Citation: *DN v Minister of Employment and Social Development*, 2022 SST 424

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	D. N.
Representative:	Karen Crowell
Respondent:	Minister of Employment and Social Development
Representative:	Andrew Kirk

Decision under appeal:	General Division decision dated October 18, 2021 (GP-20-1173)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	March 21, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	May 25, 2022
File number:	AD-22-24

Decision

[1] I am dismissing the appeal. The Claimant is not entitled to a disability pension.

Overview

[2] D. N. (Claimant) worked as a machine operator. He applied for a Canada Pension Plan (CPP) disability pension in October, 2018. He has chronic pain, migraines, anxiety, and depression. The Claimant stated he could no longer work as of May 2013. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed the Minister's decision to this Tribunal.

[3] To access a disability pension, the Claimant needed to show that his disability was severe and prolonged within the meaning of the *Canada Pension Plan* on or before the end of his minimum qualifying period (MQP). Based on his contributions to the CPP, his MQP ended on December 31, 2010.

[4] The General Division decided that the Claimant was not entitled to a disability pension because his functional limitations did not affect his ability to work. The General Division relied on the fact that the Claimant returned to a full-time (but lighter duty) job in February, 2012. He stopped working again in 2013 and has not worked since. The General Division found that although the Claimant genuinely believed that he could not work because of his injury, his medical information did not support that belief.

[5] I granted the Claimant permission (leave) to appeal the General Division decision. I found that it was arguable that the General Division made an error of law in its analysis about whether the Claimant's disability was severe. The Claimant asks for leave to appeal the General Division's decision.

[6] I must decide whether the General Division made that or any of the other errors the Claimant alleges. I find that the General Division did not make an error. I am dismissing the appeal.

Issues

[7] The issues in this appeal are:

a) Did the General Division make an error of law by failing to decide when the Claimant's disability started?

b) Did the General Division make an error of fact by finding that the Claimant did not have functional limitations by December 31, 2010 given that he had surgery for his 2008 injury in October 2010 after which he remained off work until February 2012?

c) Did the General Division make an error of law by failing to provide any analysis of the medical evidence it referenced from 2010 other than to reach a conclusion about it?

d) Did the General Division make an error of law by failing to consider and analyze the Claimant's personal circumstances?

e) Did the General Division make an error of law by deciding that the Claimant's condition was not severe at the MQP based on work activity after the end of the MQP without considering and explaining why that was not a failed work attempt?

f) Did the General Division make an error of fact by ignoring evidence the Claimant gave about whether he was capable regularly of substantially gainful employment?

Analysis

Reviewing General Division decisions

[8] The Appeal Division does not give the Claimant or the Minister a chance to re-argue their case again from the beginning. Instead, the Appeal Division reviews the General Division's decision to decide if it contains errors.

[9] That review is based on the wording of the *Department of Employment and Social Development Act* (the Act), which sets out the "grounds of appeal." Failing to follow the legal analysis required by the CPP and the case law is an error of law. That is one of the grounds of appeal.[1]

Date the condition started

[10] The General Division didn't make an error about the date the Claimant's condition started.

[11] The Claimant argues that the General Division failed to decide when his condition started, and failed to understand that his doctors were more positive (as was he) about his outlook when he first had his surgery. No one could have known that ultimately, his surgery would fail.

[12] In my view, the General Division didn't have to choose a start date for the Claimant's disability because it only had to decide whether the Claimant had a severe and prolonged disability on or before the end of the minimum qualifying period (MQP).

[13] Since the General Division decided that the Claimant didn't prove he was disabled on or before the end of this MQP, the General Division did not have to decide anything else about when the Claimant's conditions actually did start.

Functional Limitations

[14] The General Division did not make an error of fact about the Claimant's functional limitations at the time of the MQP. Part of the discussion of the Claimant's limitations is confusing, but this does not amount to an error of fact. Even if the General Division did make an error about the Claimant's functional limitations before the end of the MQP, that error is not material in light of the General Division's other findings (it cannot change the outcome of the decision).

