Citation: *J. S. v. Minister of Employment and Social Development*, 2015 SSTAD 1426

Appeal No: AD-15-840

BETWEEN:

J. S.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: December 14, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated April 23, 2015. The General Division conducted a teleconference hearing on January 14, 2015 and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan*, as it found that her disability was not "severe" at her minimum qualifying period of December 31, 2010. The Applicant filed an application requesting leave to appeal on July 15, 2015. The Applicant alleges that the General Division made a number of errors. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] Counsel submits that the General Division erred in law and also based its decision on various erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. In particular, counsel submits the following, that the General Division (for ease of reference, I will use the same heading descriptions and numbering scheme as counsel, although have renumbered the headings under "Errors of Law"):

i. Errors of Fact

1. misapprehended the evidence;

2. failed to consider the Applicant's evidence; and

3. failed to appreciate expert opinion;

ii. Errors of Law

1. failed to apply *Villani*;

2. failed to consider all medical issues;

3. failed to assess her disability as of the minimum qualifying period;

4. failed to consider *Inclima*;

5. equated "philanthropic" employer with a "realistic" employer; and

6. equated the capacity to attend school with the capacity to be gainfully employed.

[4] Counsel further submits that the Appeal Division has certain obligations to meet, in relation to the decision rendered by the General Division.

[5] The Respondent has not filed any written submissions.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out that the only grounds of appeal are the following:

i. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

ii. The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

iii. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

The Federal Court of Canada recently affirmed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

i. Errors of fact

[8] Counsel submits that the General Division based its decision on the following erroneous findings of fact that it made in a perverse or capricious manner or without regard to the material before it:

1. Misapprehended the evidence

i. by failing to appreciate the real nature of the Applicant's disabilities by ignoring important evidence, substituting his own opinion for those of medical providers and misapprehending the evidence;

ii. at paragraph 51 of its decision, by finding that there was no medical opinion concerning the severity of the Applicant's psychological condition by her minimum qualifying period, in the face of a confidential report dated April 1, 2008 and psycho-vocational report dated December 21, 2008. Counsel submits that the General Division failed to appreciate the totality of the Applicant's medical evidence in relation to her mental health, and that the Member substituted his own opinion, despite the opinion of the Applicant's medical providers, particularly prior to the minimum qualifying period;

iii. at paragraph 53, noted that the Applicant's testimony mainly described her disability after her minimum qualifying period. Counsel submits that this is inaccurate as the record shows that the Applicant confirmed that she suffered from numerous medical problems at her minimum qualifying period, and that her medical problems have been continuous and that her health has been deteriorating with time. Counsel notes that the Applicant was required to undergo left knee replacement surgery on April 15, 2015 and that she anticipates that right knee replacement surgery will be scheduled soon;

iv. overall, erred in concluding that the Applicant's disability is not severe, by neglecting to consider the combination of the Applicant's mental and physical disabilities.

[9] Some of these grounds properly fall under the heading "errors of law". I will address them in that context where counsel has appropriately identified a potential ground of appeal.

[10] Counsel submits that the General Division erred in finding that there was no medical evidence confirming that the Applicant suffered from a severe depression in 2008.

[11] The General Division reviewed the medical evidence in its Evidence section. The evidence consisted of the social worker's report of April 1, 2008 and the psycho-vocational testing summary report completed on December 21, 2008 (paragraphs 22 and 23 of the decision). Clearly, the General Division was alive to the fact that there were at least two medical reports which addressed the issue of the severity of the Applicant's disability, as it related to her psychological condition, so it cannot be said that the General Division found that there was no medical evidence that the Applicant did not suffer from a severe depression in 2008.

[12] At paragraph 51 of its decision, the General Division wrote:

> There is no medical opinion concerning the Appellant's psychological condition **being a severe disability** that rendered her incapable regularly of pursuing any substantially gainful occupations on or before December 31, 2010. (My emphasis)

[13] The General Division does not appear to have been dismissive of the fact that the Applicant might have had a psychological condition prior to her minimum qualifying period, but it determined that the medical evidence prior to the minimum qualifying period relating to her psychological condition could not support a finding that it was severe.

