



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. R. v Minister of Employment and Social Development*, 2020 SST 299

Tribunal File Number: AD-19-592

BETWEEN:

D. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 9, 2020

DECISION AND REASONS

DECISION

[1] I dismiss the appeal. The General Division made an error by failing to analyze the Claimant's functional limitations. I will give the decision that the General Division should have given and analyze those functional limitations. The result remains the same: the Claimant is not entitled to a disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] D. R. (Claimant) was working as a self-employed driver until he was in a car accident in 2015. He has permanent loss in his field of vision in one eye. He has pain in his right shoulder, knee, and right elbow. He has depression.

[3] The Claimant applied for a disability pension on December 18, 2017. The Minister denied this second application initially and on reconsideration. The Claimant appealed to this Tribunal.

[4] The General Division dismissed the Claimant's appeal on May 27, 2019. The General Division found that the Claimant did not show that he had a severe and prolonged disability¹ on or before the end of his minimum qualifying period (MQP) on December 31, 2016. The Claimant filed an application for leave to appeal the General Division's decision.

[5] I granted the Claimant permission (leave) to appeal the General Division decision on September 4, 2019. I found that there was an arguable case that the General Division made an error of law by failing to assess the Claimant's conditions all together (in their totality).

[6] I must decide whether the General Division made an error. If the General Division did make an error, I need to decide what I will do to fix (remedy) the error.

[7] In my view, the General Division member made an error of law in the decision. To fix that error, I am giving the decision that the General Division should have given. The result

¹ *Canada Pension Plan*, s 42(2).

remains the same: the Claimant is not entitled to a disability pension under the CPP. I dismiss the appeal.

ISSUE

[8] Did the General Division make an error of law by failing to analyze the Claimant's functional limitations at the time of the MQP?

ANALYSIS

Reviewing General Division decisions

[9] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. That review is based on the wording of the *Department of Employment and Social Development Act* (DESDA). The DESDA sets out the possible reasons for (grounds of) appeal.² One of those reasons for appeal arises when the General Division makes an error of law.³

Did the General Division make an error of law?

[10] The General Division made an error of law by failing to analyze and decide what the Claimant's functional limitations were on or before the end of the MQP.

[11] Claimants have a "severe" disability within the meaning of the CPP when they are "incapable regularly of pursuing any substantially gainful occupation."⁴ The focus is not whether claimants have severe impairments, but whether disability prevents claimants from earning a living.⁵ The General Division must assess the claimant's functional limitations when deciding whether the disability is "severe" under the CPP.⁶

² DESDA, s 58(1).

³ DESDA, s 58(1)(b).

⁴ *Canada Pension Plan*, s 42(2).

⁵ The Supreme Court of Canada mentions this in a case called *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28.

⁶ The Federal Court of Appeal discusses this idea in *Ferreira v Canada (Attorney General)*, 2013 FCA 81; and in *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[12] In this case, the General Division correctly set out a series of legal principles that apply to deciding whether a disability is severe within the meaning of the CPP.⁷ The General Division decision gives four reasons why the Claimant was not eligible for the disability pension:⁸

1. No severe clinical examination findings or severe functional limitations related to the Claimant's right shoulder, right knee, or elbow that would preclude him from all work;
2. The Claimant's daily activities show that he had some capacity for work;
3. The Claimant did not continue "active therapy" for his shoulder, elbow and knee; and
4. No evidence that the Claimant's depression and anxiety were disabling conditions for him.

[13] The Claimant argued that the General Division made an error by failing to consider the effect of all of his conditions together, including his psychological condition.⁹

[14] The Minister argues¹⁰ that the General Division considered the effect of all of the Claimant's conditions together. The General Division was clear in its decision that it must assess the Claimant's condition in its totality. That means considering all of the possible impairments, not just the biggest impairments or the main impairment.¹¹ The General Division recognized that the Claimant said bending over and getting up were problematic. The Claimant would have some limitations of physically demanding work, but his disability was not severe.¹² The General Division acknowledged the Claimant's vision loss, but he continued to work and drive a vehicle after that injury.¹³

[15] In my view, the General Division made an error of law. The problem with the General Division's approach here is that it focuses on a list of reasons why the Claimant is not entitled to the disability pension. Instead, the General Division needed to discuss and analyze all of the

⁷ General Division decision, paras 9-12.

⁸ General Division decision, reason 1 is at para 13, reason 2 is at para 14, reason 3 is at para 15, and reason 4 is at para 16.

⁹ AD1-2.

