



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *SD v Minister of Employment and Social Development*, 2021 SST 203

Tribunal File Number: AD-21-2

BETWEEN:

**S. D.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Kate Sellar

DATE OF DECISION: May 14, 2021

## DECISION AND REASONS

### DECISION

[1] I am allowing the appeal. The General Division made an error. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension. Payments begin effective April 2016.

### OVERVIEW

[2] S. D. (the Claimant) moved to Canada after completing her education. She worked as a seamstress more than 10 years, then left the paid workforce to raise her family. She later returned to work as a cleaning technician for a flood and fire restoration company.

[3] In 2013, the Claimant had a car accident. She was injured. She applied for a disability pension under the *Canada Pension Plan* (CPP). She had pain in her back, neck, shoulder and left foot. She experiences right-hand numbness, swelling, burning, and pain. Her doctor diagnosed her with rheumatoid arthritis. She also has headaches, anxiety, depression, and high blood pressure.

[4] The Claimant applied for a disability pension in March 2017. The Minister denied the Claimant's application for the disability pension initially and on reconsideration. The Claimant appealed this decision to the Tribunal. The General Division dismissed the appeal. The Appeal Division gave her leave (permission) to appeal that General Division decision. But in the end, the Appeal Division dismissed the appeal. The Claimant asked the Federal Court of Appeal to judicially review the Appeal Division's decision to dismiss her appeal.

[5] The Minister and the Claimant agreed that the Federal Court of Appeal should allow the application for judicial review and return the case to a different member of the Appeal Division for redetermination. The Federal Court of Appeal made that order on the parties' agreement.

[6] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA). If the General Division made an error, I must decide what I will do to remedy (fix) that error.

[7] I find that the General Division made two errors of fact. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension

## **PRELIMINARY MATTERS**

[8] I asked the parties for arguments about what the issues were on the table for me to decide (this is called the “scope of the appeal”).

[9] The parties agreed that I should decide the case as though there was never a final decision from the Appeal Division. The parties also agreed that if I addressed the issues as they are set out in the written arguments filed with the Appeal Division after the decision from the Federal Court of Appeal, that I would have addressed all of the issues.<sup>1</sup> The Claimant also clarified that she is not relying on the arguments she made previously about the fairness of the hearing, so I have not addressed that issue.

[10] I agree that the parties have identified a scope of appeal that is within my power at this stage of the case. As a result, I have not considered any arguments about whether the General Division failed to provide the Claimant with a fair process. The Claimant stopped raising that issue after the Federal Court of Appeal order.

## **ISSUES**

[11] The issues are:

1. Did the General Division make an error of law by applying the test for a severe disability incorrectly?

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<sup>1</sup> After the Federal Court of Appeal decision, the parties gave arguments at AD7 and AD8 that discuss the issues on appeal.

2. Did the General Division make an error of fact by finding that the Claimant provided no evidence that she had problems with sitting and that she did not provide any evidence to explain why she could not work as a seamstress or some sedentary work?
3. Did the General Division make an error of fact by finding that the Claimant had no psychological barriers to employment?

## **ANALYSIS**

### **Reviewing General Division decisions**

[12] 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 it made an error. The Appeal Division bases that review on the wording of the DESDA, which sets out the grounds of appeal.

[13] The three reasons for an appeal arise when the General Division fails to provide a fair process (or decides something it cannot decide or fails to decide something it must decide), makes an error of law, or makes an error of fact.<sup>2</sup>

### **“Severe” disability within the meaning of the CPP**

[14] 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.”<sup>3</sup> Each piece of that definition has meaning. And very generally, this shows that the idea of a severe disability in the CPP context is connected what a person can and cannot do (when it comes to work) as a result of a disability. This is sometimes called “functional abilities” or “functional limitations.”

[15] To decide whether a disability is severe, several things are important:

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

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<sup>2</sup> DESDA, s 58(1).

<sup>3</sup> *Canada Pension Plan*, s 42(2).

- the Claimant’s medical condition (which involves assessing the condition in its totality – all of the possible impairments that could affect capacity to work).;<sup>4</sup> and
- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.<sup>5</sup>

### **Errors of fact**

[16] The DESDA says that it is an error when the General Division “bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.”<sup>6</sup> A mistake involving the facts has to be important enough that it could affect the outcome of the decision (that is called a “material” fact).

[17] The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.<sup>7</sup> The Federal Court of Appeal has explained that a perverse or capricious finding of fact is one where the finding squarely contradicts the evidence.<sup>8</sup>

### **The General Division applied the test for a severe disability**

[18] The General Division applied the test for a severe disability. The decision could have more clearly set out one part of the analysis. However, I am satisfied that the General Division did not confuse the concept of a severe disability with having some capacity to work. The General Division did consider all of the Claimant’s conditions.

[19] The General Division’s analysis starts by considering the Claimant’s medical evidence and testimony under a heading that states that the Claimant’s disability was “not severe.”<sup>9</sup> The member decided that:

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<sup>4</sup> The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>5</sup> 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.

<sup>6</sup> DESDA, s 58(1)(c)

<sup>7</sup> The Federal Court explained this in a case called *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

<sup>8</sup> The Federal Court of Appeal explained this in a case called *Garvey v Canada (Attorney General)*, 2018 FCA 118.

<sup>9</sup> General Division decision, the heading between paras 6 and 7.

