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

Citation: *T. M. v Minister of Employment and Social Development*, 2018 SST 1279

Tribunal File Number: AD-17-457

BETWEEN:

T. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: December 10, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] T. M. (Claimant) has a Grade 11 education and worked for a major retailer from 2004 to 2006, when her family physician advised her to stop working because of medical issues. She worked as an office administrator in her husband's home-based consulting company from 2007 until 2011, when her husband closed the business. She explains that she has been unable to work full-time since the business closed. She started some work at a dollar store near the end of 2011. She says her main disabling conditions are fibromyalgia, rheumatoid arthritis, irritable bowel syndrome (IBS), migraines, and degenerative disc disease.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) in 2014. The Minister denied the application both initially and on reconsideration. The Claimant appealed the Minister's decision. The General Division denied her appeal in March 2017, deciding that she had capacity for work and that there was no evidence that her efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition.

[4] The Appeal Division granted leave to appeal the General Division's decision, finding there was an arguable case that the General Division made several errors.

[5] 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 grants the appeal, it must decide whether to give the decision that the General Division should have given, to refer the case back to the General Division for reconsideration, or to rescind or vary the General Division's decision.

[6] The Appeal Division finds that the General Division made an error of law by failing to

apply the legal principles relating to treatment.

PRELIMINARY MATTER

[7] At the oral hearing before the Appeal Division, counsel to the Claimant indicated that she would no longer rely on her allegations about the General Division failing to observe a principle of natural justice arising from a poor phone connection during the oral hearing. The Appeal Division allows the Claimant to withdraw her argument on this issue.

ISSUE

[8] Did the General Division make an error of law by failing to follow the established legal principles when analyzing the Claimant's efforts to follow recommended treatment?

ANALYSIS

Appeal Division's Review of the General Division's Decision

[9] The Appeal Division does not provide an opportunity for the parties to re-argue 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.

[10] 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.[1] For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

[11] By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[2]

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

Did the General Division make an error of law by failing to follow the established legal principles when analyzing the Claimant's efforts to follow recommended treatment?

[12] The General Division made an error of law by failing to follow the applicable legal principles when it considered the Claimant's efforts to follow recommended treatment. In the context of an appeal for a Canada Pension Plan disability pension, claimants must show efforts to manage their medical conditions. There is no blanket legal requirement to exhaust all medical treatments associated with a medical condition to be eligible for the disability pension. Claimants can be ineligible for the disability pension if they have unreasonably refused treatment that would have an impact on the disability. The General Division made a series of findings about the Claimant's treatment, but it did not set out or expressly apply these principles in its analysis, which is an error of law.

[13] To qualify for a disability pension, the claimant must have a severe and prolonged disability on or before the end of the minimum qualifying period. According to the CPP, a person with a severe disability is someone who is incapable regularly of pursuing any substantially gainful occupation.[3]

[14] The CPP definition for a severe disability does not include any reference to how much treatment a claimant must try. The Federal Court of Appeal has found, however, that claimants have an obligation to show efforts to manage their medical conditions.[4]

[15] As the Federal Court of Appeal stated in *Lalonde v Canada*, a claimant who unreasonably refuses treatment may not be entitled to the disability pension.[5] In such a case, the General Division must consider the expected impact of the treatment on the disability. More recently in *Sharma v Canada*, the Federal Court of Appeal found that the General Division must consider both the personal characteristics of the claimant and the duty to mitigate (which refers to the claimant's efforts to manage their conditions). If either aspect fails, the claimant has not established a severe disability within the meaning of the CPP.[6]

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[3] CPP, s 42(2).
[4] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, para 16.
[5] *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[6] *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[16] The Minister's *Canada Pension Plan Adjudication Framework* (Adjudication Framework), which is not binding law but does provide insight into the policy the Minister applies when deciding applications, references the role that treatment plays in determining eligibility for the disability pension:

> For Canada Pension Plan purposes treatment can be defined as what is needed to restore or improve the health and function of a particular person, or what is needed to prevent or delay deterioration.
>
> Treatments can vary depending on the nature, and severity of the medical condition or conditions, and the person's response to those treatments. In some cases the goal of treatment or treatments is to cure or remove the cause of the medical condition. In other cases the goal of treatment or treatments is to control the progression of the medical condition, and/or provide relief of symptoms, and/or provide insight and necessary coping mechanisms for adapting to the person's identified limitations.
>
> The medical adjudicator must determine how ongoing medical treatments are likely to affect the medical condition and a person's ability to work in the short term and/or in the future. Short term in this context means within one year.[7]

[17] There is no requirement in the CPP or from the Federal Courts cases that claimants must exhaust all treatment options. The Adjudication Framework does not reflect such a requirement either, focusing the adjudicators instead on the goal of the medical treatment and attempting to address situations in which ongoing treatments may impact capacity to work in the short term and in the future.

