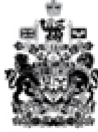

Citation: *LG v Minister of Employment and Social Development*, 2022 SST 1136

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	L. G.
Representative:	J. H.
Respondent:	Minister of Employment and Social Development
Representative:	Jared Porter

Decision under appeal:	General Division decision dated December 28, 2021 (GP-20-1086)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	July 12, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	October 27, 2022
File number:	AD-22-179

Decision

[1] I'm dismissing the appeal. The General Division made an error. But the error does not change the outcome for the Claimant: he is not entitled to a disability pension. These reasons explain why.

Overview

[2] L. G. (Claimant) applied for a Canada Pension Plan (CPP) disability pension in March 2019. He explained that he had been unable to work since August 1985 because of a pinched nerve in his back, diabetes, and a vascular disease in both legs.

[3] The Minister refused the Claimant's application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division decided that the Claimant did not show that his condition was severe on or before December 31, 2002.

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (Act).

[5] The General Division made an error of law by failing to explain why it was not necessary to consider the Claimant's personal circumstances, given that there was medical evidence that he had medical conditions on or before the end of the minimum qualifying period (MQP). I will give the decision that the General Division should have given. Considering all of the factors including the Claimant's personal circumstances, he did not prove that his disability was severe on or before December 31, 2002. The Claimant is not entitled to a disability pension.

Issues

[6] The issues in this appeal are:

a) Did the General Division reach its findings about the Claimant's functional limitations on or before December 2002 by ignoring or misunderstanding the Claimant's medical evidence and testimony at the hearing?

b) Did the General Division make an error of law by failing to consider the Claimant's personal circumstances before concluding that his disability was not severe?

c) If the General Division made any of these errors, what should I do to remedy (fix) them?

Analysis

[7] In this decision, I'll describe the approach the Appeal Division takes when reviewing General Division decisions. Then I'll explain what I've decided about the alleged errors. Then I'll give the decision that the General Division should have given.

Reviewing General Division decisions

[8] The Appeal Division doesn't give the Claimant or the Minister a chance to re-argue their case again from the beginning.[1] Instead, the Appeal Division reviews the General Division's decision to decide whether it contains errors.

[9] That review is based on the wording of the Act, which sets out the "grounds of appeal." A claimant has a ground of appeal where the General Division makes an important error of fact either by ignoring or misunderstanding the evidence (such that the finding isn't supported by the evidence).[2]

[10] Following the law in this area requires assuming that the General Division has considered all the evidence, even if the General Division does not discuss all of that evidence in its decision. However, a claimant can overcome that assumption if the evidence was important enough that the General Division should have discussed it.[3]

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[1] See *Gittens v Canada (Attorney General)*, 2019 FCA 256.See also section 58(1) of the *Department of Employment and Social Development Act* (Act).
[2] For more about errors of fact, see *Walls v Canada (Attorney General)*, 2022 FCA 47.
[3] See the Federal Court of Appeal Decision *Simpson v Canada (Attorney General)*, 2012 FCA 82 and the Federal Court decision in *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

[11] A claimant also has a ground of appeal where the General Division makes an error of law.[4]

No error of fact about functional limitations on or before the end of the MQP

[12] The General Division didn't make an error of fact about when the Claimant's disabilities caused functional limitations that affected his ability to work.

[13] I granted the Claimant permission to appeal because I found that it was arguable that the General Division made an error of fact about the impact of the Claimant's conditions on his ability to work at the time of the MQP. However, I have had the benefit of full argument from both the Claimant and the Minister now on this question.

[14] I cannot conclude that the General Division ignored either the medical evidence or the testimony in a way that amounts to an error of fact about the impact of the Claimant's condition on his ability to work before the end of the MQP.

[15] The General Division didn't discuss the report from the Claimant's doctor dated after the MQP, but I cannot find that this led to an error of fact. The report was dated nine years post-MQP by a doctor who wasn't treating the Claimant during the MQP. The report wasn't clear about when the Claimant's conditions started and what impact they had on his functioning before the end of the MQP. The General Division didn't question whether the Claimant had pain before the end of the MQP; the question was whether that pain consistently kept him from working at that time. In light of that more specific question, the report was not so important that I can infer that the General Division ignored it.

