Citation: *SE v Minister of Employment and Social Development*, 2024 SST 105

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. E.
Respondent:	Minister of Employment and Social Development
Representative:	Jordan Fine

Decision under appeal:	General Division decision dated June 8, 2022 (GP-21-728)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	January 19, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	February 4, 2024
File number:	AD-22-499

Decision

[1] The appeal is dismissed. The General Division made factual and legal errors. However, having reviewed the record myself, I find that the Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 57-year-old former factory worker who suffers from osteoarthritis, mainly in her hands. She has not had a full-time job since 2008, when the factory where she was working closed. She has been employed as a part-time bartender since 2013.

[3] The Appellant applied for a CPP disability pension in October 2019.[1] Service Canada, the Minister's public-facing agency, refused the application because, in its view, the Appellant had not proved that she had a severe and prolonged disability during her minimum qualifying period (MQP), which ended on December 31, 2010.[2]

[4] The Appellant appealed Service Canada's refusal to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and dismissed the appeal because it didn't find enough medical evidence showing that the Appellant was disabled from substantially gainful employment during her MQP. The General Division acknowledged that the Appellant might have some functional limitations now, but it saw no indication that they affected her ability to work before December 31, 2010.

[5] The Appellant then asked the Appeal Division for permission to appeal the General Division's decision.[3] She alleged that the General Division made the following errors:

---

[1] The Appellant had previously applied for CPP disability benefits in August 2017. The Minister denied that application, and the Appellant did not pursue a reconsideration or appeal.
[2] An MQP is established by working and contributing to the CPP. It is the period in which a contributor had coverage for the CPP disability pension. A contributor who applies for the pension must show that they became disabled during the coverage period and remained so afterwards.
[3] On December 5, 2022, the rules governing appeals to the Appeal Division changed. Whereas the Appeal Division was previously restricted to considering errors that the General Division might have made, it is now mandated to hold fresh hearings on the merits of an appellant's claim. Since the Appellant

- It ignored her family doctor's evidence that the first recorded onset of her osteoarthritis was in December 2008 and that the condition would be "prolonged for more than one year…" and
- It ignored evidence that her current employer makes major accommodations to allow her to continue working as a part-time bartender.

[6] In August 2022, one of my colleagues on the Appeal Division granted the Appellant permission to appeal because she saw an arguable case that the General Division had erred in several more ways:

- It may have committed a legal error by stating that she had to provide medical evidence showing functional limitations before the MQP;
- It may have failed to consider aspects of an April 2011 neurology report and a February 2017 rheumatology report that seemingly traced some of her medical problems back to the MQP;
- It may have failed to ask her questions about her functional limitations from the time around her MQP; and
- It may have committed a legal error by failing to consider the effect of her background and personal circumstances on her real-world employability.

[7] When this case came into my hands, I scheduled a hearing by videoconference to discuss the issues in full. On the appointed day, I convened the hearing, but the Appellant did not appear. Having satisfied myself that the Appellant had received notice of the hearing, I decided to proceed in her absence.

[8] In deciding to proceed, I also considered the fact that this was the second time the Appellant had missed an opportunity to make her case. The Appeal Division had originally scheduled a hearing in this matter for November 7, 2022. At the Appellant's

---

in this case filed her application for leave to appeal on August 19, 2022, before the new rules came into effect, this appeal proceeded under the old rules.

request, the hearing was rescheduled for December 6, 2022. On that date, the Appellant did not appear either. The hearing was then adjourned for a future date.

[9] Given this history, I am satisfied that the Appellant will suffer no prejudice if I render a decision without hearing her oral submissions.

Issues

[10] There are four grounds of appeal to the Appeal Division. An appellant 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]

[11] My job was to decide whether the General Division did, in substance, make any errors that fall into the permitted grounds of appeal.

Analysis

[12] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision.

[13] I am satisfied that the General Division committed related factual and legal errors. Because the General Division's decision falls on these grounds alone, I see no need to consider the Appellant's other allegations.

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

The General Division disregarded evidence about the onset of the Appellant's osteoarthritis

[14] In its decision, the General Division found no medical evidence that the Appellant's functional limitations affected her ability to work as of December 31, 2010.[5] According to the Appellant, this finding ignored the following items:

- Her family doctor's September 2019 report, which said that her osteoarthritis began in December 2008 and that it had produced "loss of function and pain" and was "prolonged for more than one year";[6]
- Her neurologist's April 2011 report, which said that she had experienced episodic numbness and pins and needles in her fingers "for many years";[7] and
- Her rheumatologist's February 2017 report, which said that she had suffered from bilateral thoracic outlet syndrome since 2010.[8]

[15] The Appellant's disability claim faces several challenges. One of them is the complete absence of medical information that dates from her MQP. The Appellant insists that, while she didn't submit reports that were prepared before December 31, 2010, the documents listed above still address that period. She says that, although they were written after the MQP, the reports still confirm that she had some functional limitations during that period.