[18] In its decision, the General Division did not set out any of the principles from the cases referenced above to guide its analysis. It did, however, reference treatment in a number of ways. First, the General Division stated that "the fibromyalgia is manageable with medication and physical activity."[8] Second, the General Division linked the treatment of fibromyalgia generally to the Claimant's treatment, stating that fibromyalgia:

> in and of itself is not disabling and there is a plethora of treatment, therapies, referrals and programmes which successfully help in the

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[7] *Canada Pension Plan Disability Adjudication Framework*, https://www.canada.ca/en/employment-social-development/programs/disability/benefits/framework.html.
[8] General Division decision, para 37.

> management of the condition. Education and physical activity is generally encouraged as has been the case with the [Claimant].[9]

[19] Third, the General Division stated that the Claimant's family physician, Dr. Walley, reported that she had not tried some treatments

> that could improve the better management of her medical issues (aerobic exercise, weight training, Tylenol, NSAIDS, injections, osteopathy, neuropathy, and acupuncture). The Tribunal finds that if the [Claimant] incorporates some of the treatments she may continue to better manage and improve functionality. The Tribunal further notes that in the same report, Dr. Walley relayed that the [Claimant] had found some of her treatments (Heat, Ice, physiotherapy and massage therapy, chiropractor) helpful (GD5 – 4). It is possible that regular incorporation of these treatment measures, the [Claimant's] medical issues will continue to be manageable and to improve her functionality such that she continues to work in her job or in a job that is better suited to her limitations. [10]

[20] The General Division concluded its consideration of the Claimant's treatment by stating:

> Her treatment remains conservative. She is reported to have found some of her treatments (physiotherapy, massage therapy and chiropractor) helpful but that she cannot afford these treatments. The Tribunal is aware that financial hardship is not relevant to a finding of disability. Furthermore, there are treatment options that the [Claimant] is yet to access which could further help her in managing her conditions.[11]

[21] The Claimant made a series of arguments alleging errors of fact and errors of law in the way the General Division analyzed the evidence about her treatment. After the Appeal Division raised the question in the decision on leave to appeal, the Claimant took the position that the General Division made an error of law by failing to apply the test in *Lalonde*. The test in *Lalonde* allows the General Division to find claimants ineligible for the disability pension when they have refused treatments unreasonably. The Claimant argued that each part of the test in *Lalonde* is important because the test requires the General Division to consider not just whether a treatment was refused but first whether that treatment was actually recommended and whether the refusal was reasonable. The Claimant argued that the General Division could not rely on Dr. Walley's report to show that the Claimant refused treatment because it was a document that tracked which

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[9] General Division decision, para 40.
[10] General Division decision, para 41.
[11] General Division decision, para 44.

treatments she tried but did not necessarily reflect a series of treatment recommendations that she refused.

[22] The Minister argued that it was clear from the analysis that the General Division understood and applied the legal tests. The Minister took the position that, even if the General Division did not cite the test in *Lalonde*, it does not mean that the General Division member failed to turn her mind to the question of the Claimant's efforts to reduce the impact of her disability through treatment. The Minister pointed out that the General Division is presumed to have considered all of the evidence in the case, even when it is not expressly set out in the decision.[12]

[23] The General Division made an error of law. The General Division discussed the Claimant's treatment at some length and relied on its conclusions about the Claimant's treatment in denying the disability pension without applying its findings to the legal principles from the Federal Court of Appeal.

[24] The General Division found that: (i) the Claimant's disability was manageable;[13] (ii) she might better manage her condition and improve her functionality with some additional treatments she had not yet tried;[14] and (iii) there were further treatment options that the Claimant had not accessed that could help in managing her conditions.[15] These findings about the Claimant's treatment led to the finding that she did not qualify for the disability pension.

[25] Those kinds of factual findings about the Claimant's treatment can be relied on in two ways. First, in accordance with the Federal Court of Appeal in *Klabouch v Canada*, the General Division can consider the Claimant's treatment to decide whether she met her obligation to show efforts to manage her medical conditions. Second, the General Division can consider the Claimant's treatment to determine whether she has unreasonably refused recommended treatment that would impact her disability status. This is the test from the Federal Court of Appeal in *Lalonde*.

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[12] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[13] General Division decision, para 37.
[14] General Division decision, para 41.
[15] General Division decision, para 44.

[26] The requirement that claimants show evidence of their efforts to manage medical conditions seems to be a low threshold. There is no specific requirement that the evidence be from a claimant's physician, although physicians often include this kind of information in their reports. There is no express requirement that the efforts be substantial, extensive, or otherwise exhaustive. In *Sharma*, the Federal Court of Appeal appears to agree with the way the Appeal Division referred to the test as "reasonable efforts" and a "reasonable explanation" for not following medical advice.[16] This is important because not all claimants who are incapable regularly of pursuing any substantially gainful occupation will have tried every treatment associated with their conditions more generally.

