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

Citation: *V. N. v Minister of Employment and Social Development*, 2020 SST 298

Tribunal File Number: AD-19-522

BETWEEN:

V. N.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 8, 2020

DECISION AND REASONS

DECISION

[1] I allow the appeal. The General Division made an error of law. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan* (CPP).

OVERVIEW

[2] V. N. (Claimant) worked as a full-time home-based customer service call-centre representative until 2016. She stopped working because of pain in her back from degenerative disc disease (DDD). She has chronic pain disorder. The Claimant also has adjustment disorder, major depressive disorder, and anxiety.

[3] The Claimant applied for a disability pension under the CPP in September 2016. The Minister denied the application initially and on reconsideration. She appealed to this Tribunal. The General Division dismissed her appeal on March 28, 2019. The General Division found that the Claimant had limitations, but the evidence did not support the presence of any "severely disabling physical condition."[1]

[4] The Claimant appealed to the Appeal Division. I granted permission (leave) to appeal the General Division decision. I found there was an arguable case that the General Division made an error of law.

[5] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If the General Division did make an error, I must decide how to fix (remedy) that error.

[6] I find that the General Division made an error of law. I will give the decision that the General Division should have given: the Claimant proved she has a severe and prolonged disability within the meaning of the CPP. She is entitled to a disability pension.

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[1] General Division decision, para 22.

ISSUE

[7] Did the General Division make an error of law by failing to apply the correct standard of proof in assessing the Claimant's claim for the CPP disability pension?

ANALYSIS

[8] The Appeal Division does not hear cases again from the beginning. At the Appeal Division, the focus is on deciding whether the General Division made an error. The only errors the Appeal Division can focus on are ones listed in the DESDA. One of those errors falls into a category called an "error of law."[2] Failing to apply the correct standard of proof would be an error of law.

Did the General Division make an error of law?

[9] The General Division made an error of law. The General Division member failed to apply the correct standard of proof in assessing the Claimant's case for a disability pension. Although the General Division referred to the correct standard several times in the decision (called the "balance of probabilities"), I find that the General Division did not actually apply that standard. In reaching that conclusion, I have considered three things:

- the required approach to apply the correct standard given the evidence that was available in this case; and
- individual "red flag" statements by the General Division member in the decision that show that the standard of proof they applied was too high;
- the reasons the General Division gave for rejecting the conclusions in the medical evidence which I find are more consistent with a search for perfect and different evidence rather than weighing available evidence to decide if the Claimant "more likely than not" meets the legal test.

[2] DESDA, s 58(1).

The Claimant's Case

[10] The Claimant had to show that she had a severe and prolonged disability on or before the end of her minimum qualifying period. A person's disability is severe when they are incapable regularly of pursuing any substantially gainful occupation.[3]

[11] The Claimant's key report is her psychological assessment. The assessment report diagnoses chronic pain disorder and psychological conditions including major depressive disorder. The assessment concludes that the Claimant is "permanently unemployable."[4]

[12] Put simply, the Claimant provided an assessment report that, on its face, provided relevant evidence that speaks directly to many parts of the test for a disability pension. The report diagnosed chronic pain disorder and psychological diagnoses including major depressive disorder. The assessment report explained the assessment process, which for psychological disabilities, is based on self-report (there are no blood tests or CT scans for diagnosing depression).

[13] The report described in some detail the Claimant's limitations including the pain she experienced and the many challenging functional limitations she had, including panic attacks, social isolation, poor memory and concentration, inability to sleep, and poor energy level. The report described testing results for the Global Assessment of Functioning (GAF). The Claimant had a GAF score of 50, which means moderate difficulty in social and job functioning, and impairment in work or school functioning. The assessment report stated that given how chronic and severe the condition was, the assessors expected that the Claimant would be unemployable permanently. The Claimant gave testimony about why she could not work.

Referring to the correct standard

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[3] *Canada Pension Plan*, s 42(2).
[4] GD11-6.

[14] There are three different points in the decision in which the General Division member refers to the "balance of probabilities" as the standard of proof that applies.

[15] The decision confirms that the Claimant must show both a severe and prolonged disability, and that:

> [a] person must prove on a **balance of probabilities** their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.[5] **(emphasis added)**

[16] The General Division considered the assessment report again in the decision, noting that the GAF score was 50, which means moderate difficulty in social occupational or social functioning and impairment in occupation or school functioning. The General Division then stated

> I accept these reports but subject to the obligation on the Claimant to satisfy me on a **balance of probabilities** that she has no work capacity. I do not find the conclusions of the psychologists to be compelling.[6] **(emphasis added)**

[17] At the end of the analysis, the General Division stated that the Claimant "has not met the onus of proof on a **balance of probabilities**."[7] **(emphasis added)**

[18] The question however, is not whether the General Division ever described the correct standard of proof: it did. The question is whether that is the standard the General Division actually followed.

