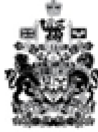

Citation: *RG v Minister of Employment and Social Development*, 2022 SST 1356

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	R. G.
Representative:	David Brannen
Respondent:	Minister of Employment and Social Development
Representative:	Viola Herbert

Decision under appeal:	General Division decision dated February 24, 2022 (GP-20-1406)

Tribunal member:	Kate Sellar
Type of hearing:	Videoconference
Hearing date:	August 30, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	November 22, 2022
File number:	AD-22-299

Decision

[1] I am allowing the appeal. The General Division made an error of fact and 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] R. G. (Claimant) worked his way up from the warehouse to an operations manager at a wholesale company. The company laid him off in June 2013 (restructuring). He got a certificate in supply chain logistics. He tried a commission-based sales job from April to October 2018. He didn't make any sales, so he didn't earn any income.

[3] The Claimant applied for a Canada Pension Plan (CPP) disability pension on March 7, 2019. The Minister of Employment and Social Development (Minister) refused his application. The Claimant appealed to this Tribunal.

[4] The General Division decided that the Claimant didn't prove that he had a severe and prolonged disability on or before December 31, 2016. The General Division found that although the Claimant had limitations, his personal circumstances showed that he could work in the real world. The General Division decided that the Claimant's supply chain certificate and his attempt at a sales job showed that he had some capacity for work. The General Division dismissed the Claimant's appeal.

[5] I gave the Claimant permission to appeal. Now I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (Act). If the General Division did make an error, I need to decide what to do to fix it.

[6] The General Division made an error of fact and an error of law. I'll give the decision that the General Division should have given: the Claimant is entitled to a disability pension.

Issues

[7] The issues in this appeal are:

a) Did the General Division make an error of fact about the Claimant’s supply chain certificate?

b) Did the General Division make an error of law by failing to consider the impact of all of the Claimant’s conditions together on his ability to work?

c) Did the General Division make an error of law or of fact by failing to consider properly the Claimant’s personal circumstances?

d) Did the General Division make an error of fact by ignoring any of the Claimant’s functional limitations (like the pain he had getting in and out of a chair or a car)?

e) Did the General Division make an error of fact by deciding that the Claimant could have earned an income if he had tried working in a job that paid an hourly wage?

f) Did the General Division make an error of fact by deciding that the Claimant’s supply chain certificate showed he had capacity for work?

g) If the General Division made any of these errors, how should I fix it?

Analysis

[8] In this decision, I’ll describe the approach the Appeal Division takes when reviewing General Division decisions. Next, I’ll explain how I’ve decided that the General Division made an error of law. Finally, I’ll give the decision that the General Division should have given.

Reviewing General Division decisions

[9] 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.

[10] That review is based on the wording of the Act, which sets out the "grounds of appeal."

[11] A claimant has a ground of appeal where the General Division makes an error of law. An error of law can happen when the General Division describes but then does not actually apply a legal test.[1]

[12] A claimant also has a ground of appeal where the General Division makes an error of fact. The error needs to be important enough that it could impact the outcome of the decision.

Error of fact

[13] The General Division made several errors of fact that led to the conclusion that the Claimant's attendance at a career college was evidence of capacity to work.

[14] An error of fact can happen when General Division ignores or misunderstands evidence, or when the evidence doesn't support the General Division's conclusion.[2] Following the law about errors of fact requires me to assume that the General Division considered all of the evidence, even if the General Division didn't refer to every piece of evidence in the decision.[3] However, the Claimant can overcome that assumption by showing that the evidence was important enough that the General Division should have discussed it.[4]

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[1] See section 58(1)(b) of the *Department of Employment and Social Development Act* (*Act*) for the reference to errors of law.
[2] The Federal Court of Appeal describes errors of fact in more detail in *Walls v Canada (Attorney General)*, 2022 FCA 47.
[3] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[4] See *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

[15] The General Division decided that despite the Claimant's functional limitations, he was able to earn a supply chain certificate, so his disability wasn't severe enough to prevent him from working in a "modified, light, or sedentary" environment.[5]

[16] More specifically, the General Division decided that the time the Claimant spent at the career college (which was scheduled for 5 days per week from 8am to 3pm) showed that the Claimant could maintain a schedule and attend work on a predictable basis. The General Division also found that the accommodations from the college were not "unique or exceptional" and could be expected from an employer, like regular breaks and flexible deadlines.

[17] In my view, the General Division made several errors of fact here.