[27] The General Division can find that the Claimant is not eligible for the disability pension because she refused treatment. However, to reach that conclusion, the General Division must be satisfied that the treatment was actually recommended and that the refusal was unreasonable. It must also consider the impact the treatment was to have on the disability status.

[28] Each part of this test about refusing treatment is important and has meaning. If a claimant refuses a treatment, the General Division must first find that the treatment was actually recommended. As a result, evidence about the claimant's recommended treatments is more important than the "gold standard" or typical treatment for any given condition because the focus here is on **refusing** treatment. A plain reading of the test in *Lalonde* does not place an obligation on claimants to investigate further treatments that have not already been recommended by the claimant's treatment team.

[29] The General Division must satisfy itself that the claimant truly refused the recommended treatment. Attempting a treatment briefly that was not successful, for example, may not necessarily be a refusal. The General Division also must consider the impact of the recommended treatment on the disability status. This is important in light of the Adjudication Framework, which acknowledges that the goal of some treatments can be the cure of the medical condition, while the goal of others can be to help the claimant cope with the symptoms of their disability. Some treatments may fail, and some treatments may succeed but only help the claimant cope with a series of functional limitations that do not actually change. Considering the

[16] *Sharma v Canada (Attorney General)*, 2018 FCA 211, para 4.

impact the treatment was to have on the disability status is important so that claimants are not disentitled to the disability pension for refusing a treatment that was not expected to have an impact on their capacity for work.

[30] It is clear from the General Division's decision that determinations about the Claimant's treatment played a role in reaching the outcome, but the General Division did not apply the legal principles set out in the case law. If the General Division is going to make findings of fact about treatment, it must either be to inform the question as to whether the Claimant has made sufficient efforts to manage her medical condition or to inform the question of whether she has unreasonably refused recommended treatments that would have an impact on her capacity for work. Discussing and relying on the question of the Claimant's treatment so heavily without applying the legal principles provided by the Federal Court of Appeal on treatment is an error of law.

[31] The Claimant lost her appeal at the General Division at least in part because of the evidence on treatment, but it is not clear from the decision whether the General Division found that she did not make reasonable efforts to manage her medical conditions or if she unreasonably refused recommended treatment that would have impacted her disability status.

[32] The General Division did not necessarily have to cite the *Lalonde* decision to avoid error, but it seemed to rely on some of the factors in that test without providing an analysis of each one. The Minister is correct that the starting assumption is that the General Division considered all the evidence, but we cannot assume that it addressed all of the aspects of a test when the factors of that test are not set out. For example, it seems that the General Division put weight on the fact that Dr. Walley listed some treatments that the Claimant had not tried and it concluded that those treatments might have improved her functionality without any reference as to whether this was an unreasonable refusal of a recommended treatment or whether this was evidence that she did not make efforts to manage her condition (which, in *Sharma*, is called failing in the duty to mitigate). The General Division must apply the legal tests to the factual findings, and the General Division did not complete that task here.

[33] If the General Division properly applies the legal principles from the Federal Court of Appeal about treatment, there should be no need to quote from or consider the Minister's

submissions about the treatment of fibromyalgia generally. Part of the General Division's task is to consider whether the Claimant has shown efforts to manage her medical condition. Referring to the "gold standard" treatment for any particular disability puts the focus on the diagnosis itself, rather than the Claimant's specific experience of the disability. Claimants only need to show reasonable efforts to manage their conditions, and they cannot unreasonably refuse recommended treatments that would have an impact on their capacity for work. A list of treatments for a condition is not evidence that is highly relevant to either of these tests, which focus more on general efforts to manage conditions and specific instances in which physicians recommend treatments that the claimant refuses.

REMEDY

[34] The Appeal Division has several options to remedy errors in General Division decisions: for example, 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.[17] The Appeal Division has the ability to decide any question or fact or law before it.[18]

[35] The Appeal Division requested submissions about remedy at the oral hearing before it. The Claimant's counsel stated that her position on remedy might depend in part on the nature of the error. She stated that it may be that a second hearing at the General Division may be necessary if more evidence is then required to reach a decision.

[36] Counsel for the Minister noted that there were many years of disability pension at stake and that there is also a need for efficiency in the Tribunal's process. Counsel for the Minister suggested that if the Appeal Division found an error of law, the Appeal Division owed no deference to the General Division and the Appeal Division could substitute its decision, but if the error was an error of fact, the Appeal Division would need to return the matter to the General Division for reconsideration because, in accordance with the law, the General Division is the trier of fact.[19]

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[17] DESDA, s 59.
[18] DESDA, s 64.
[19] *Cameron v Canada (Attorney General)*, 2018 FCA 100; *Quadir v Canada (Attorney General*), 2018 FCA 21.