[16] Similarly, the General Division didn't discuss some aspects of the Claimant's testimony and the testimony of his witness, but I cannot conclude that the General Division made an error of fact by ignoring testimony. The Claimant's argument about the testimony is more about how much weight the Claimant would have liked the General

[4] See section 58(1)(b) of the Act.

Division to put on that evidence. The way the General Division weighed evidence cannot form the basis for a successful appeal.[5]

– **The report**

[17] The report from the Claimant's doctor dated December, 2020 states that the Claimant had been her patient since July, 2011.[6] The doctor states that the Claimant's back and leg pain "long predated" when the Claimant became her patient. She states that she is unable to give an exact duration for the disability, but that it has "certainly been well over a decade, likely much longer."

[18] The report explains that the Claimant has different types of pain, coming from lumbar degenerative disc disease, nerve pain from spinal arthritis, peripheral arterial disease and possible diabetic neuropathy. The letter states that this means he has mechanical back pain, neurological back and leg pain, and ischemic leg pain. It lists specific restrictions in terms of carrying, lifting, pushing, pulling, and walking.

[19] One possible interpretation of the report is that it gives the doctor's opinion that the Claimant had back and leg pain starting at least 10 years before she wrote the letter, that is in 2010, but likely much longer (which may or may not include the Claimant's MQP of 2002).

[20] Another possible interpretation is that the doctor is saying that the onset of disability was 10 years before she started treating the Claimant in 2011, which would be 2001 (which is within the Claimant's MQP), but likely much longer.

[21] In either case, this letter describes the types of pain the Claimant had, and the limits to his functioning as a result.

[22] The doctor wrote the letter long after the end of the Claimant's MQP, but that is not a reason to ignore it. The General Division stated that when a Claimant fails to prove that they suffered from a severe disability before the MQP, the medical evidence

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[5] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[6] See GD3-3 to 4.

from after that date is irrelevant. The General Division provided a footnote to the Federal Court's decision in a case called *Dean* to support this idea.[7]

[23] In my view, this part of the *Dean* decision doesn't excuse the General Division from considering post-MQP evidence when the Claimant has provided some objective evidence of a disability on or before the MQP. There is reference in the doctor's notes before the end of the MQP to the Claimant's back pain, and there is a document immediately after the MQP that says the Claimant's problem was longstanding and exacerbated on December 26, 2002 (during the MQP).

[24] The Minister argues that the follow up letter from the family doctor wasn't important enough that the General Division needed to discuss it: it doesn't help to explain whether the Claimant had a severe disability as of December 2002, the last day of the Claimant's MQP. The Minister says the doctor's report is "silent" on that period.

[25] In my view, the General Division's failure to discuss the doctor's note does not warrant me inferring that the General Division ignored the note and therefore made an error of fact. The General Division didn't make an error by failing to discuss the report because it wasn't important enough to the key issue the General Division was trying to resolve. It didn't help the General Division to decide what impact the pain had on the Claimant's ability to work before the end of the MQP.

[26] It seems from the General Division decision that it was not when the Claimant's conditions started that was at issue, but rather whether the Claimant was able to prove that his conditions were severe and prolonged on or before the end of the MQP. The General Division concluded that the medical evidence failed to show that the Claimant **suffered consistently** from back and leg pain before the end of December 2002.[8]

[27] The doctor's letter is potentially important in the sense that it explains the type of pain that the Claimant has and the impact that this pain has on specific functioning like

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[7] See paragraph 27 in the General Division's decision. That paragraph refers to the decision in C*anada (Attorney General) v Dean*, 2020 FC 206.
[8] See paragraph 22 in the General Division decision.

carrying, lifting and more. But it’s not the only piece of evidence that shows the Claimant had leg and back pain before the end of the MQP.

[28] The General Division’s decision is focussed more specifically about whether the Claimant’s pain and limitations meant that he was “incapable regularly” of substantially gainful work before the end of the MQP. This doctor’s letter can’t really help with that issue: she can’t paint a detailed picture of the Claimant’s consistent functional limitations because she wasn’t treating the Claimant at that time.

