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

Citation: *G. P. v Minister of Employment and Social Development*, 2020 SST 467

Tribunal File Number: AD-19-768

BETWEEN:

G. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 3, 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) starting 15 months before the date of his application for the disability pension, which is March 2017. Payments begin four months later in July 2017.

OVERVIEW

[2] G. P. (Claimant) worked as a corrections officer. He was diagnosed with PTSD in 2012. He had difficulty, but he continued to work at his usual job until February 2014 when he took early retirement. For financial reasons, he worked part-time in a series of jobs, on and off, until June 2018 when he stopped working completely because of his medical conditions.

[3] He applied for a CPP disability pension stating that he could no longer work due to PTSD, anxiety and hypertension. The Minister found the Claimant disabled as of June 2018. The Claimant argued that he was disabled as of February 2014 when he retired from his usual job. The Minister denied the Claimant's request to reconsider the date his disability began. The Claimant appealed the Minister's decision to this Tribunal. The General Division dismissed his appeal. The General Division found that the Claimant had capacity to work (although not at his corrections officer job) until June 2018, when he became disabled as defined by the CPP.

[4] 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.

[5] 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 starting 15 months before he applied which is March 2017. Payments begin four months later in July 2017.

ISSUE

[6] Did the General Division made an error of law by failing to apply the correct legal test to decide whether the Claimant had a severe and prolonged disability beginning in February 2014?

ANALYSIS

Reviewing General Division decisions

[7] 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 are any errors. That review is based on the wording of the DESDA, which sets out the reasons that form the basis for any appeal (grounds of appeal).[1] If the General Division made an error of law, that can form the basis for an appeal.[2]

"Severe" disability within the meaning of the CPP

[8] To be eligible for a disability pension, the Claimant must have a severe disability within the meaning of the CPP. A person with a severe disability is incapable regularly of pursuing any substantially gainful occupation.[3] When assessing the evidence about a claimant's disability, the General Division considers both:

- the Claimant's background (including age, education, language proficiency, past work and life experience); and

- the Claimant's medical condition (which involves assessing the condition in its totality – all of the possible impairments that could affect capacity to work).[4]

[9] The General Division also considers the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.[5]

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[1] DESDA, s 58(1).
[2] DESDA, s 58(1)(b).
[3] *Canada Pension Plan*, s 42(2).
[4] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[5] The Federal Court of Appeal explained this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48; and in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

Did the General Division make an error of law?

[10] The General Division failed to follow the legal test to decide whether the Claimant had a severe disability within the meaning of the CPP when he stopped working as a correctional officer in February 2014. The General Division needed to consider and discuss the Claimant's medical conditions, functional limitations, treatment, and personal circumstances. The General Division skipped some of this analysis and moved on to decide, based on the Claimant's work activity between 2014 and 2018, that his disability was not severe during that period.

[11] The General Division decided that the Claimant had capacity for work and ultimately that he did not meet the test for a severe disability under the CPP at any time before June 2018.[6] To reach that conclusion, it seems that the General Division relied mostly on the facts about the work the Claimant did after he left his corrections officer job.

[12] The General Division accepted that the Claimant could no longer perform his usual work, and that his condition and symptoms started before he left his corrections job in 2014. The General Division "accepted the Claimant's evidence that he has been suffering since 2014 (or earlier); however, the suffering of the claimant is not an element on which the disability test rests."[7]

[13] The General Division then analyzed the Claimant's work activity, and decided that the work activity showed a capacity for work. The General Division summarized its conclusion about the Claimant's work like this:

> In looking at the Claimant's ability to obtain and maintain employment, adhere to a work schedule and work with consistent frequency in remunerative employment, I concluded that the Claimant had ongoing capacity for substantially gainful work until his medical conditions prevented him from continuing in June 2018.[8]

[6] General Division decision, para 17.
[7] General Division decision, para 7.
[8] General Division decision, para 11.