[37] The Appeal Division will give the decision the General Division should have given. Because the parties had the chance to file all of their evidence before the General Division, providing the decision that the General Division should have given is consistent with the *Social Security Tribunal Regulations* (SST Regulations), which require proceedings to be conducted as informally and quickly as the circumstances and the considerations of fairness and justice permit.[20] The Appeal Division's role is to determine whether there are errors under the DESDA and to remedy those errors if they exist.

[38] There is ample case law that supports the idea that when the Appeal Division is identifying errors, it is not reweighing evidence, it is only identifying whether there is an error under the DESDA.[21] However, there is no case law that clearly indicates that once the Appeal Division has identified an error of fact or an error of law, it cannot reweigh evidence in order to remedy that error. The Appeal Division's jurisdiction on remedy is set out in the DESDA provisions cited above, and those provisions do not carve out any exception for reweighing evidence.

[39] The General Division and the Appeal Division are two divisions of one tribunal, not a tribunal and a reviewing court. When the Appeal Division finds an error in the General Division's decision, and the parties have had their opportunity to present their evidence and make their submissions, it is most efficient for the Appeal Division to simply issue the decision the General Division should have made.

[40] The Claimant's counsel suggested that if the Appeal Division were to choose to substitute its decision, the parties should have the opportunity to give submissions to assist the Appeal Division. The SST Regulations allow for the parties to provide submissions 45 days after the leave to appeal is granted. The parties in this case had an opportunity to give submissions, and the Appeal Division has the benefit of the submissions the parties made at the General Division about the Claimant's eligibility for a disability pension under the CPP.

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[20] SST Regulations, s 3(1)(a).
[21] *O'Keefe v Canada (Attorney General)*, 2016 FC 503; *Marcia v Canada (Attorney General)*, 2016 FC 1367.

The Decision the General Division Should Have Given

Overview

[41] The Claimant has medical conditions that are documented in medical records. These medical conditions result in functional limitations that negatively impact the Claimant's employability and capacity for work. The Claimant has made efforts to manage her conditions and has not unreasonably refused treatment. The Claimant's work at the dollar store shows a capacity for work. It is certainly work that she has obtained and maintained, but it is not at a substantially gainful level, due to her health condition. The Claimant's medical evidence shows that she is incapable regularly of pursuing any substantially gainful occupation. As of July 2014, which was before the end of her MQP, the Claimant had a severe and prolonged disability within the meaning of the CPP, so she is entitled to a disability pension.

Serious documented medical conditions during the MQP

[42] A person who is incapable regularly of pursuing any substantially gainful occupation has a severe disability within the meaning of the CPP.[22] To qualify for a disability pension under the CPP, the Claimant must show that she has a severe and prolonged disability on or before December 31, 2015, the day her MQP ended.[23] The Claimant must show some medical evidence of her conditions.[24]

[43] The Claimant has fibromyalgia, rheumatoid arthritis, and IBS. Dr. Walley made it clear that the Claimant has those three conditions in a report dated October 21, 2014, which is within her MQP.[25] The Claimant also had mild degenerative disc disease, as documented by a report in February 2012; this was also within her MQP.[26] In 2006, Dr. Walley confirmed that the Claimant also experiences migraines.[27]

[22] CPP, s 42(2)(a).
[23] CPP, s 42(2)(a) for "severe and prolonged."
[24] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[25] GD2-17.
[26] GD2-104.
[27] GD2-308.

[44] The Claimant was first diagnosed with IBS and fibromyalgia in 2006. In fact, Dr. Walley recommended in July 2006 that she stop working at the full-time job she was doing at the time for family, noting that working would make the fibromyalgia worse in the long run.[28]

[45] The Claimant was first diagnosed with rheumatoid arthritis in 2013, sees a specialist for that condition three times a year, and treats it with prescription medication.[29]

[46] In 2012, the Claimant was referred to a rheumatologist, Dr. Alderdice, who acknowledged by way of background that she also had some depression that had been treated with medication for five years with improvement.[30]

Functional limitations

[47] When determining whether a claimant has a severe disability within the meaning of the CPP, it is not the diagnosis of the claimant's conditions that is important, but the impact of those conditions on the claimant's capacity to work that matters.[31] In determining the severity of a disability under the CPP, the Appeal Division must consider the impact of all of the medical conditions, not just the main disabling condition.[32]

[48] Dr. Walley has provided evidence about the Claimant's limitations as a result of her conditions, the limitations that may arise as side effects of her medications, and her limitations in her day-to-day activities. The Appeal Division accepts Dr. Walley's evidence as timely and relevant and puts considerable weight on his opinion. The Claimant is a long-time patient of Dr. Walley, and his reports are informative. Dr. Walley's evidence is also largely consistent with medical evidence from an occupational therapist that the Claimant saw from the Arthritis Society.

