Citation: *BO v Minister of Employment and Social Development*, 2021 SST 761

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. O.
Respondent:	Minister of Employment and Social Development
Representative:	Érélégna Bernard

Decision under appeal:	General Division decision dated April 29, 2021 (GP-20-1560)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	October 18, 2021
Hearing participants:	Appellant Respondent's representative
Decision date:	December 10, 2021
File number:	AD-21-221

Decision

[1] The appeal is allowed. The Appellant, B. O. (Claimant), is entitled to a Canada Pension Plan disability pension because her disability has been severe and prolonged since the end of her minimum qualifying period on December 31, 2015. Payment of a pension starts as of January 2019.

Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Claimant did not have a severe disability by the end of her minimum qualifying date[1] of December 31, 2015, or by the prorated date of July 31, 2016.

[3] The Claimant argues that the General Division made several legal and factual errors. The Claimant asks the Appeal Division to allow the appeal and give the decision that it says the General Division should have given.

[4] The Claimant argues that the evidence at the General Division shows that she has a severe and prolonged disability, as she claims that she has been unable to work since at least December 31, 2015. She claims that any work she did from 2015 to 2017 was nominal and does not represent a substantially gainful occupation. The Claimant asks the Appeal Division to grant her a disability pension.

[5] The Respondent, the Minister of Employment and Social Development (Minister), argues that the General Division did not make any reviewable errors. The Minister asks the Appeal Division to dismiss the appeal. Or, if the General Division made any reviewable errors, the Minister argues that it does not change the outcome, and that the appeal should still be dismissed.

Issues

[6] The Claimant raises several issues.

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[1] The minimum qualifying period is the date by which a claimant has to be found disabled to qualify for a Canada Pension Plan disability pension.

1. Did the General Division fail to apply the *Villani*[2] test? In other words, did the General Division fail to consider the Claimant's personal characteristics when it assessed whether she was severely disabled?

2. Did the General Division ignore the circumstances surrounding the Claimant's last job?

3. Did the General Division mischaracterize or overlook some of the medical evidence base?

[7] I will focus on the first issue, namely, whether the General Division failed to apply the *Villani* test.

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[3]

Did the General Division fail to apply the *Villani* test?

[9] The Claimant argues that the General Division failed to apply the *Villani* test by failing to consider her personal characteristics.

[10] The General Division held that, when deciding whether a disability is severe, sometimes it has to consider a person's age, level of education, language ability, and past work and life experience. The General Division explained that this would allow for a realistic assessment of that person's work capacity.

[11] However, the General Division found that it was unnecessary to apply *Villani* in the Claimant's case "because the Claimant's functional limitations did not prevent her from working by December 31, 2015 or July 31, 2016. This means she did not prove her disability was severe by then."[4]

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[2] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[3] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[4] See General Division decision, at para 28.

[12] The Minister argues that a decision-maker does not always have to conduct a real world analysis. This was the case in *Giannaros*,[5] *Doucette*,[6] and *Kiriakidis*.[7] The Minister argues that, because these are decisions of the Federal Court of Appeal, they are binding on the General Division. If these decisions cases apply, this would mean that the General Division did not have to conduct the *Villani* real world analysis.

[13] On the facts of this case, the Minister argues that the General Division did not err because it had no choice to but to follow the three decisions. The Minister says that the General Division properly applied the law to the facts.

[14] The Minister submits that, where there is evidence of work capacity, a decision-maker does not have to conduct the *Villani* real world analysis.[8] The Minister argues that there was evidence of work capacity in the Claimant's case, so there was no need to conduct a *Villani* analysis.

– **Comparing *Kiriakidis* to the Claimant's case**

[15] The Minister claims that the *Kiriakidis*[9] case most closely mirrors the Claimant's situation. Much like *Kiriakidis*, the Claimant worked past the end of her minimum qualifying period.

[16] However, I find the similarities end there. The medical evidence showed that Mr. Kiriakidis was doing reasonably well. In 2001, he reported to an orthopaedic surgeon that he was having very little pain in his hip and did not require analgesics or anti-inflammatories. While his hip was stiff and painful, he had good range of motion and mobility.

[17] The Court also noticed the orthopaedic surgeon's January 2003 report that, while Mr. Kiriakidis was doing renovation work with two other workers, he was actually doing the work himself. He took occasional medications. As Mr. Kiriakidis was coping

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[5] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.
[6] See *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292.
[7] See *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316.
[8] See *Giannaros* and *Doucette*.
[9] See *Kiriakidis*.

reasonably well, the orthopaedic surgeon advised again hip arthroplasty. The surgeon would see him in follow-up in a year's time, unless something were to happen.

[18] The Claimant's circumstances differ from those of Mr. Kiriakidis. The medical evidence before the General Division shows that, throughout 2015, the Claimant complained of sharp, stabbing pain in the pelvic region. She made several trips to the emergency department because of pelvic pain.

[19] The Claimant tried a short course of injections. That failed to alleviate the pain. She requested a bilateral oophorectomy to remove cysts, despite the risks and even though the gynaecologist was of the opinion that the cysts were likely to return.[10] She went through with the surgery in November 2015.

[20] The Claimant returned to the emergency department at the walk-in clinic in December 2015. She had injured her left arm in October 2015. She injured it while lifting a client. She complained of pain on the entire left side of her body.[11]

[21] Finally, while it is a contested point, the Claimant also testified that she relied on morphine to enable her to work through her pain.[12]

– **The *Villani* requirement to conduct a "real world" analysis**

[22] The Claimant worked beyond the end of her minimum qualifying period. But, unlike in *Kiriakidis*, the Claimant's earnings are below the threshold for a substantially gainful occupation. But, her earnings do not necessarily prove that she was incapable of working at or regularly pursuing a substantially gainful occupation. (Her earnings were in line with what she traditionally earned.)

