



[TRANSLATION]

Citation: *Minister of Employment and Social Development v ML*, 2022 SST 94

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Minister of Employment and Social Development
Representative: Attila Hadjirezaie

Respondent: M. L.

Decision under appeal: General Division decision dated
May 31, 2021 (GP-20-378)

Tribunal member: Jude Samson

Type of hearing: Teleconference

Hearing date: February 2, 2022

Hearing participants: Appellant's representative
Respondent

Decision date: February 23, 2022

File number: AD-21-285

Decision

[1] The appeal is allowed. The Applicant is not eligible for a disability pension.

Overview

[2] M. L. is the Applicant in this case. He left his job as a bricklayer and supervisor in January 2019 following a snowmobile accident.

[3] In June 2019, the Applicant applied for a Canada Pension Plan (CPP) disability pension. His application was based on partial paralysis of his left arm.

[4] The Minister of Employment and Social Development (Minister) decided that the Applicant was not eligible for a disability pension.¹ The Applicant appealed this decision to the Social Security Tribunal's General Division. It found that the Applicant was eligible for a disability pension as of May 2019.

[5] The Minister is now appealing the General Division decision to the Appeal Division. The Minister argues that the General Division decision contains several errors of law.

[6] The Minister is right. Because of this, I can give the decision that the General Division should have given. The Applicant is not eligible for a CPP disability pension.

Issues

[7] Here are the issues I will consider in this decision:

- a) Did the General Division misapply the legal test for a severe disability?
- b) If so, how should that error be fixed?
- c) Is the Applicant eligible for a CPP disability pension?

¹ Service Canada delivers this program for the Minister.

Analysis

[8] I can intervene in this case only if the General Division made a relevant error. In this decision, I mainly consider whether the General Division made an error of law.²

The General Division misapplied the legal test for a severe disability

[9] The General Division's role was to decide whether the Applicant was eligible for a CPP disability pension. In this regard, the Applicant had to show that he has a severe disability, meaning that he is incapable regularly of pursuing any substantially gainful occupation.³

[10] To begin with, the General Division noted that the Applicant had started working as a bricklayer again for his usual employer. Normally, that would prevent him from being eligible for a disability pension.⁴

[11] However, the General Division found that the Applicant's employer was benevolent.⁵ In other words, the accommodations offered by the Applicant's usual employer go beyond what can be required of another employer in a competitive environment. This means that the Applicant's ability to do the work does not prove that he would be able to work as a bricklayer elsewhere.

[12] However, the Minister points out that the severity of the disability is not premised upon an applicant's inability to perform their regular job, but rather on their inability to pursue any substantially gainful occupation.⁶

[13] I agree with the Minister's arguments.

² This error is set out in section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

³ This legal test is set out in section 42(2)(a)(i) of the *Canada Pension Plan* (CPP).

⁴ The Federal Court of Appeal discussed this principle in decisions like *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at para 13; and *Miller v Canada (Attorney General)*, 2007 FCA 237 at para 4.

⁵ See paragraphs 19 to 23 of the General Division decision.

⁶ In support of this argument, the Minister relies on *Klabouch v Canada (Social Development)*, 2008 FCA 33 at para 15.

[14] The General Division decision focuses in particular on whether the Applicant's ability to work as a bricklayer for his usual employer shows that he can work as a bricklayer for a different employer.

[15] Because of this, the General Division made an error of law by:

- considering the Applicant's work capacity based on his employer's benevolence
- failing to consider whether the Applicant was incapable regularly of pursuing other substantially gainful occupations

[16] So, I find that the General Division misapplied the legal test to determine whether the Applicant had a severe disability under the CPP.

I will give the decision that the General Division should have given

[17] On the one hand, the Minister argues that I can give the decision that the General Division should have given.

[18] On the other hand, the Applicant is asking me to send the case back to the General Division for reconsideration. That way, he could provide additional evidence in support of his case.

[19] I find that I should give the decision that the General Division should have given. At the General Division stage, the Applicant was not prevented from submitting his evidence or making submissions.

[20] In addition, I have to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.⁷

⁷ This requirement comes from section 3(1)(a) of the *Social Security Tribunal Regulations*.

[21] In the circumstances, I find that I have the necessary information and authority to make a final decision.⁸ This means that I can decide whether the Applicant is eligible for a disability pension.

The Applicant is not eligible for a disability pension

[22] To be eligible for a CPP disability pension, a person has to prove that they had a severe and prolonged disability before the end of their minimum qualifying period.

