Citation: *M. C. v. Minister of Employment and Social Development*, 2015 SSTAD 712

Appeal No. AD-13-47

BETWEEN:

M. C.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER:	Janet Lew
DATE OF HEARING:	November 24, 2014
LOCATION OF HEARING:	Kitchener, Ontario
TYPE OF HEARING:	In-person
DATE OF DECISION:	June 8, 2015

IN ATTENDANCE

Appellant	M. C.
Representative for the Appellant	Alexandra Victoros (counsel) and George Dietrich (counsel)
Representative for the Respondent	Hasan Junaid (Counsel)

INTRODUCTION

[1] This is an appeal of the decision of the Review Tribunal issued on June 12, 2013, which dismissed the Appellant's application for a disability pension, on the basis that the Appellant did not prove that his disability was severe for the purposes of the *Canada Pension Plan*, by his minimum qualifying period of December 31, 2008. Leave to appeal was granted on March 26, 2014, on the grounds that the Review Tribunal may have erred in law in rendering its decision.

FACTUAL OVERVIEW

[2] The Appellant submitted an application for Canada Pension Plan disability benefits in June 2011. The Questionnaire for Canada Pension Plan Disability Benefits indicates that the Appellant was last employed as an industrial labourer in September 2007, when he stopped working after an accident in which he was severely injured. He alleges that he has been unable to work since then.

[3] In the Questionnaire, the Appellant advised that he sustained numerous fractures, and that he has been left with pain in his left leg, knee and above his ankle. The injury rendered him unable to lift or carry any extra weight on his left side, withstand any prolonged walking, running, shifting or squatting. He described numerous functional limitations and restrictions in the Questionnaire. He has seen different specialists and despite undergoing surgeries, has not seen any appreciable improvement in pain or functionality, and continues to take pain medication.

[4] In February 2011, the Appellant was seen by a neurologist and diagnosed with myotonic dystrophy, for which there is no known treatment. The Review Tribunal noted the progression of this disease to be variable and uncertain.

BRIEF HISTORY OF PROCEEDINGS

[5] The Review Tribunal issued its decision on June 12, 2013. On or about July 5, 2013, the Appellant sought leave to appeal. The Appeal Division of the Social Security Tribunal granted leave on March 26, 2014, on the basis that the Review Tribunal may have made errors of law.

[6] The Appeal Division scheduled an in-person hearing of the appeal for November 24, 2014, by mutual consent of the parties.

[7] The Appellant's submissions were set out in the Application for Leave to Appeal and Notice of Appeal filed on July 5, 2013. Counsel for the Appellant alleged numerous errors on the part of the Review Tribunal. She alleged that the Review Tribunal erred as it failed to apply the principles set out in *Villani v. Canada (Attorney General),* 2001 FCA 248; *E.J.B. v. Canada (Attorney General),* 2011 FCA 47; *The Attorney General of Canada v. Dwight St.-Louis,* 2011 FC 492; *Cochran v. Canada (Attorney General),* 2003 FCA 343; and *MHRD v. Ethier,* CP 6086 (July 1998). She also alleged that the Review Tribunal based its decision on erroneous findings of fact without regard for the material before it, but leave was not granted on this basis.

[8] On May 9, 2014, counsel for the Respondent filed submissions and authorities. Briefly, he submitted that the standard of review of the decision of the Review Tribunal is one of reasonableness. He further submitted that the Review Tribunal had in fact considered the *Villani* factors and that it had applied the legal principles set out in the various authorities cited by counsel for the Appellant. He further submitted that the overall decision of the Review Tribunal is reasonable, and that it therefore does not permit intervention by the Appeal Division.

[9] On June 25, 2014, counsel for the Appellant filed a Reply to the Submissions of the Respondent. She agreed that the appeal is not a hearing *de novo*, but disagreed that an

appeal before the Appeal Division is in the nature of a judicial review and that the standard of review is reasonableness. She noted the provisions of subsection 59(1) of the *Department of Employment and Social Development* ("DESDA"), which provides for the following:

> **59.**(1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[10] Counsel for the Appellant submits that as the Appeal Division is permitted to give the decision which the Review Tribunal should have given or can vary the decision in whole or in part, the appeal cannot be in the nature of a judicial review and should not be treated as such. And, notwithstanding the leave decision, counsel for the Appellant submits that the Appeal Division should consider not just the grounds which were permitted in the leave decision, but also the erroneous findings of fact set out in the Notice of Appeal.

[11] On July 23, 2014, counsel for the Respondent filed a letter responding to the Appellant's submissions of June 25, 2014. He agrees that the appeal is not a hearing *de novo*, but submits that the appeal should be in the nature of a judicial review and that the standard of review is one of reasonableness. On November 14, 2014, counsel for the Respondent filed a second letter, with case authorities supporting his submissions that the appeal ought to proceed as one in the nature of a judicial review.

[12] On November 18, 2014, counsel for the Appellant filed a letter acknowledging the Respondent's submissions of July 23, 2014, and included a copy of *d'Errico v. Canada (Attorney General),* 2014 FCA 95.

REVIEW TRIBUNAL DECISION

[13] At the hearing before the Review Tribunal in March 2013, the Appellant testified about his schooling and work experience. He also testified about his injuries and the treatment he has undergone. He testified that, despite surgeries and treatment, there was no change in his pain levels and very little improvement in his leg. He testified that he has limited functionality and that he relies on his family to assist with some of the activities of

daily living. The Appellant also testified that he had considered returning to school to obtain his high school diploma, and that, but for financial constraints, he had considered enrolling in a motorcycle mechanic assistant program.

[14] The Review Tribunal found that the Appellant had the capacity to work. The Review Tribunal also found that he had the ability to sit for prolonged periods with few breaks, and that he required minimal pain medication that would interfere with his thinking ability. The Review Tribunal found that the Appellant did not attempt to find suitable employment. The Review Tribunal determined that the Appellant was required to find a job, irrespective of the fact that any job he might be capable of performing might pay less than the labour jobs he had done in the past.

[15] Finally, the Review Tribunal found that the Appellant could overcome any barriers to further his education. While he faced significant financial constraints, the Appellant reported that he enjoys working with motorcycles and believes that he has the aptitude and ability to do the job, and as such, the Review Tribunal found that these considerations indicate that the Appellant has the capacity to work.

ISSUES

[16] The issues before me are as follows:

1. What form of hearing should the appeal take? Should the appeal be in the form of an appellate review or an appeal in the nature of a judicial review?

2. What is the applicable standard of review when reviewing decisions of the Review Tribunal?

Grounds of Appeal

3. Did the Review Tribunal commit any errors of law?

4. Can the Appeal Division consider all of the grounds of appeal set out in the Application for Leave to Appeal and Notice of Appeal, including those which the Appeal Division determined did not raise an arguable case? If so, did the

Review Tribunal base its decision on any erroneous findings of fact made without regard for the material before it?

Remedies

5. If the standard of review is reasonableness, is the decision of the Review Tribunal reasonable? If the standard of review is correctness, what outcome should the Review Tribunal have reached?

6. If the Review Tribunal committed any errors – whether an error of law or of fact – what is/are the appropriate remedy(ies), if any?

ISSUE 1: FORM OF HEARING - APPELLATE REVIEW VS. APPEAL IN NATURE OF JUDICIAL REVIEW

[17] Counsel for the Appellant submits that the appeal should be in the form of an appellate review. She envisions that such an appellate review would consist of a *de novo* process. She submits that as an oral hearing had been granted, the Appellant had been led to believe that he could address any questions regarding his disability at the minimum qualifying period. She relies on various authorities which she submits definitively show that the appeal should be an appellate review in the form of a *de novo* hearing.

[18] The type of appellate review envisioned by counsel for the Appellant would provide for a re-trial or re-determination on the merits of the Appellant's claim for a disability pension. The Appellant would, in essence, have the benefit of the *de novo* process that had formerly existed with the Pension Appeals Board. An appellate review as envisioned by counsel for the Appellant would enable both parties to the appeal to adduce any "new evidence" that may not have been before the Review Tribunal (or General Division); effectively, an appellant would have a second opportunity to improve his case by addressing any shortcomings or deficiencies in the evidence or in submissions. In such an appellate review, the Appeal Division would be able to look beyond the record before the Review Tribunal (or General Division), and come to its own determination on the merits of the matter, based on the facts and the law before it.

[19] Counsel for the Appellant questions the notion that an appeal before the Appeal Division should be anything but an appellate review consisting of a *de novo* hearing; after all, she questions the point of judicial review to the Federal Court of Appeal if the Appeal Division is conducting its own judicial review. She submits that this would amount to decisions being tested twice on a deferential standard.

[20] Counsel for the Appellant submits that a deferential standard had been applied to decisions of the Pension Appeals Board, but not to decisions of Review Tribunals. She acknowledges that the Appeal Division's mandate with regard to the hearing of decisions of Review Tribunals or of the General Division differs from that of the former Pension Appeals Board, particularly as the Appeal Division does not conduct hearings *de novo*. She submits however that the legislation is mute as to whether the appeal is in the nature of a judicial review and mute also as to whether the standard of review of decisions of the Review Tribunal is necessarily one of reasonableness.

