



Citation: *Minister of Employment and Social Development v DP*, 2022 SST 1050

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Minister of Employment and Social Development  
**Representative:** Ian McRobbie

**Respondent:** D. P.  
**Representative:** S. S.

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**Decision under appeal:** General Division decision dated March 3, 2022  
(GP-21-1449)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Teleconference

**Hearing date:** September 13, 2022

**Hearing participants:** Appellant's representative  
Respondent  
Respondent's representative

**Decision date:** October 11, 2022

**File number:** AD-22-354

## Decision

[1] I am allowing this appeal. The General Division made an error of law when it granted the Claimant a Canada Pension Plan (CPP) disability pension. To fix that error, I am giving the decision that the General Division should have given. I find that the Claimant does not have a severe and prolonged disability.

## Overview

[2] The Respondent (who I will refer to as the Claimant) is a 40-year-old former army reservist and commercial diver who developed post-traumatic stress disorder (PTSD) following a tour of duty in Afghanistan. He was last employed as an inspection and maintenance diver for Ontario Power Generation (OPG). He left that job in May 2018 after experiencing anxiety and flashbacks because of what he describes as workplace harassment.

[3] In December 2020, the Claimant applied for a CPP disability pension. The Minister refused the application because, in her view, the Claimant had not shown that he had a severe and prolonged disability.<sup>1</sup>

[4] The Claimant appealed the Minister's refusal of his application to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and allowed the appeal. The General Division found that, even though the Claimant was relatively young and had a good education, he was nonetheless incapable regularly of any substantially gainful occupation.

## The Minister's reasons for appealing

[5] The Minister is now asking for permission to appeal the General Division's decision. She alleges that the General Division made the following legal errors:

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<sup>1</sup> Coverage for the CPP disability pension is established by working and contributing to the CPP. In this case, the Claimant's earnings and contributions gave him disability coverage up to December 31, 2022. That meant that the Claimant had to show he became disabled as of the General Division hearing date.

- It failed to fully analyze the Claimant's obligation to attempt to return to work; and
- It failed to determine whether the Claimant's "real world" circumstances barred him from all occupations.

[6] Earlier this year, I granted the Minister permission to proceed because I thought her appeal had a reasonable chance of success. Last month, I held a hearing by teleconference to discuss the Minister's allegations in full.

[7] Now that I have heard submissions from both parties, I have concluded that the General Division's decision cannot stand.

## **Issue**

[8] There are four grounds of appeal to the Appeal Division. An appellant 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.<sup>2</sup>

[9] My job is to determine whether either of the Minister's allegations fall into one or more of the permitted grounds of appeal and, if so, whether any of them have merit. In this appeal, I have to answer the following questions:

- Did the General Division make an error of law by failing to analyze the Claimant's obligation to attempt to return to work?
- Did the General Division make an error of law by failing to consider the Claimant's ability to work in the "real world"?

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<sup>2</sup> See *Department of Employment and Social Development Act* (DESDA), section 58(1).

If I decide that the General Division made an error, I also have to decide how to fix that error.

## **Analysis**

[10] 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 made an error of law by improperly assessing the Claimant's efforts to return to work. Since the General Division's decision falls for this reason alone, I see no need to address the Minister's other reason for appealing.

### **The General Division improperly analyzed what the Claimant did to get back to work**

[11] In order to be entitled to a disability pension, claimants must show that they had a severe and prolonged disability. A disability is severe if it renders the claimant "incapable regularly of pursuing any substantially gainful occupation."<sup>3</sup>

[12] A Federal Court of Appeal decision called *Inclima* says that disability claimants must do what they can to find alternative employment that is better suited to their impairments:

Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.<sup>4</sup>

[13] This passage suggests that, if a claimant retains at least some work capacity, the General Division must conduct an analysis to determine (i) whether they attempted to find another job, and (ii) if so, whether their impairments prevented them from getting and keeping that job.

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<sup>3</sup> See *Canada Pension Plan*, section 42(2)(a)(i).

<sup>4</sup> See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[14] On top of that, disability claimants must make **meaningful** attempts to return to work.<sup>5</sup> They cannot limit their job search to the type of work that they were doing before they became impaired. That is because they must show that they are regularly incapable of pursuing **any** substantially gainful occupation.<sup>6</sup> Claimants who fail to pursue alternative forms of employment may be ineligible for benefits.

