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

Citation: *J. L. v. Minister of Employment and Social Development,* 2018 SST 1144

Tribunal File Number: AD-17-307

BETWEEN:

J. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: November 13, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] J. L. (Claimant), states that she has a Bachelor of Applied Science degree, a nutrition and food program degree, and was enrolled in a distance LL.B. program. She worked as a bank teller from 2010 to 2013 and stopped due to her health conditions. Her physician's report states that she has (among other medical issues) major depressive disorder, anxiety disorder, post-traumatic stress disorder , and irritable bowel syndrome (IBS).

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP). The Minister denied her application both initially and on reconsideration. The General Division of this Tribunal denied the Claimant's appeal in November 2016, deciding that the Claimant had the capacity to work and that she did not show that efforts at obtaining or maintaining employment had been unsuccessful by reason of her health condition.

[4] The Appeal Division granted leave to appeal the General Division's decision. The Appeal Division must decide whether the General Division made any errors under the *Department of Employment and Social Development Act* (DESDA) such that an appeal should be granted. If the Appeal Division allows the appeal, it must decide whether to give the decision that the General Division should have given, refer the case back to the General Division for reconsideration, or rescind or vary the General Division's decision.

[5] The Appeal Division finds that the General Division made an error of fact. The record is complete, and it is efficient and within the Appeal Division's power to give the decision that the General Division should have given.

[6] Having analyzed the medical evidence, the Appeal Division finds that the Claimant's functional limitations are such that she became disabled within the meaning of the CPP before the end of the Claimant's qualifying period on December 31, 2015.

PRELIMINARY MATTER

[7] When the Appeal Division grants leave to appeal, it does **not** provide new hearings on the merits (*de novo* hearings), in which Claimants are expected to present all their evidence for the Appeal Division to weigh and consider.[1] The general rule is that the evidence the Appeal Division uses to make its decision is the same evidence that was available to the General Division.[2] There are some limited exceptions to this general rule.

[8] To support her case, the Claimant provided the Appeal Division with some new evidence that was not available to the General Division when it made the decision. At the General Division, the Claimant had to show that she had a severe disability on or before the end of her minimum qualifying period (MQP). The General Division found that there was evidence that she had the capacity to work, so, to succeed in her appeal, the Claimant had to show that efforts to obtain and maintain employment were unsuccessful by reason of her health condition.[3]

[9] The new evidence the Claimant asks the Appeal Division to consider is an update on her efforts to obtain and maintain employment starting from the month the General Division issued the decision. The Appeal Division has not considered any of this evidence. It is new evidence that was not before the General Division at the time it made its decision, and, in any event, it is not relevant because the efforts to obtain and maintain employment that are relevant to the question of entitlement to the disability pension are those that were made on or before the end of the MQP.

ISSUE

[10] Did the General Division make an error of law by failing to identify evidence of the Claimant's work capacity, in accordance with the Federal Court of Appeal's decision in *Inclima v Canada (Attorney General)*?[4]

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[1] *Grosvenor v Canada (Attorney General)*, 2018 FC 36 para 7.
[2] *Mette v Canada (Attorney General)*, 2016 FCA 276.
[3] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[4] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

ANALYSIS

Appeal Division's review of the General Division's decision

[11] The Appeal Division does not provide an opportunity for the parties to reargue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division's decision to determine whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[12] The DESDA says that a factual error occurs when the General Division bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.[5] For an appeal to succeed at the Appeal Division, the legislation requires that the General Division decision's finding of fact that is at issue be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

[13] By contrast, the DESDA says that a legal error occurs simply when the General Division makes an error of law, whether or not the error appears on the face of the record. [6]

Did the General Division make an error of law by failing to identify evidence of the Claimant's work capacity, in accordance with the Federal Court of Appeal's decision in *Inclima*?

[14] The General Division made an error of law by failing to identify evidence of the Claimant's work capacity, in accordance with the decision in *Inclima*.

[15] It is only when there is evidence of work capacity that a claimant must show that efforts at obtaining and maintaining employment were unsuccessful by reason of their health condition.

[16] According to the Federal Court of Appeal's decision in *Inclima,* when there is evidence of work capacity, the claimant must show that their efforts at obtaining and maintaining employment have been unsuccessful because of a health condition. This means the General

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[5] DESDA, s 58(1)(c).
[6] DESDA, s 58(1)(b).

