April 2016.

Overview

[2] The Respondent is 57-year-old businesswoman who has owned and operated a clothing consignment store in Victoria since 2011. Until 2014, she also worked as an administrative assistant at a seniors' residence. She has experienced neck and back pain since the late 1980s.¹

[3] In November 2015, the Respondent applied for a CPP disability pension.² Three months later, she was involved in a motor vehicle accident (MVA) that aggravated her neck and back pain. In January 2016, the Minister of Employment and Social Development approved the Respondent's application after determining that she had a severe and prolonged disability. The Minister granted her a disability pension effective December 2014.³

[4] In October 2019, the Minister revisited his approval decision after learning that the Respondent's store had earned significant revenues over the previous several years. Following an investigation, the Minister determined that the Respondent was no longer disabled and terminated her benefits.⁴ The Minister ultimately demanded repayment of pension monies that the Respondent had received going back to March 2016 — an amount totalling nearly \$54,000.⁵

[5] 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, despite gross annual business earnings of

¹ See report dated January 14, 2015 by Dr. Susan Edwards, general practitioner, GD2-319.

² See the Respondent's application for a CPP disability pension date stamped November 24, 2015, GD2-222.

³ See the Minister's letter dated March 10, 2016, GD2-210.

⁴ It appears that the Minister launched his investigation after the Respondent notified Service Canada that she intended to return to work — see the Minister's return to work report dated October 11, 2019, GD2-208.

⁵ See the Minister's reconsideration letter dated September 15, 2021, GD2-5.

more than \$100,000 since 2016, the Respondent never stopped being disabled. The General Division allowed the Respondent to keep her pension.

[6] The Minister was unhappy with that decision. He applied for permission to appeal to the Appeal Division. In August, one of my colleagues on the Appeal Division granted the Respondent permission to appeal. Last month, I held a hearing to discuss her case in full.

[7] Now that I have considered submissions from both parties, I have concluded that the Respondent ceased to be disabled as of January 2016. The evidence shows that, while the Respondent may have still experienced health problems after that point, she was no longer regularly incapable of a substantially gainful occupation.

What I have to decide

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

[9] When the Minister approved the Respondent's disability application in March 2016, he accepted that she had a disability that was severe and prolonged. Under the *Canada Pension Plan*, those words have a very specific meaning:

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.⁶ 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.⁷ The disability must be expected to keep the claimant out of the workforce for a long time.

⁶ See section 42(2)(a)(i) of the *Canada Pension Plan*.

⁷ See section 42(2)(a)(ii) of the *Canada Pension Plan*.

[10] When the Minister seeks to terminate benefits that he had previously approved, he bears the burden of proving, on a balance of probabilities, that the recipient's disability is no longer severe and prolonged.⁸

[11] In this case, the Minister had to prove that the Respondent's post disability earnings (i) were substantially gainful and (ii) indicated a capacity to regularly pursue an occupation.

Analysis

[12] 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 January 2016. I don't doubt that the Respondent has ongoing back and knee pain, but the evidence shows that she nevertheless managed to run a high-volume business over a prolonged period.

The Respondent has played an active role in her business

[13] The Respondent testified that in 2011, while she was still employed as an administrative assistant, she opened the X, a consignment clothing store. By 2014, her back and knee pain had increased to the point where she could no longer perform her employment duties. She had to also step back from the store, although she trained her daughter to manage it. She continued to come in but on a very limited basis — only two hours a week.

[14] In 2016, the X was evicted from its original location. The Respondent had to find new premises, negotiate a lease, oversee the renovation of the new location, and manage the move. She used the occasion to commission a new website and implement a new point of sale system. She insists that she could not have accomplished these tasks without the help of friends and family.

[15] In October 2019, alarmed by its continuing losses, the Respondent decided to take on a more active role in the store. She remained in severe pain, but by then her

⁸ 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.

condition had improved enough to at least make an attempt to return to work. She duly notified Service Canada of her decision, which prompted it to investigate her continued eligibility for the CPP disability pension. However, she emphasizes that she only lasted two weeks in the store at regular hours before having to retreat again.

