



Citation: *AR v Minister of Employment and Social Development*, 2022 SST 1420

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant (Claimant):** A. R.  
**Representative:** Chantelle Yang  
Allison Schmidt

**Respondent:** Minister of Employment and Social Development  
**Representative:** Viola Herbert

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**Decision under appeal:** General Division decision dated February 9, 2022  
(GP-20-1549)

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**Tribunal member:** Kate Sellar

**Type of hearing:** Teleconference

**Hearing date:** September 7, 2022

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

**Decision date:** December 19, 2022

**File number:** AD-22-306

## Decision

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

## Overview

[2] A. R. (Claimant) started work in May 2009 as a machine spot welder on automotive parts. She started having foot pain 2010. She also had pain in her shoulders, neck, and upper back. Sometimes, she asked other workers to help her with tasks that involved pushing or lifting. She didn't talk to her employer about her pain because she saw that the employer treated other workers poorly when they reported injuries.

[3] While working, the Claimant tried to manage the pain, but it became too much. She stopped working in August 2012. She hasn't gone back to work since.

[4] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) a few times. The Minister of Employment and Social Development (Minister) refused her most recent application (the March 2019 application) both initially and on reconsideration.

[5] The Claimant appealed to this Tribunal. The Claimant had to show that her disability was severe and prolonged within the meaning of the CPP on or before the end of her coverage period on December 31, 2015 (the last day of the minimum qualifying period, or MQP).<sup>1</sup>

[6] The General Division dismissed the Claimant's appeal, finding that she wasn't eligible for a disability pension. She had some capacity for work before the end of the MQP. She didn't show that efforts to get and keep work were unsuccessful because of her disability.

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<sup>1</sup> The minimum qualifying period (or MQP) is calculated based on the Claimant's contributions to the Canada Pension Plan through her earnings at work.

[7] I find that the General Division made an error of law under the *Department of Employment and Social Development Act* (Act) by failing to discuss and consider whether the medical diagnoses from early 2016 assisted the Claimant to show that her disability was severe on or before December 31, 2015.

[8] To fix the error, I'll give the decision that the General Division should have given: the Claimant is eligible for a disability pension.

## Issues

[9] The issues in this appeal are:

- a) Did the General Division make an error of law by failing to discuss and consider whether medical diagnoses dated just after the end of the MQP helped to show that the Claimant's disability was severe on or before the end of the MQP?
- b) Did the General Division make an error of fact about when symptoms of fibromyalgia, chronic fatigue, depression, and anxiety started affecting the Claimant's ability to work?
- c) Did the General Division make an error of law by failing to discuss the medical evidence dated just after the MQP dealing with the conditions listed in b) above?
- d) Did the General Division make an error of fact by failing to consider the testimony about the Claimant's fibromyalgia and mental health conditions before the end of the MQP?
- e) Did the General Division make an error of law by failing to provide adequate reasons for why it failed to address that testimony referenced above at (d)?
- f) Did the General Division make an error of law by failing to consider all of the Claimant's conditions together?
- g) If the General Division made an error, what should I do to fix it?

## Analysis

[10] In this decision, I'll describe the approach the Appeal Division takes when reviewing General Division decisions. Then I'll explain how I've decided that the General Division made an error of law. In conclusion, I will give the decision that the General Division should have given: the Claimant is entitled to a disability pension.

### Reviewing General Division decisions

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

[12] That review is based on the wording of the Act, which sets out the "grounds of appeal." Failing to follow the legal analysis that the CPP and case law require is an error of law. That is one of the grounds of appeal.<sup>2</sup>

### Error of law

[13] The General Division made an error of law by failing to discuss and consider whether the medical evidence from early 2016 assisted the Claimant to show that her disability was severe on or before December 31, 2015. The approach the General Division took to this evidence is not consistent with the legal requirements for medical reports. It is also a failure to provide sufficient reasons on a key issue that required explanation.

