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

Citation: *M. T. v Minister of Employment and Social Development*, 2019 SST 53

Tribunal File Number: AD-18-541

BETWEEN:

M. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 25, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, M. T., is a high school graduate who has training as a X. He is now 34 years old. In August 2013, he was involved in an all-terrain vehicle (ATV) accident, in which he sustained a compression fracture to his thoracic spine. At the time, he was working as a X at a X. He underwent a spinal fusion, followed by traction and many months of physiotherapy. He has not worked since and continues to report pain in his back, neck, shoulders, and left knee.

[3] In November 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 his disability was not "severe and prolonged," as defined by the CPP, during the minimum qualifying period (MQP), which ended on December 31, 2015. The Minister acknowledged that the Appellant experienced back pain, among other medical conditions, but it found that they 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 teleconference and, in a decision dated May 29, 2018, dismissed the appeal because it found, on balance, that the Appellant was capable of substantially gainful work as of the MQP.

[5] On August 24, 2018, the Appellant requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division:

(i) mischaracterized Dr. Robert Simpson's opinion about the Appellant's capacity to work;

(ii) misinterpreted the conclusions of the functional assessment and vocational evaluation reports; and

(iii) erred when it found that the Appellant had failed to look for suitable work.

[6] In a decision dated September 19, 2018, I granted leave to appeal because, although I did not see an arguable case for the first of these submissions, I did for the second and third.

[7] I called a hearing by teleconference because the format respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness, and natural justice permit. Having reviewed the parties' oral and written submissions, I have concluded that neither of the Appellant's remaining submissions have sufficient merit to justify overturning the General Division's decision.

ISSUES

[8] According to section 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.

[9] I must decide the following questions:

Issue 1: Did the General Division mischaracterize the results of the functional assessment and vocational evaluation?

Issue 2: Did the General Division err when it found that the Appellant had failed to look for suitable work?

ANALYSIS

[10] In *Canada v Huruglica*,[1] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance when determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent."

[1] *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[11] Applying this approach to the DESDA, one notes that sections 58(1)(a) and (b) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of section 58(1)(c) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 1: Did the General Division mischaracterize the results of the functional assessment and vocational evaluation?

[12] The Appellant alleges that the General Division distorted the essential meaning of two reports commissioned by his legal representative. He accuses the General Division of selectively relying on findings that suggested he might be capable of work while ignoring findings that indicated otherwise.

[13] Having reviewed the General Division's decision against the record, I agree with the Appellant that the presiding member mischaracterized the reports in question. The General Division is owed deference in its role as trier of fact, but not if it disregards material information. Likewise, the General Division cannot be expected to address every fact and conclusion in every report on file but, at the same time, it cannot pick and choose findings out of context. In this case, the General Division focused on the fact that the functional assessment[2] and vocational evaluation[3] did not completely bar the Appellant from future employment, but it ignored what the authors of those reports identified as daunting obstacles to his returning to even light work.

[14] The reports in question analyzed the Appellant's capabilities in the context of his injuries, his background, his aptitudes, and the demands of the labour market. I acknowledge that the General Division considered the reports and, indeed, summarized them in its decision; however,

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[2] KEY Method Whole Body Functional Assessment Report by Evangelica F. Reyes-Viray, occupational therapist, dated September 12, 2017, GD6-43.

[3] Vocational Evaluation Report by Allan Mills, vocational evaluator, dated November 3, 2017, GD6-74.

although they did not contain any inaccuracies per se, the General Division's summaries were notable, not for what they included, but for what they left out. In paragraph 26 of its decision, the General Division described the functional assessment as follows:

> [The occupational therapist] concluded the Appellant's current work day tolerance was three to four hours. She reported, based on the Appellant's functional abilities, his capacity is classified as limited. She noted the Appellant may benefit from the guidance of a vocational specialist exploring realistic/viable vocational options compatible with his physical abilities and tolerances. Ms. Reyes-Viray noted the Appellant, when asked his vocational goal, noted he likes doing mechanical work, but does not know if this is realistic given his ongoing physical limitations from his accident. She noted the Appellant expressed a willingness to work with a vocational specialist if that will help direct him to career options that are more suitable.

