Citation: *KG v Minister of Employment and Social Development*, 2023 SST 65

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant (Claimant):	K. G.
Representative:	Rajinder Johal
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie

Decision under appeal:	General Division decision dated March 23, 2022 (GP-20-2014)

Tribunal member:	Kate Sellar
Type of hearing:	In Writing
Decision date:	January 24, 2023
File number:	AD-22-389

Decision

[1] The appeal is allowed. The General Division made errors of law. I'll give the decision that the General Division should have given: the Claimant is entitled to a *Canada Pension Plan* (CPP) disability pension. Payments start October 2019.

Overview

[2] K. G. (Claimant) worked as a packer in warehouses. In June 2019, she stopped working due to back and leg pain. She applied for a *Canada Pension Plan* (CPP) disability pension on October 8, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed to this Tribunal.

[3] The General Division dismissed the Claimant's appeal, finding that she wasn't eligible for the disability pension. The General Division found that the Claimant:

- had back pain that affected her ability to sleep, sit, stand, walk, bend, and twist
- unreasonably refused treatment because she tried physiotherapy once but did not continue because it was too painful
- could work in the real world because: she had finished high school in India, she had transferrable skills from her work in warehouses, and she wasn't too old to retrain and to improve her English
- didn't show efforts to get and keep work were unsuccessful because of her disability (I call this the "work efforts test")

[4] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (Act).[1] If the General Division did make an error, I must decide what I'll do to remedy (fix) it.

[1] Before December 5, 2022, the Appeal Division addressed errors of law as set out in the *Department of Employment and Social Development Act* (Act) at section 58(1)(b). The Appeal Division fixed errors as set out in section 59(1). Section 242(2) of the *Budget Implementation Act* 2021, No.1, says that sections

[5] The General Division made errors of law. I'll give the decision that the General Division should have given: the Claimant is entitled to a disability pension.

New Evidence

[6] The Claimant provided new medical evidence in support of her appeal.[2]

[7] Generally, the Appeal Division doesn't consider new medical evidence in these appeals.[3] The focus of the appeal is on whether the General Division made any errors of law or any errors of fact, so new medical evidence from the Claimant will not help me in that task.

[8] I won't consider the new medical evidence.

Issues

[9] The issues in this appeal are as follows:

a) Did the General Division make an error of law by failing to make a clear finding about the Claimant's capacity for work before applying the work efforts test?

b) Did the General Division make an error of law in the way it applied the test for unreasonably refusing treatment? More specifically, did the General Division reach a finding without evidence about what results could be expected from physiotherapy and how much pain or discomfort would be expected and for how long?

c) Did the General Division make an error of fact by finding that the Claimant's work history in warehouses meant that she had transferrable skills?

58(1) and 59(1) of the Act as it read before December 5, 2022 continue to apply to appeals like this one filed before December 5, 2022.

[2] See AD2 and AD4.

[3] See *Parchment v Canada (Attorney General)*, 2017 FC 354. There are some exceptions to the rule against accepting new evidence that the Court described in *Sibbald v Canada (Attorney General)*, 2022 FCA 157, but none of those exceptions apply in this case.

d) Did the General Division make an error of fact by ignoring or misunderstanding the reports from the Claimant's doctors that were supportive of her application for a disability pension?

Analysis

[10] First, I'll explain what the Appeal Division's role is in reviewing General Division decisions. Next, I'll explain how I've concluded that the General Division made two errors of law. Finally, I'll fix (remedy) the error by giving the decision that the General Division should have given: the Claimant is eligible for a disability pension.

The first error of law: failing to identify the evidence of capacity for work before applying the work efforts test

[11] The General Division made an error of law by failing to make a clear finding about capacity for work before applying the work efforts test.

[12] Where there is evidence of capacity for work, the Claimant must show that efforts to get and keep work were unsuccessful because of the disability.[4]

[13] The General Division clearly found that the Claimant had some physical limitations that "would be expected to affect her ability to work as a packer in a warehouse by December 31, 2020."[5]

[14] However, the General Division moved on to consider whether the Claimant could work in the real world given her personal circumstances like her age, education, ability to speak English, and work and life history.

[15] The General Division concluded that the Claimant could work in the real world and therefore there was evidence of some capacity for work. The General Division decision seems to suggest that the Claimant had the capacity to improve her English or retrain for different work, in part because of her age.