[29] The General Division didn’t discuss this report in its decision, but it didn’t have to because it wasn’t important enough. I find that the report didn’t speak to the key issue the General Division was grappling with, which was whether the Claimant’s back and leg pain resulted in limitations that were keeping him from being capable regularly of work.

[30] The next question is whether the testimony at the hearing (from the Claimant and his witness) may have filled in that gap in the evidence the General Division identified. Did the General Division ignore testimony leading to an error about whether the Claimant’s functional limitations impacted his ability to work before the end of the MQP?

– **Testimony**

[31] The Claimant argues that the General Division made an error by failing to consider the testimony at the hearing. The Claimant argues that if the General Division had understood or discussed (and not ignored) the testimony at the hearing, then the General Division would have allowed the Claimant’s appeal. The Claimant and his witness gave their evidence under oath and they were credible. The testimony made it clear that the Claimant’s back pain prevented him from working.[9]

[32] It is clear to me that the General Division didn’t ignore the testimony from the hearing. In reviewing the Claimant’s submissions on this point, the Claimant is really

[9] See AD2-1.

arguing that the General Division failed to give enough weight to the testimony about his disability on or before December 31, 2002.[10]

[33] I understand the Claimant's concern that the testimony does not seem to form a key part of the General Division's analysis. Claimants do not always have medical documents that set out all of the functional limitations associated with their conditions. As a result, testimony about how their disabilities affected their functioning on or before the MQP is important. Where the testimony is credible and reliable, it can help to provide a more complete picture to the General Division of the Claimant's functioning on or before the end of the MQP.

[34] In this case, I cannot conclude that the General Division ignored the testimony. The decision dedicates several paragraphs to summarizing the testimony from both the Claimant and his witness.[11]

[35] It is the General Division's job to hear the evidence and weigh it. The Appeal Division cannot find that the General Division made an error in applying the facts to the law.[12] The Appeal Division cannot conclude that the General Division made an error because it failed to give more weight to the testimony.

[36] The testimony did make it clear that the Claimant had back pain on or before the end of the MQP. However, the question as to whether the testimony established that the Claimant's pain made him incapable regularly of work was a question for the General Division to decide. That's applying the facts to the law. There's no part of the testimony I can see that the General Division misunderstood on this point.

[37] Whether I would have drawn the same conclusions about the Claimant's functional limitations at the time of the MQP based on that testimony in combination with the medical evidence isn't relevant.

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[10] See AD1-4.
[11] See paragraphs 13 to 16 in the General Division decision.
[12] See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

[38] A final note about the testimony. Deciding when the disability resulted in the functional limitations that affected work is key. To be eligible for the disability pension, claimants need to provide medical evidence in support of their application that is about their condition on or before the end of the MQP.[13] Claimants can show this though post-MQP medical evidence that speaks to the Claimant's condition during the MQP.[14] There is no requirement in law for the objective medical evidence alone to establish the existence of the functional limitations during the MQP.

[39] In this case, I can see how the Claimant may feel that the General Division's decision is mostly about medical evidence, and does not clearly explain how it is that his testimony was also part of the analysis, rather than only summarized at the beginning. However, the way the General Division weighed the Claimant's testimony is not a ground of appeal that I can consider.

Failing to explain why it wasn't necessary to consider personal circumstances

[40] The General Division made an error of law by failing to explain why it wasn't necessary to consider the Claimant's personal circumstances.

[41] In *Villani*, the Court guided decision-makers on the correct approach to the test for a severe disability. The Court considered the text, context and purpose of the section that defines a severe disability.

[42] 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.

