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

Citation: *DD v Minister of Employment and Social Development*, 2020 SST 919

Tribunal File Number: AD-20-718

BETWEEN:

D. D.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 23, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant, D. D., is a former truck driver who was involved in an on-the-job motor vehicle collision in June 2000. A passenger in the other vehicle did not survive. The Claimant did not sustain any physical injuries, but he was later diagnosed with delayed-onset post-traumatic stress disorder (PTSD). In November 2001, the Claimant was involved in a second accident, this time falling 30 feet from tree while on a hunting trip. He sustained multiple injuries, including fractures to his sternum, left hip, left ribs, left femur, and left ankle.

[3] In February 2014, the Claimant applied for a Canada Pension Plan (CPP) disability pension, claiming that he could no longer work because of PTSD, anxiety, chronic myofascial pain, and post-traumatic arthritis. The Minister refused the application because it found that the Claimant's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*, during his minimum qualifying period (MQP), which it determined ended on December 31, 2002.

[4] In June 2016, the Social Security Tribunal's General Division dismissed the Claimant's appeal. The Appeal Division later overturned that decision because the General Division had failed to consider the impact of the Claimant's anxiety and depression on his ability to work. The Appeal Division referred the matter to the General Division for reconsideration. The same member who had presided over the first General Division hearing heard the second, which he conducted solely by way of documentary review. In June 2019, he again dismissed the Claimant's appeal in what was, in effect, an addendum to his previous decision—one that considered only the Claimant's mental health issues. The Claimant returned to the Appeal Division, which allowed the appeal, finding that the General Division had denied him his right to a full hearing.

[5] The Appeal Division referred the matter back to the General Division yet again. The General Division held a hearing by teleconference on all issues but dismissed the appeal for a third time, finding insufficient evidence that the Claimant was regularly incapable of performing a substantially gainful occupation as of the MQP.

[6] The Claimant has now returned the Appeal Division, alleging that the General Division's most recent decision contained numerous errors. Earlier this year, I granted the Claimant leave to appeal because I thought he had raised an arguable case.

ISSUES

[7] There are only four grounds of appeal to the Appeal Division. A claimant must show that the General Division (i) acted unfairly; (ii) refused to exercise or exceeded its jurisdiction; (iii) interpreted the law incorrectly, or (iv) based its decision on an important factual error.[1]

[8] The Claimant alleges that, in coming to its decision, the General Division made the following legal errors:

(a) It gave insufficient consideration to the Claimant's background and personal characteristics;

(b) It gave insufficient consideration to the cumulative effect of the Claimant's medical conditions on his capacity to work;

(c) It failed to assess whether the Claimant's disability was severe and prolonged as of the MQP;

(d) It improperly found that the Claimant had the residual capacity to find alternative work; and

(e) It failed to recognize that claimants should not be required to locate "philanthropic" employers who are willing to offer flexible work schedules and other accommodations.

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[1] *Department of Employment and Social Development Act*, section 58(1).

[9] The Claimant also alleges that the General Division made the following factual errors:

(a) It failed to consider the Claimant's testimony;

(b) It engaged in unwarranted speculation by

- finding that the "Claimant may have had more functional abilities than he acknowledged to other practitioners";[2]
- wondering if the Claimant had misrepresented his pain levels in an effort to fraudulently obtain pain medications;
- doubting that the Claimant quit a computer retraining program because he could not focus on course materials or tolerate extended sitting; and
- drawing a negative inference from the Claimant's inability to remember dates from 10 or 20 years ago;

(c) It contradicted itself by finding that the Claimant had "significant functional limitations prior to the MQP" while also concluding that his disability was not severe as of December 31, 2002; and

(d) It failed to appreciate numerous items of expert evidence prepared both before and after the MQP.

[10] My job is to decide whether any of the Claimant's allegations have merit.

ANALYSIS

[11] Having reviewed the record and considered the parties' oral and written submissions, I have concluded that none of the Claimant's reasons for appealing justify overturning the General Division's decision. These are my reasons.

Alleged Legal Errors

(a) The General Division considered the Claimant's background and personal characteristics

[2] See General Division decision, paragraph 24.

[12] The Claimant submits that the General Division misinterpreted a case called *Villani* [3] by inadequately considering his background and personal characteristics. *Villani* says that employability must be assessed in a real world context. That requires a decision-maker to look at a CPP disability claimant as a whole person, taking into account factors such as age, education, language proficiency, and work and life experience.

[13] The Claimant acknowledges that the General Division cited *Villani* and noted aspects of his personal background and characteristics,[4] but he argues that it disregarded his lack of anything resembling office experience.