[14] The Claimant argues that the work he did between 2014 and 2018 was not substantially gainful, that his accommodations were not "minor", and that his disability was severe in 2014 when he took early retirement from his job in corrections.

[15] The Minister argues that the General Division:

- correctly set out the test for disability benefits in the decision;
- was required to decide whether the Claimant could be found disabled earlier, and the Minister had already found he had a severe and prolonged disability as of June 2018;
- recognized the "undisputed fact" that the Claimant's condition, symptoms and suffering were present before he retired from his regular job as a corrections officer; and
- relied heavily (as it is entitled to do because the General Division's job is to weigh evidence) on Dr. Hart's report, which stated that the Claimant would be unable to return to work as of June 14, 2018, indefinitely for medical reasons.

[16] The Minister argues that the General Division did not make an error in its analysis, and did consider the medical evidence, and the limitations the Claimant had while he was working.

[17] In order to decide whether the Claimant met the test before June 2018, the work he did between 2014 and 2018 was an "obvious and important factor in order to decide capacity for work, despite his condition and symptoms."[9]

[18] In my view, the General Division made an error of law. I agree with the Minister that the General Division's role was to decide whether the Claimant was disabled earlier than June 2018. The General Division did correctly set out the test for the disability pension. I also agree that the work the Claimant completed between 2014 and 2018 was an obvious and important factor in the analysis.

[19] However, if the General Division's job is to decide the date of onset of a disability, it must provide a full analysis of whether the disability was severe for that date of onset. Skipping

[9] AD3-9.

over an analysis as set out above in paragraph 8 renders any discussion of the Claimant's work activity insufficient. For example, claimants may well have participated fully in part-time work that is not substantially gainful without receiving any accommodation at all, and yet an analysis of their functional limitations shows that they are incapable regularly of pursuing any substantially gainful occupation.

[20] The General Division did not apply the required legal test to decide whether the Claimant had a severe disability before he stopped working altogether in June 2018. There is no doubt that the work the Claimant did between 2014 and 2018 was important in this case. But the fact that the Claimant worked a series of part-time jobs on and off from 2014 to 2018 does not excuse the General Division from assessing the evidence about the Claimant's conditions and limitations.

[21] The fact that the Claimant did some part-time work can form the basis for a finding that there was a capacity for work. However, a full analysis of the Claimant's medical condition and its limitations is still required.

REMEDY

[22] 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.[10]

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

[24] 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.[11]

[25] The Claimant's minimum qualifying period (MQP) ended on December 31, 2019. The Claimant takes the position that his disability became severe and prolonged within the meaning of the CPP in February 2014, when he was no longer able to work as a corrections officer. He

[10] DESDA, s 59.
[11] *Social Security Tribunal Regulations*, s 2. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222.

worked sporadically between 2014 and 2018. The Minister takes the position that the Claimant did not show that he was disabled within the meaning of the CPP before June 2018, when he stopped working completely.

[26] In my view, the Claimant has shown that he had a severe and prolonged disability within the meaning of the CPP when he stopped working in corrections in 2014. In reaching this conclusion, I have considered the Claimant's medical condition and functional limitations. There was some evidence of residual capacity to work (because he engaged in some work activity). However, I am satisfied that these work efforts were never substantially gainful, they represented the most work that he could do, and that they failed as a result of his disability.

Personal Circumstances

[27] When deciding whether the Claimant has a severe disability, I need to consider how employable the Claimant is in the real world, given his:

a) age;

b) level of education;

c) ability to speak, read, and write English; and

d) past work and life experience.[12]

[28] The Claimant was 51 years old on the last day of the MQP. He was not necessarily too old to retrain. The Claimant completed grade 12. He completed half a semester of college in the late 1980's, but he left to take a job in corrections. He completed a corrections course certificate in May 1988 and became a correctional officer, a job he had until 2014, when he took early retirement due to disability. The Claimant has no barriers in terms of his ability to communicate in English.