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[13] *Canada (Attorney General) v Dean*, 2020 FC 206; and see section 68.1 of the *Canada Pension Plan Regulations*, requiring claimants to provide a medical report in support of their application for the disability pension.
[14] See the Federal Court decision in *Bowles-Fraser v. Canada (Attorney General)*, 2018 FC 308

Claimants still need to show medical evidence: not everyone who has trouble getting and keeping work will be eligible for a disability pension.[15]

[43] The General Division stated "since I am not persuaded that the [Claimant] suffered from a severe disability, it is not necessary for me to apply the "real world" approach."[16] The General Division provided a footnote to a Federal Court of Appeal decision called *Giannaros*.[17]

[44] The Minister argues that the General Division made no error by failing to consider the Claimant's personal circumstances. The Minister argues that *Giannaros* clearly states that where the decision maker isn't persuaded that the Claimant had a severe and prolonged disability as of the MQP, there is no need for it to consider the Claimant's personal circumstances.

[45] In my view, the General Division still needed to explain how or why *Giannaros* applies in this case.

[46] There needs to be some objective evidence of a serious medical condition.[18] 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.

[47] 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

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[15] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[16] See paragraph 29 of the General Division decision.
[17] *Giannaros v Canada (Minister of Social Development)*, 2004 FCA 187.
[18] *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.

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.

[48] 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.[19] The first decision maker did not consider Giannaros' personal circumstances. The Court decided on judicial review that the decision was still reasonable.

[49] The Appeal Division has 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."[20] 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.

[50] 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*.

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

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[19] 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.
[20] See paragraph 19 in the Appeal Division's decision in *T.M. v Minister of Employment and Social Development*, 2017 CanLII 73237
[21] *Doucette v Canada (Minister of Human Resources Development)*, 2004 FCA 292, para 6 citing *R. v Sheppard*, [2002] 1 SCR 869.

[52] The General Division's reasons for failing to analyze the Claimant's personal circumstances are insufficient. Stating that there was no need to consider personal circumstances when you are not persuaded that the Claimant has a severe disability 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.

[53] In this case, it is clear from several pieces of medical evidence that that the Claimant had back and leg pain at the time of the MQP.[22] The question about what impact that had on his ability to work was in question, but all the more reason for the General Division to consider all the factors that affected the Claimant's employability at that time.

Fixing the error

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

[55] 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]

[56] 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.

[57] Giving the decision that the General Division should have given is an efficient way to move forward in many cases.[25] I listened to the General Division hearing and reviewed the documents in the case. I have the information that I need to decide

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[22] The General Division decision acknowledges that the Claimant visited his family doctor for back pain before the end of the MQP, and that there is a record of the Claimant's visit to emergency for his back in December 2002.
[23] See section 59 of the Act.
[24] See section 64 of the Act.
[25] See section 2 of the *Social Security Tribunal Regulations* about the need to proceed in a way that is fast, fair, and just.

whether the Claimant is eligible for a disability pension. Giving the decision that the General Division should have given is fair, fast, and just.

What do you have to prove to be eligible for a disability pension?

[58] 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.”[26]

[59] Each part of that definition has meaning. A severe disability in the CPP context links to what a person can and cannot do when it comes to work. The things people cannot do because of a disability are sometimes called “functional limitations.”

Considering the Claimant’s eligibility for a disability pension

[60] In my view, the Claimant hasn’t proven that he has a severe and prolonged disability within the meaning of the CPP by the MQP. I have considered:

- the Claimant’s medical conditions (which involves assessing the conditions in their totality—all of the possible impairments that could affect capacity to work)[27]
- the Claimant’s background (including age, level of education, language abilities, and past work and life experience)[28]
- the steps the Claimant has taken to manage the medical conditions, and whether he has unreasonably refused any recommended treatment[29]

[26] See section 42(2) of the *Canada Pension Plan*.
[27] The Federal Court of Appeal discussed this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[28] These factors I need to consider come from a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.
[29] See *Klabouch v Canada (Social Development)*, 2008 FCA 33; and *Sharma v Canada (Attorney General)*, 2018 FCA 48. In those cases, the Federal Court of Appeal explained that claimants need to make reasonable efforts to manage medical conditions. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants seeking a disability

Medical conditions

[61] The Claimant does not have a lot of medical evidence from the time of his MQP.

[62] I understand from the Claimant's evidence that he moved to PEI for family reasons. He testified that he saw several back specialists before moving to PEI, but the Minister was not able to access those records.