[49] By contrast, the Appeal Division puts less weight on the evidence from Dr. Alderdice, a rheumatologist who determined in May 2012 that the Claimant did not have rheumatoid arthritis.[33] Dr. Setty, another rheumatologist, diagnosed the Claimant with seropositive

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[28] GD2-249.
[29] GD2-103.
[30] GD2-112.
[31] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.
[32] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[33] GD2-200 to 201.

rheumatoid arthritis and then began treating her for this condition.[34] Dr. Setty's involvement is closer to the end of the MQP than Dr. Alderdice's participation in the Claimant's care.

[50] Dr. Setty's evidence was that "from a rheumatoid arthritis point of view," the Claimant was doing well in March 2014.[35] This may initially seem at odds with Dr. Walley's opinion about the Claimant's condition during the MQP and in 2014 specifically. However, Dr. Setty did also note symptomology including pain that he said was the result of osteoarthritis and degenerative disc disease. Dr. Setty's opinion that the Claimant did not have any significant joint pain or joint swelling must be considered in light of Dr. Walley's opinion about the significance of the pain she experiences from fibromyalgia, which he states is often "indecipherable from the pain she would have from the rheumatoid arthritis."[36]

[51] Furthermore, Dr. Setty's opinion about the Claimant's lack of joint pain and joint swelling in March 2014 must also be considered in light of the intermittent nature of rheumatoid arthritis, the symptoms of which can flare up. Dr. Setty's March 2014 opinion does not make it clear how often the Claimant was experiencing flare-ups, or for how long.

[52] Similarly, Dr. Lackner, an emergency room physician, saw the Claimant after the MQP in May 2016 to address on an urgent basis a series of symptoms that he concluded may have been a flare-up of her rheumatoid arthritis symptoms or her fibromyalgia.[37] The fact that Dr. Lackner concluded his note by stating that "at this point, things are slowly improving" is not evidence that the Claimant's permanent conditions were improving for good, but that the symptoms of the flare-up that necessitated the emergency room visit were slowly improving. He did not treat the Claimant on a regular basis, so it is difficult to know what his baseline for noting improvement was. Dr. Walley's opinion is more helpful to the Appeal Division on that issue.

[53] Dr. Walley has documented several groupings of symptoms that the Claimant experiences that most certainly impact her ability to work.[38] Dr. Walley is clear that the Claimant experiences generalized muscle pain, morning stiffness, tendonitis, and multiple joint and muscle

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[34] GD2-103.
[35] GD2-103.
[36] GD6-3.
[37] GD5-7.
[38] GD2-17, GD6-3.

pains. Dr. Walley states that she experiences diarrhea, abdominal pain, cramps, bloating, and constipation. She also experiences migraines, failing memory, and cognitive issues. Finally, Dr. Walley notes that the Claimant experiences profound tiredness, decreased energy and decreased strength, and memory and cognitive disorders. In a report dated January 17, 2017 (after the MQP), Dr. Walley explained that the profound tiredness experienced by those with fibromyalgia is

> not the usual tiredness that a normal person feels, but at times is more like exhaustion such as one would feel after running 10 miles. Of course it also produces multiple pains throughout her body but these are often indecipherable from the pain she would have from the rheumatoid arthritis. There is no known cure for this condition and it is permanent.[39]

[54] Dr. Walley states that the Claimant has problems with the cognitive aspects of all of her duties, as well as difficulty with heavy and light lifting, vacuuming, and housecleaning.[40]

[55] The report from the occupational therapist at the Arthritis Society states that the Claimant can sit for only 30 minutes, walk 15 to 30 minutes, stand for 10 to 15 minutes and that she has functional limitations that affect her ability to drive, cook, and prepare meals. She has pain that she testified is “piercing” in her hands, wrists, ankles, lower and upper back, elbows, and hips. She testified that she experiences this pain all over, but when it flares up, the pain may be intensified on one side of her body. She described the pain associated with her fibromyalgia as feeling heavy and aching. She does not sleep well, and she also testified that her sleep can be all over the map. She naps during the day.[41] The Claimant testified that she takes medication for pain and that it helps the pain, calming it down a little bit, but does not take it away. The Claimant stated in her medical questionnaire that her migraines occur twice a week.[42]

[56] Taken together, the medical evidence and the Claimant’s own evidence in the record show significant limitation that negatively impacts her capacity to work. Pain, fatigue, and the symptoms related to the Claimant’s digestion cumulatively pose a significant barrier to her capacity to work.

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[39] GD6-3.
[40] GD2-18.
[41] GD2-19.
[42] GD2-115.