[18] The Claimant's testimony was that he was allowed to "rewrite", not "reschedule" tests.[6] Rewriting tests suggests that the Claimant was allowed to write a test again, not simply miss a test and have it rescheduled. Allowing for rewriting tests is consistent with the Claimant's testimony about how hard it was for him to "stay on track" and complete the homework. It's also particularly relevant in light of the fact that the General Division acknowledged the Claimant had trouble with concentration.[7] Rescheduling tests suggests a need to defer work to another day, rewriting tests suggests work is not completed to standard the first time and is permitted to be re-done. The General Division misstated the Claimant's evidence about the rewrite of tests versus their rescheduling. The nature of the accommodation at issue is significantly different and is important when considering whether the Claimant had capacity for work.

[19] Second, the General Division ignored the evidence that the career college permitted him to miss time to attend appointments.[8] The General Division decided that the college course showed that the Claimant could maintain a schedule and attend work

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[5] See paragraph 43 of the General Division decision.
[6] The Claimant's testimony about this is at about the 54-minute mark in the recording of the General Division hearing.
[7] See paragraph 41 in the General Division's decision.
[8] The Claimant's testimony about this is at about the 54-minute mark in the recording of the General Division hearing.

on a predictable basis. The evidence about missing time to attend appointments was important enough in light of that finding about the Claimant's reliability that the General Division needed to discuss it.[9]

[20] Since the General Division relied on the evidence about the Claimant's time at the career college to conclude that he had some capacity to work, any factual errors on that issue are important.

Error of law

[21] The General Division made an error law by failing to consider the impact of all of the Claimant's conditions together on his ability to work.

[22] The Federal Court of Appeal requires that when considering whether a disability is severe, decision makers must look at the impact of all of the conditions together, not just the main impairment or impairments.[10]

[23] The General Division described this approach to the analysis in its decision, but in my view, the General Division didn't actually take this approach in its analysis.[11]

[24] The General Division listed the Claimant's functional limitations resulting from his hip and neck conditions, but it is not clear that the General Division considered all of the functional limitations arising from the Claimant's conditions together.[12]

[25] The Claimant argues that considering all of his functional limitations in their totality leaves no question as to whether he had capacity to work: he didn't have any capacity for work.

[26] For example, the General Division noted that the Claimant had trouble getting in and out of a chair or a car. The General Division also noted that the medical evidence

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[9] In the context of the rest of the Claimant's testimony both before and after this part in the hearing referencing specialist appointments, I understand his reference to appointments to be medical in nature.
[10] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[11] See paragraph 21 of the General Division decision where the General Division explained the required approach correctly.
[12] See paragraph 23, 27, and 31 in the General Division decision.

showed the Claimant could not sit or stand for long periods of time, and needed to alternate between sitting and standing. It is only in considering these two functional limitations together and in their totality that the severity of the Claimant's disability is better understood. The Claimant has limitations in sitting or standing for long periods of time, which he must address by alternating between sitting to standing, which he also has limited ability to do because he has trouble sitting down.

[27] Similarly, the General Division acknowledged that the Claimant was limited in terms of his ability to concentrate, but then did not seem to analyze how that limitation would impact his ability to work from home along with his other physical restrictions considered all together.

[28] The General Division noted the Claimant had a clubfoot and chronic obstructive pulmonary disease. The Claimant argues that the General Division did not discuss the impact of the functional limitations associated with these conditions on the Claimant's ability to work.

[29] The Minister argues that the General Division did consider all of the conditions together. The General Division described the correct approach for deciding whether a disability is severe, and then took that approach. The General Division considered all of the Claimant's functional limitations together and did not ignore the fact that the Claimant had trouble with sitting and driving. The General Division mentioned that functional limitation specifically when it described the work the Claimant tried to do from home.[13]

[30] In my view, the General Division made an error of law. The General Division accepted the Claimant's testimony about his limitations. The evidence was sincere, and the evidence supported the limitations.[14] The General Division decided that the Claimant had the ability to work in the real world based on his personal circumstances, like his age, education, ability to speak English, and his work and life experience.[15]

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[13] See paragraph 5 in the General Division decision
[14] See paragraphs 22, 23, and 25 to 29 in the General Division decision.
[15] See paragraphs 36 to 39 in the General Division decision.

[31] However, the Claimant's personal circumstances are part of a global question about capacity for work. It is not clear how the Claimant's personal circumstances like his age meant that he had capacity to work in light of the totality of the evidence about his functional limitations.