[15] The General Division did not mention that the Appellant's three to four hours of work were non-consecutive:

> [The Appellant's] current workday tolerance is determined to be 3-4 hours. Within these hours, the [Appellant] is capable of sitting for 3-4 hours for up to 30 minutes in duration, standing for 1 hour for up to 10 minutes in duration, and walking for 1-2 hours for short to moderate distances
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> […]
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> The numbers above indicate total hours in a workday, not consecutive hours.[4]

[16] In paragraph 27 of its decision, the General Division described the vocational evaluation:

> In his report dated November 3, 2017, Mr. Mills referenced various documents reviewed as part of his evaluation. He noted a Functional Abilities Evaluation by Ms. Berton, physiotherapist, dated April 14, 2015, concluded the Appellant **did not suffer an inability to perform the essential tasks of his pre-accident employment** as a result of the accident subject to various noted physical restrictions. Mr. Mills referred to various other assessments which indicated the Appellant is likely precluded from returning to work as a millwright. He did not conclude the Appellant is precluded from sedentary or light duty type work, or retraining. Mr. Mills' report contained various recommendations to enhance the Appellant's return to work. He noted

[4] GD6-49.

> the Appellant was open and interested in pursuing sedentary work. He recommended an occupational therapist conduct an ergonomic assessment to determine what may be required in order to enhance his tolerances and postures while in school. He recommended job search training be provided after the Appellant graduates from college or university, as he will be looking for jobs in different occupations than he had worked at prior to his injury. [emphasis added]

[17] This passage appears to misstate the conclusion of the Berton functional abilities evaluation.[5] As relayed by the vocational evaluation, Ms. Berton actually concluded that the Appellant **did** "suffer an inability to perform essential tasks of his Pre-accident employment as a result of the motor vehicle accident." Moreover, while the vocational evaluation did contemplate the Appellant returning to work, the General Division omitted the numerous conditions and qualifiers that were attached to that prospect:

> As it stands, [the Appellant] is at a very high level of competitive disadvantage. Although he might be able to transition to the position of a [X], this job requires constant standing. As such, part-time is likely his tolerance. Additionally, his income potential as a [X] is for about $13 per hour. Even as a [X], he would benefit from some computer skills training in order to compete. If [the Appellant] is provided with no support, his income potential is for minimum wage entry-level work. In my opinion, it is not appropriate at this time to recommend or identify any long-range jobs. His interest test results are varied and employment counselling is required to advance a career goal. When we consider his age, remote location, poor physical tolerances, home-life responsibilities, limited experience in anything beyond labour and mechanical work, as well as his limited computer skills, it is this author's opinion that the chances of [the Appellant] succeeding with a lengthy college program is very guarded.[6]

[18] When it came time to actually analyze the evidence, the General Division quickly dispatched the two reports as follows:

> A Functional Assessment completed by an occupational therapist and a Vocational Evaluation completed by a vocational specialist, both completed more than one year after the Appellant's MQP, concluded the Appellant was precluded from physically demanding work such as that of

[5] The report itself was not included in the record.
[6] GD6-98.

> a millwright, but did not preclude sedentary or light duty type work, retraining, or educational upgrading.[7]

[19] In reality, the functional assessment and vocational evaluation told a different, and more complicated, story. They identified numerous barriers to the Appellant's participation in the labour market—not just his physical restrictions but also his low aptitude for retraining in clerical or supervisory positions. While the General Division correctly found that the two reports held out the possibility of light work, it neglected to mention that they had framed such a possibility in, at best, theoretical terms. In failing to come to terms with the complete picture conveyed by these reports, the General Division based its decision on an erroneous finding of fact without regard for the material before it.