[16] Since then, she has continued to be involved in the store, but on a limited basis. She goes in twice a week, and not for full days. She cannot sit for long. She can walk around the store and see if she is needed. She is able to do the daily cash reports and the books online, usually from home. She handles payroll. She is the only one with access to the store's bank account. The store is only open for five hours a day, from 11:00 am to 4:00 pm.

[17] The Respondent testified that, because the X has never made money, she has periodically cashed in investments to keep it going. Asked why she has carried on the business for so long if all it does is drain her finances, she replied that she always hoped to turn a profit at some point. She said that it is something for her to do, and it makes her proud because it helps the community. The store donates unsold clothing to charity for a tax credit. It also used to provide prom dresses to graduates who couldn't afford them.

[18] Because of its charitable aspect, the X has attracted volunteers, some of them the Respondent's friends. At one time, the store was staffed entirely by volunteers, but now she has only one, along with three paid part-timers. One of the staffers now does intake and pricing — important tasks that the Respondent used to do herself.

[19] I asked the Respondent whether she thought her store's losses were attributable to her impairments. She replied that was hard to say, but she did know that a business without an active owner operates at a disadvantage. She said that if she weren't there at all, the X would probably soon fade away.

[20] I understand that the Respondent feels she is still disabled. However, I must base my decision on more than just her subjective view of her capacity.⁹ The

⁹ A 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*

Respondent's testimony indicates that, while she does not spend much time at her store, she continues to be its guiding mind. She decided to keep the business going after it was evicted from its premises, and she oversaw its relocation and the upgrading of its systems. Moreover, although she has staff, she remains solely responsible for managerial tasks such as bookkeeping, banking, and payroll. The Respondent may be doing these tasks from home, and she may spend only a few hours per week doing them, but the evidence shows that the X would not be able to operate without her.

The Respondent's medical records show improvement in her condition

[21] There is no doubt that the Respondent has medical problems, which presumably account for the Minister's decision to grant her a CPP disability pension in the first place. Her file contains imaging reports showing degenerative changes to her lower back. To take one example, an MRI revealed significant nerve root entrapment, as well as anterolisthesis and an annular tear in her lumbosacral spine.¹⁰

[22] However, the severity of a disability depends, not on a claimant's disease, but on their capacity to work.¹¹ Some medical reports after 2015 point to an improvement in the Respondent's functionality, for example:

- In July 2016, Dr. Kuss, a general practitioner who completed a medical statement pursuant to the Respondent's MVA insurance claim, wrote that the Respondent was "self-employed" and displayed "no severe functional limitation." Asked whether her patient was capable of modified or alternative work, Dr. Kuss replied, "Yes, already at work."¹²

Regulations. In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said that there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁰ See clinical note dated May 13, 2016 by Dr. Nelson Svorkdal, pain management specialist, GD2-18.

¹¹ See *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

¹² See ICBC medical report dated July 12, 2016 completed by Dr. Kathryn Kuss, general practitioner, GD270.

- In May 2017, Dr. Robertson, the Respondent's family doctor, noted that, despite degenerative disc disease, the Respondent was "generally healthy," "on her feet through the day," and "really busy."¹³

[23] I also find it notable that there was a lengthy gap between Dr. Robertson's note and the next medical report on file. In January 2021, an unnamed physician associated with a walk-in clinic wrote that the Respondent was seeking help on a CPP issue that was causing her financial stress.¹⁴ The physician noted that the Respondent reported chronic back pain and difficulties with sleeping, sitting, standing, and bending. However, it appears that she had not sought any medical help in the previous four years, an interval that, for me, casts doubt on the severity of her symptoms.

The Respondent's business earnings exceeded the substantially gainful threshold

[24] The Respondent insists that, whatever she does for the store, the fact remains that she has never made any money from it. She urges me to focus on the years of net losses that she recorded after Service Canada found her disabled.