¹⁰ AD2-8 to 10.

¹¹ General Division decision, para 11.

¹² General Division decision, para 15.

¹³ General Division decision, para 16.

functional limitations that impacted the Claimant's ability to work at the time of the MQP. The General Division is not free to skip that part of the legal analysis. The Federal Court of Appeal requires the General Division to consider the functional limitations that impact the ability to work. While the General Division mentioned several functional limitations, it did not provide an analysis of all of the limitations that impacted the Claimant's ability to work. This is an error of law. This particular error can also result in a failure to consider all of the conditions in their totality, which is more the error that the Claimant focussed on.

[16] The General Division does not need to refer to every piece of evidence in the decision.¹⁴ However, the General Division must assess the claimant's functional limitations when deciding whether the disability is severe.¹⁵ The decision falls short on that requirement to assess the functional limitations.

[17] The General Division's decision focusses on giving reasons why the Claimant did **not** show he had a severe disability. The General Division should still have analyzed and decided what the Claimant's functional limitations were at the time of the MQP.

[18] In terms of functional limitations, the General Division member mentioned:

- some of the Claimant's evidence about daily activities like driving and carrying bags when shopping, and the fact that he went to Jamaica for a vacation;¹⁶
- the Claimant's evidence that bending over and getting up were problematic;¹⁷
- the Claimant's evidence about the impact of his loss of field of vision in the left eye;¹⁸
and
- knee pain after the end of the MQP.¹⁹

¹⁴ The Federal Court of Appeal explains this in a case called *Simpson v Canada (Attorney General)*, 2012 FCA 82.

¹⁵ The Federal Court of Appeal explains this in a case called *Ferreira v Canada (Attorney General)*, 2013 FCA 81.

¹⁶ General Division decision, para 14.

¹⁷ General Division decision, para 17.

¹⁸ General Division decision, para 18.

¹⁹ General Division decision, para 19.

[19] However, there was a great deal more evidence in the record about the Claimant's functional limitations that the General Division should have discussed. The Claimant's chiropractor at the rehabilitation clinic, Dr. Kerr, provided information about the Claimant's functional limitations in an assessment after the car accident, and then again later in progress reports.²⁰ The Claimant provided some information in his CPP Disability Questionnaire about his limitations.²¹ The Claimant also provided a progress report from psychotherapy that sheds light on the functional limitations associated with his depression.²² The General Division decision fails to analyze this evidence in order to determine what the Claimant's functional limitations were at the time of the MQP. This is an error of law.

[20] The General Division made an error of law. The General Division must describe and consider the impact of the Claimant's functional limitations on his ability to work. General Division decisions cannot simply skip over this exercise and choose instead to describe the disparate reasons why a claimant is not entitled to a benefit.

REMEDY

[21] Once I have found an error by the General Division, I can return the case to the General Division for reconsideration, or I can give the decision that the General Division should have given.²³

[22] At the Appeal Division, the Minister and the Claimant agreed that if I found an error, I should give the decision that the General Division should have given.

[23] The record is complete. I will give the decision that the General Division should have given. This is the most fair and efficient way forward.²⁴

[24] I find that the Claimant has physical and psychological limitations that have some negative impact on his ability to work at any substantially gainful occupation. When I consider all the conditions together (and the functional limitations that go along with them) in addition to

²⁰ GD1-70.

²¹ GD2-63 to 70.

²² GD1-142.

²³ DESDA, s 59. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222.

²⁴ *Social Security Tribunal Regulations*, s 2.

the Claimant's personal circumstances, I find that at the end of the MQP, the Claimant had some residual capacity to work. He did not show that his efforts to get and keep work were unsuccessful because of his disability. He took steps to manage his conditions and he did not refuse treatment. However, he is not entitled to the disability pension.

Legal test to prove a disability is 'severe'

[25] A person is entitled to a disability pension when they can show that they had a severe and prolonged disability on or before the end of their MQP. The Minister calculates the MQP based on the person's contributions to the Canada Pension Plan. The Claimant's MQP ended on December 31, 2016.

[26] A person's disability is severe if it makes them incapable regularly of pursuing any substantially gainful occupation.²⁵ To decide whether a disability is severe, decision makers must consider all of the claimant's conditions together.²⁶ The focus is on the functional limitations the claimant has that impact the ability to work.²⁷ Efforts to manage the medical conditions is also important,²⁸ as is the impact of the claimant's personal circumstances on the ability to work.²⁹ If the claimant has at least some (or "residual") capacity to work, the claimant must show that efforts to get and keep employment were unsuccessful because of the disability.³⁰

The Claimant's conditions

[27] At the end of the MQP, the Claimant had degenerative arthritis, degenerative disc disease (DDD), a history of rotator cuff tendonitis, and depression. He also had reduced field of vision in his left eye. These conditions resulted in functional limitations that affected his ability to work. However, he has not shown that he was incapable regularly of pursuing any substantially gainful occupation. He had some capacity to work at the end of the MQP.