Division must clearly identify what the "evidence of work capacity" is that is triggering the work effort test the claimant must meet.[7]

[17] In its analysis, the General Division began with two paragraphs outlining the test for a severe disability.[8] The General Division then stated:[9]

> The Tribunal recognizes that the [Claimant] suffers from multiple conditions and is satisfied that she has been diligent in pursuing treatment recommendations. It is also clear that she has many longstanding limitations. The Tribunal is not satisfied, however, that she is regularly precluded from all gainful employment.
>
> In this case it is important to consider the [Claimant's] particular circumstances. She is very young and was only 30 years old on the December 2015 MQP; she was only 27 years old when she last worked in March 2013. She has a very good education and numerous transferable skills. She was able to find employment with the X Bank though a program supporting university students with disabilities. The evidence supports that the bank is prepared to adapt to her limitations and that the [Claimant] was able to work notwithstanding her limitations.

[18] The General Division stated: "In order to satisfy the *Inclima* test the [Claimant] should pursue the bank's graduated return to work offer."[10]

[19] The Minister argues that the General Division decision does not contain an error of law. The Minister argues that the General Division found that the Claimant had the capacity to work when it stated that she was not precluded from gainful employment.[11] The Minister argues that the General Division supported this finding by acknowledging the Claimant's evidence that she would be able to return to work at reduced hours if she was provided with solar shield glasses.[12]

[20] The fact remains that the General Division was not clear what evidence it relied on as evidence of work capacity. Identifying the evidence of work capacity is what triggers the requirement for the Claimant to meet the work effort test.

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[7] *Inclima v Canada (Attorney General)*, 2003 FCA 117 para 3.
[8] General Division decision, paras 42 and 43.
[9] *Ibid*., paras 44 and 45.
[10] *Ibid*., para 48.
[11] *Ibid*., para 44.
[12] *Ibid*., para 46.

[21] The General Division's statement that it was "not satisfied […] that she is regularly precluded from all gainful employment" [13] is not a clear statement that identifies evidence of work capacity in the record. The General Division's decision lacks any analysis of the medical evidence related to the Claimant's capacities and limitations. The General Division made this bold assertion that it was not satisfied the Claimant was regularly prevented from all gainful employment without reference to any supporting evidence.

[22] The Minister points out that the General Division did state that the Claimant "appears to have acknowledged that she would be able to return to work at reduced hours if she was provided with solar shield sunglasses."[14] The Appeal Division finds that the General Division did not rely on that statement as evidence of work capacity.

[23] The General Division's statement that the Claimant **appears** to have acknowledged she would be able to return to work is not sufficiently definitive to be considered evidence of work capacity triggering the Claimant's need to meet the requirement on work efforts, so the Appeal Division will not presume that the General Division relied on it. The General Division's use of the term "appears" here is significant.

[24] The Claimant did not expressly acknowledge that she was able to return to work with that accommodation. The Claimant's evidence was that in both 2014 and 2015, she "wanted to talk about" returning to work with the case managers;[15] there is no express acknowledgement that she was in fact able to return. Wanting to talk about returning to work with case managers in the context of a Long Term Disability (LTD) claim is not evidence of the Claimant acknowledging she was able to work. These discussions can, should, and do take place before a claimant actually has a capacity to work. These discussions take place even when returning to work is not actually possible in the end.

[25] This statement is more properly understood to be part of the analysis of the Claimant's work efforts themselves, not evidence of the capacity for work that is supposed to trigger that discussion.

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[13] General Division decision, para 44.
[14] *Ibid*., para 46.
[15] *Ibid*., para 38, answer to question 3.

[26] As the Appeal Division pointed out at the leave to appeal stage, the General Division did not analyze the medical evidence from the file in its decision or identify which limitations specifically the Claimant had that impact her capacity to work.

[27] However, in this case, the General Division was not clear what the "evidence of work capacity" was that triggered the requirement for the Claimant to show that efforts to obtain and maintain employment were unsuccessful because of her health condition. Evidence of a capacity to work cannot be inferred from the General Division's analysis of the medical evidence because that analysis is missing.