[14] I fail to see merit in this submission.

[15] The General Division was plainly aware of the *Villani* real world test and cited it in its decision. It noted the Claimant's age (he was 40-years-old as of the end of the MQP) and language proficiency (he was fluent in English), but it also considered the impact of his lack of education (he only attended school up to Grade 10 or 11) on his ability to pursue a new career. With that in mind, the General Division placed weight on a psycho-vocational assessment report[5] showing that the Claimant had a better-than-average capacity to learn new skills:

> [H]is file notes that he has been tested and found to have an equivalency much higher than grade 11. He reportedly scored 96% on the learning capabilities assessment. A psycho-vocational assessment of May 2003 states that the Claimant's intellect is better than 70% of the general population. He reads at the grade 12 level, though his spelling and arithmetic operations are at the grade 8 level. The assessor concluded he has the potential to do training at the post-secondary level.[6]

[16] The Claimant believes that the psycho-vocational report was outweighed by other evidence showing that his pain and cognitive impairments would effectively rule out all forms of work, even a desk job. In making this argument, the Claimant is really alleging that the General Division committed, less a legal error, than a factual one. However, the General Division, in its

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[3] *Villani v. Canada (Attorney General)*, [2002] 1 FCR 130, 2001 FCA 248. The principles from *Villani* have been followed and reinforced by a succession of cases, including *Garrett v. Canada (Minister of Human Resources and Development)*, 2005 FCA 84.
[4] General Division decision, paragraphs 36 and 37.
[5] Psycho-vocational assessment report dated February 3, 2003 by Dr. Norman Thomas, psychologist, GD4-99.
[6] General Division decision, paragraph 37.

role as finder of fact is entitled to weigh the available evidence as it sees fit so long as it remains within the boundaries of logic and reason. In this case, I see no reason to interfere with the General Division's analysis.

(b) The General Division considered the cumulative effect of the Claimant's medical conditions

[17] *Bungay7* is another case that reiterates the *Villani* principles, one that emphasizes the importance of considering all of a claimant's medical conditions, not just their main complaint. The Claimant submits that the General Division failed to take into account the totality of his condition when it determined that his disability was less than severe. He specifically alleges that the General Division ignored evidence that his chronic pain and PTSD prevented him from succeeding in a sedentary job.

[18] I have already addressed the issue of whether the General Division adequately considered the Claimant's *Villani* factors. I found no indication that it failed to do so. I also see nothing to suggest that the General Division neglected to consider all of the Claimant's medical conditions and their impact on his capacity to do low impact work. The General Division heard the Claimant's testimony that his physical and psychological symptoms and led to the closure of his retail pet business. For reasons that I will discuss below, the General Division declined to believe that the Claimant's involvement in the business was as passive as he claimed. The General Division went on to find that, while the business eventually went bankrupt, the Claimant's involvement in it did not amount to a failed effort at employment.[8]

[19] The Claimant plainly disagrees with these conclusions, but that does not mean the General Division failed to consider the evidence or misapplied a legal principle. Again, the General Division should be given some leeway in how it assesses the available information, particularly where, as here, it provided clear and detailed reasons for favouring certain items of evidence over others. In this case, the General Division made what strikes me as a full and genuine attempt to sort through the Claimant's various complaints to determine whether they

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[7] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.
[8] General Division decision paragraph 45.

constituted a severe disability prior to the end of the MQP. In my view, the General Division did not ignore any significant aspect of the Claimant's condition.

(c) The General Division properly assessed whether the Claimant's disability was severe and prolonged as of the MQP

[20] The Claimant acknowledges that the General Division examined the Claimant's medical records but alleges that it failed to give specific consideration to his condition as of December 31, 2002, the last time he had coverage for CPP disability benefits.

[21] I see little merit in this submission. My review of its decision indicates that the General Division properly focused its attention on the MQP. While the General Division did discuss selected post-MQP evidence, it did so only to determine whether the Claimant's disability was prolonged and whether his efforts to pursue alternative employment were sufficient. Otherwise, the General Division was careful to limit its inquiry to the most relevant period—the months and years leading up to December 31, 2002.

(d) The General Division properly determined that the Claimant had the residual capacity to find alternative employment

[22] The Claimant alleges that the General Division misapplied case law requiring CPP disability applicants to have made a reasonable effort to obtain and maintain alternative employment. I don't agree.

[23] The leading case on this subject is *Inclima*, which says that claimants who have at least some work capacity must also show that their efforts to obtain and maintain employment have been unsuccessful because of their health condition.[9] This test suggests that a decision-maker cannot rely on a claimant's supposed failure to retrain or attempt other forms of work unless it first finds that they had the *residual capacity* to do so.