The required approach in light of the available evidence

[19] The Claimant needed to prove that she meets the test for a severe and prolonged disability on a balance of probabilities. This means that in order to allow the Claimant's appeal, the General Division did not need absolute proof that the Claimant's disability was severe and

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[5] General Division decision, para 5.
[6] General Division decision, para 30.
[7] General Division decision, para 44.

prolonged. The General Division only needed to be satisfied that based on the overall evidence it is more likely than not that the Claimant's disability was severe.[8]

[20] In this particular case, many or most of those facts the Claimant relied on to meet the legal test were contained in a single assessment report. There was no other medical assessment that reached a different or opposite conclusion.

[21] The Claimant argues that the assessment report established a *prima facie* case that the Claimant met the test for a severe and prolonged disability. That just means that if you accept the evidence as true, the evidence seems to satisfy the test for a disability pension. The report describes a condition and functional limitations. It provides a score on a test that assesses impacts on the ability to work. The Minister brought no evidence to refute the case raised by the Claimant and her psychological assessment, so the General Division could only consider argument from the Minister about how or why the assessment report should be given little weight.

[22] There are cases in which a medical report that on its face answers many of the evidentiary questions will not be enough to meet the balance of probabilities standard. It may be that the report is unreliable – it might contradict other evidence so much that it cannot be relied on. There might be evidence that the report writer was biased or acting as an advocate, although report writers are rarely produced for cross-examination. The report might be based on testing that is discredited or it might be wildly at odds with testimony, in which case the General Division would need to decide which evidence to prefer.

[23] In my view, given that the standard of proof is the balance of probabilities, it should be a rare case in which the General Division rejects the conclusions from a Claimant's medical report when:

- the report purports to answer the questions the General Division needs to answer in order to find a severe disability (testing results that speak directly to workplace functioning, lists of functional limitations, diagnosis, prognosis etc.); and

[8] This is consistent also with the "reasonably satisfied" standard set out in the *Canada Pension Plan Adjudication Framework* in section 1.

- there is no competing or contradictory medical report from the Minister.

"Red flag" statements showing the standard the General Division applied was too high

[24] The General Division member uses a variety of phrases throughout the decision that show that although they set out the correct standard of proof, they did not actually apply it.

[25] The General Division summarized the assessment report, weighed it against some of the Claimant's testimony, discussed some of the wording choices in the report, and then concluded:

> **The report does not give me confidence that its conclusion can be relied upon.** I would have preferred to rely on the outcome of the cognitive behavioural therapy but there is no report from the social worker or Dr. King of the outcomes of these treatments. Consequently, I am unable to say that her mental health issues are **conclusive** as to a severe disability.[9] **(emphasis added)**

[26] When considering the effect of treatments, the General Division stated that there was no X-Ray, MRI, CAT scan or ultrasound to provide a diagnosis or prognosis related to the Claimant's pain between her shoulder blades, her neck, her left arm and elbow. The General Division stated that "the facts related to these are **inconclusive** of a severe condition."[10] **(emphasis added)**

[27] The Claimant argues[11] that requiring the assessment report to give the General Division "confidence that it can be relied upon" is too strong a test to be required for any single piece of evidence, particularly given that the Claimant only needs to prove that her disability was severe on a balance of probabilities.

[28] Further, the Claimant argues that preferring to have more or different evidence (like a report from the outcome of the cognitive behavioural therapy) is not consistent with the burden of proof in these cases. The General Division must assess the evidence that it does have, rather than comparing it to hypothetical better evidence that the Claimant does not have. The paragraph also implies that there was a need to show that "mental health issues" were "conclusive" of a

[9] General Division decision, para 17.
[10] General Division decision, para 18.
[11] AD1.

severe disability, which seems to suggest that the General Division did not actually consider all of the conditions together, but rather considered the psychological impairments separately from the physical impairments.

[29] The Minister argues[12] that the General Division rejected the conclusions of the report because of the inconsistencies between it and the Claimant's testimony. The Minister notes that the General Division simply applied the facts to the law, and it is the conclusion about the weight the General Division assigned to the report that the Claimant seems to have a problem with, not any legal error or error of fact. Assigning weight is the General Division's job, and is not a legal error the Appeal Division can address.