REMEDY

[28] The Appeal Division has several options to remedy errors in General Division decisions. Among those options, the Appeal Division can give the decision that the General Division should have given or refer the case back to the General Division for reconsideration.[16] The Appeal Division has the ability to decide any question of fact or law before it.[17]

[29] During the hearing before the Appeal Division, the Claimant took the position that (considering the need to proceed efficiently and quickly), if the Appeal Division found that the General Division made an error under the DESDA, the Appeal Division should substitute its decision rather than send the matter back to the General Division for reconsideration. The Minister took the position that, if the Appeal Division identified an error under the DESDA by the General Division, the Appeal Division should substitute its decision and find that the Claimant does not have a severe disability under the CPP.

[30] Given that the existing record contains the Claimant's written answers to questions about her medical conditions, limitations, and treatment, and the Appeal Division has the explicit ability to decide any question of law or fact before it,[18] the Appeal Division will make the decision that the General Division should have made.[19] Because the record is complete, providing the decision that the General Division should have made is consistent with the *Social*

[16] DESDA, s 59.
[17] *Ibid*., s 64.
[18] DESDA, s 64.
[19] DESDA, s 59.

Security Tribunal Regulations, which require the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and justice permit.[20]

Decision the General Division should have made: The Claimant had a severe and prolonged disability before the end of her MQP

[31] The Claimant proved on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2015, which was the date her MQP ended.[21]

[32] More specifically, the Claimant had a severe and prolonged disability as of September 2015. At that time, despite treatment of her conditions, she was still not working, and Dr. Lee stated that her symptoms of postherpetic neuralgia were not gone, her IBS symptoms with pain and diarrhea were about the same, but her depression about her disabilities was increasing.

[33] To determine whether a disability is "severe" within the meaning of the CPP, the initial focus is on capacity for work rather than simply on the diagnoses of conditions—sometimes referred to as employability.[22] The decision-maker must take a real-world approach to determining the claimant's employability, which means a claimant's condition must be assessed in its totality, considering all of the possible impairments that affect the claimant's employability and not just the biggest impairment or the main impairment.[23]

[34] Taken as a whole, it is clear that the Claimant has many longstanding limitations. When those limitations are identified and considered, it becomes clear that the Claimant is incapable regularly of pursuing any substantially gainful occupation. It is the cumulative impact of these conditions that makes it so difficult to conclude that the Claimant can work at any substantially gainful occupation, regardless of her training or skills. The Claimant's participation in distance education, her previous work at the bank, and the fact that her long-term disability ended are not evidence of a capacity to work.

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[20] *Social Security Tribunal Regulations*, s 3(1)(a).
[21] GD2-73.
[22] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33 para 14.
[23] *Bungay v Canada (Attorney General)*, 2011 FCA 47.

[35] In reaching these conclusions, the Appeal Division has reviewed all of the medical evidence and discusses only the most important reports. The General Division relied on the medical evidence, but it also relied on the Claimant's description of how her conditions impact her capacity.

[36] The Appeal Division relies on the evidence the Claimant provided in her request for reconsideration, which is dated 2014, before the end of the MQP. One of the questions the Claimant answered in writing for the General Division member was "Please describe your typical day and all of your usual activities."[24] Unfortunately, the Claimant was not asked to describe her typical day on or before December 31, 2015, which was the end of her MQP. It is impossible to know for sure what period of time the Claimant referenced when she provided her responses to this question and others. At an oral hearing, she may well have been asked to clarify. As such, the Appeal division has not relied on the Claimant's evidence about her typical day as expressed in the General Division decision as evidence of her condition at the time of the MQP because it is not entirely clear what period of time that answer addresses.

The Claimant's conditions and their corresponding functional limitations show she is incapable regularly of pursuing any substantially gainful occupation

[37] The Claimant's physician, Dr. Lee, wrote a letter that summarizes the Claimant's main conditions. The letter is undated, but it contains an addendum from a visit on December 5, 2014, and it appears that it was received by Service Canada on December 11, 2014.[25] According to Dr. Lee, the Claimant's main medical conditions are a) postherpetic neuralgia; b) chronic anxiety and depression, post-traumatic stress with obsessive compulsive traits; and possible attention deficit disorder; and c) chronic irritable bowel syndrome and non-ulcer dyspepsia.[26]

a) Postherpetic neuralgia

[38] Postherpetic neuralgia is a painful complication of shingles. Dr. Lee states that the Claimant was diagnosed with herpes zoster (shingles) in March 2013, with her left forehead and left eye affected. Dr. Lee states that Dr. Macdonald (an ophthalmologist) saw the Claimant

[24] General Division decision, para 38, question 7.
[25] GD2-73 to 75.
[26] *Ibid*.