[16] I see merit in this argument.

[17] When a disability claim lacks evidence that is contemporaneous to the MQP, it is important to examine the record for relevant **retrospective** medical assessments. In this case, the General Division addressed the above three documents in its decision,

---

[5] See General Division decision, paragraphs 27 and 39.
[6] See CPP medical report dated September 10, 2019 and completed by Dr. James Cluett, family physician, GD2-96.
[7] See report dated April 16, 2011 by Dr. Michael Lacerte, neurologist, GD2-116.
[8] See report dated February 2, 2017 by Dr. Phil Andros, rheumatologist, GD2-101.

but it did not specifically consider what they said about the Appellant's condition before December 31, 2010.

[18] The three reports were all dated after the MQP, but they all referred, in varying ways, to the Appellant's condition during the relevant period. I recognize that two of them, the neurology and rheumatology reports, touched on the period before December 31, 2010, but only to relay the Appellant's own account of her medical history. However, the third, the family doctor's report, offers what appears to be an objective assessment of the Appellant's condition during the relevant period. Dr. Cluett, who had been the Appellant's primary caregiver since 2008, said that her osteoarthritis began that year and that it had resulted in functional limitations.

[19] Despite this, the General Division seemingly dismissed or gave minimal weight to the Appellant's evidence because it was all produced after the MQP. As we will see, this led to an error law.

The General Division failed to consider the Appellant as a whole person

[20] The leading authority on CPP disability requires disability claimants to be assessed in a real-world context.[9] 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.

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

> When I am deciding whether a disability is severe, I usually have to consider an appellant's personal characteristics.
>
> This allows me to realistically assess an appellant's ability to work.
>
> I don't have to do that here because the Appellant's functional limitations didn't affect her ability to work by December 31, 2010. This means she didn't prove her disability was severe by then.[10]

[9] See *Villani v Canada (Attorney General)* 2001 FCA 248.
[10] See General Division decision, paragraphs 37–59.

[22] 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 under certain circumstances.[11] However, *Villani* suggests that the real-world analysis is an integral part of the severity assessment:

> In my view, it follows from [the wording of section 42(2)(a)(i) of the *Canada Pension Plan*] that the hypothetical 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].[12]

[23] On the face of it, *Giannaros* and *Villani* are inconsistent with one another. If a severity assessment cannot be divorced from a claimant's personal circumstances, then how can one assess disability without looking at age, education, and personal and life experience? The answer is when a severity assessment is not necessary in the first place.

[24] *Giannaros* is brief and leaves much unsaid. However, a close reading of the decision points to limited circumstances in which it may not be necessary to assess the severity of a claimant's impairments, for instance:

- When the claimant has not attempted to comply with treatment recommendations;
- When the claimant has not attempted to find alternative work within their limitations; and
- When the claimant has not produced **any** objective medical evidence about their condition during the MQP.

[25] These last two conditions are also compatible with *Villani*, which cautioned that every unemployed person with a health problem would not necessarily be entitled to a

---

[11] See *Giannaros v Canada (Minister of Social Development)*, 2005 FCA 187.
[12] See *Villani*, (above at note 9), paragraph 38.

disability pension: “Medical evidence will still be needed, as will evidence of employment efforts and possibilities.”[13]

[26] In this case, the General Division found that the Appellant did not produce **any** objective medical evidence about her condition during the MQP. However, as we have seen, that was not true. She did produce evidence — her family doctor’s assessment of her osteopathic condition as of 2008. Granted, this evidence was retrospective, and it was short on detail, but it nonetheless constituted at least **some** evidence linked to the relevant period.[14]

[27] The Minister argues that there was no need to address *Villani* in this case because the Appellant’s evidence was so weak. I disagree. It is true that the Appellant did not submit any medical reports that were prepared during her MQP. However, the Appellant did provide **some** objective medical evidence, however scanty, in support of her disability claim. That, absent evidence of non-mitigation, was enough to oblige an assessment of her ability to work in the real world.