Issue 2: Did the General Division err when it found that the Appellant had failed to look for suitable work?

[20] The Appellant alleges that the General Division erred in paragraph 41 of its decision, when it wrote:

> The [Appellant] has not looked for work not precluded by his functional limitations, or attended any educational upgrading or retraining program since his injury in August 2013. He has not shown that effort at obtaining and maintaining employment has been unsuccessful by reason of his health condition.

[21] In paragraph 43, the General Division added:

> […] The Tribunal determined the conservative nature of the Appellant's treatment contemporaneous to his MQP, being essentially medication, massage and aqua therapy, and home exercises, the absence of any referral for treatment or evaluation by specialists since January 2016, the failure of the Appellant to look for work not precluded by his functional limitations, the reports of the Appellant's treatment providers suggesting the Appellant look at employment options not precluded by his functional limitations, and/or retraining determined by the Tribunal as evidence of work capacity contemporaneous to the Appellant's MQP, and the absence of evidence that obtaining and maintaining employment has been unsuccessful by reason of the Appellant's health condition, led to the conclusion the Appellant did not have a severe disability on or before his MQP of December 31, 2015.

[7] General Division decision, para 37.

The above passage is difficult to parse, but it is clear enough that the General Division drew an adverse inference from what it found was the Appellant's failure to mitigate his injuries and try to remain in the workforce.

[22] The Appellant insists that the General Division made these findings against evidence that he had taken all reasonable steps to re-enter the labour market. He points to correspondence from the X dated May 30, 2017,[8] as proof that he did, in fact, seek work within his restrictions. Having reviewed the documentary record, as well as the audio recording of the General Division's May 2018 teleconference, I am compelled to disagree.

[23] In drawing a negative inference from the Appellant's supposed lack of effort to seek alternative employment, the General Division was rightly guided by *Inclima v Canada*,[9] in which the Federal Court of Appeal imposed on Canada Pension Plan disability claimants a duty to mitigate their impairments:

> […] an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

Every word in this passage carries significance. First, only when there is **some** work capacity (as opposed to none at all) is a tribunal obligated to investigate whether an applicant has taken steps to find work that is suitable to their condition. In this case, the General Division established that the Appellant had residual capacity after conducting an analysis of the severity of his impairments in the context of his background and personal characteristics, as required by *Villani v Canada*.[10]

[24] Second, it is insufficient to show efforts at obtaining employment; a claimant must also show efforts at **maintaining** employment. The latter suggests that a claimant must not merely look for alternative work, but actually secure a job and give it a fair try. As the Minister notes,

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[8] See GD6-25.
[9] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[10] *Villani v Canada (Attorney General)*, 2001 FCA 248.

the Federal Court has signaled[11] that attempting a job for a few days would qualify as a "failed attempt" to return to work—one that would satisfy the *Inclima* requirement, without going so far as to indicate capacity. This approach, it seems to me, is also consistent with the language used in section 42(2)(a) of the CPP, which defines a severe disability as one that renders a person incapable regularly of "pursuing" any substantially gainful occupation. Use of the verb "pursue," rather than alternatives such as "seek, "search," or "investigate," suggests that any attempt to resume employment must be active, engaged, and goal-oriented.

[25] Here, the Appellant testified that, in March 2016, he briefly attempted to work in a X owned by his brother's friend, but it was beyond his physical capacity, and he stopped after a day.[12] He visited an employment centre the following year, he said, but staff could not identify any suitable work options. He said that he had had not attended any retraining or educational upgrading programs, because he did not believe he could attend classes regularly.[13] The Appellant's account was supported by a letter, dated May 30, 2017, by L. L. of X.[14] She said that an employment counsellor had seen the Appellant on April 6, 2017, and on three later occasions to identify potential employment and retraining options. Citing the "significant medical restrictions identified by Dr. Dang," L. L. confirmed that her office had been unable to offer assistance to the Appellant.

