Citation: *B. Z. v. Minister of Employment and Social Development*, 2015 SSTAD 377

Appeal No. AD-13-188

BETWEEN:

B. Z.

Appellant

and

Minister of Employment and Social Development
(formerly known as Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Janet Lew
DATE OF HEARING:	November 25, 2014
PLACE OF HEARING:	Barrie, Ontario
TYPE OF HEARING:	In person
DATE OF DECISION:	March 20, 2015

IN ATTENDANCE

Appellant	B. Z.
Observer	M. Z. (Spouse of Appellant)
Representative for the Respondent	Michael Stevenson (Counsel) (via videoconference)

INTRODUCTION

[1] This is an appeal of the decision of the Review Tribunal issued on January 22, 2013, which dismissed the Appellant's application for disability benefits, on the basis that the Appellant did not prove that her disability was severe for the purposes of the *Canada Pension Plan*, by her minimum qualifying period of December 31, 2012. Leave to appeal was granted on May 27, 2014, on the ground that the Review Tribunal may have based its decision on an erroneous finding of fact, without regard for the material before it.

FACTUAL BACKGROUND

[2] The Appellant was 38 years old when she submitted an application for Canada Pension Plan disability benefits in January 2010. She has a Grade 12 education and holds a Health Care Aide Certificate.

[3] The Questionnaire for Canada Pension Plan Disability Benefits indicates that the Appellant was last employed as a health care aide worker in August 2005. The Appellant noted in her Questionnaire that she stopped working to look after her children at home, though sometime that same year, developed intermittent spasms in her low back area.

[4] The Appellant subsequently developed chronic back pain due to a bulging disc in her central and lower back, and alleges that she has been unable to work as of August 2007, and incapable of regularly pursuing any substantially gainful occupation. She described numerous functional limitations and restrictions, including limited standing, sitting, walking, lifting, reaching and bending. Her condition has progressively deteriorated since August 2007. She developed depression and in 2012, was diagnosed

with fibromyalgia. She has not seen any measurable relief in her symptomology, despite undergoing physiotherapy, massage therapy and chiropractic treatments, and taking various medications.

REVIEW TRIBUNAL DECISION

[5] At the hearing before the Review Tribunal in December 2012, both the Appellant and her spouse testified and described how the Appellant's symptoms impacted her.

[6] There was extensive medical evidence before the Review Tribunal. The Appellant's family physician, Dr. Michael Robson, and medical specialists prepared medical opinions, confirming the Appellant's diagnoses of chronic back pain, fibromyalgia and depression. There were diagnostic reports too, which confirmed the diffuse disc bulge at L5-S1. In his consultation report dated February 14, 2011, her physiatrist Dr. Samuel Wong summarized his findings on an MRI:

> [The Appellant] had an MRI done last November showing mild degenerative changes and disc bulging at C4-5 and C5-6. Her previous MRI of the lumbosacral spine does show a moderate broad-based disc. Despite these findings on the MRIs of the cervical spine and lumbosacral spine, there is no evidence of any focal neurological deficits.

[7] The Appellant testified that, despite her medical condition, she has attempted to find work. There is little evidence of her efforts in this regard.

[8] The Review Tribunal found that the Appellant had not exhausted all reasonable treatment options available to her, noting in particular that she did not participate in any fibromyalgia classes or pain clinics; did not seek a psychiatric consultation, despite her hospitalization; or pursue other modalities of health measures readily accessible in her geographic area. The Review Tribunal found that the Appellant had failed to reasonably mitigate her health issues.

[9] The Review Tribunal reviewed the diagnostic opinions and medical reports of the various practitioners. It preferred the medical opinions of the specialists to the

opinions of her family physician and the testimony of the Appellant and her spouse, largely because it found that the electronic imaging, apart from showing "mild diffuse disc bulge at L5-S1", was normal or unremarkable. The Review Tribunal also noted that the opinion of the psychiatrist, who was seen in Emergency, did not support a finding of inability to do gainful employment. The Review Tribunal accepted that the Appellant suffers from some disability, but determined that she nonetheless retained the capacity to perform some "alternate and more sedentary occupation" by her minimum qualifying period. The Review Tribunal found that "neither the medical reports nor the testimony [preclude] performing all types of work".