---

[1] See the Act, section 58(1)(c).

– What the General Division found about the Claimant's functional limitations

[15] On functional limitations, the General Division decided:[2]

- the Claimant doesn't have functional limitations by his MQP date of December 31, 2010[3]
- at the end of the MQP, the Claimant was off work recovering from surgery
- the Claimant "genuinely believes" that his functional limitations affect his ability to work[4]
- the medical evidence doesn't "support what the Claimant says" by December 31, 2010. The medical evidence shows he had symptoms and some limitations following his accident in 2008, but it doesn't show that he had functional limitations that affected his ability to work by his MQP of December 31, 2010.[5]

– The Claimant argues the General Division made an error of fact about his functional limitations

[16] The Claimant argues that it was clear that he had a serious medical condition that kept him from working from 2008 onwards. He clearly had functional limitations at the end of the MQP: he was recovering from surgery at that time. He was unable to lift anything and he understood that he should not do house cleaning or yard work.

– The Minister argues there is no error of fact, the General Division was simply pointing out a lack of medical evidence about the functional limitations

[17] The Minister argues that the General Division did not make an error of fact about the Claimant's limitations, and that the General Division's finding was quite specific: the

---

[2] See paragraphs 14 to 25 of the General Division's decision.
[3] See paragraph 16 of the General Division decision: "I find that the Claimant doesn't have functional limitations by his MQP date of December 31, 2010."
[4] See paragraph 17 of the General Division's decision.
[5] See paragraph 24 of the General Division's decision.

General Division found that the Claimant had limitations, but that the medical evidence didn't show that those limitations did not affect his ability to work by the end of the MQP.

[18] The Minister points out that CPP Regulations require claimants to provide medical reports and medical evidence in order to be eligible for a disability pension. The Minister says that the "medical evidence has to prove the severity of the [Claimant's] condition by the end of his MQP."[6]

– The General Division's findings about the Claimant's functional limitations are confusing, but there is no error of fact because the findings are not material

[19] In my view, the General Division's discussion of the Claimant's functional limitations is somewhat confusing, but does not rise to the level of an error of fact.

[20] It seems to me that the reference to the Claimant not having functional limitations is a misstatement, since the General Division decided more specifically:

- that the Claimant did have some functional limitations before the end of the MQP
- but that the medical evidence about that period did not show that he had functional limitations that affected his ability to work.

[21] However, the medical evidence itself does not have to establish those limitations if it shows a serious medical condition at the time. Rather, the Claimant needed medical evidence that showed he had a serious medical condition on or before the end of the MQP.[7] The Claimant can establish the functional limitations after his surgery and before the end of the MQP with a combination of the medical evidence about the condition and his own evidence about the functional limitations he experienced.

[22] The medical evidence alone does not need to establish the severity of the disability, which involves looking at all the conditions in their totality and deciding

---

[6] See AD2-9, paragraph 18.
[7] See *Bungay v Canada (Attorney General)*, 2011 FCA 47. See also *Klabouch v Canada (Social Development)*, 2008 FCA 33.

whether there were functional limitations that meant the Claimant was incapable regularly of any substantially gainful work. Treatment, work efforts, and the Claimant's personal circumstances are also relevant when deciding whether a disability is severe within the meaning of the *Canada Pension Plan*.

[23] However, even if the General Division misstated what the functional limitations were before the end of the MQP, the error is not material – it is not likely to change the outcome of the decision.

[24] Regardless of what the functional limitations were at the end of the MQP, the Claimant returned to work full-time earning substantially gainful income for more than a year starting in 2012, years after the end of the MQP.