[23] As the Federal Court of Appeal stated in *Villani*, no interpretative approach can read out express limitations in a statute. The test refers to a "substantially gainful occupation." From this, the Court concluded that the severity test under the *Canada*

[10] See gynaecologist's consultation report dated April 30, 2015, at GD3-111.
[11] See Emergency Department Record dated December 30, 2015, at GD3-59.
[12] The Minister denies that the Claimant took morphine at work, saying that the evidence shows that she took morphine at home.

Pension Plan must involve an aspect of employability, which occurs in the context of commercial realities and the particular circumstances of a claimant.

[24] Because the severity test involves an aspect of employability, a decision-maker is required to consider the particular circumstances of a claimant, including their education and work experience. From this perspective, a *Villani* real-world analysis is unavoidable.

[25] The General Division did not address the employability aspect of the severity test in the Claimant's case. Given the factual circumstances of this case, I am satisfied that the General Division should have conducted a real-world analysis. Its failure to conduct a real-world analysis represents a legal error.

Remedy

[26] How can I fix the General Division's error? I have two basic choices.[13] I can substitute my own decision. Or, I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.[14]

[27] Neither the Claimant nor the Minister asked me to return this matter to the General Division for a reconsideration.

[28] The Claimant's minimum qualifying period is several years in the past. There are medical records dating to 2014. The Claimant has not suggested that there are any gaps in the medical evidence. But, she says that the doctors may not have provided full details in their records.

[29] There is no indication that the Claimant did not get a full chance to present her case before the General Division. She could have produced witnesses and any records at the hearing, but the Claimant chose to go ahead without her witness.

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[13] See section 59(1) of the DESD Act.
[14] See *Weatherley v Canada (Attorney General)*, 2021 FCA 58 at paras 49 and 51, and *Nelson v Canada (Attorney General)*, 2019 FCA 222 at para 17.

[30] Given these considerations, I find it appropriate to review this matter and come to my own assessment.

– The Parties' arguments

[31] The Claimant urges the Appeal Division to find that she had a severe and prolonged disability by the end of her minimum qualifying period. She argues that the evidence shows that she had fibromyalgia, panic attacks, anxiety and depression, all of which left her unable to regularly pursue a substantially gainful occupation. She says that the evidence shows that she was unable to work without morphine or without help from her children.

[32] The Minister asks the Appeal Division to dismiss the appeal. The Minister argues that, even if the Appeal Division finds that the General Division made any reviewable errors, they do not change the outcome. The Minister argues that the evidence falls short of establishing that the Claimant had a severe and prolonged disability by the end of the minimum qualifying period.

[33] For instance, the Minister argues that, although the Claimant says that she could no longer work due to anxiety, depression, and panic attacks, there is no mention of these in any of the records around the end of 2015 or even into 2016

[34] The Minister also denies that there was any evidence before the General Division that the Claimant took morphine at work, or that her children helped her with her work duties.[15]

– Review of the evidence

o The Claimant's family background

[35] The Claimant, now 45 years of age, testified that she had a difficult upbringing. At age 5, a relative sexually abused her. She also had an abusive grandmother.

[15] See Submissions of the Minister, filed September 27, 2021, at AD4-12 and AD4-13, at para 29 to 30.

[36] At age 16, the Claimant moved out from the family home. She moved in with a boyfriend who eventually became abusive. After one beating, the Claimant miscarried. She was 6.5 months pregnant. The boyfriend threatened to kill her if she left him. Despite the threats, the Claimant left the boyfriend.

[37] The Claimant married, but her husband turned out to be abusive. She testified that he once threw a knife at her, which stuck. The Claimant tried to leave her husband several times. She left for good after he beat her son, then 12, who tried to stop her husband from beating her.

[38] The Claimant has three children, who now range in age from 19 to 24. When her oldest son was 13 or 14, he told her to go to work. He offered to look after his brother and sister.

[39] Despite her medical conditions, the Claimant felt she had to work so she could provide for her children. She also did not want to risk losing them. Her oldest son "took care of everything." In 2016, while she was away at work, her children cleaned the house and cooked meals.[16] At 17, her daughter helped the Claimant with activities of daily living, such as with bathing.[17]

[40] Relatively recently, the Claimant moved in with someone who helps her. (In the 2014 medical records, the Claimant lists him as her next of kin.[18] In recent records, she describes him as her common-law spouse.[19]) Her children will do the laundry and tasks that her common-law spouse is unable to do.[20]

- **Education**

[41] The Claimant has a grade 12 education.

[16] At approximately 1:04:30 of the audio recording of the General Division hearing.
[17] See Claimant's request for reconsideration, dated December 2019, at GD2-21 to GD2-27.
[18] See, for instance, Emergency Department Record, dated September 24, 2014, at GD3-69.
[19] See, for instance, Outpatient clinic record, dated August 23, 2019, at GD3-18.
[20] At approximately 1:06:00 of the audio recording of the General Division hearing.