[30] In my view, the General Division's red flag statements above are sufficient for me to conclude that the General Division was not really applying the correct standard of proof. I accept the Claimant's arguments set out above. The General Division did not simply weigh the evidence. The General Division rejected the conclusion from a medical report. There are no references to the idea of weight in the decision. There is no conclusion that the Claimant's testimony was more reliable than the medical evidence.

[31] The references to the need to be "convinced" or "confident in the report conclusions" sets up the wrong dynamic. The General Division's language in these red flag examples suggests an exercise in which uncontroverted medical evidence requires a level of scrutiny that goes way beyond what is necessary for the overall assessment. If the overall assessment is to decide whether the claimant has shown they have a severe and prolonged disability on a standard of "more likely than not", then uncontroverted medical reports that contain relevant evidence do not need to "convince".

[32] The General Division's task is not to be **convinced** or to be **confident in the conclusions** of a medical report. The medical professionals reach the conclusions; the General Division reviews all of the evidence and decides how much weight to give the evidence in relation to the Claimant's case. The Claimant has only to show that she more "likely than not" meets the test for

[12] AD5.

a severe and prolonged disability.

[33] The General Division can accept the conclusions of a report but assign little weight to the report because it does not help to show that the Claimant meets the test for a disability pension. The General Division can prefer some other contradictory evidence about the Claimant's conditions in relation to the legal test. But the General Division here seems to have found the report wanting because it was not conclusive or did not convince him that the Claimant had a severe disability. The General Division member does not have to be "confident" in the conclusions of a medical report, and that kind of language sets the bar too high.

Searching for Perfect and Different Evidence

[34] In my view, the level of scrutiny that the General Division applied to the medical evidence is not consistent with the ultimate task, which is to determine whether it is more likely than not that the Claimant meets the definition of a severe and prolonged disability. The General Division member parsed the wording choices in the assessment report very closely (like taking issue with the use of terminology like "trauma" or "injury" that are terms of art in disability evaluations). The General Division seemed to require the Claimant's testimony to mirror the findings of the assessors on minute issues.

[35] The General Division specifically rejected the conclusion that the Claimant was "unemployable permanently."[13] It seems that this was because it was "subjectively derived", and because there was not more evidence to support this conclusion from other kinds of reports like functional evaluations, vocation assessments or abilities testing.

[36] However, the task was not to decide how much evidence the General Division would have liked to assess, or to take on the way psychological assessment or chronic pain works generally (i.e. self report).

[37] The General Division's approach here applied too stringent a standard of proof on the

[13] General Division decision, para 16.

Claimant.

REMEDY

[38] Once I find an error, I have two options to fix (remedy) it. I can give the decision that the General Division should have given, or I can return the case to the General Division for reconsideration.[14]

[39] At the Appeal Division hearing, the Claimant's lawyer argued that the matter should be returned to the General Division for a new hearing with a different General Division member who has access only to the materials in the record that the first General Division member had.

[40] The Claimant's counsel argues that even though I have access to the record, the problem is that in a case that involves chronic pain disorder and psychological conditions, I need to hear the evidence of the Claimant first hand, not simply by listening to the recording of the hearing that already took place at the General Division level. Strategically, Claimant's counsel does not want a member of the Appeal Division giving the decision when that member has been privy to the initial decision from the General Division (since the General Division decision found against the Claimant).

[41] The Minister argued that if I found an error, I could give the decision that the General Division should have given.

[42] Where the record is complete, I have a tendency to give the decision that the General Division should have given. This is often the most fair and efficient way forward. I appreciate that I have had access to the General Division's decision. In addition, I have only had access to the recording of the General Division's hearing. As a result, I have heard all of the evidence but

[14] DESDA, s 59.

not in real-time. I have not had the opportunity chance to ask questions of the Claimant during her testimony.

[43] However, the legislation allows me the opportunity to give the decision that the General Division should have given. I have that power regardless of the fact that I have had access to the General Division decision and that I did not hear the evidence live the first time. The Claimant's point about chronic pain and psychological conditions is a good one: in many of these cases, it is the testimony from the Claimant that is especially relevant. If I did not understand the Claimant's evidence on a key point, I might well decide that the case needs to return to the General Division so that she has every opportunity to present relevant evidence and make every argument.

[44] However, in this case, I am satisfied that I understood the Claimant's evidence and that I can assess the reliability of that evidence without having physically seen the Claimant testify.