[21] Counsel for the Appellant submits that as the Appeal Division holds a wide scope of powers to the extent that it is empowered to give the decision which the Review Tribunal should have given or vary the decision in whole or in part, the appeal is not in the nature of a judicial review and should not be treated as such, and that it should therefore proceed as an appellate review. This interpretation seems overbroad, since rendering the decision which the Review Tribunal should have given can be accomplished by assessing the evidentiary record which had been before the Review Tribunal. To that extent, this does require an assessment of the evidence before the Review Tribunal, but this does not require adducing any new evidence or submissions on the merits of the claim for a disability pension.

[22] Counsel for the Appellant relies on a line of authorities in the immigration context. In both *Eng v. The Minister of Citizenship and Immigration,* 2014 FC 711 and *Alyafi v. The Minister of Citizenship and Immigration,* 2014 FC 952, the Federal Court of Canada considered the issue of the appropriate standard of review for the Refugee Appeal Division's (RAD) examination of decisions of the Refugee Protection Division (RPD). The Federal Court enquired into the RAD's jurisdiction and agreed with the applicant in that case that Parliament appears to have wanted to confer a broad power of intervention on the RAD, thus

allowing the RAD to dispose of the merits of the appeal. In examining decisions of the RPD, the RAD was not restricted to determining whether the RPD's decision was made in a reasonable manner. However, the Court also agreed that an appeal before the RAD is not an appeal *de novo*. In *Eng*, the Court found that the RAD misinterpreted its role as an appeal body in holding that its role was merely to assess, against a standard of reasonableness, whether the RPD's decision was within a range of possible, acceptable outcomes.

[23] Counsel for the Appellant rightly points out that there is little evidence as to what Parliament intended, in terms of whether it intended to confer the Appeal Division with powers of appellate review or powers akin to judicial review. While Trudel J.A. in *Atkinson v. Canada (Attorney General),* 2014 FCA 187 described the creation of the Social Security Tribunal as a "major overhaul of the appeal processes", there is no evidence as to what Parliament intended for the scope of review of decisions of Review Tribunals or of the General Division.

[24] The Respondent agrees with the Appellant that the Appeal Division is the final administrative level of appeal from decisions of Review Tribunals or of the General Division and that, as such, the appeal is not a judicial review *per se* of a final decision. However, counsel for the Respondent submits that that does not necessarily render the appeal an appellate review either.

[25] Counsel for the Respondent compares the current legislative framework for the Social Security Tribunal to the *Employment Insurance Act* (EIA) and notes that the grounds of an appeal to the Umpire under the former subsection 115(2) of the EIA are nearly identical to the grounds of an appeal to the Appeal Division under subsection 58(1) of the DESDA, and similarly, that the powers of the Umpire under the former section 117 of the EIA are nearly identical to the powers of the Appeal Division under subsection 59(1) of the DESDA. Counsel for the Respondent submits that the comparison is particularly apt as the powers of the former Umpire were transferred to the Appeal Division, and the grounds of appeal set out in subsection 58(1) of the DESDA are the same the Appeal Division as well.

[26] Counsel submits that as appeals before the Appeal Division are not *de novo*, Parliament necessarily intended the Appeal Division to assume and exercise powers similar

to those of the former Umpire. In *Canada (Attorney General) v. Merrigan*, 2004 FCA 253, the Federal Court of Appeal made reference to *Re Roberts et al. and Canada Employment and Immigration Commission et al.*, [1985] 60 N.R. 349, [1985] F.C.J. No. 413, (1985) 19 D.L.R. (4th) 570 (Fed. C.A.). In that decision, the Federal Court of Appeal stated that although the word "appeal" was used in section 115 of the EIA [formerly section 95 of the *Unemployment Insurance Act*], the substance of the Umpire's jurisdiction is largely identical with that of the Federal Court in section 28 of the Federal Courts Act. MacGuigan J.A. wrote that "the proceeding therefore is not an appeal in the usual sense of that word but a circumscribed review".

[27] *Merrigan* is definitive on this issue, given the language of the EIA and the DESDA; the statutory authority that was conferred to the former Umpire under the EIA and now conferred to the Appeal Division under the DESDA; and the grounds of appeal for both the former Umpire and the Appeal Division. The authorities cited by counsel for the Appellant have no relevance to the legislative framework under which the Appeal Division operates by virtue of the existence of subsection 58(1) of the DESDA. There are no similar provisions under the applicable legislation that governs the RAD and the RAD is not constrained by any set of grounds of appeal. In other words, it seems that the appellate administrative tribunals which favour appellate review operate under a different legislative framework than does the Appeal Division of the Social Security Tribunal.

[28] We can satisfy ourselves further as to the nature of appeals before the Appeal Division. While there were parallels in the grounds of appeal between the former Umpire and the Appeal Division, there are marked differences between the former Pension Appeals Board and the Appeal Division. Previously, an applicant was required to seek leave to appeal, but he was not required to satisfy the Pension Appeals Board that there was a reasonable chance of success on any of the grounds of appeal. Now, an applicant is required to seek leave under the grounds of appeal under subsection 58(1) of the DESDA. Additionally, there were no provisions under the *Canada Pension Plan* which bound the Pension Appeals Board on how to conduct appeals, whereas subsection 58(1) of the DESDA seems to circumscribe the nature of the appeal before the Appeal Division. By limiting the

grounds of appeal available to an appellant, this, in my view, effectively defines the nature of the proceedings before me as being an appeal in the nature of judicial review.

[29] There is further evidence that an appeal in the nature of judicial review was intended. Indeed, the Federal Court of Appeal has been more definitive as to the nature of appeals. In *Canada (Attorney General) v. McCarthy* [1994] A.C.F. No. 1158, [1994] F.C.J. No. 1158, 174 N.R. 28 (Fed. C.A.), Isaac, C.J. referred to the *Roberts* decision and wrote:

> 18 In *Roberts v. Canada (Employment & Immigration Commission)* (1985), 85 C.L.L.C. 14,030, 60 N.R. 349 (Fed. C.A.), and *Canada (Attorney General) v. Taylor* (1991) *(*sub nom. *Taylor v. Canada (Minister of Employment & Immigration))* 126 N.R. 345 (Fed. C.A.), this Court held that an appeal to an Umpire is not an appeal in the usual sense or a trial de novo, but a proceeding in the nature of judicial review. In *Roberts*, this Court also held that where a decision of a Board of Referees is challenged because it was based on erroneous findings of fact, the Umpire's review is limited to considering and determining whether the view of the facts taken by the Board of Referees was reasonably open to them on the record. (My emphasis)

[30] Although *Roberts* and *McCarthy* were in the context of sections 115 and 80, respectively, of the *Unemployment Insurance Act* (since repealed), the language which set out the nature and scope of the appeal to the Umpire was, as noted above, identical to the scope of appeals under subsection 58(1) of the DESDA.

ISSUE 2: STANDARD OF REVIEW

[31] Counsel for the Respondent submits that the Appeal Division is required to determine the standard of review in *reviewing* decisions of the Review Tribunal or General Division: *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306. I agree with this proposition, however, Counsel for the Appellant and Respondent disagree on the applicable standard of review.

[32] Counsel for the Appellant submits that correctness is the applicable standard of review and that ultimately I ought not to give any deference to the Review Tribunal, and that I should substitute my own decision for that of the Review Tribunal. Alternatively, counsel for the Appellant submits that if the standard is one of reasonableness, the decision of the

Review Tribunal is not reasonable. Counsel submits that it was unreasonable for the Review Tribunal not to have found the Appellant disabled on a balance of probabilities, given the overwhelming medical evidence before it. She submits that this too merits substituting my own decision for that of the Review Tribunal. She submits that there is authority for me to do this under subsection 59(1) of the DESDA. She also submits that this would be appropriate, where remitting a matter to the General Division "may undermine the goal of expedient and cost-efficient decision making". She submits that I should follow *D'Errico v. Canada (Attorney General*) 2014 FCA 95, where the Federal Court of Appeal stated that Parliament could not have intended the final disposition of disability benefits to have taken eight years. The Federal Court of Appeal thereby made its own assessment on the record before it and directed the result that followed on the facts and the law.

[33] Counsel for the Respondent on the other hand 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 which he submits stand for the proposition that reasonableness is the default standard of review: *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Assn.*, 2011 SCC 61 at para. 34; M*cLean v. British Columbia (Securities Commission),* 2013 SCC 67 at para. 21; and *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36 at para. 50. And, for cases involving disability under the Canada Pension Plan, counsel for the Respondent submits that since *Dunsmuir*, a standard of reasonableness with a high degree of deference applies: *T.G. v. Canada (Attorney General),* 2013 FCA 254 at para 9. The Federal Court of Appeal also stated in T.G. that where the decision is mainly factual, the range of defensible and acceptable outcomes available is relatively wide.

[34] Counsel for the Respondent submits that the reasonableness standard applies in respect of decisions of the Review Tribunal that are reviewed by the Appeal Division, and that the Review Tribunal interpreted and applied its "home statute" as much as the Pension Appeals Board was applying and interpreting its home statute. Counsel submits that there is further support for the reasonableness standard given that the Appeal Division is reviewing the Review Tribunal decision on essentially the same grounds as when the Federal Court of

Appeal judicially reviewed decisions of the Pension Appeals Board. Counsel submits that accordingly, the Review Tribunal should be accorded a high degree of deference by the Appeal Division.

[35] 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 in that decision 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. He submits that I ought to find that the decision of the Review Tribunal falls within the range of acceptable outcomes.

[36] In *Dunsmuir,* 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.

[37] 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.

[38] 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.

[39] 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.

[40] Thus, the applicable standard of review will depend upon the nature of the alleged errors involved. For instance, an error of law could attract either a correctness or reasonableness standard.