- **Earnings and work history**

[42] The Claimant worked after the end of her minimum qualifying period of December 31, 2015, or the prorated date of July 31, 2016. She earned about $6,400 in 2017. However, the earnings statements show that the Claimant has always had nominal earnings.[21]

[43] The Claimant denies that she was able to regularly pursue a substantially gainful occupation after 2015 or July 31, 2016. The Minister argues that, as the Claimant's 2017 earnings were consistent with her previous years' earnings, then she had the capacity regularly of pursuing a substantially gainful occupation.

[44] The Claimant explained that, as a single mother, she worked part-time.[22] But, it is unclear from the record whether, before 2017, the Claimant could have worked a lot more hours than she did, or if there were other reasons (other than raising her children) to explain why she did not work much.

[45] In terms of her work experience, the Claimant testified that she worked odd jobs. Early on, she worked as a cook in take-out restaurants.

[46] The Claimant's brother owned a taxi company. He hired her as a dispatcher. She was allowed to lie on a bed in the office so she could do her work. The Claimant did not have fibromyalgia when she worked for her brother's taxi company, but she had weight issues. She had become morbidly obese. She had trouble moving. But, she felt that she had to get up everyday and work to provide for her family. She would have continued working for her brother, but they replaced her when she went on leave for a gastric bypass.

[47] The Claimant started working as a homecare worker in August 2015, according to a questionnaire[23] from her employer. Duties included housekeeping and personal care. The Claimant worked 5.5 hours daily, as this was all the work that was available.

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[21] See earnings history, at GD2-41 to GD2-51, GD4-7, and GD6.
[22] See Claimant's Request for Reconsideration, dated December 10, 2019, at GD2-23.
[23] See Employer's Questionnaire, dated August 28, 2019, at GD2-62 to GD2-64.

[48] The employer described the Claimant's attendance as "good," although the Claimant missed work for medical reasons. The employer did not say how much work the Claimant missed. The employer found the Claimant`s work satisfactory. The employer denied that the Claimant's medical condition affected her ability to handle the demands of the job.

[49] The employer stated that the Claimant last worked on May 22, 2017. The employer explained that the Claimant stopped working due to a shortage of work. The client had passed away.

[50] The Claimant says that did not ask her employer for more work because her employer said to her that the employer needed someone who was reliable and not always sick.[24] When the Claimant was off work, the employer had other workers who could replace her.

[51] The Claimant disputes the employer`s account. She denies that she was able to do any housekeeping. She says that, for the most part, she sat and watched the client who was in a palliative state. The Claimant notes that her employer was never present, so questions how the employer could have observed what she was capable of performing at work.

[52] I note, however, that the Claimant's work was not as passive as she initially claimed. When she went to the emergency department in December 2015, she reported that she had injured her left arm in October that year because she had been lifting a client.[25]

[53] Clearly, the Claimant was not simply sitting and watching her client. The Claimant must have been performing her work duties to some extent. This included some physically demanding tasks.

[54] But, the Claimant testified that she took morphine between shifts. She suggested that the morphine enabled her to work, as it reduced her pain. After working one to two

[24] At approximately 32:28 of the audio recording of the General Division hearing.
[25] See Emergency Department Record dated December 30, 2015, at GD3-59.

hours in the morning, she returned home, took morphine, and lay down to rest. She returned to work in the afternoon for another hour or so. When she finished working, she returned home and took more morphine.[26]

[55] The Minister argue that, apart from the Claimant's testimony, there was no evidence on the record that the Claimant took morphine at work. The Minister argues that, more likely than not, the Claimant was referring to her home duties, not her work duties.

[56] I agree that there is no documentary evidence to support the Claimant's testimony about when she took morphine. In fact, the emergency department records list morphine as something to which the Claimant is allergic.[27] Yet, an emergency physician clearly gave her morphine during one visit.[28]

[57] I am prepared to accept that the Claimant frequently experienced pain and that she may have periodically taken morphine or other painkillers between her shifts to deal with the pain.

[58] The Claimant also says that the evidence shows that her children helped her at work and cooked meals that they brought for her client.[29] In other words, she suggests that, without her children, she could not perform the bulk of her duties at work because of her medical conditions.

[59] However, this account differs from the audio recording. At most, the Claimant testified that her children helped at home. So, when she returned home from work, her children had already cleaned the house and cooked dinner.[30] There was no evidence at the General Division that the Claimant's children accompanied her to her workplace and performed her duties.

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[26] At approximately 32:55 to 34:10 and 38:25 of the audio recording of the General Division hearing.
[27] See, for example, Emergency Department record, dated April 10, 2015, at GD3-66.
[28] See, for example, Emergency Department record, dated May 29, 2018, at GD3-43.
[29] See Claimant`s Application to the Appeal Division – Income Security, at AD1-20.
[30] At approximately 1:04:30 of the audio recording of the General Division hearing.

[60] The Claimant has not worked since May 2017.

[61] The Claimant testified says that she was unable to continue working because of her medical conditions. Emotionally and physically, she felt she could no longer work as of 2010 or 2011.

[62] The Claimant filled out a questionnaire for her application for disability benefits. She wrote that she was already having trouble at work in 2015 and 2016, but could no longer work at all as of 2017. She wrote that she could no longer work because of panic attacks, depression, anxiety, fibromyalgia, and left knee osteoarthritis. She also wrote that due to the fibromyalgia, she was forgetful and had trouble with focusing.

[63] The Claimant listed numerous limitations. She wrote that she was limited to sitting, standing, or walking for no more than 10 to 15 minutes. She found that she could not be around strangers due to her anxiety and panic attacks.