[14] Counsel submits that the General Division failed to consider the totality of the evidence and the combination of the Applicant's mental and physical disabilities. I will properly address this issue under the heading "errors of law", but apart from the two reports dated April 1, 2008 and December 21, 2008, counsel has not pointed to any other reports which she submits the General Division failed to consider, or why they might have been critical in the analysis as to whether the Applicant could be found disabled for the purposes of the *Canada Pension Plan.*

[15] The General Division noted that the Applicant had been pursuing employment opportunities in 2010. The General Division referred to the April 2011 opinion of Dr. Jones that the Applicant's post-traumatic stress disorder was triggered in Christmas 2010, but found that the medical evidence indicated that the psychological condition only became severe after 2010. This is when Dr. Ibrahiem is alleged to have reported that the Applicant became anxious about going out in 2011. It appears to be on this particular basis that the General Division determined that the Applicant's disability did not become severe until after December 31, 2010.

[16] Counsel submits that the General Division Member erred in substituting his own opinion in the place of the expert opinion on the issue of the severity of the Applicant's disability. Again, this issue is properly characterized as an error of law, but I will deal with this ground here. Generally, it would be an error of law for the General Division to substitute its own medical opinion in the place of an expert, but the determination as to whether an Applicant can be found disabled for the purposes of the *Canada Pension Plan* falls on the General Division, as the primary trier of fact. This is a distinct exercise from rendering an expert opinion on the medical condition of an applicant. The test for disability under the *Canada Pension Plan* is very specific. It calls for a legal assessment of the medical and other evidence before it, in a "real world context", under paragraph 42(2)(a) of the *Canada Pension Plan*. This does not displace the expert opinion as to the diagnosis, history and treatment, prognosis and recommendations which a medical expert is qualified to render, but the assessment under the *Canada Pension Plan* requires the trier of fact to determine whether, based on the medical and other evidence before it, an applicant's

disability can be considered severe and prolonged in order to meet the definition of disabled under the *Canada Pension Plan*.

[17] I am not satisfied that the appeal has a reasonable chance of success on these alleged grounds of errors of fact.

2. Failed to consider the Applicant's evidence

[18] Counsel submits that the General Division failed to consider the Applicant's evidence. During the hearing, the Applicant testified about her various medical conditions, including those present prior to the minimum qualifying period, and their negative impact on her life. Counsel submits that the Applicant also testified about her various functional limitations, her constant pain and low energy levels, which she finds prevents her from performing the majority of her activities of daily living, as well as from engaging in any form of gainful occupation on a regular basis. From a review of the decision, it appears that the General Division conducted a review and analysis of some of the medical evidence as well as some of the physical restrictions. It may not have been an exhaustive analysis, but that is not required. I note the words of the Supreme Court of Canada in this regard, that it is unnecessary for a decision-maker to write exhaustive reasons addressing all of the issues before it: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, where the Court wrote:

> 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).

[19] As Stratas J.A. also wrote in *Canada v. South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.,* 2012 FCA 165:

> … trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.

[20] Counsel further submits that the General Division failed to give "due weight" to the Applicant's evidence relating to her functional limitations, and that it therefore failed to assess the severity of the Applicant's disabilities.

[21] Apart from the fact that counsel has not referred to any specific portions of the recording of the hearing nor produced any transcripts of the hearing, the Federal Court of Appeal has previously addressed this submission in other cases that the Pension Appeals Board failed to assign the appropriate weight to the evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the Applicant's counsel identified a number of medical reports which she said that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. The Federal Court of Appeal dismissed the application for judicial review and refused to interfere with the decision- maker's assignment of weight to the evidence, holding that that properly was a matter for "the province of the trier of fact". I agree with that approach.

[22] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division did not apply "due weight" to the Applicant's evidence, or that it did not consider the Applicant's evidence.

3. Failed to appreciate expert opinion

[23] Counsel submits that the General Division failed to "appreciate" the expert opinion. Counsel listed a number of medical reports, including:

i. a confidential intake assessment dated April 1, 2008 prepared by a registered social worker, who noted that the Applicant reported elevated levels of distress on the symptom dimensions of anxiety, depression and interpersonal sensitivity. Her global assessment of functioning rated 50;

ii. a report dated October 21, 2008 prepared by an orthopaedic surgeon who was of the opinion that the Applicant presented with early arthritis in her right knee. He prescribed Mobicox and recommended physiotherapy;