#### – What the law says about medical reports

[14] There are cases from the Federal Courts that this Tribunal is required to follow when making decisions about access to CPP disability pensions. The Federal Courts write those decisions when a party asks the court to decide whether a tribunal decision was reasonable (judicial review). As a result, decisions from the Federal Courts do not

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

always tell us everything we need to know about applying the test for a disability pension in every case. But we do know from these decisions that:

- a) The personal circumstances of the Claimant are important, but medical evidence is still required to meet the test for a disability pension.<sup>3</sup>
- b) Claimants need some kind of objective medical evidence to support their applications for the disability pension.<sup>4</sup> Claimants need to provide some documents that support what the medical situation was at the time of the MQP.
- c) Medical reports should not be dismissed out of hand just because they are dated after the minimum qualifying period (MQP), if those reports speak to the Claimant's disability at the time of the MQP.<sup>5</sup>
- d) Evidence about the Claimant's medical condition after the MQP is not relevant where the Claimant has not proved that there was a disability during the MQP.<sup>6</sup>

– **The Claimant's medical reports**

[15] The Claimant had objective evidence of a disability involving her feet at the time of the MQP. The effects of that condition were serious enough that the General Division concluded that it kept the Claimant from her regular job. The Claimant also had medical reports dated after the MQP (by only several months) containing additional diagnoses. The reports did not pinpoint when the symptoms relating to those diagnoses started. However, the Claimant and her partner testified about the symptoms she had in 2015 (during the MQP), as well as why she did not focus on those symptoms at doctor's appointments until just after the end of the MQP in early 2016.

– **The General Division's approach to the medical reports**

[16] In this case, the General Division decided that:

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<sup>3</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>4</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377.

<sup>5</sup> See *Bowles-Fraser v Canada (Attorney General)*, 2018 FCA 308.

<sup>6</sup> See *Canada (Attorney General) v Hoffman*, 2015 FC 1348

- The Claimant had functional limitations related to her foot condition and other pain that affected her ability to do her job by December 31, 2015, but her disability was not severe at that time.<sup>7</sup>
- The Claimant's overall condition **worsened** with her fibromyalgia, chronic fatigue, depression, and anxiety. **These conditions started after December 31, 2015.**<sup>8</sup>

– **The General Division's approach to the medical reports is an error**

[17] In my view, the General Division made an error of law.

[18] The Claimant had evidence of a serious medical condition during the MQP. This medical condition affected her feet. It was serious enough that the General Division agreed that because of the Claimant's functional limitations from that medical condition, the Claimant couldn't do her regular job on or before the end of the MQP. That evidence was not enough on its own for the General Division to conclude that the Claimant's disability was severe – the General Division found evidence of some capacity to work in the medical reports.

[19] The General Division decided that the Claimant's limitations **worsened** with her fibromyalgia, chronic fatigue, depression and anxiety. Without sufficient explanation or analysis, the General Division decided that these conditions started **after** December 31, 2015.<sup>9</sup> I'm not pointing this out because I have an interest in reweighing the evidence for the General Division about when the conditions started affecting the Claimant's ability to work. Rather, the decision lacks an explanation as to how the General Division decided that the conditions started after December 2015 specifically.

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<sup>7</sup> See paragraph 28, 29, and 40 in the General Division decision.

<sup>8</sup> See paragraph 29 in the General Division decision.

<sup>9</sup> See paragraph 29 in the General Division decision.

[20] In this case, there was:

- testimony about symptoms in 2015 that on their face are consistent with some of the conditions doctors diagnosed in 2016
- an explanation about why the Claimant didn't see a doctor for diagnosis before the end of the MQP.

[21] It's not clear from the reasons how the General Division decided that the functional limitations worsened with the conditions, and that this worsening was **after** the end of the MQP.

[22] The medical evidence alone does not need to establish the onset of the disability. The diagnoses were several months after December 2015. The doctor's notes and the reports after the end of the MQP don't provide a date of onset for the conditions that were diagnosed in early 2016. There was no mention of symptoms associated with these conditions in the medical records on or before December 2015. The Claimant didn't have **medical** evidence that stated that the symptoms she experienced on or before December 31, 2015 were connected to diagnoses she received in March and April of 2016.