[25] The Claimant's work activity suggests that whatever the limitations were in 2010, the disability was not continuous (or it was not prolonged). The General Division noted this work in relation to the Claimant's functional limitations.[8]

[26] In my view, the General Division did not make an error of fact. The Claimant did give some testimony about his functional limitations during the MQP. He testified about the fact that he did not return to work after the surgery until 2012. He stated that he rested and tried to recover, and that he participated in intense physiotherapy for 17 months. He explained that he lost grip strength and that he had pain.[9]

[27] However, the General Division found that these limitations did not mean that he was incapable regularly of any substantially gainful occupation. I will not interfere with that finding. The Claimant was receiving long-term disability at that time, but the requirements of that program are different from those in the *Canada Pension Plan.* It is clear that the Claimant had functional limitations that meant that he could not return to his old job. However, that does not mean that he had a severe and prolonged disability within the meaning of the *Canada Pension Plan* at that time.

---

[8] See paragraph 25 of the General Division's decision.
[9] Recording of the General Division hearing at about 10:04.

Analyzing Evidence from 2010

[28] The General Division did not make an error by referencing medical evidence without providing any analysis of that evidence.

[29] The General Division stated that the medical evidence did not support the claim of a severe and prolonged disability on or before the end of the MQP.[10] In support of that statement, the General Division referenced pages of the evidence in the footnotes.

[30] The question is whether the General Division made an error stating this as a conclusion without analyzing any evidence.

[31] The Minister argues that there was little analysis for the General Division do because there was "nothing in the way of medical evidence" that explained what the Claimant's condition was at the end of 2010.[11]

[32] The parts of the evidence that the General Division referenced in support of its conclusion included only one document with a date on it from 2010. This was a physiotherapist's summary of the Claimant's condition post-surgery. It stated that there was decreased pain, a decrease in strength with some improvement, and some cracking in the Claimant's neck that did not limit him.

[33] The rest of the reports the General Division relied on were from 2011. They were physio reports from February 11, 2011 up to when the Claimant returned to work. These reports showed what the Minister refers to as "steady improvement."

[34] In my view, the General Division did not make an error. A closer look at the evidence the General Division referenced supports the Minister's argument. The General Division did not need to provide more analysis of these documents as they did not provide much in the way of evidence of a severe disability before the end of the MQP.

---

[10] See paragraph 25 of the General Division's decision.
[11] See AD2-12 at paragraph 33.

Personal Circumstances

[35] The General Division did not make an error by failing to consider the Claimant's personal circumstances before deciding that his disability was not severe.

– Considering personal circumstances

[36] To decide whether a disability is severe, the General Division considers medical conditions and personal circumstances (like age, ability to communicate in English, education, and work and life history).[12] Considering personal circumstances is important, and is sometimes called the real world approach, because it focuses on the employability of a claimant.

[37] Considering a Claimant's personal circumstances is not strictly required in every appeal. However, there are situations in which a claimant may show a serious medical condition that impacts their ability to do their old job, but leaves open the question as to whether they might be able to do some other work. Sometimes, it is in considering those personal circumstances that it becomes clear that retraining or alternate work is not a real world option for the claimant because of factors outside of just the medical condition itself.

– The General Division didn't consider the Claimant's personal circumstances

[38] The General Division didn't consider the Claimant's personal circumstances, stating that although this is usually required, the General Division did not have to in this appeal because "the Claimant's functional limitations didn't affect his ability to work by December 31, 2010. This means he didn't prove his disability was severe by then."[13]

[39] The General Division relied on a case called *Giannaros* for the idea that it is not necessary to consider personal circumstances when the evidence does not show a severe disability.[14]

---

[12] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[13] See paragraph 28 of the General Division's decision.
[14] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.

– Minister argues the General Division didn't need to consider the Claimant's personal circumstances

[40] The Minister argues that the General Division did not need to consider the Claimant's personal circumstances because the "limited medical evidence" as of the MQP did not support a finding of a severe disability at the MQP and the Claimant was able to go back to work. In that situation, there is no need to consider personal circumstances.