[25] It is true that the X has been generally unprofitable, but that by itself does not decide the matter.

[26] 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.

[27] The available evidence shows that the Respondent earned the following amounts in the years after the Minister found her disabled:¹⁵

¹³ See clinical note dated May 15, 2017 by Dr. Leslie Robertson, general practitioner, GD2-18.

¹⁴ See report dated January 8, 2021 by an unnamed physician with the X Urgent and Primary Care Centre, GD2-19. It appears that this report is incomplete — only one of four pages is included in the file.

¹⁵ See Respondent's record of earnings and contributions (GD2-242) and her T2125 Five-Year Comparative Income Statements, 2011-15 (GD2-76) and 2014-18 (GD2-195).

Year	Employment Income (\$)	Gross Business Income (\$)	Net Business Income (\$)	Maximum Disability Amount (\$) ¹⁶
2011	30,733	98,759	(9,300)	N/A
2012	23,824	130,965	(225)	N/A
2013	23,357	100,126	(17,473)	N/A
2014	23,261	79,463	(3,400)	14,822
2015	-	84,197	(15,083)	15,175
2016	-	139,602	(18,227)	15,489
2017	-	116,110	(215)	15,763
2018	-	126,172	(13,818)	16,029
2019 ¹⁷	-	119,170	41,528	16,353

[28] This table shows that the X's gross earnings significantly exceeded the maximum allowable amount for several years running. I note that gross earnings nearly doubled in 2016, an increase that coincided with the store's relocation and its adoption of new software. However, with one exception, the store registered net losses in every year of operation. The exception came in 2019, the last year for which there are numbers, when the store apparently produced net income of more than \$41,000. I asked the Respondent what changed in 2019, but she could not explain why, after many years of losses, her business was suddenly able to generate a significant profit.

[29] These numbers tell only part of the story, but they suggest that the Respondent regained the capacity to perform substantially gainful work some time in 2016.

The Respondent's business earnings reflected capacity

[30] The Respondent argued that it would be a mistake to focus on her gross business earnings or revenues. She noted that, to earn those revenues, she had to incur significant business expenses, chiefly cost of goods sold, but also overheads such as rent, salaries, insurance, and supplies. She maintained that her store's net losses, which were far from the statutory thresholds each year, were a better measure of her capacity.

¹⁶ Section 68.1 of the *Canada Pension Plan Regulations* came into effect in 2014. Before that, the maximum disability amount was not used to benchmark substantially gainful earnings.

¹⁷ The file does not contain any of the Respondent's income tax returns for years after 2018. In this table, the gross and net income numbers for 2019 come from a similar table prepared by the Minister (see AD1-21). The primary document from which these numbers are drawn was not made available to me, but the Minister's representative assured me that they are accurate. I have decided to rely on that assurance.

[31] 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.¹⁸ These cases work on the logic that no job exists without financial outlays of some kind.

[32] In this case, the Respondent's net losses matter, but only up to a point:

– **There are many possible reasons for a business to be unprofitable**

[33] Business losses are relevant in determining disability, but such losses, by themselves, are not necessarily proof of disability.¹⁹ That's because the success of a business, or lack of it, depends on many variables besides the proprietor's health, such as:

- general economic conditions;
- the industry in which the business operates;
- the proprietor's managerial competence; and
- luck.

[34] Profitability is also influenced by the natural tendency of businesses to overstate expenses and understate revenues when reporting their income for tax purposes.

[35] In this case, the Respondent insisted that her store was persistently unprofitable because of her back and knee pain. But she also said that the women's clothing consignment business was difficult, with tight margins at the best of times. She said that the store's charitable donations may have also contributed to its lack of profitability.

– **Business losses must be linked to disability**

[36] It follows that disability claimant seeking to attribute their losses to their impairments must establish a clear connection between the two.