[26] In my view, the General Division accurately and fairly summarized the evidence on this issue. The audio recording indicates that the Appellant was questioned at length on his efforts to return to work. His testimony was clear: he had not actually tried alternative work, other than a short-lived physical job similar to the kind he had previously held, and his efforts to re-enter the labour market had gone no further than discussing potential jobs with an employment counsellor. In expressing pessimism about the Appellant's employment prospects, L. L. deferred to expert opinion, but I cannot help but note that Dr. Dang recommended only that his patient avoid manual labour and that neither of his neurological reports[15] ruled out light or sedentary work.

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[11] *Monk v Canada (Attorney General)*, 2010 FC 48.
[12] Recording of hearing at 39:40.
[13] Recording of hearing at 41:00.
[14] GD6-25.
[15] Reports by Dr. Tommy Dang dated March 19, 2014 (GD4-94), and October 29, 2015 (GD2-65).

[27] As we have seen, simply searching for work does not meet the obligation under *Inclima*. The evidence on file shows that the Appellant merely looked into other types of jobs, which fell far short of the required "efforts at obtaining and maintaining employment." I see no erroneous finding of fact underpinning the General Division's application of *Inclima*.

REMEDY

Is the record complete?

[28] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 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 section 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.

[29] 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 more than three years ago. If this matter were referred back to the General Division, it would lead only 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.

[30] In oral submissions, both parties agreed that, if the General Division committed an error, the existing record was sufficiently complete to permit me to give the decision that the General Division should have given. I agree. The Appellant took full advantage of his opportunity to submit evidence to the Tribunal. I have access to numerous reports documenting the Appellant's recent medical history. I have considerable information about his employment and earnings history. I have listened to the recording of the hearing of May 24, 2018, in which the Appellant answered questions about his impairments and their effect on his work capacity. I doubt that the Appellant's evidence would be materially different if this matter were reheard.

[31] Of course, the parties had different views on the merits of the Appellant's disability claim. The Appellant argued that, if the General Division had given due consideration to the

Reyes-Viray functional assessment and Mills vocational evaluation, it would have concluded that the he was disabled and ordered a different outcome. The Minister argued that, whatever errors the General Division may have made, the balance of the available evidence still pointed to a finding that the Appellant was capable of some form of employment.

[32] To be found disabled under the CPP, 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?

[33] To establish an MQP after 1998, the CPP requires a disability claimant with less than 25 years of reported earnings to show valid contributions in at least four of six calendar years. The Appellant last had four years of valid contributions over a six-year period from 2010 to 2013 inclusively.[16] I therefore find that the Appellant's MQP ended on December 31, 2015. For him to qualify for the Canada Pension Plan disability pension, the evidence would have to show that he became disabled before 2016 and has remained so ever since.

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

[34] Having reviewed the record, I am not convinced, on balance, that the Appellant had a severe disability as of the MQP. There is no doubt that the Appellant sustained serious injuries in his August 2013 ATV accident, most prominently a T5 compression fracture to his thoracic spine, which required a surgical fusion, followed by physiotherapy.[17] The evidence consistently indicates that his injuries prevent him from returning to the kind of physically demanding work he used to do as a X, but I do not see compelling evidence—even when I take into account the Reyes-Viray functional assessment and the Mills vocational evaluation—that the Appellant is incapacitated from lighter employment. Like the General Division, I also place great weight on the Appellant's failure to pursue alternative work that might have been suited to his limitations.

[16] Record of Earnings and Contributions, GD2-4.
[17] Discharge summary by Dr. Dang, August 20, 2013, GD2-78.

Does the Appellant have residual capacity?

[35] As discussed, *Inclima* obliges claimants to demonstrate their disability by showing that they attempted and failed to remain in the productive workforce. In order to invoke *Inclima*, a decision-maker must first determine whether the claimant had the residual capacity to make such efforts.