[24] In this case, I am satisfied that the General Division took that first step. The General Division was certainly aware of *Inclima* and cited it in its decision.[10] It had previously engaged in a lengthy analysis of the oral and documentary evidence, leading it to conclude that, despite

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[9] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[10] General Division decision, paragraph 38.

his impairments, the Claimant had at least some capacity to work. It then looked at the Claimant's post-MQP attempts to remain in the workforce and decided that they were unsuccessful, not because of his health condition, but for other reasons. The General Division found that the Claimant had cut short his computer-training program to operate his own pet store—and not because, as he claimed, he couldn't tolerate prolonged sitting or concentrated studying. It also found that he had closed the pet store because the business wasn't viable—and not because, as he claimed, his health condition prevented him from running it effectively. Like so much else in this case, the Claimant's claim of disability came down to his own credibility. The General Division didn't believe the Claimant's testimony about his efforts to obtain or maintain employment. As we will see, it did not make this finding heedlessly but offered defensible reasons for doing so, pointing to discrepancies between the Claimant's testimony and what he was documented as saying in medical reports. It was open to the General Division, as finder of fact, to weigh all the evidence and draw conclusions about the Claimant's attempts to pursue alternative occupations.

(e) The General Division did not expect the Claimant to locate a philanthropic employer

[25] The Claimant alleges that the General Division disregarded a case called *Bennett*,[11] which says that it is not reasonable for a decision-maker to expect a disability claimant to search for "philanthropic" employers offering a flexible work schedules or relaxed productivity requirements.

[26] The words "philanthropic" and "flexible" do not appear in the General Division's decision. The General Division never explicitly said that the Claimant should have looked harder for an accommodating employer, and there was no evidence that he had ever benefitted from one. Still, I understand what the Claimant is attempting to argue—that the General Division implicitly held him to a stricter standard in his job search than what the law demands.

[27] That said, I don't find that argument compelling, and I don't see how the General Division erred in law. In its reasons, the General Division examined what the Claimant actually did after his accidents and after he gave up driving trucks. There was evidence that the Claimant

[11] *Canada (Minister of Human Resources Development) v. Bennett*, 1997 CPP 4757 (PAB).

attempted two activities that he hoped would help him earn a living again: first, he went back to school, then he ran a retail business. The General Division accepted that these were appropriate and realistic activities for someone in the Claimant's position to attempt but, in both cases, the General Division found that the Claimant stopped them for reasons other than his health condition. The General Division offered what strikes me as defensible reasons for making these findings.

Alleged Factual Errors

(a) The General Division considered the Claimant's testimony

[28] The Claimant alleges that the General Division gave insufficient weight to the Claimant's testimony, in which he described the effects of his physical and mental impairments on his life and, in particular, his ability to work.

[29] Having listened to the recording of the hearing and compared the Claimant's testimony with the General Division's account of it, I can't agree. In its reasons, the General Division discussed in detail what it thought were the most relevant portions of the Claimant's testimony, weighing his words against reports from treating physicians and experts commissioned by the Ontario Workers' Safety Insurance Board (WSIB). The General Division could not be expected to address each and every aspect of the Claimant's testimony, nor was it under any obligation to wholly accept his version of events.

(b) The General Division did not engage in unwarranted speculation

[30] The Claimant alleges that the General Division repeatedly jumped to conclusions that were unsupported by the facts. It cites five occasions in which the General Division supposedly made findings based on assumption and speculation. For the following reasons, I cannot find that the General Division erred on any of them.

→ ***The General Division did not err by relying on evidence that the Claimant exaggerated his symptoms***

[31] The Claimant objects to the General Division's statement that there were "hints in the file that the Claimant may have had more functional abilities than he acknowledged to other

practitioners."[12] The Claimant alleges that there was nothing to support this finding, but the General Division referred to two specific instances where he exaggerated his symptoms—the WSIB's finding that he was functioning at greater level that what he claimed and his family physician's accusation that he had committed fraud in a bid to obtain prescription pain medications. Use of the word "hints" usually suggests that there is only a loose connection between the evidence and the conclusions drawn from it. However, in this case, the General Division backed up its finding that the Claimant was less than credible with documented examples of past deceit.