[63] The Claimant's family doctor in PEI saw the Claimant for back pain in February 2002. The doctor's notes are almost impossible to read, but they do show that he received a prescription for his back pain.[30]

[64] Then on one of the last days before the end of the MQP (Boxing Day, 2002) the Claimant's back was worse. He had tried to shovel some snow. He went to the emergency room at the hospital in January 2003 with a sore back and left leg pain. The emergency room doctor stated that the Claimant had a herniated lumbar disc. He also stated that he had longstanding L4 and L5 disc disease with recent exacerbation down his left leg.[31] The pain was serious enough that the doctor prescribed opioid medication to the Claimant.

[65] The Claimant's back does not seem to have improved. He had other health problems diagnosed after the MQP, like hemorrhoids, angina, and diabetes and peripheral vascular disease. These diagnoses aren't as important to the Claimant's application for the disability pension because they came after the end of the MQP.

[66] After the MQP, in 2006, his low back pain was acute. The doctor prescribed medication for pain and muscle spasms.[32]

[67] The Claimant started seeing his current family doctor in July 2011. That doctor isn't able to pinpoint when the Claimant's back and leg pain started. She was not treating the Claimant before 2011. It's really not clear to me whether the doctor was

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pension should not unreasonably refuse treatment. In a case like that, it is important to consider the expected impact of the treatment on the Claimant's disability.

[30] See GD10-8.

[31] See GD10-46.

[32] See GD10-10.

trying to say that the Claimant's back and leg problems were already started by December 2002 or not. There is more than one way to understand her letter.[33]

[68] However, when I look at the medical evidence, all together, I conclude that the Claimant had back and leg pain. He was doing some physical labour by the end of the MQP at a dairy farm, and it seems that eventually this labour was too strenuous for him and he had to stop.

[69] The Claimant's current doctor cannot pinpoint a specific date for when the Claimant's back and leg problems started. She doesn't say (and couldn't really know) whether all of the functional limitations she lists that the Claimant has more recently were also affecting the Claimant in December 2002. But that report isn't the only objective medical evidence about the Claimant's sore back. There is other evidence too, like:

- The reference to the Claimant's sore back in the doctor's notes in February 2002[34]
- the emergency room doctor stated immediately after the end of the MQP in January 2003 that the Claimant had longstanding L4 and L5 disc disease with a recent exacerbation down the left leg and that he injured it further at the end of December 2002 (that's before the end of the MQP)
- the testimony from the Claimant, who said that his back and leg pain started before he started working on the dairy farm in 2002 and that he stopped that job because he couldn't stand the pain anymore
- the testimony from the Claimant's witness, who explained in some detail that the Claimant's back was bad when she first moved in with him back in 2000 or 2001, and that he was in "rough shape" when he was trying to work in 2002

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[33] See paragraphs 19 to 20 in this decision.
[34] See GD10-8.

[70] Given all of this evidence, I'm satisfied that the Claimant's back and leg pain started before the end of the MQP.

The Claimant had functional limitations that affected his ability to do physical labour

[71] It is not enough for the Claimant just to have some medical evidence that he had back and leg pain during the MQP. He needs to show that he had functional limitations (things he couldn't do) that would affect his ability to work.

[72] The best evidence about the Claimant's functional limitations in this file come from several places.

[73] First, I'll consider the testimony. The Claimant testified that his major problem in 2002 was his back pain. He had seen back specialists before 2002 (that is, before moving to PEI). He said that the specialist told him that there was a 50% chance that surgery would leave him paralyzed. He testified that he was off work because of back pain before he left for PEI. The Claimant didn't produce records to back up his story about his back pain before he came to PEI.

[74] However, I found he testified in a clear way that made sense. He stated that he had pain in his back and his legs, and that it affected his ability to do labour work like shovelling or using a chain saw. He said he can't stay on his legs too long. He confirmed he had done cooking at home but that he stopped working at the dairy farm when he couldn't stand the back pain anymore. He was doing labour in the fields and feeding cattle.

[75] There is some medical information before the end of the MQP to suggest that the Claimant had problems with his back and leg. There is no medical evidence from after the MQP to contradict the Claimant about his back – there is no suggestion that he was once a surgical candidate before moving to PEI or that he was able to work before he left for PEI. The Claimant's testimony gives me no reason to doubt what he said about his medical care from the time before he moved, or about how and why he stopped working after the dairy farm. But more on the dairy farm later.