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[4] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[5] See paragraph 36 in the General Division decision.

[16] However, the General Division did not discuss whether the Claimant's functional limitations would allow for such retraining. The General Division decision noted the medical evidence stating the Claimant's back pain limited her standing, sitting and walking. She had to change positions regularly.[6]

[17] It isn't sufficiently clear whether the General Division suggested that the Claimant could complete sedentary work with retraining. If so, it isn't clear what the basis of that finding was in the evidence, especially given the medical opinion from the Claimant's doctor about how unlikely it was that she would return to work.[7]

[18] The General Division decision states that if the Claimant can "work in the real world, she must show that she tried to find and keep a job."[8] The case from the Federal Court of Appeal says that if there is **some evidence of capacity for work**, then the Claimant must show those efforts to get and keep a job.

[19] The General Division needed to come to a clear finding identifying what the evidence was that showed capacity for work, considering both her functional limitations and her personal circumstances together. The General Division made an error of law.

[20] The Minister argues that the General Division did not make an error of law. The case law says that the trigger for applying the work efforts test is that there be evidence of work capacity. The Minister argues that the use of the term evidence here is a low threshold to meet: the General Division must apply it where work capacity is not exhausted.

[21] The Minister says that the General Division found that the Claimant had some work capacity, so it was required to apply the work efforts test. The General Division accepted that the Claimant had some pain and limitations from her medical conditions

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[6] See paragraph 35 General Division decision
[7] The CPP Medical Report stated that the Claimant's condition would likely deteriorate and that the doctor didn't expect a return to work in future. See paragraph 26 in the Decision and GD2-70 for the CPP medical report.
[8] See paragraph 56 in the General Division decision.

(for example, problems bending and twisting), but that these limitations were not clearly specified in the medical evidence before it.[9]

[22] The Minister argues that the important part of this finding is that the General Division did not find that the Claimant's work capacity was exhausted. This meant that the Claimant's work efforts were a live issue, and the General Division was required to apply the work efforts test.

[23] In my view, the General Division made an error of law. It is not clear from the decision which piece of evidence suggested that the Claimant had capacity to work. I see no basis in law for the idea that evidence of capacity to work means the same thing as a general finding based on the medical evidence that work capacity is not exhausted.

[24] The Appeal Division has decided many times that the General Division needs to make a clear finding of capacity for work in order to apply the work efforts test.[10] Without such a finding, the General Division is not following the Federal Court of Appeal's requirement.[11]

[25] Requiring a clear finding about evidence of capacity to work is more consistent with the overall approach to analyzing whether a disability is severe. In a case called *Villani*, the Federal Court of Appeal made it clear that the General Division must decide, "in practical terms", whether the Claimant is incapable regularly of pursuing any substantially gainful work. They are not supposed to think about vague categories of labour that the Claimant might do that are not connected to reality. More specifically, the Court in *Villani* explained:

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[9] The General Division relies on paragraphs 23, 28, and 29 of the General Division decision for this point.
[10] For examples, see *IT v Minister of Employment and Social Development*, 2017 SSTADIS 514; *K.S. v Minister of Employment and Social Development* 2019 SST 1361; and *R.V. v Minister of Employment and Social Development*, 2020 SST 195.
[11] See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

> …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.[12] **(emphasis mine)**

[26] In this case, the General Division did not take issue with the notion that the Claimant's functional limitations included both sitting and standing, and yet somehow found that she had capacity to retrain in English or to work a job with light duties.

[27] Since there is no analysis of the evidence that grounds the General Division's conclusion that the Claimant had some capacity to work, it seems that the General Division is doing what the Court in *Villani* warned against. The General Division is making an implicit finding that the Claimant could do some unspecified sedentary work because she can sit for an unspecified amount of time. This Court overturned that kind of reasoning about a Claimant who needed to alternate between sitting and standing in another case called *Garrett*.[13]

[28] The General Division must identify what evidence showed that the Claimant had some capacity for work. Personal circumstances can tell us something about the Claimant's employability, but the age or work history of the Claimant alone cannot be evidence of capacity to work if the Claimant's functional limitations preclude that work.

[29] The General Division made an error by requiring the Claimant to meet the employment efforts test without first explaining what evidence showed that she had

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[12] See paragraph 47 in *Villani v Canada (Attorney General)*, 2001 FCA 248.
[13] See *Garrett v Canada (Attorney General)*, 2005 FCA 84.

some capacity for work.