"many times" and that the Claimant has been treated with eye drops.[27] The residual symptoms of this postherpetic neuralgia include photosensitivity, irritable sensation in her left eye, and headaches. The Claimant saw another ophthalmologist, Dr. Breslin, who referred her to a neuro-ophthalmologist. Dr. Lee states that the Claimant still had migraines with light sensitivity and ocular pain as a result of the postherpetic neuralgia and that the chronic postherpetic pain in her eye likely makes it difficult for her to concentrate on tasks for a prolonged period of time.[28]

[39] On February 5, 2015, Dr. Margolin, the neuro-ophthalmologist, found that, while there were no abnormal findings in her ocular examination, her symptoms were likely secondary to previous shingles resulting in postherpetic neuralgia, that her treatment should be approached in a manner consistent with chronic pain syndrome, and that she should see a chronic pain specialist.[29]

[40] It is clear that the Claimant's limitations arising from the postherpetic neuralgia are significant. In her request for reconsideration, which she dated July 23, 2014, the Claimant explained that "[**a]t any time**, light sensitivity could be so severe I have to put a compress over my eyes and lay [*sic*] down due to chronic pain. This past month I have suddenly collapsed due to severe dizziness 3 times […]. The moment I feel dizzy, I try to lay [*sic*] down on the floor because I am afraid I will black out and bump my head"[30] [emphasis added]. The Claimant provided evidence about the low lighting she uses at home, her challenges in using computer screens indoors, and her need for wearing solar shield sunglasses indoors.[31]

[41] In her request for reconsideration in July 2014, the Claimant also provided evidence about her migraine symptoms, which result in light sensitivity that causes a burning sensation in her eyes and headaches. The headaches cause neck and shoulder pain then back pain. The Claimant stated that this leads to diarrhea, vomiting, nausea, and stomach pain. She explained what this means in the following: "I am confined to bed. I sleep and eat in bed all day and night

[27] GD2-73 to 75.
[28] GD3-12.
[29] GD3-14.
[30] GD2-18.
[31] GD2-184, for example.

next to a vomit container, and often have an eye infection. I keep a towel compress on my eyes."[32]

[42] The Claimant's evidence is consistent with a conclusion that these days (in which she is bedridden due to headaches, migraine symptoms, pain, and then nausea, vomiting, and diarrhea) are not rare occurrences.[33] She has not indicated that she has warning of which days she will have a migraine or a headache. It is clear that when she experiences a migraine, there is no work, even sedentary work, that the Claimant can accomplish. She lies in bed, she is light-sensitive, she experiences pain, and she vomits.

[43] The frequency of the migraines the Claimant stated she was experiencing in the summer of 2014 when she applied for reconsideration are such that she is not capable regularly of substantially gainful work because she would not be reliable, even on a part-time basis. Dr. Margolin recommended in February 2015 that the Claimant be treated at a chronic pain clinic, but the Claimant's limitations after she made efforts to follow that treatment did not seem to change. The Claimant's questions and answers completed for the General Division describe, at some length, her limitations, including this summary statement: "I feel the pain every day and I am frequently in bed because I am in too much pain and dizzy to stand up or sit upright. The condition has no cure."[34] There is no evidence that those migraines improved, and, in September 2015, Dr. Lee stated that the migraines with light sensitivity were still present and that her condition had not improved "at all" since January 2015.[35]

[44] The Appeal Division accepts the Claimant's evidence (which is unchallenged) shows that her light sensitivity is such that she needs to lie down on the floor. Predictability is the essence of regularity. The request for reconsideration shows that, as of the summer of 2014, her migraine symptoms occur "almost every day" and that she does not have the energy to complete chores, like cooking, cleaning, or laundry, and that she needs to attend physician appointments with a friend because she has collapsed in the subway in the past.

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[32] GD2-17.
[33] *Ibid*., see reference to "[t]hese symptoms occur almost every day;" GD2-34, see reference to "I am often in bed."
[34] GD6-56.
[35] GD3-12. The original quotation is in capital letters; lower-case letters are used in the transcription here.