→ ***The General Division did not err by relying on evidence that the Claimant engaged in prescription fraud***

[32] In the same vein, the Claimant also objected to the General Division wondering "whether the Claimant was misrepresenting his pain levels to his doctor so as to obtain pain medications."[13] Here, the General Division relied on a strongly-worded letter from Dr. Wendling, the Claimant's former family physician, terminating their relationship:

> It has come to my attention that you have committed fraud with regards to the prescriptions I gave to you for your medical treatment. In this circumstance, I do not believe that it is in your best interest for me to continue as your physician. I therefore regret to inform you that I will not be in a position to provide you with further medical services.[14]

As the General Division noted, Dr. Wendling had previously prescribed Oxycocet and Oxycontin for the Claimant's pain.[15] Given this context, the General Division had a firm basis to call the Claimant's credibility into question. Contrary to the Claimant's allegation, the General Division was doing more than merely "speculating" that he had misrepresented his pain levels.

→ ***The General Division did not err by relying on evidence that the Claimant prematurely left his retraining program***

[33] The Claimant alleges that the General Division erred when it found that he had quit retraining to purchase a retail pet store. I take a different view. The General Division concluded

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[12] See General Division decision, paragraph 24.
[13] General Division decision, paragraph 26.
[14] Letter dated November 9, 2009 from Dr. Lisa Wendling, family physician, GD2-115.
[15] See General Division decision paragraph 25 referencing Dr. Wendling's letter dated August 15, 2005, GD2-224.

that the Claimant left college, not because of his health conditions, but because he wanted to pursue a business opportunity. It based this finding on (i) the length of time that the Claimant was able to participate in the program and (ii) the coincidence between his decision to stop the program and his purchase of the pet business.[16] The Claimant testified that, he had no plans to buy the business when he left college, but the General Division did not believe him. Credibility was—again—a major factor in its reasoning, but the General Division did not simply dismiss the Claimant's version of events; it offered considered reasons for doing so, citing discrepancies between what the Claimant said and what was written in the file. It noted that the Claimant testified that he had attended retraining for four months when the documentary evidence indicated that he did so for eight or nine months. It noted that the Claimant testified that he had seen Dr. Tahlan regularly for counselling when the documentary evidence indicated that he went seven years between visits.

[34] The Claimant argues that participation in a retraining program should not be equated with work capacity.[17] While this is true, such participation is not irrelevant to capacity either. It is just one factor to be considered, along with others, in determining whether a disability claimant can regularly pursue substantially gainful employment. In this case, the General Division arrived at its decision to deny the Claimant disability benefits for many reasons, not just the several months he spent learning about computers.

[35] The Claimant also argues that the General Division ignored documentary evidence in the file that corroborated his claim that he left the retraining program for health reasons. He points to Dr. Wendling's July 2004 letter[18] informing the WSIB that, because of a flare-up in his PTSD symptoms, he would be unable to attend his school program for six to eight weeks. It is true that the General Division did not mention this letter in its decision, but that does not mean the presiding member ignored it and, in any event, decision-makers are presumed to have considered all the evidence before them. Moreover, the letter was just one piece of evidence that the General Division presumably weighed in assessing why the Claimant left the program. I note that, in her letter, Dr. Wendling did not offer her own assessment of the Claimant's condition but simply

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[16] General Division decision, paragraph 42.
[17] *Canada* (*Minister of Human Resources and Development) v. Bennett* (July 10, 1997), CP 04757 (PAB)*; Romanin v. Canada (Minister of Social Development)* (November 18, 2004), CP 21597 (PAB).
[18] Dr. Wendling's letter to WSIB dated July 5, 2004, GD2-247.

relayed what her patient told her. If the General Division discounted this letter in favour of other factors (the conspicuous timing of the Claimant's new business, the unreliability of the Claimant's testimony), then it had good reason to do so.

→ ***The General Division did not err by relying on inconsistencies about the Claimant's psychiatric treatment***

[36] The Claimant argues that the General Division unfairly impugned his credibility merely because he could not remember dates of long gone events from 10 or 20 years ago. On this point, I also disagree. As noted, the General Division did not believe the Claimant's explanation for leaving his retraining program because, among other reasons, he was a "poor historian":

> There were several occasions throughout the hearing when the evidence he gave was very inconsistent with documentary evidence. For example, the Claimant testified that he started seeing Dr. Tahlan in either September 2001 or October 2001 and that he continued to see her regularly for counselling until she passed away a couple of years ago. The documentary evidence, however, shows that the Claimant first saw Dr. Tahlan in December 2002 and then not again until 2009. Moreover, the Claimant's representative said that she thinks Dr. Tahlan passed away several years ago (rather than two years ago).[19]

From what I can tell, this passage accurately reflects what the Claimant told the General Division at the hearing.[20] The file indicates that the Claimant first saw Dr. Tahlan in late November 2002, rather than, as the General Division suggested, December 2002, but this discrepancy is, in my view, immaterial. More to the point, there is nothing in the file to contradict the General Division's finding of a seven-year gap between visits.[21] The Claimant pointed to a medical report, prepared for his first CPP disability application in June 2009, in which Dr. Tahlan wrote that she had "known" the Claimant for seven years. According to the Claimant, this, along with the "robustness" of Dr. Tahlan's accompanying assessment, suggested an ongoing patient-doctor relationship. I think that's a stretch. In the absence of any documentary evidence that Claimant

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[19] General Division decision, paragraph 43.