[41] The Minister relies on the *Kiriakidis* case from the Federal Court of Appeal. In that case, the Federal Court of Appeal found that it was not unreasonable for the tribunal to skip over an analysis of the Claimant's personal circumstances. In that case, the claimant worked after the end of the MQP and the medical showed that he was "doing reasonably well."[15]

– No error of law by failing to consider personal circumstances in this case

[42] In my view, the General Division did not make an error by skipping over the analysis of the personal circumstances in this particular case, although the reasons the General Division gave for taking this approach were somewhat lacking.

[43] In most cases, considering a claimant's personal circumstances is a necessary part of the analysis about whether a disability is severe within the meaning of the *Canada Pension Plan*. The reasons for skipping this part of the analysis should be clear.

[44] The General Division relied on *Giannaros* for the idea that it was not necessary to consider the Claimant's personal circumstances.

[45] However, the case in *Giannaros* was different from the Claimant's appeal. In *Giannaros* there was

---

[15] See *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316.

- Extensive analysis of the medical evidence and the Pension Appeals Board concluded that no medical doctor had said that the claimant was unable to work.
- the medical evidence said that the prognosis was fair
- doctors advised the claimant to return to work twice
- the claimant failed to make reasonable efforts to follow treatment recommendations

[46] I am not satisfied that the Claimant's situation is like the *Giannaros* case. The Claimant was receiving long-term disability benefits at the end of the MQP. He was recovering from surgery. There was no doctor telling him to return to work at that time, and he was following treatment recommendations.

[47] The Claimant's case is more like the case in *Kiriakidis*, though. In *Kiriakidis*, the Federal Court of Appeal found that it was not unreasonable to skip over the personal circumstances analysis when the Claimant was doing reasonably well after the end of the MQP and he was working.

[48] In my view, the General Division did not make an error by skipping over a discussion of the personal circumstances. The General Division decided that the Claimant's return to work after the end of the MQP showed that he had some capacity for work. That, coupled with the lack of evidence about functional limitations that kept him from any substantially gainful work, meant that the General Division did not need to consider the Claimant's personal circumstances.

Work Activity

[49] The General Division did not make an error of law by focusing too much on work activity after the end of the MQP without considering and explaining why that was not a failed work attempt.

– The General Division's analysis of the Claimant's work

[50] The General Division found that the Claimant had capacity for work based partly on medical evidence from the MQP, and partly on the facts about the Claimant's return to work long after the end of the MQP in 2012.[16]

[51] The General Division considered that when the Claimant returned to work, he was still a machine operator, and the duties were supposed to be lighter. He started having pain and migraines six months into his return to work. He took medication at night to be able to work during the day. He stopped work in May 2013 because of pain and did not return to any work after that. He said his doctor did not recommend that he return.[17]

[52] The General Division pointed out that the Claimant's work was full time and that he worked from February 27, 2012 to May 29, 2013. The work was substantially gainful. The General Division pointed out that when the Claimant applied for the disability pension, he stated that he felt he could no longer work as of May 2013, which is long after the end of his MQP.[18]

[53] The General Division also considered the information the Claimant's employer provided about his work, including the fact that his attendance and work was satisfactory (in a role for employees with medical restrictions) and that he stopped work because of his medical situation.[19]

[54] The Claimant testified that his surgeon didn't approve of the return to work but that the doctor for the employer "overrode" the surgeon's opinion.[20] He stated that the first six months of work weren't bad, but that his symptoms (back pain, headaches, pain in the arms) returned and the doctors told him to "suck it up and push through." He

---

[16] See paragraph 25 of the General Division's decision.
[17] See paragraph 20 of the General Division's decision.
[18] See paragraph 25 of the General Division's decision.
[19] See paragraph 15 of the General Division's decision.
[20] The Claimant's testimony about returning to work is in the recording of the General Division hearing, starting at about 18:03.

testified that he got a hernia trying to protect his neck while he worked. He stopped working in May 2013 and his doctor told him not to return to work.

