Citation: *NH v Minister of Employment and Social Development*, 2022 SST 667

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	N. H.
Respondent:	Minister of Employment and Social Development
Representative:	Joshua Toews

Decision under appeal:	General Division decision dated December 28, 2021 (GP-21-826)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	May 10, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	July 22, 2022
File number:	AD-22-109

Decision

[1] I am allowing the appeal. The General Division made an error of law. I will give the decision that the General Division should have given: The Claimant is entitled to a Canada Pension Plan disability pension.

Overview

[2] N. H. (Claimant) came to Canada in adulthood from Bangladesh. Since coming to Canada, he has worked in factories and restaurants. He started driving a taxi in 2011. He had a car accident in 2015 and has had pain in his neck, back, and shoulder. He has chronic headaches. He is diabetic.

[3] After the car accident, he started working part-time, making very little money. He stopped driving a taxi altogether in October 2019. In late 2021, he tried working again, driving for a ridesharing app.

[4] The Claimant applied for a Canada Pension Plan (CPP) disability pension on October 11, 2019. The Minister of Employment and Social Development (Minister) refused his application initially and on reconsideration.

[5] The Claimant appealed to this Tribunal. The General Division decided that the Claimant was not eligible for a disability pension because his disability was not severe within the meaning of the CPP.

[6] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (Act). If so, I need to decide what I will do to fix (remedy) that error.

[7] The General Division made an error of law by stating (without sufficient explanation) that it did not need to consider the Claimant's personal circumstances that affect his employability. I will give the decision that the General Division should have given. The Claimant is entitled to a disability pension under the *Canada Pension Plan*.

Issues

[8] The issues in this appeal are the following:

a) Did the General Division make an error of law by failing to explain how it interpreted and applied the Federal Court of Appeal's decision in *Giannaros* to the Claimant's case?[1] The General Division relied on *Giannaros* when it decided that it was not necessary to consider the Claimant's personal circumstances as a possible barrier to the Claimant's ability to work in the real world.[2]

b) Did the General Division make an error of law by failing to consider the impact of all of the Claimant's conditions together on his ability to work?

c) Did the General Division make an error of law by failing to analyze and discuss whether the part-time work the Claimant completed was substantially gainful?

d) Did the General Division make an error of law by failing to consider and discuss whether the Claimant was incapable **regularly** of pursuing any substantially gainful work?

e) Did the General Division make an error of fact in the conclusion it drew from the fact that the Claimant received Canada Emergency Response Benefits (CERB)?

f) If the General Division made an error, how should I fix it?

Analysis

Reviewing General Division Decisions

[9] The Appeal Division reviews the General Division's decision to decide if it contains errors. I can only address three types of errors:

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[1] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187 (*Giannaros*).
[2] See paragraph 45 in the General Division's decision.

- errors of fact,
- errors of law, and
- errors the General Division made because not provide a fair process (or made an error relating to the powers that it has).[3]

The General Division made an error of law

[10] The General Division made an error of law by failing to explain how it applied the decision from the Federal Court of Appeal (Court) in *Giannaros* in order to decide that it was not necessary to consider the Claimant's personal circumstances. The brief reason the General Division provided about *Giannaros* is not sufficient in light of the differences in the two cases. The Court discussed the need to consider personal circumstances in disability pension cases in *Villani*. Moving away from that approach by relying on *Giannaros* requires explaining.[4]

[11] In this section, I will describe:

- The approach to deciding whether a disability is severe under the *Canada Pension Plan*
- How important personal circumstances are to that approach
- What happens when decision makers have not considered personal circumstances
- How the General Division's failure to explain why it did moved away from that approach is an error of law

[3] See section 58 of the *Department of Employment and Social Development Act* (DESDA).
[4] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

– The approach: considering personal circumstances

[12] The Claimant had to show that he had a severe and prolonged disability on or before December 31, 2016.[5] A disability is severe if it means that a claimant is incapable regularly of pursuing any substantially gainful work.[6]

[13] To decide if a disability is severe, the General Division will look at two things:[7]

[14] First: Is there a **serious health condition** that affected the claimant's capacity to work? Is there some capacity to work? To decide this, the General Division considers:

- Whether the nature of the medical conditions and all of the functional limitations (things the claimant cannot do) affect the claimant's ability to work.
- Whether the claimant took steps to manage his conditions and whether he unreasonably refused treatment that could affect his disability.
- Whether the claimant's personal circumstances, including factors like his age, education level, language ability and past work and life experience affect his ability to work in a real world way.[8]

[15] Second: If there is some evidence of work capacity, what do the claimant's employment efforts tell us about whether he was, in the real world context, incapable **regularly** of pursuing **any substantially gainful** work?

