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

Citation: *DL v Minister of Employment and Social Development*, 2021 SST 16

Tribunal File Number: AD-20-787

BETWEEN:

D. L.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 21, 2021

CORRIGENDUM DATE: January 26, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The General Division committed an error by failing to consider whether the Claimant had the residual capacity to attempt alternative employment. I am overturning the General Division's decision and substituting it with my own decision to grant the Claimant a disability pension.

OVERVIEW

[2] The Claimant is a former line worker and forklift driver who injured her back in April 2016. She has not worked since and is now 55 years old.

[3] In August 2018, the Claimant applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work because of ongoing back pain. The Minister refused the application because, in its view, the Claimant's condition did not amount to a "severe and prolonged" disability as of her minimum qualifying period, which ended on December 31, 2018.

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and, in a decision dated August 31, 2020, dismissed the appeal. It found that Claimant had not provided enough evidence to show that she was regularly incapable of pursuing a substantially gainful occupation. In particular, the General Division placed weight on what it found was the Claimant's failure to pursue retraining or attempt alternative employment within her limitations.

[5] The Claimant is appealing the General Division's decision. She alleges that the General Division committed various errors when it found that she was not disabled.

[6] Last month, I held a hearing to discuss the Claimant's allegations. I have now concluded that the General Division committed at least one error in arriving at its decision. I have decided that the appropriate remedy in this case is to make my own assessment of the Claimant's disability claim and give the decision that the General Division should have given. As a result, I

am overturning the General Division's findings and substituting them with my own decision to grant the Claimant a CPP disability pension.

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 error of fact.[1]

[8] At the hearing, we discussed three questions:

Issue 1: Did the General Division fail to appreciate that the Claimant lacked the resources to pursue retraining?

Issue 2: Did the General Division misinterpret the criteria for a "severe" disability?

Issue 3: Did the General Division fail to consider whether the Claimant had residual capacity to pursue alternative employment?

My job was to determine whether these issues fell into one or more of the permitted grounds of appeal and, if so, whether any of them had merit.

ANALYSIS

[9] Having considered the parties' arguments, I am satisfied that the General Division committed an error by basing its decision on the Claimant's supposed failure to attempt alternative employment without first finding that she had the residual capacity to do so. Because the General Division's decision falls for this reason alone, I see no need to consider Issues 1 or 2.

Issue 3: Did the General Division fail to consider whether the Claimant had residual capacity to pursue alternative employment?

[10] The General Division based its decision, in part, on a finding that the Claimant hadn't done enough to pursue work beyond her former occupation as a forklift driver. In my view, the

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

General Division erred in law by coming to this conclusion without first satisfying itself that the Claimant was **[not]** incapable of pursuing *any* alternative career.

[11] There is no doubt that the General Division's decision turned, in part, on a finding that the Claimant had failed to fulfill her obligation—imposed by a case called *Inclima*[2]—to make a reasonable effort to obtain and maintain alternative employment:

> I note the Claimant has not attempted to secure employment within her limitations. Her attitude is if she were to return to work, it would be with her previous employer. She has not made reasonable efforts to find employment within her restrictions.[3]

Inclima 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. 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. In assessing whether there is residual capacity, the General Division must take into account, not only a claimant's medical condition as a whole, but also his or her background and personal characteristics.[4]

[12] In its decision, the General Division did not mention *Inclima*, even though that case established the legal principle on which it based much of its analysis. A failure to cite relevant case law is not, by itself, an error so long as the General Division actually applies the correct legal principle to the facts. However, in this case I see signs that the General Division did not do so.

[13] The General Division correctly stated that it was not the nature or the name of the Claimant's medical condition that mattered, but its functional effect on her ability to work. The General Division acknowledged that the Claimant's back pain prevented her from performing strenuous work, but it also found that her functional limitations did not rule out all occupations.[5]

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[2] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[3] General Division decision at paragraph 15.
[4] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[5] General Division decision, para 13.

[14] With this statement, the General Division declared that the Claimant had the residual capacity to attempt a less physically demanding occupation than her previous job as a forklift operator. However, the discussion that followed contained inconsistences that, in my view, cast doubt on the General Division's findings and its understanding of the *Inclima* principle.

