



Citation: *Minister of Employment and Social Development v CL*, 2024 SST 233

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Rebekah Ferriss

Respondent: C. L.

Decision under appeal: General Division decision dated November 16, 2022
(GP-21-1299)

Tribunal member: Neil Nawaz

Type of hearing: Videoconference

Hearing date: February 9, 2024

Hearing participants: Appellant's representative
Respondent

Decision date: March 7, 2024

File number: AD-23-160

Decision

[1] The appeal is dismissed. The Respondent is entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Respondent is a 61-year-old former corporate trainer with a degree in theology. In the late 1990s, she joined X, a Halifax-based non-profit organization. She moved to Poland, where she co-founded an English language school using a Bible-based curriculum that she developed. She still lives in Poland and continues to be employed by X.

[3] Over time, the Respondent developed mobility problems and pain related to degenerative changes in her lower spine. Although she has had multiple lumbar disc surgeries, she is now confined to a wheelchair. She continues to work, but at reduced hours and with the help of accommodations authorized by her employer.

[4] In February 2019, the Respondent applied for a CPP disability pension. In her application, she said that she could no longer work because of arthritic back pain, Hashimoto's disease, and hypothyroidism.

[5] The Minister of Employment and Social Development refused the application after finding that the Respondent did not have a severe and prolonged disability. The Minister based its refusal in large part on the fact that the Respondent continued to make roughly \$30,000 per year — well above the statutory threshold.

[6] The Respondent appealed the Minister's refusal to the Social Security Tribunal. The Tribunal's General Division held a hearing by videoconference and allowed the appeal. The General Division acknowledged that the Respondent's earnings were substantially gainful under the CPP's definition, but it nevertheless found the Respondent disabled because she was working for a so-called "benevolent employer."

[7] The Minister then applied for permission to appeal to the Appeal Division. In February 2023, one of my colleagues on the Appeal Division granted the Minister

permission to appeal. Earlier this month, I held a hearing to discuss the Minister's appeal in full.

Issue

[8] For the Respondent to succeed, she had to prove that, more likely than not, she has a disability that is 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.¹ 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.² The disability must be expected to keep the claimant out of the workforce for a long time.

[9] CPP disability claimants must show that they developed a severe and prolonged disability during their coverage period. In this case, the parties agreed that, for now, the Respondent's CPP disability coverage won't end until December 31, 2026.³

[10] I therefore had to decide whether the Respondent had a severe and prolonged disability as of the hearing date. In particular, I had to decide whether the Respondent's recent 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

[11] I have applied the relevant law to the available evidence and concluded that the Respondent is disabled according to the definition set out in the *Canada Pension Plan*. I am satisfied that her physical impairment, seen in the context of her background and

¹ See section 42(2)(a)(i) of the *Canada Pension Plan*.

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

³ Under section 44(2) of the *Canada Pension Plan*, a "minimum qualifying period" is established by making threshold contributions to the CPP. The Respondent's CPP contributions are listed on her record of earnings at GD2-91.

personal characteristics, renders her effectively unemployable. I am also persuaded that the Respondent benefits from the largesse of a benevolent employer, one that is willing to pay more than market value for the services it receives from her.

[12] These are the reasons for my decision:

The Respondent credibly testified about her impairments

[13] At the hearing, the Respondent described in detail how her health problems have affected her ability to work. I found the Respondent to be a trustworthy witness on her own behalf: in an understated, matter-of-fact way, she explained that, although she continues to do some work for her ministry, it is a fraction of what she could once do.

[14] The Respondent testified that she has had back pain for many years. About 15 years ago, it began to get worse, and was soon accompanied by numbness and swelling in her right lower leg. These symptoms impaired her mobility, and before long she was using a walker.

[15] Imaging revealed severe lumbar spinal stenosis marked by multiple disc herniations. She has since undergone a series of back surgeries, including:

- a June 2016 decompression;
- a July 2018 micro-decompression; and
- a June 2021 fusion at the L3-5 levels.

[16] These surgeries did not significantly reduce her symptoms. She has been left with limited feeling in her legs and feet and finds herself unable to stand without braces (which she can't put on by herself). She sometimes needs a wheelchair to get around and has had a stair climbing machine installed in her home. As well, she requires assistance to:

- leave her second-floor apartment — she needs someone to assist her with the chair lift on the staircase, and she can't climb a staircase herself without someone behind pushing and supporting her as she drags herself up hand over hand along the handrail;

- teach classes — she needs someone to retrieve materials from the printer, distribute and gather papers, carry her laptop and books, assist her to set up her classroom and teaching table, and write and post materials on the board.