[45] The Claimant proved she had a severe and prolonged disability by September 2018 when she had medical evidence to support the diagnosis of chronic pain disorder and psychological conditions. The psychological assessment concluded at that point that she was permanently unemployable. Therefore, before the end of her MQP, she proved that her main conditions were chronic pain disorder, major depressive disorder, and adjustment disorder mixed with depression and anxiety. The unexplained pain that she experiences (the chronic pain disorder) appears to have started with her degenerative disc disease in her back.

[46] The Claimant has functional limitations from these conditions that mean that she is incapable regularly of pursuing any substantially gainful occupation. In this case, her personal circumstances are not a significant barrier to employment. It is her functional limitations (chronic pain disorder and psychological conditions) that keep her from any substantially gainful occupation. She has taken steps to manage her conditions. She has not refused treatment. She has a severe and prolonged disability under the CPP, and she is entitled to a disability pension.

Proving a disability is "severe"

[47] A person is entitled to a disability pension when they can show on a balance of probabilities that they had a severe and prolonged disability on or before the end of the MQP.[15] The Minister calculates the MQP based on the person's contributions to the Canada Pension Plan. A person's disability is severe if it makes them incapable regularly of pursuing any substantially gainful occupation.[16]

[48] The Tribunal considers medical evidence and the testimony of the Claimant, as well as evidence about the Claimant's treatment and efforts to manage their disability.[17]

Personal circumstances not a barrier to employment

[49] I must take a "real-world" approach to considering the severity of the Claimant's disability. That means that I must take into account the Claimant's personal circumstances, including her age, education level, language proficiency, and her past work and life experience.[18]

[50] The Claimant was 47 years old at the end of the MQP on December 31, 2018. She has a grade 12 education. She has not attended any college or university and she has not been involved in any technical, trade or on the job training.

[51] She worked as a customer service representative for X from 2010 to 2013, and then as a customer service representative for another company from 2013 until April 2016. She had sickness benefits from EI after that.

[52] The Claimant's personal circumstances are not the key barrier here to accessing work. At the time of the MQP, the Claimant had many years to go before the age that many people in Canada retire. Her education does limit her somewhat, because some sedentary jobs require specialized training or post-secondary education. The Claimant does not have that kind of education or training.

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[15] CPP, s 42(2).
[16] CPP, s 42(2).
[17] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[18] The Federal Court of Appeal explained this in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

[53] While the Claimant's age and education would otherwise make her a good candidate for retraining, her functional limitations preclude her from participating in retraining.

The Claimant has limitations that affect her capacity to work

a) The Claimant's testimony

[54] The General Division hearing took place three months after the end of the Claimant's MQP. As a result, the Claimant focussed her testimony on her limitations at the time of the hearing, which was reasonable.

[55] The Claimant testified[19] that she has low stabbing low back pain that is below the belt and is constant. She testified that the pain was an 8 (on a scale of 1 to 10, 10 being excruciating). She testified that for the past two to three months, she has pain and numbness in her left arm and elbow, all the way to her wrist. She stated that pain was an 8 or 9 in her arm, and a 9 in her elbow.

[56] She testified that she has migraines. She also stated that she has pain in her neck about three times a week, which starts pulling between her shoulder blade and middle of her neck. The pain remains for 4 to 5 hours at a time and is about an 8 on the pain scale. She testified that she could not walk around her block. She has to adjust constantly her position when she sits. She cannot stand for more than 15 to 20 minutes. She has trouble grocery shopping and needs to lean over her cart to complete her shopping. She experiences pain when she tries to lift of stretch.

[57] The Claimant testified that she has side effects from the medication that she takes. Her pain medication makes her feel "stupid." She is very forgetful. She does not sleep a whole lot. Her concentration and memory is not good. The Claimant misstated her birthdate by almost a decade at the beginning of her testimony: she was nervous.

[58] The Claimant stated that she could not walk around the block, even to walk her dog. She can dress herself but she needs to sit on her bed. She can stand to do some dishes a little at a time

[19]There are two parts to the General Division's Recording of the Hearing. The Claimant's testimony starts at part one at about the 25:00 minute mark and to the end of the first part. The Claimant continues her testimony from the beginning of part 2 until about the 19:00 minute mark.

and in moderation. She has pain all the time for bending and reaching. She can do some laundry but she cannot lift the laundry baskets. She does not do outdoor work like snow removal.

