Citation: *KP v Minister of Employment and Social Development*, 2022 SST 1397

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	K. P.
Representative:	Kristen Slaney and Allison Schmidt
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter

Decision under appeal:	General Division decision dated March 18, 2022 (GP-21-110)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	October 25, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	November 9, 2022
File number:	AD-22-404

Decision

[1] The appeal is dismissed. The General Division did not make any errors.

Overview

[2] The Claimant is a 52-year-old former educational assistant. She stopped working in June 2018 because of neck and shoulder pain caused by a pinched nerve. At the time, she also experienced increasing symptoms related to anxiety and post-traumatic stress disorder (PTSD).

[3] In November 2019, the Claimant applied for a Canada Pension Plan (CPP) disability pension. She claimed that she could no longer work because of a wide variety of medical conditions, including:

- pinched nerve;
- depression, anxiety, and PTSD;
- psychotic breakdowns;
- acid reflux;
- cataracts and macular degeneration;
- endometriosis;
- herpes;
- high cholesterol;
- irritable bowel syndrome;
- migraines;
- obesity;
- osteoarthritis;
- skin cancer; and
- sleep apnea.

[4] The Minister found that the Claimant did not have severe and prolonged disability as of December 31, 2019, the last time she had CPP disability coverage.

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and dismissed

the appeal. It found that, while the Claimant had some limitations, the evidence did not show she was regularly incapable of a substantially gainful occupation.

[6] The Claimant is now requesting permission to appeal the General Division's decision. She alleges that the General Division made the following errors:

- It failed to consider her condition in its totality;
- It disregarded evidence that her physical health conditions contributed to her disability;
- It overlooked evidence about her levels of pain medication; and
- It failed to meaningfully apply the "real world" test to the facts of this case.

[7] In July, I gave the Claimant permission to appeal because I thought she had an arguable case. Last month, I held a hearing by teleconference to discuss his allegations in full.

Issues

[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 exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

[9] In this appeal, I had to decide whether any of the Claimant's allegations fell under one or more of the above grounds of appeal and, if so, whether any had merit.

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

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 none of the Claimant's reasons for appealing can succeed.

General Division considered the Claimant's condition in its totality

[11] The Claimant alleges that the General Division erred in law by failing to consider the cumulative impact of her symptoms and impairments, contrary to the Federal Court of Appeal's direction in a case called *Bungay*.[2] The Claimant acknowledges that the General Division referred to the *Bungay* principle in its decision, but alleges that it then went on to assess her physical and psychological conditions individually, rather than considering their combined effect on her work capacity.

[12] I don't see an error here. In my view, the General Division's approach to the evidence was consistent with *Bungay*.

[13] As the Claimant notes, the courts have confirmed that the CPP disability test may be satisfied by a combination of physical or mental disabilities—even where each condition might not be considered to be "severe" in itself. *Bungay* says that employability is not to be assessed in the abstract, but rather in light of all of the circumstances, including the claimant's overall medical condition, which comprises all the impairments that could affect employability, not just the "biggest" or "dominant" ones.

[14] In its decision, the General Division cited this principle[3] and proceeded to methodically classify each one of the Claimant's claimed medical conditions under the following categories:

- medical conditions unsupported by medical evidence;

[2] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[3] See General Division decision, paragraph 7.

- medical conditions that were supported by medical evidence but **did not** result in ongoing functional limitations; and
- medical conditions that were supported by medical evidence and **did** result in ongoing functional limitations.

[15] For reasons that I will explore further, I don't see how the General Division erred in how it characterized the Claimant's many ailments. The General Division found that the conditions in the first category—including allergies, dwarfism, and periodontal disease—were unsubstantiated by the medical evidence. It found that the conditions in the second category—including depression, endometriosis, irritable bowel syndrome, osteoarthritis, and a pinched nerve—were all managed with medication, physiotherapy, or surgery. It found that the conditions in the third category—including anxiety, paranoia, and PTSD—produced functional limitations but nothing that rendered her regularly incapable of substantially gainful employment.

[16] I agree with the Claimant that it is not enough to state the law correctly; it must also be applied correctly. However, I don't see any error in how the General Division assessed the Claimant's condition in this case.

[17] In effect, the General Division found that all the medical conditions listed in the first two categories were non-factors. According to the General Division, none of them, individually or cumulatively, prevented the Claimant from working. That left only three psychological conditions that, in the General Division's view, affected her ability pursue employment.