[45] The frequency and unpredictability of these days in which she must lie down is also reflected in the Claimant's request for the hearing at the General Division to proceed by way of questions and answers. The Claimant referenced her concern that, if a teleconference hearing was booked, she could not predict whether she would be well enough to attend and that there would be a "high possibility that [she] may become ill during that specific time and date, and may not be able to attend the hearing"—further stating that her "illness is frequently in a state of unpredictable flare and remission."[36]

[46] The Claimant's episodes in which she needs to lie down are frequent enough that she is incapable regularly of work. And in any event Dr. Lee has identified that the chronic pain from the postherpetic neuralgia would likely make it difficult for the Claimant to concentrate on tasks for a prolonged period of time.

b) Chronic anxiety and depression, post-traumatic stress with obsessive compulsive traits, and possible attention deficit disorder

[47] There is no doubt that the record shows that the Claimant has survived a history that includes both physical and sexual assaults (both as a child and as an adult) that were traumatic.[37]

[48] Dr. Lee states that the Claimant experiences anxiety attacks, insomnia, restlessness, difficulty with concentration, and anhedonia. She has a long history of family disruption and relationship issues.[38] The Claimant's mental health conditions are not merely treated by her physician; she has had referrals during her MQP to specialists as well.

[49] The Claimant's mental health diagnoses in 2013 are not trivial. She was diagnosed by Dr. Burra (a psychiatrist) with major depressive disorder, and she had a global assessment of functioning (GAF) score of only 50.[39]

[50] She has tried cognitive behavioural therapy (CBT), and she was treated with a range of medications that were all unsuccessful due to side effects.[40] The Claimant gave evidence in her request for reconsideration in 2014 that her CBT sessions were over the phone because she was

[36] GD6-1.
[37] GD2-176, GD2-179, and GD2-78.
[38] GD2-73.
[39] GD2-169.
[40] GD2-74.

not capable of meeting with a therapist in person on a regular basis.[41] She was referred to another psychiatrist for possible attention deficit disorder, but she could not afford the formal testing.[42] She tried medication, but it triggered her irritable bowel symptoms.[43]

[51] Dr. Lee noted that the Claimant was to try taking Concerta, and the addendum to Dr. Lee's opinion, dated December 5, 2014, shows that the Claimant complied with that recommendation. Dr. Lee does not indicate in the addendum that the Claimant's condition improved with this drug.[44] By September 2015, Dr. Lee reported that the Claimant's depression about her disability was increasing.[45] This is significant, considering that the Claimant was already diagnosed with major depressive disorder in December 2013 and had a GAF of only 50.The Claimant and her physician refer to her need for a supportive environment,[46] and her physician's reference to the connection between her depression and her other disabilities show that her mental health conditions also impact her functioning.

[52] The Claimant's mental health diagnoses no doubt result in some functional limitations that impact the Claimant's employability. Anxiety attacks, restlessness, difficulty with concentration, and insomnia, particularly together with her other physical symptoms, negatively impact the Claimant's ability to participate in a competitive workforce, even in a sedentary position.

c) Chronic irritable bowel syndrome and non-ulcer dyspepsia

[53] Dr. Lee explains that the Claimant has experienced many years of abdominal bloating, dyspepsia, and diarrhea. Dr. Lee states that she was seen by a Dr. Kempston, had a gastroscopy, and had biopsies taken in 2012. She had abdominal ultrasounds and gastric emptying studies in 2013. She tried a variety of medications with minimal improvement. Her last follow-up appointment with Dr. Elfassy, in April 2014, resulted in the Claimant having another new medication to try.

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[41] GD2-34.
[42] GD2-74.
[43] *Ibid.*
[44] GD2-75.
[45] GD3-12.
[46] GD2-32.

[54] It is significant that Dr. Elfassy characterized the Claimant's IBS as "quite severe" in January 2014.[47] By April 8, 2014, Dr. Elfassy explained to the Claimant that they had exhausted all reasonable therapy investigations and that he was not able to explain or significantly help her with her symptoms.[48] The Claimant stated in her request for reconsideration, dated in the summer of 2014, that she had two episodes of chronic vomiting in the past month, that all of these symptoms kept her bedridden, and that she is not able to function at all.[49]

[55] In October 2014, Dr. Elfassy reported only two episodes of vomiting but that the Claimant was doing "relatively well over all" and that she still gets "periodic abdominal pain".[50] By September 2015, Dr. Lee reported that the Claimant's irritable bowel symptoms and pain and diarrhea were about the same.[51]