[30] The General Division also made an error of law in the analysis of the Claimant's treatment efforts.

The second error of law: failing to make a finding about what impact refusing treatment was likely to have on the Claimant's disability status

[31] The General Division failed to consider what impact the treatment would have on the Claimant's disability status. This is an error of law.

[32] The Federal Court of Appeal is clear that if the Claimant refuses treatment unreasonably, the decision maker must also consider what impact the refusal might have on the Claimant's "disability status."[14]

[33] The General Division made an error of law by reaching a finding without evidence about the impact the Claimant's treatment would have on her disability status.

[34] The General Division decided that the Claimant unreasonably refused treatment in the form of physiotherapy.

[35] The General Division decided that following the medical advice about physiotherapy

> …might have made a difference to the [Claimant's] disability. The doctor who recommended the treatment "obviously believed that physiotherapy would have a positive impact on the [Claimant's] condition, because he kept recommending it. I accept his opinion. Physiotherapy is a conservative and typical treatment for back pain and functional limitation.[15]

[14] See *Lalonde v Canada (Attorney General)*, 2002 FCA 211.
[15] See paragraph 43 in the General Division decision.

[36] In my view, the General Division made an error of law. I understand that the way the General Division applies settled law to the facts is not an error that I can address in my decision.[16]

[37] In my view, the General Division made no finding about what impact the physiotherapy would have on the Claimant's disability status. In other words, the fact that the physiotherapy would have a positive impact on the Claimant's condition because the doctor consistently recommended it is not a finding about the impact on the **disability status**.

[38] The General Division doesn't state how the physiotherapy would impact the Claimant's ability to work.

[39] The vague reference to a difference or a positive impact does not show that the General Division grappled with the evidence to determine how that evidence showed an impact on disability status. All treatments are expected to help in some way, but this does not tell us whether the physiotherapy would impact the disability status in a meaningful way. It wouldn't make sense to deny a disability pension to a person for refusing a treatment that would not amount to a chance in improving the disability status anyway.

[40] I have noted in the context of other cases (and with reference to the Minister's Canada Pension Plan Adjudication Framework) that treatment can be what is needed to restore or improve the health and function of a particular person, or what is needed to prevent or delay deterioration.[17] People respond differently to different treatments. The goal of treatment can be to cure or remove the cause of the medical condition, or it can be to provide relief of symptoms or provide insight and coping mechanisms for adapting to existing limitations.

[41] The Minister argued that the General Division made no error of law here. The Minister argues that when a medical professional makes a recommendation for

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[16] Applying facts to the law is a mixed error of fact and law, and I can't address those. See *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[17] See paragraph 16 *T.M. v Minister of Employment and Social Development*, 2018 SST 1279.

treatment, it is presumed that the treatment will have some beneficial effect on a Claimant's conditions.[18]

[42] In my view, the legal question is not whether the treatment will have some beneficial effect on a Claimant's conditions. The requirement from the Federal Court of Appeal is to consider whether the treatment will impact the Claimant's disability status. A condition may well improve in some way with physiotherapy but not change enough to impact a claimant's disability status.

[43] There is no evidence on the record about the extent to which physiotherapy was expected to help the Claimant's disability, or in what way, or for how long. The General Division did not consider what impact the physiotherapy would have on the Claimant's disability status. If it would have changed the Claimant's disability status such that she could work, it would be important to dismiss the Claimant's appeal for unreasonably refusing treatment.

[44] But where there is no evidence that suggests that the treatment would impact her disability status, the fact that she refused it unreasonably should not necessarily result in a finding that she's ineligible for the disability pension.

[45] Since these two errors go to the central questions that the General Division needed to answer, I will move on to fixing the errors.

Fixing the errors by giving the decision that the General Division should have given

[46] Once I find that the General Division made an error, I have a choice about how to fix the error. I can give the decision that the General Division should have given, or I can return the matter to the General Division for reconsideration.[19] I can decide any question of law necessary for deciding an appeal.[20]

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[18] The General Division relies on *K. S. v Minister of Employment and Social Development*, 2015 SSTAD 868, paragraphs 32 to 34.
[19] See section 59 of the Act.
[20] See section 64 of the Act.

