Citation: *EB v Minister of Employment and Social Development*, 2021 SST 618

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	E. B.
Representative:	Sepideh Alimirzaee (counsel)
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie (counsel)

Decision under appeal:	General Division decision dated September 16, 2019 (GP-18-2621)

Tribunal member:	Janet Lew
Decision date:	October 7, 2021
File number:	AD-21-265

Decision

[1] The appeal is allowed. The General Division erred in law by failing to consider whether the Claimant was incapable “regularly” of pursuing any substantially gainful occupation. I am giving the decision that the General Division should have given and am granting the Claimant a disability pension, with payments commencing effective November 2016.

Background

[2] The Appellant, E. B. (Claimant), was injured in a motor vehicle accident on December 18, 2015. She sustained various injuries that left her with numerous functional limitations. As a result, she did not return to either of her previous jobs as a casual part-time resident care aide or as a part-time general plumbing laborer.

[3] The Claimant’s motor vehicle insurer required her to apply for Canada Pension Plan disability benefits. She applied on October 31, 2017. She reported that the accident left her with limited range of motion in her right arm, persistent pain in her right arm, shoulder, and neck; swelling of her right hand; impaired ability to sit and stand for prolonged periods; and sleep disturbance due to pain.

[4] The Respondent, the Minister of Employment and Social Development (Minister), denied the Claimant’s application for disability benefits, as well as her subsequent request for reconsideration. The Claimant appealed the Minister’s reconsideration decision to the General Division of the Social Security Tribunal.

[5] The General Division dismissed the Claimant’s appeal. It found that the Claimant still had some residual work capacity and could therefore pursue a gainful occupation suitable to her situation. The General Division concluded that the Claimant was not severely disabled by the end of her minimum qualifying period on December 31, 2017.

[6] The Claimant then appealed to the Appeal Division. On March 6, 2020, the Appeal Division dismissed the Claimant’s appeal of the General Division decision. The

Claimant then applied to the Federal Court of Appeal for judicial review of the Appeal Division decision.

[7] The Court of Appeal allowed the Claimant's application for judicial review.[1] The Court of Appeal set aside the Appeal Division decision and remitted the matter to a different member of the Appeal Division for redetermination. This matter now comes before me.

[8] The parties now agree that the appeal should be allowed on the basis that the General Division erred in law by failing to consider whether the Claimant was incapable "regularly" of pursuing any substantially gainful occupation.

The parties agree on the outcome of the appeal

[9] The parties have asked for a decision based on a written agreement dated September 29, 2021 by the Claimant, and October 4, 2021, on behalf of the Minister. The agreement states:

> a) The evidence on the record, and particularly the evidence from Dr. Ervine and Dr. Cameron describing the Appellant's Complex Regional Pain Syndrome, leads to the conclusion that the Appellant's condition was both "severe" and "prolonged" as of **July, 2016**, which is fifteen months prior to her date of application of **October, 2017** and is the maximum retroactive period allowed by CPP s. 42(2)(b),
>
> b) The deemed disability date of **July, 2016** gives the Appellant the required 4/6 years of contributions within her contributory period to obtain a CPP Disability Pension per CPP s. 44(2)(a)(i) and CPP s. 44(2)(b),
>
> c) With a deemed disability date of **July, 2016**, the CPP Disability Pension will become payable four months later, in **November, 2016**, per s. 69 of the CPP.

I accept the parties' agreement

[10] A person is considered to be disabled under the *Canada Pension Plan* if they are determined to have a severe and prolonged mental or physical disability. "Severe" and

[1] *Balkanyi v Canada (Attorney General)*, 2021 FCA 164.

"prolonged" are defined in subparagraphs 42(2)(a)(i) and (ii) of the *Canada Pension Plan*. Paragraph 42(2)(*a*) is as follows:

> **When person deemed disabled**
>
> (2) For the purposes of this Act,
>
> > (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
> >
> > > (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
> > >
> > > (ii) disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and …

[11] As the Federal Court of Appeal set out, according to *Villani*,[2] paragraph 42(2)(a)(i) of the *Canada Pension Plan* is to be construed generously and the meaning of each of the words in the definition for severity "must be interpreted in a large and liberal manner, and any ambiguity flowing from [them] should be resolved in favour of a claimant for disability benefits".[3]

[12] The Court found that the Appeal Division had not provided any analysis as to how the General Division's references to:

(i) the Claimant's testimony regarding the variability of her condition and her ability to sit for one to two hours, walk and stand for 20 minutes, and

(ii) the fact that she managed her pain with Tylenol when needed,

could be connected to the General Division's finding that the Claimant had some capacity for work.

---

[2] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[3] *Villani v Canada (Attorney General)*, 2001 FCA 248, at para. 29.