[76] The Claimant's witness also gave some evidence about the Claimant's functional limitations. She explained that he never had long-term employment during their relationship. She explained that he couldn't carry wood in the house for her. She said he did what he could around the house. At one point, he could do some shopping although he cannot anymore. She testified about the Claimant being in "rough shape" when she would pick him up from work at the dairy farm.

[77] The Claimant's Questionnaire is of limited help.[35] He completed it long after the end of the MQP. The way the Claimant describes his pain in that document is consistent to the simple way he described it in his testimony. When the pain is at its worst, he can't handle anything else and "the pain in unbearable."[36] It's unfortunate that he wasn't able to say more about the way his pain impacted him before the end of the MQP.

[78] Third, I find the description of the Claimant's limitations from his doctor is also less helpful because it focuses on the Claimant's condition since she began to treat him in 2011. She stated that he had chronic low back pain that radiates to one of both of his legs. She also stated that he has chronic daily pain as well as flares of pain exacerbated by back strains if he tries to carry, lift, push, or pull. She stated that he needs to change position frequently and cannot sit for long periods. This is true when his pain is relatively well controlled, and even more so when his pain flares.[37]

[79] I am satisfied that the Claimant had functional limitations because of his back pain by December 2002 that impacted his ability to do physical labour involving carrying, lifting, pushing, pulling, or standing for long periods of time.

[80] However, when I consider the testimony from the Claimant and his witness and also the medical evidence, I conclude that on or before the end of his MQP, the Claimant had some capacity for sedentary work, something lighter than working in fields

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[35] It would have been helpful for the Claimant to have been asked more detailed questions about his functional limitations at the time of the MQP in the hearing. Claimants who apply for a disability pension long after the end of their MQP are at a disadvantage when completing this form, which does not clearly cue the Claimant to provide their functional limitations on or before the MQP.
[36] See GD2-23.
[37] See GD3-3 to 4.

and feeding cattle. The medical evidence and his testimony show that during his MQP, the Claimant had some pain and worked on a farm.

Some other evidence of capacity to work

[81] I recognize that there is some other evidence that the Minister says shows that the Claimant had some capacity to work before the end of his MQP.

[82] Particularly, I need to consider whether any of the following evidence shows that the Claimant had some capacity to work:

- the help the Claimant gave his partner at home
- the work he did at the dairy farm
- the doctor's letter from 2007 that didn't mention his back pain

– **Helping at home**

[83] In my view, the fact that the Claimant helped his wife at home is not evidence of capacity for work.

[84] In 2007, the Claimant's family doctor stated that the Claimant was doing heavy work taking care of his partner, who had a disability.[38] I am not able to conclude that the work the Claimant did was "heavy." The Claimant's doctor made this statement in order to get food stamps for her patient on social assistance. She didn't describe what the "heavy" work was.

[85] The Claimant's partner testified about her multiple sclerosis. She said that she has times when she is in remission, but there are times when she has needed the Claimant's help. At those times, she said that the Claimant helps her as much as he can. She said that he did a lot of cooking and that he did the shopping around the time of the MQP. This testimony about the nature of the work the Claimant did is more detailed that the note from the family doctor. To the extent that the descriptions of the

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[38] See GD1-28 to 30.

Claimant's work at home differ, I prefer the testimony from the Claimant's partner. Her evidence was forthright and clear and she is in the best position to recall what kind of help she received.

[86] Being capable of doing small tasks around the home is not necessarily evidence of a capacity to do that kind of work in some kind of hypothetical sedentary or semi-sedentary job that might qualify as "any" job in the CPP.[39]

[87] I am mindful of the context in which the Claimant was helping. The Claimant's partner worked at a fast food restaurant when her disability was in remission and then when it worsened, she wasn't working. The Claimant testified about receiving social assistance when they came to PEI. He was eventually in too much pain to continue on the dairy farm. I accept that he took care of his partner as best he could. I am not sure how "heavy" this work was, and therefore I do not find the Claimant's contributions around the home to be evidence of capacity for work.