[20] The Claimant can be heard discussing his history with Dr. Tahlan from 1:17:40 to 1:21:00 and from 1:48:00 to 1:51:35 in the recording of the April 2020 General Division hearing.

[21] Dr. Wendling's handwritten office notes from 2001 to 2009 (GD4-30 to GD4-66) are silent about Dr. Tahlan, other than her initial referral to the psychiatrist in late 2002.

saw Dr. Tahlan between 2002 and 2009, the General Division was within its authority to find that he had not received regular psychiatric counselling during that period.

[37] The Claimant testified that he saw Dr. Tahlan "regularly,"[22] so the General Division was not wrong to find a real inconsistency between what was said and what was documented.[23] The Claimant suggests that this inconsistency is insignificant or, if not that, understandable, given the length of time that had passed since he was seeing Dr. Tahlan. However, I don't think that the inconsistency was insignificant, and I agree with the Minister that the General Division was justified in giving it weight. It mattered because it spoke to the severity of the Claimant's mental health condition; one can reasonably assume that a case of PTSD requiring two psychotherapy sessions over seven years is less serious than one that called for, say, weekly or monthly sessions over the same period. It also mattered because it spoke to the Claimant's credibility; if the Claimant had seen Dr. Tahlan as often and as regularly as he claimed, then one would expect to see a clear record of it in the file.

(c) The General Division did not contradict itself

[38] The Claimant alleges that the General Division contradicted itself by finding that the Claimant had "significant functional limitations prior to the MQP"[24] while concluding elsewhere in its decision that his disability was not severe as of December 31, 2002.

[39] I fail to see the contradiction. The General Division did not deny that the Claimant sustained serious physical and psychological injuries in 2001-02, but it found that his overall condition was not severe, as defined by the governing legislation, as of December 31, 2002. Under the *Canada Pension Plan*, it is entirely possible for a claimant to be found "regularly capable of pursuing a substantially gainful occupation"[25] even while living with impairments of one kind or another.

[22] Recording of April 2020 General Division hearing, 1:20:15.
[23] Dr. Tahlan wrote a letter to Dr. Wendling dated November 27, 2002 (GD2-270) thanking her for the referral and documenting her initial psychiatric consultation with the Claimant. The next record in the file from Dr. Tahlan is a letter dated May 5, 2009 (GD4-121), which again thanked Dr. Wendling for asking her to see the Claimant but made no mention of regular appointments or any ongoing relationship during the previous seven years.
[24] General Division decision, paragraph 17.
[25] *Canada Pension Plan*, section 42(2)(a)(i).

[40] Similarly, the Claimant sees a disconnect between the General Division's dismissal of his claim and its finding that his "mental health conditions appear not to have improved, in any significant way, after his MQP."[26] I don't share his view that there's a disconnect. While the General Division found that symptoms related to the Claimant's PTSD were stable after December 31, 2002, the General Division also made it clear that those symptoms, combined with the Claimant's other medical conditions, never amounted to a severe disability during the relevant period.

(d) The General Division considered the expert evidence

[41] The Claimant alleges that the General Division failed to consider his expert evidence, He lists numerous reports, prepared both before and after the MQP, that he claims the General Division ignored when it decided that he was not disabled.

[42] I don't see merit in this submission. As I noted earlier, a decision-maker is presumed to have considered all the evidence before it and can't be expected to discuss to each and every letter and report in its written reasons. In this case, the hearing file contained several hundred pages of medical documents. The General Division did address many of them, but only those that it relied on to arrive at its decision. I saw no indication that the General Division considered the available medical information selectively or, to use a more informal phrase, "cherry-picked" evidence to come to a predetermined conclusion.

CONCLUSION

[43] For the reasons discussed above, the Claimant has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal.

[44] The appeal is therefore dismissed.

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[26] General Division decision, paragraph 27.

Member, Appeal Division

HEARD ON:	October 9, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES :	D. D., Appellant Bozena Kordasiewicz, representative for the Appellant Susan Johnstone, Representative for the Respondent