“there is no doubt the Claimant’s medical condition affected her ability to go back to her old job...The problem is that the medical information tells me the Claimant likely had the capacity to perform some type of work at that time, even if she could not do her usual job.”<sup>10</sup>

[20] Then under the heading “the Claimant had work capacity”, the General Division decided that the Claimant had capacity for a seated job that did not involve the heavy use of her shoulder. The General Division relied on four key parts of the evidence to show that the Claimant had “work capacity”:

- Her psychiatrist encouraged her to work;<sup>11</sup>
- Her hand symptoms were on and off but there was “no evidence” they were a significant problem at the time;<sup>12</sup>
- There was “no evidence” she had problems with sitting;<sup>13</sup> and
- Although she has few employment options as a result of her personal circumstances, she could still have worked as a seamstress like she did previously.<sup>14</sup>

[21] The Claimant argues that the General Division failed to apply the correct legal test for a severe disability. The Claimant argues that the General Division equated the legal test for a severe disability with having no work capacity, but those two concepts are different. Having a severe disability means a person is incapable regularly of pursuing any substantially gainful occupation, and each part of that test has meaning.

[22] The Claimant argues that the General Division conflated work capacity with severity in at least three places in the decision:

- (i) After identifying the Claimant’s conditions, the General Division concluded that “the problem is that the medical information tells me the Claimant likely had the capacity to perform some type of work at that time, even if she could not do her usual job.”<sup>15</sup>;

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<sup>10</sup> General Division decision, para 13.

<sup>11</sup> General Division decision, para 25.

<sup>12</sup> General Division decision, para 25.

<sup>13</sup> General Division decision, para 25.

<sup>14</sup> General Division decision, para 28.

(ii) The General Division stated that the “the medical evidence tells me the Claimant had some work capacity at December 2015...”<sup>16</sup>

(iii) In the paragraph about the Claimant’s personal circumstances, the General Division stated that she had few employment options, but the General Division member went on to conclude, “however, I don’t think they mean she has no work capacity.”<sup>17</sup>

[23] The Minister argues that the General Division applied the right test to decide whether the Claimant had a severe disability. Deciding whether a claimant has some capacity for work (or a residual capacity for work) is part of deciding whether someone is employable.<sup>18</sup>

[24] The Minister argues that the General Division member weighed the evidence and explained how she reached the conclusion that the Claimant had some capacity for work at the time of the MQP. It is not the Appeal Division’s job to weigh that evidence again.

[25] At the hearing, I asked the parties whether the General Division was really just applying what I call the “employment efforts rule” to the Claimant’s case. That rule, which comes from a Federal Court of Appeal case, states that where there is evidence that the Claimant has some capacity to work, they must show that efforts to get and keep employment were unsuccessful because of their medical condition.<sup>19</sup>

[26] Asking whether a claimant has some capacity for work still needs to be done with the overarching legal question in mind, which is whether the Claimant is incapable regularly of pursuing any substantially gainful occupation.

[27] In my view, the General Division did not make an error of law. The General Division decided that there was evidence of some capacity for work (based on both her psychological and physical conditions), and therefore required the Claimant to show that efforts to get and keep employment were unsuccessful because of her medical condition. The General Division decided

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<sup>15</sup> General Division decision, para 13.

<sup>16</sup> General Division decision, para.25.

<sup>17</sup> General Division decision, para 28.

<sup>18</sup> To explain this idea, the Minister relies on the Federal Court of Appeal’s decision in *Villani v Canada (Attorney General)*, 2001 FCA 248, para 44.

<sup>19</sup> The Federal Court case that contains the employment efforts test is called *Inclima v Canada (Attorney General)*, 2003 FCA 117.

that the Claimant's employment efforts were not reasonable because her efforts were not focussed on work that the General Division considered suitable (or within her limitations).

[28] Some of the General Division's references to a severe disability and also to capacity to work may have been confusing, but it seems that the General Division found that the Claimant did not have a severe disability, but that there was evidence of some capacity for work.<sup>20</sup>

[29] It does seem that the General Division was applying the employment efforts test particularly at the end of the decision when it discussed her efforts to return to her old job.

...[The Claimant] did not have the chance to try something less demanding. If she had tried lighter, sedentary work and failed, that might have persuaded me her condition was severe despite what the medical evidence showed.<sup>21</sup>

[30] The General Division decision could have been more clear, but there is no legal error here. The General Division applied the test for a severe disability, and decided that the Claimant had some capacity for work and did not meet the employment efforts test.

**Error of fact about why the Claimant could not work as a seamstress**

[31] The General Division made an error of fact by finding that the Claimant provided no evidence that she had problems with sitting and that she did not provide any evidence to explain why she could not work as a seamstress or something similar at the end of the MQP.

[32] The General Division decision states that the Claimant had "provided no evidence she had problems with sitting" and "did not provide any evidence to explain why she could not [work as a seamstress] or something similar at December 2015."<sup>22</sup>

[33] The Claimant points out that both of these findings about the Claimant's abilities are incorrect, and are inconsistent even with other parts of the decision.<sup>23</sup> The Claimant testified that she had pain, swelling, and numbness in her hand and wrist. The medical evidence showed that,

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<sup>20</sup> General Division decision, paras 13, 25, 28.

<sup>21</sup> General Division decision, para 29.

<sup>22</sup> General Division decision, paras 25, 28.

<sup>23</sup> General Division decision, paras 8-10, 13, 16, and 19.



“both before and after the MQP, the Appellant was experiencing these symptoms and was referred for tests for rheumatoid arthritis, which came back positive early in 2016.”<sup>24</sup>

[34] The Claimant also argues that during the General Division hearing, she said that she could not return to a job like a seamstress due to her hands and her inability to focus. She also testified that she could only sit for 30 minutes before experiencing pain.

