Citation: *DB v Minister of Employment and Social Development*, 2022 SST 90

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. B.
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter

Decision under appeal:	General Division decision dated October 23, 2021 (GP-20-1225)

Tribunal member:	Neil Nawaz
Type of hearing:	On the record
Decision date:	February 18, 2022
File number:	AD-22-20

Decision

[1] The appeal is allowed. The General Division made an error when it found that the Claimant was not entitled to a Canada Pension Plan (CPP) disability pension. The Claimant's pension will begin as of July 2020.

Background

[2] The Claimant is D. B.. She is a 50-year-old former cook, cleaner, and sales clerk. She has been diagnosed with a variety of medical conditions, including osteoarthritis, Crohn's disease, sleep apnea, and depression. She has had two hip replacement surgeries.

[3] In October 2018, the Claimant applied for a CPP disability pension. She claimed that she could no longer work because of incontinence, fatigue, and widespread pain.

[4] The Minister refused the application because, in its view, the Claimant had not shown that she had a severe and prolonged disability.[1] Among other things, the Minister noted that the Claimant continued to work 12 to 16 hours per week.[2]

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by videoconference and dismissed the appeal because it did not find enough medical evidence to show that the Claimant was disabled from substantially gainful employment. The General Division acknowledged that the Claimant had functional limitations but saw no indication that they affected her ability to work.

[6] The Claimant then asked the Appeal Division for permission to appeal. She insisted that she is disabled and argued that the General Division drew the wrong conclusion from the evidence. She criticized the General Division for assuming that,

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[1] Coverage for the CPP disability pension is established by working and contributing to the CPP. In this case, the Claimant's CPP disability coverage will end on December 31, 2022.
[2] See Minister's reconsideration decision letter dated June 2, 2020, GD2-25.

because she returned to work after her first hip replacement, she should have also been able to return to work after her second.

[7] In a decision dated January 18, 2022, I granted the Claimant permission to appeal because I thought she had an arguable case. At the suggestion of the Minister's legal representative, I convened a settlement conference to see if there was common ground on which the parties might come to an agreement.

[8] The parties did reach an agreement, and its terms were read into the record at the end of the settlement conference.[3] The parties have asked me to prepare a decision that reflects that agreement.

Agreement

[9] At the settlement conference, the Minister's representative conceded that the General Division's decision contained errors of law. He agreed that the Claimant has had a severe and prolonged disability since March 2020, and he offered the Claimant a CPP disability pension with first payment date of July 2020. The Claimant accepted the offer.

Analysis

[10] For the following reasons, I accept the parties' agreement.

The General Division failed to consider the Claimant's conditions in their totality

[11] The Claimant has reported symptoms from several medical conditions, including

- Crohn's disease;
- osteoarthritis;
- diabetic gastroparesis;
- carpal tunnel syndrome;
- sleep apnea;

[3] Recording from settlement conference dated February 16, 2022.

- anxiety and depression;
- hypertension;
- hemochromatosis; and
- uterine fibroids.

[12] The leading CPP disability case is *Villani v Canada*,[4] which requires the Tribunal to consider claimants as whole persons. This principle was amplified by a case called *Bungay*, which said that a claimant's medical condition must be assessed in its totality.[5] A number of cases have taken this to mean that the Tribunal must look at the cumulative effect of a claimant's various impairments.[6]

[13] In its decision, the General Division acknowledged *Bungay*, saying:

> I cannot focus on the Claimant's diagnoses. Instead, I must focus on whether she has functional limitations that get in the way of her earning a living. When I do this, I have to look at **all** of the Claimant's medical conditions (not just the main one) and think about how they affect her ability to work [emphasis in original].[7]

[14] The General Division then proceeded to discuss the Claimant's medical conditions individually, finding that none of them by themselves were an obstacle to work during the Claimant's coverage period.

[15] The General Division was clearly aware of the need to consider all of the Claimant's medical conditions. However, the General Division did not make a genuine effort to grapple with their **cumulative** impact on her capacity to perform substantially gainful employment. It appears that the General Division addressed the Claimant's many medical conditions in isolation from each other, when case law has repeatedly cautioned decision-makers against considering impairments in silos.

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[4] See *Villani v Canada (Attorney General)* 2001 FCA 248.
[5] See *Bungay v Attorney General of Canada*, 2011 FCA 47.
[6] For example, *Barata v Minister of Human Resources and Development* (January 17, 2001), CP 15058 (PAB) and *E.T. v Minister of Employment and Social Development*, 2017 CanLII 91758 (SST).
[7] General Division decision, paragraph 19.

The General Division disregarded the Claimant's background and personal characteristics

[16] Employability must be assessed in a real world context. *Villani* requires decision-makers to consider claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience.[8]

[17] In its decision, the General Division cited the *Villani* test but saw no need to apply it:

> Finally, when I am deciding whether a disability is severe, I usually have to consider a claimant's personal characteristics. This allows me to realistically assess a claimant's ability to work.
>
> I do not have to do that here because I do not believe the Claimant's functional limitations make her incapable of regularly of pursuing any substantially gainful occupation. This means she did not prove her disability was severe by then.[9]

[18] In support of this position, the General Division cited a case called *Giannaros*, which appears to relieve decision-makers of the need to conduct a real world analysis under certain circumstances.[10] However, *Giannaros* involved a claimant who was found to have disregarded treatment recommendations. That is not the case here.

[19] *Villani* itself suggests that the real world analysis must be an integral part of the severity assessment:

> Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an Appellant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, […] occupations which a decision-maker must consider **cannot be divorced** from the particular circumstances of the Appellant, such as age, education level, language proficiency and past work and life experience [emphasis added].[11]

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[8] *Villani*, see note 4.
[9] General Division decision, paragraphs 34–35.
[10] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.
[11] *Villani*, paragraph 38.

[20] The Claimant has only a high school education and is now well into middle age. She has many years of work experience but only in low-skilled jobs. Nevertheless, the General Division saw no need to consider the Claimant's age, education, and work history. This is an error of law.

[21] However weak it might have found her evidence, the General Division could not assess the severity of her disability without also considering the impact of her background and personal characteristics on her employability.

Remedy

[22] When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.[12]

[23] The Tribunal is required to proceed as quickly as fairness permits. The parties agreed that the Claimant is disabled, and there is enough information on file to allow me to confirm that assessment for myself.

[24] Having reviewed the entire case file, I am satisfied that the Claimant does, in fact, have a severe and prolonged disability.

[25] The Claimant suffers from a constellation of physical and psychological conditions. They produce a variety of symptoms, including widespread joint pain, fatigue, incontinence, and anxiety and depression. The Claimant has done everything reasonably possible to get better, but she no longer has the capacities that she once did, especially now that she is past 50. She has had two hip replacement surgeries that have improved her mobility but done little to restore her workplace functionality. There is evidence that her impairments were a factor in her dismissal from her last job, as a part-time cashier, two years ago. Although she has a lengthy work history, her jobs have always involved manual labour or counterwork. At this point, given her many persistent ailments, it is difficult to see how she could be successfully retrained for deskwork.

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[12] DESDA, section 59(1).

[26] For these reasons, I find that the Claimant has a severe and prolonged disability. She is effectively unemployable.

Conclusion

[27] The appeal is allowed in accordance with the parties' agreement. The Claimant became disabled as of March 2020, the last month she worked. Her CPP disability pension therefore starts as of July 2020.[13]

Member, Appeal Division

[13] According to section 69 of the *Canada Pension Plan*, payment of a pension starts four months after the date of disability.