iii. a psycho-vocational testing summary report dated December 21, 2008, in which a registered psychologist stated that the Applicant scored in the severe category on testing of her psychological health. She was of the opinion that the Applicant would benefit from various treatment options;

iv. a report dated August 23, 2010 of the orthopaedic surgeon, who indicated that the Applicant had not responded to the course of Mobicox. Indeed, the Applicant reported increased pain with stairs, kneeling and squatting;

v. an assessment dated April 26, 2011 from Mental Health Services, which noted that the Applicant suffered from post-traumatic stress disorder, major depressive disorder, recurrent and severe, secondary to post- traumatic stress disorder. Her psychiatric issues were thought to stem from childhood physical, emotional and sexual trauma by family members; and

vi. medical report dated July 15, 2011 in which Dr. Arora diagnosed the Applicant with chronic knee pain and post-traumatic stress disorder with depression. Dr. Arora considered the Applicant's prognosis to be poor.

[24] The General Division summarized each of these reports listed above, other than the report dated October 21, 2008 of the orthopaedic surgeon. The General Division also referred to a number of other reports.

[25] It is worth noting that the preliminary documentary record before the General Division consisted of 1,392 pages, much of it medical documentation and the Applicant's file with the Workplace Safety and Insurance Board (WSIB). Counsel filed updated records on behalf of the Applicant. Counsel prepared written submissions and addressed the medical reports listed in paragraph 20 above.

[26] Counsel does not indicate how the General Division allegedly failed to "appreciate" the expert opinion. If it is a matter of failing to assign the appropriate weight to these reports, as I have noted above, the Federal Court of Appeal has addressed this issue previously: *Simpson.*

[27] While the General Division may not have summarized all of the evidence or referred to it when conducting its analysis, that does not necessarily mean that it ignored that evidence or that it failed to consider it. As I have written above, the Supreme Court of Canada has determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all the issues before it: *Newfoundland and Labrador Nurses' Union* and *South Yukon Forest Corporation and Liard Plywood and Lumber Manufacturing Inc.*

[28] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Errors of law

[29] Counsel submits that the General Division made the following errors of law:

1. Failure to apply *Villani*

[30] Counsel submits that the General Division failed to have regard to the principles set out in *Villani v. Canada (Attorney General)*, 2001 FCA 248, in assessing the merits of the Applicant's appeal for a Canada Pension Plan disability pension. Counsel notes that the Federal Court of Appeal established that in determining whether an applicant satisfied the statutory criteria for a disability pension, the decision maker must have regard to the applicant's age, education, and work experience, and whether the applicant is employable in the "real world". Counsel reproduced paragraphs 37, 38 and 39 of the decision, and submits that if a claimant is not able to engage in substantially gainful employment in the context of the "real world", she will be considered disabled within the meaning of the statutory framework.

[31] Counsel submits that, although the General Division referred to *Villani* and the severity requirement of a "real world" employer at paragraph 54 in its decision, it did not

take into account the Applicant's personal characteristics. Specifically, counsel submits that the General Division failed to consider the Applicant's age, limited education and restricted work experience, and that the Applicant also suffers from severe physical and psychological disabilities. Counsel submits that the Applicant's medical conditions result in severe functional limitations and cognitive impairments which affect the Applicant's ability to perform activities of daily living. Counsel submits, for instance, that the General Division did not consider the fact that the Applicant does not have any prior sedentary work experience.

[32] Counsel submits that re-entering the workforce and finding a substantially gainful occupation, and not just any conceivable occupation, is highly unlikely for a person in the real world when one is faced with physical and psychiatric impairments. Counsel submits that as the General Division did not turn its mind to the Applicant's personal characteristics, and more specifically, her multiple medical problems and resulting limitations, advancing age and limited work experience, it approached the question of "severity" in a vacuum. Counsel submits that without applying the guiding principles of *Villani,* the Tribunal fell into error as noted in *Garrett v. Canada (Minister of Human Resources Development) 2005 FCA 84,* 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.*

[33] For the purposes of a leave application, it is sufficient to show that the General Division did not apply the principles set out in *Villani.* At paragraphs 54 and 55 of its decision, the General Division wrote:

> [54] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must

> keep in mind factors such as age, level of education, language proficiency, and past work and life experience.
>
> [55] The Appellant was only 45 years of age at the time of the MQP. She had a limited education however she excelled receiving high marks in a program to train as a medical lab assistant. This indicates language proficiency and the attainment of a level of education to make her employable in a real world context. She has work experience and along with her training gives her transferable skills. When considering the *Villani* factors at the date of the MQP the Tribunal finds the Appellant did not suffer from a severe disability as defined in the [*Canada Pension Plan*].