[57] The Appeal Division must consider both the personal characteristics of the claimant and the duty to mitigate (efforts to manage the medical conditions). If either aspect fails, the claimant has not established a severe disability within the meaning of the CPP.[43]

[58] Some of the Claimant's personal circumstances also create barriers to her capacity to work. Although she was only 44 years old when she applied for CPP disability benefits and English is her first language, the Appeal Division is mindful of the fact that the Claimant did not graduate from high school; she has a Grade 11 education. The Claimant's employment history includes factory work, janitorial work, customer service and office work (for her ex-husband), and work in a retail setting. The Claimant's age and proficiency in English favour retraining, but her functional limitations and the limited nature of her employment history are insurmountable barriers for her.

Reasonable efforts to manage her conditions

[59] The Claimant must show efforts to manage her conditions in order to qualify for a CPP disability pension.[44]

[60] The Appeal Division finds that the Claimant has made reasonable efforts to manage her conditions. The Claimant gave evidence at the General Division about how she manages her conditions, including the medical treatment she receives. The Claimant's evidence was direct and compelling. The Claimant did not appear to be prone to exaggeration, focussing instead on providing concrete examples of how her conditions have impacted various aspects of her life, including her ability to work.

[61] The Claimant gave evidence about the ways she manages her condition outside of formal medical treatment. She demonstrated a pattern of attempting to manage her symptoms for years, beginning as early as 2006, when she stopped working in retail on the advice of her physician and began working for her then-husband in an office setting.

[62] The Claimant testified about limiting her physical activity like lifting, including at the dollar store where she began working in 2001; accepting help with activities of daily living,

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[43] *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[44] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.

including with tasks like opening jars and the help she sometimes requires getting out of the bath tub; and napping during the day when necessary, due to interrupted sleep patterns.

[63] She testified that she takes steps to try to avoid migraines, including drinking lots of water and trying to avoid stress and other triggers. When she has migraines, she says she has tried treating them with acupressure and a cold rice bag for relief. The Claimant referenced her efforts to manage her IBS though diet.[45] The Claimant stated that she tried seeing a chiropractor in 2013 and that at some point she also tried massage, but could not continue because she could not afford it.

[64] In October 2014, the Claimant acknowledged that she was doing less swimming and walking than she used to,[46] but Dr. Siricha (a family physician who sees Dr. Walley's patients on an as-needed basis) noted in his medical report dated August 2014 that she was taking her medications and engaging in physical therapies, including a swimming program, but there was minimal improvement in her symptoms.[47]

[65] In terms of medical treatment, Dr. Walley noted that the Claimant takes prescription medications for her rheumatoid arthritis, fibromyalgia, and IBS. Dr. Walley noted that these medications involve a list of possible side effects, including dry mouth, sedation, fine tremor, mental sluggishness, epigastric discomfort and the possibility of bone marrow suppression and alteration of liver and kidney results.[48] The Claimant's compliance with medications is particularly noteworthy given Dr. Walley's observation that some of the side effects of the medications can overlap with the symptoms of some of her other conditions.

[66] The Claimant testified that she tries not to take sleep medication, but she does take it if she needs it. The Claimant testified that she had to stop taking one of her medications in 2015 because she developed really bad stomach problems. The Claimant stated that she has taken medication for depression since 1999, although she still feels down and avoids associating with people, answering the phone, and going out, which is why she tries to stay engaged in the

[45] GD2-118.
[46] GD2-117.
[47] GD2-98.
[48] GD2-17.

community through her limited work at the dollar store. The Claimant testified that she saw counsellors at the hospital for depression in 2013 and 2014.

[67] In May 2012, Dr. Alderdice recommended that the Claimant try an arthritis self-management program, and the Claimant's evidence was that she did participate in that program and followed the advice she received in that program. The Claimant's counsel referred to this program as one that focuses on coping mechanisms.

[68] Dr. Alderdice also stated that the Claimant should "consider some kind of exercise program."[49] The Claimant gave evidence about exercise: in addition to her evidence about swimming and walking, she stated she did gentle exercises, but her condition worsened and she stopped. She gave evidence about trying stretches. Assuming that Dr. Alderdice's statement about **considering** some kind of exercise program was a formal treatment recommendation, the Appeal Division finds that the Claimant tried and stopped and that this does not constitute refusing treatment. If the Appeal Division is incorrect about this and this constitutes refusing treatment, that refusal is reasonable because the Claimant did not benefit from her attempts. Consistent with her testimony, there is evidence from after the MQP that shows that when the Claimant pushed herself physically, she experienced a flare-up of symptoms and went to the emergency department at the hospital.[50]

[69] Dr. Siricha observed that the Claimant's condition was not improving despite the swimming and physical therapy, so the extent to which the exercise Dr. Alderdice recommended would change her disability status is questionable at best. The Claimant's attempts at exercise were part of her efforts to manage her disability and are not the basis for any analysis about refusing recommended treatment that would have an impact on her disability status.