BRIEF HISTORY OF PROCEEDINGS

[10] The Review Tribunal issued its decision on January 22, 2013. On or about April 18, 2013, the Appellant sought leave to appeal on numerous grounds. The Appeal Division granted leave on May 27, 2014, on the basis that the Review Tribunal may have erred in finding that the report of Dr. Wong, dated February 14, 2011, stated that the MRI was normal, when an MRI taken on November 10, 2010 showed abnormalities, such as mild degenerative changes at C4-C5, disc bulging at C6-7 and moderate broad-based disc and foraminal stenosis in her lumbosacral spine.

[11] The Appeal Division scheduled an in-person hearing of the appeal on November 25, 2014, by mutual consent of the parties.

[12] The Appellant's submissions were set out in the leave application and Notice to Appeal. She filed additional submissions on August 5, 2014. She wrote that Dr. Wong confirmed that the MRI taken in November 2010 showed mild degenerative changes and disc bulging at C4-5 and C5-6-7, and that the lumbosacral spine showed a moderate broad-based disc which caused moderate foraminal stenosis.

[13] Counsel on behalf of the Respondent filed submissions on July 11, 2014. He submits that the applicable standard of review is one of reasonableness, and that the decision of the Review Tribunal is overall reasonable.

ISSUES

[14] The issues before me are as follows:

(a) What is the applicable standard of review?

(b) Did the Review Tribunal base its decision on an erroneous finding of fact without regard for the material before it?

(c) If the standard is reasonableness, is the decision of the Review Tribunal reasonable? If the standard is correctness, what outcome should the Review Tribunal have reached?

(d) What is the appropriate remedy(ies), if any, if the Review Tribunal based its decision on an erroneous finding of fact, without regard for the material before it?

STANDARD OF REVIEW

[15] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law generally are determined on the correctness standard. The correctness standard is generally reserved for jurisdictional or constitutional questions, or questions which are of central importance to the legal system as a whole and outside the expertise of the tribunal. When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis. Ultimately if it disagrees with the decision of the decision-maker, the court must substitute its own view as to the correct outcome. The correctness standard is vital as it promotes and ensures just decisions, consistency and predictability in the law.

[16] Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Such a review necessarily attracts a deferential standard.

Dunsmuir set out a list of factors which would lead to the conclusion that a decision-maker should be afforded deference and that a reasonableness test applies:

- A privative clause; this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of the law. A question of law that is of "central importance to the legal system . . . and outside the … specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.,* [2003] 3 S.C.R. 777, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[17] The Supreme Court of Canada in *Smith v. Alliance Pipeline*, [2011] SCC 7, [2011] S.C.R. 160, at para. 26, also set out the scope of the standard of reasonableness to include issues that (1) relate to the interpretation of the administrative tribunal's "home statute" or statutes closely connected to its function with which it has familiarity and expertise, (2) raise matters of fact, discretion or policy or (3) involve inextricably intertwined legal and factual issues.

[18] Counsel for the Respondent submits that reasonableness is the default standard of review subject to deference when a tribunal is "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity". He relies on a number of authorities where the courts have consistently held that reasonableness is the default standard of review: *Dunsmuir*, ibid, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, 2011 SCC 61 at para. 34; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 21. And, for cases involving disability under the *Canada Pension Plan,* counsel submits that since *Dunsmuir,* the standard of reasonableness with a high degree of deference applies: *Gaudet v. Canada (Attorney General),* 2013 FCA 254 at para 9.

[19] Counsel for the Respondent submits that I should follow *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62

and that in applying the reasonableness standard of review, I ought not undertake a separate analysis of the Review Tribunal's reasons. Counsel notes that the Supreme Court of Canada described the review of an administrative decision as an organic exercise in which the reasons of the tribunal must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible acceptable outcomes. Counsel for the Respondent submits that, irrespective of whether the Review Tribunal committed any errors, the ultimate test we are to apply is to assess whether the decision of the Review Tribunal falls within the range of acceptable outcomes, and that in this case, submits that I ought to find that the decision of the Review Tribunal fell within the range of acceptable outcomes.