[47] The Minister and the Claimant didn't object to me giving the decision that the General Division should have given. This is an efficient way to move forward in many cases.[21]

[48] I will give the decision that the General Division 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

[49] 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."[22]

[50] Each piece 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."

[51] In my view, the Claimant proved that she had a severe and prolonged disability within the meaning of the CPP. Her disability was severe and prolonged within her coverage period, which ended on December 31, 2020.[23] I 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);[24] and

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[21] See section 2 of the *Social Security Tribunal Regulations* about the need to proceed in a way that is fast and fair.
[22] See section 42(2) of the CPP.
[23] The coverage period (minimum qualifying period, or MQP) is calculated based on the Claimant's contributions to the Canada Pension Plan.
[24] The Federal Court of Appeal discusses this in a case called *Bungay v Canada (Attorney General)*, 2011 FCA 47.

- the Claimant's background (including age, education level, language proficiency, past work and life experience);[25] and

- the steps the Claimant took to manage the medical conditions, and whether the Claimant unreasonably refused any treatment.[26]

[52] Considering these three factors, in my view, the Claimant does not have even some (or a residual) capacity for work. She has functional limitations that preclude pursuing any substantially gainful work. She has some additional personal circumstances that result in challenges or barriers to employment. She has taken steps to manage her conditions, and she has not refused treatment unreasonably. Since I found that she does not have capacity for work, she does not have to show that her efforts to get and keep work were unsuccessful because of her medical conditions.

Medical conditions and limits on the Claimant's functioning

[53] The Claimant has multiple functional limitations that, considered together, mean that she is incapable regularly of pursuing any substantially gainful work. She has a combination of medical documents and other evidence including her testimony that show her disability is severe.

[54] The Claimant does not have some (sometimes called "residual") capacity to work that would trigger the employment efforts test.

[55] I am satisfied that the Claimant's medical evidence as well as the testimony from the General Division hearing shows that the Claimant has real limitations that impact her ability to work.

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[25] These factors I need to consider come from a case called *Villani v Canada (Attorney General)*, 2001 FCA 248.
[26] The Federal Court of Appeal explained that Claimants need to make reasonable efforts to manage medical conditions in *Klabouch v Canada (Social Development)*, 2008 FCA 33 and *Sharma v Canada (Attorney General)*, 2018 FCA 48. There is no reference to exhausting all treatment options in these cases. The requirement set out in *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211, is that claimants are not to unreasonably refuse treatment, which is different from exhausting all treatment options.

[56] The Claimant testified and I accept that she has:

- significant back pain that limits her ability to bend and twist.
- Her back pain radiates into her right leg, causing it to feel weaker.
- Her standing and sitting are limited to 10 minutes. She has to change positions.
- She can walk for 10 minutes before she needs to rest.
- Her sleep is affected by pain and it's hard to find a comfortable position.[27]

[57] The medical evidence supports that the Claimant has pain and limitations.

[58] The Claimant's MRI of her lumbar spine on May 15, 2019showed findings at the L4-5 level of the spine that included a loss of disc space, a disc bulge and mild anterolisthesis.[28] There was no spinal stenosis or nerve damage.

[59] The Claimant was referred to a pain specialist. The pain specialist's report is dated August 13, 2019.[29] He said that the Claimant reported back and leg pain for eight months. Walking made the pain worse. He said the Claimant had reduced range of motion and tenderness in her lumbar spine.

[60] In the Medical Report for CPP, the Claimant's family doctor also noted the reduced range of motion and strength. He said standing and sitting were limited to 15 minutes. He believed the condition would likely deteriorate in the future and didn't expect a return to work in the future.[30]

[61] In a medical report dated November 19, 2020 (the month before the end of the coverage period), the Claimant's doctor confirmed there was still back pain radiating to the right leg. He said there was difficulty bending, twisting standing and with prolonged

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[27] See paragraph 21 of the General Division decision, which I adopt.
[28] See GD2-70.
[29] See GD2-76.
[30] See GD2-70.

walking. He said the Claimant declined to see a neurosurgeon after being advised there are risks with surgery. She has elected to use pain management for her condition.[31]

[62] In a report dated October 23, 2002, another pain specialist confirmed that the Claimant had back pain that moves into her right leg if she stands or sits for more than 15 minutes.[32] He said she has difficulty with bending, twisting, walking and standing. He diagnosed chronic mechanical low back pain, and strain of the right facet and sacroiliac joints.