[18] One of the General Division's jobs is to make findings of fact. In this role, the General Division is entitled to some leeway in how it chooses to weigh that evidence.[4] Here, I see no reason to interfere with the General Division's findings, which it made after what appears to be a thorough summary of the Claimant's medical file. I am

[4] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

satisfied that the General Division looked at the Claimant's condition as a whole and did not consider her various complaints in silos.

[19] In making her disability claim, the Claimant cited an unusually large number of medical problems. However, the severity of a disability claimant's impairments matters more than their quantity—particularly where there is evidence that some or all of those impairments are under control. A claimant is more likely to succeed if they can show that they have a single severe medical condition rather than a dozen mild or managed ones. In this case, the Claimant failed to show that her impairments, individually or collectively, added up to a severe disability.

The General Division considered the Claimant's physical health conditions

[20] The Claimant alleges that the General Division erred by focusing on her mental health problems at the expense of her physical impairments. In particular, she says that the General Division was wrong to find that she experienced no functional limitations because of (i) osteoarthritis and bunions in her feet and (ii) a pinched nerve in her neck.

[21] I don't see merit in this argument.

[22] The General Division found evidence that the Claimant had problems with her feet but no evidence that those problems caused functional limitations. To support this finding, the General Division cited a report in which a podiatrist diagnosed the Claimant with "mild to moderate" hallux valgus (bunions) and with left mid-foot degenerative changes associated with osteoarthritis.[5] The podiatrist gave the Claimant a prescription for toe spacers and a custom or off-the-shelf orthotic, but she said nothing about any permanent impairment.

[23] The General Division also found no evidence that the pinched nerve in the Claimant's neck caused her functional limitations. The General Division pointed to a

[5] See report dated November 21, 2018 by Teri Fisher, podiatrist at the Footbridge Clinic, GD2-29.

report in which a physiotherapist declared that the Claimant was "functioning at a level that would allow her to return to work at this time."[6]

[24] The General Division, citing medical evidence, found nothing to suggest that the Claimant's bunions, osteoarthritis, or pinched nerve were impediments to her returning to work. As noted previously, the General Division is entitled to a measure of deference in how it assesses the available evidence. I don't see any error in the General Division's findings, and I don't see any reason to interfere with them.

The General Division did not ignore evidence about the Claimant's medication

[25] The Claimant alleges that the General Division ignored a key aspect of her medical evidence: the number and type of medications, including the opioid derivative Tylenol #3, that she has tried for her pain.

[26] I am not persuaded by this argument.

[27] As finder of fact, the General Division is presumed to have considered all the evidence before it.[7] The fact that the General Division did not mention the Claimant's pain medication regime in its decision is not necessarily an indication that it ignored them. In any event, I see few mentions of Tylenol #3 in the Claimant's fairly sizeable medical file,[8] suggesting that it did not play a large role in her pain management regime.

The General Division did not overlook the Claimant's stature when it applied the "real world" test

[28] The Claimant alleges that the General Division did not meaningfully apply the *Villani* case, which requires employability to be assessed in a "real world" context. In particular, the Claimant says that the General Division considered her dwarfism only as

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[6] See discharge report dated June 4, 2018 by Matt Peters, physiotherapist at Back in Motion Rehab Clinic, GD2-59.
[7] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] There is a reference to a 30-pill Tylenol #3 prescription in Dr. Jenet Sun's office note dated August 28, 2018, GD2-21.

a component of her disability, rather than as a personal characteristic that was likely to affect her future work prospects.

[29] I have carefully considered this argument. In my view, the General Division's approach was consistent with *Villani*.

– **The General Division performed a *Villani* analysis**

[30] *Villani* requires decision-makers to consider claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience. In the words of the Federal Court of Appeal:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) [of the CPP] he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.[9]

[31] This passage suggests that the General Division, in its role of fact finder, should be given some leeway in how it assesses a claimant's background. It also implies that **whether** the test for disability was applied matters more than **how** it was applied. This approach happens to align with Federal Court of Appeal decisions that prevent the Appeal Division from intervening on questions of mixed fact and law.[10]

[32] In its decision, the General Division correctly cited *Villani* and analyzed in detail the likely impact, given her impairments, of the Claimant's background and personal characteristics on her employment prospects:

> I find that the [Claimant] can work in the real world; she was still able to work as of December 31, 2019. She was only 49 years old by then. She is fluent in English. Although she testified that she struggled in high school, she did finish, and she went on to complete the coursework for an Early Childhood Education

[9] See *Villani v Canada (Attorney General)*, 2001 FCA 248, paragraph 49.
[10] See *Quadir v Canada (Attorney General)*, 2018 FCA 21.