– Personal circumstances are important

[16] Considering personal circumstances is a key part of the approach to deciding whether a disability is severe.

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[5] That was the last day of the Claimant's minimum qualifying period, or MQP. The MQP is calculated using the Claimant's contributions to the Canada Pension Plan.
[6] See section 42(2) of the *Canada Pension Plan.*
[7] The Appeal Division has described the approach in *S.G. v Minister of Employment and Social Development*, 2017 CanLII 141823 (SST). (*S.G.*)
[8] This need to consider personal circumstances as the Appeal Division described in *S.G.* comes from *Villani*.

[17] The key case from the Court about how to decide whether a disability is severe under the *Canada Pension Plan* is *Villani*. That case says that the way decision makers had been applying the test for a severe disability was a problem.

[18] Some Court decisions, like *Villani*, are especially important because they direct tribunal decision makers in how to understand and apply the law properly. Other Court decisions, even though decision makers still need to follow them, really tell us only whether a particular tribunal decision was reasonable (because at the Court, the party is asking the Court to "judicially review" the tribunal's decision).

[19] In *Villani*, the Court guided decision makers on the correct approach to the test for a severe disability. The Court considered:

- The words in the *Canada Pension Plan*
- The context of those words
- The purpose of the *Canada Pension Plan* as a law designed to provide benefits to people who qualify. These kinds of laws (social benefits legislation), require a generous (large and liberal) approach to understanding what they mean.[9]

[20] The Court explained that deciding whether a disability is severe necessarily includes thinking about whether a claimant is employable. Employability includes considering the particular circumstances of a claimant. Assessing whether a disability is severe needs to be practical, not just a theory about whether a claimant can work. Claimants still need to show medical evidence: not everyone who has trouble getting and keeping work will be eligible for a disability pension.[10]

[21] Ten years later, the Court specifically referred to *Villani* as the leading case on interpreting the meaning of a severe disability.[11] In that case, *Bungay*, the Court confirmed again that the decision maker must adopt a "real world" approach to decide

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[9] See the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII, 837.
[10] See paragraph 50 in *Villani*.
[11] See *Bungay v Canada (Attorney General)*, 2011 FCA 47 (*Bungay*).

whether a claimant, in the circumstances of his or her personal circumstances and medical condition is employable. Assessing employability is not abstract. It is grounded in the claimant's circumstances.[12]

[22] *Bungay* is a strong statement from the Court about the need for the Pension Appeal Board (PAB) to apply the approach the Court set out in *Villani* to the test for a severe disability.[13] In *Bungay*, the Court returned the case to the PAB for a new hearing. The Court found that the first decision from the PAB was unreasonable because it failed to take the real world approach to the claimant's appeal that the Court required in *Villani*.

[23] In the years since *Villani*, there are individual cases in which the Court has found that the Tribunal made an error of law by failing to consider the claimant's personal circumstances.[14]

[24] There are also individual cases in which the Court has found that the initial decision from the Tribunal was still reasonable, even though it didn't include a discussion of personal circumstances as the Court in *Villani* and *Bungay* required.[15] I'll describe some examples.

[25] In *Inclima*, the Court focused on the fact that there was a lot of medical evidence showing that the claimant had no significant abnormalities. The record included three medical reports from different doctors near the MQP that stated that the claimant could return to light duty work. The General Division often refers to *Inclima* because the claimant did not try to return to work or to retrain in that case. The medical evidence

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[12] See paragraph 8 in *Bungay*.
[13]Before 2013, the Pension Appeals Board (PAB) heard the appeals from the Review Tribunal. Now the Appeal Division decides appeals from the General Division at the Social Security Tribunal.
[14]See, for example*: Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211; *Garrett v Canada (Minister of Human Resources Development)*, 2005 FCA 84; and *Canada (Attorney General) v St-Louis*, 2011 FC 492.
[15]See, for example: *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187 (*Giannaros*); *Kiriakidis v Canada (Attorney General)*, 2011 FCA 316; *Inclima v Canada (Attorney General)*, 2003 FCA 117 (*Inclima*); and *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292.

here is notable because the medical evidence actively recommended that the claimant return to work and the claimant did not try that.

