



Citation: *PB v Minister of Employment and Social Development*, 2022 SST 1567

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant: P. B.
Representative: Rajinder Johal

Respondent: Minister of Employment and Social Development
Representative: Érelégna Bernard

Decision under appeal: General Division decision dated June 26, 2022
(GP-20-1761)

Tribunal member: Neil Nawaz

Type of hearing: Written questions and answers

Decision date: December 30, 2022

File number: AD-22-688

Decision

[1] The appeal is dismissed. The General Division made an error of law by failing to consider the Claimant as a whole person. However, having reviewed the evidence myself, I still don't think the Claimant is entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Claimant is a 52-year-old woman who was born in India. She came to Canada in 1993 and has since held a variety of jobs—factory worker, counter server, bus driver, receptionist, and esthetician. She hasn't worked since November 2019.

[3] In December 2019, the Claimant applied for a CPP disability pension. She claimed that she could no longer work because of dizziness and headaches.¹ The Minister refused the application because, in her view, the Claimant had not shown that she had a severe and prolonged disability as of her minimum qualifying period (MQP), which ended on December 31, 2015.² The Minister also found no evidence of any disability that had started during the Claimant's "prorated" period, which ran from January 1, 2016 to September 30, 2016.³

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal because it found insufficient evidence that the Claimant was disabled during either the Claimant's MQP or prorated period. The General Division acknowledged that the Claimant experienced dizzy spells but saw no indication that they prevented her from regularly pursuing substantially gainful employment during her coverage periods.

¹ See Claimant's application for CPP disability benefits dated December 19, 2019, GD2-30.

² The MQP is the period in which a claimant last had coverage for CPP disability benefits. Coverage is established by working and contributing to the CPP.

³ See section 44(2.1) of the *Canada Pension Plan* exempts claimants from the full contribution requirement if they can show that they became disabled at some point during what would have been the final year of their contribution period.

[5] The Claimant requested permission to appeal from the Appeal Division. She maintained that she was disabled and alleged that, in coming to its decision, the General Division made the following errors:

- It failed to consider her condition in its totality; and
- It failed to consider her background and personal characteristics.

[6] In October 2022, I granted the Claimant permission to appeal because I thought she had an arguable case. At the Claimant's request, I conducted a hearing by way of written questions and answers.

Issue

[7] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.⁴

[8] My job is to determine whether either of the Claimant's allegations fall into one or more of the permitted grounds of appeal and, if so, whether any of them have merit.

Analysis

[9] I am satisfied that the General Division erred in law by failing to consider the Claimant consider the Claimant's background and personal characteristics. Because the General Division's decision falls for this reason alone, I see no need to consider the Claimant's other allegation.

⁴ See *Department of Employment and Social Development Act* (DESDA), section 58(1).

The General Division disregarded the Claimant's background and personal characteristics

[10] The General Division found evidence for the Claimant's disability to be so weak that it didn't have to consider her background and personal characteristics. But the Claimant faced significant impediments to her continued employment other than her medical condition. She was well into middle age by the end of her coverage periods, and English is her second language. She had many years of work experience but mostly in unskilled jobs.

[11] The leading CPP disability case is *Villani v Canada*,⁵ which requires claimants to be assessed in a real world context. According to *Villani*, decision-makers must consider claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience. This principle has been affirmed in cases such as *Bungay*,⁶ which says that employability is not to be assessed in the abstract, but in light of "all of the circumstances," including the claimant's background and medical condition.

[12] In its decision, the General Division cited *Villani* but saw no need to apply it:

Finally, when I am deciding whether a disability is severe, I usually have to consider [a claimant's] personal characteristics.

This allows me to realistically assess a [claimant's] ability to work.

I don't have to do that here because the [Claimant's] functional limitations didn't affect her ability to work by December 31, 2015 or in 2016 by September 30, 2016. This means she hasn't proven her disability was severe by then.⁷

[13] In support of this position, the General Division cited a case called *Giannaros*, which appears to relieve decision-makers of the need to conduct a real world analysis if they have already decided that a claimant's disability falls short of severe.⁸ However,

⁵ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

⁶ See *Bungay v Canada (Attorney General)*, 2011 FCA 47.