²⁵ *Canada Pension Plan*, s 42(2).

²⁶ The Federal Court of Appeal case that describes this is *Bungay v Canada (Attorney General)*, 2011 FCA 47.

²⁷ The Federal Court of Appeal cases that explain these ideas are *Ferreira v Canada (Attorney General)*, 2013 FCA 81; and *Inclima v Canada (Attorney General)*, 2003 FCA 117.

²⁸ The Federal Court of Appeal explained this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48.

²⁹ The Federal Court of Appeal explained this in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

³⁰ The Federal Court of Appeal explained this in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[28] As of July 2016, the Claimant's chiropractor, Dr. Kerr,³¹ provided a detailed list of physical limitations the Claimant had that would impact the Claimant's ability to work. The Claimant had these limitations despite the fact that he had attended many sessions at the rehabilitation clinic to that point in 2016 alone.³²

[29] In June 2016, Dr. Hewchuk (a clinical psychologist at the rehabilitation clinic) reassessed the Claimant. Dr. Hewchuk stated that the Claimant remained in the "severe" range for depression despite making progress in treatment.³³ He had not been back at work since his accident in May 2015.

[30] The Claimant provided medical evidence explaining that he "definitely has a permanent left field loss" as a result of the car accident.³⁴

The Claimant has functional limitations that affect his capacity to work

[31] The Claimant has CPP medical reports from Dr. Walters, his family doctor. When he first applied for the disability pension in March 2017,³⁵ Dr. Walters confirmed that he had degenerative arthritis for which he took Advil and Tylenol. He explained that the Claimant had neck, head, and elbow pain after a car accident in 2015. Dr. Walters confirmed that the Claimant's medical history included rotator cuff tendinosis of the right shoulder (in an x ray from July 15, 2016), and that he had an MRI of his head in 2017 (which showed nothing significant).

[32] The next time the Claimant applied in December 2017,³⁶ Dr. Walters completed a CPP medical form again. This time Dr. Walters explained that the diagnoses were right shoulder pain, knee pain, and right elbow pain. Dr. Walters stated that the Claimant had difficulty lifting over 90 degrees due to right shoulder pain. The right elbow pain was intermittent -- a shooting pain going up the arm. Under prognosis, Dr. Walters wrote "degenerative arthritis."

³¹ GD1-127.

³² GD1-98.

³³ GD1-145.

³⁴ GD1-9.

³⁵ GD2-108 to 111.

³⁶ GD2-56 to 59.

[33] In an initial assessment after the car accident,³⁷ the Claimant's chiropractor (Dr. Kerr) stated that the Claimant's prognosis was fair to moderate. He stated that the Claimant had possible psychological disturbances, moderate DDD in part of his back, and minimal DDD in another part. Because of his shoulder pain, he had difficulty lifting over 90 degrees, and had intermittent shooting pain up his arm.

[34] In a report dated July 15, 2015 by Dr. Hsu (a chiropractor), the Claimant was diagnosed with moderate degenerative disc disease, moderate uncovertebral arthrosis, and mild facet arthrosis.³⁸

[35] In a report dated October 21, 2015 by Dr. Hsu, the Claimant was still showing poor progress with his right shoulder and arm pain.³⁹ The pain was still extended from the right side of his neck to the right shoulder and into the arm and hand. He still had intermittent numbness and tingling with weakness in the right hand. Simple tasks like grasping object remained difficult and painful. He still had significant discomfort into the right elbow. As well as ongoing headaches and dizziness. He had problems sleeping. The report noted that he had not returned to work.

[36] In April 2015, the Claimant had a right shoulder ultrasound. The ultrasound showed right supraspinatus tendinitis with some calcification. The elbow ultrasound (from the same date) showed that the Claimant had calcification, which was probably degenerative.⁴⁰

[37] About six months before the end of the MQP, a detailed progress report from Dr. Kerr⁴¹ stated that the Claimant still had discomfort in his right neck, shoulder and arm. It was aggravated with all movement of the right arm requiring the assistance of his left arm. Simple tasks such as brushing his teeth or shaving were "difficult and painful." Dr. Kerr stated that the Claimant had numbness, tingling and weakness extended down the right arm and hand. The Claimant reported ongoing right-sided headaches that seemed worse "as the day goes on." The Claimant reported difficulty with getting a restful sleep. The Claimant was only taking over the counter medication (Advil) throughout the day. His physician and insurer denied request for an

³⁷ GD1-70.