[59] She explained that she has panic attacks three times a week. She had some trouble describing the attacks, stating that she is "not good with words." She stated that her legs go numb, she is shaky, and that she gets very nervous and light headed and has the feeling that she does not want to be here, and that she wants things "to end." She described the limitations she has in terms of interacting with other people. She said that she stays in the house and is snappy, nervous, and anxious outside of the house. She testified that she only leaves the house once every two weeks unless she has a medical appointment. Simply put, when asked to describe her psychological or emotional state, the Claimant admitted that it "sucks."

b) The Claimant's other Evidence

[60] When the Claimant applied for a disability pension in September 2016, she completed a Questionnaire for CPP that describes her functional limitations.[20] She completed the Questionnaire long before the General Division hearing, and she testified at the hearing that she had less functionality at the time of the hearing than she did she first applied for the disability pension.

[61] In the Questionnaire, the Claimant stated that she could not sit for a long period of time, and could not stand. She explained that she had severe back pain when seated and that she tried heating pads and adjustments to her chair. She stated that she could sit for maybe two hours (if that). She could stand for not even 15 minutes. She said she could walk "maybe a block if lucky." She stated that she could not lift anything and under the heading "bending and reaching" she wrote "all the time", which she explained at the hearing meant that it caused pain all of the time. Under "remembering" she wrote, "n/a" and under concentration, she wrote, "only when severe pain is present." She stated that she does not sleep and that when driving a car she needs to take breaks every 1 ½ hours. She clarified in the hearing that she does not drive long distances now, and indeed only leaves the house once every two weeks outside of medical appointments.

[20] GD2-53.

She said that she can do dishes a little at a time but has to ask for help for laundry basket. She does household maintenance in moderation.

c) The medical evidence

[62] When the Claimant applied for a disability pension, she provided a CPP Medical Report dated September 2016 from Dr. Akter,[21] who was her family doctor at the time. Dr. Akter stated that the Claimant had mechanical low back pain, which she later describes as "chronic low back pain worse since last year." She stated that an x-ray showed degenerative changes in the lower spine. An MRT showed multilevel facet degeneration. The report confirms, "patient reports to have disabling pain." In terms of functional limitations, Dr. Akter stated that the Claimant reported that she was not able to sit for more than an hour, that she was unable to walk a block, and that she needs help for her household tasks from family members.

[63] Dr. Akter states the Claimant had restricted flexion with pain and pain when she raised her legs to 60 degrees while lying on her back. Dr. Akter stated that the pain was not well-controlled, and that she had chronic back pain progressively getting worse. Dr. Akter did not expect full recovery. Dr. Atken noted that the Claimant also had hypertension, asthma and obesity.

[64] The Claimant provided a report from April 2016 showing moderate lumbar rotoscoliosis, mild to moderate disc space narrowing, and degenerative changes in facet joints.[22] In July 2016, a consultation report stated that the Claimant had "several level spondylotic changes, but not evidence of significant disc protrusion, root compression, or stenosis. Several level fact degenerative changes."[23]

[65] The Claimant provided another CPP medical report from Dr. Campbell,[24] a family doctor at a walk-in clinic. She testified that this doctor started treating her in 2017. Dr. Campbell confirmed the Claimant's chronic back pain and stated that he was undergoing a full

[21] GD2-43 to 46.
[22] GD2-47.
[23] GD2-48 and 49.
[24] GD3 and GD5.

investigation and confirmed that she would need an MRI to determine the extent of the disc disease in her back. He could not say more about her chronic back pain. He was investigating.

[66] The Claimant agreed to an assessment by a clinical and rehabilitation psychotherapist under the supervision of a psychologist in October 2018.[25] The report explains that after the Claimant left work, she continued to experience substantial pain and then emotional disturbance including a loss of ability and interest in participating in recreational activities, social isolation, frequent emotional outbursts of crying, and a profound sense of sadness. She explained that she was struggling with memory, concentration and organization skills. She was reporting trouble with both short and long-term memory, insomnia and sleep derivation and disturbed dreams. It documented the fact that the Claimant told them about a failed educational /retraining plan due to her disability. She experienced frequent panic attacks.