[17] The Respondent says that she can no longer prepare meals, do laundry, or perform household cleaning. She is no longer able to drive. She can't go into the community to deliver pastoral care. She sleeps every afternoon to get through her day. She has even lost some of her manual dexterity — she can't type as fast as she used to, even with an ergonomic keyboard.

[18] The Respondent says that her spinal degeneration led to a neurological deficit that caused her feet to turn outward, which in turn resulted in valgus knees. Last May, she underwent extensive reconstructive surgery of both feet. The right side was rebuilt in a fusion operation that required seven screws and pins. On the left side, she had a ligament repaired.

[19] She spent the next five month in rehab, regaining her core strength and relearning how to walk. In December, her right knee was replaced, and she is slated to get a new left knee as well. She will also be getting a right hip replacement at some point, although she's not sure when. She tries to walk 30 to 40 minutes per day with a walker. She cannot walk unassisted and, although she hopes to someday do so again, she regards it more as a dream than a realistic goal.

The Respondent's medical records indicate significant spinal damage

[20] CPP disability claimants must provide medical evidence of functional limitations that affect their ability to work.⁴ It is not enough for claimants to simply list diagnoses; they must also show that their medical conditions prevent them from making a living.

[21] In this case, the Respondent has provided ample medical evidence that confirms she has significant back pain and mobility problems.

⁴ See *Warren v Canada (Attorney General)*, 2008 FCA 377; and *Canada (Attorney General) v Dean*, 2020 FC 206.

[22] In June 2016, the Respondent underwent an L3-4 and L4-5 decompression (a procedure to relieve compressed nerves in the lower spine). Three weeks after the surgery, her neurosurgeon reported that she was seeing some improvement, although she still had issues with mobility, balance, and pain. She was significantly deconditioned, as her mobility had been impaired for 18 months.⁵

[23] In a follow-up report, the neurosurgeon noted that, while the Respondent still had pain that was aggravated with standing and walking, she was getting better after a longstanding impairment. He said that her sensory symptoms had improved, and he was hopeful that her balance would improve in time. He encouraged her to do as much walking as possible, as well as other home exercises.⁶

[24] The Respondent's low back pain apparently returned, accompanied by recurrent weakness and numbness in her left lower leg. In July 2018, her neurosurgeon examined her, noting that she arrived at his clinic using a walker and displaying a shuffling gait and stooped posture. Imaging showed what appeared to be worsened stenosis at L3-4 with crowding of the cauda equina (a collection of nerves at the base of the spine) above the area that was decompressed in 2016.⁷

[25] An MRI indicated that there remained a moderate-sized disc bulge at L3-4 superimposed upon prominent ligamentum flavum (ligaments that connect the vertebrae) thickening as well as severe facet hypertrophy in addition to severe post-surgical changes causing severe spinal canal stenosis and complete effacement of the spinal fluid surrounding the cauda equina nerve roots.⁸

[26] The Respondent consented to another decompression. In August 2018, she was discharged with a two-wheeled walker and cleared to engage in "full activity as tolerated."⁹

⁵ See report dated July 15, 2016 by Dr. Jacob Alant, neurosurgeon, GD2-142.

⁶ See Dr. Alant's report dated July 27, 2016, GD2-144.

⁷ See Dr. Alant's report dated July 16, 2018, GD2-150.

⁸ See MRI of the lumbosacral spine dated July 25, 2018, GD2-152.

⁹ See Dr. Alant's hospital discharge summary reports dated August 4, 2018, GD2-155 and GD2-157.

[27] However, the Respondent's problems persisted. In November 2019, she was seen for an increasing right foot deformity. On examination, she presented with right foot pain and significantly limited right ankle joint movement.¹⁰ She was diagnosed with paresis (partial paralysis) and elephantiasis (enlargement) and later fitted for a right foot orthotic.

[28] The Respondent saw her neurosurgeon the following month.¹¹ He noted that her condition had deteriorated despite two previous lumbar surgeries. He observed that she had difficulty walking independently with lower extremity weakness and pain. She required help with activities such as walking, cooking, and cleaning. He again diagnosed her with lumbar spinal stenosis and claudication (activity-induced pain caused by insufficient blood flow), and he concluded that she could no longer do missionary work.