[56] The cumulative impact of these conditions is significant. The Claimant is incapable regularly of performing any substantially gainful occupation. It is the collection of symptoms associated with her postherpetic neuralgia, her mental health diagnoses, and her chronic IBS that mean that she is not able to participate in a working environment. In her request for reconsideration in 2014, she describes what happens when the symptoms of her disabilities require her to be in bed. While the evidence suggests that not all of these symptoms occur simultaneously every day, the Appeal Division finds that they are frequent enough that the Claimant cannot attend a workplace with sufficient predictability for her to be considered capable regularly of any substantially gainful occupation.

[57] Even if she is not experiencing a migraine or a headache, her day-to-day challenges with concentration related to her depression and her insomnia, her need for a supportive environment and history of trauma, and her chronic ocular pain mean that there is no evidence of work capacity.

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[47] GD2-85.
[48] GD2-84.
[49] GD2-18.
[50] GD2-83.
[51] GD3-12.

The Claimant's personal circumstances

[58] When determining whether a disability is severe, the Appeal Division must take a real-world approach. This requires the Appeal Division to determine whether a claimant, in the circumstances of their background and medical condition, is employable. This assessment must be done while considering all of the circumstances, including the Claimant's personal circumstances (namely, age, education level, language proficiency, and past work and life experience).[52]

[59] The Claimant was only 30 years old at the end of her MQP on December 31, 2015, and she was only 27 years old when she last worked in March 2013. She has a Bachelor of Applied Science degree, a nutrition and food program degree, and was enrolled in a distance LL.B. program in which she received extensive accommodation and did not experience much success. She worked as a customer service representative at a bank in 2010, for which she was hired through a special program for students with disabilities, but she stopped working in 2013 and was on long-term disability leave for a year. The Claimant has experienced trauma, which is a significant part of her life experience.

[60] The Claimant is relatively young and well-educated. She has excellent communication skills and English proficiency. She does not have a long history of work experience to draw from. She has experienced trauma. The Claimant's medical limitations mean that she is not capable regularly of pursuing any substantially gainful occupation, and, while some of her personal circumstances might otherwise make her a good candidate for participation in the workforce, they are not sufficient to overcome the incapacity she experiences because of both the trauma she has experienced and the symptoms associated with her medical conditions.

The Claimant's participation at work and efforts to add to her education are also not evidence of a capacity for work

[61] The fact that the Claimant's long-term disability benefits ceased is not sufficient to be evidence of work capacity in this particular case. The Claimant was already receiving accommodation in her part-time (15 hours per week) position with "light occupational

[52] *Villani v Canada (Attorney General)*, 2001 FCA 248; *Bungay v Canada (Attorney General)*, 2011 FCA 47.

demands,"[53] when she stopped working and was approved for long-term disability benefits from her employer's insurer for one year effective March 12, 2014.[54]

[62] There is evidence to suggest that the Claimant's treating physician, Dr. Lee, did not support a return to work as of April 2016, several months after the end of the MQP. The decision from the LTD provider that the Claimant no longer met its criteria for eligibility for benefits appears to be based on an opinion from Dr. Margolin, who, the insurer believed, cleared the Claimant for return to work, but who was not treating the Claimant for all of her conditions.

[63] Similarly, the Claimant's efforts at education are not evidence of work capacity in this case. The Claimant simply did not progress in this education sufficiently to show a capacity for work—she was in distance education and was not having much success in passing courses, even with a vastly reduced course load which she indicates was permitted to her as an accommodation for her disabilities.[55]

[64] The Claimant's previous work at the bank is not evidence of work capacity. The Claimant was hired at the bank as part of a program for students with disabilities. She worked 15 hours per week; the job is classified for LTD purposes as having "light occupational demands."[56] She stopped working in 2013, received disability benefits from the insurer for a year, and had not returned to work at the time of the hearing. As of April 2016, the Claimant's physician did not support a return to work, and so evidence about whether the bank was offering accommodation for one of her limitations (solar shield sunglasses for photosensitivity) is not evidence that she has the capacity to work.

The Claimant made reasonable efforts to comply with treatment

[65] The Claimant has made reasonable efforts to follow recommended treatments. Dr. Margolin recommended a chronic pain program in February 2015. At the General Division, the Minister argued that the Claimant did not attend this program and, therefore, not all treatment modalities were pursued.

