Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *R. G. v. Minister of Employment and Social Development*, 2018 SST 985

Tribunal File Number: AD-18-415

BETWEEN:

R. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 12, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, R. G., was born in 1963 and attended school up to Grade 8. He spent much of his working life in construction, mostly as a crane operator. In June 2014, he fractured his left ankle in a motorcycle accident. Although he has had three reparative surgeries and extensive physiotherapy, he continues to feel pain, and he has been diagnosed with post-traumatic arthritis. He has not worked, or looked for work, since his accident.

[3] In October 2015, the Appellant applied for a disability pension under the *Canada Pension Plan* (CPP). The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that the Appellant's disability was not "severe and prolonged," as defined by the CPP, during the minimum qualifying period (MQP), which it determined would end on December 31, 2017. The Minister acknowledged that the Appellant experienced ankle pain, but found that it did not prevent him from performing work within his limitations.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated March 28, 2018, dismissed the appeal, finding on balance that that the Appellant was capable of substantially gainful work as of the MQP.

[5] On June 27, 2018, the Appellant's representative requested leave to appeal from the Tribunal's Appeal Division for the following reasons:

- The General Division misapplied *Villani v. Canada*,[1] finding that the Appellant's disability fell short of severe, despite evidence that his personal background would limit his ability to pursue alternative employment.
- The General Division disregarded vocational assessment reports and other evidence indicating that the Appellant would face significant challenges in securing and maintaining sedentary work.
- The General Division erred when it discounted Dr. Louis Weisleder's report because the orthopedic surgeon did not explain his opinion that the Appellant did not meet the requirements for selected light occupations. In fact, Dr. Weisleder's opinion was based on an assessment of the Appellant's demonstrated capacity.
- The General division erred when it concluded that the Appellant had demonstrated "some occupational flexibility" from his past experience in the pipeline industry. In fact, the Appellant's work in pipelines differed little in substance from his work in construction.
- The General Division erred when it found that the Appellant had not tried to retrain or considered looking for alternative work because he was "doing great in life now." In fact, he testified that he was not looking to further his education because he had done fine in life with what he had. In addition and contrary to the General Division's finding, the Appellant did not testify that he wouldn't work for less than $30 per hour; rather, he said that an individual needs to earn about $30 per hour to make a decent living.

[6] In a decision dated July 31, 2018, I granted leave to appeal because I saw an arguable case for two of the Appellant's arguments. I made no finding on the Appellant's remaining submissions.

[7] I have decided that an oral hearing is unnecessary and that the appeal will proceed on the basis of the documentary record for the following reasons:

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[1] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

- The Appellant prefers to proceed this way;
- There are no gaps in the file and there is no need for clarification; and
- This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit.

[8] Having reviewed the parties' written submissions, I have concluded that there is reason to overturn the General Division's decision.

ISSUES

[9] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[10] My task is to determine whether the Appellant has raised an arguable case of the following questions:

Issue 1: Did the General Division follow *Villani*?

Issue 2: Did the General Division disregard vocational assessments indicating that the Appellant was incapable of sedentary work?

Issue 3: Did the General Division err by discounting Dr. Weisleder's orthopedic report?

Issue 4: Did the General Division err by finding that the Appellant's pipeline work differed significantly from his construction work?

Issue 5: Did the General Division ignore the context of the Appellant's remark that he was "doing great in life now"?

ANALYSIS

Issue 1: Did the General Division follow *Villani*?

[11] The Appellant suggests that the General Division misapplied *Villani*, which requires disability to be considered in a "real world" context, taking into account a claimant's employability given their age, work experience, level of education, and language proficiency. The Appellant specifically alleges that the General Division erred when it determined that his disability was less than severe, despite evidence that his personal background would limit his ability to retrain or to secure alternative employment.

[12] Ultimately, I do not see a case for this submission, which amounts to a request to reassess the evidence regarding the Applicant's personal characteristics. I note the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) [of the CPP] he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

This passage suggests that the General Division, as trier of fact, should be afforded a degree of deference in how it assesses a claimant's background. It also implies that **whether** the test for disability was applied matters more than **how** it was applied. This approach happens to align with recent Federal Court of Appeal decisions[2] that have clearly defined the three grounds of appeal available under s. 58(1) of the DESDA. In short, the court now considers that the Appeal Division does not have jurisdiction to intervene on questions of mixed fact and law. It is, therefore, necessary to ask whether a reason for appealing can be clearly classified as an error of law or as an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

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[2] *Quadir v. Canada (Attorney General)*, 2018 FCA 21; *Cameron v. Canada (Attorney General)*, 2018 FCA 100; *Garvey v. Canada (Attorney General)*, 2018 FCA 118.

