



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *LG v Minister of Employment and Social Development*, 2021 SST 277

Tribunal File Number: AD-21-92

BETWEEN:

**L. G.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: June 14, 2021

## **DECISION AND REASONS**

### **DECISION**

[1] The appeal is allowed.

[2] The decision that the General Division should have given is made. The Claimant is disabled. Disability pension payments will begin as of June 2017.

### **OVERVIEW**

[3] L. G. (Claimant) completed Grade 8 before she entered the paid workforce. She last worked as a forklift operator. A car accident has left the Claimant with headaches; and back, neck and right shoulder pain.

[4] The Claimant applied for a Canada Pension Plan disability pension and says that she is disabled by her conditions. The Minister of Employment and Social Development refused the application. The Claimant appealed to the Tribunal. The Tribunal's General Division dismissed the appeal. It decided that the Claimant has some capacity to work and did not try to work within her limitations, so her disability is not severe.

[5] Leave to appeal this decision to the Tribunal's Appeal Division was granted. The General Division may have failed to consider the impact of the Claimant's literacy and education on her capacity to work.

[6] I have now read the General Division decision and listened to relevant parts of the General Division hearing recording. I have read all of the documents filed with the Appeal Division and heard the parties' oral arguments. The General Division made an error in law. It did not fully analyze all of the Claimant's personal characteristics, including her literacy and education, when it made its decision. I am making the decision that the General Division should have given: the Claimant is disabled. Disability pension payments will begin as of June 2017.

### **ISSUE**

[7] Did the General Division make an error in law by failing to consider the Claimant's literacy and education?

## ANALYSIS

[8] An appeal to the Tribunal's Appeal Division is not a rehearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or
- d) based its decision on an important factual error.<sup>1</sup>

### **Failure to Consider the Claimant's Literacy and Education**

[9] To decide whether a claimant has a severe disability the Tribunal must consider their medical conditions and background. Background includes age, education, language skills, and work and life experience.<sup>2</sup> The General Division decision states:

[26] I must assess the severe part of the test in a real-world context. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, in finding that the Claimant's disability is not severe, I considered that she was 46 years old as of the MQP with a grade 8 education. She is unable to use a computer. She is able to speak and understand English. She has worked mainly in factory jobs and as a forklift operator. She has also worked as a babysitter and cashier at KFC.

[27] I note her low level of education and inability to use a computer. However, her age and functional limitations would not preclude her from attempting lighter work, training for lighter work or upgrading her education. In considering her personal characteristics, I do not find that she was unemployable in a real-world context as of the MQP. While I acknowledge that she would be unable to perform heavy physical work, she would not be precluded from attempting lighter or sedentary work within her restrictions, or retraining for such work.

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<sup>1</sup> This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*

<sup>2</sup> *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Bungay v. Canada (Attorney General)*, 2011 FCA 47

[10] The decision lists the Claimant's personal characteristics, including her age, and education in the summary of evidence early in the decision.<sup>3</sup> In its analysis, it again refers to the Claimant's Grade 8 education and inability to use a computer. However, the General Division does not grapple with how the Claimant's limited education, trouble with completing paperwork,<sup>4</sup> and an inability to use a computer would affect her capacity regularly to work in a substantially gainful occupation. There is no indication of what weight was given to this evidence, if any at all, or how these characteristics impacted the Claimant's capacity to work.

[11] In a decision called *Giannaros* the Federal Court of Appeal said that it was not necessary to consider a claimant's personal characteristics if there was insufficient evidence of a severe and prolonged disability.<sup>5</sup> However, that case is very different from the one before the Appeal Division. In that case, the Claimant did not present enough evidence to support her disability claim. In addition, the claimant did not follow various treatment recommendations. The Court concluded that the claimant's personal characteristics did not matter in these circumstances.

[12] The facts are different in this case. There is medical evidence that supports the Claimant's disability claim. The evidence consistently shows that the Claimant cannot work in a physically demanding job, such as a forklift driver. The Claimant also has complied with treatment recommendations. Because the facts are significantly different, I need not follow the Court's decision in *Giannaros*.

[13] The Appeal Division dealt with the same issue in a decision called *RF*.<sup>6</sup> In that case, like this one, the General Division noted the claimant's personal characteristics but provided no analysis of them, and the Appeal Division intervened. The Appeal Division conducted a thorough review of the law on the issue of when a consideration of a claimant's personal characteristics is not required. It made the following statements:

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<sup>3</sup> See General Division decision at para. 11

<sup>4</sup> See testimony, General Division hearing recording at approximate time 44:00 although the exact time may differ depending on the device used to listen to the recording

<sup>5</sup> *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187

<sup>6</sup> *RF v Minister of Employment and Social Development*, 2019 SST 1344.