[64] However, the Claimant filled out the questionnaire in 2019—years after the end of her minimum qualifying period or prorated date had already passed. So, the questionnaire is not a reliable measure of the Claimant's functionality or capacity for 2015 or 2016.

[65] The Claimant also testified that her former family doctor often took her off work because of her anxiety, depression, and panic attacks.[31] However, there was no evidence of this in any of the medical records. And, the Claimant did not produce any medical notes excusing her from work.

- **Review of the medical evidence**

[66] I will largely focus on the medical records around the end of the minimum qualifying period of December 31, 2015, and the prorated date of July 31, 2016. But, I also examine the records since then, to see if they shed any light on the Claimant's condition around these timeframes.

[31] At approximately 16:25 and 55:50 of the audio recording of the General Division hearing.

[67] Prior to 2014, the Claimant had a significant surgical history. She had bariatric surgery, laparoscopic cholecystectomy (gall bladder removal in January 2010) and a hysterectomy.[32] She also had bilateral carpal tunnel release in 2012.

[68] The 2014 medical records show that the Claimant had a history of right lower quadrant pain because of a cyst. The Claimant had a bilateral ovarian cystectomy in September 2014 to remove four ovarian cysts.[33]

2015

[69] In January 2015, the Claimant had a tonsillectomy (removal of tonsils) because of recurrent tonsillitis.

[70] The Claimant continued to experience pelvic and abdominal pain, despite the cystectomy in September 2014. There had been some initial relief but the pain resumed.[34] In March 2015, the Claimant went to the emergency department. From there, she was referred to a gynecologist. She had a 2-week history of increasing right lower quadrant pain, radiating to her back. She rated the pain at 10/10 on a pain scale. It was worse with movement.

[71] The Claimant expected surgery to remove a cyst. The gynaecologist was of the opinion that a single ovarian cyst measuring 4 cm did not warrant emergency surgery. Instead, the doctor recommended pain management and further assessment by her family physician, along with repeat ultrasound.[35]

[72] In April 2015, the Claimant went to the emergency department because of what she described as severe pain. She had tenderness in the right inguinal region. She stated that she had been taking Oxycocet.[36]

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[32] See history set out in consultation report dated August 14, 2014, at GD3-120.
[33] See Operative Report dated September 22, 2014, at GD3-118 to GD3-119.
[34] See consultation report of gynaecologist, dated April 30, 2015, at GE3-111 to GD3-112.
[35] See consultation report of gynaecologist, dated March 29, 2015, at GE3-113 to GD3-114.
[36] See Emergency Department Record dated April 10, 2015, at GD3-66.

[73] At the end of April 2015, the Claimant saw the gynaecologist who had performed the September 2014 surgery. The Claimant described intermittent severe pain. The Claimant was uninterested in oral contraceptive pills because of intolerable side effects.

[74] The Claimant had discontinued Depo-Provera because of weight gain. The gynecologist noted that the Claimant had tried very hard to lose weight so the thought of this medication was very concerning for her.

[75] The gynecologist explained that other medications used for ovulation suppression were associated with more severe side effects.

[76] The Claimant wanted a bilateral oophorectomy (removal of both ovaries).[37] This was despite the risks, and the doctor's opinion that the cysts might not be the cause of the Claimant's pain.

[77] The Claimant was started on a trial of Lupron in May 2015, but she stopped after three injections.[38] The medical records do not show why she stopped. The Claimant returned to the emergency department in August 2015 because of pelvic and abdominal pain.[39]

[78] While awaiting surgery, the Claimant returned to the workforce. Medical records show that the Claimant injured her left arm in October 2015, while lifting a client.[40]

[79] The Claimant had the bilateral oophorectomy on November 12, 2015.[41] However, the surgery did not resolve her pain. She went to the emergency department on December 30, 2015, complaining that she had had pain throughout her entire left side for the past two weeks.[42] (There is no indication whether the Claimant saw the gynaecologist who performed the surgery for any follow-up, although this would have

[37] See consultation report of gynaecologist, dated April 30, 2015, at GE3-111 to GD3-112.
[38] See Emergency Department Records dated May 7, June 18, and July 15, 2015, at GD3-62 to GD3-64.
[39] See Emergency Department Record dated August 7, 2015, at GD3-61.
[40] See Emergency Department Record dated December 30, 2015, at GD3-59.
[41] See Operative Report dated November 12, 2015, at GD3-108 to GD3-110.
[42] See Emergency Department Record dated December 30, 2015, at GD3-59.

been the norm for such a procedure.) The Claimant also reported having left knee pain during this visit. The diagnosis was of a "pinched nerve/fibromyalgia."[43]

2016

[80] The Claimant returned to the emergency department in April and May 2016, due to abdominal and lower back pain. During the April 2016 visits, the Claimant reported that she had been experiencing pain for the past week.[44] During the May 2016 visit, she also reported that she had had the pain for the past week.[45]

[81] In the same month, the Claimant also saw an orthopaedic surgeon for left knee pain. The Claimant had osteoarthritis in her left knee. The surgeon's consultation report suggests that the Claimant had seen him before. After all, he wrote that he injected her left knee *again* to see if it would benefit her. He would see her in follow-up. At that point, they would decide on further treatment, depending upon the results of the injection and an x-ray.[46]

[82] The orthopaedic surgeon saw the Claimant in follow-up on August 3, 2016. She reported that she did not get much relief from the injection. X-rays showed that there was virtually bone on bone. The x-rays also showed some degenerative changes at the patellofemoral joint. They discussed treatment options. The surgeon did not think arthroscopy would likely help. The Claimant's treatment of choice was total knee replacement. The surgeon put the Claimant on a wait list for the procedure.[47]