[26] In *Doucette*, the medical records included a psycho-vocational assessment that concluded that the claimant had the capacity to do other jobs. That assessment considered claimant's personal circumstances when recommending the kinds of work the claimant could do. As a result, there was little need for the decision maker to discuss personal circumstances in detail. The decision maker analyzed the assessment, and that assessment already considered the personal circumstances.

[27] In *Kiriakidis*, the Court noted that in the last year of his MQP, the claimant had expanded his business and hired others to work for him. The doctor's notes stated that the claimant "wishes to carry on" and stated that the claimant was obviously doing very well. The same doctor noted, about a year after the end of the MQP, that the Claimant was still working in his business but was actually doing the work himself. He walked well, got up out of a chair well and had good range of motion. He was doing reasonably well. In its decision delivered from the Bench, the Court dismissed the judicial review, citing the facts about the claimant's capacity for work as noted by his doctor in some detail.

[28] *Giannaros* is the judicial review decision that the General Division relied on for choosing not to discuss the Claimant's personal circumstances, so I'll discuss it in more detail.[16]

– **The trouble with following *Giannaros* to move away from *Villani***

[29] In my view, decision makers should be careful about using the outcome of judicial reviews from the Court like *Giannaros* to move away from the overall approach to the law that the Court specifically decided on in *Villani* for two reasons:

1. These are judicial review decisions of original decisions with unique facts that the Court doesn't always discuss (or need to discuss) in the judicial review.

[16] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.

Some of the facts in these cases point to other bigger problems with the claimant's case for the disability pension (as I've discussed in the examples above).

2. It's easy to misinterpret what some of these cases can really tell us about *Villani*.

[30] **First, *Giannaros* is one of those judicial review cases with unique facts and other bigger problems with the claimant's appeal.**

[31] Giannaros' prognosis was fair: medical evidence showed that she was advised twice to return to work. She also failed to make reasonable efforts to follow recommended treatments.[17] The PAB did not consider Giannaros' personal circumstances. The Court decided that the decision was still reasonable.

[32] The Claimant's case is quite different from *Giannaros*.

[33] In the Claimant's case, the General Division did **not** find that the Claimant was advised to return to work after his accident. The General Division did **not** find that the Claimant failed to follow treatment recommendations after his accident.

[34] By contrast, the General Division found that the Claimant did not have functional limitations that stopped him from working, and that he did part-time work after his accident so his disability was not severe.

[35] Without any explanation, it is not clear what it is about the facts and the analysis in *Giannaros* that applies to the Claimant's appeal. They seem to focus on different aspects of the test for a severe disability.

[36] **Second, it isn't clear what *Giannaros* tells us about considering personal circumstances more generally.**

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[17] *Giannaros v Canada (Minster of Human Resources Development)*, PAB CP19163. Failing to follow recommended treatment can mean that a claimant is ineligible for the disability pension, see *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

[37] In *Giannaros*, the Court describes *Villani* like this:

> - *Villani* is clear that a claimant must always be in a position to show that they have a severe and prolonged disability that stops them from working. If a claimant can't show that, then it isn't necessary to consider the claimant's personal circumstances.[18]

[38] The Appeal Division considered *Giannaros* and decided that it meant that assessing personal circumstances "will not be worthwhile unless at least some medical evidence suggesting severity is first present."[19] This understanding of *Giannaros* points to the fact that the medical evidence advised Giannaros:

- to take treatment steps she didn't take; and
- return to work, which she didn't do.

[39] In that way, in *Giannaros*, there was not even at least some medical evidence suggesting a severe disability, so there was no need to consider personal circumstances. Not all shortcomings in the medical evidence are as stark as they were in *Giannaros*.

– The General Division did not sufficiently explain how or why it followed *Giannaros*

[40] The General Division made an error of law. The General Division relied on *Giannaros* to say that considering personal circumstances was not necessary because the Claimant's "functional limitations didn't affect his ability to work by December 31, 2016. This means he didn't prove his disability was severe by then."[20]

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[18] See paragraph 45 in the General Division decision. I bolded the word severe here because *Villani* actually uses the word serious instead, which is important.
[19] See paragraph 19 in the Appeal Division's decision in *T.M. v Minister of Employment and Social Development*, 2017 CanLII 73237.
[20] See paragraph 45 of the General Division's decision.

[41] Failing to give reasons on a key issue in circumstances that require an explanation can be an error of law.[21]

[42] *Villani* is an important case and it says that considering personal circumstances is important. *Giannaros* is a judicial review decision where the Court did not find an error when the PAB failed to analyze personal circumstances where the medical evidence showed that the Claimant was told to return to work and she refused treatment.