ISSUE 3: DID THE REVIEW TRIBUNAL MAKE ANY ERRORS OF LAW?

[41] Leave to appeal was granted on the basis that the Review Tribunal may have made various errors of law.

(a) ***Villani v. Canada (Attorney General)***

[42] Counsel for the Appellant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *Villani,* in that it did not assess the Appellant's disability in a "real world context". Counsel submits that a decision-maker must have regard to the applicant's age, education, and work experience, and must also consider whether the applicant is employable in the "real world". Thus, if an applicant is not able to engage in substantially gainful employment in the context of the "real world", he or she will be considered disabled within the meaning of the statutory framework. Counsel submits that while the Review Tribunal referred to *Villani* and to the *Villani* factors, it must also turn its mind to applying those factors. In particular, the Review Tribunal did not consider the following:

> …the Tribunal did not consider the fact that [the Appellant], although only 36 years old at the time of his MQP, had worked in physically demanding jobs since dropping out of school when he was seventeen years old. Therefore, retraining and re-entering the workforce, and finding a regular substantially gainful occupation (and not any conceivable occupation) was highly improbable for a person in the real world when he does not have a high school diploma and was noted to have a severe or complete limitation with regard to his ability to participate in sustained physical activity including walking more than three blocks, in addition to poor pain control leading to depression, according to his family doctor's report to ODSP.

[43] Counsel for the Appellant submits that as the Review Tribunal did not turn its mind to the Appellant's personal characteristics, and more specifically, to his age, training and work experience, it approached the question of "severity" in a vacuum. Without applying the guiding principles of *Villani,* counsel submits that the Review Tribunal made an error of law. She cites *Garrett v. Canada (Minister of Human Resources Development)* 2005 FCA 84 at paragraph 3, in which Malone J.A. stated:

> [3] In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the "real world" context of the analysis required by *Villani.*

[44] Counsel for the Respondent submits that the Review Tribunal was reasonable in its application of *Villani* to this case, in that not only did it refer to *Villani,* but also applied the criteria to the facts of the case. Counsel referred to the evidence and the analysis and findings made by the Review Tribunal and submits that the Review Tribunal clearly applied the *Villani* factors by specifically mentioning his age, level of education and past work and life experience. Counsel submits that the Appellant's circumstances do not support a finding that in the "real world", the Appellant would be unable to engage in employment given his age, education, language proficiency and other personal factors. Counsel submits that the Appellant's ability to speak English and his age suggest that, in the real world, these factors might assist him in retraining or finding suitable employment.

[45] The Review Tribunal recognized the Appellant's educational attainments, past work and life experience, including his interest in working with motorcycles, in its analysis of various issues.

[46] The parties agree that the Review Tribunal referred to the *Villani* test and the need to consider the Appellant's personal characteristics. What is in dispute is whether the Review Tribunal considered them in a "real world" context, in determining how they would impact upon his capacity regularly of pursuing any substantially gainful occupation.

[47] The Review Tribunal determined that the Appellant exhibited some capacity for sedentary work, when it found that he has the ability to sit for prolonged periods with a few breaks and is on minimal pain medication that would interfere with his thinking ability. However, the Review Tribunal also seemed to implicitly recognize that the Appellant has educational barriers and limited past work experience, but if he could overcome these, found that he held the capacity regularly of pursuing any substantially gainful occupation. In other words, the Appellant needed to undergo some retraining, but the Review Tribunal found, based on the evidence before it, that the Appellant could further his education, albeit it was not without some problems.

[48] In this particular instance, the Review Tribunal determined if there was any employment that matched the Appellant's expressed interest in motorcycles, and looked to see what personal characteristics might pose a barrier. The Review Tribunal relied on the

Appellant's belief that he has both the aptitude and ability to work with motorcycles (though it is unclear the nature of this employment and what physical demands, if any, it might exact, or if the employment might be sedentary). The Review Tribunal also looked to the Appellant's myotonic dystrophy and was satisfied that it would present only an occasional problem, with the Appellant testifying apparently that it would not interfere to a significant degree. This was the extent to which the Review Tribunal conducted the *Villani* test.

[49] I note that the Federal Court of Appeal in *Villani* stated that:

> . . . as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantial gainful occupation. The Assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[50] Accordingly, as an assessment of the Appellant's circumstances ought to be seen as a question of judgment, I would not interfere with the assessment undertaken by the Review Tribunal, notwithstanding its seemingly rudimentary analysis of the Appellant's personal circumstances. If a Review Tribunal or the General Division undertakes an assessment and considers an appellant's personal characteristics in a "real world" context, in determining how those factors impact upon his or her capacity regularly of pursuing any substantially gainful occupation, that suffices to meet the test set out in *Villani*.

(b) ***E.J.B. v. Canada (Attorney General)***

[51] Counsel for the Appellant submits that the Review Tribunal failed to consider the Appellant's entire condition, and not just the main disabling condition. Counsel referred to *E.J.B.*, at paragraph 17, in which Stratas J.A. stated:

> [17] In reviewing what the Board has done on the basis of the deferential standard of reasonableness, for the foregoing reasons I conclude that the majority decision is unreasonable and should be quashed. A new panel of the Board must reconsider this matter applying the *Villani* test. In particular, that new panel of the Board must examine the "real world" condition of the applicant, taking into account her entire condition [emphasis of Stratas J.A.], and not just severe osteoporosis.

[52] Counsel submits that the Appellant suffers from a chronic pain condition, the result of a severe leg injury, as well as myotonic dystrophy. Counsel submits that the Appellant testified before the Review Tribunal that his hands close involuntarily and that he opens them with his other hand, and that his tongue seizes up which interferes with his speaking. Counsel submits that the Review Tribunal could not have turned its mind to the real world condition of the Appellant with regard to whether he would be capable regularly of pursuing any substantially gainful occupation, when faced with his various disabilities, including his myotonic dystrophy, a progressive incurable illness. She submits that this is obvious from the decision, which states:

> [26] The Appellant also told the Tribunal that he would love to work with motorcycles and said that he believed he had the aptitude and ability to do the job. The myotonic dystrophy would present an occasional problem but the Appellant said that this would not interfere to a significant degree.

[53] Counsel submits that the Review Tribunal should have considered the Appellant's various disabilities, including in particular his myotonic dystrophy, as part of the real world analysis in determining whether he was incapable regularly of pursuing any substantially gainful occupation.

[54] Counsel for the Respondent submits that the Review Tribunal looked at the totality of the Appellant's condition. He notes that the Review Tribunal referred to the Appellant's leg injury and myotonic dystrophy.

[55] The Review Tribunal was required to determine whether the Appellant could be found disabled under the Canada Pension Plan by his minimum qualifying period of December 31, 2008. The Appellant had by then sustained the leg injury and undergone surgery twice; a third surgery was performed in February 2009, just shortly after the minimum qualifying period. There is relatively little documentary evidence however as to when the Appellant might have begun to experience symptoms relating to the myotonic dystrophy, and how frequently he experienced the symptoms, their duration and their impact on his overall functionality and capacity, at the minimum qualifying period. The Appellant was diagnosed with myotonic dystrophy in February 2011. Had the Review Tribunal

focused on the Appellant's disabilities at his minimum qualifying period, it could have been forgiven had it directed itself to only the Appellant's leg injury, as the Appellant's symptomology arising out of his myotonic dystrophy does not appear to have arisen until sometime after the minimum qualifying period.

[56] I note that in the written submissions of the Appellant's counsel, which were sent by courier to the Office of the Commissioner of Review Tribunals in January 2013, for the hearing before the Review Tribunal, there was no reference in the submissions to the myotonic dystrophy until February 2011. While it was unnecessary for a diagnosis of myotonic dystrophy to have been made by the minimum qualifying period, there is no indication that the Appellant was symptomatic or had any early signs of myotonic dystrophy. On investigation by the neurologist in February 2011, a review of his past medical history indicates that the Appellant had a longstanding history of difficulty relaxing his hands. The neurologist was of the opinion that the Appellant had a longstanding history of myotonia with a phenotype "consistent with myotonic dystrophy", and while the neurologist spoke of the Appellant's balding, temporalis wasting, mild facial weakness and mild distal foot weakness, there was no discussion regarding his limitations, functionality or capacity. Given that the symptoms of myotonic dystrophy do not appear to have been referenced until early 2011, it is not unreasonable that the Review Tribunal did not refer to the symptoms or to myotonic dystrophy at the Appellant's minimum qualifying period.

[57] The Review Tribunal however did consider the Appellant's disabilities and took into account the myotonic dystrophy, when it concluded that it would present an occasional problem and noted that the Appellant had said that it would not interfere to a significant degree, if he were to pursue work with motorcycles.

[58] I see also that the Review Tribunal considered the Appellant's personal characteristics when assessing his capacity regularly of pursuing any substantially gainful occupation involving work with motorcycles. The Review Tribunal also found the Appellant has the ability to sit for long periods of time with a few breaks, and by implication, that he is capable regularly of pursuing any sedentary occupation, and that his personal characteristics would not impede his pursuits in this regard.

[59] Thus, it cannot be said that the Review Tribunal failed to consider the Appellant's entire condition. Apart from the fact that there was little documentary medical evidence before it, the Review Tribunal nonetheless considered the Appellant's chronic pain condition and his myotonic dystrophy. While the Review Tribunal may not have conducted a comprehensive analysis, that by itself does not impugn the overall result.