[20] The Supreme Court of Canada set out the reasonableness approach in *Dunsmuir* at paragraph 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] The Appellant did not make any submissions on the standard of review.

[22] Hence, if I am to follow these authorities, then I should apply a deferential standard of reasonableness. This requires that I determine whether the decision of the Review Tribunal can be justified, is transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. So, in this particular case, even if I should find that the Review Tribunal erred and based its decision on an erroneous finding of fact without regard for the material before it, the decision can still stand if I should find that it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

DID THE REVIEW TRIBUNAL BASE ITS DECISION ON AN ERRONEOUS FINDING OF FACT WITHOUT REGARD FOR THE MATERIAL BEFORE IT?

[23] At paragraph 45 of its decision, the Review Tribunal wrote:

> Dr. Wong in a report dated February 14, 2011, provides a report in summary that confirms the electrodiagnostic studies were normal as was the MRI.

[24] As noted in my leave decision, Dr. Wong's report of February 14, 2011 in fact states the following:

> She had Electrodiagnostic Studies last August which were reported as normal.
>
> …
>
> [The Appellant] had an MRI done last November showing mild degenerative changes and disc bulging at C4-5 and C5-6. Her previous MRI of the lumbosacral spine does show a moderate broad-based disc. Despite these findings on the MRIs of the cervical and lumbosacral spine, there is no evidence of any focal neurological deficits.

[25] Paragraph 45 of the Review Tribunal decision suggests that Dr. Wong wrote that the MRI was normal, when in fact the MRI showed mild degenerative changes and disc bulging at C4-5 and C5-6. A previous MRI of the lumbosacral spine showed a moderate broad-based disc.

[26] The Appellant submits that the Review Tribunal erred in finding that the report dated February 14, 2011 stated that the MRI (of her cervical spine) was normal, when an MRI of her cervical spine taken on November 10, 2010 showed abnormalities, such as mild degenerative changes at C4-5, disc bulging at C6-7 and moderate broad-based disc and foraminal stenosis in her lumbosacral spine. Indeed, even Dr. Wong referred to the degenerative changes and disc bulging at C4-5 and C5-6 in his report of February 14, 2011.

[27] I agree with the Appellant that the Review Tribunal mischaracterized both the findings made by Dr. Wong in his consultation report of February 14, 2011 and the actual results of the MRI, but did the Review base its decision on these findings?

[28] While the Review Tribunal wrote that Dr. Wong summarized the MRI findings to be normal, the Review Tribunal must have been aware of the diffuse disc bulge, as it referred to this at paragraph 44 in its decision.

[29] Having found that the results of the MRI, and other diagnostic examinations were largely normal, other than for the "mild diffuse disc bulge at L5-S1", the Review Tribunal found that the Appellant could not have been very credible where her complaints were concerned. While the Review Tribunal considered a number of different factors in determining that the Appellant is not disabled for the purposes of the *Canada Pension Plan,* it gave little weight to the oral testimony and to the family physician's opinions, in part because of the results of the diagnostic examinations. There were other diagnostic examinations and opinions before the Review Tribunal, but they all served to underline the fact that there were no objective signs to account for the Appellant's symptomology and on this basis, the Review Tribunal concluded that the Appellant had the capacity regularly of pursuing any substantially gainful occupation. Hence, I find that the Review Tribunal based its decision on these erroneous findings of fact, that the MRI results were normal, when they in fact showed degenerative disease and disc bulging in her cervical spine and moderate broad-based disc and foraminal stenosis in her lumbosacral spine.

REASONABLENESS OF DECISION

[30] Having concluded that the Review Tribunal based its decision on an erroneous finding of fact without regard for the material before it, I turn now to a determination as to whether the decision of the Review Tribunal is reasonable.