[36] While there is no doubt that the Appellant can no longer perform a physically demanding job, I see indications that he had at least the residual capacity to seek alternative work during the MQP. In coming to this conclusion, I was influenced by the following items of evidence:

- In the questionnaire that accompanied his Canada Pension Plan disability application dated November 6, 2015,[18] the Appellant wrote that he could sit, stand, and walk for up to 50 minutes.
- In a report dated December 27, 2015,[19] Dr. Robert Simpson, the Appellant's family physician, reported that his patient experienced increased pain after sitting or standing for more than an hour. He declared the Appellant unable to do any physical work.
- In various office notes from 2014 and 2015,[20] Dr. Simpson encouraged or endorsed the Appellant's return to work or retraining. On August 25, 2016, Dr. Simpson relayed that the Appellant was "[s]till having some mid back pain at times."[21]
- In a letter dated December 2, 2014,[22] Joe Grossi, a physiotherapist, wrote that, while the Appellant would not likely return to his previous level of employment as a millwright, he would benefit from discussing "other career options and possible retraining with the appropriate professionals."

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[18] GD2-80.
[19] GD2-57.
[20] See, for example, office notes dated July 9, 2014 (GD4-38), June 17, 2015 (GD4-19), and September 16, 2015 (GD4-16).
[21] GD4-2.
[22] GD4-71.

- In a letter dated October 5, 2015,[23] Dr. Patrick Charron, an orthopedic specialist, wrote that the Appellant reported pain in his upper back, extending from the top to bottom of his shoulder blades, "characterized as a tight and stabbing and pressure and achy sensation." The Appellant also reported that the achy sensation was constantly present, although the stabbing component was getting better. The pain, he said, felt worse when walking and standing rather than sitting.
- In his progress report dated October 29, 2015, two months before the end of the MQP,[24] Dr. Dang reported that the Appellant rated his back pain as 5 on a scale of 1 to 10 and stated his pain was aggravated by prolonged sitting, standing, or walking. Dr. Dang advised the Appellant to undergo core-strengthening exercises and warned him against bending, twisting, or lifting any weight greater than 15 to 20 pounds.
- At the hearing before the General Division, the Appellant testified that he could sit or stand for up to 20 minutes at a time, stating, "If I do push it, the pain and swelling does increase."[25]

[37] The most compelling evidence in the Appellant's favour were the reports that emerged from the Reyes-Viray functional assessment and the Mills vocational evaluation, but even they conveyed an ambiguous message about the Appellant's sitting tolerance. The functional assessment indicated that the Appellant could sit for three to four non-consecutive hours, and observed testing indicated some degree of functionality where he was given the opportunity to get up periodically and stretch:

> During the initial hour of the assessment, [the Appellant] was observed to sit continuously for 48 minutes on a regular padded chair after which time he stood up to stretch; client reported feeling aggravated in the mid-back. After standing for approximately 6 minutes, client sat down. Client also reported feeling sore in the neck (stretching of the neck observed). Client worked for another 16 minutes before standing up to stretch; client sat down after standing for a minute. Client sat for another 5 minutes before standing up again to stretch. Client demonstrated this behaviour (sit-stand-sit) throughout the sitting portion of the task. Client reported

[23] GD2-69.
[24] GD2-65.
[25] Recording of hearing at 24:50.

> that prolonged sitting is aggravating to his neck and mid-back so he needs to change his position frequently or stand up to stretch/pace. Client did say that while he could only tolerate short periods of standing, it still helps to stretch and pace around.[26]

Following this performance, Ms. Reyes-Viray did not rule out work, concluding that the Appellant might "benefit from intervention by a vocational specialist by way of providing professional guidance to the client toward exploring realistic/viable vocational options that are more compatible with his physical abilities and tolerances."[27]

[38] Mr. Mills, the vocational evaluator, found that the Appellant was at a competitive disadvantage for jobs based solely on his transferrable skills: "If the goal is to identify jobs commensurate with [the Appellant's] pre-injury status, remuneration and nature of his work, there is nothing in the jobs that have been identified by the IE [insurer examination] Vocational Evaluator that are commensurate."[28]