[34] Although counsel submits that the General Division did not take into account the Applicant's personal characteristics and in particular, her age, limited education and work experience, it is clear that the General Division considered the Applicant's personal characteristics at paragraph 55 of its decision.

[35] I note that that the Federal Court of Appeal in *Villani* also 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. Th e Assessment of the applic ant's circumstances is a question of judgment with which this Court will be reluctant to interfere. (My emphasis)

[36] Given that the General Division has taken the Applicant's personal circumstances into account, I would not interfere with its assessment. As it undertook the *Villani* analysis required of it, I am not satisfied that the appeal has a reasonable chance of success on the grounds that the General Division erred in failing to apply the "real world" context.

2. Failure to consider all medical issues

[37] Counsel submits that the General Division failed to regard the principles set out in *Taylor v. MHRD* (July 4, 1997), CP 4436, in assessing the severity of the Applicant's

medical conditions. Counsel submits that *Taylor* establishes that an applicant's physical and psychological conditions must be considered as a whole, where multiple medical problems exist. Counsel submits that the General Division did not assess the Applicant's case in its entirety because it failed to consider the fact that the Applicant suffered from multiple health problems at her minimum qualifying period of December 31, 2010.

[38] Counsel submits that the medical conditions – which include pain in the Applicant's right wrist extending to her upper arm, chronic back and knee pain, as well as post-traumatic stress disorder, anxiety, depression and problems with sleep – were objectively verified by the Applicant's medical providers. Counsel submits that the General Division should have assessed the totality of the Applicant's medical problems which were noted prior to the minimum qualifying period.

[39] Counsel submits that, in light of the Applicant's numerous physical impairments and resulting functional restrictions, it is unrealistic to expect she would be employed in the real world.

[40] The General Division looked at the objective medical evidence. It noted the Applicant's post-traumatic stress disorder at paragraph 51 of its decision, and at the Applicant's physical restrictions in paragraph 52. The General Division referred to the medical opinion of Dr. Stapleton which indicated that the Applicant had full movement of the elbows, wrists and forearms, reasonable grip strength and pain free movement in her cervical spine. Otherwise, it is unclear what physical conditions the General Division considered. There is no mention in its analysis of any specific condition or pain involving the Applicant's upper arm, back or knee. Similarly, there is no mention in its analysis of the Applicant's depression (as distinct from her post-traumatic stress disorder) or of her anxiety or problems with sleep. It is not generally sufficient to make a general reference that it has "considered the medical condition of the [Applicant] both physically and mentally", as it is then difficult to discern whether there was any consideration given to each of the disabilities or to their cumulative effect. I am satisfied that the appeal has a reasonable chance of success on the ground that the General Division may not have considered all of the medical issues in its analysis.

3. Failure to assess the Applicant's disability as of the minimum qualifying period

[41] Counsel submits that the General Division was required to assess the Applicant's medical condition at her minimum qualifying period of December, 31, 2010. Counsel submits that the Applicant suffered from pain in her right wrist extending to her upper arm, chronic back and knee pain, as well as post-traumatic stress disorder, anxiety, depression and problems with sleep. Counsel submits that the General Division focused on the Applicant's health status after the minimum qualifying period and, based on the fact that the Applicant's health further deteriorated after December 31, 2010, the General Division concluded that the Applicant's disability could not have been severe prior to her minimum qualifying period. Counsel submits that the General Division ought to have closely examined the Applicant's health status as of her minimum qualifying period, and in failing to do so, erred in its application of the facts to the law.

[42] While it is true that the General Division found that the medical reports indicated the condition of the Applicant deteriorated after the minimum qualifying period, at the same time, it is apparent that the General Division did not solely focus on the Applicant's health status after the minimum qualifying period. For instance, at paragraph 52, the General Division wrote, "Medical reports concerning the physical condition of the [Applicant] on or before the [minimum qualifying period] does not indicate she suffered from a severe disability…" and, at paragraph 53, wrote, "Medical reports indicate the [Applicant] suffered from some limitations prior to the [minimum qualifying period]. Her oral testimony mainly described her disability post-[minimum qualifying period]". The General Division did not restrict itself to examining the medical reports at or about the minimum qualifying period, but examined also the activities in which the Applicant was involved, and the extent to which she was active, in determining whether the Applicant could be found disabled by her minimum qualifying period.