[43] The Minister argues that the General Division made no error by following *Giannaros*. The General Division decided that the Claimant wasn't disabled by the end of his MQP because he did not have sufficient functional limitations, and because he continued to work part-time driving a taxi.

[44] In my view, skipping over the personal circumstances analysis because the Claimant did not show functional limitations that affected his ability to work is not necessarily "following" *Giannaros* absent further explanation. *Giannaros* does not seem to be about skipping over personal circumstances any time the medical evidence falls short in some way.

[45] Where the medical evidence documents some serious health conditions, the Claimant gives some evidence about functional limitations, and the Claimant tries to do some work, deciding the appeal requires analyzing fully whether there is some capacity to work. Part of analyzing capacity for work is considering personal circumstances.

[46] The Minister says that since the Claimant didn't have a severe disability, the General Division didn't need to analyze his personal circumstances: No analysis of personal circumstances could change that the Claimant's medical evidence and part-time work showed he was capable regularly of pursuing a substantially gainful occupation.

[47] It is not entirely clear to me from the reasons which functional limitations the General Division decided the Claimant actually had based on the medical evidence and

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[21] *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292, para 6 citing *R. v Sheppard*, [2002] 1 SCR 869.

the Claimant's testimony. The Claimant gave evidence that on its face describing functional limitations that affected work: chronic daily headaches, evidence about how the pain he experienced made it hard to hold the wheel and look over his shoulder to drive, and how much time he needed to rest. It may be that the General Division expected that the medical documents alone need to show that the Claimant had functional limitations that affected his ability to do any substantially gainful work. The law does not require this.

[48] The Minister calls the General Division's approach to skipping over the personal circumstances practical, because when he was a full-time taxi driver before the accident, the Claimant was earning a living. The Claimant's personal circumstances were the same before the accident as they were after, so the only thing that **changed** for the Claimant after the accident was his medical situation. The General Division analyzed the Claimant's medical situation and found it did not create functional limitations that prevented him from earning a living at the time of the MQP, so there was no need to consider his personal circumstances.

[49] This "what has changed?" approach to analyzing whether a disability is severe sounds like a common sense approach. However, I'm not persuaded by this argument because whether there is a **change** in personal circumstances is not what makes personal circumstances relevant. If personal circumstances needed to have changed after the onset of the disability in order to be relevant, they would almost never be relevant.

[50] Before his accident, the Claimant drove a taxi full time. There were certain facts about his life (his personal circumstances) that meant he did this work rather than a different sedentary job that might have required a different skill set. After his accident, those same personal circumstances are relevant when we think about his employability. He was already limited in his employability before his car accident and that is relevant when thinking about his employability after the accident too.

[51] There is medical evidence about the Claimant's conditions after the car accident. It doesn't necessarily establish a severe disability all on its own, but to decide if there is

some capacity to work in light of that evidence, the General Division needs to consider the Claimant's personal circumstances. After the accident, was the Claimant employable in the real world? The fact that the Claimant may not have been particularly employable in other types of jobs that met his physical limitations makes a difference here. His personal circumstances may have been precisely why he returned part-time to his original job even though he was not working enough hours to earn him a living. Employability matters and employability is about more than only the functional limitations.

[52] There needs to be some objective evidence of a serious medical condition.[22] But the medical evidence alone does not have to show a severe disability. The medical evidence might show some capacity for work. In that case, the decision maker needs to consider the Claimant's personal circumstances. In some cases, medical evidence will point to a health condition, but the impact of that condition in terms of the ability to work may well come from the Claimant's evidence about their efforts to work and functional limitations they had in doing so.

[53] The General Division made an error of law by failing to explain how or why *Giannaros* means that there is no need to consider personal circumstances in this case. The facts of *Giannaros* are different from the facts here. Maybe the General Division believed that *Giannaros* justifies skipping over personal circumstances any time there are hurdles to proving a severe disability exposed by the medical evidence or by the fact that the Claimant did some work. But to rely on *Giannaros* that way, the General Division needed to explain its interpretation.

[54] I won't address the other possible errors in this decision. The error I've discussed goes to the overarching approach to the test for a severe disability, which was the key issue in the Claimant's appeal, so it is not necessary to address each individual error before moving on remedy.

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[22]See *Warren v. Canada (Attorney General)*, 2008 FCA 37; and *Canada (Attorney General) v Dean*, 2020 FC 206. These cases do not say that medical evidence alone must establish all of the functional limitations.