[15] The extent of a claimant's work effort is not just a side issue; it is an integral part of any disability analysis. A decision-maker, whether it's the Minister or the Tribunal, must have some concrete evidence of a claimant's ability to function—or not—in varied work settings. It is an error of law not to perform this analysis when dealing with a claimant who has at least some residual capacity.<sup>7</sup>

[16] In this case, the General Division's decision did not mention *Inclima* at all. That by itself would not be a problem if the General Division had actually analyzed the Claimant's job search efforts in compliance with *Inclima*'s principles. However, it did not. Instead, the General Division mentioned the Claimant's job search efforts only in passing.

[17] Let me explain.

[18] In its decision, the General Division explicitly found that, despite his limitations, the Claimant retained a capacity to work or retrain:

I agree with the Minister. I find that the medical evidence shows he has functional limitations that affect his ability to work. It also shows he can't go back to his regular job, **but he might be able to do a different job or retrain with his limitations** [emphasis added].<sup>8</sup>

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<sup>5</sup> See *Tracey v Canada (Attorney General)*, 2015 FC 1300, paragraphs 43 and 45, in which the Federal Court stated that the onus is on claimants to show that they made "sincere" efforts to meet the employment efforts test.

<sup>6</sup> See *Canada (Attorney General) v Ryall*, 2008 FCA 164.

<sup>7</sup> See *Tracey*, note 5, as well as *Yantzi v Canada (Attorney General)*, 2014 FCA 193; and *Minister of Employment and Social Development v A.M.*, 2017 SSTADIS 111.

<sup>8</sup> See General Division decision, paragraph 30.

Later, the General Division wrote:

The Minister says that the [Claimant] is young, has a good education, and skills that would support retraining. **I agree.** I find the [Claimant] has positive characteristics that would allow him to retrain or do other work [emphasis added].<sup>9</sup>

The General Division's finding of residual capacity triggered an obligation to conduct an *Inclima* analysis. In my view, the General Division failed to fulfill that obligation.

[19] As the General Division noted, the Claimant thought about working, retraining, and volunteering. But the General Division also found that he did very little to follow through on those thoughts:

The [Claimant] thought about going back to work for his parents as a delivery driver. That would give him flexibility. However, he is afraid of damaging his existing personal relationships any more than they are. He also could not deliver the furniture into people's homes because of his fear of the public.<sup>10</sup>

[20] The main thing here is that the Claimant did **not** actually make an effort to deliver furniture for his parents, so we have no way of knowing whether his inability to do so was because of his health condition. Yet the General Division overlooked the Claimant's failure to attempt the job, even though it had earlier recognized his residual work capacity. What's more, it apparently didn't occur to the General Division that the Claimant might have pursued any number of alternative employment opportunities. After all, there are other jobs that are flexible, there are other jobs that involve minimal contact with the public, and there are other potential employers who are not his relatives.

[21] The General Division applied the same flawed logic to the Claimant's thoughts of volunteering and retraining:

He asked the humane society and the food bank in his town if there were any volunteer opportunities. He filled out the

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<sup>9</sup> See General Division decision, paragraph 45.

<sup>10</sup> See General Division decision, paragraph 49.

application to volunteer, panicked and could not follow through with the process. He considered retraining through a veteran's vocational program, but his symptoms stopped him from following through.<sup>11</sup>

[22] Again, the evidence shows that the Claimant made little or no effort to do these activities; he only contemplated doing them. But the law says that, for a claimant who has residual capacity, contemplation is not enough. The claimant must make an effort and that effort must be meaningful.<sup>12</sup>

[23] The General Division's finding that the Claimant's symptoms stopped him from following through is at odds with its other finding that the Claimant had residual capacity. The General Division concluded:

The [Claimant] has tried to look for work and volunteer but has been unsuccessful because of his conditions. His experiences show he can't regularly do any work he could earn a living from.<sup>13</sup>

But reading the General Division's decision, it is impossible to know what standard of reasonableness, if any, the General Division applied to the Claimant's attempts to resume employment, such as they were. The General Division did not perform a real analysis of the Claimant's work efforts but simply took his word for it that he lacked the capacity to volunteer, retrain, or work at any job, even one relatively free of stress. That was an error of law.

## Remedy

### **There are two possible ways to fix the General Division's errors**

[24] The Appeal Division has the authority to address the General Division's errors.<sup>14</sup> I can refer this matter to the General Division for reconsideration or give the decision that the General Division should have given.

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<sup>11</sup> See General Division decision, paragraph 51.

<sup>12</sup> See *Tracey*, note 5.

<sup>13</sup> See General Division decision, paragraph 47.

<sup>14</sup> See DESDA, section 59(1).