[43] The General Division also wrote at paragraph 52:

> [52] ... Considering the medical condition of the [Applicant] both physically and mentally on or before December 31, 2010, the

> Tribunal finds the medical evidence does not prove on a balance of probabilities she suffered from a severe disability at the relevant time.
>
> [53] … The fact that she may suffer from a severe disability after the [minimum qualifying period] is not relevant to the issue of whether she suffered from a severe disability at the time of the [minimum qualifying period], unless the oral and medical evidence relates back to the relevant time period. The Tribunal finds the evidence of the [Applicant] and the reports filed do not prove the [Applicant] suffered from a severe disability at the requisite time period. The evidence of her physical and psychological conditions diagnosed at the time of the [minimum qualifying period] was not severe as to render her incapable regularly of pursuing any substantially gainful occupations.

[44] I am not satisfied that the appeal has a reasonable chance of success on this ground.

4. Failure to consider *Inclima*

[45] Counsel relies upon *Inclima v. Canada (Attorney General),* 2003 FCA 117, where Pelletier J.A. wrote at paragraph 3:

> Consequently, 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, as here, 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.

[46] Counsel submits that the Applicant had been working modified duties due to medical problems and resulting restrictions when she was last employed, before her employer declared bankruptcy in 2009. Counsel submits that the Applicant was optimistic that she would be able to find an employer who would accommodate her numerous limitations and therefore participated in the labour market retraining (LMR) program through WSIB. Counsel submits that the Applicant's medical conditions did not stabilize or improve and, despite her interest in the medical technician field, she was unable to

secure and maintain a job in that area since her job placement in 2010, leaving her with no alternative but to apply for a Canada Pension Plan disability pension.

[47] Counsel submits that there is no medical evidence confirming that the Applicant had the capacity to be engaged regularly in a substantially gainful occupation at her minimum qualifying period. Counsel points to the medical report of the orthopaedic surgeon in August 2010, which indicates that the Applicant suffered from patellofemoral medial compartment osteoarthritis. The orthopaedic surgeon recommended Synvisc injections to her right knee, which counsel submits clearly suggests that the Applicant's knee was deteriorating. Counsel also points to the assessment undertaken by Mental Health Services In April 2011. The Applicant was diagnosed with post-traumatic stress disorder, major depressive disorder and her global assessment of functioning (GAF) score was 49 at that time.

[48] At paragraph 50 of its decision, the General Division wrote:

> [50] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant made an effort at obtaining employment initially in modified duties and then upon being retrained. She was unable to maintain her modified duties employment due to the financial collapse of her employer. After retraining she pursued a new career and applied to a number of potential employers without obtaining an interview. This indicated an ability to maintain employment and the evidence does not suggest she did not obtain employment due to her health condition. She was able to complete a job placement, exhibiting the ability to fulfill the duties required. The Tribunal finds the Appellant did not prove on a balance of probabilities her effort at obtaining and maintaining employment was due to her health condition.

[49] Had the Applicant not undergone training and completed a job placement in 2010, and then subsequently made efforts to look for work in that same field as her job placement, it might have been an error for the General Division not to have examined the medical evidence for the purposes of assessing the Applicant's capacity. However, the General Division wrote, "the success of the [Applicant] and her completion of the

placement indicated she was capable regularly of pursuing gainful employment in 2010". The General Division found that the Applicant exhibited the capacity to be substantially gainfully employed upon completion of her training, and the fact that the Applicant had been unable to secure a position was due to reasons other than her health.

[50] If the General Division had found that the Applicant did not have any capacity regularly of pursuing any substantially gainful occupation, it would have committed an error in law in requiring that she undertake efforts to obtain and maintain employment, but here, the General Division found that the Applicant had the capacity regularly of pursuing any substantially gainful occupation.

[51] I am not satisfied that the appeal has a reasonable chance of success under this ground.