[28] The Appellant had entered middle age by the end of her MQP, and she has a limited education and few skills. Nevertheless, the General Division saw no need to consider her age, education, and work history, even though she provided at least some evidence of disability before December 31, 2010. That was an error of law. However weak it might have found the Appellant’s evidence, the General Division could not assess the severity of her disability without also considering her employability in light of her background and personal characteristics.

---

[13] See *Villani* (above at note 9), paragraph 50.
[14] More recent cases have affirmed the obligation of CPP disability claimants to provide medical evidence indicating functional limitations during the MQP — see *Warren v Canada (Attorney General)*, 2008 FCA 377 and *Canada (Attorney General) v Dean*, 2020 FC 206. Since the Appellant produced at least some evidence linked to the MQP, these cases do not bar her from the CPP disability pension.

Remedy

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

[29] When the General Division makes an error, the Appeal Division can address 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.[15]

[30] The Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness allow. In addition, the Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing an application for a disability pension to conclusion. It has been more than four years since the Appellant applied for benefits. 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

[31] I am satisfied that the record before me is complete. The Appellant has filed numerous of 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 Appellant testified about her medical condition, its effect on her capacity to work. I had access to the recording of the hearing, and I doubt that the Appellant's evidence would be materially different if this matter were reheard.

[32] 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 considered the Appellant's background and personal characteristics, it would have come to the same result. My own assessment of the record satisfies me that the Appellant was not disabled as of her MQP.

---

[15] See DESDA, section 59(1).

There is insufficient medical evidence showing the Appellant had a severe disability during her MQP

[33] Claimants for disability benefits bear the burden of proving that they had a severe and prolonged disability.[16] I have reviewed the record, and I have concluded that the Appellant did not meet that burden according to the test set out in the *Canada Pension Plan*. While the Appellant may suffer from disabling physical and mental conditions now, I couldn't find enough evidence to suggest that she was incapable of regularly pursuing substantially gainful employment as of December 31, 2010.

[34] In her October 2019 application for benefits, the Appellant said that she was prevented from working by osteoarthritis, fibromyalgia, and vertigo.[17] She said that it was extremely difficult to perform daily tasks such as cooking, cleaning, and brushing her hair and teeth. She said that she couldn't write for more than a couple of minutes or lift her arms over her head. She said that her condition was getting worse and affecting her mental health.

[35] The file indicates that the Appellant worked in a plastics factory for more than a decade — five years in the molding department and, after developing tendonitis, five years in the paint department. In 2008, the factory shut down and she went on Employment Insurance benefits.

[36] After physiotherapy and home exercise, her condition improved. In 2013, she began a part-time job as a bartender, working every Tuesday and Thursday night from 8:00 pm to 1:00 am. She still has this job but insists that she has been able to hang onto it only because she has boss who is willing to accommodate her impairments.

[37] Although the Appellant may feel that she is disabled, 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 MQP. I don't doubt that the Appellant experienced some

---

[16] See *Canada Pension Plan*, section 44(1).
[17] See Appellant's application for CPP disability benefits dated October 25, 2019, GD2-19.

limitations before December 31, 2010, but that doesn't mean she was incapacitated from all forms of work as of that date.

[38] I base this conclusion on the following factors:

– There was limited evidence of a severe disability during the MQP

[39] As noted, CPP disability claimants must provide at least some medical evidence that they had functional limitations during their MQP.[18] The problem for the Appellant is that, although she has provided such evidence, it is thin. All the reports that refer to the Appellant's condition during the MQP were prepared years after the fact. The neurology and rheumatology reports do nothing more than relay the Appellant's subjective and retrospective account of her pain and discomfort before December 31, 2010. Her family doctor mentioned that she had osteoarthritic pain in 2008, but he said nothing about how intense it was at the time or whether it prevented her from working.

[40] I am not inclined to give the above evidence much weight, especially in light of evidence that the Appellant's condition did not become severe until well after the MQP.

[41] In April 2011, Dr. Cluett referred the Appellant to a specialist in physical medicine.[19] Dr Lacerte wrote that the Appellant complained of episodic numbness and tingling in her fingers, although she reported no prior history of arthritis. On examination, the Appellant's hands were mostly normal revealed mostly normal, with only "mildly prolonged" latencies in both extremities. Electromyography (EMG) revealed mild median entrapment neuropathy in the right wrist, but not the left.

[42] In a July 2011 follow-up appointment, the Appellant reported a "marked improvement" in her hands thanks to vitamins and a splint that Dr. Lacerte had previously recommended. Physical examination and EMG results confirmed the reported improvement.[20]

---

[18] See *Warren* and *Dean*, above at note 14.
[19] See Dr. Lacerte's report dated April 27, 2011, GD2-116.
[20] See Dr. Lacerte's report dated July 27, 2011, GD2-117.