[25] The Tribunal is required to conduct proceedings as quickly and fairly as circumstances allow. It has been nearly two years since the Claimant applied for the disability pension. Sending the parties back to the General Division would only prolong matters and likely result in a decision no different from mine.

### **The record is complete**

[26] I am satisfied that I can decide this matter myself. Both parties had adequate opportunity to make their respective cases at the General Division. I have access to a complete recording of the General Division hearing, in which the Claimant testified at length about his life and career, his medical conditions, and his functional limitations. Since this appeal largely revolves around issues of law and misinterpretation of the available evidence, I have enough information to assess the merits of the Claimant's disability claim.

[27] As a result, I am in a position to give the decision that the General Division should have given. In my view, if the General Division had properly considered the Claimant's efforts to obtain and maintain alternative employment, it would have concluded that the Claimant did not have a severe and prolonged disability as of the date of the hearing before the General Division.

### **The medical evidence does not point to a severe disability**

[28] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability.<sup>15</sup> I have reviewed the record, and I have concluded that the Claimant did not meet that burden according to the test set out in the *Canada Pension Plan*. I have no doubt that the Claimant suffers from significant psychological conditions, but I simply did not find enough evidence to suggest that symptoms associated with those conditions have prevented him from regularly pursuing substantially gainful employment.

[29] The Claimant has been diagnosed with PTSD, anxiety, and depression. He says that he is disabled because of low energy, low concentration, and low motivation. He

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<sup>15</sup> *Canada Pension Plan*, section 44(1).



has panic attacks. He can't sleep. He is hypervigilant and finds it difficult to be around other people.

[30] Although the Claimant may feel that he is unable to work, I must base my decision on more than just his subjective view of his capacity. In this case, the evidence, looked at as a whole, does not suggest severe impairment that prevents him from regularly performing any occupation. The Claimant is subject to some limitations, but he is not incapacitated from all types of work.

– **None of the Claimant's treatment providers ruled out work**

[31] The Claimant has been assessed and treated by several mental health professionals. While all have confirmed that the Claimant is subject to restrictions, none have ruled out employment:

- In January 2019, Dr. William Ammons, a clinical psychologist, wrote that the Claimant suffered from anxiety and paranoia, exacerbated by harassment and work demands. Dr. Ammons concluded that returning to his previous position seemed unrealistic given his lack of trust in his co-workers. Dr. Ammons urged the Claimant to consider an “alternative position at work.”<sup>16</sup>
- In June 2019, Roseanne VanHoof, a nurse practitioner, noted that the Claimant had declined several alternative work options with OPG, including returning to his old position, taking another position with lower pay, or retraining within the company. Ms. VanHoof concluded that the third option seemed “equitable,” provided he was not “placed in a location with daily exposure to triggers, namely in the form of staff that were directly involved in the harassment claim.”<sup>17</sup>
- In October 2019, Chris Hill, a psychological counsellor, wrote that the Claimant's therapeutic progress was negatively affected by targeted bullying

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<sup>16</sup> See Ontario Power Generation psychiatric assessment questionnaire dated January 21, 2019 and completed by Dr. William Ammons, clinical psychologist, GD2-112.

<sup>17</sup> See letter to Canada Life dated June 5, 2019 by Roseanne VanHoof, nurse practitioner, GD2-98.

and a toxic work environment: “If the workplace culture of the dive team had not been toxic, [the Claimant] would not have needed to go on leave in the first place.<sup>18</sup>

[32] These reports, as well as others, indicate that the Claimant was responding to treatment and “progressing well” until he encountered workplace harassment at his last place of employment.<sup>19</sup> The evidence suggests that the Claimant’s difficulties were specific to his demanding and stressful job at OPG and its particular combination of aggressive co-workers and unsympathetic bosses. While his treatment providers unanimously agreed that the Claimant was no longer capable of returning to his old job as a diver, none of them ruled out working in other jobs for other employers. In fact, Dr. Ammons and Ms. VanHoof explicitly contemplated the possibility that the Claimant might be capable of some other form of employment.

– **The Claimant’s background and personal characteristics are not barriers to work**

[33] Disability claimants must be assessed in a real world context. According to a leading case called *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.<sup>20</sup> This principle has been affirmed in cases such as *Bungay*,<sup>21</sup> 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.

[34] The Claimant has many assets that, all else being equal, would help him in the employment market. He is only 40—years from the typical age of retirement and young enough to adapt to changed circumstances. He is a native-born English speaker and a high school graduate. He has received post-secondary training and has a lengthy work history in positions of responsibility. The Claimant undoubtedly has psychological issues, but I can’t see how, when assessed in the context of his background and

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<sup>18</sup> See report dated October 10, 2019 by Chris Hill, MSW, GD2-95.