Fixing the Error

[55] Once I find that the General Division made an error, I can decide how to remedy (fix) the error.

[56] I can give the decision that the General Division should have given, or I can return the matter to the General Division for reconsideration.[23] I can decide any question of law necessary for dealing with an appeal.[24]

[57] The Claimant and the Minister both agreed that if I were to find an error, I should give the decision that the General Division should have given.

[58] Giving the decision that the General Division should have given is an efficient way to move forward in many cases. I will give the decision that the General Division should have given. I listened to the General Division hearing and reviewed the documents in the case. I have the information that I need to decide whether the Claimant is eligible for a disability pension. Giving the decision that the General Division should have given is fair, fast, and just in the circumstances.

The Claimant has a severe disability

[59] To be eligible for a disability pension, the Claimant must have a severe disability within the meaning of the CPP. A person with a severe disability is "incapable regularly of pursuing any substantially gainful occupation."[25]

[60] Each piece of that definition has meaning. A severe disability in the CPP context is about what a person can and cannot do (when it comes to work). The things people cannot do because of a disability are functional limitations.

[61] In my view, the Claimant proved that he had a severe and prolonged disability within the meaning of the *Canada Pension Plan*. He does not have any capacity for earning a living.

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[23] See section 59 of the Act.
[24] See section 64 of the Act.
[25] See section 42(2) of the *Canada Pension Plan*.

[62] I considered:

- the Claimant's medical conditions (which involves considering all of the Claimant's conditions – all of the possible limitations that could affect capacity to work);[26] and
- the Claimant's personal circumstances (including age, education level, language proficiency, past work and life experience);[27] and
- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.[28]

[63] In light of those factors, in my view, the Claimant did not have even some (residual) capacity for work. He has functional limitations including pain and headaches that, when I consider them in a real world way in light of all of the evidence, stop him from earning a living. His language abilities and lack of transferrable skills in the Canadian workforce result in additional challenges or barriers to employment. He has taken steps to manage his conditions, but he is still incapable regularly of pursuing any substantially gainful work.

[64] Since I found he does not have capacity for work, he does not have to show that his efforts to get and keep work were unsuccessful because of his medical conditions.

Medical conditions and limits on the Claimant's functioning

[65] The Claimant's medical evidence as well as the testimony from the General Division hearing shows that the Claimant has real limitations because of his medical conditions that affect his ability to work.

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[26] This comes from the Federal Court of Appeal's decision in *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[27] The Federal Court of Appeal listed these factors in *Villani v Canada (Attorney General)*, 2001 FCA 248.
[28] The Federal Court of Appeal explained that Claimants need to make reasonable efforts to manage medical conditions in *Klabouch v Canada (Social Development)*, 2008 FCA 33 and *Sharma v Canada (Attorney General)*, 2018 FCA 48. There is no reference to exhausting all treatment options in these cases. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants are not to unreasonably refuse treatment. This requirement is different from exhausting all treatment options.

Serious medical conditions

[66] The Claimant has serious medical conditions. The CPP medical report says that the Claimant has diabetes, degenerative disc disease (DDD) of the neck, hypertension, right shoulder tendonitis and peptic ulcer disease. The Claimant experiences weakness, abdominal discomfort, and low back joint stiffness. He had pain in his low back, neck, and right shoulder. The Claimant's doctor did not list headaches separately on that form, although there are notes from a neurologist about those headaches.

[67] In my view, it's the Claimant's headaches and neck degenration that are the most serious conditions that affected his ability to work on or before the end of his MQP. His diabetes wasn't well controlled before the MQP, but it is less clear that the Claimant was limited in what he could do at work because of his diabetes.

[68] In the CPP medical report, the Claimant's doctor stated that he began treating the Claimant for his primary medical condition in February 2015. He stated that he recommended that the Claimant stop working, but did not provide the date he made that recommendation.

– Headaches

[69] The Claimant was in a car accident in February 2015. After the car accident, his family doctor referred the Claimant to a neurologist. The neurologist stated that the examination was normal. He found the Claimant's problems were musculoskeletal with a degree of anxiety. The neurologist stated that the Claimant was having trouble with headaches, light-headedness and discomfort in his neck, shoulders and back.[29] The neurologist said that the Claimant "really hasn't been able to work since the accident." The neurologist noted that the Claimant tried physiotherapy with some improvement. He prescribed medication to help the Claimant sleep.