[37] In this case, I saw nothing to suggest that the Respondent's business losses were linked to her back and knee pain. The business was unprofitable before the

¹⁸ 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.

¹⁹ See *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316.

Respondent's condition deteriorated in 2014, and it remained unprofitable afterward. Indeed, revenues significantly increased in 2016 and remained at relatively high levels for at least the next four years. I understand that the Respondent has reported a string of losses to the Canada Revenue Agency, but I find it hard to imagine why she would have carried on with the business for more than a decade unless it gave her some kind of material benefit.

[38] The Respondent seems to be under the impression that, by themselves, her reported net losses proved her disability. That is not so. As I've already noted, a business can lose money for any number of reasons. In this case, the evidence shows that the Respondent was the force behind an active and sustained enterprise that, while it may have lost money in most years, eventually turned a profit.

– The Respondent made a significant net profit in 2019

[39] After years of losses, the Respondent's store eventually did make a profit, and a sizable one at that. As noted, the X reported \$41,528 in net earnings in 2019, suggesting that the Respondent's business activities were capable of producing substantially gainful income.

– The Respondent's gross earnings suggest capacity

[40] Even if the X hadn't reported an above-threshold profit in 2019, I would still find the Respondent's business activities to be evidence of capacity. That's because her store has consistently generated revenues in the six figures. I find that those revenues are a better reflection of her capacity than her several years of net business losses.

[41] The Respondent owns and manages a store that sells used clothing. Over the course of a year, it sells many items at what I assume are modest prices. Such a business does not manage itself. Somebody has to make strategic decisions about where to be located, who to direct marketing efforts to, and what kind of merchandise to stock. Somebody has to also look after day-to-day operations such as accounting, banking, staffing, and scheduling. The evidence indicates that the person primarily responsible for these tasks has been the Respondent.

[42] To keep her store going year after year, the Respondent had to have been capable of attending to it regularly. Whatever her physical limitations, she has demonstrated that she was able to consistently run a high-volume business for an extended period.

The Respondent was not running a charity

[43] At the hearing, the Respondent was at pains to explain why she carried on — even subsidized — her consignment store despite years of losses. She suggested that the X was as much a charity as a business. She said that it gave her personal fulfillment to maintain an enterprise that contributed to the community.

[44] I don't find this explanation convincing. I don't doubt that the X has occasionally donated clothes to worthy causes. However, such donations were ancillary to the store's main business of buying and reselling woman's clothing. The evidence indicates that the Respondent conceived the X as a money-making enterprise and, despite losses, it appears to have been run that way.

[45] The Respondent testified that she struggled to make her business more profitable, commissioning an up-to-date website, upgrading her IT system, even contemplating paying her consignors a lower percentage of sales. The Respondent's business has benefitted from free labour offered by friends and associates, but her reliance on volunteers does not mean she was running a charity.

The Respondent's disability was not prolonged

[46] Under the CPP, disability must be severe and prolonged. I have already found that the Respondent's disability is no longer severe. Although it is not 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 Respondent's disability came to a definite end when she resumed active management of her clothing consignment store in 2016.

Conclusion

[47] It is unfortunate that the Respondent must return nearly four years of benefits, and I regret that my decision will cause her financial hardship. However, she received

those benefits after she ceased to be disabled. She knew, or should have known, that she was obliged to report significant business income to the Minister.²⁰ She did not meet that obligation. Later, when the Minister learned of the Respondent's business earnings, he had the right to investigate whether she had regained her ability to work. He also had the right to terminate her benefits once he 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.

[48] I find that the Respondent's disability ceased to be severe and prolonged as of January 2016, at the beginning of a year in which (i) her family doctor found her healthy and active and (ii) her store's sales increased significantly. Taking into account a three-month work trial period, that means her disability pension should be properly terminated as of April 2016.²¹

[49] The appeal is allowed.



Member, Appeal Division

²⁰ See section 70.1 of the *Canada Pension Plan Regulations*.

²¹ 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.