[12] This "real-world" approach, using these four criteria, comes from the Federal Court of Appeal in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

[29] In terms of past work and life experience, the Claimant witnessed and experienced trauma at his job in corrections. I am satisfied that this trauma has impacted the Claimant's mental health in a way that has created a significant barrier to employability in future.

Medical Conditions and Functional Limitations

[30] In the Medical report for the CPP completed in June 2018,[13] Dr. Hart (the Claimant's family doctor) stated that he had been treating the Claimant since 1995. He started treating the Claimant for the main medical condition in 2012 (when he still worked in corrections). Dr. Hart diagnosed post-traumatic stress disorder (PTSD), and "superimposed" chronic anxiety disorder. He also made notes that stated "current family mental health" and stated that the Claimant developed hypertension exacerbated by his PTSD.

[31] Dr. Hart wrote:

> Worked at penitentiary for 26 years , he left his employment in 2014 as a result of declining mental health…**shortly after leaving and to this day** he suffers with insomnia, panic attacks, flashbacks, regarding serious confrontations at the corrections facility, there are nightmares, become extremely irritable with mood swings and paranoid thoughts, he has tried other jobs since 2014, mostly part time but has been **unable to continue** in any of these positions. **(emphasis added)**

[32] Dr. Hart stated that that Claimant attended regular follow up appointments with him. Dr. Hart stated that he had made referrals for the Claimant for both psychological and psychiatric assessment. The Claimant takes an anti-depressant and blood pressure medication. Dr. Hart stated "at this point he is unable to work at any position and will require intensive psychotherapy. For prognosis, Dr. Hart stated "hopefully he will continue to perform his personal daily needs."[14]

[33] Dr. Hart also wrote a letter dated June 27, 2018 that stated: "this patient is unable to return to work as of this date due to medical reasons, for an indefinite period."[15]

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[13] GD2-101.
[14] The final page of Dr. Hart's CPP medical report is missing from the file, but is summarized in a document from the Minister at GD2-93.
[15] GD2-99.

[34] The Claimant provided a Disability Tax Credit certificate, completed by Dr. Hart. [16] Dr. Hart stated in that form that the Claimant is "markedly restricted in all aspects of daily living." Dr. Hart stated that the Claimant continued to experience panic attacks, insomnia, and flashbacks to serious confrontations that occurred when he worked in corrections and that he had become extremely irritable and has both mood swings and paranoid thoughts. Dr. Hart stated that the Claimant "has tried other jobs, mostly part time but has been unable to continue in any of these positions."

[35] In his Questionnaire for the CPP disability pension,[17] the Claimant stated that he was not able to work due to: lack of sleep, panic attacks, flashbacks, nervousness, paranoia and mood swings. He reported that he also has nightmares, is hypervigilant, irritable and emotional. He stated that he worked part time to survive financially but had to give it up for medical reasons. The Claimant stated, "after I left corrections I attempted to become gainfully employed, over time my conditions have worsened, four year later still have effects."[18]

[36] The Claimant testified that once he took an early retirement, he was on a waiting list for a mental health clinic. He confirmed that he saw his family doctor regularly. His family doctor retired several months after he stopped working, but then decided to come back for two to three days a week and started a new file for him. The Claimant stated that he was taking medication for his anxiety and his blood pressure. It was not until 2018 that he got his referral for more mental health support. He testified that in 2018, his doctor suggested the referral as he seemed to be getting worse.

[37] The Claimant provided evidence to show multiple functional limitations that would impact negatively on his ability to work. Despite treatment from his family doctor, and although he was compliant with his medications, the Claimant's functional limitations impacted his capacity for work. I find that the Claimant's insomnia/lack of sleep, panic attacks, flashbacks, paranoia, nervousness, hypervigilance, irritability, and mood swings are functional limitations that impact the Claimant's ability to work. They are the reason he was no longer able to continue

[16] GD2-55.
[17] GD2-103.
[18] GD2-104.

in corrections, but I find that they continued to impact the Claimant when he left corrections as well.

