



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *R. V. v Minister of Employment and Social Development*, 2020 SST 195

Tribunal File Number: AD-19-765

BETWEEN:

**R. V.**

Appellant  
(Claimant)

and

**Minister of Employment and Social Development**

Respondent  
(Minister)

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

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DECISION BY: Neil Nawaz

DATE OF DECISION: February 26, 2020

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] The Claimant is a high school graduate and has had a varied career in sales and project management. In April 2014, he had a heart attack and underwent emergency coronary artery bypass surgery. At the time, he was working as a project manager for a construction contractor. He attempted to return to work on a graduated basis but could not manage the demands of his job. He has not worked since February 2015 and is now 46 years old.

[3] In July 2017, the Claimant applied for a Canada Pension Plan (CPP) disability pension, claiming that he could no longer work because of symptoms related to post-traumatic stress disorder (PTSD). The Minister refused the application after determining that the Claimant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*.

[4] The Claimant 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 July 24, 2019, dismissed the appeal. It found that the Claimant had failed to demonstrate that he became incapable regularly of pursuing any substantially gainful occupation during his minimum qualifying period, which ended on December 31, 2017. The General Division based its decision, in part, on a finding that the Claimant had not attempted to work in any capacity after his health crisis began.

[5] The Claimant requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. I granted the Claimant leave to appeal because I thought his submissions had a reasonable chance of success.

[6] I called a hearing by teleconference because, in my view, 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. On January 10, 2020, the Claimant

submitted additional written submissions that elaborated on his reasons for appealing. On the same day, the Minister filed written submissions arguing that the General Division did not commit any errors and that its decision should stand.

[7] I have reviewed the parties' written and oral submissions and concluded that the General Division committed at least two errors in coming to its decision. I have decided that the appropriate remedy in this case is to make my own assessment of the Claimant's disability claim and give the decision that the General Division should have given. As a result, I am overturning the General Division's decision, but I am substituting it with my own decision not to the Claimant a CPP disability pension.

## **ISSUES**

[8] The Claimant raised the following issues:

- (i) The General Division found that none of the Claimant's conditions prevented him from pursuing regularly substantially gainful employment. The Claimant alleges that the General Division failed to take a "real-world" approach to analyzing the severity of his disability and ignored evidence that his panic attacks were highly unpredictable and that he could not reliably report for work in any occupation.
- (ii) The General Division found that the Claimant had "not tried to work in any capacity." The Claimant alleges that this finding was an error that ignored the fact that he returned to part-time work but could not manage his duties.
- (iii) The General Division found that the Claimant was telling the truth about his condition and how it prevented him from working. Despite finding him credible, the General Division went on to find that he was capable of work. The Claimant says that this amounted to a contradiction that rendered the general Division's reasons incomprehensible.
- (iv) The General Division relied on Dr. Adey's statement that he was eager to go back to work. The Claimant says that, in doing so, the General Division effectively

penalized him for believing that he had the capacity to return to work, even though his ultimately unsuccessful effort to do so proved otherwise.

## **ANALYSIS**

[9] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.<sup>1</sup>

[10] Having considered the parties' submissions, I am satisfied that the General Division based its decision on an erroneous finding about the Claimant's effort to return to work and breached a principle of natural justice by failing to offer comprehensible reasons for its decision. Since the General Division's decision falls on these issues alone, I see no need to address the remaining issues.

### **The General Division erred when it found that the Claimant had not made a sufficient attempt to return to work**

[11] I have concluded that the General Division mischaracterized the Claimant's efforts to return to work after his health declined.

[12] Although the Claimant initially stopped working because of heart problems, his application for disability benefits was largely based on depression, anxiety, and PTSD. He claimed that these psychological conditions caused panic attacks and severe headaches and made it hard for him to concentrate.

[13] A major reason for the General Division's decision was its finding that the Claimant had failed to meet his obligation, set out in a case called *Inclima v Canada*,<sup>2</sup> to show that (i) he had attempted suitable alternative employment, and (ii) that attempt was unsuccessful because of his health condition. In paragraph 9 of its decision, the General Division wrote:

Even if I accept, based on the testimony and medical evidence that the Claimant could not work in his usual position, which was cognitively

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<sup>1</sup> Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

<sup>2</sup> *Inclima v Canada* (Attorney General), 2003 FCA 117.

demanding, I find that he had the capacity to work in an alternate position. The Claimant feels he is totally disabled from working; however, the medical evidence does not support that conclusion. If a person has some capacity to work, they must show efforts to find work. **The Claimant has not tried to work in any capacity.** As a result, the Claimant did not make efforts to find alternate work, and therefore I cannot conclude that his disability is severe [emphasis added].