[70] The Claimant testified about the headaches that started after the car accident and stopped him from working. He said that they were extreme and bad enough that he

[29] See GD2-116.

could not raise his head. He said that he continues to have these headaches. When he has one, he cannot leave his bed, and he cannot see properly.

[71] The Claimant testified about seeing the neurologist after the car accident about his headaches. In addition to the neurologist report from just a few weeks after the accident, a medical record dated May 22, 2019 confirms that he had seen the Claimant "previously" and that the Claimant continued to have diffused pressure-like headaches. The neurologist's assessment was **chronic daily headaches** and that the treatment was to try to reduce anxiety levels but that medication was not likely to be helpful.[30]

– **Neck, back and shoulder pain**

[72] In the months following the car accident and the consult with the neurologist, the Claimant had a neck X-ray (June 2015), followed by an MRI of his neck and back in November 2015 because he was still having persistent pain. The MRI showed mild to moderate degenerative degeneration in the neck and a possible pinching of a nerve.[31]

[73] In a follow up years after the end of the MQP in May 2018, there was still mild to moderate degeneration in the Claimant's neck, with narrowing of the C5 and C6 and C6-C7 neural foramina on both sides (when foramina narrow the issue becomes the impact on nerve roots). The Claimant had a shoulder ultrasound in May 2018 that did not show any problems.[32] But later, there was some suggestion that his shoulder pain was actually a result of the problem in his neck. By July 2018, he had an MRI of his shoulder and it showed some mild degeneration.[33]

[74] The Claimant took prescription and non-prescription Tylenol for the pain in his neck and shoulders, and after the MQP, he also tried injections to address the pain.

[75] When the General Division asked the Claimant about how his shoulder pain and back pain from the car accident that stopped him from working, the Claimant stated that after the accident, he tried working when he could (part-time) but it was difficult and

[30] See GD2-100.
[31] See GD2-83.
[32] See GD2-123.
[33] See GD2-127.

painful to look behind his shoulder and to hold the steering wheel. The Claimant made it clear in his testimony that his back was not as sore in 2015 as it became later.

– **Diabetes and peptic ulcer disease**

[76] The Claimant had a consultation in April 2015 for his type 2 diabetes.[34] During that consult, the doctor confirmed that the Claimant had peptic ulcer disease as well. He was diagnosed in 2000, and the doctor confirmed that despite the medications he was taking, he had poor glycemic control and set out a standard plan for better managing his diabetes that involved changing some of his medications.

[77] In November 2016, the Claimant saw a specialist in gastroenterology and liver disease who noted that the Claimant had intermittent upper abdominal pain in the epigastric region and upper right quadrant, as well as some symptoms of gastroesophageal disease (GERD).[35]

[78] When I consider all of the Claimant's conditions together, the impact on the Claimant's ability to work becomes clear. The Claimant's headaches coupled with the neck pain especially but also to a lesser extent in his back and shoulders means that he has functional limitations that impact his ability to work, even when that work involves sitting (like driving a cab).

No Capacity to work

[79] In my view, the Claimant does not have capacity for work. To reach that conclusion, I have decided this in light not only of his medical situation as I have described, but also the evidence about his personal circumstances, his steps to manage his medical conditions (treatment efforts), and his efforts to get and keep work.

– **Personal circumstances**

[80] I need to consider how employable the Claimant is in the real world, given his:

[34] See GD2-94.
[35] See GD2-115.

- age
- level of education
- ability to speak, read, and write English
- past work and life experience.[36]

[81] When his MQP ended on December 31, 2016, he was 45 years old. He would have 20 years of working life until the age of retirement under the *Canada Pension Plan*. Age 45 is not too old to upgrade English skills or to retrain for different work, given the amount of time left to retirement or even early retirement. However, age is not the biggest barrier to the Claimant's ability to retrain, it is his physical limitations. The Claimant's headaches and pain even sitting in a taxi mean that he would not be regularly capable of language training or retraining for sedentary work.

[82] The Claimant testified that he came to Canada from Bangladesh in 2000 when he was around 30 years old (I suspect he was probably 28, depending on when he arrived in 2000). He speaks Bengali. He has an honours Masters degree in sociology from Bangladesh. The Claimant's education shows that he has academic ability in his first language.

[83] The Claimant speaks and understands some English. At the hearing, the General Division member observed that the Claimant speaks and understands English and he responded, "a bit, yes." He ask for the interpreter to interpret everything the General Division member said, including the things she said to start the hearing. The interpreter interpreted all of the questions asked of him, and he responded in his first language, Bengali.