[63] The doctor's clinical records continue to document the Claimant's back and leg pain in the months following the end of the MQP. The family doctor recommended physiotherapy more than once.

[64] A third pain specialist saw the Claimant after the end of the coverage period.[33] The reports from that specialist confirm the ongoing existence of the pain, noting that the pain in the low back was persistent and not improving. The Claimant was having pain injections. The diagnosis was mechanical low back pain and disc herniation. The pain specialist didn't recommend a return to work due to chronic low back pain.

[65] The Claimant had back pain that limits her standing, sitting, and walking. She must change positions regularly. She has limitations in terms of twisting and bending and the range of motion in her low back is limited.

[66] The Claimant gave testimony about the impact that pain has on her daily life.[34] She has no hobbies, and she leaves the house only to go to the doctor. She cannot drive for more than 15 minutes because she is in too much pain. She does not attend celebrations with family or friends. She has extended family who help with cleaning and laundry and other household tasks. She needs help with some personal care like showering. She makes her own tea when a family member is not available to help.

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[31] See GD2-17.
[32] See GD2-18.
[33] See GD7-2 and GD9-2.
[34] See the Recording of the General Division hearing at about 45:00.

[67] The Claimant has functional limitations that affect her ability to work. The Claimant's background is important too. Some aspects of that background represent additional barriers to employability.

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 English; and
- past work and life experience.[35]

[69] The Claimant was 37 years old when she stopped working and applied for a disability pension. Her age isn't a barrier to returning to work and she has many years before the standard retirement age in Canada.

[70] The Claimant's education and ability is English are barriers to employability in Canada. The Claimant has the equivalent of a high school education from India.[36] She testified (and I accept) that she doesn't speak, read, or understand English. She testified that she spoke Punjabi in her previous workplaces. She relied on coworkers or supervisors who spoke both Punjabi and English to translate for her to understand instructions or to communicate.[37]

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[35] The Federal Court of Appeal listed these factors in *Villani v Canada (Attorney General)*, 2001 FCA 248.
[36] See Recording of the General Division hearing at 14:16.
[37] See Recording of the General Division hearing at 41:33.

[71] She has no work experience in India. Her Canadian work experience is as a packer in industrial warehouses. She does not have computer skills, does not check her own email account, and does not use social media.

[72] To gain work that is less physical than she has done in warehouses, it seems to me that she would likely need to upgrade her English skills and then retrain, as her work in warehouses is unlikely to translate to a job with fewer physical requirements. Communication in English would be necessary for many jobs that are less physical in nature.

[73] The Claimant's personal circumstances, in particular her lack of English skills and her lack of work experience or skills that would transfer to a less physical job are real barriers to her real-world employability.

The Claimant took steps to manage her back pain. When she refused treatment, she acted reasonably.

[74] The Claimant has taken steps to manage her conditions and she has not refused any medical advice unreasonably.

[75] Claimants have an obligation to show efforts to manage their medical conditions.[38] There is no specific requirement that the evidence be from a claimant's doctor, although doctors often include this kind of information in their reports. There is no express requirement that the efforts be substantial, extensive, or otherwise exhaustive.

[76] In *Sharma*, the Federal Court of Appeal appears to agree with the way the Appeal Division referred to the test as "reasonable efforts" and a "reasonable explanation" for not following medical advice.[39]

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[38] The Federal Court of Appeal explained this requirement at paragraph 16 in *Klabouch v Canada (Attorney General)*, 2008 FCA 33.
[39] See paragraph 4 in *Sharma v Canada (Attorney General*), 2018 FCA 48 which refers to the Appeal Division considering whether the Claimant made reasonable efforts to follow medical advice to alleviate his conditions or provide a reasonable explanation why he did not do so The Federal Court of Appeal did not alter or change the test the Appeal Division applied here.

[77] It is important that the bar is set at “reasonable efforts” and a “reasonable explanation” because not all claimants who are incapable regularly of pursuing any substantially gainful occupation will have tried every treatment associated with their conditions more generally. They need only to make reasonable efforts.

[78] The Claimant has taken steps to manage her medical conditions and has not refused medical treatment unreasonably.

[79] The Claimant refused to continue with physiotherapy after trying it for about a month. There is evidence that her family doctor encouraged her to continue with physiotherapy more than once. The Claimant provided a reasonable explanation for refusing to continue with the physiotherapy, as she testified that it was too painful.