Residual Work Capacity

[38] There is some limited evidence that the Claimant had some (or what's called a "residual") capacity work. The evidence shows that the Claimant did some work after he took early retirement from his job in corrections in 2014.

[39] The Claimant started the early retirement in February 2014. He had EI regular benefits until the spring/summer season of 2015 when he worked for a landscaping company. That work was seasonal, and in the fall of 2015 and through the winter of 2016, the Claimant collected EI. In the Spring of 2016, he went back to the seasonal job, but had to stop in the summer due to his medical condition. In the fall of 2016, the Claimant started work at a cleaning company, worked three to four hours per day, five days a week. The Claimant testified that he reduced his hours to two to three hours per day, and only on weeks when there was less job stress. In the fall of 2017, he took on a second job at a grocery store. He started at 20 hours a week, but eventually reduced his hours to 12 to 15 hours a week. In June 2018, the Claimant stopped working completely.

[40] The Questionnaire from the cleaning company[19] stated that the Claimant stopped working in June 2017 because of shortage of work. It states that the Claimant's attendance was good and that there were not absences for medical reasons. The Questionnaire confirms that he worked four hour shifts, but then states without further explanation that he worked both full time and part time.

[41] The Questionnaire from the grocery store[20] confirms that that Claimant stopped working for medical reasons in 2018. It states that he worked 22 hours per day average, which I assume was meant to be per week. The employer ticked the box to state that the Claimant worked those hours because that was all the work that was available. I find this largely unhelpful, as it is not clear how the employer knew that the second box did not also apply, which states that he worked

[19] GD2-56 to 58.
[20] GD2-59 to 61.

part time because that was all he was capable of performing. The Questionnaire states that the Claimant's medical condition did not affect his ability to handle the demands of the job, that his attendance was good, and that there were not absences for medical reasons.

[42] There is no Questionnaire from the landscaping company.

[43] The Claimant argued that the work that he did between 2014 and 2018 does not show that he could have worked in a substantially gainful occupation. The evidence he provided from his family physician confirmed that he was "unable to continue in any of these positions." He argued that the work reports are inaccurate because they were not completed by immediate supervisors, and that in fact he did not work all of the hours that were available to him. In addition, that in the case of the grocery store job, he received accommodations that are not outlined in the questionnaires because they were completed by people at the head office.

[44] The Claimant argues those at head office are not familiar with his working conditions on the ground. The Claimant testified about needing to give up the landscaping job due to mental and physical illness – PTSD, blood pressure/hypertension and chronic anxiety. He did not receive EI. He explained that he did not have records of any doctor's visits at that time from May to June of 2018 because his doctor had retired, his records went into storage, and then the doctor came back to work.

[45] The Claimant testified that at the landscaping company he could have had more work but that he asked for those hours. He noted that if he did not work, he just was not paid; there were not records of when he was sick. The initial decision from the Minister was heavily based on the reports but he never had the opportunity to explain them until the General Division hearing, The Claimant took the position that he could not work full time but that he did the best that he could.

[46] The Minister acknowledged that as of 2014, the Claimant was no longer able to work at his old job as a correctional officer, and that he took on jobs with part-time hours, never earning a substantially gainful wage. However, the Minister argued that the Claimant worked low hours at the jobs he had because that was all that was available, and that his medical condition did not affect his ability to perform the jobs.

[47] The Minister argued that there was no evidence to suggest that the Claimant would have been precluded from working full time in these positions if the work had been available as full time. The Claimant worked part time due to financial necessity because he was only getting 50% of his salary from his early retirement pension. The Minister took the position that the Claimant worked part time in these years to supplement his partial payments from his pension. The Minister argued that the Claimant's ability to work these jobs actually means that he had the ability to work in other jobs, such as full time jobs. In other words, the fact that he worked these jobs meant that actually he had capacity to pursue substantially gainful employment.[21]

[48] The Minister essentially argues that the fact that the Claimant worked part time is evidence, in this case, that he could have worked full time. The Minister also argued that the Claimant did not see his doctor from May 2016 until June of 2018, so it was unlikely that his condition worsened during that time.