[67] The assessors diagnosed the Claimant with adjustment disorder mixed with depression and anxiety; major depressive disorder; chronic pain disorder, and degenerative disc disease. The assessment states that the Claimant's Global Assessment of Functioning (GAF) score was 50. In other cases at this Tribunal, a GAF of 50 has been found to mean that a claimant has severe impairment in social functioning and cannot keep a job.[26] The Claimant required urgent clinical attention. The assessment concluded:

> For this assessment, we based our opinion on [V. N.]'s self-report as well as reviewing clinical testing. It is apparent that she has sustained physical and subsequent emotional conditions that interfere with her normal functioning in different areas of personal life and employment. [V. N.] has been unable to return to her full time employment, due to physical disability on her lower back, chronic pain and emotional disturbance which are considered as secondary to her injury of April 01, 2016. [V. N.] has been suffering from physical incapacity and chronic pain and she has not adjusted to the changes that have brought about since the accident. She requires psychological treatment for her emotional reactions.
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> In refer (*sic*) to her level of employability, we base our opinion on severity, extent and duration of injury. Considering the chronicity and severity of her condition, it's expected that she would be unemployable permanently.

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[25] GD11.
[26] See *D.O. v Minister of Employment and Social Development*, 2019 SST 587, available online at https://www1.canada.ca/en/sst/ad/adis-2019-sst-587.html, citing also *Plaquet v Canada (Attorney General)* 2016 FC at para 58.

[68] The Claimant explained that when Dr. Campbell retired, she changed family doctors to Dr. Kling. It appears that her first appointment with Dr. Kling was in October 2018. The Claimant's lawyer asked for a report from Dr. Kling, who explained that she did not yet have sufficient information to answer questions about the Claimant's condition for her CPP disability pension appeal. Dr. Kling noted that the Claimant had chronic pain and that she referred the Claimant for cognitive behavioural therapy (CBT). Dr. Kling noted a medication would be a good next step, but the Claimant did not want more medication that particular day. Dr. Kling was attempting to find someone for physiotherapy who could handle direct billing. Dr. Kling's resident also had a note in the file that stated that the Claimant "suffers from chronic low back pain, as well as subacute right arm pain likely related to degenerative disc disease of the cervical and lumbar spine."

[69] Very shortly after the end of the MQP on January 25, 2019, the Claimant started her appointments with a social worker for cognitive behavioural therapy (CBT). The CBT was meant to address her struggles with chronic pain and her limited coping strategies to help cope with or reduce her levels of pain. She testified that the hope is that it will improve her pain or her coping with pain, but it had not "eased [the pain] yet." The social worker's notes state that the Claimant felt guilty about her physical limitations and inability to work.[27] The next month, the social worker noted again the struggle with chronic pain, especially in the left arm. There was a suggestion that the Claimant join some therapeutic swim classes as soon as the financial budget would allow.[28]

Analyzing all of the evidence about the Claimant's limitations

[70] I find that the Claimant has shown that she has a severe and prolonged disability within the meaning of the CPP. Her main medical condition is chronic pain disorder, along with major depression and adjustment disorder. I accept the Claimant's testimony about her limitations, and I put great weight on the results of the assessment report from October 2018.

a) The relevance of objective medical tests in a chronic pain case

[27] GD14-6.
[28] GD14-6.

[71] The Supreme Court of Canada has recognized chronic pain syndrome and related conditions. These conditions involve pain that persists beyond the normal healing time or is disproportionate to an injury.[29]

[72] As a result, in this case it is not the Claimant's degenerative disc disease or the results of the MRI alone that lead me to conclude that the Claimant has a severe disability. These objective reports are relevant, but they do not, on their own, establish a severe disability.

[73] Rather, it is the disproportionate pain and other psychological limitations that the Claimant developed that mean she is incapable regularly of pursuing any substantially gainful occupation.

[74] Accordingly, I do not disagree with the Minister's argument about Dr. Akter's report. That report alone and the x-rays do not support "any severe pathology or impairment to preclude all types of suitable work."[30] That report, at least on its own, does not prove that the Claimant has a severe disability. It supports the existence of the underlying "injury" (or "condition" or "pathology" or even sometimes "accident") from which we see that the Claimant has unexplained or out of proportion type of pain and psychological symptoms. It is that chronic pain and the psychological symptoms that are the basis of my decision to grant the disability pension.

b) Assessing evidence of limitations from chronic pain and psychological symptoms

[75] I put a great deal of weight on both the psychological assessment and the Claimant's testimony. Together, they show the Claimant has many functional limitations that affect her ability to work.