[13] In this case, the General Division cited *Villani* and analyzed in detail the likely impact of the Applicant's impairments, in the context of his age, education and work history, on his future employment prospects. I will quote the passage in full:

> [22] The question then becomes whether it is realistic to think that the Appellant could retrain or find sedentary work in a "real world" context. Dr. Cohen, a psychologist reporting to the Appellant's lawyer in December 2015, wrote that there were "no viable options" for the Appellant in a sedentary occupation because of his limited education, narrow work history, lack of computer skills, limited transferable skills, and occupational interests. I disagree.
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> [23] In spite of the Appellant's limited education (Grade 8 and some high school credits), Dr. Cohen's testing showed "generally high school level abilities in reading, math and spelling, with some difficulty with division." This suggests that the Appellant would be capable of finishing high school in a relatively short period of time. Moreover, as the Appellant submitted, when tower crane work was unavailable, he was able to find work in alternate fields such as pipelines, which shows some occupational flexibility, albeit in physically demanding work. While he may not be interested in using a computer, there is no evidence that he would be unable to learn. I also note that the Appellant testified that he was interested in nonfiction, had read three books on a former Toronto mayor, and was about to start a book on indigenous people in Thunder Bay. This suggests the Appellant has some intellectual interests.
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> [24] The Appellant was 54 years old at his MQP, and would normally expect to work for more than another ten years. Given that he had the capacity for sedentary work, I find that his personal characteristics do not mean that he lacked the capacity regularly to pursue any substantially gainful occupation.

[14] It cannot be said that the General Division was unmindful of *Villani* or that it did not try to apply its chief principle. The General Division examined the Appellant's profile and history and concluded that, even with his back pain, the Appellant had demonstrated sufficient physical and mental capacity to upgrade his skills. I acknowledge the Appellant finds the General Division's analysis unreasonable, but unreasonableness is not one of the grounds of appeal permitted under s. 58(1).

[15] As a result, I do not see an error of law here; however, the Appellant also alleges that the General Division's *Villani* analysis was founded on distortions and misrepresentations of the

record. I will now consider whether the General Division based its decision on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it.

Issue 2: Did the General Division disregard vocational assessments indicating that the Appellant was incapable of sedentary work?

[16] The Appellant alleges that the General Division did not consider a functional capacity evaluation (FCE),[3] which found that he was unsuited to the physical demands of driving a limousine. The Appellant also alleges that the General Division failed to consider the challenges he would likely encounter in retraining for sedentary employment.

[17] I am not convinced by this submission. I see that the General Division did consider the FCE in question, which was prepared by Brian Lowe, a registered physiotherapist, in June 2016. At paragraph 19, the General Division wrote:

> I have considered the Appellant's functional limitations in arriving at my decision, and agree with the Respondent's submission that there is medical evidence to support a finding that the Appellant would be able to perform sedentary work. First, in June 2016, a functional capacity evaluation performed for the insurer determined that the Appellant demonstrated physical capabilities within the light to medium strength levels.

[18] Even if the General Division had not explicitly addressed the FCE in its decision, there would have been no error under s. 58(1)(*c*) of the DESDA. A trier of fact is presumed to have considered all the evidence before it and need not refer in its decision to each and every item in the record. Of course, once the General Division mentioned the FCE, it had an obligation to convey its contents accurately. With that in mind, I do not see how the General Division misrepresented the FCE in this instance. An admittedly lengthy document, the FCE detailed the results of extensive testing but ultimately found that the Appellant was capable of at least one type of occupation—operating certain types of heavy equipment.[4]

[19] It is true that the FCE also found that the essential duties of a limousine driver (which it deemed a job requiring medium strength) were beyond the Appellant's physical capabilities.

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[3] GD5-52.
[4] GD5-56.

However, it must be remembered that the scope of the vocational assessment was limited to occupations that were comparable to the Appellant's previous occupations; it said nothing about the Applicant's potential tolerance for taking classes to upgrade his skills or taking a low-impact job at a desk or behind a counter. In this light, I do not think that the General Division distorted the substance of the FCE, either by errors of omission or commission.