5. Equated "philanthropic" employer with a "realistic" employer

[52] Counsel submits that the fact that a philanthropic employer may maintain an employment relationship with an otherwise disabled individual ought not to be interpreted by the trier of fact as evidence of work capacity. Counsel submits that the Pension Appeals Board has consistently held that an applicant cannot be expected to locate employment under the forgiving shroud of a benevolent employer. Counsel submits that in *Minister of Social Development v. Cannon* (February 7, 2006), CP23201, the Pension Appeals Board stated as follows:

> The jurisprudence of the Board is clear - see *Minister of Human Resources Development v. Bennett*, CCH Canadian Employment Benefits and Pension Guide Reports (1993, CP04757, CCH # 8690, pp. 6319-6320) and *Chaisson v. Minister of Human Resources Development*, unreported (CP0482l, 1998) - that these employers are not ordinary, and a failure to look for them will not disqualify an applicant.

[53] And, counsel submits that, likewise, in *Rogers v. Minister of Human Resources Development* (December 4, 2001), CP14443 at para. 18[1], the Pension Appeals Board stated that, "the existence of one or two employers with supportive facilities does not stand the economic test of the market".

[54] In the *Cannon* decision, the Respondent Cannon was stone deaf, except with the assistance of a headset and directional microphone. The Pension Appeals Board considered that alone was fatal to any potential employment other than with a so-called "niche" employer engaging Ms. Cannon in a specially-designed individual site of work or duties.

[55] Counsel alleges that the Applicant was forced to stop working in March of 2009, due to business reasons and due to pain in her right wrist, extending to her upper arm, chronic back and knee pain, as well as post-traumatic stress disorder, anxiety, depression and problems with sleep. The General Division found that while the Applicant experienced limitations and was on modified duties, the Applicant stopped working after March 2009, for reasons that the employer went out of business. The General Division found that the medical reports concerning the physical condition on or before the minimum qualifying period do not indicate that the Applicant suffered from a severe disability.

[56] Counsel submits that the General Division failed to recognize principles established in *MNHW v. McDonald,* (October 1988) CP1527[2], indicating that the scope of subparagraph 42(2)(a)(ii) is not restricted solely to mental or physical disability but includes a disability resulting from the combination of both mental and physical aspects. Counsel submits that the General Division should therefore consider all of the Applicant's medical conditions and their impact on her employability or capacity to be retrained. Counsel submits that, according to *McDonald*, the General Division is not allowed to consider medical conditions for the purposes of the *Canada Pension Plan* in isolation.

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[1] On November 30, 2015, I sent a request to counsel that she provide me with a copy of *Rogers.* To date, I have yet to receive a copy of this decision.

[2] On November 30, 2015, I sent a request to counsel that she also provide me with a copy of *McDonald.* To date, I have yet to receive a copy of this decision as well.

[57] Counsel raises two points: one, whether the General Division equated a "philanthropic" employer with a "realistic" employer and secondly, whether the General Division restricted itself to considering solely a mental or physical disability, rather than a combination of both mental and physical aspects. I have considered this latter point under subheading (b) above and will not be revisiting it in this section, other than to the limited extent that it might touch upon the first point.

[58] The Applicant had been placed on modified duties at her last place of employment. She retrained subsequently and completed a LMR program. The evidence set out in paragraph 30 of the decision indicates that the Applicant completed the required 150 hours of the program and that she performed various duties. The General Division did not indicate that the Applicant required any workplace modifications for this type of work; indeed, it found that the job placement was something which the Applicant was able to fulfill. The fact that an applicant might require accommodations in one workplace setting does not necessarily mean that an applicant will require accommodations in another workplace setting.

[59] Had the General Division found that the Applicant did not have capacity regularly of pursuing any substantially gainful occupation, it would have committed an error in law in requiring that she either approach her past employer about seeking workplace accommodations or that she pursue other work with a philanthropic prospective employer, but here, the General Division found that the Applicant held the capacity regularly of pursuing any substantially gainful occupation. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

6. Capacity to attend school

[60] Counsel submits that the General Division erred in law in equating the capacity to attend school with the capacity to be gainfully employed. Counsel relies on *Marriott v. MHRD* (January 31, 2000), CP 08452, which she submits stands for the proposition that an applicant's participation in several courses in an effort to qualify for whatever kind of work would be suited to his or her condition is indicative of good faith. She also relies on *Fraser v. MHRD* (September 20, 2000), CP 11086, which she submits stands for the proposition

that there is no principle of law equating an applicant's school experience with a position in the workforce of modified or light duty, and that each case must turn on its own facts.