[84] The Claimant explained that he was a student in Bangladesh and does not have any work history from there. In Canada, he worked in restaurants and factories. He also

[36] The Federal Court of Appeal listed these factors in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

did delivery work. He did not recall exactly when he started driving a taxi, but maybe between 2011 and 2013.

[85] I find that the Claimant's has some ability to speak and understand English, but he there are limits to his ability to speak, read, and write English as evidenced by his use of the interpreter at the hearings and his own description of his abilities. I cannot conclude that the Claimant is "fluent" in English based on the record before me. The Claimant's ability in English further narrows the kind of work employers would hire him to do.

[86] His lack of work experience outside of manual labour in Canada further limits the kind of work he is employable for in the real world. He lacks transferrable skills from his work experience in Canada that would assist him to work in a sedentary job.

[87] The Minister argues that two aspects of the Claimant's work history shows evidence of capacity for work.[37] I'll consider each of these arguments next.

– **Part-time work after the car accident**

[88] First, the Minister argues that the fact that the Claimant worked part time at the end of the MQP and after the MQP shows that he had capacity for work.

[89] 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.[38]

[90] 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 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.

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[37] See AD2-12.
[38] See the Federal Court's decision in *Monk v Canada (Attorney General)*, 2010 FC 48.

[91] Certain questions need asking when considering what post-relevant period work tells us about whether a claimant was incapable regularly of pursuing any substantially gainful work:

- Was the claimant able to find and keep a job, go to work regularly, and be reliable? (that is the "incapable regularly" part of the definition of a severe disability)
- Was the claimant capable of doing enough of the kind of work that would allow them to earn a living? (that is the "substantially gainful" part of the definition of a severe disability)
- Was the claimant working for a benevolent employer? (the "work" part of the definition of a severe disability covers this)

[92] If a claimant has some capacity for work during the relevant period, then they have to show that efforts to find and keep a job were unsuccessful because of their medical condition.[39]

[93] The Claimant testified that from 2016 to 2019 he worked only part-time a few hours a shift. He explained that if he felt up to it, he worked. If he did not feel up to it, he did not work. He testified that he worked 2 to 3 days, and then stayed home 3 or four days. He stated that working more than that caused stressed on his body and he would be ill and need to stay home.[40] A report dated November 12, 2018[41] confirms that the Claimant was working 3 to 4 hours per shift as a taxi driver but was no longer working full time.

[94] In my view, the Claimant's work was not self-employment, but was similar in the sense that he was able to set his own hours. He worked when he felt that he was physically able, and he did not work when he was not well enough. His ability to work

[39] See the Federal Court of Appeal's decision in *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[40] The Claimant testified about his at about 13:00 in the recording of the General Division's hearing.
[41] GD2-98

was not sufficiently predictable or reliable to earn a living. The work the Claimant did driving a taxi when he felt well enough did not add up to full-time hours.

[95] Further, the Claimant did not earn a living at this work. Although it was the same type of work he did before the accident (driving a taxi), he only worked when he felt well. Despite that extreme flexibility in working only when he was well, those hours did not add up to what the *Canada Pension Plan* calls substantially gainful work.

[96] The *Canada Pension Plan Regulations* (Regulations) define substantially gainful earnings. A claimant earns a substantially gainful amount if they earn the same or more than annual the maximum a person could receive in disability pension benefits from the Canada Pension Plan.[42] Substantially gainful earnings are calculated by adding a basic amount to an amount calculated using the claimant's contributions to the Canada Pension Plan.

[97] The Claimant's earnings after his accident come nowhere close to substantially gainful. The Claimant's record of contributions show that the Claimant did not earn more than $5,216 in unadjusted pensionable earnings for any year between 2015 and 2019.[43]

[98] I do not consider the work the Claimant did to be benevolent. Driving the taxi was still work, and I do not have any evidence on the record that would compare the Claimant's output or performance to other taxi drivers who might have worked irregular hours for various reasons.

[99] In light of all of these factors, I cannot conclude that the Claimant's efforts to earn a living are evidence of a capacity for work. I accept his evidence that he drove a taxi when he was well enough. This represented maximum effort on the Claimant's part and yet he was not capable regularly of pursuing substantially gainful work.

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[42] See section 68.1 of the *Canada Pension Plan Regulations* (Regulation).
[43] See GD2-56.

– **CERB**

[100] Second, the Minister argues that the fact that the Claimant received CERB is evidence that he was able to work.