[15] First, the General Division did not address uncontested medical evidence indicating that the Claimant was incapable of sitting or standing for extended periods. Amid the large volume of material in the file were two reports that detailed, in precise terms, the extent of the Claimant's physical restrictions. In July 2017, Dr. Sleiman wrote that the Claimant was capable of returning to work but not in a job that involved sitting, standing, or walking for more than 30 minutes at a time. Dr. Sleiman also indicated that the Claimant would be unable to do jobs that required significant repetitive motion or involved bending, twisting, pushing, pulling, or lifting.[6] In July 2018, Dr. Hasnain listed similar limitations, finding the Claimant unable to sit or stand for long periods, perform repetitive movements, lift heavy objects, or bend or rotate at the waist.[7]

[16] The General Division acknowledged that these limitations were "significant," but it then found that they would not "preclude light or sedentary occupations."[8] Later, the General Division implicitly criticized the Claimant for not doing more to retrain for an office or clerical job:

> The Claimant was only 53 years of age at the time of the MQP. She has a high school education and technical training as a forklift operator. She has work experience resulting in some transferable skills. She is proficient in English and has some computer skills. She does not have difficulty with concentration and memory allowing her to upgrade her education or retrain to enhance her employment skills. There is insufficient medical evidence and evidence of employment efforts.[9]

However, when I read the General Division's decision as a whole, I see no attempt to come to terms with the logical implications of Dr. Sleiman's and Dr. Hasnain's reports. To be specific, the General Division never explains how someone incapable of sitting or standing for more than half an hour could be realistically expected to retrain for a desk job, much less succeed in such a

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[6] Medical update form completed for A.P. Plasman by Dr. Nicholas Sleiman, general practitioner, on July 28, 2017, GD4-36.
[7] CPP Medical Report completed by Dr. Haider Hasnain, general practitioner, on July 31, 2018, GD2-116.
[8] General Division decision, para 14.
[9] General Division decision, para 19.

job if she were ever hired for one. The Federal Court has recently reaffirmed the need for administrative decision-makers to make their reasons intelligible and transparent. This means, "the basis for a decision … is understandable, with some discernible rationality and logic."[10] In my view, the General Division's decision falls short of this standard.

[17] I have a second reason to doubt whether the General Division fully considered the medical evidence concerning the Claimant's functional limitations. As we have seen, there were two reports on file that documented the Claimant's inability to sit for extended periods. Both were prepared by general practitioners who had actually treated the Claimant and who were familiar with her overall condition. Where they differed was in their conclusions: one doctor left open the possibility that Claimant could return to work, despite her limitations, whereas another did not. However, it is not clear to me why, all else being equal, the General Division chose to endorse Dr. Sleiman's conclusion yet dismiss Dr. Hasnain's — particularly when the latter came a year later and therefore a year closer to the end of the MQP. The General Division did not explain its reasoning, again violating the principles of transparency and intelligibility.

[18] The confusing way in which the General Division addressed the Claimant's medical reports suggests that it did not fulfill its obligation under *Inclima* to fully consider whether the Claimant had residual capacity. In the end, the General Division failed to explain how a high school graduate in her fifties, someone who had spent her entire working life in manual occupations, could be expected to succeed in a clerical or white collar job if she was incapable of sitting at a desk for more than 30 minutes at a time.

REMEDY

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

[19] The Appeal Division has the authority to address whatever errors that the General Division may have committed.[11] I have the power to:

- confirm, rescind, or vary the General Division's decision;

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[10] See *Canada (Attorney General) v Redman*, 2020 FC 1093 at para 44, quoting with approval *Vancouver Airport Authority v PSAC*, 2010 FCA 158, [2011] 4 FCR 425.
[11] DESDA, s. 59(1).

- refer the case back to the General Division for reconsideration; or
- give the decision that the General Division should have given.

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

[20] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. It is now two years since the Claimant applied for a disability pension. If this matter were referred back to the General Division, it would only delay a final resolution.

[21] The Claimant and the Minister agreed that, if I were to find an error in the General Division's decision, the appropriate remedy would be for me to give the decision that the General Division should have given and make my own assessment of the substance of the Claimant's disability claim. Of course, the parties had different views on the merits of that claim. The Claimant argued that, if the General Division had properly characterized her efforts to return to work, it would have found her disabled and ordered a different outcome. The Minister argued that, whatever the General Division's errors, the balance of the available evidence still pointed to a finding that the Claimant was regularly capable of substantially gainful employment.