(c) ***The Attorney General of Canada v. Dwight St.-Louis***

[60] Counsel for the Appellant submits that the Review Tribunal erred in failing to follow *Dwight St.-Louis*, in failing to address any of the medical opinions or documents before it, particularly those that described the Appellant's restrictions and limitations. Counsel for the Appellant submits that the Review Tribunal did not reference the medical reports contemporaneous with the Appellant's minimum qualifying period, such as:

- a Fracture Clinic Note dated August 27, 2008;
- Emergency Room Reports dated November 3, 2008 and March 16, 2009;
- The family physician's clinical notes from July 2008 onward; and,
- An independent medical examination of an orthopaedic surgeon, in September 2010.

[61] Counsel for the Appellant submits that when assessing an Appellant's disability, the Review Tribunal must include a review and assessment of all relevant factors, and where a medical report directly speaks to the criteria for disability, this evidence must be discussed. Counsel for the Appellant submits that an important document, which directly spoke to the severity and permanency of the Appellant's medical condition, was neither discussed nor even noted by the Review Tribunal.

[62] Counsel for the Respondent did not address these submissions directly, other than to allege that the Review Tribunal reasonably assessed the Appellant's entire condition. Counsel for the Respondent noted that at paragraph 15 of its decision, the Review Tribunal referred to Dr. Steckley's report of February 2011, wherein he diagnosed the Appellant with myotonic dystrophy, and then addressed how it might affect him. Counsel also notes that

the Review Tribunal referred to the Appellant's family physicians, the Appellant's surgeries, his visit to an orthopaedic surgery, and his use of prescriptive medication.

[63] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court of Canada remarked that:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion *(Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391).

[64] However, the circumstances before me represent a marked departure from the analysis contemplated by the *Newfoundland and Labrador Nurses'* decision. The Supreme Court of Canada held that it was unnecessary to address each of the constituent elements of a case, but that presupposes that there is some analysis. Although the Review Tribunal referred to some of the medical documentation and opinions in its summary of the evidence, it did not purport to undertake any analysis of the medical documentation, whether at the minimum qualifying period or since then. While the Review Tribunal summarized the medical evidence, it did not make any findings on the evidence, did not indicate what evidence it might have accepted or rejected, nor indicate whether it agreed or disagreed with any of the expert opinions and upon what basis it might have made that determination. While the Review Tribunal made a number of findings of capacity (e.g. it found that the Appellant has the ability to sit for prolonged periods, as conclusive of the Appellant's capacity), it did not reconcile these findings with the medical evidence.

[65] I fail to see how one can properly assess a claim for a disability pension without analyzing the medical evidence. It is insufficient to assess a claim for a disability pension by merely analyzing an applicant's personal characteristics and his attempts to find suitable employment or to retrain, without undertaking some assessment also of the medical evidence.

[66] I agree with the submissions of counsel for the Appellant that the Review Tribunal erred in failing to address any of the medical opinions. This failure constitutes an error of law, reviewable on a correctness standard which requires me to substitute my own view as to the correct outcome. A correctness standard applies as it is fundamental and inescapable to any assessment of disability claims that at least a basic level of analysis of the medical evidence is undertaken.

[67] Substituting my own view as to the correct outcome necessarily requires me to review the evidence, including the various medical opinions, and determine whether the Appellant can be found disabled under the Canada Pension Plan.

[68] Having come to this determination, I need not engage in a full review and analysis of the other grounds of appeal, however I do so in the event that I am mistaken on this particular ground of appeal, as to whether the Review Tribunal was required to analyze any of the medical evidence in assessing disability under the *Canada Pension Plan.*

(d) ***Cochran v. Canada (Attorney General)***

[69] Counsel for the Appellant submits that the Review Tribunal erred in failing to apply the principles set out by the Federal Court of Appeal in *Cochran v. Canada (Attorney General),* 2003 FCA 343 in that it did not consider the medical evidence around his minimum qualifying period in coming to its decision and instead, focused on the health of the Appellant at the date of the hearing.

[70] Counsel for the Appellant submits that the Appellant had numerous severe and prolonged impairments stemming from a trip and fall incident in September 2007, and that he was prescribed numerous pain relief medications which resulted in him feeling cognitively slow and extremely fatigued. Counsel submits that the Appellant also developed depression due to his chronic pain condition. Counsel submits that despite this evidence before it, the decision of the Review Tribunal does not reflect that it considered his disability at his minimum qualifying period.

[71] Counsel for the Respondent submits that there was relatively little in the way of documentary medical records or expert opinions concerning the Appellant's medical

condition at his minimum qualifying period, and that the Review Tribunal was limited in what was available for it to consider. Counsel for the Respondent notes that the Review Tribunal referred to the surgeries in September 2007, April 2008 and February 2009, so was alive to the Appellant's condition at his minimum qualifying period. Counsel for the Respondent acknowledges that the Review Tribunal did not specifically refer to any of the medical opinion or reports in its analysis, but notes that these were set out in the evidence.

[72] In further submissions, counsel for the Appellant refutes any suggestion that there was little documentary medical evidence before the Review Tribunal which addressed the severity of the Appellant's disability at his minimum qualifying period. She points to the operative reports, health report to ODSP and to the clinical notes and records of the Appellant's family physician, Dr. Bhatty, dating back to July 2008. She points out that these medical notes in and around the minimum qualifying period indicate that the Appellant required a cane to ambulate and that he walked with an antalgic gait. He had reduced range of motion in the left knee and ankle. He was prescribed numerous medications, including anti-depressants to stabilize his mood.

[73] Counsel for the Appellant submits that, despite this medical evidence, the Review Tribunal did not analyze the Appellant's impairments and resultant restrictions and limitations at his minimum qualifying period in December 2008, and that this constitutes an error of law. She submits that had the Review Tribunal properly considered the evidence of the Appellant's impairments at the minimum qualifying period, it would have concluded his disabilities to be severe and prolonged for the purposes of the Canada Pension Plan. She submits that the Review Tribunal failed to address this evidence in its analysis.

[74] The factual circumstances in *Cochran* differ markedly, as there, the applicant's long-term prognosis was indeterminate, and medical evidence up to that time was specific as to her limitations, from a vocational perspective. The applicant there was receiving continuing treatment. The Pension Appeals Board dismissed the appeal, finding that it was unable to determine at that time whether the applicant's pain would be either severe or prolonged after her treatment had concluded. The applicant argued that the Pension Appeals Board did not properly realize the severity of her injury; with regard to the concurring

judgment, she argued that some of the medical reports that were prepared closer to the minimum qualifying date were ignored.

[75] The Federal Court of Appeal held that the Pension Appeals Board made two errors that were patently unreasonable. The first of these was that the focus of the majority reasons was on the health of the applicant at the date of hearing, rather than at her minimum qualifying period. The Federal Court of Appeal stated that the current health of the applicant was of course relevant, but the main question is the condition of the applicant at the minimum qualifying period. The second error was that the Pension Appeals Board appeared to have ignored significant evidence that would shed light on the applicant's condition at the minimum qualifying period. Medical opinions around the minimum qualifying period indicated that the applicant was likely permanently disabled for heavy work and that the applicant was unable to perform any type of work on a regular basis. A more recent letter concluded that she continued to be unable to work in any profession. While there was hope for improvement following the continuing treatment, it was early yet to determine whether there had been improvement by the hearing.

[76] Traditionally, patent unreasonableness was seen as a defect that was so flawed that no amount of curial deference could justify letting it stand. This was referred to in *Dunsmuir*.

> . . . Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:
>
> > [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" … A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[77] As a result of *Dunsmuir*, the concept of patent unreasonableness has been collapsed into a single form of "reasonableness review".

[78] There may have been insufficient medical evidence before the Review Tribunal for it to have concluded that the Appellant was disabled by his minimum qualifying period, but that overlooks the issue as to whether the Review Tribunal even conducted any analysis as to whether the Appellant was disabled by his minimum qualifying period in the first instance. I agree that the Review Tribunal was required to assess the Appellant's disability at the minimum qualifying period and that its focus ought to have been on the Appellant's disabilities at his minimum qualifying period, rather than on his disabilities at the time of the hearing before it. The Review Tribunal does not appear to have undergone any analysis as to whether the Appellant's disabilities could be found severe and prolonged at his minimum qualifying period. This constitutes an error of law.

[79] Assessing an appellant's injuries at the minimum qualifying period can be particularly relevant when his or her injuries improve after the minimum qualifying period to the point that he or she can no longer be considered severely disabled for the purposes of the *Canada Pension Plan*. (It can also be relevant for other reasons, such as when a "closed period" of disability might be found.)

[80] Having found an error of law, what standard of review applies? *Cochran* provided some indication, when it referred to the decision of the Pension Appeals Board as being patently unreasonable. However, the Supreme Court of Canada in *Dunsmuir* collapsed this deferential standard of patent unreasonableness into reasonableness. It also determined that questions of fact and mixed questions of fact and law are decided on the reasonableness standard. The nature of the question and the fact that the issue here involves an interpretation of the "home statute" strongly suggests that a reasonableness standard applies. That being so, is the decision of the Review Tribunal justifiable, transparent and intelligible, and does it fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law? I do not find that the decision of the Review Tribunal on this issue is at all reasonable, given that it did not conduct any enquiry into whether the Appellant could be found disabled at his minimum qualifying period. The decision of the Review Tribunal cannot stand on this basis, and as such, I can refer this matter to the General Division or give the decision that the Review Tribunal should have given. I will determine the appropriate remedy below.