Issue 3: Did the General Division err by discounting Dr. Weisleder's orthopedic report?

[20] The Appellant alleges that the General Division erred when it discounted Dr. Weisleder's report dated May 30, 2016, because the orthopedic surgeon had failed to explain why, in his view, the Appellant was incapable of selected light occupations.

[21] The General division addressed Dr. Weisleder's report in paragraph 16 of its decision:

> Dr. Weisleder wrote that the Appellant would not be able to work as a limousine driver because his ankle became stiff with prolonged sitting. **I do not find this statement persuasive, given that there is no evidence that it was based on anything but the Appellant's say-so.** Moreover, there is **no further information** about how disabling the stiffness might have been. The doctor also wrote, **without further explanation**, that the Appellant "would not meet the Body position requirements associated with the occupations of Flagman, Light Packager, and Assembler." Given the paucity of documentation for severe ankle stiffness, and the lack of explanation for the Appellant's alleged unsuitability for the three other jobs, I am not convinced by Dr. Weisleder's conclusion that the Appellant suffered a complete inability to work at any job for which he was reasonably suited by education, training or experience. [emphasis added]

The Appellant maintains that Dr. Weisleder's opinion was, in fact, based on an assessment of the Appellant's demonstrated capacity. Having considered the submissions from both parties, I see merit in the Appellant's argument.

[22] Dr. Weisleder's remarks[5] are contained in an orthopedic report that is part of a larger multidisciplinary assessment conducted by the Viewpoint Group, a medical consultancy commissioned by the Appellant's insurer. In his report, Dr. Weisleder wrote that he had reviewed the Appellant's medical file, whose constituent documents were listed in a three-page

[5] GD5-38 to GD5-41. A similar statement can be found in the Multidisciplinary Assessment Report Summary, co-signed by Dr. Weisleder, at GD5-36.

appendix[6] and which included numerous imaging reports for the left ankle. Dr. Weisleder also wrote that he "had the chance to review the concurrent psychology assessment report, vocational assessment report, transferable skills analysis, and functional capacity evaluation, all completed as part of this multidisciplinary assessment process." These reports, totaling more than 50 pages, described extensive investigations into the Appellant's capacity to work.

[23] In this context, Dr. Weisleder's conclusions were, contrary to the General Division, based on more than just the Appellant's "say-so." In finding that the Appellant's ankle became stiff with prolonged sitting, Dr. Weisleder relied on the medical record and the multidisciplinary reports prepared by his Viewpoint colleagues. In particular, Brian Lowe's FCE report[7] detailed range of motion and muscle strength testing on every major joint in the Appellant's musculoskeletal system, including his ankles. The physiotherapist wrote:

> In the physical screening [the Appellant] demonstrated moderate physical restrictions of his left ankle and mild physical restrictions of his left hip compared to his right hip.
>
> […]
>
> [The Appellant] consistently demonstrated reduced weight bearing through his left leg in activities that required standing or walking. He demonstrated functional restrictions in activities involving his lower extremities which include: standing work, walking, carrying, lifting, crouching, stairs and ladder climbing.

[24] Mr. Lowe's raw test results were set out in a schedule entitled "WorkWell FCE History."[8] It indicated the following scores for the Appellant's ankles:

		Range of Motion		Muscle Strength	
Ankle	**Normal**	**Right**	**Left**	**Right**	**Left**
Dorsiflexion	20	12	-2 (unable to get to neutral)	5	4
Inversion	35	WNL	0 (nil)	5	4
Eversion	15	WNL	½	5	4

[6] GD5-98.
[7] GD5-52 to GD5-59.
[8] GD5-60 to GD5-74.

[25] In my view, these scores represent objective evidence that supported Dr. Weisleder's conclusions. The General Division therefore erred when it found that Dr. Weisleder's opinion that the Appellant was incapable of working as a limousine driver was based purely on the Appellant's subjective reports. The General Division also erred when it said that there was "no further information" about the Appellant's left ankle stiffness. These findings were erroneous despite medical evidence on the record. These findings were not just erroneous but also material because the General Division used them to discount an otherwise favourable report—one that ruled out a relatively sedentary job option.