[23] As a result, the Minister argues that there was no need to discuss this medical evidence dated after the MQP because there was no suggestion in the evidence that the fibromyalgia, chronic fatigue, depression, and anxiety diagnosed after the end of the MQP resulted in any functional limitations or a severe disability under the CPP during the MQP. The testimony about the Claimant's conditions was not important enough that the General Division needed to discuss it. The Minister argues that there were no other reports of global or diffuse pain before the end of the MQP that would have signaled fibromyalgia.

[24] However, in my view, the General Division made an error of law in two related ways.

[25] First, the General Division dismissed the Claimant's diagnoses in medical notes just a few months after the MQP by failing to consider whether they supported the existence of those conditions in December 2015. The General Division did this even though the evidence was very close to end of the MQP and there was testimony that pointed to symptoms consistent with those conditions during the MQP.

[26] Second, the General Division failed to provide reasons on a key issue in circumstances that required an explanation.<sup>10</sup> Given how near to the coverage period the diagnoses were, the General Division needed to discuss how it decided that the Claimant's overall condition was worse with these conditions, but that worsening not happen until sometime after the end of the MQP (despite testimony to suggest that the Claimant did have functional limitations associated with these conditions by December 2015).

– **Dismissing medical diagnoses in a way that is contrary to law**

[27] The Claimant requires at least some medical evidence of disability during the MQP. The Claimant had that. There was medical evidence about the serious condition affecting her feet. The law does not require medical evidence documenting every functional limitation during the MQP.

[28] The General Division stated that the Claimant must provide medical evidence that shows that her functional limitations affected her ability to work by the end of the MQP.<sup>11</sup> The General Division agreed with the Minister that the Claimant did not have medical evidence that showed that the Claimant's issues with fibromyalgia, chronic fatigue, anxiety, and depression were severe by the end of the MQP.<sup>12</sup> The General Division stated that those conditions contribute to her pain and make her overall condition worse: "The medical evidence shows that these conditions started after

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<sup>10</sup> See paragraph 39 in *R. v. Sheppard*, 2002 SCC 26 on sufficiency of reasons.

<sup>11</sup> See paragraph 27 of the General Division decision.

<sup>12</sup> See paragraph 28 of the General Division decision.



December 2015. So, they can't be considered severe by her minimum qualifying period."<sup>13</sup>

[29] The General Division did not explain how it decided that the medical evidence showed that these conditions started after December 2015. The medical evidence about depression, anxiety, and fibromyalgia arises in the medical records when the doctor discussed it with the Claimant several months after the end of the coverage period.<sup>14</sup> The doctor never pinpointed the date of onset for the symptoms associated with the new diagnoses. So the medical evidence certainly shows that the doctor diagnosed these conditions shortly after December 2015, but the General Division did not explain how the medical evidence showed that these conditions started after December 2015 specifically.

[30] However, the notes about diagnosing those conditions are important in the sense that they may help to explain some of the functional limitations the Claimant had during the MQP as outlined in testimony (even though those conditions were not yet diagnosed).

[31] Claimants may establish the severity of a disability with testimony about functional limitations associated with medical conditions that are not ultimately diagnosed until shortly after the end of the MQP. The law on medical evidence does not preclude this. The medical evidence did not state an onset for the disability, so it is not clear how the General Division decided that the medical evidence showed the conditions started after December 2015.

[32] In fact, there was written evidence and testimony that suggested that functional limitations associated with these conditions were impacting the Claimant in 2015, specifically:

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<sup>13</sup> See paragraph 29 of the General Division decision.

<sup>14</sup> The notes documenting the doctor visits about fibromyalgia, chronic pain, anxiety, depression, and chronic pain are at GD2-297 to 300 especially. The family doctor referred to some of these diagnoses in the application for the disability pension starting at GD2-384.

- The Claimant identified functional limitations when it came to sleep in the questionnaire closest to the MQP and in her testimony at the hearing<sup>15</sup>
- The Claimant's witness testified that when seeing doctors, they focused on the Claimant's leg and foot issues for insurance reasons. However, her pain in other parts of her body was still there. Near the end of 2015, the Claimant was depressed and irritable. She hardly did anything and was often tired.<sup>16</sup>

[33] The General Division mentioned this evidence in its decision. However, the General Division had already decided the medical evidence showed that these medical conditions started after the end of the MQP so they couldn't be considered. This is an error of law. The General Division needed to explain or reconcile the testimony about depression and irritability, the fact that she wasn't doing hardly anything and was often tired, with the medical evidence diagnosing depression, chronic fatigue, anxiety, and fibromyalgia from early in 2016.