(e) ***MHRD v. Ethier***

[81] Counsel for the Appellant submits that the Review Tribunal erred in failing to apply the principles set out by the Pension Appeals Board in *MHRD v. Ethier*, CP 6068 (July 1998), by not considering whether it was realistic that he could undergo any retraining. The Pension Appeals Board wrote at paragraph 17:

> 17 The Respondent stated that he may be able to work part-time for a period of two hours per day provided all his limitations could be respected. This answer must be attributed more to his honesty and sincerity than to common sense. It is not realistic on the basis of all the evidence that he could pursue on a regular basis any substantially gainful occupation.

[82] Counsel for the Appellant submits that the Review Tribunal found that the Appellant could retrain and hence concluded that he did not meet the criterion of a severe disability as defined by the Canada Pension Plan, yet did not give any consideration to the medical evidence before it.

[83] Counsel for the Respondent submits that the Review Tribunal had to assess the Appellant's capacity to work and in that respect, noted at paragraph 23 that he has the "ability to sit for long periods of time with a few breaks and is on minimal pain medication that interfere with his thinking ability".

[84] While it may be that the Appellant is young and has the aptitude to retrain, for the reasons which I have expressed above, I am of the view that the Review Tribunal was required to assess the medical evidence to determine if the Appellant had the overall capacity to retrain, particularly as the retraining here seems to have contemplated working with motorcycles. This too constitutes an error of law.

ISSUE 4: CAN THE APPEAL DIVISION CONSIDER ALL GROUNDS OF APPEAL, INCLUDING THOSE FOR WHICH LEAVE WAS NOT GRANTED? IF SO, WERE THERE ERRONEOUS FINDINGS OF FACT?

[85] Counsel for the Appellant submits that the Appeal Division can consider any grounds, including those which the Appeal Division determined at the leave stage did not raise an arguable case. Accordingly, she submits that the Appeal Division ought to consider

the Appellant's submissions that the Review Tribunal based its decision on erroneous findings of fact made without regard for the material before it.

[86] Counsel for the Respondent submits that the opportunity to revisit these grounds is now closed, as leave was not granted for them. Counsel submits that the appeal is limited to those grounds which have been raised in the leave application, and for which leave has been granted.

[87] I addressed a similar issue in *M.C. v. Minister of Employment and Social Development*, (March 30, 2015), unreported SST-AD-13-35, where the representative for the appellant successfully argued that he could raise new grounds of appeal at the hearing. There, I determined that a party could raise new grounds, even if it might result in some prejudice to the other party with the late notice, as the prejudice could be cured by adjourning the matter. However, while I determined that a party could raise new grounds of appeal, I required the Appellant in that case to satisfy me that the new ground fell into one of the enumerated grounds of appeal under subsection 58(1) of the DESDA, and that there was a reasonable chance of success. In weighing my discretion in favour of considering the new ground of appeal, ultimately I was swayed by what I perceived to be the best interests of the parties to allow the full merits of the case to be adjudicated to allow justice to be done.

[88] Counsel for the Appellant submits that the Review Tribunal ignored relevant evidence in addressing the severity of the Appellant's impairments and that it ought to have assigned considerable weight to the conclusions stated in the medical opinions. Counsel submits that the Review Tribunal necessarily committed an error of fact by finding that the Appellant did not have a severe disability, when it had been presented with "overwhelming evidence to the contrary".

[89] Counsel for the Respondent did not make any submissions specifically addressing this ground of appeal.

[90] While I am prepared in this particular instance to consider this ground of appeal, I remain of the view that these submissions do not raise proper grounds of appeal, in that

counsel for the Appellant has not properly raised any specific findings of fact. The issue of the assignment of weight, for instance, is not a matter of a finding of fact.

ISSUE 5: REMEDIES -- REASSESSMENT

[91] I have determined that the decision of the Review Tribunal is unreasonable, as the Review Tribunal did not conduct any enquiry as to whether the Appellant was disabled at his minimum qualifying period. I have also determined that the Review Tribunal erred in law, as it failed to analyze any of the medical evidence in assessing whether the Appellant could be found disabled at his minimum qualifying period and continuously since then, for the purposes of the Canada Pension Plan, and that this error is reviewable on a correctness standard.

[92] Subsection 59(1) of the DESDA permits me to dismiss the appeal, give the decision that the Review Tribunal should have given, refer the matter back to the General Division for reconsideration, or rescind or vary the decision of the Review Tribunal in whole or in part. Although I do not have the benefit of any transcripts or recording of the hearing before the Review Tribunal, there is an extensive documentary record and submissions that are sufficient for me to proceed with assessing the Appellant's claim and to give the decision which the Review Tribunal should have given, or to rescind or vary the decision of the Review Tribunal, in whole or in part. Counsel for the Appellant also submits that I should proceed with an assessment on the record that was before the Review Tribunal.

a. Factual Background

[93] The Appellant was born in X X. The Questionnaire accompanying the Appellant's application for disability benefits indicates that he has a Grade 11 education. Since 2003, he has worked primarily as a labourer and briefly in construction and as a cleaner. The Appellant last worked in September 2007 as a part-time industrial labourer, until a severe injury to his left leg. Concrete stairs had fallen on his left leg, leaving him with an open comminuted tibia-fibula fracture.

[94] The Appellant underwent surgery three times, in:

i. September 2007 for left tibia-fibula irrigation and debridement and open reduction internal fixation with intramedullary nail (pages AD2-80/125-126/237-238 of the hearing file before the Review Tribunal);

ii. April 2008 for hardware removal (AD2-75/117/271-272); and

iii. February 2009 for left tibia intramedullary nail removal and arthrotomy of the left knee (AD2-73/111/273).

[95] The Appellant participated in a trial of physiotherapy. In January 2008, he completed an Outpatient Questionnaire in which he reported having extreme difficulty with his usual work and hobbies, performing heavy activities, walking, standing, running and making sharp turns; and quite a bit of difficulty with performing light activities, walking between rooms, lifting, stair climbing, and hopping. He had moderate difficulty with getting into or out of a vehicle, and no difficulty with sitting for an hour, squatting or rolling over in bed. The progress notes indicate that he continued to have physiotherapy until at least early April 2008 (AD2-243, AD2-244 to AD2-259). In November 2009, his family physician advised that he would need more physiotherapy, but he was unable to afford it at the time. He was given another referral for physiotherapy in May 2010 and June 2010 (AD2-165 to 166) and as of September 2010, was on a wait-list for an OHIP- funded local physiotherapy clinic (AD2-213).

[96] Since the injury, the Appellant has been able to carry only light loads. He has difficulty with bending or squatting. No lifting is permitted. He avoids prolonged stair climbing, walking, standing or pushing or pulling on his left side, as it aggravates the pain in his left leg. He finds that the pain in his left leg interfered with his concentration. He is "ok" with sitting. The Appellant indicates that he was not taking any medication or undergoing any treatment at the time he completed Questionnaires in August 2009 and June 2011 (AD2-84 to AD2-90 and AD2-128 to AD2-134), although a Shoppers Drug Mart Patient Medical Expenses history from October 2007 to November 2009 shows that he regularly took pain relief medication (AD2-224 to AD2-225), and the clinical records of his family physician suggest that he was taking Percocet for pain control throughout 2010 and 2011 (AD2-164 to

AD2-171). The Patient Medical History shows a gap in usage of pain relief medication between March 2009 and October 2009.

[97] The Appellant applied for Ontario Disability Support in August 2008. In the self-report form, he indicated that his disability caused him physical and emotional difficulty. He indicated also that he had a lot of pain, which stopped him from completing daily activities. The Appellant wrote that he got depressed when he saw people doing activities that he was able to do in past. He could no longer do physical jobs because of his pain and limitations. He had pain and difficulty with walking and weight-bearing. Although he took pain medication, it caused fatigue. His family physician completed various forms, including a questionnaire that indicated that the Appellant had severe or complete limitations with physically participating in sustained activity and with walking, and had moderate limitations with physical strength, stair climbing and standing. He was noted to have mild limitations with housekeeping, sitting for a sustained period and functioning with respect to impulse control and behaviour. The family physician also noted that the Appellant was frustrated with his injury and pain control issues (AD2-186 to AD2-209).

[98] Despite the fact that the fractures have healed, the Appellant continues to experience pain in his left leg. The Appellant applied for a disability pension in September 2009 and in June 2011. This appeal relates of course to the 2011 application.

b. Review of Medical Records

i. Diagnostic examinations

[99] The Appellant has had numerous diagnostic examinations between September 29, 2007 and November 16, 2010. They confirm that the Appellant sustained a comminuted fracture of the mid-shaft of the tibia and fracture of the lower shaft of the fibula. The scans in and around the minimum qualifying period showed the following:

- November 3, 2008 (AD2-74) – imaging of left tibia and fibula, AP and lateral views showed a healing fracture with an intramedullary rod in the tibia with a metallic plate with multiple screws at the site of the fracture of the tibia and fibula. Alignment was satisfactory. Juxta-articular deossification was found in

the ankle region. The ankle bony parts otherwise were intact. The joint space was well maintained. No significant soft tissue swelling was identified. The left foot scan showed mild deossification of bony parts, most probably due to disuse osteoporosis.