[26] As the Minister notes, Dr. Weisleder reported that, by the Appellant's own account, his left ankle symptoms had improved by 50 percent; however, this does not change the fact that, even with the improvement, Dr. Weisleder still found him incapable of a series of jobs, ranging in impact from high to low.

[27] The Minister also argues that the Weisleder report—and Brian Lowe's associated FCE—deserved lesser weight because they only considered eight jobs that had been identified by a vocational evaluator, Rachel Yeboah, as part of her transferrable skills analysis. The Minister adds that the transferrable skills analysis, like every component of the Viewpoint Group multidisciplinary assessment, was concerned with determining whether the Appellant suffered a "complete inability to engage in any occupation for which he is reasonably suited by education, training or experience"—a test that differed from the CPP's requirement that a claimant be "incapable regularly of performing any substantially gainful occupation."

[28] Here, the Minister raises valid points, but they do not address the issue. The Minister rightly notes that there were reasons to give lesser weight to the multidisciplinary assessment, but dismissing Dr. Weisleder's opinion because he relied on purely subjective evidence was not one of them. Moreover, even though they applied a different standard of disability, the multidisciplinary assessment reports were still highly relevant to the issue before the General Division because they were among the few documents in the file that squarely addressed the Appellant's vocational capacity—all the more so, given their consideration of jobs that were classified as relatively "light."

Issue 4: Did the General Division err by finding that the Appellant's pipeline work differed significantly from his construction work?

[29] The Appellant objects to the General Division's finding that he had demonstrated "some occupational flexibility" based on his past experience in the pipeline industry. In fact, the Appellant says his work in that field was brief, facilitated by his family, and no different in substance from construction.

[30] Although I saw an arguable case for this submission on leave to appeal, I am not convinced, on further consideration, that it meets the criteria of s. 58(1)(*c*) of the DESDA. In paragraph 23 of its decision, the General Division considered the Appellant's work experience in its assessment of whether he was capable of retraining or sustaining employment in a sedentary field: "[W]hen tower crane work was unavailable, [the Appellant] was able to find work in alternate fields such as pipelines, which shows some occupational flexibility, albeit in physically demanding work."

[31] The Appellant submits that the General Division erred by inferring "occupational flexibility" from his periodic detours in pipeline installation and maintenance. He maintains that he secured these jobs only through the intervention of friends and relatives. In any case, he argues, there was evidence on the record (a psychovocational report by Dr. Daniel Cohen dated December 31, 2015) that his duties as a general pipeline labourer—grading, greasing excavation machines, and other manual work—were comparable to construction work.[9]

[32] My review of the audio recording of the hearing indicates that the General Division did not misrepresent the essence of what the Appellant had to say about his pipeline experience.[10] He testified that "when things were slow [in construction], I would go work in another sector of work." He also acknowledged that he had "a significant number of family [members]" working in pipelines who helped him get jobs if tower crane work was not available. The General Division did not go too far by inferring "occupational flexibility" from the Appellant's history of switching sectors, as shown by its use of the word "some" as a modifier. As well, the General

[9] GD5-19.
[10] Audio recording of General Division hearing, 19:09 to 19:50.

Division signaled its awareness that the Appellant's work in pipelines and construction was comparable, by taking pains to add the qualifier "albeit in physically demanding work."

[33] The General Division did not mention the Appellant's evidence that family members helped him get pipeline work, but how a claimant gets a job is less relevant than the fact that they are able to manage its demands. Moreover, the General Division had reason to give this fact lesser weight, since the Appellant's reliance on family to help him obtain work was not restricted to the pipeline sector; he also stated at another point during the hearing that his father, uncle and cousins helped him join a construction union.[11]

[34] During the hearing, the Appellant's legal representative was careful to note that, while her client had taken on many job assignments over the years, he had never performed clerical or administrative work. A trier of fact is presumed to have considered the complete record and cannot be expected to refer in its decision to each and every element of the evidence before it. I see no indication that the General Division ignored or misconstrued evidence that the Appellant's work in the pipeline sector was similar to his work as a crane operator.

Issue 5: Did the General Division ignore the context of the Appellant's remark that he was "doing great in life now"?

[35] The Appellant alleges that the General Division erred when it found that he had not attempted to retrain or considered looking for alternative work because he was "doing great in life now." The Appellant insists that what he actually said in testimony was different: he was not looking to further his education because he had done fine in life with what he had.