[14] This passage contains a definite and unqualified statement that is not supported by the available evidence. The General Division found that the Claimant had “not tried to work in any capacity,” but the information on file indicates that he came back to his project management job on a part-time basis. While it is true that the General Division briefly referred in its decision to the Claimant’s “gradual” return to work,<sup>3</sup> it did not address the conditions under which the Claimant returned to his job or the circumstances that led him to stop working once and for all.

[15] After a six-week recovery period following his heart attack, the Claimant resumed his job at X. He was “eased back” into his old position, working from 9:00 a.m. to 2:00 p.m. He was not required to make site visits, which had previously occupied about 40 percent of his time. When I listened to the recording of the General Division hearing, I heard the Claimant testify at length about his diminished capacities:<sup>4</sup>

- He felt tired and stressed. His recall and concentration “wasn’t there.” He was doing only one-tenth of what he had done previously.
- “The things that I used to find easy, I found incredibly difficult to do.”
- He was prone to panic attacks. He constantly had lump in his throat, “like lightening was going to strike at any time.”
- He developed a bleeding ulcer and began missing work, one or two days at a time.

[16] The Claimant persisted in his accommodated role for eight months until he and his employer agreed, by mutual consent, to end their relationship. None of this was mentioned in the General Division’s decision. Whether his job was “cognitively demanding,” as the General

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<sup>3</sup> General Division decision, paragraph 5.

<sup>4</sup> Recording of hearing 23:50 to 29:00.

Division put it, and whether he had explored all reasonable employment alternatives are two questions that I will explore later in my reasons. However, in light of the above evidence, I am satisfied that the General Division based its decision on an erroneous finding that the Claimant had had not tried to work in any capacity.

**The General Division contradicted itself by finding the Claimant “credible” while rejecting his claim that he was disabled**

[17] The General Division dismissed the Claimant’s disability claim for essentially two reasons. It found that he had not tried hard enough to remain employed, and it relied on his psychiatrist’s statements that his condition had improved to the point where he felt able to go back to work.

[18] The Claimant insisted that he had done his best to remain employed but could not perform the duties of his old job even with significant accommodations. As we have seen, the General Division did not refer to the Claimant’s testimony on this point, although it did briefly summarize his position as follows:

The Claimant [said] that he cannot work in any job due to the unpredictability of his PTSD and panic attacks. He also stated he is unable to adhere to a schedule, interact with people and avoid things that would trigger his conditions.<sup>5</sup>

[19] The General Division then summarized the “objective” evidence that it used to justify its decision, but when I examine that evidence closely, I see that it mostly supported the Claimant’s claim that he was struggling with anxiety and depression after his heart attack. Only two items of evidence diverged from this narrative. Chief among them was a June 2016 note, in which Dr. Adey found an overall improvement in the Claimant’s symptoms and an increase in his daily functioning. The psychiatrist also noted that the Claimant was “eager to go back to work and feels like he is able to do so.”<sup>6</sup>

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<sup>5</sup> General Division decision, paragraph 5.

<sup>6</sup> Clinical notes by Dr. Tanis Adey dated June 28, 2016 (GD2-48) and Dr. Marcus Hancock dated December 16, 2016 (GD2-94).