[76] The Claimant argues that she is not capable regularly of any substantially gainful occupation. When she stopped working in April 2016, she was already in a job that was sedentary. She was experiencing severe pain from sitting which was not well managed either, despite her taking prescribed medications, using a heating pad, and trying to change aspects of her workstation. Several months before the end of the MQP, the Claimant had a psychological

[29] The case from the Supreme Court of Canada is *Nova Scotia Workers' Compensation Board v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54.
[30] GD7-4.

assessment that confirmed a diagnosis of chronic pain disorder. The report documents the many functional limitations the Claimant has that impact her ability to work, including an inability to sit or stand for any significant amount of time, as well as limitations in her memory and concentration.

[77] The psychological assessment showed that in addition to the severe pain she was experiencing in her back and her arm and her shoulders, she had major depressive disorder, and a GAF of 50, which shows how seriously she was impaired in terms of ability to function in a workplace or educational setting. The Claimant urges the Tribunal to accept the conclusions of the assessors that the Claimant is unemployable on a permanent basis.

[78] The Minister did not provide any medical evidence that runs counter to the conclusions of the psychological assessments. Instead, the Minister argued[31] that it was "interesting" that prior to the psychological assessment, neither the Claimant nor her family doctor described any significant mental health issues, and that there was no previous indication that she required any type of psychological intervention or referrals. The Minister argued that if the Claimant started treatment, improvement in her symptoms "would be expected." As a result, the Minister argued that the psychological assessment did not support the Claimant's position that her disability was severe.

[79] In my view, when a Claimant provides a medical assessment report like this one that assesses the Claimant, provides diagnoses and identifies a series of functional limitations, and then concludes that the Claimant is permanently unemployable, it is the "best evidence" available on the legal questions I have to decide. There are limited circumstances in which that best evidence from a professional will be unreliable. This is particularly true because the evidence is tested on a balance of probabilities; the Tribunal is applying remedial legislation; and the appeal is about access to a public pension for which the Claimant is a contributor.

[80] I put a great deal of weight on the psychological assessment for several reasons. First, the content of the assessment is helpful to the legal questions I have to answer. The report is within the MQP, and close to the end of the MQP. It provides a:

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[31] GD13-2 and 3.

- diagnoses;
- long list of functional limitations that I find would affect the Claimant's ability to work;
- prognosis; and
- an opinion about employability in light of the conditions and limitations.

[81] Second, it is consistent with the Claimant's testimony about her functional limitations in any way that is significant. It described a failed education plan. The Claimant did not speak about that failed plan in her testimony, but that is not an inconsistency. I refuse to draw an adverse inference from the Claimant failing to address that plan in her testimony. She was not asked any question (including by the member, who did ask her questions) about that failed plan.

[82] The assessment describes the Claimant having lost weight. The Claimant testified about weight gain at the hearing. This is not an inconsistency: the Claimant testified about how much weight she had gained since 2016. The assessment report refers only generally to weight loss and the report is dated 2018, so without more information about the period the assessment refers to, there is no inconsistency.

[83] Further, the report does refer to the Claimant's adjustment to her "injury." This is not an inaccuracy that puts the reliability of the report in any jeopardy. I accept the Claimant's argument (and am familiar with the notion) that psychological assessments in the disability community can use the term "injury" in a somewhat strange way, in a way that is essentially a synonym for disability or condition.

[84] I do not accept the Minister's arguments about how much weight the Tribunal should give to the psychological assessment. There is nothing "interesting" or in any way suspect to me about the Claimant's lawyer referring his client to have a psychological assessment when he did. There is no reason in this case for me to be suspicious of the conclusions in this assessment report about the Claimant's psychological diagnoses simply because this is not a report from a treating physician. In order to properly prepare a case for hearing, lawyers representing people with disabilities routinely seek professional medical assessments from specialists.

[85] Similarly, I will not give the report low weight simply because I would "expect" that the Claimant's new diagnoses would improve with treatment. This is an argument from the Minister about what might be "expected", but it is not a medical opinion from the Minister about the Claimant's treatment that I need to weigh against the psychological assessment.[32] The fact that the Claimant would improve with treatment is also not a notorious fact that is capable of immediate demonstration, so it cannot form the basis for judicial notice, either.

[86] The notes from the social worker (who provided the CBT after the end of the MQP on referral from the family doctor) echo the content of the psychological assessment. I find, based on all the medical evidence and the Claimant's testimony, that the Claimant has physical limitations in terms of sitting, standing, bending, reaching, and walking. She experiences pain that she rates very highly on a pain scale.[33] As a result of that pain and the side effects of the medications she takes, the Claimant has lowered concentration and memory and does not sleep well. These are also functional limitations that affect her ability to work, even in a sedentary position. Although she sat throughout the hearing, when the General Division member asked her about that, she explained that she was in excruciating pain in her back and her elbow.