[80] Even if this explanation was unreasonable, I do not have sufficient information about the impact that the physiotherapy was expected to have on the Claimant’s disability status. For the purpose of a disability pension, the focus is on ability to work. There is no discussion or suggestion in the record that ongoing physiotherapy was expected to have an impact on the Claimant’s disability status.

[81] Given the pain the Claimant testified about, I will not infer that the doctor’s repeated recommendations for physiotherapy meant that the doctor thought that physiotherapy would result not changes to the Claimant’s ability to work.

[82] At the General Division hearing, in answer to a question about not getting relief from physiotherapy or chiropractic care, the Claimant testified that her doctor told her to stop because it was not making a difference.[40] No one asked the Claimant when the doctor gave her that advice. This advice may explain why the notes suggest physiotherapy several times and then stop, but I cannot know that for sure. The CPP Medical Report states that the Claimant tried physiotherapy with “no response.”[41]

[83] The Claimant did not explore surgery as an option for her back, but her doctor has not recommended surgery again, nor did the pain clinic suggest she go back and

[40] See Recording of the General Division hearing at about 21:35.
[41] See GD2-72.

pursue that option. Her diagnosis from the pain clinic was degenerative disc disease of the lumbar spine and radiculopathy, and they advised her that one hundred percent pain control is not possible.[42]

[84] The Claimant testified about taking Advil and Tylenol for back pain on the advice of her doctor. When her doctor referred her to a pain clinic, she participated in the treatments they suggested. She tried Gabapentin first, she had injections for her pain weekly, and then later she had the injections monthly. She continues with those injections although she doesn't find them beneficial.

[85] The Claimant also testified that she does exercises at home although she does not find that they help.[43]

The Claimant doesn't have capacity for work, so she doesn't need to show that efforts to get and keep work failed because of her disability.

[86] In my view, there is no evidence of capacity for work.

[87] The Claimant's medical reports are quite clear about the range of functional limitations that the Claimant has. The pain in her back and legs not only limits her ability to walk and to stand, but also to sit. She cannot lift or bend either. Her day-to-day life shows that her day is taken up with trying to cope with her pain, and that she is not able to complete even routine tasks around her home independently.

[88] Clearly, she cannot return to packing work, which would exceed her ability to walk, stand, lift, carry, and twist. But her need to change positions regularly and her restrictions in terms of sitting mean that she is also not able to participate in sedentary work. I accept the Claimant's doctor's evidence, which states clearly that he recommended that the Claimant stop working in June 2019, and that from a strictly medical standpoint he does not expect the Claimant to return to any type of work in the future.[44]

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[42] GD2-78.
[43] See Recording of the General Division decision at about 24:00.
[44] See GD2-72.

[89] In addition, I accept the Claimant's testimony about the affect that her disability has had on her day-to-day living. I also accept that she is not physically capable of the kind of retraining she would need to do to be employable in a sedentary job. She cannot sit for more than 15 minutes.[45] Her lack of English is a major barrier to accessing sedentary work in Canada.

[90] The Claimant does not have to show that efforts to get and keep work were unsuccessful because of her medical condition.

The disability is prolonged

[91] 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.[46]

[92] In October 2019, the Claimant's doctor stated that from a strictly medical standpoint, he did not expect the Claimant to return to any type of work in the future. The doctor stated under "prognosis" that he expected the Claimant's condition to deteriorate, and that it was expected to last more than a year and be continuous.

[93] Years later, when the Claimant testified at the General Division hearing in 2022, she explained that her pain was worse than before. That worsening existed despite years of treatment, including medication and 8 months of follow up with a pain clinic.[47]

[94] I am satisfied that the Claimant had a severe and prolonged disability by June 2019, which is before the end of her coverage period of December 31, 2020. She applied for the pension in October 2019. Payments start four months after she became disabled in June 2019, which is October 2019.[48]

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[45] Again, see GD2-72.
[46] See section 42(2) of the CPP.
[47] See Recording of the General Division hearing at 41:00.
[48] See section 69 of the CPP.

Conclusion

[95] I've allowed the appeal. The General Division made errors of law. I've given the decision that the General Division should have given: the Claimant is entitled to a disability pension under the *Canada Pension Plan*. Payments start October 2019.

Kate Sellar
Member, Appeal Division