– **2007 medical form doesn't talk about back or leg pain**

[88] In my view, the medical form is not evidence of capacity to work. The Claimant's doctor filled in a medical form in 2007 and said nothing about back or leg pain, stating that the Claimant's key medical problems were stress and hypertension.

[89] It appears to be a form the doctor completed to certify what the Claimant's dietary needs were (advocating for food coupons for the Claimant). She explains in the form that the Claimant requires those coupons to relieve stress and hypertension. I doubt that there was anything about the Claimant's back or legs that the doctor would have needed to report in 2007 on that form to help the Claimant get food coupons.

[90] I cannot conclude that because the doctor did not mention the Claimant's back and legs in that letter, they must have not been keeping him from work.

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[39] The Federal Court of Appeal discussed this idea in a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

– **Work on the dairy farm**

[91] In my view, the Claimant's work on the dairy farm lacked the detail I would need to conclude that it was evidence of capacity to work.

[92] The Claimant worked on a dairy farm sometime in 2002 until sometime in 2003. He testified he was receiving social assistance while he worked on this farm.

[93] His partner described the job as a "family thing" and that the employer was very flexible with him. I understand this testimony to mean that the farm was run by a family, but it wasn't run by the Claimant's family. The Claimant testified that he did labour in the fields and fed the cattle. If he couldn't come to work, he would phone the employer. The evidence was not detailed on this point, but it seems that the employer allowed the Claimant to do less physically demanding work. It's not clear to me which tasks those were. The Claimant stopped work there because of his back pain. The Claimant's partner said that when the Claimant was working, he was in "rough shape." She described picking him up from work and being concerned about him.

[94] 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.[40]

[95] I accept his partner's evidence about how informal this work arrangement was. When he wasn't well enough, he simply called and then did not attend. Despite the work being more of a "family thing," he was in rough shape and did not last a full year due to pain. The work was not substantially gainful.

[96] The Claimant's work on the dairy farm shows that he was not capable of maintaining that particular physical job. But without more detailed information about the extent of his accommodations in that job, it doesn't tell me either way whether he had capacity for sedentary work.

[40] See the Federal Court's decision in *Monk v Canada (Attorney General)*, 2010 FC 48.

Steps to manage medical conditions

[97] The Claimant has taken steps to manage his conditions, and he has not refused any treatment unreasonably.

[98] Claimants have an obligation to show efforts to manage their medical conditions.[41] Claimants should not refuse treatment unreasonably.[42]

[99] I accept the Claimant's testimony that he saw doctors (including specialists) for his back before he moved provinces. I accept that he understood he was not a candidate for surgery. There is reference in medical notes that he saw his family doctor about back pain once he moved to PEI. When his back pain got worse in late December 2002 after shoveling snow, he went to the hospital emergency department.

[100] For several years after the end of the MQP, it is true that there is no record of the Claimant attending his doctor's office regularly about his back pain. I accept the Claimant`s testimony that he had high blood pressure and fluid retention at the end of 2002, and he did not understand there to be anything further that doctors could do for his back pain. He developed multiple other health conditions later and there are records about his efforts to treat those conditions too.

[101] The Claimant has taken steps to manage his medical conditions. He is not a candidate for surgery and he has sought additional emergency care when needed. The Claimant has multiple health issues for which he sees doctors. His current doctor states that multiple investigation and specialist opinions "over the years" have failed to result in any hope for curative or remedial intervention.[43] I see no evidence in the file (particularly from his current family doctor) that would suggest to me that he has refused any treatment unreasonably that would have made a difference in his disability.

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[41] The Federal Court of Appeal explained this requirement in a case called *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[42] The Federal Court of Appeal explained this in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.
[43] See GD3-4.

The Claimant's background

[102] When deciding whether the Claimant has a severe disability, I also need to consider how employable the Claimant is in the real world, given his:

- Age
- level of education
- ability to speak, read, and write in English
- past work and life experience[44]

[103] The Claimant was 38 years old at the end of his MQP on December 31, 2002. Normally, a worker that age would have decades more work ahead of them. Age was not a barrier to the Claimant's employability.