[23] A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A real-world approach must be taken with the test for severity.⁹ This means that, when deciding whether a person's disability is severe, I have to consider their condition as a whole and factors such as their age, level of education, language abilities, and past work and life experience.¹⁰

[24] I also point out these important teachings from the Federal Court of Appeal:

- a) The severity of the disability is not based on the applicant's inability to perform their regular job, but rather any substantially gainful occupation.¹¹
- b) It is work capacity and not the diagnosis or description of the disease that determines the severity of the disability under the CPP.¹²
- c) Where there is evidence of work capacity, the applicant has to show that they made efforts to find and keep a job but that their efforts were unsuccessful because of their health condition.¹³

⁸ Section 59(1) of the DESD Act gives me the power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal decision in *Nelson v Canada (Attorney General)*, 2019 FCA 222.

⁹ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

¹⁰ See *Bungay v Canada (Attorney General)*, 2011 FCA 47 at para 8.

¹¹ See *Villani v Canada (Attorney General)*, 2001 FCA 248; and *Patterson v Canada (Attorney General)*, 2009 FCA 178.

¹² See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

¹³ See *Inclima v Canada (Attorney General)*, 2003 FCA 117 at para 3.

– **The Applicant does not have a severe disability**

[25] The Applicant is suffering from major after-effects of a snowmobile accident in January 2019. In May 2019, the Applicant's family doctor was of the opinion that he was unfit for any work after his accident.¹⁴

[26] The Applicant had dual nerve transfer surgery in April 2019. The Applicant's condition improved somewhat after his surgery. However, the surgery did not produce all the desired results.

[27] So, the Applicant has permanent impairments that reduce his mobility and the strength in his left arm, his non-dominant arm.¹⁵

[28] In addition, the Applicant says that he has always done physical work and that he could never have a desk job.

[29] In his supplementary submissions, the Applicant adds that he is not asking for a full disability pension; he is asking for compensation for lost wages and the limited hours worked because of his health situation.¹⁶ Also, he refuses to do less demanding work that could hurt his mental health and pay less.

[30] Unfortunately, the law does not allow for partial payment of a CPP disability pension. Furthermore, the Applicant's submissions explain how largely personal reasons, rather than medical ones, are preventing him from looking for another job.

[31] Although I acknowledge the Applicant's limitations, I find that he has some work capacity. In making my finding, I mainly rely on the following facts:

- The Applicant was 36 years old when he applied for a disability pension.
- He has a high school diploma.

¹⁴ The family doctor's medical report starts on page GD2-58.

¹⁵ The report of a physiotherapist is on page GD5-2.

¹⁶ See document AD5.

- He has significant work experience in construction.
- On his pension application, the Applicant describes his abilities to stay on his feet, walk, go up or down steps, kneel, squat, stay seated, and drive as good or excellent.¹⁷
- The Applicant mentioned no significant behavioural, emotional, communication, or thinking problems.¹⁸
- The report by the Applicant's physiotherapist indicates that he could work within his limitations.¹⁹
- The Applicant started working as a bricklayer again in July 2020 with some accommodations.²⁰
- The Applicant told the General Division that he could work as a supervisor, but the company he works for is not big enough to justify such a position.²¹

[32] I acknowledge that the Applicant is heavily accommodated at work. However, his ability to work as a bricklayer shows that he can do other work that is better suited to his limitations.

[33] So, I find that the Applicant has transferrable skills and should be able to find a job that is better suited to his limitations. The Applicant's age, level of education, language abilities, and past work and life experience all support this finding.

[34] Based on the evidence on file, I find that the Applicant has some residual work capacity. So, before being eligible for a disability pension, he had to make efforts to find a job within his limitations. However, he never tried to find a different job.

¹⁷ See page GD2-26.

¹⁸ See pages GD2-27 and GD2-28.

¹⁹ See page GD5-3.

²⁰ See the employer's letter on page GD4-2.

²¹ Listen to part 2 of the audio recording of the General Division hearing at approximately 0:05:45.

[35] For this reason, the Applicant has not shown that he is incapable regularly of pursuing any substantially gainful occupation. On this point, I note that there are many jobs (even excluding desk jobs) that are less demanding than a bricklayer job and that the “substantially gainful” threshold is currently less than \$17,000.²²

[36] I sympathize with the Applicant’s situation. He has given good reasons why he is still working as a bricklayer. However, I have no choice but to apply the CPP’s highly restrictive definition concerning the concept of a severe disability. Unfortunately, this definition does not cover all individuals who have serious and prolonged impairments.²³

[37] In short, I find that the Applicant does not have a severe disability and is not eligible for a CPP disability pension.

Conclusion

[38] I am allowing the Minister’s appeal. I have concluded that the General Division made an error of law that justifies my intervention in this case. I also find that this is a case where it is appropriate to give the decision that the General Division should have given: The Applicant is not eligible for a CPP disability pension.

Jude Samson
Member, Appeal Division

²² Section 68.1 of the *Canada Pension Plan Regulations* describes what a “substantially gainful occupation” is for the purpose of section 42(2)(a)(i) of the CPP.

²³ See *Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 3.