– **Failing to provide sufficient reasons on a key issue**

[34] In my view, the General Division needed to explain how it concluded that the evidence showed that the fibromyalgia, chronic fatigue, anxiety, and depression started after December 2015, given the evidence in the questionnaire closest to the MQP and the testimony of the Claimant's witness, which describes symptoms consistent with these conditions near the end of 2015.

[35] The General Division seems to infer that the additional diagnoses in early 2016 worsened her overall medical condition, and that this worsening did not happen during the MQP. If the General Division is confident that the Claimant had the conditions at least some time before the diagnosis, how or why did it determine that it was after December 2015 (particularly given the evidence about functional limitations from 2015)?

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<sup>15</sup> See paragraph 24 of the General Division decision.

<sup>16</sup> See paragraph 26 of the General Division decision.

[36] The Minister argues that to understand whether reasons are sufficient requires considering the reasons as a whole. I agree.

[37] In this case, the General Division's reasons made clear how it decided that the pain and mobility problems the Claimant had with her feet meant that she could not do her old job by December 2015. However, given the reasons as a whole, it seems less clear how it reached the conclusion that some of the functional limitations like concentration and memory were impacting the Claimant at the time of the MQP, but that the conditions worsened sometime after end of the MQP and possibly before they were diagnosed in early 2016. The General Division mentioned testimony that suggested the Claimant had significant trouble with mood and sleep by December 2015 -- she was hardly doing anything, she was depressed and irritable, and she was often tired. The General Division did not reconcile that evidence with its conclusion that she had capacity to work at that time and that her overall condition worsened with conditions diagnosed in 2016, but that worsening didn't occur on or before the end of December 2015.

[38] Given that these errors go to the heart of the question about whether the Claimant's disability was severe, I will move on to consider how to fix the error.

### **Fixing the error**

[39] Once I find that the General Division made an error, I have a choice about how to fix it. I can give the decision that the General Division should have given, or I can send the file back to the General Division to reconsider its decision.<sup>17</sup> I can decide any question of law necessary for deciding an appeal.<sup>18</sup>

[40] The Minister did not object to me giving the decision that the General Division should have given. This is an efficient way to move forward in many cases.

[41] I will give the decision that the General Division should have given. I have listened to the General Division hearing and reviewed the documents in the case. I have

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<sup>17</sup> See section 59 of the Act.

<sup>18</sup> See section 64 of the Act.

the information that I need to decide whether the Claimant is eligible for a disability pension. Giving the decision that the General Division should have given is fair, efficient, and just in the circumstances.

### **The Claimant has a severe disability**

[42] 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.”<sup>19</sup>

[43] Each part of that definition has meaning. A severe disability in the CPP context is connected 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.”

[44] In my view, the Claimant has proven that she has a severe and prolonged disability within the meaning of the CPP. I’ve 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)<sup>20</sup>
- the Claimant’s background (including age, level of education, language abilities, and past work and life experience)<sup>21</sup>
- the steps the Claimant has taken to manage the medical conditions, and whether she has unreasonably refused any treatment<sup>22</sup>

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<sup>19</sup> See section 42(2) of the *Canada Pension Plan*.

<sup>20</sup> The Federal Court of Appeal discussed this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

<sup>21</sup> These factors I need to consider come from a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>22</sup> 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. There is no reference to exhausting all treatment options. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants are cannot unreasonably refuse treatment, which is different from exhausting all treatment options.

## Medical conditions

– **Medical evidence shows a serious health condition on or before the end of the MQP**

[45] The Claimant needs medical evidence to show that she had a serious health condition on or before December 31, 2015.<sup>23</sup>

[46] I find that as of December 2015, the Claimant had right foot conditions and pain. I also find that she had at least some of the symptoms of fibromyalgia, chronic pain, depression, and anxiety that were diagnosed in the spring of 2016.