[70] The Claimant confirmed that she takes medication for her rheumatoid arthritis and that it "calms" that pain down "a little" but does not take it away. Dr. Walley explains that this medication, Plaquenil, is an autoimmune modulator that is designed to try to "switch off the

[49] GD2-21.
[50] GD5-6 to 7.

body's attack on her tissues. This [*sic*] is under the mistaken belief by her immune system that her joints and joint membranes are no longer part of her body."[51]

[71] The Appeal Division finds that the note from Dr. Walley from June 2016[52] (after the MQP) contains a summary of some of the treatments that the Claimant has tried. It cannot form the basis of any analysis about whether the Claimant unreasonably refused any recommended treatments because it is not a list of recommended treatments. The note includes a heading called "Prior Treatments" that the Appeal Division finds is a descriptive section that lists a series of treatments, but the Appeal Division does not find that Dr. Walley recommended each of these treatments. This document appears to have been more of an information-gathering exercise by Dr. Walley rather than a list of treatments he recommended for the Claimant specifically.

[72] This list from Dr. Walley's notes includes a reference to Tylenol, which the Claimant did not take. The fact that Tylenol is referenced in this list does not mean it was recommended to the Claimant—Tylenol would be a strange recommendation for Dr. Walley to make, given that the Claimant was already prescribed medications for pain and mental health diagnoses, including Gabapentin, Cipralex, and Trazodone. Similarly, the list includes a reference to the fact that the Claimant was not taking nonsteroidal anti-inflammatories (NSAIDS). The fact that NSAIDs are on this list does not mean they were recommended to the Claimant. NSAIDs include Aspirin and ibuprofen, and the Claimant was already taking prescription-strength medications for pain. There is evidence in the record that the Claimant was advised to "continue to avoid NSAIDs" at the emergency department.[53]

[73] Dr. Lackner noted that he "strongly encouraged" the Claimant to cut back smoking and alcohol use.[54] He noted the Claimant smoked six to eight cigarettes a day and drank alcohol "infrequently."[55]

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[51] GD6-3.
[52] GD5-3.
[53] GD5-7.
[54] GD5-7.
[55] GD5-6.

[74] There are references in other parts of the Claimant's medical file to the "very occasional" drink[56] or the occasional intake of alcohol.[57] It appears that the Claimant discussed quitting smoking in 2012 but did not follow through.[58]

[75] The Appeal Division acknowledges that smoking is, of course, harmful to health and that cessation is widely recommended by physicians as part of a healthy lifestyle. However, there is no express evidence in the medical file that the Claimant's failure to stop smoking was a failure to manage her particular medical conditions or that Dr. Lackner was making that suggestion as a treatment recommendation for her conditions. There is no information that there would be an impact on her disability status such that the Appeal Division would need to consider whether the Claimant has unreasonably refused treatment by failing to quit smoking or abstaining from alcohol all together. The Appeal Division is satisfied that the Claimant has made reasonable efforts to manage her conditions, but she has not met a standard of perfection in that regard.

Capacity to work at a substantially gainful level

[76] Where there is evidence of capacity for work, the Claimant must show that efforts to obtain and maintain employment were unsuccessful by reason of the Claimant's health condition.[59]

[77] In 2012, the Claimant's unadjusted pensionable earnings were $17,500.[60] As of November 2014, the Claimant works two to three shifts a week at the dollar store. According to her testimony, the shifts are four hours long, she has no back-to-back shifts, she is accommodated with light duties, and she can rearrange her shifts depending on her condition. This is evidence of capacity to work but, based on the Claimant's Record of Earnings on file, her earnings have not been substantially gainful. In accordance with *Inclima*, the question is whether the Claimant made efforts to obtain and maintain substantially gainful employment but was unsuccessful because of her health condition.

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[56] GD2-177.
[57] GD2-102.
[58] GD2-217.
[59] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[60] GD2-60. 2013 is not listed in this Record of Earnings document, likely because the Claimant did not file a tax return that year.

[78] The *Canada Pension Plan Regulations* (CPP Regulations) provide a definition for the phrase "substantially gainful" as it exists in the CPP Regulations definition for a severe disability.[61] In 2014, her earnings were below the year's basic exemption, and in 2015 her unadjusted pensionable earnings were only $10,545.[62] The Claimant receives benefits from the Ontario Disability Support Program (ODSP). The Claimant's testimony was that she works at the dollar store because it helps with her depression. She testified that she would work more if she could, but activity makes her pain worse, and she is very sore after her shifts. She has a residual capacity to work in the sense that she works some hours and has some earnings. However, that work is not substantially gainful in accordance with the CPP Regulations: the maximum amount a person could receive as a disability pension in 2014 was $14,836.20 and in 2015 was over $15,175.08.