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

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

[23] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it should have given, had it not erred. In my view, if the General Division had properly applied *Inclima*, the result would have been different. My own assessment of the record satisfies me that the Claimant is entitled to a CPP disability pension.

The medical evidence suggests the Claimant has a severe disability

[24] Having reviewed the record, I find that the Claimant is disabled.

[25] To be found disabled, a claimant must prove, on a balance of probabilities, that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is "incapable regularly of pursuing any substantially gainful occupation." A disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death."[12]

The Claimant's physical impairments rule out all forms of work

[26] The Claimant has a history of back pain, but she says that her condition worsened after sustaining an injury while shopping in a garden centre in April 2016. Although she received treatment and spent time off work, her recovery plateaued and she contained to experience pain. In the questionnaire that accompanied her application for benefits, she wrote that she had severe arthritis and a slipped disc in her lower back, leaving her in constant daily pain.[13] At the General Division hearing, she testified that she remains technically employed by her former company, an automobile parts manufacturer, and is on long-term disability through its employee benefits plan. She said that she had not looked for employment elsewhere, because she does not believe she could work due to her back pain and related restrictions. She said that her pain was excruciating, rating it as five or six on a scale of 10 most days, as high as 10 on some days. She said that she needed help with her housework such as vacuuming, washing floors, and going up and down stairs to do laundry.[14]

[27] Like the General Division, I find that the Claimant is likely incapable of returning to her previous job as a forklift driver or, for that matter, any job that has a significant physical component. The question is whether she remained capable of light or sedentary employment as of December 31, 2018.

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[12] *Canada Pension Plan*, s. 42(2)(a)(ii).
[13] Claimant's CPP questionnaire completed and signed on August 14, 2018, GD2-118.
[14] Part 1 of General Division hearing recording at 10:20.

[28] There is no doubt that organic pathology underlies the Claimant's pain symptoms, as indicated by an x-ray of her lumbar spine, which shows "moderate" degenerative changes.[15] The remaining medical evidence is patchy, perhaps because one of her family physicians died and another had his license revoked.[16] However, there is enough evidence to convince me that the Claimant is incapable of maintaining a clerical or retail job retraining for such a position. I won't repeat Dr. Hasnain and Dr. Sleiman's findings, except to note again that they were in agreement that the Claimant could not sit or stand for more than 30 minutes at a time. These limitations would present significant problems for anyone who was enrolled in a program of study or hired to sit at computer all day. Unlike the General Division, I am inclined to give more weight to Dr. Hasnain's findings because his report was dated closer to the end of the MQP.

The Claimant lacks capacity when viewed as a whole person

[29] The leading case on the interpretation of "severe" is *Villani*,[17] which requires the Tribunal, when assessing disability, to consider a disability Claimant as a "whole person" in a real-world context. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances." Those circumstances fall into two categories:

(a) The claimant's background — matters such as "age, education level, language proficiency and past work and life experience" are relevant;

(b) The claimant's medical condition — this is a broad inquiry, requiring that the claimant's condition be assessed in its totality.

[30] I don't think that the Claimant has anything left to offer a real-world employer. When she last qualified for benefits, she was past 50 and could no longer be described as young. She is fluent in English and has a lengthy history as a factory worker, but she has only a High School education and the skills that she has acquired along the way are no use if she is unable work at a desk or counter. She is not a suitable candidate for retraining, and I cannot see how she can succeed in the competitive labour market with her physical impairments.

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[15] X-ray of the lumbar spine dated July 31, 2018, GD2-60.
[16] There is evidence on file that Dr. Basur died in 2017 and that Dr. Hasnain was found guilty by a disciplinary committee in 2018 of having had a sexual relationship with a patient.
[17] *Ibid*., Note 4.

The Claimant did not have sufficient capacity to pursue alternative employment

[31] *Inclima* requires disability claimants with residual capacity to show that they have made reasonable efforts to obtain and secure employment and that those efforts have been unsuccessful because of their health condition. In this case, the Claimant lacked the residual capacity to make such efforts. For that reason, I will not draw a negative inference from the lack of any evidence that she launched a job search or investigated retraining programs. The Claimant had a genuine belief that she could no longer do any kind of work, and the medical evidence bears that out.