[47] More specifically, the CPP Medical Report states that as of November 2015, the Claimant had peroneal tenosynovitis, right peroneal strain, and plantar fasciitis with an unsuccessful peroneal tendon repair. She had ongoing ankle pain with limited mobility.<sup>24</sup>

[48] Immediately after the end of the MQP in January 2016, a rehabilitation consultant noted the Claimant was reporting constant pain and trouble sleeping because of the pain. She could walk short distances but had a hard time with stairs. She relied on her husband for significant activities and heavy tasks.<sup>25</sup> She could complete her own personal care, light duties in the house, and drive short distances. With physiotherapy, she reported limited progress and ongoing pain.<sup>26</sup>

[49] Based on this evidence, I agree with the General Division that as of December 31, 2015, the Claimant's right foot pain and conditions stopped her from doing her regular job.

[50] However, I find that some of her symptoms were likely also connected to the diagnoses she went over with her doctor early in 2016, namely fibromyalgia, chronic pain, depression, and anxiety. As such, sedentary work would also have been outside of the Claimant's functional limitations. She was having trouble sleeping due to the pain. She was fatigued. Her testified that near the end of 2015, the Claimant was depressed

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<sup>23</sup> See *Canada (Attorney General) v Dean*, 2020 FC 206.

<sup>24</sup> See GD2-581 to 585.

<sup>25</sup> See GD2-455 to 457.

<sup>26</sup> See GD2-482 and GD2-484 to 485.

and irritable, she hardly did anything, and she was tired. Physiotherapy was having limited success. In my view, the pain the Claimant was reporting, plus the symptoms associated with these conditions as described in testimony meant that she was not capable regularly of pursuing substantially gainful work. The General Division also acknowledged the affect that pain had on the Claimant's ability to sleep and to concentrate. Sedentary jobs require workers to be rested and able to concentrate.

– **Claimant's testimony explains more about the functional limitations she had before the end of the MQP**

[51] The General Division outlined the functional limitations the Claimant testified about:

- She has constant pain in her right foot that goes up her shin to her knee. She describes the pain as an 8 to 9 out of 10.
- She has pain in her back, neck, and shoulders. This pain is constant. She describes the pain as a 7 out of 10.
- Her pain is worse now than it was in December 2015.
- She can't walk or stand for more than 15 minutes.
- She can't sit for more than 30 minutes.
- She spends most of the time lying down.
- She has "good days" two days a week. On those days she can do some light cleaning or help get supper ready.
- She has "bad days" four or more days a week. On those days, she can't do much. This includes showering, washing her hair, or most daily activities.
- She has low energy, low mood, and is easily fatigued.

- Her pain makes her unreliable. She has a hard time keeping plans with her friends or family because she doesn't know what her days will be like.
- Her partner does most of the housework and childcare.
- Her partner or other family members have to drive her around.
- Her anxiety makes it hard for her to go out of the house or be in a car.
- Sometimes, if she is having a bad day and no one else is available, she can't take her kids to school. This happens 10 to 15 times a year.

[52] It is hard to be certain which of these functional limitations the Claimant had at the time of the MQP and to what extent. However, at least some of these limitations, like low energy, low mood, and fatigue are consistent with diagnoses she received in March 2016 of chronic fatigue, depression, anxiety, and fibromyalgia. I take official notice of the fact that anxiety feelings about leaving the house, being depressed and irritable, having a low mood, and low energy are symptoms commonly associated with chronic fatigue, anxiety, or depression.

– **Claimant's questionnaire provides some more information about functional limitations in 2015 that may have been related to 2016 medical diagnoses**

[53] The questionnaire the Claimant completed closest to the end of the MQP stated that she had problems with sleeping, driving, sitting, walking, lifting, carrying and reaching.<sup>27</sup> I agree with the General Division's finding that in addition, the pain she experienced would have also affected her concentration and memory.