[104] The Claimant testified that he was held back in Grade 5, and that he has a grade 6 education. I find this is a significant barrier to employment in Canada.

[105] The Claimant's first language is English. However, I find that I cannot assume one way or the other what the Claimant's ability to read and write in English is given this low level of education. The General Division didn't discuss the Claimant's level of literacy in English with the Claimant.

[106] The Claimant has worked since he was 15 years old. He had done physically demanding jobs – roadwork and farm work, for example. He has been on social assistance. He had a license for driving trucks at one point.

[107] I find that the Claimant's work and life experiences are somewhat of a barrier to employment in the real world. He lacks transferrable skills from his physical labour work that would help him to get work in a job that he could do physically. However, given his

[44] See *Villani v Canada (Attorney General)*, 2001 FCA 248.

age, he may have been able to upgrade his education and skills for other sedentary work.

Efforts to get and keep work

[108] The medical evidence and testimony led me to conclude only that the Claimant could not do physically demanding work like he did on the farm. The medical evidence and the testimony are evidence of some capacity to work. The testimony and the medical evidence suggest that the Claimant couldn't push, pull, lift, and carry. But a sedentary job would not require those kinds of tasks. The Claimant was in rough shape after working in the fields when his partner picked him up, but there wasn't testimony or medical evidence to suggest that the Claimant couldn't retrain for or do some more sedentary work on or before the end of the MQP.

[109] Since there is some evidence that the Claimant had capacity for work, I must consider whether he showed that efforts to get and keep work were unsuccessful because of this disability.[45]

[110] The Claimant tried to get and keep work in the sense that he did work at the dairy farm. The wages were not substantially gainful, he was not able to maintain the work due to his pain, and the work was modified with some flexibility in terms of tasks and expectations as his witness mentioned.[46] The Claimant stopped working on the farm due to pain.

[111] However, I find that the Claimant didn't show sustained efforts to get and keep employment that was less physical than the work he did on the farm.

The Claimant's disability isn't severe

[112] The Claimant's medical information and the testimony tells me that he has several types of back pain. He had back and leg pain before the end of the MQP. I find that he had the back pain before December 2002, and it got worse in 2002 on Boxing

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[45] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[46] See GD2-35 and following.

Day. He was doing (but having trouble with) the physical work that he had always done because he had trouble with pain. He couldn’t lift, carry, bend, walk or stand easily and he stopped his physical job as a result. It appears the back pain got worse when he shovelled snow just before the end of the MQP. There is a lack of information about how his back would affect a capacity to work at less physically demanding jobs. He had some functional limitations that affected the ability to work in a physical job.

[113] The Claimant’s personal circumstances show that he has some additional barriers in terms of employability. He had many working years left at the time of the MQP, his education history suggests that he may well have barriers to real-world employment within his physical restrictions. The lighter jobs he may have been capable of physically may have required some upgrading and retraining. However, the Claimant didn’t try this so it’s not clear how difficult that would have been for him given his limited education.

[114] Given all of these factors together, I‘m not satisfied that the Claimant was incapable regularly of pursuing any substantially gainful occupation by December 2002. I have no doubt that the Claimant had back and leg pain as of December 2002. It worsened shovelling snow, and not long after December 2002, it became clear that he could no longer do physical labour like the farm work. But the Claimant hasn’t shown that he was incapable regularly of pursuing any substantially gainful work at that point. He didn’t show efforts to get and keep lighter work, or to retrain for lighter work that didn’t involve pulling, pushing, carrying, lifting or walking.

[115] It seems that at some point closer to the General Division hearing, the Claimant’s pain became such that he could no longer work at all. Unfortunately, it seems that the Claimant reached that point after the end of the MQP.

[116] Since I’ve concluded that the Claimant’s disability is not severe, I do not need to consider whether it is prolonged.

Conclusion

[117] I dismiss the appeal. The General Division made an error, but when I give the decision that the General Division should have given, I reach the same conclusion: the Claimant is not entitled to a disability pension under the *Canada Pension Plan*.

Kate Sellar
Member, Appeal Division