[35] The Minister says that when the General Division found there was no evidence that the Claimant had problems with sitting, this was in the context of discussing medical evidence, not testimony. In that regard, the statement was accurate and not a factual error. Similarly, the General Division was also merely noting a lack of **medical** evidence about why the Claimant could not do seamstress work (or something similar).

[36] In my view, the General Division made an error of fact by stating that the Claimant provided no evidence that she had problems with sitting and that she did not provide any evidence to explain why she could not work as a seamstress or something similar at the end of the MQP. There was medical evidence that showed the Claimant had pain in her hands before the end of the MQP, and the diagnosis very shortly after the MQP was rheumatoid arthritis. To decide that the Claimant’s hands were not a “significant problem at that time” is not consistent with the Claimant’s testimony.

[37] The law requires objective medical evidence in support of the application.<sup>25</sup> It does not require objective medical evidence that describes each limitation associated with a condition. I must read the General Division’s findings consistent with the legal test. Often, evidence about limitations comes from the Claimant through testimony and through the Questionnaire. The Claimant provided evidence about her inability to sit and the limitations she had with working as a seamstress. The General Division did not state that there was a lack of medical evidence on these questions. It stated there was a lack of evidence on these questions, and that is an error of fact.

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<sup>24</sup> AD8-10.

<sup>25</sup> The Federal Court of Appeal explained this in a case called *Warren v Canada (Attorney General)*, 2008 FCA 377.

[38] While I understand that a close reading of the decision might suggest that the General Division may have been referring to a lack of medical evidence, that is not what the decision actually says. There is also no analysis about the weight the General Division would give to the testimony about the Claimant's ability to sit or to concentrate and use her hands for seamstress work. This suggests that the General Division ignored the testimony, and that the finding that there was no evidence meant what it said, and was in error.

**Error of fact about psychological barriers to employment**

[39] The General Division made an error of fact by deciding that the Claimant did not have psychological barriers to employment.

[40] The Claimant argues that the General Division's finding that the Claimant did not have psychological barriers to employment squarely contradicts the evidence.

[41] The Claimant argues that mental injuries should be understood the same way as physical injuries.<sup>26</sup> There was plenty of evidence about the Claimant's anxiety and depression from the Claimant's psychiatrist and other treating professionals, but the General Division decided instead to focus on one statement from the Claimant's psychiatrist in one progress report that encouraged the Claimant to try work as evidence that she had no psychological barriers to employment.

[42] The psychiatrist stated in the December 2015 progress report that the Claimant's depression was in remission. That statement, combined with the recommendation that the Claimant attempt to work at something she was physically capable of, led the General Division to conclude that the Claimant had no psychological barriers to employment.

[43] The Claimant argues that the medical evidence simply does not support a finding that there was no psychological barriers to employment. The Claimant's anxiety was active at the end of the MQP, and the same report that mentioned work also stated that the Claimant was only feeling "a little bit better" but was still "consumed" with somatic complaints, which is consistent with the obsessive nature of her anxiety disorder. The Claimant argues that the other evidence from the time of the MQP clearly puts on display the psychological barriers the Claimant faced.

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<sup>26</sup> The Claimant relies on a Supreme Court of Canada decision for that idea: *Saadati v. Moorhead*, 2017 SCC 28, at para. 35.

The Claimant's occupational therapist specifically referenced the Claimant's depression and anxiety as part of what limited her physical recovery.<sup>27</sup>

[44] The General Division did reference the occupational therapist's evidence earlier in the decision, so the Claimant takes the position that the General Division's finding about there being no psychological barriers to employment is inconsistent with the occupational therapist's evidence and even the General Division's own summary of that evidence.<sup>28</sup>

[45] In the Minister's view, the General Division's conclusion about the Claimant having no psychological barriers to working was supported by evidence. The General Division's findings were not wrong, and were consistent with the evidence. The General Division carefully considered the psychiatrist's report. The psychiatrist noted that the plan for the Claimant was supportive therapy. To that end, he wrote that he told the Claimant that "rather than consuming herself with her physical complaints she should do some exercise, yoga and meditation, and if she wants to consider another job if she was physically capable."<sup>29</sup>

[46] In other words, the Minister argues that the psychiatrist's own advice to the Claimant to try work suggests that she had no psychological barriers to work. There are two other reports from the same psychiatrist that document his efforts to encourage the Claimant to work in March 2015 and August 2015. This means the finding is not perverse or capricious. Finally, the Minister notes that the General Division did not reach this conclusion by ignoring evidence from others like the occupational therapist, but rather considered that evidence and ultimately gave more weight to the psychiatrist's evidence.

[47] In my view, the General Division made an error of fact by deciding that the Claimant had no psychological barriers to employment. I understand that this is a high threshold to meet, but in this case, the psychiatrist's report (along with several other aspects of the evidence) squarely contradicts the conclusion that the Claimant had no psychological barriers to employment. This conclusion is not simply a weighing of evidence, it is a conclusion that is not supported by the evidence.

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<sup>27</sup> GD4-259.

<sup>28</sup> The General Division referenced the occupational therapist's evidence at para 19 of its decision.

<sup>29</sup> GD4-268.

[48] It is clear that the phrase “no psychological barriers to employment” does not actually appear in the psychiatrist’s report. So the General Division interpreted the evidence through inference. This is a critically important finding, and to make it by inference is squarely inconsistent with the evidence. The psychiatrist did encourage the Claimant to find ways to distract herself from her obsessive behaviours associated with her other psychiatric illness: her anxiety. However, to find that because a psychiatrist encouraged the Claimant to try work on more than one occasion does not mean that the psychiatrist was stating that the Claimant had no psychological barriers to employment.