[36] On balance, I do not see how this submission can succeed. In my view, the General Division's words are a fair summary of the Appellant's attitude toward investigating alterative career options. During the hearing,[12] the Appellant testified that he had not upgraded his education since he stopped working. When asked why not, the Appellant replied, "I don't see any reason to… what would my reasoning for higher education be? I'm doing great in life right now." The presiding General Division member then offered the Appellant an opportunity to clarify these remarks: "I'm not quite understanding. You haven't tried upgrading your education

[11] Audio recording, 13:10.
[12] Audio recording, 49:25 to 52:25.

because your life is just fine now?" He simply answered, "Yeah." At that point, the Appellant's legal representative asked him whether he had ever considered upgrading his skills. He again replied, "No," adding, "I'm just not interested in that, and I couldn't sit in a room and use a computer all day. I just couldn't do that. It's not me, it's not in me. I have no interest whatsoever." He also testified that he had not tried finding any other type of work because he knew that he would be unable to do it. When asked how he knew this if he had never tried, the Appellant replied, "Because I know my body and my abilities and the strengths I have, and I know I can't do it. And like I said earlier, who's going to employ me?"

[37] In this segment of the recording, I heard the Appellant clearly express his view that he is unemployable, not only because he is physically unable to do the types of jobs for which he has training, but because he has no facility—and, more significantly, no interest—in pursuing lower impact occupations. Twice, the Appellant clearly said that he was doing "great" or "fine" **now**, and I heard nothing in his words to suggest that he was talking about the entire arc of his life.

[38] The Appellant also claims that the General Division misrepresented him when it found, at paragraph 20 of its decision, that "he would not be interested in any job that paid less than $30 an hour."

[39] Again, I see no merit in this submission, because the General Division's words are essentially consistent with the Appellant's testimony. The Appellant was asked during the hearing, "Do you feel it would be worthwhile to work for less money than at your old job?"[13] He replied that it would, but he would not work for, say, $5 an hour. Asked what minimum amount he would work for, he said that he would want to make $30 per hour, although he emphasized that he lacked the "physical ability" to do so. While the Appellant may have meant that he, like all people, needed to earn at least that much in order to maintain a decent living, he did not exactly say that, and his words left the impression that monetary considerations, as much as his injuries and medical problems, were keeping him from working.

[40] A trier of fact is entitled to draw reasonable conclusions from the evidence before it and, in this context, the General Division cannot be faulted for finding that the Appellant was

[13] Hearing recording, 52:45.

unwilling to make an effort to remain in the workforce unless, his impairments aside, there were minimum financial incentives for him to do so.

[41] Ultimately, it is irrelevant whether a claimant merely believes they are incapable of employment outside their former occupation; what matters is whether they have actually attempted to perform alternative work. This principle flows from *Inclima v. Canada*,[14] which requires disability claimants to show that their efforts at obtaining and maintaining employment have been unsuccessful because of their health condition. In this case, the General Division found that the Appellant made no effort to obtain or maintain any form of employment; I see no indication that, in doing so, it committed a factual error, much less one that was perverse, capricious or made without regard for the material.

DISPOSITION

[42] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under s. 59(1), I may give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with directions, or confirm, rescind or vary the General Division's decision. Furthermore, under s. 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[43] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. The Appellant applied for a disability pension nearly three years ago. If this matter were referred back to the General Division, it would only lead to further delay. In addition, the Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow.

[44] In its written submissions, the Minister argues that the appropriate remedy for this appeal is to give the decision the General Division should have given and dismiss the Appellant's claim for disability benefits. I agree. The record before me is complete. The Appellant has filed numerous medical reports with the Tribunal, and I have considerable information about his

[14] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

employment and earnings history. The General Division conducted a full oral hearing and questioned the Appellant about his impairments and their effect on his work capacity. I doubt that the Appellant's evidence would be materially different if the matter were reheard.

[45] As a result, I am positioned to assess the available evidence and make the decision that the General Division would have made had it not erred. As I have already noted, the General Division based its decision, in part, on an erroneous finding that Dr. Weisleder's orthopedic opinion was based solely on the Appellant's subjective evidence.

[46] To be found disabled, claimants must prove on a balance of probabilities that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

When did the Appellant's MQP end?