[20] At the hearing, the Claimant was asked to respond to these statements. He insisted that the psychiatrist had presented a slightly distorted view of his condition in 2016:

I was trying to get better. I was trying to be optimistic. Now, I don't remember saying, I'm ready to go back to work, like jumping up and down, you know, feeling great. It [Dr. Adey's statement] doesn't paint the proper picture. I think responding well to the medications—it's probably when I was weaned from the Celexa and the withdrawal symptoms dissipated with the Zoloft. I might have been optimistic—just saying I hope this works. But I was still having panic attacks.<sup>7</sup>

[21] The Claimant insisted that Dr. Adey had overstated the improvement in his psychological condition, but the General Division did not even mention this testimony in its decision. The General Division placed significant weight on Dr. Adey's statements,<sup>8</sup> but it did not give similar credit to the Claimant's attempt to qualify and contextualize those statements. It is therefore difficult to escape the conclusion that the General Division was reluctant to take the Claimant's assertions at face value. This is surprising, since the General Division had earlier declared that it found the Claimant highly credible:

I think the Claimant was telling the truth when he made submissions and testified. His answers to questions at the hearing were consistent with his written submissions. I find the Claimant credible; however, I must also look at the objective evidence on file to determine whether it supports the Claimant's testimony.<sup>9</sup>

It is difficult to see how the Claimant could be “credible” and “consistent” in general terms yet unworthy of belief when testifying about the central question in this proceeding—whether his anxiety disorder prevented him from regularly performing substantially gainful employment. The Claimant's main medical condition is characterized by symptoms that are largely subjective. They cannot be confirmed by diagnostic testing, and any assessment of their impact on an individual's ability to function ultimately depends on a finding about the credibility of that individual.

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<sup>7</sup> Hearing recording, 44:00 to 45:30.

<sup>8</sup> General Division decision, paragraph 8.

<sup>9</sup> General Division decision, paragraph 6.

[22] I am satisfied that the General Division's conclusions did not logically flow from one of its major findings of fact. As a result, the General Division's reasons for denying the Claimant's disability claim were rendered essentially incomprehensible, thereby bringing them into conflict with a principle of natural justice.

## **REMEDY**

### **There are three possible ways to fix the General Division's error**

[23] The Appeal Division has the power to address whatever errors that the General Division may have committed.<sup>10</sup> Under the *Department of Employment and Social Development Act* (DESDA), I can:

- confirm, rescind, or vary the General Division's decision;
- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

I also have the power to decide any question of fact or law necessary to carry out the above remedies.

[24] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, 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. It has now been four years since the Claimant applied for a disability pension. If this matter were referred back to the General Division, it would only delay a final resolution.

[25] In oral submissions before me, the Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Claimant's disability claim. Of course, the parties had different views on the merits of the Claimant's disability claim. The Claimant argued that, if the General Division had

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<sup>10</sup> DESDA, section 59(1).



properly assessed the eight futile months in which he attempted to return to his old job, it would have found him disabled and ordered a different outcome. The Minister argued that, whatever the General Division's errors, the balance of the available evidence still pointed to a finding that the Claimant was capable of some form of substantially gainful employment.

**The record is complete enough to decide this case on its merits**

[26] I am satisfied that the record before me is complete. The Claimant has filed numerous medical reports with the Tribunal, and I have considerable information about his employment and earnings history. The General Division conducted a lengthy oral hearing, in which the Claimant was questioned about his impairments, their effect on his work capacity, and his efforts to pursue alternative employment. I doubt that the Claimant's evidence would be materially different if the matter were reheard.

[27] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, had it not erred. In my view, even if the General Division had properly assessed the Claimant's attempt to remain in the labour market, it would have come to the same result. My own assessment of the record satisfies me that the Claimant did not have a severe and prolonged disability as of December 31, 2017.

**There is not enough evidence that the Claimant had a severe disability as of the MQP**

[28] To be found disabled, a claimant 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."<sup>11</sup>

[29] I have reviewed the file and concluded that the Claimant did not meet the burden of proving that he had a severe disability as of the MQP. I recognize that the Claimant underwent a quadruple bypass surgery six years ago and this, combined with his age, undoubtedly rules out many physically demanding occupations that might have otherwise been open to him, given his

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<sup>11</sup> CPP, section 42(2)(a)(ii).

education and work experience. The Claimant bases his disability claim on his psychological condition, but I simply did not find enough evidence to suggest that his anxiety, depression and PTSD rendered him regularly incapable of performing a substantially gainful occupation as of December 31, 2017. I based this conclusion on the following factors:

***The Claimant's psychological conditions responded to treatment***

[30] I do not deny that the Claimant has had mental health problems. His family doctor's office notes suggest that his existing anxiety and depression escalated around August 2014.<sup>12</sup> The following month, Dr. Hancock noted that the Claimant found work stressful and was having panic attacks. The Claimant took a week off work and said that he was considering changing careers.<sup>13</sup> Over the next few months, he continued to complain of panic attacks, as well as low mood, poor concentration, and forgetfulness. In March 2015, Dr. Hancock noted that the Claimant had been unwell for the past six months and was being treated with antidepressants and supportive counselling.<sup>14</sup>

[31] In February 2016, Dr. Hancock referred the Claimant to the St. John's START Clinic for psychotherapy.<sup>15</sup> There, he was assessed and treated under the supervision of a psychiatrist, Dr. Adey, who reported encouraging results. In May 2016, Dr. Adey reported that the Claimant continued to have anxiety and panic attacks but had experienced a reduction in symptoms. She relayed that he had been able to play a show (the Claimant had previously had a sideline as music performer), whereas in the past he had been unable to do so.<sup>16</sup> The following month, Dr. Adey discharged the Claimant and wrote:

Patient was followed and started on Sertraline [Zoloft] at 50 mg and titrated to 150 mg. Patient was responding well to medications and reported no further panic attacks and an increase functioning in day to day activities. Patient notes overall improvement in symptoms and is agreeable

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<sup>12</sup> Office note by Dr. Marcus Hancock, family physician, dated August 5, 2014, GD2-67. The available office notes from before that date did not disclose any complaints about anxiety or depression.

<sup>13</sup> Office notes dated September 9 and 18, 2014, GD2-69-70.

<sup>14</sup> Office note dated March 10, 2015, GD2-81.

<sup>15</sup> Office note dated February 25, 2016, GD2-92.

<sup>16</sup> Office note by Dr. Tanis Adey, psychiatrist, dated May 16, 2016, GD2-111.

to transfer care back to GP. Patient eager to go back to work and feels like he is able to do so.<sup>17</sup>

By any measure, this was a positive report, although it came more than 18 months before the end of the MQP. I looked for evidence of regression in the Claimant's condition but could not find any in the subsequent medical reports. Dr. Hancock continued to see the Claimant, but less frequently than previously—once every three to six months. Dr. Hancock noted that the Claimant was subject to “multiple stressors,”<sup>18</sup> but he also noted that his patient had received psychotherapeutic counselling with positive results.<sup>19</sup> Even in the medical report that accompanied the Claimant's CPP disability application, Dr. Hancock offered no more than an open-ended prognosis, “To be determined.”<sup>20</sup> Updated office notes from around the end of the MQP did not help the Claimant either. Dr. Hancock continued to note that the Claimant had anxiety and depression but added, “mood sad but was worse in 2016.”<sup>21</sup> Another note described a routine physical examination but did not mention any significant mental health events. Dr. Hancock's only reference to the Claimant's psychological condition was “anxiety related to bloodwork.”<sup>22</sup>

[32] A diagnosis cannot be equated with disability. The Claimant suffers from depression and anxiety, but the evidence shows that it responded to treatment and markedly improved before the end of the MQP. At the General Division hearing, the Claimant attempted to minimize Dr. Adey's final report, suggesting that he had given the psychiatrist an overly optimistic view of his capacity and outlook at the time. That may be so, but I am also influenced by the fact that there was nothing in the Claimant's medical file to suggest severe mental health issues after mid-2016.

[33] Like the General Division, I found the Claimant credible, but that does not decide the matter. I have no doubt that the Claimant genuinely believes himself disabled, but a finding of disability under the CPP cannot rely entirely on a claimant's subjective view of his or her capacity; it must also be supported by medical evidence. In this case, the available medical

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<sup>17</sup> Office note by Dr. Adey dated June 24, 2016, GD2-48.

<sup>18</sup> Office notes dated December 16, 2016 (GD2-126) and June 9, 2017 (GD2-96).

<sup>19</sup> Office note dated December 16, 2016, GD2-126.

<sup>20</sup> CPP Medical Report prepared by Dr. Hancock and dated July 24, 2017, GD2-105.

<sup>21</sup> Office note by Dr. Hancock dated December 21, 2017, GD3-4.

<sup>22</sup> Office note dated February 7, 2018, GD3-5.

evidence did not convince me that the Claimant was incapable regularly of pursuing substantial gainful employment.