– **Return to work and the concept of a failed work attempt**

[55] Evidence that a claimant worked after the end of the MQP may show that the Claimant has some capacity to work, but not in all cases.

[56] For example, some work completed by a claimant can be a "failed attempt" that does not show a capacity for work at all. The Federal Court found that while there is no firm line between work that establishes capacity and work that is a failed attempt. A return to work that lasts only a few days would be a failed attempt, but the Federal Court once stated that two years of earnings consistent with what the claimant earned before would not be a failed attempt.[21]

– **No error of law by failing to consider whether the work was a failed attempt**

[57] In my view, considering the decision as a whole, the General Division did not make an error of law here. The General Division considered the length of time the Claimant worked, the income that he earned, his performance, and the reason he stopped working.[22]

[58] In my view, the General Division's decision implies that the work was too long to be a failed attempt at work, although it would have been better for the General Division to state that explicitly. I cannot conclude that the General Division made an error of law by failing to reference the phrase "failed attempt." The General Division included information about the nature of the work and the symptoms that the Claimant had doing that work.

[59] I find that the General Division was live to the question as to whether the work was a failed attempt but did not provide that analysis expressly given that the Claimant's

[21] See *Monk v Canada (Attorney General)*, 2010 FC 48.
[22] See the analysis at paragraph 25 of the General Division's decision.

earnings and length of employment were not unlike what the court talked about in *Monk* as being the kind of work that does not qualify as a failed attempt.

[60] I appreciate that there is an ocean of difference between the kind of failed attempt at work that lasts a few days and the two-year mark the Federal Court of Appeal talks about in *Monk*. However, the Claimant's return to work is much more consistent with the two-year situation than brief attempt over the span of a few days.

Capable regularly

[61] The General Division did not make an error of law by failing to consider the Claimant's evidence about whether he was **capable regularly** of any substantially gainful work.

[62] For a disability to be severe, the Claimant must be incapable regularly of any substantially gainful work. Each part of that definition has meaning. Predictability is the essence of regularity. [23] The question of whether the Claimant was capable regularly was important.

[63] The Claimant was off work from the time of his injury in September 2008, until he tried a return to work in 2012. At the end of the MQP, he was recovering from surgery.

[64] The Claimant had limitations at the end of the MQP, but the General Division found that those limitations did not mean that he was incapable regularly of any substantially gainful work. When he returned to work in 2012, the General Division cited evidence that suggested he was capable regularly during that period. The General Division referenced that the work was full time and that there were no attendance problems, for example.

[65] In my view, the General Division did not make an error of law. Much of the evidence the Claimant provided about the fact that he was not capable regularly of work referred to functional limitations he had after he stopped working in 2013, after the end of the MQP. The Claimant gave reasons why he was not capable regularly of work at

[23] See paragraph 28 in *Atkinson v Canada (Attorney General)*, 2014 FCA 187.

the end of the MQP (he was participating in intense physiotherapy and was in a lot of pain). But the General Division considered the medical evidence and work he completed after the end of the MQP and decided that the Claimant was capable regularly of some substantially gainful work. I will not interfere with those findings.

Closing

[66] In closing, the issues I've considered are mostly about whether the Claimant's disability was severe. Since the General Division did not find that the disability was severe on or before the end of the MQP, there was no need to make a decision about whether the disability was prolonged.

[67] It's noteworthy however, that at least some of the reasons why the General Division found that the disability was not severe would have relevance as well to the question of whether the disability was prolonged. For example, the post-MQP work is relevant to the question of whether the disability was prolonged.

[68] I am also mindful of the Minister's arguments about other evidence in the record that suggests that the Claimant had capacity to work as late as 2017.[24]

Conclusion

[69] The appeal is dismissed. The General Division did not make an error.

Kate Sellar

Member, Appeal Division

[24] AD2-18 to 20.