[49] In my view, the General Division’s reading of the report is perverse, and is not supported by the rest of the report or other reports from the same treating psychiatrist. The symptoms associated with the Claimant’s anxiety and depression did not need to be “debilitating” in order for her to be experiencing them.

[50] In finding this error, I am not simply saying that the General Division should have weighed the evidence differently. I am finding that the evidence did not actually say that the Claimant had no psychological barriers to employment. The General Division made that inference when it was not supported by the evidence.

[51] The psychiatrist made suggestions to the Claimant about how to refocus and see things differently in relation to her obsessive-type anxiety. This does not mean that the Claimant did not experience any psychological barriers to reemployment. The psychiatrist provided several more letters to explain that treatment of the Claimant’s mental illness has not been successful, and that she is not capable regularly of employment.<sup>30</sup>

[52] Psychological barriers must be totalizing or full or “debilitating” in order to be functional limitations that make a person incapable regularly of work. Assuming that the Claimant does not have **any** psychological barriers to employment simply because her psychiatrist continued to try to suggest to her that she change her thinking and behaviours is not consistent with steady judgement. The psychiatrist was describing his approach to supportive therapy for the Claimant.

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<sup>30</sup> GD4-427.

[53] The General Division made an error of fact by finding that the Claimant had no psychological barriers to employment. This finding was not consistent with the evidence from the occupational therapist that specifically identified psychological barriers to employment and from the Claimant's psychiatrist.<sup>31</sup>

## **REMEDY**

### **Giving the decision that the General Division should have given**

[54] 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.<sup>32</sup>

[55] 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.

[56] When the claimant has had a fair chance to make their case at the General Division, I give the decision that the General Division should have given. This is often the most fair and efficient path forward.<sup>33</sup>

[57] I will give the decision that the General Division should have given. Although the Claimant raised some concerns at a different stage of the process about the fairness of the General Division hearing, she is not pursuing those arguments now. I do have the information I need from the recording of that hearing and from the documents in the case to decide whether the Claimant is eligible for a disability pension. The parties agree that is fair and appropriate in the circumstances. Moving efficiently is important in this file, as the Claimant first applied for the disability pension back in 2017.<sup>34</sup>

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<sup>31</sup> At GD4-259, depression and anxiety were limiting the Claimant's physical recovery, according to the occupational therapist.

<sup>32</sup> DESDA, s 59.

<sup>33</sup> *Social Security Tribunal Regulations*, s 2. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222.

<sup>34</sup> Although the context is a little different, the Federal Court of Appeal sometimes gives the decision that the tribunal should have given when a Claimant has waited a long time and the Court has the evidence it needs to decide the case. One example of that is *D'Errico v Canada (Attorney General)*, 2014 FCA 95.

[58] The General Division's decision was based on these two key findings of fact: the Claimant did not have any psychological barriers to employment, and she did not give a reason why she could not do seamstress (or other similar) work.

[59] In this case, because the errors of fact directly impact the finding that there was a residual capacity to work, in order to give the decision that the General Division should have given, I need to weigh the evidence again to decide whether there was any capacity to work.

[60] When I weigh the evidence, I come to a different conclusion than the General Division did. Given the impact of the Claimant's medical conditions and her personal circumstances, I find that she meets the test for a severe disability under the CPP. I do not find any evidence that the Claimant has a residual capacity to work that would trigger the need to meet the employments efforts test.

[61] If I am wrong about that, and the Claimant does have some residual capacity to work, I still find that she made reasonable efforts to get and keep employment. Her efforts for a graduated return to work in which co-workers did heavy lifting for her was not too physically demanding and therefore was suitable. What made that work unsuitable for the Claimant was that she is not really capable regularly of work due to psychological barriers.

**The Claimant has a severe disability**

[62] In my view, the Claimant proved that she had a severe and prolonged disability within the meaning of the CPP on December 31, 2015. The evidence shows that her mental health deteriorated over the winter holidays in December of that year. And although she did not yet have a diagnosis of rheumatoid arthritis, I am satisfied that as of December 31, 2015, the Claimant was experiencing pain consistent with that arthritis, and simply did not have her test results back yet. I reached my conclusions by considering:

- the Claimant's background (including age, education level, 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).;<sup>35</sup> and
- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.<sup>36</sup>

[63] In light of those three factors, in my view, the Claimant did not have even some (or a residual) capacity for work. She has taken steps to manage her conditions, but she is still incapable regularly of pursuing any substantially gainful occupation.

[64] Even if I am wrong about that, and the Claimant did have some capacity for work, she has shown that her efforts to get and keep employment were unsuccessful because of her health condition so she has met the employment efforts test. The efforts she made failed because she could not actually work anymore. Her efforts to do modified work at her old job in a very gradual manner were reasonable and suitable. She also had significant barriers to accessing other employment, like her age, her limited language skills in English, and nature of her work experience in physical jobs.

#### **Medical conditions and limits on the Claimant's functioning**

[65] The Claimant has both physical and mental health conditions, namely rheumatoid arthritis, depression, and anxiety. She has other conditions, like hypertension (which is controlled with medication) and pain with her foot that I have ultimately considered as part of the pain she experiences as a result of her rheumatoid arthritis. The Claimant's conditions resulted in limits to her functioning. Her disability was severe on December 31, 2015. The parties agree that the Claimant's minimum qualifying period (MQP), ended on December 31, 2015. In my view, the Claimant was incapable regularly of pursuing any substantially gainful occupation at that time and continuously thereafter.<sup>37</sup>

[66] First, I will consider the impact of the Claimant's physical condition on her ability to work.