[83] In November 2016, the Claimant underwent a gastroscopy. The procedure was to rule out any abnormality for her abdominal discomfort and vomiting that might have arisen after a gastric sleeve surgery (for weight reduction) about 3.5 years ago. The

[43] See Emergency Department Record dated December 30, 2015, at GD3-59.
[44] See Emergency Department Records dated April 7 and 8, 2016, at GD3-57 and GD3-58.
[45] See Emergency Department Record dated May 19, 2016, at GD3-56.
[46] See orthopaedic surgeon's consultation report, dated May 25, 2016, at GD3-107.
[47] See orthopaedic surgeon's consultation report, dated August 3, 2016, at GD3-105

surgeon did not find anything abnormal. He suspected narcotics could be causing the issues.[48]

2017

[84] The Claimant went to the emergency department several times throughout 2017.

- February 20 - the Claimant had back pain from a fall.[49]
- April 22 - the Claimant had headaches and dizziness, as well as tingling down her right arm. She was diagnosed with a questionable migraine headache.[50]
- May 29 - the Claimant had pain in her right hip and leg radiating to her groin. She was diagnosed with possible osteoarthritis of her right hip.[51]
- September 23 - the Claimant had increasing the pain, back pain and lower neck pain. She was diagnosed with osteoarthritis of her left knee.[52]
- October 11 – the Claimant went to get a refill of her prescriptions for fibromyalgia.[53]
- October 27 - the Claimant presented with chronic left knee pain. It was noted that she had a history of osteoarthritis and fibromyalgia.[54]
- November 21 - the Claimant presented with generalized pain due to fibromyalgia. The emergency department physician discontinued Paxil and started her on Amitriptyline.[55]

[48] See Endoscopy Report dated November 7, 2016, at GD3-103 to GD3-104.
[49] See Emergency Department Record dated February 20, 2017, at GD3-55.
[50] See Emergency Department Record dated April 22, 2017, at GD3-54.
[51] See Emergency Department Record dated May 29, 2017, at GD3-53.
[52] See Emergency Department Record dated September 23, 2017, at GD3-52.
[53] See Emergency Department Record dated October 11, 2017, at GD3-51.
[54] See Emergency Department Record, dated to October 27, 2017, at GD3-50.
[55] See Emergency Department Record dated November 21, 2017, at GD3-49.

- December 7 – the Claimant presented with neck and lower back pain. The pain had started the previous day, after a sudden movement.[56]

- December 20 – the Claimant complained of recurrent back pain.[57]

[85] The Claimant also saw the orthopaedic surgeon again in May 2017. She wondered about getting a brace for her left knee, but the orthopaedic surgeon did not think that would settle the symptoms.[58] (I note that the Claimant testified that she got a knee brace in about 2010.[59])

[86] The Claimant saw her family physician on September 8, 2017, for a refill of her medications, which included morphine. The physician increased the dosage of Paxil from 10 to 20 mg. The physician noted that the Claimant had a history of fibromyalgia and left knee pain.[60]

[87] In December 2017, the Claimant was tested for environment allergens.[61] She complained of constant postnasal drip, sinus congestion, and always having to cough to clear her throat. The physician noted that she was taking Amitriptyline at night for anxiety and depression. The physician advised her to avoid cats. As there was no other obvious cause for her symptoms, they discussed smoking as the most likely contributing factor as all of her symptoms occurred in the last two years when she started smoking again. The physician recommended that she quit smoking.

2018

[88] The Claimant underwent total left knee replacement in January 2018.[62] The Claimant was to follow-up with the orthopaedic surgeon in six weeks. However, there are no further consultation reports from the orthopaedic surgeon.

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[56] See Emergency Department Record dated December 7, 2017, at GD3-48.
[57] See Emergency Department Record dated December 20, 2017, at GD3- 47.
[58] See orthopaedic surgeon's consultation report, dated May 10, 2017, at GD2-89.
[59] At approximately 54:40 of the audio recording of the General Division hearing.
[60] See clinical records of community health centre, dated September 8, 2017, at GD2-93.
[61] See consultation report, dated December 8, 2017, at GD2-100
[62] See orthopaedic surgeon's consultation Operative Report dated January 2, 2018, at GD3-98, and Discharge Summary, dated January 4, 2018, at GD2-90 and GD3-97.

[89] The Claimant went to the emergency department several times throughout 2018. In May 2018, she reported epigastric (abdominal) pain radiating to her back. [63]

[90] Later that same month, the Claimant complained of generalized pain that she rated 10/10 on a pain scale. She felt her whole body was “on fire” or a “muscle spasm.” She reported a history of fibromyalgia. The physician gave her morphine for pain control. They told her to return to the clinic for pain management.[64]

[91] The Claimant returned to the emergency department in early June, presenting with muscular pain throughout her body.[65]

[92] At the end of June 2018, the Claimant’s family physician referred the Claimant to an internist and a pain clinic for fibromyalgia. The physician noted that the Claimant had not benefited from several medications thus far.[66]

[93] The Claimant’s pain complaints continued, and included ongoing lower back pain,[67] and pain in her left hip, radiating to her groin and down her leg.[68]

[94] Diagnostic examinations in 2018 included the following:

- June 2018 - ultrasound of the abdomen to investigate right-sided pain. Scanning showed a cyst.[69]

- August 2018 - follow-up ultrasound. The radiologist could not determine the origin of the cyst. He recommended a repeat ultrasound in six months.[70]

[63] See Emergency Department Record dated May 7, 2018, at GD3- 44.
[64] See Emergency Department Record dated May 29, 2018, at GD3- 43.
[65] See Emergency Department Record dated June 7, 2018, at GD3- 42.
[66] See referrals dated June 28, 2018, at GD2-91 and GD2-92 (and at GD3-88 and GD3-89).
[67] See Emergency Department Records, dated August 23, 2018, at GD3- 41, and August 24, 2018, at GD3- 40
[68] See Emergency Department Record dated October 5, 2018, at GD3- 39.
[69] See Diagnostic Imaging Report dated June 22, 2018, at GD3-91 to GD3-92.
[70] See Diagnostic Imaging Report dated August 7, 2018, at GD3-86 to GD3-87.