[54] I agree with the General Division that her symptoms got worse with her chronic fatigue, depression, and fibromyalgia. However, I infer that the Claimant was experiencing at least some symptoms associated with those conditions by December 2015. The concentration, memory, pain, trouble sleeping and fatigue would all be consistent with diagnoses she ultimately received in March 2016. Those symptoms, in

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<sup>27</sup> See GD2-638 to 644.

addition to the findings the General Division already made about the Claimant's constant pain and limited mobility means that she was incapable regularly of pursuing any substantially gainful occupation. Her functional limitations were also unpredictable, which meant she was not sufficiently reliable for work.

– **The testimony from the Claimant and her witness was clear that she had symptoms in 2015 of conditions diagnosed early in 2016**

[55] I accept the testimony from the Claimant's witness about her symptoms in 2015.<sup>28</sup> He testified that near the end of 2015, the Claimant's hope that things would improve was gone and that she was "kind of – very depressed" as well as "far more irritable." He stated that she would hardly do any of the things that she normally would have done. He stated that she was often on the couch with a heating pad trying to make her neck and back feel better, and that regarding her leg, she had "kind of just [given] up – it always hurt anyway."

[56] When the representative asked the Claimant's witness about her fibromyalgia and depression prior to 2016, the Claimant's partner testified that the focus was on her leg and getting surgery: "I don't think anybody was really looking at the other symptoms a whole lot. The other symptoms were there, but I think –we and maybe the doctors kind of thought it was, y-know, just part of all the pain and trouble and frustration with the leg."<sup>29</sup>

[57] Further, I accept the Claimant's own testimony about her conditions before the end of her coverage period. She gave some evidence about experiencing symptoms of anxiety in 2015, including starting to struggle with being in a car, and that if she had to be out of the house for an appointment, she "definitely struggled."

[58] The Claimant testified about lacking insight into the cause of some of her symptoms, stating that she did have difficulty with her mood in 2015 but she mistakenly believed that it was situational. In other words, that her mood problems were the result of the stress of worrying about and helping a family member at that time. When the

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<sup>28</sup> See the Recording of the General Division hearing stating at about 11:00.

<sup>29</sup> See the Recording of the General Division hearing at approximately 14:00.



family member improved and her mood did not change, she noticed that what she was feeling was not going away.<sup>30</sup>

– **Evidence Minister relies on to show Claimant did not have functional limitations in 2015 associated with 2016 diagnoses is not compelling**

[59] The Minister argues that there is evidence to support the idea that the Claimant wasn't experiencing symptoms in 2015 of the conditions the doctor diagnosed in early 2016. More specifically, the Minister points out that:

- The Claimant told her physiotherapist that she was “otherwise healthy” when she saw him in January 2016.<sup>31</sup>
- The same physiotherapist also noted that the Claimant's medication was Tylenol and tramadol as needed but infrequently.<sup>32</sup>
- The first application materials in October 2018 don't mention anything except the foot and lower leg problems.
- A year after the end of the MQP in December 2016, the Claimant's doctor wrote that the Claimant was generally healthy.<sup>33</sup>
- The Claimant's doctor stated that the Claimant should be retrained in a sedentary career.<sup>34</sup>

[60] The Claimant had functional limitations in 2015 of the conditions her doctors diagnosed in early 2016. I don't find any of the evidence above to be compelling evidence to the contrary.

[61] I would not expect claimants to advise physiotherapists about mental health diagnoses, which may or may not be relevant to the physiotherapist's role to improve physical function and movement. I put more weight on aspects of the physiotherapist's

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<sup>30</sup> See the Recording of the General Division hearing at approximately 49:55.

<sup>31</sup> See GD2-477.

<sup>32</sup> See GD2-477.

<sup>33</sup> See GD2-477.

<sup>34</sup> See GD2-488.

report that relate to the treatment the physiotherapist provided. The Claimant sought the assistance of her doctor with the issues the doctor diagnosed in 2016. Her doctor is an appropriate professional with whom to share that information once she had sufficient insight to seek help.

[62] The physiotherapist noting the use of tramadol (an opioid) as needed but infrequently is evidence that the Claimant experienced pain, and that she was sometimes using strong medication (opioids) to address that pain. I don't find this to be evidence that is supportive of the idea that she had any capacity to work in 2015.