- March 4, 2009 (AD2-110) - imaging of left tibia and fibula. Intramedullary rod was removed from the tibial shaft one week ago. Small lucent defects present. Spiral fracture of distal tibial shaft has healed. A metallic plate is well fixated in distal left fibula. No acute abnormality

[100] In September 2010, the distal fibular fracture appeared well healed in x-rays (AD2-221). A CT scan later that month showed severe endosteal thickening and cortical irregularity at the mid-shaft of the tibia and two cortical defects at the fracture site (AD2-69/222). In November 2010, a total bone scan showed remote post-traumatic postsurgical changes in the left tibia and left fibula. There was no evidence of complications. The scan also showed mildly increased uptake in both knees and the glenohumeral joint of both shoulders, consistent with degenerative changes.

ii. **Chronology of medical records**

[101] The family physician's clinical records cover the period from July 20, 2007 to December 9, 2009 (AD2-227 to AD2-232), March 24, 2010 to August 11, 2011 (AD2-164 to AD2-171) and from September 22, 2011 to May 17, 2012 (AD2-175 to AD2-184). Most of the visits related to the Appellant's leg pain and to refill of prescriptions.

[102] After the initial surgery in September 2007, the Appellant was seen for follow-up orthopaedic consultations with Dr. G. Moammer. As Dr. Moammer noted that the tibial fracture did not heal and that there was a non-union of the left tibia, he removed the distal and proximal screws of the intramedullary nail to help dynamize the fracture site, with the hopes that it would stimulate healing. Dr. Moammer was of the opinion that if the fracture healed, the prognosis would be full, but if it did not, the Appellant would require surgery for hardware removal and another fixation with bone grafting. (AD2- 240)

[103] The Appellant was seen for another follow-up consultation with Dr. Moammer, in early June 2008. The Appellant was seen to be doing very well. Dr. Moammer wrote that the Appellant was still doing physiotherapy but that his leg pain was almost gone. (AD2-73/114).

[104] In December 2008, the Appellant was noted to have ongoing pain from weight bearing and prolonged standing. He was using Tylenol 500 mg which he found provided relief, but was advised against using it extensively. He was prescribed Tylenol #2 on an as needed basis. (AD2-229)

[105] On the next visit to his family physician in March 2009, the Appellant noted that he was encountering a lot of pain and swelling in his left knee. Movement was limited and the knee joint was hot, swollen and tender on palpation. The Appellant wanted painkillers, but his family physician advised that he needed to manage his pain better instead. The Appellant was sent to E.R.

[106] The Appellant attended at E.R. at the Grand River Hospital on March 16, 2009. He complained that his pain and mobility were now much worse than before his surgery when he had the intramedullary rod removed. He had run out of Percocet a few days earlier. On examination, there was mild warmth and swelling in his knees, tender to touch. He was diagnosed with post-operative knee pain and advised to follow up with Dr. Moammer as well as his family physician. He was prescribed Naproxen 500 mg. (AD2-233)

[107] Dr. Moammer prepared a Medical Report dated September 24, 2009 in support of the Appellant's initial application for CPP disability benefits. Dr. Moammer indicated that despite the fact that the fractures had healed, the Appellant continued to experience pain. He noted that the Appellant was not on any medication at the time. He was of the opinion that the prognosis was good. The Appellant was discharged from his care at that time (AD2-105 to AD2-108).

[108] On the Appellant's visit to his family physician in October 2009, the Appellant was seen as being "very bitter". He had pain in his left foot and increased pain with weight bearing. The family physician advised him to go to the Pain Clinic in Guelph, but the

physician noted that the Appellant refused due to transportation issues. He was seen again in November and December 2009 and was assessed as requiring physiotherapy.

[109] Dr. Drew Bednar, an orthopaedic surgeon, prepared a defence medical-legal report dated September 29, 2010 (AD2-210 to AD2-220). Dr. Bednar spoke of the surgeries. The goal of the third surgery apparently had been to relieve residual pain in the left leg, but that procedure was completely unsuccessful in that regard and in fact, the Appellant reported his leg pain increased since the rod was removed. The Appellant complained of constant deep aching pain at the middle of his left shin, worse with any attempt at weight-bearing activity. There was also burning hypersensitivity to light touch at the distal end of the surgical incision overlying his knee cap and on the lateral part of the left leg. The Appellant walked with a cane in his right hand and leaned heavily on it. With the cane, he was able to stand and walk for short distances.

[110] Dr. Bednar conducted a physical examination and reviewed the medical records. Dr. Bednar diagnosed the Appellant as having suffered a compound fracture to the left tibia mid-shaft, with a concomitant closed fracture of the fibula and injury to the superficial peroneal nerve. Dr. Bednar was of the opinion that the Appellant might have a tibial non-union to explain some of the symptomology. Clinical examination suggested injury to the superficial peroneal nerve of the Appellant's right leg. Dr. Bednar was of the opinion that the Appellant's impairment is permanent and that it presents substantial interference with the Appellant's occupational, physical and daily living pursuits.

[111] In terms of the prognosis, Dr. Bednar was of the opinion that there was a small probability that EMG testing might define a focal area of nerve compression that might be addressed surgically. The prognosis for the bone fracture was indeterminate, pending results of a CT scan report. He did not expect any accelerated arthritic deterioration in the adjacent joints of the left knee and ankle. He considered the injuries permanent. Dr. Bednar also felt that the Appellant was "completely disabled" from his previous work as an industrial labourer. He also had at least a partial permanent disability in normal home maintenance tasks. Dr. Bednar did not comment on the Appellant's capacity or incapacity regularly of pursing any other substantially gainful occupation.

[112] In February 2011, the Appellant was seen by Dr. Steckley, a neurologist, for investigation into paraesthesia and hyperesthesias in his left lateral leg. The Appellant also reported a longstanding history of difficulty relaxing his hands, mild facial weakness and mild distal foot weakness. EMG studies were abnormal, demonstrating evidence of diffuse myotonia, consistent with a clinical diagnosis of myotonic dystrophy. Dr. Steckley recommended Amitriptyline for neuropathic pain, or if it was not effective, Lyrica or Gabapentin. Dr. Steckley was going to arrange for genetic testing in connection with the diagnosis of myotonic dystrophy. If the Genetics Test was positive, he would refer him to the Genetics Clinic in Hamilton. (AD2-62 to AD2-66/AD2-172 to 174). In November 2011, Dr. Steckley confirmed the diagnosis of myotonic dystrophy (AD2- 278).

[113] The Appellant's family physician, Dr. Bhatty, prepared a CPP Medical Report in May 2011. Dr. Bhatty diagnosed the Appellant with asthma, possible myotonic dystrophy, chronic pain in his left leg (tibia/fibula) and bone loss in his left leg, the result of inactivity and atrophy. Dr. Bhatty was of the opinion that the Appellant was unable to sustain any prolonged activities, unable to walk without support and had severe pain with weight-bearing. Treatment at the time consisted of pain control using Percocet. There had been no recent changes in dosage. The prognosis was considered poor (AD2-58 to AD2-61).

[114] By October 20, 2011, the Appellant advised his family physician that he was experiencing intermittent pain in his back. On his next visit of November 14, 2011, he reported that he had continuing pain in his leg and back and that it had been getting worse and was now radiating to his hips. He had decreased range of motion in both the leg and back areas. Dr. Bhatty diagnosed him with neck and back strain. By mid-December 2011, the pain had increased and the Appellant was having difficulty with weight-bearing.

[115] In late January 2012, the Appellant reported to his family physician that pain control was "an issue" and that he still had "limited activity due to myotonia". By March 2012, the Appellant had found another family physician closer to home and was considering transferring there.

c. Submissions of parties

[116] Counsel for the Appellant submits that the Appellant's pain and disability have increased since the time of the original incident in September 2007. She submits that the prescription medications have caused the Appellant debilitating side effects such as dizziness and sleepiness. She further submits that the Appellant's prolonged disability has resulted in him becoming quite depressed. She notes that the Appellant continues to face physical restrictions. He is unable to walk for more than three blocks, perform any task requiring heavy lifting, or use his left for heavy weight-bearing activities, such that he developed osteoporosis before the age of 40. She acknowledges that he had been referred to a pain clinic, but was unable to attend because of "severely constrained finances" (AD1).

[117] Counsel for the Appellant submits that numerous medical documents attest to the fact that the Appellant was not gainfully employable at his minimum qualifying period in December 2008, due to the severity of his physical and psychological impairments, particularly given his limited education, reliance upon multiple medications that interfere with his mental alertness and stamina, work experience limited to physically demanding factory and construction jobs and severe permanent physical disabilities. She submits that the Appellant suffers from a severe and prolonged disability, preventing him from engaging in any form of gainful employment since December 2008, and that the appeal therefore should be allowed.

[118] In submissions before the Review Tribunal, the Respondent's representative at the time submitted that while the Appellant suffered fractures of his lower leg, they healed in good alignment following surgical repair and he has not been seen by a surgeon since March 2009. At the time of both his previous and current applications, he was not participating in any treatment programs and denied taking medication. While it was reasonable to conclude that he might be limited with respect to his former heavy type of work, the Respondent's representative submitted that he should have been able to perform some type of suitable work, considering his age, education and abilities (AD2- 289 to AD2-291).

d. Analysis

[119] The Appellant sustained significant, traumatic injuries from an accident that occurred in September 2007. He suffered comminuted fractures of his left tibia and fibula. Despite undergoing surgeries and physiotherapy, he has been left with chronic pain in his left leg. He also developed depression, secondary to the injury to his left leg. The injury rendered him unable to return to his former occupation as a labourer.