³⁸ GD1-71.

³⁹ GD1-77 to 78.

⁴⁰ GD1-113 to 114.

⁴¹ GD1-127.

MRI of the Claimant's neck and shoulder. This report documents the range of mobility of the Claimant's right shoulder in some detail.

[38] The Claimant had a right shoulder x-ray in September 2017,⁴² about eight months after the end of the MQP. The x-ray found no significant bone or joint abnormality. There was mild degenerative change in the elbow joint with small osteophyte.

[39] A 2015 psychological progress report⁴³ documented the fact that the Claimant saw a psychotherapist, Eugene Hewchuk, once a week to address anxiety and depression. The report states that the Claimant had completed at least part (perhaps 6 sessions) of his "second treatment plan." The Claimant reported some improvement since starting the treatment, including a "slight increase" in home activities. Nevertheless, the Claimant was still experiencing psychological and emotional issues because of the car accident. He was experiencing insomnia, appetite loss, fatigue, behaviour changes, and mood changes and thinking styles consistent with depression.

[40] In a report dated June 11, 2016, Mr. Hewchuk stated that he gave the Claimant depression and anxiety tests again. The Claimant's condition had not changed. The results placed the Claimant's anxiety and depression in the "severe range."⁴⁴ The Claimant testified that he had gone to a psychiatrist once a week.⁴⁵ The Claimant testified that the depression really affected him badly but did not give much detail about how.

[41] The Claimant had an MRI in January 2017 because he had persistent daily headaches since his car accident. The Report from the MRI did not help to explain why these headaches were happening.⁴⁶

[42] In the Questionnaire the Claimant completed in December 2017⁴⁷ when he applied for the disability pension (after the end of the MQP), the Claimant stated that he had problems with bending, stretching and carrying. He stated that his sitting and standing were "limited", that he could walk half a kilometre, that he could carry 10 pounds for a hundred yards, and that he could

⁴² GD2-60.

⁴³ The report is undated at GD1-142 but it states that the initial assessment was October 28, 2015

⁴⁴ GD1-145.

⁴⁵ Recording of the General Division hearing, 23:39.

⁴⁶ GD2-61.

⁴⁷ GD2-63 to 70.

only do “limited” household maintenance. Under remembering and concentrating, he wrote “somewhat” and under sleeping he wrote “limited.” He stated that he could drive a car for maybe half an hour. The Claimant stated that he had moderate headaches that came frequently.

[43] The Claimant described the affect that his disability has on his ability to complete physical tasks in daily life. For example, in his testimony at the General Division hearing, the Claimant said that:

- his wife did most of the grocery shopping;⁴⁸
- he could only dress and bathe himself “most” days;⁴⁹
- he could not fix things;⁵⁰
- friends and neighbours helped him with things around the house;⁵¹
- he could not clean;⁵²
- he could not drive, and later clarified that he could drive close by to the store;⁵³ and
- he could not use a computer very much.⁵⁴

[44] The Claimant also testified about his inability to complete tasks that might be more closely associated with an ability to work, even in a sedentary position. The Claimant testified that:

- he did not think he could show up for a job at a certain time each day;⁵⁵

⁴⁸ Recording of General Division hearing, at about 29:45.

⁴⁹ Recording of General Division hearing, at about 25:22.

⁵⁰ Recording of General Division hearing, at about 27:00.

⁵¹ Recording of General Division hearing, at about 27:00.

⁵² Recording of General Division hearing, at about 27:00.

⁵³ Recording of General Division hearing, at about 17:44 and 48:00.

⁵⁴ Recording of General Division hearing, at about 25:55.

⁵⁵ Recording of General Division hearing, at about 37:00.

- he cannot stand long enough to work part-time as a greeter in a store;⁵⁶
- he cannot sit for more than 5 minutes;⁵⁷ and
- there were days that he cannot not get out of bed.⁵⁸

[45] The Claimant took reasonable steps to manage his condition. He did not refuse treatment.