[63] The Claimant did not yet have diagnoses and lacked insight into her mental health challenges in 2015, so she did not list them in her application materials in 2015. This finding is consistent with the evidence about the Claimant focusing on the disabilities relating to her feet in 2015. Her husband noticed trouble with her sleep and her mood in 2015. She came to understand these problems better in 2016 after she observed her son's health improving with therapy. I accept the testimony about the Claimant's focus on the problems with her feet in 2015.

[64] The Claimant's doctor did state that the Claimant was generally healthy in 2015. However, I accept the Claimant's argument that this observation was in context of an assessment for another foot surgery.

[65] The Claimant argues that it takes time to reach a diagnosis for mental health disorders and for fibromyalgia, and that the documents from March 2016 are contemporaneous enough with the Claimant's MQP that the General Division needed to consider them.

[66] I agree. Given that there was testimony about the Claimant's mood and sleep in 2015 just before she was diagnosed in early 2016, there was evidence here to suggest that the Claimant's conditions were preventing her from pursuing any substantially gainful occupation in 2015. Some of the conditions that explain those symptoms were not diagnosed until early 2016.

[67] In my view, retraining was not a real possibility in light of the totality of the Claimant's medical conditions, including the conditions diagnosed in 2016 that involved chronic pain, fatigue, depression, and anxiety.

### **The Claimant's Background**

[68] When deciding whether the Claimant has functional limitations that affect her ability to work, I need to consider how employable the Claimant is in the real world, given her:

- age
- level of education
- ability to speak, read, and write in English
- past work and life experience<sup>35</sup>

[69] The Claimant was only 38 years old at the end of her MQP. She has many years to go before reaching the age for even an early retirement under the CPP.

[70] She has a grade 12 education.<sup>36</sup> She testified that she always had a hard time with school and as the General Division noted, she describes herself as a "B" or "C" student.

[71] She does not have trouble communicating in English.

[72] Her work experience involves childcare (as a nanny) and working on assembly lines. Her last job was doing machine spot welding on car parts.

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<sup>35</sup> See *Villani v Canada (Attorney General)*, 2001 FCA 248.

<sup>36</sup> See GD2-323-346 (the Claimant's application for the disability pension).

[73] I find that the Claimant's main barrier to employability in the real world is that she had only a high school education and that her work experience is in jobs that are more physically demanding that are not possible for her to do given her physical restrictions.<sup>37</sup>

[74] It is not too late for her to retrain in terms of her age. However, there would be limits to what types of jobs the Claimant could retrain for given her testimony about the difficulty she had academically, which I find are an additional barrier.

### **Steps to manage medical conditions**

[75] To receive a disability pension, a claimant must take steps to manage their medical conditions.<sup>38</sup> I must also consider whether the Claimant has refused treatment unreasonably. I must also consider what effect, if any, the medical advice might have had on her disability.

[76] My findings mirror those of the General Division on this issue. The Claimant has tried different medications to manage her conditions. Either they provided her little to no benefit, caused her stomach pain and nausea, or they became too addictive. These medications include tramadol, cyclobenzaprine, amitriptyline, Cymbalta, and Lyrica. Now, she uses extra-strength Tylenol to help manage her pain. She also uses Lorazepam to help manage her anxiety.<sup>39</sup>

[77] The Minister reviewed the Claimant's efforts from January 2016 to April 2016, and concluded that they were at best lackluster. My review of the same documents shows a claimant who was in enough pain to be taking opioids every three days, seeing a vocational rehabilitation specialist, and taking her medication. She tried physiotherapy. She tried cognitive behaviour therapy (CBT) for pain management but by April 2016 (just after she was diagnosed with fibromyalgia, chronic pain, and fatigue) she stopped volunteering and continued to try computer training.

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<sup>37</sup> Those limitations are outlined above but include limited mobility in her ankle, constant pain, ability to walk short distances only, trouble with stairs, limited ability to stand and to sit. She reported issues with sleeping, driving, sitting, walking, lifting, carrying, and reaching.

<sup>38</sup> See *Sharma v Canada (Attorney General)*, 2018 FCA 48; and *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

<sup>39</sup> See paragraph 44 in the General Division decision.

