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

Citation: *RA v Minister of Employment and Social Development*, 2021 SST 310

Tribunal File Number: AD-21-76

BETWEEN:

R. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: June 28, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal. The General Division made errors. I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension. Payments begin effective October 2018.

OVERVIEW

[2] R. A. (Claimant) has back pain, depression, and anxiety. She experiences insomnia and panic attacks. She took a sick leave from her job as a receptionist in August 2014. She has not returned to work since then. She has three young children, born in 2014, 2017 and 2019.

[3] She applied for a disability pension under the *Canada Pension Plan* (CPP) in September 2019. The Minister denied the application because it had decided that her disability was not "severe" within the meaning of the CPP.

[4] The Claimant appealed to this Tribunal. The General Division dismissed her appeal, finding that the Claimant had some capacity to work, and she did not show that efforts to get and keep work were unsuccessful because of her medical conditions.

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

[6] I find that the General Division made an error of law by failing to provide sufficient reasons to explain how the Claimant's caring for her children meant that she had some capacity for work. The General Division made an error of fact by ignoring the evidence from the psychiatrist about the Claimant being totally disabled.

[7] I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension.

ISSUES

[8] The issues are:

1. Did the General Division make an error of law by failing to provide sufficient reasons to explain how the Claimant's caring for her children meant that she had some capacity for work?

2. Did the General Division make an error of fact by ignoring the evidence from a specialist stating that the Claimant was "totally disabled"?

ANALYSIS

Reviewing General Division decisions

[9] 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.

[10] 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.[1]

Error of law: the reasons

[11] The General Division made an error of law by failing to provide sufficient reasons for one of its key findings. In my view, the General Division did not adequately explain why it found that there was some evidence of capacity to work merely because the Claimant was able to take care of her children on her own. In light of several sources of evidence about the nature of the Claimant's specific functional limitations (including her limitations in social situations with adults) and the evidence about the Claimant's day-to-day activities, it is not sufficiently clear

[1] DESDA, s 58(1).

how the General Division decided that the Claimant's care for her children meant she had some capacity for work.

[12] This error can also be described as an error of fact by ignoring (not discussing or grappling with) important evidence about the Claimant's situation at home during the pandemic before concluding that the Claimant's care for her children meant she had capacity to work.

[13] The General Division does not need to refer to every piece of evidence in its decisions.[2] However:

- failing to give sufficient reasons on a key issue in circumstances that required explanation can be an error of law[3]; and
- failing to discuss or grapple with important evidence can show that that evidence was ignored and therefore led to an error of fact.[4]

[14] The General Division discussed the Claimant's evidence about her limitations, and then shifted focus to the Claimant's care of her children:

> I understand that the Claimant finds caring for her three young children challenging especially while they are all home during the pandemic. I also acknowledge that the Claimant continues to have physical limitations and experiences anxiety, depression and panic attacks. She has to take her medication in the morning and then take care of them. However, I find that the Claimant is nonetheless capable of independently taking care of her children. She bathes, cooks, and feeds them, helps them with school, drives, does light housework, and plans/schedules their activities and appointments. The witness confirmed that although the Claimant continues to have functional limitations, she takes good care of her children's needs. Although the Claimant also says that, she cannot focus and multi-task as is required in a clerical position, this evidence shows that at the time of the hearing, she is capable of both. Her ability to care for her children and

[2] The Federal Court of Appeal explained this in *Simpson v Canada (Attorney General)*, 2012 FCA 82 and *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.
[3] The Federal Court of Appeal explained this in a case called *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292.
[4] DESDA, s 58(1)(c) explains that an error occurs 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.

> housework, every day, on a full-time basis, shows that she is capable of maintaining a responsible position and schedule.[5]

[15] The General Division then concluded that the Claimant's testimony and the testimony from her witness showed that despite her limitations, the Claimant did have some capacity for work.[6]

[16] The Minister argues that the General Division's reasons are sufficient. The reasons allow for the Appeal Division to complete a meaningful review. They adequately explain how the General Division reached its conclusion. The Appeal Division should not intervene only because it thinks the General Division did a poor job of expressing itself. The Appeal Division should only intervene when the General Division decision shows that it failed in its "elementary duty to engage in a meaningful analysis of the evidence."[7]

[17] In the Minister's view, the General Division's analysis was comprehensive. The General Division decided not only that the Claimant's testimony showed that she had some capacity for work, but that her objective medical evidence also did not show that she had limitations that would stop her from working. The Minister says that the General Division explained how it reached these conclusions, which evidence it preferred to reach them, and why. The Claimant's care of her children showed that she could multi-task and manage a schedule, which would be required in a workplace. Accordingly, the General Division found that she had some capacity to work.