The Claimant has taken reasonable steps to get better

[32] Chronic back pain is difficult to treat. The record does not indicate whether the Claimant has ever seen an orthopedic specialist, but she testified under questioning by the presiding General Division member that she has not asked for referrals and left matters up to her family doctors. The law requires disability claimants to make a reasonable effort to comply with their healthcare providers' medical recommendations, [18] but it does not go so far as to demand that they take a proactive role in their own treatment. If the Claimant chose to defer to her primary caregivers, that does not disqualify her from the disability pension.

[33] In fact, the Claimant has tried a number of treatment options, although with limited success. She has been advised that she is too young for back surgery. Clinical notes indicate that she found non-opiate medication alone ineffective.[19] Her family doctors prescribed her with Percocet, a narcotic pain reliever,[20] but discontinued it because of unwanted side effects.[21] She has also taken Nexium for gastroesophageal reflux disease and, more recently, Cymbalta for pain and depression. The Claimant attempted physiotherapy immediately after her workplace accident in 2016 but did not find it effective.[22] Her doctors have told her to exercise and lose weight, and it appears that she has made some effort to do so—Dr. Hasnain reported that she was regularly using a treadmill,[23] and she testified that she had managed to lose 30 pounds[24]—although she did

[18] *Lalonde v Canada (Minister of Human Resources and Development)*, 2002 FCA 211.
[19] Dr. Hasnain's office note dated September 20, 2016, GD2-73.
[20] Dr. Hasnain's office note dated September 13, 2016, GD2-74.
[21] Dr. Hasnain's CPP medical report, GD2-114.
[22] Part 2 of General Division hearing recording at 3:40.
[23] Dr. Hasnain's clinical note dated January 6, 2017, GD2-70.
[24] Part 2 of General Division hearing recording at 4:20.

not see a significant improvement in her condition. In any event, losing weight is difficult for most people, even in ideal circumstances, and I don't think that it is guaranteed to cure, or even alleviate, mechanical back pain.

The Claimant's testimony was credible and persuasive

[34] I have listened to the recording of the General Division hearing. The Claimant was a sympathetic and forthright witness. She explained in detail how her back pain frequently immobilizes her and prevents her from delivering the kind of regular, consistent performance that employers demand: "There are days when I can't get out of bed, days when I can't get in my vehicle."[25] She said that she was tired and exhausted, leaving her unable to carry out even basic household tasks.

[35] The Claimant's credibility was bolstered by her work history, which shows nearly 20 years of substantially gainful earnings in a variety of jobs going back to the mid-1980s.[26] The evidence indicates that the Claimant was a motivated and resilient participant in the labour market for her most of adult life until she sustained a significant back injury five years ago. One can reasonably assume that a person with the Claimant's employment record would not have given up on work unless there was some genuine underlying cause.

The Claimant has a prolonged disability

[36] The Claimant's testimony, corroborated by the medical reports, indicates that she has suffers from back pain as a result of an April 2016 injury. She has been effectively unemployable since then. It is difficult to see how her health will significantly improve, even with new medications or alternative therapies. In my view, these factors qualify the Claimant's disability as prolonged.

CONCLUSION

[37] I find that the Claimant had a severe and prolonged disability as of April 2016, when she sustained her back injury. ~~According to section 69 of the *Canada Pension Plan*, pension~~

[25] Part 2 of General Division hearing recording at 22:00.
[26] Record of Earnings, GD2-43.

~~payments start four months after the date of disability. The Claimant's disability pension will therefore commence as of August 2016.~~ **[However, under the law, a person can't be deemed disabled more than 15 months before the Minister received the application for a disability pension.[27] In this case, the Minister received the application in August 2018, so the Claimant is deemed disabled as of May 2017. Since payments start four months after the deemed date of disability,[28] the Claimant's disability pension begins as of September 2017.]**

[38] The appeal is allowed.

Member, Appeal Division

HEARD ON:	December 15, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. L., Claimant Bryan Delorenzi, Representative for the Claimant Ian McRobbie, Representative for the Minister

[27 *Canada Pension Plan*, s. 42(2)(b).]
[28 *Canada Pension Plan*, s. 69.]