[47] To establish an MQP after 1998, the CPP requires a disability claimant with 25 or more years or reported earnings to show valid contributions in at least three of six calendar years. The Appellant last had three years of valid contributions over a six-year period in 2012, 2013 and 2014.[15] I therefore find that the Appellant's MQP ended on December 31, 2017. For him to qualify for the CPP disability pension, the evidence would have to show that he became disabled before 2018 and has remained so ever since.

Did the Appellant have a severe disability as of the MQP?

[48] Having reviewed the record, I am not convinced, on balance, that the Appellant had a severe disability as of the MQP. While I do not doubt that the Appellant's left ankle is subject to restrictions, I do not see compelling evidence—even when I take into account Dr. Weisleder's opinion and the other reports associated with the Viewpoint Group's multidisciplinary assessment—that the Appellant was incapacitated from regularly pursuing substantially gainful employment as of December 31, 2017. Like the General Division, I place great weight on the

[15] Record of Earnings, GD2-4.

Appellant's failure to pursue alternative employment that might have been suited to his limitations.

The Appellant had residual capacity

[49] *Inclima* obliges claimants to demonstrate their disability by showing that they attempted and failed to remain in the productive workforce: "Where there is evidence of work capacity, a person must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of their health condition." In order to invoke *Inclima*, a decision-maker must first determine whether the claimant had the residual capacity to make such efforts.

[50] In this case, there is no doubt that the Appellant suffered a serious injury to his left ankle that has left him unable to perform medium to heavy jobs such as those he held throughout his working life; however, I have also concluded that the Appellant had at least the residual capacity to seek alternative work during the MQP. In coming to this conclusion, I was influenced by the following factors:

- In a progress report dated June 23, 2015, a year after the motorcycle accident,[16] Dr. B. Petrisor, an orthopedic specialist, relayed the Appellant's complaint of "persistent pain particularly with walking on uneven ground." There was no mention of pain or discomfort while sitting.
- In the questionnaire dated September 2, 2015, that accompanied his CPP disability application,[17] the Appellant wrote that he could stand for up to 10 minutes without pain, but he did not mention any limitations relating to sitting.
- In a report dated December 31, 2015,[18] Daniel Cohen, a psychologist, reported that the Appellant complained of intermittent left ankle and knee pain, which is aggravated by prolonged standing, walking and climbing stairs. However, Dr. Cohen stated that the Appellant could tolerate sitting for two hours and driving a

[16] GD2-118.
[17] GD2-133.
[18] GD5-14.

car for two to three hours and concluded that "The clinical interview and mental status data indicate that [the Appellant's] sitting tolerance was good."

- In the June 2016 FCE, Brian Lowe found that the Appellant demonstrated physical capabilities within the light to medium strength levels.[19]
- In a letter dated July 14, 2016,[20] Dr. Petrisor found that the Appellant had "suffered a serious permanent impairment of an important physical function," but still found that he "would be able to do a more sedentary type job."
- In a letter dated September 12, 2017,[21] Dr. Jordan Wronzberg, a general practitioner, wrote that the Appellant was advised to avoid working on his feet.
- At the hearing before the General Division, the Appellant testified that he walked about half a kilometre every day, although his left ankle injury prevented him from standing more than 10 minutes. He rated the intensity of his ankle pain when sitting as 2 on a scale of 1 to 10. He also said that he did not take any medication for his pain.

[51] I also found no evidence that the Appellant's psychological condition contributed significantly to his impairment. In his December 2015 psychological assessment, Dr. Cohen did not diagnose the Appellant with major depression or any other serious mental health condition. Instead, Dr. Cohen diagnosed the Appellant with an adjustment disorder with mixed anxiety and depressed mood, the result of situational stressors caused by his physical injuries. These findings were consistent with those of another report, dated May 19, 2016, and prepared as part of the Viewpoint Group's multidisciplinary assessment. In it, Dr. Monique Costa El-Hage, a psychologist, found that the Appellant displayed only mild levels of anxiety and depression, which did not prevent him from engaging in employment for which he was reasonably suited by education, training or experience.