[32] The Claimant is left to question how the General Division concluded that his age or his experience showed capacity for sedentary work in the real world given that the General Division found that he had restrictions or functional limitations including:

- standing, sitting, lying down,
- bending, twisting, pushing, pulling, lifting,
- completing tasks that required his hands, and
- concentrating.

[33] The General Division also noted that he experienced shortness of breath, pain in his lower body, left hip, and neck; and numbness in his left arm and hand.

[34] The Claimant's capacity in English (or his supply chain certificate) were not additional barriers to work. However, the General Division acknowledged that the Claimant had a variety of functional limitations. The General Division did not sufficiently explain how the Claimant's relatively young age or completion of a certificate for less than a year meant that the Claimant's disability did not meet the severe threshold. The decision does not answer the question about how completing that certificate meant that the Claimant would be able to overcome the totality of his physical limitations and be capable regularly of sedentary work. Many sedentary jobs require the regular and predictable use of your hands, as well as the regular sitting and concentration.

[35] The General Division acknowledged that the Claimant experienced some functional limitations. It is not clear how the General Division concluded that those limitations would affect the Claimant's ability to do his old job, but not sedentary work. Some of the functional limitations, like the inability to stand or sit for prolonged periods

would, on their face, have a negative impact on the Claimant's ability to do sedentary work.

[36] The General Division decision does not explain how these functional limitations, when considered together, mean that the Claimant could still do sedentary work. Sedentary employment within the Claimant's restrictions for sitting and standing and using his hands and concentrating requires explanation.

[37] This is not simply an attempt to substitute my own analysis for the one the General Division already provided. I am not reaching a different conclusion about the functional limitations themselves. The issue is that the General Division did not actually consider all of the functional limitations together, or explain how the Claimant could **physically** meet the requirements of a sedentary job (rather than a short term certificate) in light of the functional limitations the General Division identified.

[38] Given that the two errors I have discussed so far go to the heart of the question about the Claimant's capacity to work, I will move on to address the remedy.

Fixing the errors

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

[40] I can give the decision that the General Division should have given, or I can return the matter to the General Division for reconsideration.[16] I can decide any question of law necessary for dealing with an appeal.[17]

[41] 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.

[42] Giving the decision that the General Division should have given is an efficient way to move forward in many cases.[18] I will give the decision that the General Division

[16] See section 59 of the Act.
[17] See section 64 of the Act.
[18] See section 2 of the *Social Security Tribunal Rules*.

should have given. I listened to the General Division hearing and reviewed the documents in the case. I have 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, fast, and just in the circumstances.

The Claimant has a severe disability

[43] 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."[19]

[44] Each piece of that definition has meaning. A severe disability in the CPP context is about what a person can and cannot do (when it comes to work). The things people cannot do because of a disability are functional limitations.

[45] In my view, the Claimant proved that he had a severe and prolonged disability within the meaning of the CPP. He is incapable regularly of pursuing any substantially gainful work.

[46] I considered:

- the Claimant's medical conditions (which involves considering all of the Claimant's conditions – all of the possible limitations that could affect capacity to work);[20] and
- the Claimant's personal circumstances (including age, education level, language proficiency, past work and life experience);[21] and
- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.[22]

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[19] See section 42(2) of the *Canada Pension Plan*.
[20] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[21] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[22] See *Sharma v Canada (Attorney General)*, 2018 FCA 48 and *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211.

I adopt these reasons from the General Division's decision.

[47] The Claimant had a fractured hip bone, narrowing in his spine, a pinched nerve hear his neck, right club foot, and chronic obstructive pulmonary disease.[23] The Claimant had many functional limitations and gave sincere testimony identifying functional limitations:

- He could not sit longer than 20 to 30 minutes.
- He had difficulty sitting in a car to drive.
- He had trouble with prolonged walking.
- He could only stand for 10 to 15 minutes.
- He had difficulty concentrating because of pain.
- His left arm and hand felt numb.
- He found it hard to do tasks that required his hands.
- He had trouble moving his head because of neck pain.[24]

[48] His symptoms were unpredictable and fluctuated.[25] He experienced shortness of breath, pain in his lower body, left hip, and neck. The medical evidence supports the Claimant's testimony about those functional limitations before the end of his coverage period on December 31, 2016.[26]

[49] The Claimant followed medical advice and did not refuse treatment unreasonably.[27]

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[23] See paragraph 20 in the General Division decision.
[24] See paragraph 23 in the General Division decision.
[25] See paragraph 23 in the General Division decision.
[26] See paragraphs 24 to 31 in the General Division decision.
[27] See paragraphs 32 to 35 in the General Division decision.