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[53] GD6-11.
[54] GD6-10.
[55] GD6-3 to 5.
[56] GD6-11.

[66] The law does not require the Claimant to pursue all treatment modalities. Rather, the Claimant must provide evidence of their efforts to manage the medical conditions.[57] To be eligible for a disability pension under the CPP, when a Claimant refuses treatment, the refusal must be reasonable. The decision-maker must also consider the impact of the refused treatment on the disability.[58]

[67] The Claimant did not discuss this particular treatment for chronic pain in her written questions and answers with the General Division that were transcribed in the General Division decision. However, there is a handwritten note that appears to be written by someone at Service Canada, dated April 1, 2015, in the record stating that the Claimant said that she "recently had an appointment with a nurse at a pain management clinic."[59] The available evidence does not support a finding that the Claimant refused treatment.

[68] The Appeal Division is satisfied that the Claimant provided sufficient evidence of her efforts to manage her medical conditions. She stated, in the questions and answers, that Dr. Margolin referred her to Dr. Dimitrakoudis (another neurologist). The Claimant's undisputed evidence is that Dr. Dimitrakoudis prescribed a different medication, Verapamil, to control the nerve pain but the Claimant did not experience success in controlling her pain.[60] The Claimant stated that, based on Dr. Dimitrakoudis' recommendation and out of desperation, she tried Botox injections in her forehead in June 2015 in the hopes to numb the pain but that she has still not been able to control the pain.[61]

[69] Dr. Margolin's report from February 2015 recommended non-pharmacologic approaches to pain management,[62] and the Claimant stated, in the questions and answers, that she has been working with a cognitive behaviour therapist, attempting to reduce her pain through meditation and mindful awareness.[63]

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[57] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33 para 16.
[58] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[59] GD2-7.
[60] GD6-55.
[61] GD6-55.
[62] GD3-14.
[63] GD6-56.

No capacity to work: No need for Claimant to show that efforts to obtain and maintain employment were unsuccessful by reason of her health condition

[70] There is no evidence of work capacity such that the Claimant needs to show that efforts to obtain and maintain employment have been unsuccessful by reason of her health condition.[64] The Claimant's medical evidence, the status of her long-term disability benefits, her efforts at education, and her work at the bank are not evidence of a residual capacity to work.

[71] The Appeal Division finds there is no evidence of work capacity that would require the Claimant to show that efforts to obtain and maintain employment were unsuccessful because of her health condition.

The Claimant's disability is prolonged

[72] The Claimant's conditions are long-continued. The Claimant's herpes zoster (shingles) was only diagnosed in March 2013, and, therefore, she had not had the postherpetic neuralgia for as long as her other conditions. However, her IBS was treated as early as 2002, which means she has had that condition for all of her adult life. Her physician certified she has had depression on and off since 2007, which is over a decade. The Claimant's chronic anxiety and post-traumatic stress are linked to past trauma, including rape.

[73] In her November 30, 2014, report, Dr. Lee stated that the Claimant's prognosis was guarded:

> Multiple attempts at drug trials for antidepressants are not successful. Her [*sic*] irritable bowel symptoms will likely not improve, hence the likelihood for improvement is slow, and may have frequent exacerbations in the future. Her post herpetic neuralgia may improve with time, again, this is unpredictable.[65]

[74] In September 2015, Dr. Lee stated that the Claimant has a substantial disability that may last an indefinite period of time.

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[64] As is required by *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[65] GD2-74. The original quotation is in capital letters; lower-case letters are used in the transcription here.

[75] The medical evidence shows that the Claimant's conditions are long-continued and of indefinite duration.

CONCLUSION

[76] The appeal is allowed.

[77] The Claimant became disabled in September 2015 when her physician stated that her condition had not improved at all since January 2015, that her depression over her disability was increasing, and that she had a "substantial disability which may last an indefinite period of time."[66] Payment of the disability pension begins four months after the date of onset of the Claimant's disability, so payment begins effective January 2016.

Kate Sellar
Member, Appeal Division

HEARD ON:	June 4, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. L., Appellant Penny Brady, Representative for the Respondent

[66] GD3-13. The original quotation is in capital letters; lower-case letters are used in the transcription here.