[52] None of the Appellant's other conditions, either by themselves or in combination with others, indicated a severe disability as of the MQP. In his CPP questionnaire, the Appellant listed

[19] GD5-56.
[20] GD5-104.
[21] GD5-108.

gout as an illness that prevented him from working but, in September 2017, Dr. Wronzberg noted that it was controlled with medication. The Appellant also claimed to suffer from post-traumatic stress disorder, but Dr. Cohen specifically excluded it, and the Appellant himself testified that it was no longer a problem after counselling.

[53] The most compelling evidence in the Appellant's favour was Dr. Weisleder's May 2016 orthopedic report, but it was problematic in several ways. As the Minister noted, it considered a standard of disability that is less stringent than the one set out by the CPP. Dr. Weisleder found that the Appellant "suffered a complete inability to engage in any employment for which he is reasonably suited by education, training, or experience," but this tells me only what I have already accepted—that he is no longer fit for the kind of physical work that he has performed throughout his adult life. As discussed, Dr. Weisleder considered only eight jobs, none of which could be fairly classified as sedentary. He ruled out all of them as options for the Appellant, even the one job—limousine driver—that appeared be least physically demanding, yet I note that it was described in the FCE as requiring "medium strength" and "multiple limb coordination."[22] A limousine driver is expected to load and unload passenger luggage and, while operating their vehicle, continuously press and release the acceleration and brake pedals with their feet. In that sense, the requirements associated with this position are not much different from those of the Appellant's previous job as a crane operator. I can understand, then, why Dr. Weisleder, having determined that the Appellant's left foot became stiff with extended sitting, decided that driving a limousine was beyond his capabilities. As it is, however, Dr. Weisleder's report shed little light on the Appellant's potential tolerance for a job at which he would be spending most of his time at a desk or counter with his lower limbs stationary.

[54] At the hearing, the Appellant testified that he had no desire to perform sedentary work, but a claimant's interests and aptitudes have no bearing on whether they are capable of pursuing a substantially gainful occupation. The Appellant also suggested that sedentary work was beyond not just his physical but also his mental capabilities. I see little evidence of this in the record. It is true that the Appellant has only a Grade 8 education, but he also completed a three-year apprenticeship program as a young man, and Dr. Cohen's testing indicated high-school level

[22] GD5-56.

abilities in reading, math and spelling. In June 2016, Rachel Yeboah, the vocational evaluator, subjected the Appellant to a series of tests designed to assess his reasoning skills and academic potential. While he showed below average results in numerical reasoning, his linguistic skills were average to above average.[23] These scores indicate capacity to undergo retraining or, at the very least, to manage a job in a warehouse or retail setting. The Appellant was 54 years old at the end of the MQP and would ordinarily be viewed as some distance from retirement. I see nothing in his profile that would prevent him from working or, more to the point, trying to work.

The Appellant did not attempt to pursue alternative employment

[55] Ultimately, the Appellant's appeal must fail because he has not tried to work since his accident, and it is therefore impossible to know whether he was capable of a substantially gainful occupation as of the MQP. At the hearing before the General Division, the Appellant testified that he had not considered retraining or looking for alternative work because he knew that he was not capable of either. The presiding member asked him, quite aptly, how he could be so certain of it if he had never tried.

[56] I have found nothing in the evidence to indicate that the Appellant is prevented from prolonged sitting. As such, I find that he had sufficient residual capacity to return to school or to try a largely sedentary job that would have spared his left ankle. *Inclima* requires disability claimants in the Appellant's position to show that **reasonable** attempts to obtain and secure employment have been unsuccessful because of their health condition. In this case, it is not that the Appellant has failed to make a reasonable attempt to find alternate employment; he has made **no** attempt to find alternate employment.

[57] Applicants for disability entitlement should demonstrate a good-faith preparedness to participate in retraining and educational programs that will enable them to find alternative employment.[24] In this case, the Appellant has not done so.

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[23] GD5-78, GD5-80-80
[24] *Lombardo v. Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).

Did the Appellant have a prolonged disability as of the MQP?

[58] Since the Appellant's evidence falls short of the severity threshold, there is no need to consider whether his disability can be characterized as prolonged.

CONCLUSION

[59] I am dismissing this appeal. While the General Division erred when it discounted Dr. Weisleder's opinion for relying on the Appellant's subjective evidence, I do not think it would have come to a different conclusion if it had not made that error. Having conducted my own review of the record, I am not persuaded that the Appellant had a severe disability as of December 31, 2017.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	Debra Coulson, for the Appellant Christian Milciw, for the Respondent