[29] In October 2020, the Respondent was fitted for a custom leg brace to support her right knee and ankle joints, reduce her pain, and improve her mobility. The orthotic also promised to correct her increasingly valgus (turned outwards) knee deformation.¹²

[30] The most recent medical evidence on file is a March 2021 report, in which a Polish neurosurgeon noted that the Respondent had paresis in both lower limbs and was wheelchair dependent. X-rays revealed secondary critical stenosis of the spinal canal with jamming nerve strands and instability at L3-5. As such, the Respondent qualified for surgical decompression, although the outcome was uncertain: "Due to duration of paresis, neurological symptoms could be permanent."¹³

[31] It's clear that the Respondent's medical file is much larger than what was available to me. I suspect that many reports are missing because they were generated pursuant to the care that the Respondent received in Poland. It appears that the

¹⁰ See orthotics report dated November 20, 2019 (translated from Polish), GD2-159.

¹¹ See Dr. Alant's report dated December 20, 2019, GD2-130.

¹² See orthotics report by Anna Labak, Vigo Orthotics, dated October 9, 2020, GD2-34.

¹³ See report (translated from Polish to English) dated March 17, 2021 by Dr. Lukasz Janeczka, neurosurgeon, GD2-39.

Respondent did file some Polish-language reports, but they were excluded from the file because she did not get them translated.

[32] Even so, there is enough material here to convince me that the Respondent has suffered significant and progressive damage to her lumbar spine. She has had three back surgeries, and it appears that, despite her doctors' hopes and expectations, none of them have produced much of a positive effect. The continuing degeneration of the Respondent's spine, as documented in successive imaging and neurological reports, has led to secondary conditions affecting her hips, knees, and feet that have left her nearly immobilized. The Respondent has had, and will have, surgeries for these conditions too, but I see little indication that, even in a best-case scenario, they will restore her to anything resembling full function.

The Respondent's background and personal characteristics negatively affect her employability

[33] Based on her testimony and medical evidence, I find that the Respondent no longer has the capacity to work. I am reinforced in this belief when I look at her overall employability.

[34] The leading case on the interpretation of "severe" is *Villani*, which requires the Tribunal, when assessing disability, to consider a disability claimant as a "whole person" in a real-world context.¹⁴ Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances."

[35] When deciding whether the Respondent is disabled, I can't just look at her medical conditions. I must also consider factors such as her age, level of education, language abilities, and past work and life experience. These factors help me decide whether the Respondent could work in the real world.

¹⁴ See *Villani v Canada (Attorney General)* 2001 FCA 248.

[36] The Respondent is now over 60 — almost at the age of retirement for most people. She is well educated, but she has a degree in a discipline for which there are few real world applications. She has corporate experience, but it ended more than 25 years ago and would thus be regarded as stale by most prospective employers.

[37] None of this detracts from the fact that the Respondent has, by any standard, an impressive resume. She was a longtime executive in a respected ministry. She co-founded a school in Poland and helped develop its curriculum. She has been a teacher and pastor for two decades. But she achieved these things at a Christian non-profit organization, in a sector that, for the most part, is avowedly non-commercial and not a destination for the career-minded.

[38] At her hearing, the Respondent asked, “Who would hire me?” It’s a good question, and one I find hard to answer. Any work with a physical component is out of the question. I doubt there are many arm’s length job opportunities for a 61-year-old woman who, whatever her accomplishments as a teacher-missionary, spends much of her time in a wheelchair. Indeed, I strongly suspect that just about the only employer that would have her at this point is the one she is already working for. As we will see, that’s because X is not an ordinary employer.

The Respondent’s earnings exceed the substantially gainful threshold

[39] CPP disability applicants must be regularly incapable of any substantially gainful occupation. A major obstacle for the Respondent is the fact that, despite her health problems, she continues to make enough money to support herself, albeit modestly.

[40] 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.

[41] The parties agree that the Respondent has earned the following amounts since her health problems became acute:¹⁵

Year	Reported income	Maximum disability amount
2016	\$19,527	\$15,489
2017	\$19,527	\$15,763
2018	\$22,797	\$16,030
2019	\$25,189	\$16,354
2020	\$25,260	\$16,677
2021	\$27,774	\$17,025
2022	\$27,811	\$17,610

[42] It's obvious that the Respondent's earnings significantly exceeded the maximum allowable amount for several years running. However, that does not decide the matter. She can still demonstrate her eligibility for the CPP disability pension if she can show that she has a benevolent employer.

X is a benevolent employer

[43] There is a body of case law that says evidence of a benevolent employer must be taken into account where a CPP claimant remains in the workforce despite their claimed disability.¹⁶ The *Canada Pension Plan* contains no reference to benevolent employers, but a Federal Court of Appeal 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.