[18] The Minister argues that the Federal Court of Appeal's decision in a case called *Doucette*, which dealt with insufficient reasons, is different from the Claimant's case.

[19] In *Doucette*, the decision maker found that the claimant could work even though there was a medical report stating that he was completely disabled and left with a permanent condition. The Board (replaced by what is now the General Division) quoted that report and stated that it showed there were serious concerns. Then without exploring those concerns in any detail, the Board in *Doucette* decided that with more effort, the claimant "might well be working today."

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[5] General Division decision, para 22.
[6] General Division decision, para 23.
[7] The Minister raised these arguments at AD2-10.

The Minister argues that the Claimant's case is different because the General Division described in more detail how it weighed the evidence to reach its conclusions about the Claimant's work capacity.

[20] In my view, the General Division made an error of law by failing to provide sufficient reasons for one of its key findings. The General Division did not adequately explain why it attributed capacity to the Claimant merely because she was able to take care of her children.

[21] While the General Division was not as brief as the Board was in *Doucette*, a very similar problem arises in that case as it does here.

[22] In *Doucette*, there was medical evidence that on its face stated that the Claimant was completely disabled. In this case, there were these three pieces of medical evidence supporting that the Claimant was disabled enough that she could not work:

- the medical report stating that the family doctor recommended that the Claimant stop working, and that it was unknown when she could return;[8]
- a letter from the family doctor stating that the Claimant could not work full or part time;[9] and
- a report from a one-time consultation with a psychiatrist who stated that the Claimant was "totally disabled at the moment" and expressed "hope" that the Claimant could return to work "someday" with changes to her treatment plan.[10]

[23] The Minister argues that the medical evidence, particularly the evidence from the psychiatrist, showed that the Claimant did actually have some capacity for work. As a result, the Minister characterizes the Claimant's testimony about limits to her functioning as "conflicted." The Minister argues that ultimately the General Division decision made it clear that the Claimant successfully and independently cared for and home-schooled her children during the pandemic

[8] GD2-75.
[9] GD2-15.
[10] GD6-8.

lockdown. The Minister notes that we can fill in any gaps in the General Division's by inferring that the General Division was not persuaded by the Claimant's testimony about her limitations.

[24] At the Appeal Division hearing, the Minister pointed out that it is not unreasonable to read the circumstances the Claimant was in and to question whether the General Division should have grappled more with the evidence about the Claimant's situation at home. The Minister acknowledged that while he or I may have reached a different conclusion on those facts, it is difficult to say that that the General Division's conclusions rise to the level of an error.

[25] In my view, the General Division made an error of law because it did not sufficiently explain how the fact that the Claimant continued to care for her children was evidence of a capacity for work that somehow conflicted with the medical evidence. The Claimant and her witness testified about psychological limitations that would limit the Claimant's capacity to work, like: panic attacks; lack of concentration, focus, and memory; inability to multi-task; fear of people judging her in a workplace; sadness; and lack of self-esteem.[11]

[26] There was both testimony and medical evidence about the limits to the Claimant's functioning, particularly due to her anxiety.[12] The Claimant cared for her children during the pandemic, including when there was no in-person school. She testified that she had a referral for daycare subsidy because of her disability. She could not use the subsidy and send the daycare-aged children for that service when the daycares were closed during the pandemic lockdown.[13] In light of this evidence, the reasons are not sufficient to understand how the Claimant had some capacity for work.