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<sup>35</sup> The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>36</sup> 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.

<sup>37</sup> *Canada Pension Plan*, s 42(2).

## 1. Physical Condition

[67] The Claimant experienced pain and injuries as a result of a car accident. In 2014, the Claimant had chronic joint pain, specifically in her left foot, shoulder, and right hand and wrist. As early as March 2014, the Claimant told her psychiatrist that she was limited in what she could do with her hands.<sup>38</sup> The Claimant's right wrist was puffy in May 2015.<sup>39</sup>

[68] By October 2015, the Claimant's test results showed multilevel cervical spondylosis, forminal encroachment, facet arthrosis, and alteration of normal curvature of the spine.<sup>40</sup> In a medical note dated December 8, 2015, medical evidence states that she "generally appears to be in a lot of pain and is very distressed."<sup>41</sup> In December 2015, the Claimant was limited in what she could do physically. The Claimant had injuries to her neck, back, right shoulder and left leg from the car accident.

[69] In her Questionnaire in support of her application for disability benefits, the Claimant stated that she had pain in her right shoulder, neck strains, extreme pain and swelling in her left foot, and numbness in her right hand. She stated that she gets severe pain in her right hand after use.

[70] The Claimant described her limitations in the Questionnaire, stating that she:

- could stand for 15 minutes maximum,
- can sit for only 20 minutes without shifting positions,
- walk for 15 minutes without any help around her neighbourhood (2 blocks).
- cannot not lift more than 5 pounds and can only carry objects from one room to the next (not any further).
- cannot reach "above" without excruciating pain in her right arm (from her right shoulder all the way to her right hand).

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<sup>38</sup> She could not make a particular dish because of the need to move your hand with the spoon constantly, GD4-44.

<sup>39</sup> GD4-7.

<sup>40</sup> GD4-100.

<sup>41</sup> GD2-256.



- cannot reach to her side without experiencing severe pain in her upper back.
- has severe pain with bending.

[71] In terms of her day-to-day activities, the Claimant stated in her Questionnaire that she has intense pain in her right arm when she washes her hair. She has severe difficulty putting on socks and shoes. She can cook only small meals and can shop only with assistance. She cannot clean. She stated that she has trouble driving because she has trouble with shoulder checks and with working the steering wheel.

[72] In January 2016, the Claimant's exam showed erosive changes in two types of joints in both hands.<sup>42</sup> At that time, she had intermittent swelling and pain in her wrists, hands, ankles and feet.<sup>43</sup> This pain limited her ability to stand, walk, lift overhead, do any heavy lifting of any kind. Several months after the end of her MQP, the diagnosis was official: she has an autoimmune condition (rheumatoid arthritis).

[73] The Claimant testified about her physical limitations:

- She could not sit for more than 30 minutes before her shoulders and back hurt.
- Her arms and hands would swell even when trying to do small tasks at home.<sup>44</sup>

[74] The Claimant testified and I accept that she is not able to do many household chores, and that she spends time during the day lying down. I am satisfied that the Claimant's testimony about her limitations related to her condition at the time of the MQP. The Claimant testified that she cannot predict what each day will be like. On the day that she is in pain she cannot stand or walk for more than 15 minutes and she cannot sit for more than half an hour before her shoulders and back hurt. I am satisfied that even intermittent pain in her hands of the kind she had in December 2015 would present a serious functional limitation impacting her ability to work.

[75] I am satisfied that the Claimant took reasonable steps to manage her physical condition. Doctors have prescribed various medications over the course of her treatment to address her

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<sup>42</sup> GD4-352.

<sup>43</sup> GD4-342.

<sup>44</sup> Recording of the General Division hearing, but also GD2-184.

pain. Just after the end of the MQP, a specialist prescribed different medication to try to better control her rheumatoid arthritis but her disability remains severe. One physician noted that she “may not be compliant” with a suggestion to increase a dose of medication, but I find this is not sufficient to find that the Claimant actually refused treatment in the end.<sup>45</sup>

[76] Over the years, she has seen her family doctor, specialist for her rheumatoid arthritis, podiatrist, chiropractor, physiotherapist, kinesiologist, and occupational therapist.<sup>46</sup>

[77] Her Questionnaire for disability benefits states that she has also tried massage therapy, meditation, orthotics, constant use of ice and heat pads.<sup>47</sup> She has receipts for physiotherapy and acupuncture.<sup>48</sup>

[78] I have considered whether the Claimant’s medical evidence and her testimony about her limitations means that she might have some physical capacity for some other kind of work that is more sedentary than the work she did for the fire restoration company. For example, the Claimant was once a seamstress. In my view, the evidence does not support the idea that the Claimant could function in a job like a seamstress.

[79] In the Questionnaire she completed when she applied for CPP disability pension, she stated that she had “severe pain in right hand after use.”<sup>49</sup> She had intense pain in her right arm when washing her hair.<sup>50</sup> Although she filled this document years after the end of her MQP, I find that regardless the intermittent pain and swelling in her hands in 2015 would have made it impossible to be capable regularly of employment (as a seamstress or in sedentary employment) at the end of the MQP. I do not see a residual capacity to work as a seamstress, or in sedentary work, which would still would undoubtedly require the use of her right hand and her shoulder in some way.

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<sup>45</sup> GD2-157.

<sup>46</sup> GD2-81.

<sup>47</sup> GD2-297.

<sup>48</sup> GD2-70-73 for example.

<sup>49</sup> GD2-294.

<sup>50</sup> GD2-295.