[13] The Court found that the lack of analysis by the Appeal Division indicated that both the Appeal Division and the General Division might have misapprehended the applicable legal test and effectively read out the term “regularly” from the statutory definition of “disabled”.

[14] As the Courts have consistently held, it is the incapacity to work that must be “regular”, not the employment.[4] And, predictability is the essence of regularity.[5] Regularly” reflects the reality that employees, whether full- or part-time, “are expected to attend work on the dates and times that they are scheduled to do so.”[6] To fall within the definition of severe, an individual needs to be “incapable of pursuing with consistent frequency any truly remunerative occupation.”[7]

[15] The Claimant testified at the General Division that she is unable to predict how she will be from day to day. She testified that she can be “up and functioning for one to three hours and then she needs to rest.”[8] She also testified that she can sit for one or two hours, but then her head gets heavy and she has to lie down. She also testified that she could walk and stand for 20 minutes, which she had also reported to an occupational therapist.[9]

[16] The Claimant also testified that for three years after the motor vehicle accident, she used Extra-Strength Tylenol, although she did not always have to take it every week. There were also other weeks when she took it every day.[10] She currently takes Extra-Strength Tylenol as needed. [11]

---

[4] *Atkinson v Canada (Attorney General)*, 2014 FCA 187, at para. 37
[5] *Atkinson v Canada (Attorney General)*, 2014 FCA 187, at para. 38.
[6] *Riccio v Canada (Attorney General)*, 2021 FCA 108, at para. 23.
[7] *Villani v Canada (Attorney General)*, 2001 FCA 248, at para. 38.
[8] See General Division decision, at para. 11.
[9] See General Division decision, at paras. 22 and 26 and also Claimant’s request for reconsideration, dated March 9, 2018, at GD2-14.
[10] See General Division decision, at para. 12.
[11] See General Division decision, at paras. 24 and 26.

[17] The General Division determined that the Claimant likely could have done a seated job with her capacity to sit for an hour or more. After all, the Claimant had testified that she could sit for one to three hours, before needing to rest.

[18] However, this conclusion overlooks and is overall inconsistent with the medical opinions of Dr. Ervine, the Claimant's family physician, and Dr. Cameron, a neurologist.

[19] In his report dated March 26, 2019, Dr. Cameron remained of the opinion that the Claimant developed a complex regional pain syndrome involving her right extremity. He noted that she continued to report having severe pain in her right hand and aggravation of pain with physical activity and touching, despite trying different therapies. Although she took occasional Tylenol 3 for ongoing pain, the Claimant reported that nothing really helped to alleviate the pain.

[20] Dr. Cameron was of the opinion that the Claimant was unlikely to be able to return to work in any competitive fashion or even on a part-time basis. This was because she "is only able to be up and active for one to two hours per day and she cannot predict what day she is going to be better than other given day."[12]

[21] The Claimant's family physician shared the neurologist's opinion.[13]

[22] The General Division relied on progress reports of occupational therapists to find that the Claimant retained some work capacity. However, the member either overlooked or misapprehended one of the occupational therapist's opinion in a discharge report.[14] The occupational therapist wrote that the Claimant's medical team did not support the Claimant's return to work full-time or part-time. The occupational therapist accepted the neurologist's opinion and concluded that returning to work was not feasible for the Claimant.

[23] The General Division did not apply the appropriate legal test in determining whether the Claimant was severely disabled by failing to consider the regularity of the

[12] See medical-legal report dated March 26, 2019, of Dr. Cameron, neurologist, at GD4-2 to GD4-7.
[13] See report dated November 7, 2018, of Dr. Ervine, family physician, at GD1-9.
[14] See Occupational therapy Discharge Report, dated September 6, 2019, a GD10-4 to GD10-11.

Claimant's capacity. It is clear from the medical opinions that the Claimant was incapable "regularly" of pursuing any substantially gainful occupation, by her minimum qualifying period, as she could not predict her condition from one day to the next.

[24] The evidence also shows that the Claimant's disability is prolonged. Dr. Cameron was of the opinion that the Claimant would probably remain permanently severely disabled because of the chronic pain that she developed from injuries from the motor vehicle accident.[15]

[25] I agree with the parties that the appropriate remedy is to allow the appeal and find the Claimant disabled for the purposes of the *Canada Pension Plan*.

[26] Based on the Claimant's application of October 2017, the earliest the Claimant can be deemed to have become disabled under section 42(2)(b) of the *Canada Pension Plan* is July 2016.

[27] With a deemed disability date of July 2016, a Canada Pension Plan disability pension is payable four months later, starting in November 2016, under section 69 of the *Canada Pension Plan*.

Conclusion

[28] The appeal is allowed.

Janet Lew
Member, Appeal Division

[15] See medical-legal report dated March 26, 2019, of Dr. Cameron, neurologist, at GD4-5.