I depart from the reasons from the General Division as follows.

[50] When I consider all of that testimony and medical evidence evidence along with the Claimant’s personal circumstances, I find that:

- The Claimant’s personal circumstances result in some barriers to employability, but the bigger issue in this appeal is the Claimant’s functional abilities that keep him from working.
- The Claimant did not have any capacity to work on or before the end of the coverage period on December 31, 2016. As a result, he does not have to show that efforts to get and keep employment failed because of his disability.
- The Claimant’s attendance at a private college for his supply chain logistics certificate is not evidence of work capacity.
- If I’m wrong about that, and he did have some capacity to work before the end of the coverage period, I find that the Claimant’s attempt to work from home after the end of the coverage period in 2018 was a failed work attempt. The Claimant showed an effort to get and keep a job, but his effort failed because of his disability.
- The Claimant’s disability was prolonged.

– Personal circumstances present some barriers to employability.

[51] I need to consider how employable the Claimant is in the real world, given his:

- Age
- level of education
- ability to speak, read, and write English

- past work and life experience.[28]

[52] The Claimant was 53 years old at the end of his coverage period in December 2016. He was still many years from early retirement under the CPP at age 60, or a dozen years from standard retirement of 65 years old.

[53] The Claimant testified and I accept that did not finish high school and did not have an equivalent high school diploma.[29] Not having high school or its equivalent is a barrier to many types of employment in Canada, including jobs that do not involve physical labour. The Claimant did complete a 38-week private college course on supply chain logistics and obtained his certificate in 2016, however.

[54] The Claimant does not struggle to communicate in English.

[55] The Claimant has some transferrable skills. The Claimant was a storage clerk (a government office job) in the 1980's. He worked his way up in a warehouse job to an operations manager position over a period of 20 years. Although over the years he starting doing operations work, even as late as 2009 when he injured himself at work, he was still helping with physical labour work at the warehouse. This suggests that even though he took on an operations role, it was not exclusively operational skills that he was developing in that job. At least some of his working hours still involved manual labour.

[56] I find that the Claimant has some real-world barriers to employment. The Claimant's lack of a high school education or its equivalent negatively affects his employability. He has a long work history in physical warehouse roles, but over the many years with one company, his job evolved to include some managerial tasks that would be more transferrable, including reconciling cash, coordinating staff, assisting with invoices and budgets. His certificate in supply chain logistics and his age are not additional barriers to employment in the real world.

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[28] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[29] The Claimant's testimony about this is at about the 12-minute mark in the recording of the General Division hearing.

– **– Claimant did not have capacity for work on or before the end of his coverage period.**

[57] In my view, the Claimant did not have capacity to work on or before the end of his coverage period. The Claimant does not have to show that efforts to get and keep work were unsuccessful because of his medical condition.

[58] I must decide, “in practical terms”, whether the Claimant is incapable regularly of any substantially gainful work. I am not supposed to think about vague categories of labour that the Claimant might do that are not connected to reality. The Federal Court of Appeal states that:

> In other cases, however, decision-makers ignore the language of the statute by concluding, for example, that since a [claimant] is capable of doing certain household chores **or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as “any” occupation** within the meaning of subparagraph 42(2)(a)(i) of the Plan.[30] **(emphasis mine)**

[59] I need to look at all of the Claimant’s functional limitations together. When I take that approach, it’s clear that the Claimant has limitations that would affect his ability to do his old job (like standing, lifting, bending, and prolonged walking).

[60] In addition to those kinds of limitations, I conclude based on the Claimant’s medical conditions and their functional limitations that the Claimant does not have the capacity for sedentary work either. He can only sit for 20 or 30 minutes at a time, he has trouble sitting down once he is standing up, he has trouble using his hands (and his left hand is numb), and he has trouble concentrating. Even sedentary work might require him to move his head, which causes him neck pain. His shortness of breath is also a limitation that would affect sedentary work.

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[30] See paragraph 47 in *Villani v Canada (Attorney General)*, 2001 FCA 248; see also paragraph 3 in *Garrett v Canada (Minister of Human Resources Development)*, 2005 FCA 84 about the need to alternate between sitting and standing and the ability to perform sedentary work

[61] Further, his symptoms are **unpredictable and fluctuate**. When the Claimant cannot predict when his symptoms will be worse, this affects his ability to be reliable in a job. The Claimant's incapacity is regular.

– **Claimant's career college certificate is not evidence of capacity to work**

[62] The Claimant lost his job due to restructuring in 2013. He liked his job and received accommodations.