[27] The General Division did not mention or discuss the fact that the Claimant had a subsidy for daycare on referral from her doctor but was not able to access daycare during lockdown. This is a significant piece of evidence in her testimony that, in my view, must be discussed in the

[11] Recording of General Division hearing, witness testimony starting at about 13:32 to about 14:37; Claimant testimony 20:15 to about 24:08, 31:00 to about 36:00, 52:33 to about 56:48.
[12] In addition to the testimony in the previous footnote, there are references to the Claimant's psychological limitations in the CPP medical report at GD2-72 and 73 including panic attacks, sweating, low mood, low concentration.
[13] Recording of the General Division hearing, starting at about 48:00.

reasons if the General Division relies on the ability to care for children as evidence of a capacity to work.

[28] There will always be things that people do in their personal lives that will show some aspect of a skill that is required in the workplace: the ability to read and answer your email might mean you are capable of reading and answering email in a workplace setting, for example.

[29] But a residual capacity for work is more than cherry picking a single skill like multi-tasking or following a schedule and finding that this is evidence of a capacity to work. This Claimant provided evidence about the limits to her functioning because of her anxiety that simply would not apply to the work she did at home. She experienced anxiety and avoided groups of people, she was afraid of being judged by people, and she had major barriers when it came to communicating with other people.[14]

[30] These challenges did not impede the Claimant's ability to feed and bathe her children during the pandemic. However, in light of all the circumstances, it is not clear from the General Division's reasons how caring for children showed a capacity to work. There was evidence in the record about the pandemic that strongly suggests that the Claimant had no choice in the matter in terms of caring for her children despite her disability during an extraordinary set of circumstances. The reasons must be read in the context of the record.

[31] The Claimant did not simply provide "subjective commentary" or information about her "suffering" for the General Division.[15] The Claimant described limits to her functioning because of her anxiety – she avoids social situations, she experiences panic attacks, she has overwhelming panic, obsessive thoughts, intolerance for groups, and more.

[32] While the General Division mentioned the Claimant's symptoms, it is not clear that the General Division considered those symptoms and how they would affect the Claimant's ability to work. The General Division seems instead to have decided that the Claimant Claimant's medications are generally "helping" the Claimant with her functional limitations due to her

[14] GD2-29 to 30.
[15] AD2-15.

depression and anxiety and panic attacks with the "goal of returning to work."[16] It is not clear how this general finding about treatment "helping" fits in to the analysis.

[33] The reasons do not make it clear how a claimant who has this much trouble with communicating, with emotions and behaviours that would factor into work, and who had more than one physician state that she could not work, has capacity to work.

[34] The General Division's reasons are insufficient. The General Division made an error of law in that regard. Alternatively, this can be described as an error of fact, because the General Division ignored the evidence about how the pandemic impacted the access the Claimant had to daycare (as a result of a medical referral). The pandemic meant that the Claimant had little choice but to care for her children at home in the ways that she did despite the limits to her functioning. This evidence, along with the specifics of her functional limitations associated with anxiety, were important enough that that the General Division needed to discuss them before reaching a conclusion about whether the Claimant had a residual capacity to work. To the extent that the General Division did relay the facts about the Claimant's anxiety, it is not clear from the analysis how they affected the Claimant's capacity to work.

Error of fact: ignoring evidence that Claimant was "totally disabled"

[35] The General Division made an error of fact by making a decision about the Claimant's ability to work without grappling with the evidence from a specialist (psychiatrist) stating that she was totally disabled.

[36] The General Division decision points to a lack of medical evidence as follows:

> Moreover, although the Claimant submits that she is still unable to work at all, she did not provide objective medical evidence that shows that, by the time of the hearing, her functional limitations kept her from working in a sedentary position.[17]

[16] General Division decision, para 31.
[17] General Division decision, para 32.

[37] At the same time, the General Division expressly mentioned the psychiatrist's report, which appears to be objective medical evidence about the Claimant's ability to work.[18] The General Division described the psychiatrist's conclusion like this: "(a)lthough he indicated that the Claimant continued to be disabled, he did not think that she was permanently disabled…"[19] However, that same report actually referred to her as "totally disabled at the moment."[20]

[38] The psychiatrist's conclusion that the Claimant is "totally disabled", even if not permanently so, is an important piece of evidence that the General Division needed to consider and discuss before deciding that the Claimant had some capacity for work. The General Division only referenced part of the psychiatrist's conclusion, and then also found that the Claimant lacked medical evidence about her ability to work in a sedentary position.