- August and October 2018 – CT scan of the left hip, worse with rotation. The radiologist could not detect any significant abnormality.[71]

2019 to Present

[95] The Claimant's complaints of chronic, generalized aches and pain continued throughout 2019 and 2020. In addition to her fibromyalgia, she also had other medical issues.

[96] In February and again in April 2019, the Claimant had x-rays and a follow-up CT scan because of abdominal pain. The radiologist was of the opinion that the cyst that appeared in the 2018 CT scans related to previous surgery.[72]

[97] In May 2019, the Claimant reported that she still had pain in her left knee, despite having had knee replacement surgery. There is no indication that she had any treatment for her left knee.

[98] She twisted her left knee in August 2019. X-rays did not reveal anything.[73] She also had x-rays of her lumbar spine, which showed minimal degenerative changes.[74]

[99] In October 2019, the Claimant reported having continuing headaches, with pain radiating down her neck and between her shoulder blades.[75] In November 2019, she reported having right lower quadrant pain that had been constant for a month.[76]

[100] Throughout most of 2020, the Claimant continued to complain of right lower quadrant pain. There was continued follow-up of the cyst. In January and September 2020, ultrasound scans showed that the cyst was overall smaller than in April 2019.[77]

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[71] See Diagnostic Imaging Report dated October 7, 2018, at GD3-84 to GD3-85.
[72] See Diagnostic Imaging Reports, dated February 16, 2019, at GD3-82 and April 30, 2019, at GD3-80.
[73] See Diagnostic Imaging Report, dated August 26, 2019, at GD3-78.
[74] See Diagnostic Imaging Report, dated August 26, 2019, at GD3-78.
[75] See Emergency Department Record dated October 27, 2019, at GD3-31.
[76] See clinical records dated November 7, 2019, at GD3-15.
[77] See repeat ultrasounds, dated January 29, 2020, at GD3-76, and September 28, 2020, at GD3-74.

[101] In March 2020, the Claimant reported that the right lower quadrant pain had been constant since December 2019.[78] In June 2020, she described it as a dull ache. Her physician recommended that she go to the emergency department for further assessment and management.[79] The abdominal and right lower quadrant pain continued to at least October 2020.[80] She complained that it affected her sleep.[81]

[102] In December 2020, the Claimant complained of continuing burning pain to her left upper leg radiating down to her ankle. She also complained of burning pain to her neck and down her right arm.[82]

[103] The medical records are current to January 2021.[83] The record suggests that the Claimant continued to have gynaecological issues and widespread pain involving her neck, back and shoulder. A nurse practitioner prescribed medications for her fibromyalgia.

Medical report for a Canada Pension Plan Disability Benefit

[104] A nurse practitioner prepared a medical report dated March 22, 2019[84] for the Claimant's application for benefits. The nurse practitioner states that she began treating the Claimant in September 2017 for fibromyalgia, osteoarthritis, and left knee pain.

[105] The nurse practitioner was of the opinion that the Claimant had difficulties with her daily activities. The Claimant was on multiple medications without significant relief of pain. She had pain more than 90% of the time.

[106] The nurse practitioner was also of the opinion that the Claimant was unfit to work because of chronic pain and anxiety, which left her fatigued. She had recommended that the Claimant stop working as of September 2017.

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[78] See clinical records dated March 6, 2020, at GD3-13.
[79] See clinical records dated June 3, 2020, at GD3-10.
[80] See, for instance, clinical records between June 3, 2020 and October 30, 2020, at GD3-6 to GD3-10.
[81] See clinical records, dated June 23, 2020, at GD3-9.
[82] See Emergency Department Record dated December 10, 2020, at GD3-29.
[83] See clinical records dated January 26, 2021, at GD3-4.
[84] See Medical Report for a Canada Pension Plan Disability Benefit, dated March 22, 2019, at GD2-80 to GD2-88.

[107] The report is of limited use for the purposes of determining whether the Claimant was severely disabled by December 31, 2015, or by July 31, 2016. The nurse practitioner first saw the Claimant after her minimum qualifying period had ended and the prorated date had already passed.

Summary and analysis

[108] The Claimant has had multiple medical issues. At the General Division hearing, the Claimant testified that, physically and emotionally, she could no longer work as of 2010 or 2011. However, there is little in the way of medical evidence to support her claim in this regard.

[109] The Claimant applied for Canada Pension Plan disability benefits in May 2019. She filled out an accompanying questionnaire.[85] She wrote that she was having trouble with work in 2015 and 2016. She stated at the time that she could no longer work as of 2017.