⁷ See General Division decision, paragraphs 44–46.

⁸ See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.

Villani itself suggests that the real world analysis must be an integral part of the severity assessment:

Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an Appellant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, [...] occupations which a decision-maker must consider **cannot be divorced** from the particular circumstances of the Appellant, such as age, education level, language proficiency and past work and life experience [emphasis added].⁹

[14] In my leave to appeal decision, I raised the possibility that *Giannaros* is inconsistent with *Villani*. However, I don't have to investigate that question here, because I am satisfied that *Giannaros* was never applicable to the Claimant's fact situation in the first place.

[15] *Giannaros* involved a claimant who disregarded clear and elementary medical advice that would have likely mitigated her impairments. Thus, it was impossible to say whether her disability was "severe and prolonged" without knowing the scope for improvement in her condition. No such difficulty exists with the Claimant. Her medical file contains no hint that she has ever been non-compliant with treatment recommendations. As such, the General Division had no justification to dispense with the *Villani* analysis.

[16] The Claimant's medical evidence during her coverage periods may have been scant, but the General Division should have still looked at her employability in light of her background and personal characteristics. The General Division's failure to do so amounted to an error of law.

⁹ See *Villani*, paragraph 38.

Remedy

There are two ways to fix the General Division's error

[17] When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.¹⁰

[18] The Tribunal is required to conduct proceedings as quickly as circumstances and considerations of fairness and natural justice allow. The Federal Court of Appeal has also said that decision-makers should consider delays in bringing claims for benefits to conclusion. It has been three years since the Claimant applied for the CPP disability pension. If this matter goes back to the General Division, it will needlessly delay a final resolution.

The record is complete enough to decide this case on its merits

[19] I am satisfied that the record before me is complete. The Claimant has filed numerous medical reports with the Tribunal, and I have considerable information about her employment and earnings history. The General Division conducted an oral hearing, in which the Claimant testified about her medical condition, its effect on her work capacity, and her efforts to seek treatment. I see no indication that the Claimant was denied an opportunity to give evidence.¹¹ I had access to the recording of the hearing, and I doubt that the Claimant's evidence would be materially different if this matter were reheard.

[20] As a result, I am in a position to assess the evidence that was available to the General Division and to give the decision that it should have given, had it not erred. In my view, even if the General Division had properly considered the *Villani* real world test,

¹⁰ See DESDA, section 59(1).

¹¹ The hearing was adjourned twice because of interpretation issues. On January 27, 2022, the General Division ended the hearing when it became clear that the interpreter on hand could not speak Punjabi. On March 29, 2022, the General Division suspended proceedings after technical issues prevented the interpreter from joining the teleconference for any length of time. When the hearing resumed on April 19, 2022, the interpreter again had difficulty remaining connected to the call. The Claimant and her representative agreed to complete the hearing in the interpreter's absence, and her representative (who speaks Punjabi) agreed to provide translation where needed.

it would have come to the same result. My own assessment of the record satisfies me that the Claimant did not develop a severe and prolonged disability before December 31, 2015 or between January 1, 2016 and September 30, 2016.

The medical evidence does not point to a severe disability

[21] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability.¹² I have reviewed the record, and I have concluded that the Claimant did not meet that burden according to the test set out in the *Canada Pension Plan*. I have no doubt that the Claimant now suffers from multiple medical conditions, but I simply did not find enough evidence to suggest that symptoms associated with these conditions prevented her regularly from pursuing substantially gainful employment during her MQP and prorated period.

[22] The Claimant says that she has been diagnosed with vertigo, dizziness, migraines, type 2 diabetes, high blood pressure, hypothyroidism, and anxiety and depression. She says that she is disabled because of light-headedness and unsteadiness. She says that she suffers from headaches, low energy, and fatigue. She says that she can't stand or walk for extended periods.

[23] Although the Claimant may feel that she is unable to work, I must base my decision on more than just her subjective view of her capacity. In this case, the evidence, looked at as a whole, does not suggest a severe impairment that prevented her from performing suitable work during her coverage periods. The Claimant was subject to some limitations at those times, but she was not incapacitated from all types of work.