[80] The Claimant was diagnosed with chronic pain disorder long after the end of the MQP, which signals to me that her pain has been continuous.<sup>51</sup>

[81] In my view, the Claimant experienced limitations relating to pain and swelling. Her hands, feet and shoulder are the problem areas. Her rheumatoid arthritis has impacted her ability to work because she has trouble sitting, standing, lifting, bending, walking, and using her hands.

[82] Next, I will consider the impact of the Claimant's mental health conditions on her ability to work.

## **2. Mental Health Conditions**

[83] In December 2015, the Claimant was limited in what she could do (functional limitations) due to anxiety and depression. The Claimant's doctor had already diagnosed anxiety, depression and hypertension in January 2014. The Claimant experienced decreased interest and motivation, feelings of hopelessness.<sup>52</sup> Her psychiatrist's report from the fall of 2015 talks about the Claimant feeling "a little bit" better. In my view, this needs to be understood in the wider context given that the Claimant was experiencing symptoms despite the fact that she was already taking medication and was seeing mental health professionals regularly at that time.<sup>53</sup>

[84] Although the Claimant's psychiatrist referred to her depression as being in "remission" in December 2015, her anxiety was not under control. Her psychiatrist diagnosed her anxiety as "obsessive in nature."<sup>54</sup>

[85] Just after the end of the MQP, in January 2016, the evidence shows this remission of the depression was short-lived. Over the holidays in December, 2015 the Claimant had more symptoms of depression again. The occupational therapist's report is consistent with this finding.

[86] The Claimant's occupational therapist specifically referenced the Claimant's depression and anxiety as part of what limited her physical recovery.<sup>55</sup> The Claimant's evidence is that she feels tired all the time, even on days that she does not have pain. The Claimant explained to the

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<sup>51</sup> GD4-395 and following.

<sup>52</sup> GD2-152.

<sup>53</sup> GD4-5, for example. An antidepressant since August 2015 and medication to help with sleep, see GD4-19.

<sup>54</sup> GD2-241.

<sup>55</sup> GD4-259.

General Division member that she feels very down, stressed, confused and cannot focus and panics. In the Questionnaire she completed for disability benefits, she talked about her lack of concentration and ability to focus.<sup>56</sup>

[87] The Claimant's doctor's notes say that the Claimant had “++ uncontrolled anxiety” in May 2016, just four months after the end of the MQP.<sup>57</sup> In July 2016, the depression was not controlled.<sup>58</sup> Uncontrolled depression and anxiety impacted the Claimant's ability to work. She had problems sleeping, she was obsessed with her pain, and she had trouble focusing and concentrating.

[88] Less than a year before the General Division hearing, the Claimant's psychiatrist wrote a letter summarizing his treatment of the Claimant's mental health conditions. He stated that she is struggling with “significant mental health symptoms” and that although he had tried her on “multiple antidepressant and anti-anxiety medications over the past few years” with “very minor and partial responses” and worsening symptoms later. The psychiatrist noted that “it is my clinical view at this point in time that she has significant psychiatric symptoms reported to myself, which make her incapable of regularly pursuing gainful occupation.”<sup>59</sup>

[89] In May 2017, the Claimant's psychiatrist summarized the Claimant's condition over the past years (including the time of the MQP)

[The Claimant] has been a patient of mine since January 20, 2014. She was referred for an assessment of depression at the time. Over the years I have known her and she has been struggling with severe anxiety symptoms. It is a mix of OCD, generalized anxiety disorder, and panic attacks. Most of the symptoms qualify her for a diagnosis of anxiety disorder NOS. Over the past many years she has struggled with on-and-off depressive episode. Due to her inability to relax, feeling tense, thinking too much, poor sleep quality, not been able to focus or concentrate, and sustain attention, therefore I would highly support her in

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<sup>56</sup> GD2-294.

<sup>57</sup> GD2-259.

<sup>58</sup> GD2-261.

<sup>59</sup> GD4-427.

getting her CPP disability considering she comes across as a genuine patient.<sup>60</sup>

[90] In her Questionnaire, the Claimant explained that her short-term memory is very weak. She cannot concentrate to read or to watch television. She cannot sleep for more than a couple of hours without waking up periodically.

[91] I am satisfied that the Claimant has taken steps to manage her mental health conditions. The Claimant routinely attended counselling after her car accident and was followed by a psychiatrist starting in 2014. She has tried multiple medications over the years but her condition is chronic. She takes prescribed medication, and she has tried recommended modifications to her medication over the years.

[92] There are times when aspects of the Claimant's mental health (like her depression but not her anxiety) temporarily improved, both before and after the MQP. However, her disability is still severe. For example, her medical files show that she was feeling better and her mood was better and anxieties were down in April 2016.<sup>61</sup> However, I must read the Claimant's psychiatrist's observation in light of his other evidence, specifically his report from the month before, in March 2016, when she arrived without an appointment and was acting extremely obsessively.<sup>62</sup> These observations are just a few months after the end of the MQP, and offer a window into the Claimant's limitations around the time of the MQP.

[93] The Claimant's psychiatrist is supportive of the Claimant's application for the disability pension, and I accept his evidence about the nature of the Claimant's mental health conditions. She has responded poorly to treatment and struggles with severe anxiety which impacts her ability to sleep, focus and concentrate. The Claimant's ability to work at a sedentary job is limited by the symptoms associated with her mental health conditions. Focus and concentration is required for sedentary work, and lack of sleep impacts the ability to work as well. The fact that the Claimant focuses on her pain and is obsessive in her anxiety about it is also a barrier to working.

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<sup>60</sup> GD2-269.

<sup>61</sup> GD2-198.

<sup>62</sup> GD2-199.

[94] Next, I need to consider the impacts of these conditions together.