- a) in the leading decision called *Villani* the Federal Court of Appeal decided that a claimant's ability to work cannot be divorced from their personal circumstances;<sup>7</sup> and
- b) a number of cases decided after *Giannaros* have concluded that an analysis of personal characteristics is required;<sup>8</sup>

[14] For these reasons I accept and adopt the legal principle set out in RF– that some form of analysis of a claimant's personal characteristics is an indispensable component of a severity assessment.<sup>9</sup>

[15] Because the General Division in this case failed to consider the impact of the Claimant's personal characteristics on her capacity regularly to pursue a substantially gainful occupation, it applied the wrong legal test. This is an error in law. The appeal is allowed.

#### **REMEDY**

[16] The Appeal Division can give different remedies to fix errors in a General Division decision.<sup>10</sup> It is appropriate for the Appeal Division to give the decision that the General Division should have given. This is because:

- a) The facts are undisputed;
- b) The written record is complete;
- c) There are no gaps in the information;
- d) The parties asked that the Appeal Division give the decision that the General Division should have if the appeal was allowed;
- e) The Tribunal has legal authority to make findings of fact and law necessary to dispose of appeals;<sup>11</sup> and

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<sup>7</sup> See *Villani v. Canada (Attorney General)*, 2001 FCA 248

<sup>8</sup> *RF v Minister of Employment and Social Development*, 2019 SST 1344 at para.16

<sup>9</sup> *RF v Minister of Employment and Social Development*, 2019 SST 1344 at para.16

<sup>10</sup> See section 59 of the *Department of Employment and Social Development Act*

<sup>11</sup> See section 64 of the *Department of Employment and Social Development Act*

- f) The Tribunal must conduct appeals as quickly as the circumstances and considerations of fairness and natural justice permit.<sup>12</sup> The Claimant applied for the disability pension in over three years ago. Referring the matter back to the General Division for reconsideration would cause further delay.

### **The Claimant's Disability is Severe**

[17] The facts in this appeal are not in dispute. I adopt the General Division's summary of the evidence,<sup>13</sup> so need not repeat it all in this decision. Briefly, the Claimant completed Grade 8 before she began to work. She has worked only in physically demanding jobs. In 2012, she was injured in a car accident, and continues to have pain and limitations as a result. I accept and adopt the General Division's conclusion that the Claimant is unable to work in any physically demanding job.<sup>14</sup>

[18] The remaining issue is whether the Claimant has capacity to work in a sedentary or less demanding job. Deciding this involves looking at the Claimant's physical limitations and her personal characteristics. This includes her age, education, language skills, and work and life experience.

[19] The Claimant is young. This does not impair her capacity to work.

[20] She has a Grade 8 education. Her spouse testified that the Claimant has difficulties with reading and spelling.<sup>15</sup> The Claimant testified that she has difficulties with paperwork, and she could not sit at a desk.<sup>16</sup> This would impact her ability to retrain, since sitting in class would be difficult as would completing assignments and tests. The Claimant also is computer illiterate. This would significantly affect her capacity to work in the commercial marketplace, where computer skills are required in most sedentary jobs.

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<sup>12</sup> See section 3(1) of the *Social Security Tribunal Regulations*

<sup>13</sup> See General Division decision at paras. 7-24

<sup>14</sup> See General Division decision at para. 23

<sup>15</sup> General Division decision at para. 11

<sup>16</sup> General Division hearing recording at approximate time 44:00

[21] Finally, the Claimant's only work experience is in physically demanding jobs. She has no skills that could be transferred to sedentary work.

[22] When the Claimant's medical conditions and personal characteristics are looked at in totality, they prove that the Claimant has a severe disability. She is unable regularly to pursue any substantially gainful occupation.

[23] The Claimant has not attempted any other work. However, there is no legal requirement that she do so if she is incapable regularly of pursuing any substantially gainful occupation. Therefore, this does not affect her disability status.

### **The Claimant's Disability is Prolonged**

[24] The Claimant's disability is also prolonged. She was injured in the car accident nine years ago. Her conditions have not resolved and there is no suggestion that they will.

### **CONCLUSION**

[25] The appeal is allowed.

[26] The decision that the General Division should have given is made. The Claimant is disabled.

[27] The Claimant became disabled in August 2012 when she was injured in the car accident. However, the *Canada Pension Plan* says that a claimant cannot be deemed to be disabled more than 15 months before they applied for the disability pension.<sup>17</sup> The Claimant applied for the pension in May 2018. Therefore, the Claimant is deemed to be disabled in February 2017.

[28] Disability pension payments start four months after a claimant becomes disabled.<sup>18</sup> Payments will start as of June 2017.

Valerie Hazlett Parker  
Member, Appeal Division

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<sup>17</sup> See section 42 of the *Canada Pension Plan*

<sup>18</sup> See section 69 of the *Canada Pension Plan*

HEARD ON:	June 3, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Chantelle Yang, Counsel for the Appellant  Viola Herbert, Representative for the Respondent