[39] The General Division does not need to refer to every piece of evidence in the reasons. However, when a fact is important enough that the General Division should have discussed it, I can infer that the General Division ignored it.[21] If the General Division ignores important evidence in the record when reaching its decision, that can be an error of fact.[22]

[40] I infer that the General Division reached its decision about the Claimant's capacity to work without considering an important part of the evidence. If the General Division grappled with the psychiatrist's conclusion about the nature of the Claimant's disability (i.e. that it was "total"), the General Division may well have reached a different conclusion about whether she could work in a sedentary position.

REMEDY

Giving the decision that the General Division should have given

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[18] GD6-8.
[19] General Division decision, para
[20] General Division decision, para 30.
[21] The case that states that we assume the decision maker considered all of the evidence even if it is not discussed in the reasons is *Simpson v Canada (Attorney General)*, 2012 FCA 82. The case that talks about inferring that evidence was ignored if it is important and not discussed *is Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498
[22] DESDA, s 58(1)(c).

[41] 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.[23]

[42] At the Appeal Division hearing, the Minister and the Claimant agreed that if I found an error, I could give the decision that the General Division should have given. The Minister raised a question as to whether I would have a complete record in order to decide whether the disability is prolonged.

[43] 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.[24]

[44] I will give the decision that the General Division should have given. The Claimant has had a fair opportunity to make her case as to why her disability is severe and prolonged within the meaning of the CPP.

"Severe" disability within the meaning of the CPP

[45] 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."[25] 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 to what a person can and cannot do (when it comes to work) as a result of a disability. This is sometimes called "functional abilities" and "functional limitations."

The Claimant has a severe disability

[46] In my view, the Claimant proved that she had a severe and prolonged disability within the meaning of the CPP. I reached my conclusions by considering:

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[23] DESDA, s 59.
[24] *Social Security Tribunal Regulations*, s 2. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222.
[25] CPP, s 42(2).

- the Claimant's background (including age, education level, language proficiency, past work and life experience); and
- the Claimant's medical conditions (which involves assessing the conditions in their totality – all of the possible impairments that could affect capacity to work).;[26] and
- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.[27]

[47] 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.

Personal Circumstances

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

- age;
- level of education;
- ability to speak, read, and write English; and
- past work and life experience.[28]

[49] The Claimant was only 31 years old when she had her hearing at the General Division.

[50] She testified that she finished 3 years of the Office Administration program (a 4-year program) at college. The Claimant has about 10 years of administrative and finance experience. In her last job, she worked in a medical office as a receptionist. Before that, she was in retail for 4 years performing duties like invoicing, deposits and scheduling.

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[26] The Federal Court of Appeal explained this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[27] 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.
[28] 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.

[51] The Claimant's age is not a barrier to entry into the workforce. If it were not for her medical conditions, she would no doubt have many years of work outside the home before retirement age. She is raising children independently. Since she has high school and some college work (even though she did not complete it), education is not a barrier to her accessing work. She clearly has transferrable skills and experience in clerical and other office work. In this case, it is not the Claimant's personal circumstances that create a barrier to her working.

Medical conditions and limits on the Claimant's functioning

[52] The Claimant has back pain, anxiety, and depression. She experiences insomnia and panic attacks. Considered together, these conditions result in a series of limitations on her functioning. Those limitations mean that the Claimant is incapable regularly of pursuing any substantially gainful work.

[53] In 2017, a psychiatrist stated that the Claimant had major depressive disorder, recurrent and generalized anxiety disorder. At that point, she had been taking antidepressant medication for 3 years.[29]

[54] In the medical report with her application, her family doctor stated that he recommended that the Claimant stop working in July 2014. The family doctor stated that it was unknown whether the Claimant could return to any type of work in the future.[30]

[55] The Claimant also provided a letter from her family doctor dated March 26, 2020 that stated that the Claimant has a "long history of severe panic disorder with social anxiety that prevents her from full time or part time working."[31] That doctor also stated that the Claimant has depression and generalized anxiety disorder. The doctor described the kinds of limitations that the Claimant has, all of which I find significant when considering whether the Claimant can work:

- Trouble articulating her speech and thoughts;

[29] GD2-83 and following.
[30] GD2-75.
[31] GD2-15.