**Consider physical and mental health conditions together**

[95] I need to consider the Claimant's physical and mental health conditions together.<sup>63</sup> There is no requirement that any one condition, whether physical or mental, be debilitating on its own in order to show that a disability is severe. I have also tried to consider these conditions together in a way that does not misunderstand the nature of the Claimant's conditions. The Claimant's anxiety showed itself through obsessive worry and anxiety about her pain and her limitations. It was in that context that her psychiatrist recommended that she try working at various times. It was not evidence of capacity to work.

[96] The Claimant raises a Supreme Court of Canada decision in support of the idea that physical and mental injuries should be treated the same for the purpose of tort law (the area of law that deals with lawsuits).<sup>64</sup> While this may seem obvious, it is easy to treat evidence about mental health limitations differently from physical limitations.

[97] The Claimant argues that with mental health disabilities, the problem is that decision makers can start to assume that people are either "one hundred percent better" or "one hundred percent unwell" when it comes to mental health, and that there is very little in-between that represents a real limit to functioning that would impact on the ability to work.

[98] The reality, the Claimant argues, is that mental health illness is chronic. The barriers claimants face with their mental health are real barriers that we cannot assume are possible to overcome simply because the person is not "one hundred percent" unwell. It is easy to assume that if a mental health specialist encourages a claimant to think differently, that the psychological barrier is not really substantial, that it somehow has to be debilitating in order to truly represent a barrier to work.

[99] The Claimant's mental health and physical health are connected. I accept the evidence from the Claimant's occupational therapist, who stated that the Claimant's depression and

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<sup>63</sup>The Federal Court of Appeal required this approach in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>64</sup> The Supreme Court of Canada decision is *Saadati v Moorhead*, 2017 SCC 28, para 35.

anxiety were part of what limited her physical recovery.<sup>65</sup> The Claimant ruminated about her physical health: she had obsessive thoughts about her physical pain. In February 2016 (just after the end of her MQP), her psychiatrist was ready to write another letter explaining that she could not work at that time due to her depressed mood.<sup>66</sup>

[100] There is no doubt that the Claimant's psychiatrist encouraged her to try to return to work more than once. In March 2015, when the Claimant raised the idea of trying to return part time, her psychiatrist encouraged her to try full time.<sup>67</sup> He was similarly supportive of the Claimant's attempt to return to work in August 2015. Finally, in the report dated December 10, 2015, the Claimant's psychiatrist suggested focussing on things like yoga, exercise and meditation to consider another job if she was physically capable as ways of combatting her consuming thoughts and feelings about her pain.<sup>68</sup>

[101] The fact that the Claimant's psychiatrist had encouraged her to try to work around December 10, 2015 does not mean that she was capable of doing so at that time. He had also suggested she try full time and "see how things unfold" in August 2015.<sup>69</sup> I understand the psychiatrist's encouragement in the context of the Claimant's obsessive thinking about her physical restrictions. I do not read that encouragement as a medical opinion that she actually could overcome her psychological barriers to work. She was not simply refusing to try. She could not work due to her diagnosed condition and its limitations.

[102] In my view, assuming that a claimant can overcome obsessive worry, a symptom of a diagnosed anxiety disorder, by simply accepting a psychiatrist's suggestion for how to think or see things differently is problematic. While the Claimant's treatment may ultimately have resulted in a successful return to work, the reality is that it did not. I am satisfied that the psychological barriers the Claimant had, her focus on somatic symptoms, was a significant and real medical barrier to her return to work. The fact that her psychiatrist was suggesting she experiment to overcome those barriers does not necessarily mean that she could. The record demonstrates that ultimately, she could not.

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<sup>65</sup> GD4-259.

<sup>66</sup> GD4-312.

<sup>67</sup> GD4-89

<sup>68</sup> GD2-241.

<sup>69</sup> GD4-19.

[103] In addition to the pain the Claimant experienced and the limitations associated with that physical pain, the obsessive worry, the lack of sleep, the poor concentration and the Claimant's rumination are symptoms of her mental health condition that mean she is incapable **regularly** of work. The Claimant argues (and I accept) that the Claimant's psychiatrist suggested that she try to find work that she was physically capable of, only in the context of the Claimant being "consumed with worry about her health and finances."<sup>70</sup> Perhaps tellingly, even after the Claimant's employer terminated her in January 2017, and the Claimant's psychiatrist was not recommending that she look for some other job.<sup>71</sup>

[104] The Claimant's functioning was limited by her pain and the symptoms of her anxiety and depression (like lack of focus and concentration, and lack of sleep). These limits in her functioning had a negative impact on her ability to work.

### **Personal Circumstances**

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

- a) age;
- b) level of education;
- c) ability to speak, read, and write English; and
- d) past work and life experience.<sup>72</sup>

[106] The Claimant was 52 years old in December 2015. She had some years to go until the age many people collect their retirement pensions. She has a high school education from India. She explained at her hearing at the General Division that she has little to no ability to read or write in English. She said she does not speak or understand English very well. I listened to a recording

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<sup>70</sup> AD8-11.

<sup>71</sup> GD4-168.

<sup>72</sup> 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.



of the General Division hearing. The Tribunal provided the Claimant with a translator at her General Division hearing.

[107] When the Claimant came to Canada, she worked as a seamstress for 13 years, and then after a time at home caring for her children, she worked as a cleaning technician for a flood and fire restoration company. Since coming to Canada, the Claimant has only worked in jobs of a physical nature. She has no clerical or computer skills.