[39] However, disability under the CPP is not defined by an inability to perform jobs commensurate with a claimant's pre-injury status, but by an inability to perform any substantially gainful occupation. Although Mr. Mills seemed to think there was scope for the Appellant to perform what he termed "elemental" sales and service occupations, such as a toll booth attendant or ticket taker, he removed them from consideration:

> These jobs are well known to be less abundant in the labor market. No postings could be found in the reporting period. As well, the income potential for any of these occupations is minimum wage with little opportunity to advancement beyond that level. This occupation [*sic*] should never have been identified for [the Appellant], as they are not well distributed in the labour market and pay only minimum wage.[29]

However, when assessing Canada Pension Plan disability claims, it is irrelevant whether an alternative occupation offers little opportunity for advancement or whether it is not widely available in the claimant's home region. Furthermore, a Canada Pension Plan disability claimant cannot disdain a potential job simply because it pays minimum wage.

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[26] GD6-53.
[27] GD6-47.
[28] GD6-97.
[29] GD6-96.

[40] Mr. Mills found that, if the Appellant were to attain his "income potential" of $30 or more, he would have to undergo retraining. This, in his view, was within the realm of possibility, although the Appellant's "very weak" tolerances for static sitting would be a barrier to retraining:

> […] it is recommended that he enroll at the schools' services for students with disabilities centre in order to secure proper accommodations. There, it would behoove him to obtain access to a note taker so that he can take breaks while in the classroom. He would require extra time to write tests and access to a quiet room to pace while writing tests. The client would also benefit from reducing his course load to part-time.
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> […]
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> All told this author is of the opinion that [the Appellant], though open and interested in pursuing more sedentary work, would still require ergonomic concessions in the workplace and at school.

[41] At the hearing, the Appellant suggested that sedentary work was beyond his physical capabilities, but there is limited support for this in the record. The Appellant can sit for more than 30 minutes—possibly much longer if he is provided the flexibility to rest, change positions, or stand up and walk. None of the Appellant's other conditions, either by themselves or in combination with others, indicated a severe disability: the Appellant testified that he had not seen a psychiatrist or other mental health specialist before the end of the MQP.[30] The Appellant is a high school graduate and was only 31 years old at the end of the MQP. He has completed a X apprenticeship, demonstrating a capacity to learn, and aptitude testing administered by Mr. Mills indicated average abilities in language, math, and reasoning.[31] These scores indicate a capacity to undergo retraining or, possibly, to manage a job in a warehouse or retail setting.

[42] In all, the available evidence suggests that the Appellant had residual capacity to at least attempt a so-called elemental job or attend retraining classes on a part-time basis. Either option could have been facilitated through accommodations, if available; postural changes, when needed; and pain management measures, where appropriate.

<u>The Appellant did not attempt alternative employment</u>

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[30] Recording of hearing at 46:50.

[31] GD6-89 to GD6-90.

[43] Ultimately, the Appellant's appeal must fail because he has not made a serious attempt 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 was not capable of either retraining or alternative work, but I question how he could be certain if he had never tried either. He said that he attempted, unsuccessfully, to work at a X for a day, but it had already been established by that time that he could not manage the physical demands of such a job. He attended an employment centre, but he did not take the additional and necessary step of actually applying for a lighter job or of attempting one.

[44] *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. Appellants for disability entitlement should demonstrate a good-faith preparedness to participate in retraining and educational programs that will enable them to find alternative employment.[32] In this case, the Appellant has not done so.

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

[45] 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.

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[32] *Lombardo v Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).

CONCLUSION

[46] I am dismissing this appeal. While the General Division erred in how it considered two key reports, 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, 2015.

Member, Appeal Division

DATE OF HEARING:	January 14, 2019
METHOD OF PROCEEDING	Teleconference
REPRESENTATIVES:	Patrick Castagna, for the Appellant Sandra Doucette, for the Respondent