[31] The fact that the Review Tribunal made an erroneous finding of fact does not unto itself render the decision overall unreasonable. How is reasonableness to be assessed? Under this standard, I am not to fact-find, re-weigh the evidence, conduct my own assessment, interfere with the conclusions or substitute my decision for that of the Review Tribunal. As set out in *Dunsmuir*, my role is to determine whether the decision of the Review Tribunal falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law before it. This does not involve a line-by-line parsing, but a review of the overall decision.

[32] In granting leave, I concluded that the Appellant might have a reasonable chance of success, arising from the fact that the Review Tribunal failed to explain why it considered the degenerative changes and disc bulging at levels C4-5 and C5-6 to necessarily be normal, and from this, how it could conclude that the "objective medicals do not support the finding such finding (*sic)* to support the pain result" and that there was "no support for the pain complaints".

[33] The Review Tribunal reviewed the diagnostic reports set out below, and found them to be inconsequential, from the perspective of determining whether the Appellant's disability could be considered severe for the purposes of the *Canada Pension Plan*.

a. CT scan of lumbar spine (December 18, 2007) – The Review Tribunal wrote that the CT scan had the terms: "well aligned, normal, unremarkable". The Review Tribunal also wrote in summary that there was, "No evidence of disc herniation, spinal stenosis or nerve root compression".

   In fact, the CT scan says that L4-L5 demonstrates a minimal diffuse disc bulge, but is otherwise unremarkable, and that at L5-S1, there is a mild broad-based posterior disc bulge centrally. (paragraph 20 of Review Tribunal decision and page 59 of Review Tribunal hearing file)

b. Electronic imaging (November 18, 2008) – The Review Tribunal wrote that there was a mild diffuse disc bulge at L5-S1.

   The consultation report itself also says that there is a small focal central protrusion at the L5-S1 level without significant mass effect. There was also mild posterolateral bulging bilaterally at this level, and contact with the exiting right L5 nerve could not be excluded. (para. 22 of RT decision and page 63 of Review Tribunal hearing file)

c. MRI of lumbar spine (June 13, 2010) – the Review Tribunal referred to this as an MRI of the cervical spine. It wrote that there was mild diffuse disc bulge at L5-S1, otherwise all other areas reviewed were normal or unremarkable.

   The MRI indicated there was moderate degenerative disc disease with mainly Modic type II endplate signal changes at L5-S1. There was moderate broad-based bulging of the disc with small stable central protrusion superimposed. Mild facet osteoarthritis. There was no spinal stenosis. There was mild right greater than left foraminal narrowing, unchanged. (para. 44 of Review Tribunal decision and pages 73 and 74 of Review Tribunal hearing file)

d. MRI of cervical spine (November 14, 2010) – The Review Tribunal wrote that Dr. Ball opined that there was no disc herniation or spinal stenosis.

   The MRI indicates that there was mild facet degeneration at C4-5 and at C5-6 and at C6-7, mild bulging was present (para. 43 of RT decision and page 68 of Review Tribunal hearing file)

[34] The Review Tribunal also noted the consultation report dated August 5, 2010, of a neurologist, and medical report dated February 14, 2011 of Dr. Wong. The Review Tribunal summarized the reports as stating, in the case of the neurologist's opinion, that all the objective neurological findings and electronic imaging were neutral, and in the case of Dr. Wong's opinion, that the electrodiagnostic studies and MRI were normal. (paras. 42 and 45 of the Review Tribunal decision and pages 60 of Review Tribunal file and AD2-158 of SST hearing file)

[35] The Review Tribunal improperly summarized the MRI results at paragraph 45, despite the fact that it was aware that the MRI done in June 2010 showed a mild diffuse disc bulge at L5-S1, and despite the fact that the reports also show degenerative disc disease.

[36] It would have been helpful had the Review Tribunal indicated whether it was aware that the MRIs showed mild degenerative changes and a moderate broad-based disc of the lumbosacral spine, and if so, why it considered these findings, including the disc bulging at C4-5 and C5-6, to be normal and of little or no consequence.