[24] I base my findings on the following factors:

¹² *Canada Pension Plan*, section 44(1).

– **The Claimant worked after her coverage periods**

[25] Despite her health problems, the Claimant was able to work in a variety of jobs after September 30, 2016.

[26] From 2014 to 2016, she worked as a school bus driver. She worked for two hours in the morning and two hours in the afternoon, five days per week.¹³ She stopped doing this job because her migraines became a problem, and her doctor advised her not to drive when taking medication.

[27] In 2017, the Claimant then began working as a self-employed esthetician in a spa. She worked there five days a week, four to six hours per day, for roughly two years. She left that job when her dizziness got worse.¹⁴

[28] The Claimant was unable to provide details about her earnings from this last job, but the evidence suggest that it was regular and substantially gainful. The fact that she carried it on after September 30, 2016 convinces me that the Claimant did not have a severe or prolonged disability during her coverage periods.

– **The Claimant admitted that she did not become disabled until after her coverage periods**

[29] It appears that the Claimant's condition significantly deteriorated in late 2018 or early 2019. On her application for disability benefits, she was asked when she could no longer work because of her medical condition.¹⁵ She specified February 2019—a date nearly 2½ years after she last had disability coverage.

– **The Claimant submitted no medical evidence dated before September 30, 2016**

[30] Apart from her post-coverage employment, the fact remains that the Claimant did not produce any medical evidence that was related to her coverage periods. Indeed, all of her medical information was from 2019 or later—well after her coverage periods ended. In a case called *Dean*, the Federal Court confirmed that CPP disability claimants

¹³ See Service Canada telephone memo dated July 6, 2020, GD2-64.

¹⁴ See Service Canada telephone memo dated July 6, 2020, GD2-64.

¹⁵ See Claimant's application for CPP disability benefits dated December 19, 2019, GD2-30.

must supply documentary evidence about their claimed medical condition at the time of their MQP.¹⁶

[31] In the earliest available medical evidence, from May 2019, Dr. Ganesan, a neurologist, reported that the Claimant had had persistent positional vertigo since November 2018.¹⁷ He added that dizziness and headaches had led her to close down her spa. By November 2019, Dr. Ganesan noted that the Claimant's dizziness was the same, although her headaches were better.¹⁸

[32] In October 2019, a neuro-otologist, Dr. Robertson, reported that the Claimant presented with "complaints of dizziness that she says began 15 years ago."¹⁹ Dr. Robertson diagnosed her with uncompensated right peripheral vestibulopathy and notified the Ministry of Transportation that her condition was a "significant contraindication" to driving. However, Dr. Robertson did not see the Claimant before 2019 and therefore had no direct knowledge of her condition during her coverage periods. Dr. Robertson noted that the Claimant's dizziness went back 15 years but, in doing so, he was merely relaying his patient's own self-reported history. In any event, symptoms by themselves do not necessarily equate to disability.

[33] The Claimant's family physician, Dr. Vohra, supported the Claimant's disability claim, but only up to a point.²⁰ She said that the Claimant suffered from "on and off" dizziness and "sporadic" light-headedness. She cautioned that she "never noticed any gait problem or visible dizziness during office visits." She noted that the Claimant left work in February 2019 due to headaches and generalized pain but offered no information about the Claimant's prognosis. When asked whether she recommended that her patient stop working, she replied, "No."

¹⁶ See *Canada (Attorney General) v Dean*, 2020 FC 206.

¹⁷ See report dated May 13, 2019 by Dr. R. Ganesan, neurologist, GD2-83.

¹⁸ See Dr. Ganesan's clinical note dated November 4, 2019, GD2-85.

¹⁹ See report dated October 22, 2019 by Dr. D. Robertson, Otolaryngology-Neurotology-Otolaryngology, GD2-81.

²⁰ See CPP Medical Report dated December 12, 2019 by Dr. Asha Vohra, family physician, GD2-72.