[79] The Appeal Division accepts the unchallenged testimony from the Claimant about how she manages to work these minimal hours in an accommodated position. She has the ability to cancel shifts when she experiences a flare-up of her fibromyalgia symptoms or her arthritis. She receives accommodations at work, including accommodations to address her physical restrictions, which mean she cannot lift, and her cognitive challenges, such as forgetting codes.

[80] The Claimant has established that although her efforts at obtaining and maintaining employment have succeeded in the sense that she works at the dollar store, she is not able to obtain or maintain work at a substantially gainful level due to her health condition. The Appeal Division accepts the Claimant's testimony on this point. When she was asked about whether she had tried longer or more shifts, the Claimant said that she had but added that if she pushes too hard, she gets very sick. She was clear that she would work more if she could. The Appeal Division accepts the Claimant's evidence in this regard. Her testimony was direct and compelling. The Claimant has made efforts to increase the number of hours she works in the job where she is already accommodated, but those efforts were not successful and her evidence was that her health deteriorated.

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[61] CPP Regulations, s 68.1(1).
[62] GD7.

[81] The part-time hours that the Claimant currently works are below the substantially gainful level, so the remaining question is whether she is capable regularly of working in any substantially gainful occupation. The answer is no.

[82] The Claimant works minimal hours that are not substantially gainful, and the Appeal Division finds that she is incapable regularly of pursuing any substantially gainful occupation. She works short shifts at a dollar store two to three times a week with no back-to-back shifts and has the ability to rearrange her shifts depending on her conditions. She is often tired after a shift and requests rest. She performs light duties in a retail setting and has cognitive challenges and fatigue that has a significant impact on her capacity for work. The Claimant testified and the Appeal Division accepts that she experiences flare-ups of pain that can last from three days to two weeks.

[83] Although her physical limitations in terms of sitting, standing, and walking might suggest that she could handle a job that is more sedentary in nature than her current position at the dollar store, her limitations in terms of her profound tiredness, memory loss, and cognitive function mean that she is incapable regularly of even sedentary employment because even her effort to increase her hours and shifts in the accommodated position at the dollar store was not successful. The Appeal Division finds that the Claimant cannot work enough hours in a day or a week to reach the substantially gainful threshold. In addition, the limitations on her sitting would also make it difficult to handle sedentary work. She has no recent experience in an office environment outside of working for family.

The Claimant's condition is severe

[84] The Appeal Division finds that the Claimant became incapable regularly of pursuing any substantially gainful occupation in July 2014. Her medical conditions and personal circumstances show significant limitations that impact her ability to work. Her work at the dollar store in 2014 was not substantially gainful, and the Claimant was working at her maximum capacity. The Appeal Division relies on Dr. Walley's evidence that that the Claimant has "been unable to work a full-time job since July 2014."[63] This appears to have been in response to a

[63] GD2-17.

question put to him for a report that was produced in support of the Claimant's successful appeal for ODSP.

The Claimant's condition is prolonged

[85] To qualify for a disability pension under the CPP, claimants must have a severe and prolonged disability. A disability is prolonged within the meaning of the CPP if it is likely to be long continued and of indefinite duration or likely to result in death.[64]

[86] The Claimant's disability is prolonged within the meaning of the CPP. Her conditions are long-continued. By the end of the MQP, the Claimant had been living with diagnosed IBS and fibromyalgia for almost a decade. Dr. Walley explains that there is no known cure for rheumatoid disease, IBS, and fibromyalgia, and that these conditions are permanent.[65]

[87] However, in October 2015, when Dr. Walley contacted the Claimant's specialists about whether she might ever return to work, he was clear that she could not work full-time as of July 2014.[66] Dr. Sirachi states that the Claimant's prognosis is "likely to be prolonged and with no likelihood of significant improvement in her underlying conditions."[67] The medical evidence shows that the Claimant's conditions are long-continued and of indefinite duration.

CONCLUSION

[88] The appeal is allowed.

[89] The Claimant met the criteria for a severe and prolonged disability in accordance with the CPP requirements in July 2014. Payment of the CPP disability pension begins four months after the Claimant met the criteria, so payment begins as of November 2014.

Kate Sellar
Member, Appeal Division

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[64] CPP, s 42(2)(a)(ii).
[65] GD6-3.
[66] GD2-17.
[67] GD2-108.

METHOD OF PROCEEDING:	Teleconference hearing June 26, 2018
APPEARANCES:	T. M., Appellant Seana Moorhead, Representative for the Appellant Penny Brady and Laura Dailoo, Representative for the Respondent