[37] I indicated in my leave decision that the Review Tribunal's statement that the MRI was normal - when the MRI reports show otherwise – to be of little or no significance in determining whether an applicant's disability might be severe for the purposes of the Canada Pension Plan. After all, the terms mild or moderate in diagnostic imaging do not correlate to the degree of functional implications or impairment. However, in this particular case, the Review Tribunal appears to have largely determined the severity of the Appellant's disability by focusing on the diagnostic results.

[38] As it interpreted the diagnostic examinations to have been normal, the Review Tribunal found that the Appellant could not have been very credible and concluded that she

therefore must have exaggerated the extent of her symptoms. It placed undue reliance on the results of the diagnostic examinations.

[39] It was unreasonable for the Review Tribunal to have used the MRI results and other diagnostic examinations alone as measures of severity of disability, without correlating it with the Appellant's own clinical experience. It was unreasonable also for the Review Tribunal to conclude that the Appellant could not have been credible and to have been outrightly dismissive of her testimony, on the basis that the diagnostic examinations were largely normal, other than for mild disc bulging.

[40] This is not to suggest that someone who exhibits moderate or severe degenerative disc disease or has other findings on a diagnostic scan has a severe disability or is even necessarily symptomatic, as that may not be the case. An individual who has advanced degenerative disc disease may not be symptomatic at all, and conversely, someone who has only mild or no degenerative disc disease or other objective criteria, may in fact be symptomatic. Simply, it was unreasonable for the decision-maker to view the diagnostic examinations or the lack of objective criteria in isolation, and conclude that an individual could not have a severe disability. It may well be that an individual is not severely disabled, but that conclusion cannot necessarily be drawn from the lack of findings on diagnostic examinations. Here, the absence of objective findings on diagnostic examinations weighed critically on the mind of the Review Tribunal.

[41] It was unreasonable for the Review Tribunal to have drawn a relationship between the results of the diagnostic examinations and the severity of the Appellant's symptomology, without correlating it with the Appellant's own clinical experience.

[42] The Review Tribunal also found that, as the Appellant retained some capacity to perform alternate and more sedentary occupations, she had failed to attempt to obtain and maintain any substantially gainful occupation. Given my findings on the reasonableness of the Review Tribunal's decision where it drew conclusions about the severity of the disability from the diagnostic scans, I do not know if I would necessarily have found that the Appellant retained any capacity to perform alternate and more sedentary occupations.

[43] I recognize however that the Review Tribunal used other factors to assess the Appellant's disability to determine if it was severe for the purposes of the *Canada Pension Plan.* I will review some of these other factors which the Review Tribunal considered.

[44] In coming to its decision, the Review Tribunal also relied on an emergency consultation of Dr. Paramsothy, psychiatrist, who diagnosed the Appellant with major depressive illness and fibromyalgia. The psychiatrist noted that the Appellant had been assessed by a rheumatologist and noted to have 14/18 pressure points for fibromyalgia. The Appellant reported that she had responded favourably to medications for her pain, and appeared to be mobile without any undue pain.

[45] It does not seem reasonable for the Review Tribunal to have relied upon the psychiatrist's observations arising out of this single visit to opine on the physical side of the Appellant's disability, as this is beyond the expertise of the psychiatrist, and would seem to be an area best left to other experts. The Review Tribunal did not rely upon any other medical reports or opinions in which any medical practitioner might have commented on the Appellant's pain levels or overall functionality. For instance, there was a massage therapist who treated the Appellant over a period of time, who described the Appellant's generalized pain as varying from treatment to treatment, but the Review Tribunal made no reference to this in its analysis. In this context, it was unreasonable for the Review Tribunal to have relied upon the psychiatrist's report as necessarily being indicative of the Appellant's disability, when he saw her on only one occasion and when it was beyond his expertise to comment on her physical condition. Remarkably, the Review Tribunal focused on the psychiatrist's comments on the Appellant's physical condition, rather than his comments on the Appellant's mental health, in determining that his report could not support a finding of inability to do gainful employment.