[46] His family doctor suggested Advil, and the Claimant took that medication. He started on Celebrex after the end of the MQP. The Claimant was compliant with treatment at the rehabilitation clinic, including physiotherapy (although he did not see any dramatic gains) and cognitive behavioural therapy. It seems that the chiropractor at the clinic, Dr. Kerr, advocated on several occasions for the Claimant to have more diagnostic tests, including MRI's. The diagnostic tests that the Claimant did have did not result in any significant changes in his treatment during the MQP.

[47] The Claimant experienced both pain and symptoms associated with depression. He had a limited field of vision in one eye.

Personal circumstances are a barrier to employment

[48] I must take a “real-world” approach to considering whether the Claimant’s disability is severe. That means that I must take into account the Claimant’s personal circumstances, including his age, education level, language proficiency, and his past work and life experience.⁵⁹

[49] The Claimant was 60 years old on the last day of his MQP. He was eligible for an early retirement pension under the CPP. He has a grade 10 education. He does not appear have any challenges with communicating in English. He did not provide a complete history of his work at the General Division hearing, but he was working as a driver delivering medications to nursing homes. Later, he did some maintenance at nursing homes (on things like the computer, the fax machine, medicine carts).

⁵⁶ Recording of General Division hearing, at about 38:30.

⁵⁷ Recording of General Division hearing, at about 40:47.

⁵⁸ Recording of General Division hearing, at about 43:07.

⁵⁹ The Federal Court of Appeal explained this in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

[50] The Claimant's personal circumstances, particularly his age and his education, mean that he has some barriers to employment. In terms of accessing work that was outside of his experience, I find that the Claimant's age and his education would act as a barrier to securing some (but not all) forms of more sedentary employment.

Analyzing the Evidence: the Claimant had some capacity

[51] In my view, the Claimant's evidence establishes that he had functional limitations at the end of the MQP, but also he had some capacity for work.

[52] The objective medical evidence confirms that the Claimant had medical conditions during the MQP including degenerative arthritis, degenerative disc disease, rotator cuff tendonitis, and depression. He had some field of vision loss as well. The Claimant's evidence shows that these conditions result in limitations that affect the Claimant's ability to work.

[53] I find that the Claimant's limitations mean that it would have been difficult for him to return to his old full-time job making deliveries for the pharmacy company, and then later fixing things at retirement residences. The bending and reaching involved in the repairs especially may have been too difficult. The Claimant did have pain in his shoulder and arm with reaching. Dr. Walters specifically stated that the Claimant had pain reaching above 90 degrees.

[54] I accept the Claimant's evidence that he was "limited" in his sitting and standing. I prefer that evidence to the testimony he gave at the General Division hearing that he can only sit for 5 minutes. The Questionnaires the Claimant completed closer to the MQP (in March 2017 and December 2017) are more reliable in terms of his situation at the time of the MQP, as opposed to the testimony he gave much later at the General Division hearing. In his Questionnaire, he stated that he could drive for maybe half an hour or short distances when he needed to.

[55] The Claimant was only taking over the counter medication (Advil, etc.) for pain. I accept his evidence that he was able to bathe and dress himself most days, walk half a kilometre, and carry 10 pounds. He had real limits in terms of what he could do around the house, particularly cleaning. In my view, the Claimant's depression meant that it was difficult to get out of bed some days, and the medical reports suggest that it took some time for him to cope with driving again after his car accident.

[56] In my view, considering the medical evidence and the Claimant's own evidence about his functional limitations as well as his personal circumstances, the Claimant had some residual capacity for work, even if he could not do his old job anymore.

[57] The Claimant testified that he could not reliably attend a job every day. However, I find that at the end of the MQP, the Claimant could have looked for a part-time opportunity within his limitations.

[58] The Claimant had some capacity for work, so he had to show that his efforts to get and keep employment were unsuccessful because of his disability. The Claimant tried to work for a friend at a coffee shop, but he could not load the espresso machine because really only one arm was functional as a result of his shoulder and arm pain.

[59] The Claimant was not able to show that he made any effort to find work that was within his physical restrictions, especially for his shoulder. The Claimant could walk half a kilometre and carry 10 pounds. He was taking Advil for pain. He was not taking any medication for his depression and his family doctor did not list it as a disabling condition. He could not stand all day long every day at a full-time job, but part-time work with some sitting and standing may well have been manageable if he had attempted that.

CONCLUSION

[60] The appeal is dismissed. The General Division made an error. I gave the decision that the General Division should have given. The result was the same: the Claimant is not entitled to a disability pension under the CPP.

Kate Sellar
Member, Appeal Division

HEARD ON:	November 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. R., Appellant Viola Herbert, Representative for the Respondent