<sup>19</sup> See also Canada Life disability questionnaire completed by Roseanne VanHoof on November 20, 2019, GD2-90.

<sup>20</sup> See *Villani v Attorney General of Canada*, 2001 FCA 248.

<sup>21</sup> See *Bungay v Attorney General of Canada*, 2011 FCA 47.

personal characteristics, those issues would prevent him from attempting to work or retrain.

– **The Claimant has not attempted to work or retrain**

[35] The Claimant's medical evidence leaves open the possibility that he could manage a less stressful job than the ones he has had before. His background and personal characteristics position him well to seek out an alternative career. These factors convince me that the Claimant, despite his impairments, has residual capacity.

[36] As mentioned, claimants who have residual capacity must show that their efforts to return to work were unsuccessful because of their health condition.<sup>22</sup> In this case, the Claimant, who has residual capacity, did not make a meaningful attempt to work or retrain. For that reason, his disability claim must fail.

– **The Claimant declined alternative work options**

[37] The file also contained evidence that the Claimant passed up an opportunity to work in other positions at OPG, away from the toxic environment that led him to take stress leave.

[38] In her June 2019 letter, Ms. VanHoof, the nurse practitioner, noted that the Claimant had declined several alternative work options with OPG, including returning to the status quo of his old position, taking a position with lower pay, or retraining within the company.

[39] However, a disability claimant cannot be too selective in their work efforts. The courts have held that claimants must be willing to contemplate jobs that accommodate their impairments, even if those jobs are part-time, lie outside their preferred field, or pay less than what they used to get.<sup>23</sup>

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<sup>22</sup> See *Inclima*, note 4.

<sup>23</sup> See *Yantzi*, note 7, and *Kaminski v Canada (Minister of Social Development)*, 2008 FCA 225.

– **The Claimant testified that he didn't really try to look for work**

[40] The Claimant admitted at the hearing that he did not make a significant effort to look for work: “No I have not tried, other than thinking about it.”<sup>24</sup>

[41] The Claimant explained that he had not been able to do more because he was an “emotional wreck,” unable to manage anything other than filling out job applications without sending them. But this account flies in the face of evidence that his treatment providers thought he was capable of some form of work. They also noted that he was responsive to therapy and able to perform activities of daily living.<sup>25</sup>

– **Failure to make a reasonable attempt to return to work invalidates a disability claim**

[42] Claimants cannot succeed unless they demonstrate that they have made meaningful efforts to mitigate (alleviate) their disability.<sup>26</sup>

[43] In this case, the Claimant had demanding jobs, first as an armed nuclear security officer, later as a maintenance and inspection diver for a nuclear and hydroelectric power utility.<sup>27</sup> The Claimant was subjected to harassment by his team members and team leaders, and he went on sick leave in May 2018.<sup>28</sup> After the Claimant applied for long-term disability benefits through his workplace insurer, OPG offered to retrain him or to move him to another position. The Claimant rejected both options. After that, the Claimant did little to pursue an alternative occupation, one that might have involved less stressful duties, offered a more collegial working environment, or otherwise better accommodated his fragile mental health.

[44] In the end, I was unable to assess the extent of the Claimant's impairments because he never made a real effort to return to the employment market.

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<sup>24</sup> Refer to recording of General Division hearing at 34:30 to 43:30.

<sup>25</sup> See Chris Hill's October 2019 report (note 18), which said that the Claimant was making “progress” until he encountered workplace bullying in his last position at OPG. See also Veterans Affairs Canada disability questionnaire completed by Dr. Ammons on September 17, 2018, GD2-141.

<sup>26</sup> See *Rouleau v Canada (Attorney General)*, 2017 FC 534.

<sup>27</sup> See Claimant's application for CPP disability benefits dated December 4, 2020, GD2-43.

<sup>28</sup> See Chris Hill's October 2019 report, note 18.

## **I don't have to consider whether the Claimant has a prolonged disability**

[45] A disability must be severe **and** prolonged.<sup>29</sup> Since the Claimant has not proved that his disability is severe, there is no need for me to assess whether it is also prolonged.

## **Conclusion**

[46] I am allowing this appeal and overturning the General Division's decision. The General Division erred in law by failing to analyze the Claimant's return to work efforts in compliance with the principles set out in *Inclima*. Having performed my own assessment of the available evidence, I am not persuaded that the Claimant has a severe disability.



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Member, Appeal Division

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<sup>29</sup> See *Canada Pension Plan*, section 42(2)(a).