[63] He managed to attend career college for a 38-week course in supply chain management in 2015 and earned a certificate despite his limitations in 2016. The Claimant testified that the course was scheduled from 8am to 3pm five days per week. The Claimant explained that he received accommodations. The school allowed him to leave, walk around, and stretch. The school allowed him to rewrite tests. It was hard to stay on track and to complete homework because his pain made it difficult to concentrate. He was absent to attend medical appointments.[31]

[64] In my view, the Claimant's attendance at the career college is not evidence of capacity to work. He had trouble concentrating and it was hard for him to complete the work. The career college permitted him to be absent for medical appointments and they let him rewrite tests.

[65] There is an obligation to accommodate workers. However, in my view, accommodations like walking and stretching or taking some breaks are somewhat more standard. However, opportunities to re-submit or re-do work (like rewriting tests in an educational setting) is more about the ability to complete work properly the first time, and is not a typical accommodation in a workplace setting. Similarly, leaving work for medical appointments can be part of an accommodated workplace, but expectations for attendance in an educational setting versus in a paid working environment are, in my view, different.

[31] The Claimant's testimony about the course is in the recording of the General Division hearing starting at about 53:00.

[66] On balance, the accommodations that the Claimant received in the context of the career college show that his pain, concentration, medical needs (like attending doctors for treatment or assessment), and ability to sit or stand for periods of time were all barriers to employability. The Claimant was incapable regularly of pursuing any substantially gainful occupation.

– **If the college's attendance is evidence of capacity to work, the Claimant has shown efforts to get and keep work that failed because of his disability.**

[67] If I am wrong, and the Claimant does have some capacity to work, it is clear in light of all of the facts that he has made sufficient effort to get and keep work, and his effort failed because of his medical condition.

[68] The Claimant's attempt to work from home as an independent sales representative failed because of his disability. He testified and I accept that he "didn't really do the position."[32] He made no sales. He took breaks when he needed them. He couldn't do what he needed to do in the role. After 6 months, he had to stop his attempt to work completely because of his functional limitations. While I understand that his testimony was that he did this work for 30 hours per week, I am not satisfied that this shows that he could have completed some other salaried or hourly wage sedentary job for 30 hours per week from home.

[69] He failed at making sales precisely because he could not manage the work because of his functional limitations. He needs to alternate between sitting and standing but he also had trouble sitting down. He needed to take breaks. He experienced pain in his lower body while standing and sitting. He had trouble with concentration because he was in pain. He had trouble using his hands due to numbness.[33]

[32] The Claimant testified about this at the General Division at about 57:00 in the recording.
[33] These are all functional limitations acknowledged by the General Division in its decision.

The disability is prolonged

[70] 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.[34]

[71] I accept the Claimant's arguments about the long continued and indefinite duration of his disability. The Claimant's hip injury first happened in 1978 and has been the cause of work restrictions since at least 2009. His neck injury happened in 2009 as well and has affected his work capacity since that time. Although he was initially able to continue working, his neck continued to deteriorate over time.

[72] The Claimant is not a candidate for any further surgery and despite trying nerve ablation, injections, physiotherapy, medications, chiropractor; he has not improved enough to return to work. It is unlikely that his condition will improve in future.

Date of disability and date of payment

[73] The Claimant's coverage period ended on December 31, 2016. The employer laid the Claimant off in June 2013 as part of a restructuring. However, the medical evidence shows that by the time he stopped work in 2013, he was experiencing significant pain with regular injections in his neck. The Claimant was working under significant physical restrictions by February 2013, and had injections in his neck and hip several more times throughout 2013.[35] By 2016, just before the end of the coverage period, he also had pain in his groin, buttock, left hip. I find that by December 31, 2016, he was incapable regularly of pursuing any substantially gainful work.

[74] The Claimant applied for the disability pension on March 7, 2019.[36] A Claimant cannot be considered disabled for the disability pension any sooner than 15 months before they apply.[37] In this case, that means that the earliest I can consider the

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[34] See section 42(2) of the *Canada Pension Plan*.
[35] See GD2-149, 152-154, and 156.
[36] See GD2-31.
[37] See section 42(2)(b) of the *Canada Pension Plan*.

Claimant disabled is December 2017. Payments always start four months after that date, which in this case is April 2018.[38]

Conclusion

[75] The appeal is allowed. The General Division made an error of law. I have given the decision that the General Division should have given: the Claimant is entitled to a disability pension.

Kate Sellar
Member, Appeal Division

[38] See section 69 of the *Canada Pension Plan*