[61] Counsel submits that the Applicant completed the LMR program, hoping to be able to return to the workforce. Counsel submits that the General Division should have interpreted this as motivation to work on the Applicant's part, and an attempt by her to mitigate her losses, and not simply as evidence of her work capacity to be gainfully employed.

[62] The General Division wrote the following at paragraphs 49 and 50 of its decision:

> [49] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the [*Canada Pension* Plan] (*Canada (MHRD) v. Rice*, 2002 FCA 47). The Appellant successfully trained to become a medical lab assistant. She completed a job placement in July 2010, and indicated she loved the placement. She participated in numerous and various duties associated with a lab assistant and felt the placement confirmed she made the right choice to pursue a new career. She applied for positions that interested her and pursued positions in her chosen field. The success of the Appellant and her completion of the placement indicated she was capable regularly of pursuing gainful employment in 2010. The Tribunal finds the Appellant exhibited the capacity to be substantially gainfully employed upon completion of her training, and the fact she was unable to secure a position was due to market conditions.
>
> [50] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117). The Appellant made an effort at obtaining employment initially in modified duties and then upon being retrained. She was unable to maintain her modified duties employment due to the financial collapse of her employer. After retraining she pursued a new career and applied to a number of potential employers without obtaining an interview. This indicated an ability to maintain employment and the evidence does not suggest she did not obtain employment due to her health condition. She was able to complete a job placement, exhibiting the ability to fulfill the duties required. The Tribunal finds the Appellant did not prove on a balance of

> probabilities her effort at obtaining and maintaining employment was due to her health condition.

[63] Counsel states that each case must turn on its own facts. It cannot be said that the General Division concluded that as the Applicant attended school, she must necessarily have exhibited the requisite capacity, without further examining the circumstances of her schooling. In this particular case, the General Division looked beyond the Applicant's schooling, and examined the Applicant's job placement, where it noted that the Applicant participated in "numerous and various duties associated with a lab assistant". These duties were set out in paragraph 30 of the evidence. The Applicant was noted to have completed 150 hours at a medical laboratory. The General Division found that the job placement as a laboratory assistant mimicked conditions the Applicant could expect in a medical laboratory work setting. In *Fraser,* the appellant commenced an industrial sewing class in November 1992, but was unable to complete it; in September 1993, she enrolled in a nine-month course. She completed a second year in June 1995. She commenced a third term in September 1995, but was forced to terminate her classes for health reasons. Unlike *Fraser*, the General Division did not consider the Applicant's school experience, as the job placement figured significantly in its determination as to whether the Applicant exhibited the requisite capacity. As the Pension Appeals Board indicated, each case turns on the facts, and here, it was not a matter of the General Division blindly finding that the Applicant held the capacity by virtue of her attendance in school. I am not satisfied that the appeal has a reasonable chance of success on this ground.

7. Obligations of the Appeal Division

[64] Counsel submits that pursuant to subsection 59(1) of the DESDA, if leave to appeal to the Appeal Division is granted, the Appeal Division of the Social Security Tribunal is permitted to do one of the following: (1) dismiss the appeal; (2) give the decision that the General Division should have given; (3) refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate; or, (4) confirm, rescind or vary the decision of the General Division in whole or in part.

[65] Counsel submits that as the Appeal Division is permitted to give the decision the General Division should have given, in accordance with the principles of natural justice, or vary the decision in whole or in part, it is not designed to operate in the nature of a judicial review tribunal. Counsel cites a number of authorities in the immigration context from the Federal Court of Canada.

[66] This submission does not speak to any of the grounds of appeal set out under subsection 58(1) of the DESDA, and would be more appropriately addressed in the context of an appeal. I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[67] For the reasons set out above, the application for leave to appeal is granted.

[68] This decision granting leave in no way presumes the result of the appeal on the merits of the case.

[69] In the event that I should determine that a further hearing is required, the parties should request their desired form of hearing and make submissions also as to the appropriateness of that form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers). In the event that a party requests a hearing other than by written questions and answers, I invite the parties to also provide preliminary time estimates for oral submissions and their respective dates of availability.

Janet Lew
Member, Appeal Division