> program in 2008. In 2016 and 2017, she completed First Aid and crisis prevention training. She currently takes self-paced online courses. All of this demonstrates an ability to retrain. world.[11]

[33] In light of this passage, it cannot be said that the General Division was unmindful of *Villani* or that it did not attempt to apply its chief principle. It examined the Claimant's profile and found that she was still capable of pursuing an alternative career, even at her age and with her education. From that standpoint, the General Division fulfilled its duty under the law.

[34] It is true that, in considering the Claimant's capacity to work in the "real world," the General Division made no mention of the potential difficulties that a small person might face while attempting to obtain and maintain a job. However, as I will discuss below, the General Division had good reason to give those difficulties minimal weight.

– **There is no precedent for considering height as a *Villani* factor**

[35] The *Villani* factors are deeply rooted and personal. They are intrinsic to an individual's identity and sense of self. For the most part, they are difficult, if not impossible, to change.

[36] When I granted the Claimant permission to appeal, I thought there was an argument that height was analogous to some of the factors specifically named in *Villani*. Height, like age, is an immutable personal characteristic, one that might affect a disability claimant's employment prospects in the competitive labour market.

[37] It seems reasonable to suppose that, compared to others, persons of short stature face limited employment opportunities. For one thing, their stature makes them simply incapable of performing certain physical jobs. For another, they may be subject to bias and discrimination that reduces the pool of jobs for which they might otherwise be considered.

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[11] See General Division decision, paragraph 33.

[38] However, there appears to be no previous cases in which short stature was assessed as part of a *Villani* analysis. Certainly, the Claimant did not cite any precedents, and my own search of the case law turned up nothing. *Villani* has been applied thousands of times, not just by this Tribunal, but at the Federal Court level, and it is telling that no one until now has made it an issue.

– **The Claimant did not plead her height before the General Division**

[39] The Claimant has another problem. She did not make her height an issue at the General Division. She did not argue that her height affected her employability. In fact, her height hardly came up at all.

[40] The Claimant did not refer to her build or stature in her application for the CPP disability pension, although her psychiatrist did list her height as "4.5" feet in a medical questionnaire that accompanied an application for provincial benefits.[12] Later, in written submissions to the General Division, the Claimant's legal representative mentioned, among her client's disabling conditions, "dwarfism," although she did so in passing.[13] The submissions did not elaborate on any specific difficulties that the Claimant might have had as a result of her height. Nor did the submissions refer to any supporting medical documents that formally diagnosed the Claimant with dwarfism or discuss specific limitations that she faced because of that condition. It is also notable that, in a section addressing the Claimant's daily struggles and her need for accommodations, the submissions did not say anything about her height.[14]

[41] I also listened to the recording of the General Division hearing. The Claimant's stature was briefly mentioned twice. At one point, asked about her activities of daily living, the Claimant said that she had to use a ladder to reach items on shelves because she was four feet, five inches tall.[15] Her representative did not ask her to elaborate. Later, the presiding General Division member asked the Claimant if it was her height or

[12] See Medical Report dated April 25, 2019 by Martina Smit, psychiatrist, for the British Columbia Persons with Disabilities Designation Application, GD2-167.
[13] See Claimant's written submissions dated August 17, 2021, GD3-5, paragraph 5.
[14] See Claimant's written submissions dated August 17, 2021, GD21–22, paragraphs 56–58.
[15] Refer to General Division recording at 46:30.

her shoulder injury that prevented her from lifting. The Claimant replied, "Well, I'm quite small, but the pinched nerve is from the injury that I got from work, so that's part of it. Also maybe a little bit due to my height as well, but the majority of it is from the injury."[16] The discussion then moved onto another topic.

[42] These exchanges leave no doubt that the General Division considered the Claimant's height. They also suggest that the Claimant herself did not regard her modest stature as a significant contributor to her disability. Moreover, neither the Claimant nor her representative explicitly argued before the General Division that her height hindered her from obtaining and maintaining another job. The General Division therefore can't be blamed for giving it minimal weight as a *Villani* factor.

Conclusion

[43] The General Division did not commit any errors that fall within the permitted grounds of appeal. From what I can see, the General Division made a full and genuine effort to weigh the evidence and apply the law. For that reason, its decision stands.

[44] The appeal is dismissed.

Member, Appeal Division

[16] Refer to General Division recording at 1:01:30.