Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. R. v. Minister of Employment and Social Development*, 2016 SSTADIS 24

Appeal No. AD-15-53

BETWEEN:

D. R.

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: August 10, 2015

TYPE OF HEARING: Videoconference

DATE OF DECISION: January 13, 2016

REASONS AND DECISION

IN ATTENDANCE

Appellant	D. R.
Representative for the Respondent	Christine Singh (Counsel)

INTRODUCTION

[1] This is an appeal of the decision of the General Division dated December 11, 2014. The General Division dismissed the Appellant's application for disability benefits, as it found that he did not suffer from a "severe disability" for the purposes of the *Canada Pension Plan,* by his minimum qualifying period of December 31, 2011. Leave to appeal was granted on February 23, 2015, on the grounds that the General Division may have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or may have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner. The hearing of the appeal of the decision of the General Division proceeded before the Appeal Division on August 10, 2015.

FACTUAL OVERVIEW

[2] The Appellant applied for a Canada Pension Plan disability pension on July 16, 2010. The Questionnaire for Canada Pension Plan Disability Benefits date-stamped received July 16, 2010 indicates that the Appellant has a Grade 9 education. The Questionnaire also indicates that the Appellant was last employed as a chemical process operator in June 2007. He alleged that he stopped working due to an injury to his right shoulder and right arm, which left him with severe pain, weakness and limited range of motion and use of his right arm. In a Questionnaire filed in August 2009, the Appellant listed type 2 diabetes and depression as his other health-related conditions or impairments. The Appellant alleged that he has numerous functional limitations and restrictions. The functional limitations and restrictions are listed in both Questionnaires and indicate that the Appellant has limitations with sitting, standing or walking, as his arm and hand go numb after 30 to 60 minutes. He also alleged in the Questionnaires that he has trouble with lifting or carrying more than one

to two pounds or even reaching, due to his right arm. An MRI confirmed a dislocated biceps tendon associated with a subscapularis tendon tear.

[3] The Appellant has been assessed and treated by an orthopaedic surgeon, and despite having undergone arthroscopic surgery and biceps tenodesis in June 2008, a rotator cuff repair in October 2013, and physiotherapy, continues to experience significant pain and loss of function involving his right shoulder and arm, exacerbated in part by a slip and fall accident in December 2013. He also experiences sleep issues.

HISTORY OF PROCEEDINGS

[4] The Appellant applied for a Canada Pension Plan disability pension on August 20, 2009. The Respondent denied the application. The Appellant did not seek a reconsideration of this decision.

[5] The Appellant applied for a Canada Pension Plan disability pension a second time, on July 16, 2010. The Respondent denied the application initially and subsequently on reconsideration, the latter by letter dated August 24, 2011.

[6] The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals on November 8, 2011. A Canada Pension Plan Review Tribunal conducted a hearing on September 4, 2012; however, the hearing was adjourned as the Appellant would be undergoing surgery in 2013. The Appellant would also be submitting additional medical information, including a functional capacity evaluation, information relating to his sleep disorder and attention deficit disorder.

[7] Under section 257 of the *Jobs, Growth and Long-Term Prosperity Act*, any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred the Appellant's appeal of the reconsideration decision to the Social Security Tribunal.

[8] On December 31, 2013, the Appellant filed a Notice of Readiness with the Social Security Tribunal, and on March 5, 2014, the Appellant filed additional medical records. On April 22, 2014, the Appellant filed a Hearing Information form.

[9] On July 16, 2014, the Social Security Tribunal issued a Notice of Hearing that the General Division intended to proceed with an in-person hearing. The Social Security Tribunal advised that the parties had until August 20, 2014 to file additional documents or submissions, and until September 24, 2014, to respond to any documents that had been filed up to August 20, 2014. Neither party filed any additional documents or submissions.

[10] On November 13, 2014, an in-person hearing proceeded before the General Division. On December 11, 2014, the General Division rendered its decision, dismissing the appeal.

[11] On February 6, 2015, the Appellant filed an application requesting leave to appeal. The Appeal Division granted leave on February 23, 2015.

[12] On April 13, 2015, the Appellant filed submissions, consisting of an Attending Physician's Supplementary Statement dated April 3, 2015. On April 24, 2015, counsel for the Respondent filed submissions. The hearing of the appeal of the decision of the General Division proceeded before the Appeal Division on August 10, 2015. The hearing by videoconference, by consent of the parties, and after considering that videoconference capability was available to both parties and paragraph 3(1)(a) of the *Social Security Tribunal Regulations* requires that matters proceed as informally and quickly as circumstances, fairness and natural justice permit.

GENERAL DIVISION DECISION

[13] The General Division found that the Appellant had residual work capacity prior to his minimum qualifying period and therefore, in following *Inclima v. Canada (Attorney General),* 2003 FCA 117, required that the Appellant show that efforts at obtaining and maintaining employment had been unsuccessful by reason of his health condition. The General Division found that the Appellant had not made any efforts to work at a job which could accommodate his diminished level of functioning in his right arm and shoulder, or that

he had sought out employment at a light or sedentary job, either on a full-time or part-time basis. The General Division also found that the Appellant had made no attempts to retrain, despite encouragement from the orthopaedic surgeon. In this regard, the General Division was "skeptical (*sic)* of the Appellant's testimony that he can't recall discussions about retraining with [the orthopaedic surgeon]". The General Division stated that it preferred the documented medical information, to the Appellant's own recollection.