[78] The Minister argues that the Claimant abandoned her effort to rehabilitate for work. I am mindful of the decision in *Bulger*, which talks about evaluating treatment efforts (like physiotherapy) fairly in light of the particular challenges that come with conditions like fibromyalgia.<sup>40</sup> In situations involving chronic fatigue, depression, anxiety, and chronic pain, objectively (or seemingly) lackluster efforts may in fact be subjectively quite significant for the person living with the challenges that come with these conditions.

[79] The Claimant has also tried non-medicinal treatments as outlined in the General Division decision:

- She had surgery in September 2014 to address her right foot issues, but she didn't see any result.<sup>41</sup> She continued having right foot pain.
- She tried cortisone injections and shockwave therapy, but they didn't help.
- She went to a pain management program. She had some benefit.
- She tried physiotherapy. Sometimes it helped and sometimes it made her pain worse.
- Now, she uses a TENS machine, heat, and ice to manage her pain.<sup>42</sup>

[80] I am satisfied that the Claimant has taken steps to manage her medical conditions and that she has not refused treatment.

### **The disability is prolonged**

[81] The Claimant's disability is likely to be long continued and of indefinite duration. This means it is prolonged within the meaning of the CPP.<sup>43</sup>

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<sup>40</sup> See *Bulger v MHRD*, (May 18, 2000) CP 9164.

<sup>41</sup> See paragraph 45 in the General Division decision.

<sup>42</sup> See paragraph 45 in the General Division decision.

<sup>43</sup> See section 42(2) of the *Canada Pension Plan*.

[82] In 2016, an independent orthopedic surgeon described the Claimant's longstanding history with pain.<sup>44</sup> This pain started in her right foot and was now all over her body. The pain was **constant** and aggravated with standing, walking, and prolonged sitting. The prognosis for the Claimant returning to her old job was poor. The likelihood of success going back into the workforce was less than 50%.

[83] A second orthopedic surgeon provided a second opinion, also in 2016.<sup>45</sup> He stated that the Claimant had chronic irritation in her peroneal tendons as it hadn't improved two years after surgery. Her diagnoses of chronic pain syndrome and fibromyalgia contributed to her symptoms. He figured that surgery might give some answers, but it might also make her pain worse.

[84] I find that the Claimant has shown that she had a severe and prolonged disability by December 31, 2015. Although the Claimant stopped working in 2012, by December 2015, I find that her conditions worsened and that she was experiencing symptoms associated with additional conditions that doctors diagnosed several months later in early 2016.

[85] Importantly, the Claimant's pain was described as constant, and aggravated with standing and walking. Her trouble sleeping was well documented in her medical records and in the testimony at the hearing. In my view, considering all of the conditions and their functional limitations together, the Claimant' was incapable regularly of pursuing any substantially gainful occupation by the end of her MQP.

[86] At the time she was planning to return to work, but as I mentioned earlier, she was unable to succeed. I find that her physical and psychological disabilities as well as some of her personal circumstances meant that she wasn't capable regularly of any substantially gainful work, whether that work was active or more sedentary. At the end of the MQP, she lacked insight into some of her conditions that her husband was observing and that her doctors diagnosed early in 2016. At the end of the MQP, in addition to her constant pain, she was hardly doing anything and she was depressed

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<sup>44</sup> See GD2-488 to 499 and paragraph 37 in the General Division decision

<sup>45</sup> See GD2-144 and paragraph 38 in the General Division decision.

and irritable. Subsequent diagnoses explained why: there was more going on medically than only her conditions related to her feet.

[87] The Claimant applied for the disability pension in March 2019. The earliest that a Claimant can be considered disabled for the purpose of the disability pension is 15 months before the time they applied.<sup>46</sup> In this case, that would be December 2017. Payments start four months later, which is April 2018.<sup>47</sup>

## **Conclusion**

[88] The appeal is allowed. The General Division made an error. The Claimant is entitled to a disability pension.

Kate Sellar  
Member, Appeal Division

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<sup>46</sup> See section 42(2)(b) of the *Canada Pension Plan*.

<sup>47</sup> See section 69 of the *Canada Pension Plan*.