[49] The Claimant gave evidence at the hearing that the part time work that he did represented the most work that he could handle, and that he was the one that decided he could only work part time.

[50] Evidence of work activity can establish a capacity to work, but not in all cases. In one case, the Federal Court decided that a return to work which only lasted a few days would be a failed attempt, but two years of earnings consistent with what had been earned before cannot be a failed attempt.[22]

[51] I accept the Claimant's testimony about his capacity for work between 2014 and 2018. He worked only enough to sustain himself financially (in combination with his reduced pension). I find that he did this not because he was simply choosing to work less than he was capable of, because he did not have the capacity to earn any more money or work any more than he did.

[52] I accept the Claimant's arguments about the questionnaires that were completed by his former employers. I do not give these questionnaires much weight. The questionnaires from the employers represent a series of ticked boxes with no explanations. It seems that the person

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[21] GD5-7.
[22] The Federal Court explained this in a case called *Monk v Canada (Attorney General)*, 2010 FC 48, at paras 8 and 10.

completing the form for the grocery store was not from the location the Claimant worked at. I do not believe that person would have access to the kind of information the Claimant testified about in terms of working only the hours he could handle.

[53] Similarly, the information provided by the landscaping company is of limited help. Mental health disabilities are sometimes referred to as “invisible” disabilities. The functional limitations associated with the disability may not be readily apparent to an employer necessarily. It might be difficult for someone in a management position at the landscaping company to know, for example, whether the Claimant’s panic attacks were the impediment to completing additional hours of work had those hours been available.

[54] I find that that while the work the Claimant completed after corrections was evidence of residual capacity to work, that work represents efforts to get and keep employment that were ultimately unsuccessful because of his disability. The Claimant had to stop working altogether in 2018, and that decision was supported by his family doctor. The work he had been doing was not substantially gainful anyway. In the case of the landscaping company, it was seasonal and he had to stop in the summer of 2016 for a time because of his disability. The work amounts to a string of part-time jobs that the Claimant was ultimately not able to maintain, even though they did not represent many hours of work.

[55] I am satisfied that the Claimant had a severe disability in 2014 when he stopped working in corrections. He was experiencing mental health disabilities that were impacting his capacity to work. He was not sleeping. He had flashbacks and panic attacks. He was extremely irritable and had mood swings. These symptoms amount to functional limitations impacting his ability to work. He was taking his medications and he was on a long wait list for additional mental health support from a clinic. The Claimant kept in contact with his family doctor and did not refuse any treatment.

[56] Although the work that he completed between 2014 and 2018 is evidence of a residual capacity to work, I find that it was a series of failed work attempts that were ultimately unsuccessful because of his disability. The Claimant was not capable regularly of performing any substantially gainful occupation when he left corrections. He was completing work that was not substantially gainful, and I find that in the case, the fact he was doing that work is not evidence

that he could have done more. The work he did represented the maximum capacity he had to offer. He was not capable regularly of pursuing any substantially gainful occupation.

The disability is prolonged

[57] 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.[23]

[58] Dr. Hart set the bar very low for the Claimant's prognosis, stating "hopefully he will continue to perform his personal daily needs."[24]

CONCLUSION

[59] I allow the appeal. The General Division made an error of law. I gave the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan* (CPP) starting 15 months before the date of his application for the disability pension, which is March 2017. Payments begin four months later in July 2017.

Kate Sellar
Member, Appeal Division

HEARD ON:	February 19, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. P., Appellant Susan Johnstone, Representative for the Respondent

[23] *Canada Pension Plan*, s 42(2).
[24] GD2-93.