[108] Given all of these facts about the Claimant's life and experience, I find that in December 2015, the Claimant also had serious non-medical barriers to accessing work. In a real world context, a limited education and English language skills significantly narrows the variety of work the Claimant might reasonably be able to secure within her physical limitations in Canada.

[109] In my view, it is not realistic to expect a person the Claimant's age with her physical limitations to upgrade her language skills and then upgrade her education or training in order to secure a sedentary job. Even if that is a reasonable expectation, I find that the combination of the Claimant's physical and psychological barriers means that this kind of training would not be realistic for her to achieve.

### **Efforts to Get and Keep Employment**

[110] If I am wrong, and the Claimant did have some capacity to work before the end of her MQP. I am satisfied that she has shown that her efforts to get and keep employment were reasonable, the work was suitable, and she was unsuccessful because of her health condition.

[111] In 2014 and 2015, the Claimant tried to return to work as a cleaning technician at the fire and flood restoration company several times.<sup>73</sup> She asked co-workers to help her by lifting heavy items for her, but she experienced pain and could not keep up with the work. Her current family doctor says that she tried in October 2014, but was unsuccessful because of her health condition. She tried again in March 2015, and was unsuccessful again because of her health condition. Then between April 2015 and August 2015, she was able to work four hours a day, two to three days a

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<sup>73</sup> GD2-209.

week. She stopped in September 2015 due to pain. She tried again in December 2016, but was unsuccessful and she was terminated by late January 2017 (she could not do the work).<sup>74</sup>

[112] The Claimant had accommodation to try to return to work. Her employer gave her greatly reduced (graduated) hours. She testified that her co-workers helped her to modify her duties by taking over tasks like lifting for her. Ultimately, she could not do the work and the employer terminated her.

[113] I accept the Claimant's testimony that the reason she was unsuccessful was her health condition. The job she tried was not physical -- she testified about her co-workers helping her with physical lifting. Yet, the Claimant was still unable to maintain the work because of her disability. Given the Claimant's personal circumstances, this job, with accommodations, was her best chance at a return to work, and she could not keep it.

[114] I am satisfied that given all of the evidence, the Claimant's efforts to get and keep employment at the end of her MQP were reasonable. Her counsellor explained the negative impact that these failed return to work efforts had on the Claimant, both in terms of aggravating her physical symptoms but also in terms of her mental health.<sup>75</sup>

[115] Taken together, the Claimant's medical evidence and personal circumstances show that she is incapable regularly of pursuing any substantially gainful job.

### **The disability is prolonged**

[116] 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.<sup>76</sup>

[117] When she applied for the disability pension, the Claimant's doctor stated that it was unknown whether she will have complete remission of her anxiety and depression as the cause is "multifactorial," and that her rheumatoid disease "should improve" with continued monitoring and follow up to ensure compliance with her medication.<sup>77</sup>

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<sup>74</sup> GD2-82.

<sup>75</sup> GD4-87.

<sup>76</sup> *Canada Pension Plan*, s 42(2).

<sup>77</sup> GD2-155.

[118] But even as late as the summer of 2016, the Claimant's doctor stated that the Claimant would be unable to return to any work in the foreseeable future. The doctor wrote that the Claimant "has uncontrolled depression with decreased ability to focus and concentration. She also has inflammatory arthritis which is uncontrolled therefore making it difficult to perform in a regular job."<sup>78</sup>

[119] By October 2016, the Claimant's doctor completed a form for her former employer, stating that although the Claimant's condition could either stay the same or improve, the Claimant would not be able to return to work and do her previous duties or return to work in any other capacity in the foreseeable future. The Claimant has flare-ups and joint pain, including one time when she tried to sew.<sup>79</sup> The Claimant's doctor wrote that the Claimant "suffers from severe anxiety and depression and combined with her chronic pain she is unable to participate in regular employment."<sup>80</sup>

[120] The Claimant's new family doctor stated in 2017 that she still has symptoms in terms of anxiety and depression and low mood. The family doctor says she has multiple chronic medical conditions. She notes that the Claimant has had multiple medication changes since 2015, part of an effort to try to help her to better manage her depression and anxiety.

[121] The functional capacity report from several years after the MQP in April 2017 concluded that she would be unable to perform light to sedentary duties. The report concluded that the testing showed sub-maximal effort, but this does not show an intent to do more poorly than she can. Similarly, she experiences symptom magnification, but again, this is not about intent, it just shows that she is inconsistent in her perception and or reporting of her subjective symptoms and functional abilities.<sup>81</sup>

[122] The Claimant proved she had a severe and prolonged disability as of December 31, 2015. This was the holiday season during which her mental health disabilities were causing her limitations, and her pain was such that she was awaiting a diagnosis for rheumatoid arthritis. That was also the last day of her minimum qualifying period (MQP).

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<sup>78</sup> GD2-184.

<sup>79</sup> GD4-222.

<sup>80</sup> GD2-170.

<sup>81</sup> GD2-135.

[123] The Claimant applied for a disability pension in March 2017, so the earliest she can be eligible for a disability pension under the CPP is 15 months before, in December 2015.<sup>82</sup> Payments start effective four months later, in April 2016.<sup>83</sup>

## CONCLUSION

[124] I allow the appeal. The Claimant is entitled to a disability pension under the CPP.

Kate Sellar  
Member, Appeal Division

HEARD ON:	March 30, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Jonathan Blair, Representative for the Appellant  Hilary Perry, Representative for the Respondent

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<sup>82</sup> The rule about only going back a maximum of 15 months from the date the Claimant applied is at section 42(2)(b) of the *Canada Pension Plan*.

<sup>83</sup> The rule about payments starting four months later is at section 69 of the *Canada Pension Plan*.