[110] Indeed, the Claimant testified at the General Division hearing that her fibromyalgia has gotten "tremendously worse", to the point that she cannot get out of bed. She needs to have someone help her get out of bed. In 2016, for instance, she could have actually showered in a chair, whereas "now [she] can't do anything."[86]

[111] While the Claimant worked after 2016, I do not find that this necessarily shows that she was capable or incapable of regularly pursuing a substantially gainful occupation. Her 2017 earnings were below the threshold to represent a substantially gainful occupation. But, the earnings were in line with what she had traditionally earned.

[112] The Claimant worked alone as a homecare worker, without any on-site oversight. She testified that she took frequent breaks. She also went home between her shifts. She rested at home and periodically took pain relief medication before returning to work.

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[85] See Questionnaire for Disability Benefits Canada Pension Plan, dated May 3, 2019, at GD2-102 to GD2-109.
[86] At approximately 46:50 to 47:52 of the audio recording of the General Division hearing.

[113] The Claimant states that she was unable to continue working because of fibromyalgia, osteoarthritis in her left knee, panic attacks, anxiety and depression. That may be so, but the Claimant has to show that she was severely disabled **before** she stopped working in May 2017. She has to show that she had a severe and prolonged disability by the end of December 31, 2015 or by the prorated date of July 31, 2016.

[114] The records show that the Claimant has chronic generalized pain, particularly to her back and neck. She has been diagnosed with fibromyalgia. The diagnosis first appeared in the records in December 2015, when the Claimant attended at the Emergency Department because of an injury to her left arm after lifting a patient. The record is not wholly legible, so it is unclear on what basis the emergency physician came up with a provisional diagnosis of a "pinched nerve/fibromyalgia."[87]

[115] But, before 2017, the Claimant did not have any recurring or chronic lower back or neck pain, other than in April and May 2016. At that time, she reported lower back pain, as well as abdominal pain. The pain lasted for about a week each time.

[116] The records show that the Claimant's lower back and neck pain have become progressively worse over time. However, I find that the Claimant did not report or have chronic lower back or neck pain by the end of her minimum qualifying period of December 31, 2015, or by the prorated date of July 31, 2016. There is no indication that the Claimant's lower back or neck pain affected her functionality or capacity.

[117] There simply is insufficient evidence in any of the medical records to show that the Claimant had chronic widespread pain. As well, there is insufficient evidence that fibromyalgia had a significant or contributing impact on the Claimant's capacity by December 31, 2015 or before July 31, 2016.

[118] The Claimant claims that panic attacks, anxiety, and depression have also left her unable to work. However, there are no references to any panic attacks, anxiety, or depression in any of the 2015 or 2016 medical records. The first reference in the records to anxiety and depression was in December 2017, when the physician noted

[87] See Emergency Department Record dated December 30, 2015, at GD3-59.

that she was taking Amitriptyline. She started taking the drug in the previous month. The nurse practitioner stated that the anxiety came on in September 2017, but this date still falls well past either the end of the minimum qualifying period or the prorated date.

[119] In other words, there is no indication in the records to show that the Claimant was experiencing any depression or anxiety either at the end of her minimum qualifying period or by the prorated period. Similarly, there is no reference at all to any panic attacks in the medical records in the 2015 to 2016 medical records.

[120] I find that the evidence shows that the panic attacks, anxiety, and depression arose sometime after July 31, 2016.

[121] This leaves the Claimant's osteoarthritis of her left knee to consider, as she says she was unable to work because of her left knee too. The Claimant testified that her knee became problematic in 2010 or 2011. She had a cortisone shot, but it did not relieve the pain. The pain gradually got worse.[88]

[122] The first reference in the records to pain in the Claimant's left knee is in an emergency department record of December 2015.[89] She sought treatment primarily for her left arm, but she also reported that she had had knee pain for the past six months.

[123] It is clear that the Claimant's knee issues were ongoing after December 2015. Her family doctor referred her to an orthopaedic surgeon. She saw an orthopaedic surgeon in May 2016. The surgeon notes that the Claimant had had injections to her knee before the May 2016 visit.[90]

[124] The Claimant next saw the orthopaedic surgeon in August 2016. The Injections had not provided much, if any, relief of the Claimant's knee pain. X-rays showed virtual bone on bone. The surgeon placed the Claimant on a wait list for a total knee

[88] At approximately 55:20 to 56:00 of the audio recording of the General Division hearing.
[89] See Emergency Department Record dated December 30, 2015, at GD3-59.
[90] See orthopaedic surgeon's consultation report dated May 25, 2016, at GD3-107.

replacement, despite her age. The surgeon thought a total knee replacement was reasonable.

[125] It is evident that the Claimant was without other options for her knee, as even the surgeon alluded to the fact that typically such procedures are reserved for older patients. If the only course of treatment for the Claimant's left knee was a total replacement, clearly, the Claimant's pain had to have been severe and likely interfering with her daily activities.

[126] The Claimant's visit to the orthopaedic surgeon in August 2016 was three days after the pro-rated period had ended. Even so, I find that the Claimant's knee condition would not have materially deteriorated within those three days. The Claimant's presentation on August 3, 2016 would have been similar to her condition on July 31, 2016.

[127] The Claimant was also dealing with other medical issues in 2015 and 2016. She had recurring abdominal and pelvic pain. She attended at the emergency department in April 2015, complaining of a sharp, stabbing pain. She elected to proceed with surgery to remove her ovaries, as she believed this would resolve her pain.

[128] I recognize that the Claimant returned to work while she waited for surgery. Three was a physical element to her work. Medical records indicate that she lifted her patient. There is no evidence otherwise to indicate how much the Claimant worked, whether she required any accommodation, or whether she missed any work because of her pain.