- Avoidance of certain situations, fear of crowds, feelings of panic, avoids public areas and social gatherings for fear of having a panic attack: malls, recovery stores, offices, appointments, birthdays;

- Abnormal level of worry and concern;

- Sweating, feeling faint, dry mouth, muscle tension, hypervigilance, vomiting;

- Difficulty interacting with others, concentrating or keeping pace in performing tasks (the ability to complete tasks).

[56] The same doctor noted that the Claimant has severe low back pain: "as a result of this condition she has been unable to work for the last 6 years." The doctor noted that the back pain affects the Claimant's ability to walk, groom, and work.[32]

[57] There are no serious clinical findings relating to the Claimant's back. An MRI of her spine was normal, and her back pain is "myofascial/mechanical in nature." She had injections every three weeks from December 2019 to September 2020 to control the pain.

[58] In May 2020, the Claimant had a phone consultation with a psychiatrist. In his opinion, the Claimant's depression, anxiety, and back pain were connected. The Claimant told the psychiatrist that the medication was helping. He recommended increasing the dosage of the medication, and continuing with psychotherapy. He concluded:

> I do feel she is totally disabled at the moment due to the severity of her GAD and social anxiety with secondary persistent depression and chronic pain….[i]t is my hope that with the above treatment plan her disability will be temporary and she will be able to get back to functioning and working one day. I do not feel she is permanently disabled which may disqualify her from CPP-D benefits, but she does have sufficient total disability at this time.[33]

[32] GD2-74.
[33] GD6-8.

[59] In her application for the disability pension, the Claimant rated her ability on all of these activities as "poor":

- stay on her feet for at least 20 minutes;
- walk a block;
- drive a car;
- pick up two bags of groceries and walk a block with it;
- sit for 20 minutes in a straight back chair; and
- stare at a computer screen for at least 20 minutes."[34]

[60] In the section on behaviours and emotional abilities, the Claimant rated her ability to do almost anything on that list as "poor", including things like:

- asking for help when needed;
- controlling temper;
- figure out what to do when stressed; and
- keep at difficult task until you get it done.

[61] She rated her abilities as "poor" when it comes to communicating and thinking, deciding between two options, concentrating and focusing attention for 30 minutes, and learning new things.

[62] The Claimant also explained that she is not able to prepare meals daily, she leaves housework behind daily, and cleaning and washing is not something she is able to do daily for herself.

[34] GD2-28.

[63] The Claimant testified that her conditions stopped her from being "physically and mentally" present at the workplace and "giving 100 percent and being there 100 percent."[35] Despite some challenges, however, she said, "I try to put my kids first and I try to only give them the best" while caring for them alone, including throughout the COVID pandemic.[36]

[64] The Claimant's friend testified at the General Division hearing. She described what she observed about the Claimant's inability to participate in social gatherings. She explained how the Claimant's conditions affected her ability to perform household chores and even shower. She stated that the Claimant "definitely [is] a great mom" that attends to, feeds, clothes, and bathes her children and takes them to their appointments as their sole caregiver.[37]

[65] In my view, it is the combination of limitations both physical and especially psychological, which result in the Claimant's disability meeting the definition of "severe" under the CPP. The main condition that keeps the Claimant from working is anxiety.

[66] I accept the Claimant's testimony about her conditions and limitations as she outlined them in her testimony and in her application for the disability pension. It is clear that she cannot participate in social situations, that she has significant struggles in communicating and in the emotional and behavioural requirements of the working world. She cannot function in a workplace (including a sedentary one). She was doing sedentary work and stopped on her doctor's recommendation back in 2014. She never returned. I accept her friend's testimony about the struggle to have the Claimant engage socially with other adults, and the Claimant's ultimate inability to do that.

[67] I accept that the Claimant had depression before 2014 and was able to work then. However, the medical evidence shows that her psychological condition deteriorated in 2014.[38]

[68] I am satisfied that the Claimant has taken steps to manage her conditions. She is a patient at a pain clinic and has injections for her back to manage her pain every 3-4 weeks.

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[35] Recording of the General Division hearing, starting around 31:20.
[36] Recording of the General Division hearing, starting around 46:20.
[37] Recording of the General Division hearing, starting around 16:00.
[38] The Claimant's family doctor recommended that she stop working at that point. See GD2-75.