[43] Through 2015 and 2016, the Appellant had X-rays taken of her head, neck, hands, and knees after complaining of dizziness and cracking in her joints. They indicated only mild conditions, including some osteoarthritis in the second right finger.[21]

[44] In February 2017, the Appellant saw Dr. Andros, the rheumatologist, for hand and joint pain, which she said had worsened in the previous year and a half.[22] Dr Andros found that the Appellant now had significant osteoarthritis, predominantly in her right hand. He added, "Her line of work as a house cleaner does not help this, and I have informed her that it would be in her best interest to start looking for different work if possible."

[45] In short, there is no evidence that the Appellant suffered from vertigo, degenerative disc disease, or fibromyalgia at the time of her MQP. She appears to have had mild osteoarthritis in her hands at the time, but there is no evidence that it prevented her from working. It appears likely that the Appellant's overall condition, which had been manageable enough that she was able to work as a house cleaner, took a turn for the worse in 2016−17, but this came well after her CPP disability coverage ended.

- **The Appellant's background and personal characteristics were not barriers to work**

[46] 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.[23]

[47] The Appellant has a high school education and few transferable skills. She has most of spent her working life in low-paying retail or factory jobs. Still, she was only 44 years old at the end of her MQP — more than two decades from the typical age of retirement. Her profile has never prevented her from obtaining and maintaining employment, and I see no reason to believe that, even with some joint pain, she was

[21] See X-ray of the bilateral hands dated July 27, 2016, GD2-122.
[22] See report dated February 2, 2017 by Dr. Phil Andros, rheumatologist, GD2-16.
[23] See *Villani*, above at note 9.

unemployable as of December 31, 2010. The Appellant may have been capable of a sedentary job at the time, but she never attempted to get one, nor did she ever attempt to retrain for one.

– The Appellant admitted that she didn't become disabled until 2017

[48] The Appellant has applied for the CPP pension disability twice. She filed her first application in August 2017, just a few months after Dr. Andros told her that that she should find a new, presumably non-physical, line of work.[24] Two years later, in her second application, the Appellant declared that she no longer felt able to work as of July 2017 — long after the end of her MQP.[25]

[49] As noted, it appears that the Appellant's condition deteriorated around 2016 or 2017 — and this is what may have prompted her to apply for disability benefits the first time. But, although the Appellant may be disabled now, the onset of her disability came too late to qualify her for the CPP disability pension.

[50] I can appreciate that the Appellant may not have fully understood the implications of the CPP's coverage cut-off rules when she made her applications. However, the fact remains that, in her second application, she explicitly admitted that her disability began **after** her MQP ended.

– The Appellant's bartending job is not substantially gainful

[51] Despite her health problems, the Appellant began working part-time as a bartender in 2013. She argues that this job shouldn't be held against her because (i) she works no more than 10 hours per week and (ii) she benefits from an unusually understanding boss.

[52] On this point, I agree. I have found that the Appellant was not disabled as of December 31, 2010, but I have not based that finding on the fact that she took a part-time job. The Appellant's record of employment indicates that she has never made

---

[24] See Dr. Andros' report dated February 2, 2017, GD2-16.
[25] See Appellant's application dated August 24, 2017 (GD2-50) and October 25, 2019 (GD2-18 and GD2-22).

anything close to a living over the past decade, and her earnings during that period appear to have fallen well below the threshold for substantially gainful.[26]

[53] Post-MQP income may or may not be evidence of capacity, depending on the number of hours worked, the amount of income earned, and the intensity of the work performed. In this case, I don't think that, by itself, the Appellant's bartending job indicates that she is regularly capable of substantially gainful occupation.

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

[54] A disability must be severe **and** prolonged.[27] Since the Appellant has not proved that her disability is severe, there is no need for me to assess whether it is also prolonged.

Conclusion

[55] I am dismissing this appeal. The General Division erred in fact by disregarding evidence about the onset of the Appellant's medical conditions. It then erred in law by proceeding to assess her disability without also considering the impact of her background and personal characteristics on her employability.

[56] However, I do not think the General Division would have come to a different conclusion had it not made those errors. Having conducted my own review of the record, I am not persuaded that the Appellant had a severe disability as of December 31, 2010.

Member, Appeal Division

[26] See Appellant's record of employment, GD2-6.
[27] See *Canada Pension Plan*, section 42(2)(a).