[46] The rheumatologist had referred the Appellant to fibromyalgia classes. There was no mention either by the Review Tribunal that the Appellant was scheduled for further psychiatric consultation, as the rheumatologist indicated in a report dated January 27, 2012. It is unclear from the decision of the Review Tribunal as to why the Appellant had not attended any fibromyalgia or pain clinics, had not seen a psychiatrist since January 2012, or

was not doing any exercises for her fibromyalgia. The Review Tribunal found that there was no reasonable explanation offered by the Appellant.

[47] While there are aspects of the decision which are unreasonable, I must look to the overall decision. While I find that it was unreasonable for the Review Tribunal to have found the diagnostic scans to have been conclusive of the severity of the Appellant's disability, my review of the decision of the Review Tribunal indicates that it considered other issues that addressed the severity question. The Review Tribunal concluded that the Appellant had not sufficiently mitigated her health issues, as she had not exhausted all reasonable treatment options which had been recommended to her. The Review Tribunal found *Bulger v. MHRD*, CP 9164 (PAB) and *MHRD v. Mulek*, CP 4719 (PAB) to be persuasive and held that appellants must attempt mitigation of their health issues to be successful in an application for *Canada Pension Plan* disability benefits. Reasonable efforts must be undertaken by an appellant, particularly when those recommendations can be expected to lead to a more favourable prognosis in terms of management of symptomology, functionality and overall capacity. Here, the Review Tribunal found that the Appellant "without reasonable explanation" did not participate in any fibromyalgia classes, any pain clinics, psychiatric consults or other modalities or health measures easily available to the Appellant, but it did not specify or list what explanation might have been offered, or if this had even been canvassed with the Appellant at the hearing.

[48] I cannot speculate as to why the Appellant might not have pursued other treatment options, as to whether it might have been due to financial constraints, childcare responsibilities, or other, or even a matter of her own family physician simply not making any recommendations or referrals for her, other than the referral to the rheumatologist and to a physiatrist. In his report of February 18, 2011, the family physician indicated that the Appellant continued to be managed by the physiatrist, who was still investigating her problems. The family physician indicated also that they were trying "various treatment modalities", but he did not set out what they might have been.

[49] In her report of January 2012, the rheumatologist noted that the Appellant was scheduled to see a psychiatrist in seven months. I do not know what became of this

psychiatric consultation, or if and why it was cancelled, or if and why the Appellant failed to attend the appointment. The rheumatologist also indicated that she would refer the Appellant for fibromyalgia classes, but I do not know if the rheumatologist followed through and if so, whether the classes were cancelled or if and why the Appellant failed to attend them.

[50] When the Appellant was seen in emergency consultation in January 2012, the psychiatrist indicated that the Appellant needed "to remain in hospital", but the Appellant wished to be discharged. There was no basis to detain her at the hospital. When discharged from the hospital, the psychiatrist prescribed antidepressants and medication to treat her fibromyalgia. He also recommended that she be followed by her family physician, which she appears to have done.

[51] In her leave application, the Appellant indicated that she had tried the "fibromyalgia and also yoga clinics classes, gentle exercises at home" and that she had done what doctors had suggested for her health. This suggests that she had in fact attended fibromyalgia classes. Yet, there had been no documentary evidence of this before the Review Tribunal, and the Appellant did not dispute the findings made by the Review Tribunal that she had not offered a reasonable explanation why she did not participate in any fibromyalgia classes, pain clinics, psychiatric consultations or other modalities of health measures easily available in her geographical area to try to mitigate her health issues, assuming that there was evidence that these recommendations had indeed been given to her by any health practitioners.

[52] There simply is a dearth of evidence and some conflict on the issue as to what recommendations and referrals had been made, and whether the Appellant attended any of these or if not, why she might have failed to pursue them. Notwithstanding the deferential standard of review involved, given that the mitigation issue is a significant one in determining whether the Appellant could be found disabled under the *Canada Pension Plan*, I find that it was unreasonable that the Review Tribunal did not set out the Appellant's evidence as to why she did not pursue treatment recommendations. Without this, it is

difficult to determine whether the decision of the Review Tribunal is defensible on the facts before it.

CONCLUSION

[53] For the reasons stated above, the Appeal is allowed and the matter referred to the General Division for a rehearing.

Janet Lew
Member, Appeal Division