[34] The available medical evidence suggests that the Claimant's dizziness worsened after 2018 but, in my view, it does not suggest that she had a severe and prolonged disability at that time—and certainly not during the most relevant period during 2015–16.

– **There is no evidence that the Claimant's other conditions contributed to disability before September 2016**

[35] In her application for benefits, the Claimant listed no medical conditions other than “dizziness” to account for her disability. The medical report that accompanied her application also focused on dizziness, although there was also a brief mention of headaches and generalized pain.²¹

[36] Again, the Claimant's medical file contained nothing dated before 2019. The Claimant says that she has type 2 diabetes, but a number of lab tests on file indicate that she had normal or somewhat elevated blood glucose levels in 2020 and 2021.²² Elsewhere, the Claimant was described as having a history of “pre-diabetes” and “diet-controlled diabetes.”²³ None of this indicates that the Claimant had diabetes before September 30, 2016 and, even if she did, nothing suggests that she was impaired by its symptoms.

[37] The Claimant has been seen by Dr. Bhandhal for proteinuria, a condition characterized by levels of protein in the urine.²⁴ In February 2020, Dr. Bhandhal wrote that the Claimant had a history of proteinuria and microscopic hematuria, likely caused by “gn”—short for glomerulonephritis or inflammation of the kidney. However, there was no information on file about any functional limitations caused by that condition—and certainly not before September 30, 2016.²⁵

²¹ See Dr. Vohra's CPP Medical Report, GD2-79.

²² See Claimant's blood chemistry results dated January 10, 2020 (GD4-82), February 3, 2021 (GD4-55), and May 11, 2021 (GD4-43).

²³ See letter dated June 3, 2020 by Dr. Victor Lo, dermatologist, (GD4-126) and Dr. Ganesan's letter dated November 8, 2021 (GD4-133).

²⁴ See reports by Dr. Sharn Bhandahl, specialist in nephrology and hypertension, dated February 27, 2020 (GD4-129) and August 18, 2021 (GD4-90).

²⁵ Dr. Bhandahl also mentioned that the Claimant's blood pressure was “good,” a finding that seems inconsistent with her claim that she was impaired, in part, by hypertension. See report dated August 18, 2021, GD4-90.

[38] The Claimant's medical file contains only a brief reference to anxiety, following the death of her father in January 2021.²⁶ Later, Dr. Ganesan wrote that the Claimant was "mainly seeking CPP for issues related pain/depression."²⁷ Otherwise, there is no mention of any referrals to a psychiatrist or psychologist, nor is there any indication that the Claimant's mental health was a contributor to any impairment during her coverage periods.

– **The Claimant's background and personal characteristics were not barriers to work**

[39] As noted, *Villani* requires decision-makers to consider claimants as whole persons, taking into account background factors such as age, education, language proficiency, and work and life experience.²⁸

[40] The Claimant has limited education, little proficiency in English, and few transferable skills. Still, she was only 46 years old by the end of her coverage periods and had proven herself capable of getting some training in this country (she earned an esthetician's certificate after immigrating to Canada in 1993).²⁹ Her profile had not previously prevented her from obtaining and maintaining a series of jobs, and I see no reason to believe that, even with her symptoms of sporadic dizziness, she was unemployable as of September 30, 2016.

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

[41] A disability must be severe **and** prolonged.³⁰ Since the Claimant has not proved that her disability is severe, there is no need for me to assess whether it is also prolonged.

²⁶ See office note dated January 15, 2021 by Dr. Angela Khanna, family practitioner, GD4-10.

²⁷ See Dr. Ganesan's office note dated November 8, 2021, GD4-143.

²⁸ See *Villani*, note 5.

²⁹ Refer to part one of the hearing recording at 12:30.

³⁰ See *Canada Pension Plan*, section 42(2)(a).

Conclusion

[42] I am dismissing this appeal. The General Division erred in law by assessing the Claimant's disability without also considering the impact of her background and personal characteristics on her employability. However, I do not think the General Division would have come to a different conclusion if it had not made those errors. Having conducted my own review of the record, I am not persuaded that the Claimant had a severe disability before December 31, 2015 or developed one between January 1, 2016 and September 30, 2016.



Member, Appeal Division