***The Claimant's background does not prevent him from pursuing alternative work***

[34] In all, the evidence leads me to conclude that the Claimant had residual capacity to explore alternative employment options as of the MQP. I say this bearing in mind the Claimant's age, level of education, language proficiency, and past work and life experience, as required by *Villani v Canada*.<sup>23</sup> The Claimant is a native-born English speaker and was only 44 years old at the end of the MQP. He is a high school graduate who has demonstrated an ability over many years to learn new skills and to adapt to a variety of working environments. He has worked as a commissioned salesperson, mortgage advisor, and project manager.<sup>24</sup>

[35] I saw little in the medical evidence to persuade me that all occupations were beyond the Claimant's capacity as of December 31, 2017. Given the Claimant's profile, I find it likely that he had the residual capacity to, at the very least, make an attempt to work in a low stress occupation in the retail or service sectors.

***The Claimant did not attempt suitable alternative employment***

[36] *Inclima*,<sup>25</sup> a leading case from the Federal Court of Appeal, requires claimants to demonstrate their disability by showing that they attempted and failed to remain in the productive workforce. To invoke *Inclima*, a decision-maker must first determine whether the claimant had the residual capacity to make such efforts.

[37] Ultimately, the Claimant's appeal must fail because, although he did attempt to work after his heart attack, he returned to a job that was particularly ill-suited to someone with his psychological conditions. I listened carefully to the recording of the General Division hearing, specifically the section in which the Claimant described his duties as a project manager at Short Atlantic. He did not have an easy job. He was required to prepare quotes, hire subcontractors,

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<sup>23</sup> *Villani v Canada (Attorney General)*, [2002] 1 FC 130, 2001 FCA 248.

<sup>24</sup> Hearing recording, 9:30 to 18:30.

<sup>25</sup> *Inclima*, *supra*, Note 2.

and make sure that they met specifications on time and on budget.<sup>26</sup> It is true that, when the Claimant returned to his job around June 2014, he did so on a part-time basis and was excused from travelling to construction sites. However, even with these accommodations, his job continued to be demanding and pressure-filled, with stiff deadlines and high expectations. He testified that he remained on good terms with his bosses but had an increasingly difficult relationship with the manager of a subcontractor on a “very technical” project on the Hebron oil-drilling platform. Ultimately, he was removed from that file, as well as a few others.<sup>27</sup>

[38] Under these circumstances, it is not surprising that the Claimant, who was already prone to anxiety, experienced an escalation in panic attacks and last lasted only eight months doing this type of high stress work. At the General Division hearing, the Claimant was asked whether he had considered doing some other kind of work. He replied that any other job was out of the question because he could not guarantee, given his anxiety and panic attacks, that he would be able to report to work every day first thing in the morning.<sup>28</sup> However, I question how he could be so certain that he was incapable of alternative work if he had never tried it.

[39] *Inclima* requires disability claimants in the Claimant’s position to show that **reasonable** attempts to obtain and secure employment have been unsuccessful because of their health condition. Applicants for disability entitlement should demonstrate a good-faith preparedness to find alternative employment.<sup>29</sup> In this case, I am not convinced that the Claimant went far enough in looking for lower-stress work that might have been better suited to his mental health condition.

### **Did the Claimant have a prolonged disability as of the MQP?**

[40] Since the Claimant’s evidence falls short of the severity threshold, there is no need to consider whether his disability is prolonged.

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<sup>26</sup> Hearing recording, 18:30 to 23:00.

<sup>27</sup> Hearing recording, 22:30 to 23:25 and 26:00 to 27:00.

<sup>28</sup> Hearing recording, 34:30 to 36:20.

<sup>29</sup> *Lombardo v Minister of Human Resources Development* (July 23, 2001), CP12731 (PAB).

**CONCLUSION**

[41] I am dismissing this appeal. While the General Division mischaracterized the Claimant's return-to-work effort and offered unintelligible reasons for its decision, I do not think it would have come to a different conclusion if it had not made those errors. Having conducted my own review of the record, I am not persuaded that the Claimant had a severe disability as of December 31, 2017.



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Member, Appeal Division

HEARD ON:	January 27, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. V., Appellant Duncan Allison, Representative for the Appellant Sandra Doucette, Representative for the Respondent