[69] She takes antidepressant medication and she sees a psychiatrist regularly for the past year and a psychologist as well.

[70] In notes from the pain clinic from September 2020, the Claimant was taking an anti-inflammatory/immunosuppressant, an antidepressant, and Tylenol with codeine (Tylenol #2).[39]

[71] The Minister argues that the Claimant provided a "relatively light record of marginally conflicted objective medical evidence, and the testimony was brief."[40]

[72] There is no stand-alone requirement for claimants to exhaust all treatment options (even those not put to them by their treatment team) in order to qualify for a disability pension. Claimants do, however, have an obligation to show efforts to manage their medical conditions.[41]

[73] I must decide, "in practical terms", whether the Claimant is incapable regularly of any substantially gainful work. I am not supposed to think about vague categories of labour that the Claimant might do that are not connected to reality, like "semi-sedentary" work. The Federal Court of Appeal states that:

> [47] In other cases, however, decision-makers ignore the language of the statute by concluding, for example, that since an applicant is capable of doing certain household chores or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2)(a)(i) of the Plan.[42]

[74] While the Minister has argued that the Claimant could do sedentary work not unlike what she used to do, I find this is not sufficiently connected to reality for the Claimant. I accept her evidence about her currently inability to interact with other adults in the ways that would be expected in a workplace, whether sedentary or not. I cannot conclude that the Claimant could work in a sedentary job simply because she has the ability to ensure that children are fed, clothed, bathed, and taken to appointments during a lock down in a pandemic. That would be to

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[39] GD4-2.
[40] AD2-12.
[41] The Federal Court of Appeal explained this in a case called *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[42] This paragraph is from a Federal Court of Appeal case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

ignore the overarching language of the statute, which requires the Claimant to be capable regularly of work. I will not assume that the Claimant has an ability to work because she managed a household during a pandemic when choices for child-care are respite are limited. She had a referral for daycare due to her disability, which she used when it was available. I am satisfied that the Claimant is limited in her ability to function with other adults in a work setting.

[75] The medical evidence backs up the idea that the Claimant does not have a capacity to work. Her family doctor was clear that as a result of her condition she has not been able to work for "6 years" and that her panic disorder with social anxiety is "severe."[43] The family doctor noted sweating, vomiting, and trouble articulating speech and thoughts. This is consistent with her own testimony about her abilities. Her friend's testimony about the Claimant's ability to care for her children but her inability to function in social situations or to care for her own hygiene and was telling. The psychiatric assessment does not paint a different picture either. It expressly states that the Claimant is totally disabled and adds only a hope that with medication changes the Claimant could improve.[44] The letter was from May 2020 and by January 5, 2021, it was clear from the Claimant's testimony that she had not improved.

[76] The psychiatrist stated clearly that the Claimant was "totally disabled" at the time of writing the report due to the severity of her generalized anxiety disorder and depression and chronic pain. The same doctor was aware that the Claimant was receiving social assistance, and he supported the Claimant applying for social assistance for people with disabilities. While the test for those benefits is different from the test for the CPP disability pension, I am satisfied that when considered along with her treating physician's assessment, the Claimant is incapable regularly of pursuing any substantially gainful occupation. The psychiatrist's hope that the Claimant's condition will improve is encouraging but does not decide the matter in light of all of the available evidence about the Claimant's functioning.

[77] The Claimant does not have some (sometimes called "residual") capacity to work that would trigger the employment efforts test. The employment efforts test kicks in when there is evidence that a claimant has some capacity to work (short of deciding that their conditions are

[43] GD2-15.
[44] GD6-8.

not severe). The employment efforts test requires claimants to show that efforts to get and keep work were unsuccessful because of their condition.[45]

[78] I am satisfied that the Claimant's medical evidence as well as the testimony from the General Division hearing shows that the Claimant has real limitations that impact her ability to work, and also that she does her best (and succeeds, with help from her friend) in caring for her children. I do not see this evidence as conflicting.

Treatment

[79] The requirement that claimants show evidence of their efforts to manage medical conditions seems to be a low threshold. There is no specific requirement that the evidence be from a claimant's physician, although physicians often include this kind of information in their reports. There is no express requirement that the efforts be substantial, extensive, or otherwise exhaustive.