[44] According to *Atkinson*, a finding of "benevolence" depends on a number of relevant criteria, including:

- (i) whether the claimant's work was productive;
- (ii) whether the work expected of the claimant was significantly less than the work expected of other employees;

¹⁵ See Respondent's Record of Earnings and Contributions, GD4-10.

¹⁶ 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.

- (iii) whether the claimant had received accommodations that went beyond what was required of an employer in a competitive marketplace;
- (iv) whether the employer had experienced hardship as a result of those accommodations; and
- (v) whether the employer was satisfied with the claimant's work performance.

[45] 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.¹⁷ Put another way, it is up to disability claimants to show that their employers are benevolent and therefore willing to accept less for their money.

[46] On balance, I find that the Respondent has satisfied the *Atkinson* criteria:

– The Respondent is not as productive as she used to be

[47] The Respondent continues to receive a full salary, even though, by all accounts, she does only a fraction of the work she was doing a few years ago.

[48] At the General Division, the Respondent testified that she can't work without taking long breaks. She naps every afternoon. She conserves her energy so that she can think creatively. She described her workload as 50 percent of what it was before her health problems. She produced witnesses who testified that she was doing even less than that.

[49] The Respondent testified that she used to teach eight classes a week. Every summer, she developed and self-published the new curriculum for the year. She was the team leader and supervised all volunteers. She led the mission's church and was lead pastor for the community. She estimated that all these activities amounted to at a minimum 60-hour work week.

[50] The Respondent maintains that her health problems have sharply reduced her productivity. She hopes to return to the workload she had before her foot surgeries last

¹⁷ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

year. At the time, she was teaching two morning classes and two night classes per week, each of them two hours long, plus two more sessions in which she acted as a discussion partner with students. Where she used to handle all aspects of the curriculum but now just contributed ideas in what she called a “group brainstorm.” She still attended to pastoral duties, but on a scaled-back schedule, informally meeting congregants for coffee two or three hours per week. She said that she would be doing this activity even if she were not paid for it.

[51] Based on this testimony, I am satisfied that the Respondent’s impairments have drastically reduced her productivity. I don’t deny that she still has some capacity, but it is far less than what it was previously. In my view, X is no longer getting anything close to the same value that it once did for the salary that it still pays her.

[52] The Respondent’s diminished worth as an employee is even more pronounced when I take into account the fact that X spends some of its scarce resources on extraordinary accommodations to keep her minimally functional.

– The Respondent benefits from extraordinary accommodations

[53] The evidence shows that the Respondent is able to work as much as she does only because she receives constant physical support from the community in which she lives and works. The Respondent receives what I would call ordinary accommodations — she can take breaks, rest, and work at her own pace. But, for various reasons, X also provides her with extraordinary accommodations that go beyond what one would expect of an employer in a competitive labour market:

- The Respondent benefits from what amounts to a full-time personal support worker (PSW) to help her get through the day. As part of its charitable mandate, X funds work placements for Ukrainian refugees, and it created a position specifically to assist the Respondent in her activities of daily living. Among other things, the refugee, who lives on site, gets the Respondent out of bed, bathes her, and helps put her clothes on. She then helps her down the stairs from her apartment and up the stairs to the classroom, both of which are located in the same complex.

- The Respondent requires in-class assistance from a volunteer or one of the other teachers in the school to perform basic tasks such as setting up the classroom, retrieving materials from the printer, distributing and gathering papers, and carrying her laptops and books.

[54] The Respondent's ability to work is helped by her unique living arrangements. She both lives and works in a Ministry compound, surrounded by colleagues who can, and are willing, to help her. I doubt that the Respondent would be able to carry on teaching at all if she were living independently and, like most people, had to get up, get ready, and commute to work herself.

– The Respondent's accommodations cause her employer hardship

[55] The Minister argues that the accommodations extended to the Respondent don't necessarily cause X hardship. The Minister notes, for instance, that X would be spending funds to benefit Ukraine refugees whether or not one of them were assigned to assist the Respondent.

[56] I don't see it that way. X's decision to keep the Respondent on staff has come with real costs.

[57] X provides funds to help refugees but, if the school didn't have an impaired teacher, those funds might be put to better use, rather than being used to keep the Respondent working. Likewise, the school's staff might be using their time more productively, rather than having to help the Respondent carry out her duties.

[58] At the General Division, one of the Respondent's witnesses was, P. B., a former member of X's board of directors, who confirmed that keeping the Respondent costs the mission in terms of overall productivity. He testified that supporting the Respondent requires resources that the organization will be unable to maintain over the long term. He said that it was not sustainable for an operation that runs on a shoestring.