[129] Even so, I find that the Claimant's abdominal and pelvic pain must have been ongoing and must have been severe if she went ahead with the surgery in November 2015. The Claimant continued to experience abdominal and pelvic pain after the surgery.

[130] I find that the Claimant was severely disabled by December 31, 2015. None of the medical evidence for 2015 or 2016 addresses the question of the Claimant's capacity regularly of pursuing any substantially gainful occupation. But, there is no

question that the Claimant had ongoing severe left knee pain in 2015. It was severe enough that it led to a total knee replacement. The severity of her left knee pain would doubtless have interfered with standing, walking, and working as a homecare worker.

[131] The Claimant had also just had surgery in late 2015, in an attempt to address her abdominal and pelvic pain. But, she had residual intermittent abdominal and pelvic pain after that. It is less clear from the evidence what functional impact the abdominal and pelvic pain had on the Claimant, if any, by December 31, 2015.

[132] It is clear that physically demanding work, or work that required prolonged standing or walking, were no longer suitable for the Claimant by December 31, 2015. The question remains: Was she capable of regularly pursuing a sedentary or other type of substantially gainful work by the end of 2015?

[133] The Claimant stated in her questionnaire that she could not sit for longer than 10 to 15 minutes.[91] But, she completed the questionnaire in 2019. It is unclear whether she had the same limitations up to the end of 2015.

The *Villani* Test

[134] In assessing whether a disability is severe, a decision-maker has to adopt a "real world" approach. In other words, I have to determine whether, taking into account the Claimant's background and medical condition, she is capable regularly of pursuing any substantially gainful occupation. Hence, considerations such as age, education level, language proficiency, and past work and life experience are relevant.

[135] The Claimant was 40 years of age at the end of her minimum qualifying period. She has a grade 12 education. She has had no other formal training or education.

[91] See Questionnaire for Disability Benefits Canada Pension Plan, dated May 3, 2019, at GD2-104 and GD2-105.

[136] I have described her life experience above. The Claimant was a single parent with three children. She was focused on raising a family, rather than on having any kind of career. This is reflected in her career path.

[137] The Claimant worked odd jobs, starting out as a cook in take-out restaurants. She then worked as a taxi dispatcher for her brother's taxi company. Finally, she worked for roughly two years as a homecare worker.

[138] The closest the Claimant came to a sedentary job was when she worked for her brother's taxi company. This was before her fibromyalgia began. But, she needed accommodations because of her obesity. She went to have a gastric bypass. Her brother replaced her when she was away. He did not rehire her.

[139] Between 2015 and 2017, the Claimant no longer needed the same accommodations she had when she worked as a taxi dispatcher. (She lost a lot of weight, but still remains obese.)

[140] The Claimant's work was satisfactory as a homecare worker, and she was able to perform her duties, despite her left knee and abdominal and pelvic pain. But, she testified that she took frequent breaks at work. She was able to take breaks because her employer was not present. And, as she also testified, the client was sympathetic.

[141] The Claimant also worked split shifts. She worked, at most, one to two hours at a time. Then, she went home, where she was able to lie down and rest.

[142] Although the Claimant worked between 2015 and 2017, and she would have likely continued working had the client not passed away, I find that she was incapable regularly of pursuing a substantially gainful occupation.

[143] While she was able to work through her pain, she took frequent breaks. She did not work for extended periods, and was able to rest between short work shifts of one to two hours. She was also absent because of medical reasons. The Claimant did not ask for more work after the client died, and the employer did not offer her more work.

[144] On top of this, given the Claimant's life experience, education, her limited work history, and the type of work experience she has had, I find the Claimant was incapable regularly of pursuing any substantially gainful occupation.

[145] In coming to this determination, I am mindful also that the Federal Court of Appeal held that subparagraph 42(2)(*a*)(i) of the *Canada Pension Plan*, which defines when a person is deemed disabled, should be given a generous construction.[92] The Court of Appeal determined that the meaning of the words used in the subparagraph must be interpreted in a large and liberal manner, and any ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits.

Prolonged disability

[146] The evidence also shows that the Claimant's disability is prolonged. Her overall condition has steadily deteriorated since 2015 and 2016. Although she had a total knee replacement in January 2018, that seems to have largely alleviated her left knee pain, the Claimant developed fibromyalgia and began to experience anxiety, panic attacks, and depression since 2016 or 2017.

[147] Although the nurse practitioner referred the Claimant to a pain clinic, she was of the opinion that the Claimant's fibromyalgia was likely either to stay the same or deteriorate. The prognosis for the Claimant's anxiety and panic attacks are unknown. The Claimant continues to have abdominal pain, despite having undergone multiple procedures. She also has occasional knee pain.

[148] The Claimant also testified that her condition has become "tremendously worse."

Payment of a Canada Pension Plan disability pension

[149] Based on the Claimant's application of December 2019, the earliest the Claimant can be deemed disabled under section 42(2)(b) of the *Canada Pension Plan* is September 2018.

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[92] See *Villani*, at para 29.

[150] With a deemed disability date of September 2018, a disability pension is payable four months later, starting in January 2019, under section 69 of the *Canada Pension Plan*.

Conclusion

[151] The appeal is allowed. The Claimant is eligible for a Canada Pension Plan disability pension because her disability has been severe and prolonged since the end of her minimum qualifying period. Payment of a pension starts as of January 2019.

Janet Lew
Member, Appeal Division