[80] In *Sharma*, the Federal Court of Appeal appears to agree with the way the Appeal Division referred to the test as "reasonable efforts" and a "reasonable explanation" for not following medical advice.[46]

[81] This is important because not all claimants who are incapable regularly of pursuing any substantially gainful occupation will have tried every treatment associated with their conditions more generally.

[82] There is no requirement that the Claimant show she was treated aggressively, just that she made reasonable efforts to manage her condition, and that she not have refused treatment unreasonably.

[83] The Claimant sees her family doctor regularly.[47] She has regular injections and takes other medication to manage her lower back pain. She takes (and has adjusted as necessary) medication to try to better manage her depression and anxiety and she experiences side effects

[45] The Federal Court of Appeal set out this test in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[46] The Federal Court of Appeal in *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[47] 5 visits in past 12 months when family doctor completed the medical form, GD2-71.

when she makes those changes. She attends therapy regularly. She saw a psychiatrist for an assessment who made suggestions for further adjusting her medications. For a psychological condition, short of inpatient treatment, there is nothing about this course of treatment that I understand to be "conservative," nor is there any evidence I should consider about how this treatment measures up to other treatment for people with these disabilities.

[84] Similarly, there is no specific treatment for her back that the Claimant needs to have tried in order for her to access the disability pension. The Claimant has pain injections and has not been a surgical candidate. The fact that her back pain is not explained by an MRI and that a psychiatrist believes it is a manifestation of her anxiety makes no difference as to whether the Claimant's condition is severe within the meaning of the CPP. The Claimant's back results in actual functional limitations in terms of sitting, standing, and personal care.[48]

[85] It does not matter whether she is a surgical candidate or not. She is taking steps to manage the pain she experiences, and she has not refused any treatment for her back. If we are to say that the diagnosis is not what is important but the functional limitations that impact work, then I do not see how characterizing the treatment as "conservative" or not makes any difference in deciding whether the Claimant has a severe disability.

[86] I also accept the Claimant's evidence that while the back injections help her to cope with the pain, she requires time to recover from the injections and that they do not take the pain away completely.

The disability is prolonged

[87] 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.[49]

[88] The Claimant does not need to show that her disability is permanent. While the psychiatrist who assessed her stated that he was hopeful that her disability would be temporary, this was not the case when he wrote the letter. There is no basis for me to conclude that her

[48] She partially meets functional goals as referenced in the documents from the pain clinic at GD4, and her own assessment of her physical limitations are at GD2-28.
[49] *Canada Pension Plan*, s 42(2).

conditions improved between the date of that letter and hearing at the General Division such that she could try working.

[89] The Claimant's family doctor stated that the Claimant's depression and anxiety would remain the same for more than 1 year (the option on the form states only "less than one year" or "more than one year"). The family doctor stated that the prognosis for the Claimant's back pain was "unknown" for more than 1 year.[50] The medical form also asks the physician "from a strictly medical standpoint, do you expect your patient to return to any type of work in the future?" The family doctor selected "unknown."

[90] The Claimant does not have to show that the prognosis will never improve, or that it is permanent. She has shown it is long-continued (the family doctor recommended she stop working in 2014) and is of indefinite duration.

[91] The Claimant applied for a disability pension in September 2019. I am satisfied that she showed she had a severe and prolonged disability beginning in August 2014 when her doctor recommended that she stop working. Her minimum qualifying period does not end until December 31, 2027 (so she needed to show the General Division that she met the criteria as of the day of the General Division hearing). The earliest she can be eligible for a disability pension under the CPP is 15 months before she applied, in June 2018.[51] Payments start effective four months later, in October 2018.[52]

[92] I wish to thank all the parties for their participation in the Appeal Division hearing, including the articling student for the Minister's office. He was well prepared and he committed at the outset of the hearing to making the process understandable for the Claimant, who was not represented.

CONCLUSION

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

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[50] GD2-72 to 74.
[51] 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*.
[52] The rule about payments starting four months later is at section 69 of the *Canada Pension Plan*.

Kate Sellar
Member, Appeal Division

HEARD ON:	May 19, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. A., Appellant Jordan Fine and Zachary Hennessy, Representatives for the Respondent