[101] In my view, receiving CERB isn't evidence of the Claimant's capacity to work. I accept the Claimant's testimony about why he applied for CERB. He applied because his income was below the required threshold in 2019. He did not seem aware or to understand what the requirements of that program were even years later when the General Division member asked him about it.

[102] The Claimant testified that he applied for and received CERB. He stated that he applied because his tax return showed he made less than $5,000 in 2019. The General Division stated that to receive the benefit, he needed to be able to work, and that the benefit was for those who lost their job because of COVID. The Claimant did not acknowledge any understanding of this, and testified again that he applied based on his income for 2019.

[103] On balance, I find that the Claimant's personal circumstances contribute additional barriers to his employability over and above the pain in his neck and shoulders and the headaches he experiences. While the Claimant is not too old to retrain and he is well educated outside Canada, his current abilities in English and several aspects of his work history in Canada are additional barriers to employment.

Steps to manage medical conditions

[104] The Claimant has taken steps to manage his conditions and he has not refused any medical advice unreasonably.

[105] The Claimant has met his obligation to show efforts to manage his medical conditions.[44] He has not unreasonably refused treatment, either.[45] The Claimant

[44] Claimants need to take steps to manage their medical conditions: see,*Klabouch v Canada (Social Development)*, 2008 FCA 33; and *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[45] See the Federal Court of Appeal decision in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

provided evidence that in addition to consulting with his doctor and specialists (like the neurologist), he tried massage, chiropractic care, acupuncture, and naturopathic care, all since the accident in February 2015.[46] The CPP medical report from the Claimant's doctor confirms the medications and physiotherapy the Claimant tried.[47]

[106] The Claimant testified that he continues to see specialists about his injuries. He has monthly injections for pain. He testified about taking Tylenol 2's and Tylenol 3's for the headaches ("so many"), and then regular Tylenol, and now Tylenol 2's and regular Tylenol.

[107] A report from June 2019 confirms that the Claimant has pain despite physiotherapy and cortisone injections for his right shoulder.[48]

[108] The Claimant has had trouble managing his diabetes, but the diabetes symptoms that have caused him the biggest challenges in terms of working started after the end of his MQP so they are not as important when deciding whether he is entitled to the disability pension.

– **Efforts to get and keep work**

[109] In my view, the Claimant did not have capacity to work. The Claimant does not have to show that efforts to get and keep work were unsuccessful because of his medical condition.

[110] If I am wrong, and the Claimant does have some capacity to work, it is clear in light of all of the facts that he has made sufficient efforts to get and keep work, and those efforts failed because of his medical condition.

[111] After his car accident, he tried to continue to work at a sedentary position that he is qualified for given his personal circumstances (driving a taxi). He wasn't able to manage more than part-time hours or earn a substantially gainful income. The job gave

[46] See GD2-39.
[47] See GD2-80.
[48] See GD2-101.

him more flexibility than other sedentary types of employment, because when he felt up to it, he worked and when he did not feel up to it, he did not work.

[112] This highly flexible job within his physical abilities (and available to him given his personal circumstances) was still not sustainable. He stopped working altogether and eventually applied for a disability pension. He wasn't earning enough money at his part-time efforts to earn a living anyway.

The disability is prolonged

[113] The Claimant's disability is likely to be long continued and of indefinite duration. This means it is prolonged within the meaning of the CPP.[49]

[114] The Claimant's disability became severe when he had his car accident in 2015. His back, neck and shoulder pain became worse in 2018. His doctor confirmed that he recommended that the Claimant stop working, and that it is unknown whether he expects the Claimant to return to work. The doctor stated that the Claimant "is not able to work at this time and for indefinite period of time." The doctor wrote that in his opinion, the Claimant "won't be able to do any gainful work in future. I recommend permanent disability for him."[50] The Claimant's disability is prolonged.

[115] I am satisfied that the Claimant showed that he had a severe and prolonged disability at the time of his car accident in 2015 (before the end of his minimum qualifying period on December 31, 2016). He applied for the disability pension in October 2019. The earliest a disability can be considered to have started for the purpose of the disability pension is 15 months before the Claimant filed the application.[51] Fifteen months before the Claimant applied is July 2018. Payments start four months after that, which is November 2018.[52]

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[49] See section 42(2) of the CPP.
[50] See the CPP Medical Report at GD
[51] See section 42(2)(b) of the CPP.
[52] See section 69 of the CPP.

Conclusion

[116] I allowed the appeal. The General Division made an error of law. I gave the decision that the General Division should have given: The Claimant is entitled to a disability pension.

Kate Sellar

Member, Appeal Division