[120] At his minimum qualifying period in December 2008, the Appellant continued to experience pain with various restrictions and limitations. He had difficulty with prolonged standing, walking, and with any weight-bearing activities. He completed a Questionnaire in August 2009, shortly after the minimum qualifying period, setting out his various limitations. He was unable to bear weight, was limited in prolonged standing, walking, bending, squatting or lifting. The Appellant indicated that he was able to drive only an automatic. Sitting was "ok".

[121] Although there may be some gaps in the medical records, I accept that the pain in the Appellant's left leg has been continuous since his injury in September 2007 and that the Appellant has been largely consistent in his use of pain relief medication. However, I also accept the submissions of the Appellant's counsel that the pain in the Appellant's left leg has been progressive, particularly after the last surgery in February 2009, and that he has since then resumed taking stronger pain relief medication.

[122] The family physician's clinical records indicate that the Appellant used Percocet and Oxycocet in fall 2008. The Shoppers Drug Mart Patient Medical Expenses (AD2-224) indicate that in November 2008, the Appellant was prescribed 10 pills of Ratio- Oxycocet. The clinical records of his family physician indicate that by December 2008, the Appellant was seen to be having some relief with Tylenol 500 mg. Dr. Bhatty prescribed Tylenol #2, to be taken on an as needed basis. The Appellant returned to using Percocet in 2009, likely as Tylenol was no longer providing the same measure of relief. Although the Appellant continued to require pain relief medication, the use of just Tylenol 500 mg and Tylenol #2 in December 2008 suggests that the Appellant's pain levels at that particular time were not severe and certainly less severe than they had been, or would be again.

[123] After his minimum qualifying period had passed in December 2008, the Appellant underwent surgery in February 2009, after which his symptoms reportedly increased. He attended at his family physician's medical clinic on March 16, 2009. He sought pain killers, but was advised that he required management, rather than something to mask the pain (AD2-229). Later that same day, the Appellant attended at E.R. where he reported that he had run out of Percocet a few days ago.

[124] At the hospital, the Appellant was diagnosed with post-operative knee pain and advised to follow up with the orthopaedic surgeon and his family physician (AD2-233). However, the CPP Medical Report dated September 24, 2009 prepared by the orthopaedic surgeon indicates that the orthopaedic surgeon had last seen the Appellant on March 4, 2009 (AD2-105). The following entry in the clinical records of the family physician is dated October 26, 2009, and indicates that the Appellant had not returned to his family physician's clinic between March 16, 2009 and October 26, 2009. In the entry for October 26, 2009, the family physician wrote that he had not prescribed any pain medications or narcotics in the past 10 months. As noted above, the Patient Medical History shows a gap in usage of pain relief medication between March 2009 and October 2009. Although it is possible the Appellant filled prescriptions at other pharmacies during this timeframe, it is for the Appellant to prove his case on a balance of probabilities. He alleges that he consistently and regularly took prescriptive pain relief medication, yet this is neither consistent with the Patient Medical History nor with the family physician's records that pain medications and narcotics had not been prescribed for more than half of 2009. I find it more likely than not that the Appellant was not regularly or consistently taking any prescriptive pain relief medication for several months in 2009, and likely reverted to using over-the-counter pain relief medication during this time. This suggests, to some extent, that his pain levels could not have been that significant during this timeframe from spring to fall 2009.

[125] In the visit of October 26, 2009, the family physician queried how the Appellant was controlling his pain, but there is no recorded response. The family physician assessed the Appellant as requiring a follow-up with the orthopaedic surgeon. He made a referral in this regard. However, there are no consultation reports or clinical records from the orthopaedic surgeon to show that the Appellant returned to see him, and there are no further

references in the family physician's clinical records that the Appellant saw Dr. Moammer again after March 2009.

[126] In April 2010, the family physician queried whether the Appellant should be reviewed again by an orthopaedic surgeon. In September 2010, the family physician's records indicate that the Appellant had been seen by an orthopaedic surgeon in Hamilton. Presumably this refers to Dr. Bednar, whom the Appellant saw for medical-legal purposes. In December 2010, the Appellant requested a referral to a plastic/orthopaedic surgeon for a second opinion. A referral to a plastic surgeon was made in February 2011.

[127] It is unclear from the records why the Appellant did not consult Dr. Moammer again. It may be that he relied upon the medical assessment conducted by Dr. Bednar, but even so, in December 2010, the Appellant requested a second opinion with a plastic/orthopaedic surgeon and still, an orthopaedic consultation – whether with Dr. Moammer or another specialist -- did not materialize by the time of the hearing before the Review Tribunal in March 2013. However, there is insufficient evidence before me to draw any inferences from the fact that the Appellant did not see Dr. Moammer again after March 2009, and does not appear to have been seen by any other treating orthopaedic surgeon.

[128] However, the Appellant did not immediately follow the advice of the emergency room physician that he follow-up with his family physician. He waited until October 2009 to see his family physician. This suggests, to some extent, that his pain levels could not have been that significant during this timeframe, if he did not return to see his family physician and seek out any medical investigations or treatment during this time, nor take any prescriptive pain relief medication.

[129] Dr. Bhatty's CPP Medical Report dated May 2011 indicates that the Appellant has severe pain with walking and weight-bearing. This report was prepared well after the minimum qualifying period. The family physician's CPP Medical Report is deficient in that it does not indicate how the limitations affected the Appellant's overall functionality and his capacity or incapacity regularly of pursuing any substantially gainful occupation at the minimum qualifying period and since then. While the clinical records of the family physician show that the Appellant's pain has been consistent, the records do not delineate

the Appellant's complaints and disability following significant events. For instance, the clinical records suggest that the Appellant's disability has become progressive over time, particularly following the surgery in February 2009, but there is no indication in the clinical records or in any of the medical opinions of the family physician as to what changes in his capacity the Appellant may have encountered as his disability progressed, from his minimum qualifying period and since then.

[130] I recognize that there are inherent limitations with clinical records, as they are intended to document the history provided by a patient and to represent the contemporaneous findings of the physicians. As well, many portions of handwritten clinical records can be illegible, rendering them virtually of little utility to a reader. Typically, clinical records do not reflect the full opinions of a physician, and they seldom provide any insights on a patient's functionality or capacity. Hence, it often becomes necessary for an applicant to obtain a medical narrative. I make these observations, as it seems that the Appellant and his counsel attach great significance to the clinical records and submit that I should rely on them, in part, to establish the severity of the Appellant's disability under the *Canada Pension Plan.* I find that the clinical records are of some assistance, in at least documenting the Appellant's complaints and Dr. Bhatty's observations, history taken and any recommendations he might have given.

[131] I place some weight on the medical opinion of Dr. Moammer, as he is a specialist in orthopaedic surgery, he performed the surgeries on the Appellant and he saw the Appellant on several occasions, including visits in and around the minimum qualifying period. From an orthopaedic perspective, the Appellant was seen to be doing well in the months preceding the minimum qualifying period. When Dr. Moammer last saw the Appellant weeks after the February 2009 surgery, he was of the opinion that the fractures had healed, but noted that the Appellant continued to complain of leg pain. Dr. Moammer did not offer any opinion on the Appellant's functionality or (in)capacity regularly of pursuing any substantially gainful occupation.

[132] The most comprehensive medical opinion produced is from Dr. Bednar, whose report was obtained for defence medical-legal purposes. Dr. Bednar however did not see the

Appellant until well after the minimum qualifying period had passed. His opinion is based on the history provided by the Appellant, the physical examination he conducted of the Appellant, and on a review of the various medical records. It does not appear that the clinical records of the family physician were available for his review. While Dr. Bednar prepared his report for defence purposes, there is no suggestion from either of the parties that I should not accept Dr. Bednar's opinion on the Appellant's diagnosis, prognosis or capacity. Dr. Bednar was of the opinion that the Appellant likely has permanent injuries and notwithstanding Dr. Moammer's opinion that the fractures had healed, Dr. Bednar had strong concerns that the Appellant might have a tibial non-union to explain some of his symptomology. Dr. Bednar was also of the opinion that the Appellant has some nerve damage, some of which might be relieved with surgery. While Dr. Bednar was of the opinion that the Appellant's impairment represents a substantial interference in his occupational, physical and daily living pursuits, he also wrote that:

> The nerve damage element of [the Appellant's] injury I expect will leave him with permanent disability from the kind of heavy industrial labour he used to do, but should a CT scan confirm my concerns to non-union it is possible that appropriate orthopaedic intervention might yet provide him significant incremental relief of pain and improved functionality.
>
> In his current state, this fellow who can barely lurch down my office hallway leaning on his cane and unable to weight bear on the left leg is certainly not going to be realistically directed towards industrial labour of any sort. <u>It is possible he might be able to do some sort of sedentary work in a seated position, and an option for him might be that of small engine mechanic, as he apparently has some interest and experience in that direction</u>. (My emphasis)

[133] Dr. Bednar's opinion that the Appellant might be able to do some sort of sedentary work appears to be consistent with the medical evidence. Although each of the Appellant's treating health caregivers agrees that the Appellant has a number of limitations, he is seen to be capable of sitting. The Appellant also indicated in his Questionnaires in 2009 and 2011 that sitting is "ok".