[87] The Claimant's physical functional limitations meant that she could no longer do her sedentary full time job as of April 2016. I find that by October of 2018, the Claimant was also incapable regularly of any substantially gainful occupation. In other words, by the time of the psychological assessment, the Claimant had limitations relating to chronic pain syndrome and major depressive disorder. She had a GAF of only 50, and she needed urgent clinical attention. Consistent with her testimony, she was becoming socially isolated and was avoiding social situations. She had trouble sleeping, concentrating and she was having panic attacks. She had poor memory and concentration. In her words, her psychological condition "sucked." These functional limitations, in addition to those she was experiencing physically, meant that she could not work fewer hours or at a job with different expectations. She was incapable regularly of pursuing any substantially gainful occupation.

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[32] I have pointed this out before in relation to the Minister leading evidence about the usual treatment modalities for fibromyalgia through submissions prepared by medical professionals that are not tested by cross-examination. See *M.H. v Minister of Employment and Social Development*, 2018 SST 826, para 26.

[33] In discussing the Claimant's pain, I am referring to the experience of that pain as a functional limitation, not just a description of suffering, which is not in and of itself relevant.

Reasonable steps to manage condition and did not refuse treatment

[88] The Claimant took reasonable steps to manage her condition. She did not refuse treatment.

[89] Claimants must show that they have taken reasonable steps to manage their medical conditions.[34] If claimants refuse treatment unreasonably, they may not be entitled to the disability pension (and the impact of the refused treatment is relevant in that analysis).[35]

[90] When the Claimant was working, she tried a heating pad for her back, and adjusted her home workstation. She tried a brace for her wrist and elbow. She took her prescribed medications including Tylenol 3, Celebrex and Lyrica. She took medication to address diabetes and to keep her blood pressure down. She cooperated with changes to her medications, including a change just before the hearing at the General Division that increased her pain but was necessary to better control her blood pressure. Dr. Akter stated in the CPP medical report "consider pain clinic referral as needed". However, she sees a social worker on a regular basis for cognitive behavioural therapy and support.

[91] The Claimant has tried physiotherapy, massage therapy and chiropractic treatments when she had the money to try them. She used medical marijuana to address pain. She stopped physiotherapy because it only "helped a little." She has tried to lose weight, which has been difficult because of the pain she experiences when she walks. She tries to exercise in ways that do not cause her more pain, including using her backyard pool. She tried stretches at home that she learned at physiotherapy.

[92] The Claimant did not unreasonably refuse treatment. More specifically: I find that there is no specific treatment that a medical professional recommended to the Claimant that she refused. The Claimant testified and I accept that she has not actually been referred to a pain clinic. Her doctor does not recommend that option when the patient does not have someone to drive them to and from the appointments and monitor them afterwards. The Claimant has some limited coverage for physiotherapy through her husband's insurance. I accept that to the extent that this

[34] The Federal Court of Appeal explains this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[35] The Federal Court of Appeal explains this in a case called *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

is a recommendation from her family doctor, she does not have the money to pay upfront for those services only to be reimbursed later by insurance. There is nothing unreasonable about the Claimant's failure to follow up on a treatment that she simply cannot afford.

The disability is prolonged

[93] The Claimant's disability is likely to be long-continued and of indefinite duration. This means it is prolonged within the meaning of the CPP. The CPP medical report from Dr. Akter stated that the Claimant's chronic back pain was progressively getting worse and that she did not expect full recovery.[36] The psychological assessment stated that, considering the chronicity and the severity of her condition, they expected that the Claimant would be unemployable "permanently."[37] The evidence does not contradict these conclusions, and I have accepted these reports and the testimony from the Claimant as reliable. The Claimant's condition is prolonged.

[94] The Claimant proved that the she had a severe and prolonged disability by October 2018, when the report from the assessors confirmed that she had chronic pain disorder and psychological conditions and was permanently unemployable. The start of her disability was therefore during her MQP, which did not end until December 31, 2018. Payments start four months after the start of the disability, which in this case is February 2019.

CONCLUSION

[95] I allow the appeal. The General Division made an error. I have given the decision that the General Division should have given: the Claimant is entitled to a disability pension.

Kate Sellar
Member, Appeal Division

HEARD ON:	November 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Stephen Yormak, Representative for the Appellant

[36] GD2-46.
[37] GD11-6.

	Susan Johnstone, Representative for the Respondent