Citation: *JP v Minister of Employment and Social Development*, 2022 SST 858

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. P.
Respondent:	Minister of Employment and Social Development
Representatives:	Viola Herbert and Helli Raptis

Decision under appeal:	General Division decision dated February 15, 2022 (GP-20-1677)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	July 27, 2022
Hearing participants:	Appellant Respondent's representatives
Decision date:	August 31, 2022
File number:	AD-22-253

Decision

[1] The appeal is allowed. The General Division made an error when it found that the Appellant was not entitled to a Canada Pension Plan (CPP) disability pension. I am returning this matter to the General Division for another hearing.

Overview

[2] The Claimant, J. P., was formerly employed as a production operator in a fish processing plant. He left his job in October 2019 and hasn't worked since. He is now 51 years old.

[3] In January 2020, the Claimant applied for a CPP disability pension. He claimed that he could no longer work because of constant back pain from arthritis and damaged discs. He also claimed to be impaired by depression and Crohn's disease.

[4] The Minister refused the application because, in its view, the Claimant had not shown that he had a severe and prolonged disability as of the hearing date.[1] Among other things, the Minister noted that the Claimant's family doctor expected him to return to work in the near future.[2]

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division scheduled two hearings by teleconference but the Claimant did not appear at either of them. The General Division then considered the documents on file 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 some functional limitations but saw no indication that they affected his ability to work.

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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 October 15, 2020, GD2-4.

[6] The Claimant then asked the Appeal Division for permission to appeal. He insisted that he was disabled and argued that the General Division drew the wrong conclusions from the evidence.

[7] I granted the Claimant permission to appeal, although not for any of the reasons that he put forward in his application for permission to appeal. Instead, I saw an arguable case that the General Division had neglected to consider the Claimant's background and personal characteristics. Last month, I held a hearing by teleconference to discuss this issue in detail.

What the Claimant had to prove

[8] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[3]

[9] My job was to determine whether the General Division committed an error that fell into one or more of the above grounds of appeal.

Analysis

[10] I am satisfied that the General Division committed an error of law by disregarding the Claimant's background and personal characteristics. Because the General Division's decision falls for this reason alone, I see no need to consider the Claimant's remaining allegations.

[3] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

The General Division failed to consider the Claimant as a whole person

[11] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the General Division failed to apply an important legal test.

[12] The leading CPP disability case is *Villani v Canada*,[4] which requires claimants to be assessed in a real world context. According to *Villani*, decision-makers must consider claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience. This principle has been affirmed in cases such as *Bungay*,[5] which says that employability is not to be assessed in the abstract, but in light of "all of the circumstances," including the claimant's background and medical condition.

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

> 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 don't have to do that here because the [Claimant's] functional limitations didn't affect his ability to work by January 31, 2020 [*sic*]. This means he didn't prove his disability was severe by then.[6]

[14] 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 if they have already decided that a claimant's disability falls short of severe.[7]

[15] However, *Villani* suggests that the real world analysis is an integral part of the severity assessment:

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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] See General Division decision, paragraphs 35–37. It appears that this passage contains a typographical error and that the General Division intended to refer to the hearing date of January 31, **2022**.
[7] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.

> In my view, it follows from [the wording of section 42(2)(a)(i) of the *Canada Pension Plan*] that the hypothetical 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].[8]

[16] On the face of it, *Giannaros* appears to be inconsistent with *Villani*. However, I don't have to explore any such inconsistency here, because I am satisfied that *Giannaros* was never applicable to the Claimant's fact situation in the first place.

[17] *Giannaros* involved a claimant who disregarded clear medical advice that would have likely mitigated (reduced the effect of) her impairments. The case turned on a finding that the claimant had "failed to wear both her lumbar and neck braces, and that she had failed to lose weight and to exercise in a reasonable manner."[9] Thus, the Pension Appeals Board found it impossible to say whether her disability was "severe and prolonged" without knowing the scope for improvement in her condition.[10]

[18] No such difficulty exists with the Claimant. His medical file contains no hint that he ever disregarded his doctors' advice, and the General Division did not make any findings about his compliance with treatment recommendations. As such, the General Division had no justification to dispense with the *Villani* analysis.

[19] The Minister argues that there was no need to address *Villani* in this case because the Claimant's evidence was so weak. I disagree. It is true, as the Minister says, that the Claimant submitted relatively few medical reports and that his family physician thought he was capable of returning to work. However, the Claimant did provide **some** objective medical evidence in support of his disability claim,[11] and that,

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[8] See *Villani*, *supra*, note 4 at paragraph 38.
[9] See *Giannaros*, *supra*, note 7 at paragraph 3.
[10] The Pension Appeals Board (PAB), one of the predecessors of this Tribunal, used to hear CPP disability appeals on their merits. The Federal Court of Appeal subsequently upheld the PAB's finding of non-compliance.
[11] See *Villani*, *supra*, note 4, at paragraph 50.

absent evidence of non-mitigation, is enough to oblige an assessment of his ability to work in the real world.[12]

[20] The Claimant is now well into middle age. He has technical training and has worked for many years, although the file contains little information about what he did for most of his career. There is also an indication that the Claimant was charged with a criminal offence at some point.[13] Nevertheless, the General Division saw no need to consider the Claimant's age, education, and work and life history. This is an error of law.

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

Remedy

[22] When the General Division makes an error, the Appeal Division can fix it by one of two ways: it can (i) send the matter back to the General Division for a new hearing or (ii) give the decision that the General Division should have given.[14]

[23] The Tribunal is required to proceed as quickly as fairness permits. I would ordinarily be inclined to give the decision that the General Division should have given and decide this matter on its merits, but I do not think that the record is complete enough to allow me to do so. That is because it contains no testimony from the Claimant.

[24] It is true that the General Division scheduled two oral hearings and that the Claimant did not appear for either of them.[15] The record shows that the Claimant's

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[12] The Minister also relied on a case called *Canada (Minister of Human Resources Development) v Angelhoni* 2003 FCA 140, which says that the test for disability cannot rest on a claimant's subjective account of suffering (see paragraph 27). However, this statement of principle, which is entirely consistent with *Villani,* does not invalidate the Claimant's case because, as noted above, it rests on at least some objective medical evidence.
[13] See CPP Medical Report completed by Dr. Scott MacNeil, general practitioner, on March 23, 2020, GD2-74
[14] See DESDA, section 59(1).
[15] As recounted in its decision, the General Division scheduled teleconferences on January 12, 2022 and January 31, 2022.

father attempted to postpone the second hearing by phone but was advised by Tribunal staff that he had no authorization to do so.[16] It is true that the General Division went out of its way to provide the Claimant with an opportunity to testify, but it is also true that the Claimant, who lacks legal representation, appears to have an exceptionally weak understanding of what is required to advance a claim for benefits. For that reason, I see a gap in the evidence that makes me reluctant to decide the merits of this matter myself.

[25] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is inherently better positioned than I am to assess the Claimant's medical evidence and to hear whatever he has to say about his impairments and their impact on his ability to work. In this particular instance, I feel the best option is to refer this matter back to the General Division for rehearing.

Conclusion

[26] For the above reasons, I find that the General Division erred in law. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

[27] The appeal is allowed.

Member, Appeal Division

[16] See Tribunal registry office telephone memos dated January 24 and 26, 2022.