[134] Despite Dr. Bednar's opinion that the Appellant might be able to do "some sort of sedentary work in a seated position", the Appellant's counsel submits that the Appellant is incapable regularly of pursuing any substantially gainful occupation, as he experiences

adverse side effects such as dizziness and sleepiness from the pain relief medication. I do not see any documented account of any complaints from the Appellant in this regard. While I do not doubt that he has experienced some side effects from some of the pain relief or other medication, I note that in or about September 2008, he stopped using Venlafaxine (also known as Effexor) for nerve pain as he found it made him sick (AD2-230). It seems that if Percocet or other medication were causing the extent of adverse side effects that is alleged, that the Appellant would have brought this to the attention of his family physician, so that other pain relief or other medications could have been tried. Certainly he was prepared to seek out other medication when facing financial constraints, so it would seem reasonable that the Appellant would have sought out other medications that had less adverse consequences on him. I am not prepared to accept counsel's submissions that the Appellant is incapable regularly of pursuing any substantially gainful occupation, on the basis that he experiences adverse side effects from taking pain relief medication.

[135] Counsel for the Appellant submits that the Appellant also suffers from depression and that he was prescribed anti-depressants. I accept that the Appellant had depression, secondary to the injury to his left leg. The clinical entry of September 29, 2008 indicates that the Appellant could not afford Gabapentin, had discontinued using Effexor and was now prescribed Elavil 25 mg. While he may have been experiencing depression and was on anti-depressants, there is however no indication in any of the medical records that the depression was severe enough to warrant further investigation and intervention, that it required ongoing use of anti-depressants, or that it impacted upon his functionality or capacity. There was no reference to any depression or mood symptoms in either of the CPP Medical Reports prepared by Drs. Bhatty and Moammer, or in the medical-legal opinion of Dr. Bednar. From this, I can only infer that the Appellant did not report his depressive symptoms and that none of the Appellant's treating physicians saw much of a depressive affect. While depression may have been present, it was by no means a significant consideration in the Appellant's overall disability.

[136] Counsel for the Appellant submits that the Appellant also suffers from myotonic dystrophy, but there is no reference to this in any of the early medical records prior to or at around the minimum qualifying period. The Appellant was subsequently assessed by a

neurologist in February 2011. From this, I infer that the Appellant must have been exhibiting symptoms to warrant a referral to a neurologist, but the records do not disclose when he began to exhibit any symptoms of myotonic dystrophy and what impact they might have had on his overall functionality. While I am prepared to find that the Appellant began experiencing symptoms of myotonic dystrophy prior to February 2011, there is insufficient evidence in the records before me to suggest that the myotonic dystrophy was present at the minimum qualifying period, or that it was significant enough in his overall disability by even September 2010, when he was assessed by Dr. Bednar. Had the symptoms of myotonic dystrophy been of concern to the Appellant by the time he saw Dr. Bednar, it would seem that he would have discussed this when reviewing his medical history.

[137] Did the Appellant attempt to appropriately mitigate his circumstances by exhausting all reasonable treatment recommendations given to him? The emergency room physician and the Appellant's own family physician suggested that the Appellant see the orthopaedic surgeon again in consultation, but for reasons which are unclear, the Appellant did not pursue this. There is insufficient evidence before me to draw any inferences from the fact that the Appellant did not see Dr. Moammer for any follow-up after March 2009.

[138] I note that the Appellant's family physician had recommended that he attend at a pain clinic. The family physician also recommended as early as November 2009 that the Appellant resume physiotherapy. There is no evidence before me that the Appellant necessarily would have seen any marked or appreciable improvement in or management of his pain, had he pursued these recommendations. While the evidence indicates that the Appellant refused to attend at a pain clinic due to transportation issues, I find that the Appellant was in any event under prohibitive financial constraints to be able to realistically pursue physiotherapy or attend at a pain clinic.

[139] Dr. Bednar suggested that possibly appropriate orthopaedic intervention might yet provide "significant incremental relief of pain and improved functionality", if there was a tibial non-union. Dr. Bednar also suggested that the Appellant could undergo surgical release of a focal compression of the superficial peroneal nerve. At the same time, Dr. Bednar wrote that there was "a small chance that indicated intervention might palliate [the

injuries] somewhat". In other words, the Appellant could expect only some relief. Dr. Bednar did not offer any opinion as to what the prospects for improvement of his pain levels and overall capacity and what risks the Appellant might face with surgery. I do not have sufficient evidence before me to determine the reasonableness of proceeding with further surgical intervention or with the focal compression which was recommended by Dr. Bednar. The medical opinions and recommendations of Dr. Bednar caused obvious concern for the Appellant, as can be evidenced by the fact that he sought a second opinion. It is unknown whether the Appellant ever obtained a second orthopaedic consultation and what the results might have been. In short, there is insufficient evidence before me to show that the Appellant failed to mitigate his circumstances by exhausting all reasonable treatment options, or that he would have successfully responded to these treatment options.

[140] The medical opinions are unanimous that the Appellant is incapable of any physically demanding work, but other than Dr. Bednar's report, they say little about the Appellant's capacity or incapacity. Dr. Bednar is of the opinion that the Appellant might be able to do "some sort of sedentary work in a seated position". This opinion alone is insufficient to establish capacity, as I must consider the "real world" context of the Appellant, in assessing whether he is incapable regularly of pursuing any substantially gainful occupation.

[141] The Federal Court of Appeal stated in *Villani:*

> . . . Each word in [subparagraph 42(2)(a)(i) of the *Canada Pension Plan]* must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[142] I must determine whether in a "real world" context the Appellant is incapable regularly of pursuing any substantially gainful occupation. The Appellant's counsel submits that retraining and re-entering the workforce and regularly pursuing any substantially gainful occupation is highly improbable in the real world for the Appellant, as he does not have a

high school diploma and has physical limitations with weight-bearing and standing, amongst other things.

[143] At the time of his minimum qualifying period, the Appellant was 36. He is now 42 years old. He is proficient in English. These two considerations do not affect his personal circumstances, from a vocational perspective. He did not complete high school and has worked in only labour-intensive positions of a general nature. He has not worked in any capacity since 2007. Dr. Bednar notes that he worked as a heavy carpenter/framer of homes, but apart from this, there is no other evidence that the Appellant has any other skills or training in the trades or in any particular areas. Before the accident, he was active in sports and was an avid recreational motorcyclist. The only substantially gainful occupations which the Appellant would be able to consider, given his physical limitations, would be sedentary in nature. Traditional clerical and administrative positions are likely unsuitable for the Appellant, given his background. It is unrealistic to expect the Appellant to perform clerical work when he has no prior work experience or any training in this area. Indeed, any clerical or occupational skills he might have acquired in high school are likely dated, though any recent skills he might have acquired - whether in the workforce or through any outside hobbies - would be relevant. This is not to suggest however that the only sedentary occupations are clerical or administrative in nature.

[144] Dr. Bednar suggested that one option the Appellant could consider is that of small engine mechanic. Dr. Bednar alluded to the Appellant's "interest and experience" in that area, but there is insufficient evidence in the records to indicate the level of experience which the Appellant might have in this area. I do not know if on-the-job training is available or if the Appellant would require some formal occupational training, if he were to pursue work as a small engine mechanic. If the latter, this likely would require some upgrading of his education. If he has some interest and experience in this area, as indicated by Dr. Bednar, this would facilitate retraining.

[145] In *Inclima v. Canada (Attorney General),* 2003 FCA 117, the Federal Court of Appeal found that the assessment and conclusions of the Pension Appeals Board was not unreasonable. The Board found that although the applicant suffered from fibromyalgia and

a chronic pain disorder, he retained the capacity to work at light to moderate levels. The Federal Court of Appeal held that an applicant who seeks to bring himself within the definition of severe disability must not only show that he or she has a serious health problem but where there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[146] In *Canada (Attorney General) v. Ryall*, 2008 FCA 164, there was evidence from an internist which stated that Mrs. Ryall, who had done clerical work in past, would likely be able to perform a job that did not require physical activity, such as walking or lifting. The Federal Court of Appeal held that:

> . . . in light of this evidence of capacity to work, it was incumbent upon Mrs. Ryall to demonstrate that she made efforts to obtain and maintain employment.

[147] Here, there is some evidence of capacity and it was therefore incumbent upon the Appellant to demonstrate that he made efforts to obtain and maintain employment. I recognize that the Appellant has some educational shortcomings, but I find that they can be overcome with either upgrading of his existing education, or with retraining.

[148] In *Doucette v. Canada (Minister of Human Resources Development)*, [2005] 2 FCR 44, 2004 FCA 292, the Federal Court of Appeal accepted that the applicant had educational and cognitive deficiencies which presented a disadvantage in job seeking, but found that he was capable of light and sedentary work, and that there was work, such as a dispatcher or telemarketer, which he was capable of doing. It was irrelevant as to whether he would find any job satisfaction or meet his salary expectations.

[149] I find that the Appellant is in a similar position. At the time of his minimum qualifying period and since then, he was capable of at least sedentary work, notwithstanding his education and past work and life experience. He however did not attempt to pursue any substantially gainful employment, or obtain and maintain any employment within his limitations, at or around his minimum qualifying period. As such, I find that, on a balance of probabilities, the Appellant's disability cannot be considered to have been severe for the

purposes of the *Canada Pension Plan*, at his minimum qualifying period and since then for at least a couple of years before his myotonic dystrophy became a consideration.

[150] Having found that the Appellant's disability is not severe, it is not necessary to make a determination on the prolonged criterion, though had I found his disability arising out of his leg injury to be severe, I would have found his disability to be prolonged.

CONCLUSION

[151] The Appeal is dismissed.

Janet Lew
Member, Appeal Division