[59] P. B. said that, as a Christian organization, X felt a moral obligation to keep the Respondent on despite her reduced productivity. The Board, he said, had not adjusted her salary to reflect her light workload because it was never high to begin with. In

appreciation of her years of service, the Board was therefore willing to give her support her when she needed it most. It seemed like a “small act of benevolence” in light of her years of dedication.

– **The Respondent’s employer has mixed feelings about her work performance**

[60] X has chosen to tolerate, even indulge, the Respondent’s limitations, but it has done so for good reasons:

- The Respondent is friends with, not just her colleagues, but also with members of the Board;
- The Respondent is a co-founder of the Polish mission and has earned considerable goodwill with that legacy; and
- The Respondent has become something of a figurehead for the organization and serves as an asset in its fundraising campaigns.

[61] For the above reasons, X can be reasonably characterized as a benevolent employer. It is spending more resources for less work because many of its principals are longtime friends of the Respondent and because they don’t want to be uncharitable to individual who has done so much for their organization over the years.

[62] I place weight on a letter from S. D., the current chair of X’s board of directors. He wrote:

On my recent visits to our school in February and March, I was able to witness [the Respondent’s] continued decline and see how much the teaching team does to accommodate her. I know that she would not find this level of accommodation in any other school or workplace. It would be cost prohibitive and a burden on the team.¹⁸

[63] X values the Respondent as an avatar of stability and continuity. But such value exists only for X. The fact that the organization derives value from its continued relationship with the Respondent should not be confused with whatever value she might

¹⁸ See letter dated May 5, 2023 by S. D., Chairman of the Board of Directors, Graceland Ministries, AD8-2.

have in a competitive work environment. Furthermore, the Respondent's value at this point comes, not from what she does, but from who she is. According to the *Canada Pension Plan*, disability arises from an inability to perform regularly a substantially gainful **occupation**, a term that suggests, not the passive embodiment of an ideal, but the active performance of regular duties.

The Respondent's disability is prolonged

[64] The evidence shows that the Respondent has longstanding lower back pain caused by degenerative changes to her lumbar spine. Her condition became acute in 2016, and it led to three surgeries that, from what I can see, have produced only marginal improvement. On top of that, the Respondent's back condition has burdened her lower extremities, leading to two additional procedures on her feet, with more planned for her knees and hips.

[65] This succession of surgeries is by itself a sign that the Respondent's condition is irreversible and intractable. The Respondent's Canadian neurosurgeon has indicated that the duration of her condition is indefinite.¹⁹ Her Polish neurosurgeon has warned that, given the amount of time that has passed since the onset of her condition, her neurological symptoms could be permanent.²⁰

[66] The Respondent's back and foot pain, combined with her age and narrow work experience, have rendered her effectively unemployable. It is difficult to see how her condition will significantly improve, even with additional surgeries, new medications, or alternative therapies. In my view, these factors indicate that the Respondent's disability is prolonged.

Conclusion

[67] This is an unusual case in which an employer has continued to pay a regular salary to an employee despite her significantly decreased productivity. Of course, X is no regular employer, and the Respondent is no regular employee.

¹⁹ See Dr. Alant's report date stamped December 23, 2019, GD2-135.

²⁰ See Dr Janeczka's report dated March 17, 2021, GD2-39.

[68] X is a Christian charitable organization that is indebted to the Respondent for co-founding and building its showcase overseas mission. The Respondent has devoted herself to X for 25 years, and it is clear that her life and work are inseparable.

[69] The Respondent has a significant back and foot impairments that, given her age and narrow work experience, would disqualify her from any regular, substantially gainful employment in the competitive labour market. She has managed to continue collecting her salary precisely because she is **not** in the competitive labour market. She lives and works in a cosseted environment, which she herself helped to create and which is overseen by a board that appreciates her past contributions. However, the board also recognizes that what work she is remains capable of does not contribute significant value to the organization — especially in light of the extraordinary accommodations that are required to keep her minimally functional. I am satisfied that X is experiencing real financial hardship as a result of these accommodations.

[70] I find the Respondent disabled as of June 2016, the month she had her first back surgery. Since the Minister received her application for benefits in October 2019, the Respondent is deemed disabled as of July 2018.²¹ That means the effective start date of the Respondent's CPP disability pension is November 2018.²²

[71] The Minister has not proven his case. The appeal is dismissed.



Member, Appeal Division

²¹ Under section 42(2)(b) of the *Canada Pension Plan*, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension.

²² According to section 69 of the *Canada Pension Plan*, payments start four months after the deemed date of disability.