[14] The General Division also reviewed the Appellant's earnings history, which showed that the Appellant had made contributions to the Canada Pension Plan in 2009. The General Division was also sceptical of the Appellant's testimony that he had not returned to any employment in 2009, noting that the Appellant was unable to offer any credible explanation to account for what it described as an "inconsistency" in the evidence. The General Division noted that the Appellant had been able to return to work following an injury in 2006 and that he continued to work until 2007. The General Division concluded that it was therefore conceivable that the Appellant had to have been able to return to some work in 2009 and earn $7,889, an amount it described as "not trivial".

[15] The General Division found that with further convalescence and rehabilitation, as recommended by the Appellant's physiotherapist, that the Appellant should in future have the capacity to become employed again, given his residual work capacity. The General Division found that the Appellant had failed to appropriately mitigate, in that the Appellant had failed to follow the advice of his physiotherapist, or take medication.

[16] Ultimately the General Division found the Appellant was capable regularly of pursuing substantially gainful employment prior to the minimum qualifying period. While the slip and fall accident in December 2013 clearly exacerbated the Appellant's right shoulder problem, the General Division noted that this was well outside the minimum qualifying period of December 31, 2011.

[17] The General Division was not satisfied on a balance of probabilities that the Appellant suffered from a severe disability in accordance with the *Canada Pension Plan*, on or before the minimum qualifying period.

LEAVE DECISION

[18] I granted leave to appeal on two grounds, whether the General Division may have:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction and

b) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

[19] During the hearing of the appeal, I also raised the question as to whether a higher burden of proof applied, when the General Division expressed scepticism of the Appellant's testimony, as it was akin to suggesting that he lacked any credibility.

ISSUES

[20] The issues before me are as follows:

1. What is the applicable standard of review when reviewing decisions of the General Division?

2. Did the General Division raise the burden of proof on the Appellant when it expressed scepticism?

3. Did the General Division fail to observe a principle of natural justice, or did it base its decision on any erroneous findings of fact in a perverse or capricious manner or without regard for the material before it?

4. If the General Division committed any errors -- whether in failing to observe a principle of natural justice or in basing its decision on an erroneous finding of fact without regard for the material before it -- what is the appropriate remedy, if any?

ISSUE 1: STANDARD OF REVIEW

[21] The Appellant did not address the issue of the standard of review. Counsel for the Respondent on the other hand provided extensive submissions on this issue, from reviewing:

1. what she considered to be the respective roles and expertise of the General Division and the Appeal Division;
2. to Parliamentary intent;
3. the degree of deference to be accorded to the General Division;
4. the nature of the questions at issue; and to
5. the application of the standards of correctness and reasonableness in practice.

[22] Counsel submits that the standard of review is reasonableness for questions of fact and for questions of mixed fact and law. Counsel submits that for questions of law, the Appeal Division should not show deference to the General Division's decision and should apply a correctness standard. Counsel largely relied on *Dunsmuir v. New Brunswick*, 2008 SCC 9, where the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. The Supreme Court of Canada held that questions of law generally are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. And, when applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome. The applicable standard of review would depend upon the nature of the alleged errors involved.

[23] In past, I have applied a standard of review analysis, in relying upon the line of authorities that arose from appeals of decisions of boards of referees to umpires, in the context of the *Employment Insurance Act.* In *Chaulk v. Canada (Attorney General) et al.*, 2012 FCA 190, for instance, the Federal Court of Appeal noted the limited grounds of appeal set out in subsection 115(2) of the *Employment Insurance Act*, S.C. 1996, c. 23 (since repealed) and then proceeded to conduct a standard of review analysis. The *Employment*

Insurance Act did not confer any jurisdiction on umpires to hear and determine applications for judicial review, yet the umpires exercised a superintending power and applied standard of review analyses to decisions of the board of referees.

[24] In *Chaulk*, the Federal Court of Appeal recognized that courts consistently held that umpires reviewing decisions of boards of referees were to review questions of law involving the interpretation of the employment insurance legislation on a standard of correctness.

[25] The language of subsection 58(1) of the DESDA mirrors the language set out in subsection 115(2) of the *Employment Insurance Act* (since repealed). Given that the language set out in subsection 58(2) of the DESDA was taken from subsection 115(2) of the *Employment Insurance Act* (since repealed) and given the body of jurisprudence before it, it seemed reasonable for the Appeal Division to apply the same standard of review analysis undertaken by umpires.

[26] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal suggested that that approach is not appropriate when the Appeal Division is reviewing appeals of decisions rendered by the General Division. The Federal Court of Appeal recently approving this approach in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[27] The Federal Court of Appeal suggested that whereas the review and superintending powers of "federal boards" is provided for by section 18.1 of the *Federal Courts Act* and subsection 28(1) of the *Federal Courts Act*, there are no similar provisions in the DESDA conferring a review and superintending power upon the Appeal Division. Notwithstanding the fact that the courts consistently held that umpires should conduct a standard of review analysis (although the *Employment Insurance Act* also did not confer any review and superintending powers upon umpires) and despite the fact that the language in subsection 58(1) of the DESDA was taken from subsection 115(2) of the *Employment Insurance Act (*since repealed), the Federal Court of Appeal cautions against "borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and that an "administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or … "federal boards".

[28] As the Federal Court of Appeal has pointed out in *Jean*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. Subsection 58(1) of the DESDA sets out the grounds of appeal, and subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The only grounds of appeal under subsection 58(1) are as follows:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) 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.

[29] Notwithstanding the compelling nature of the submissions before me on the issue of the standard of review, I "must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and restrict myself to determining whether the General Division, in the proceedings before me, failed to observe a principle of natural justice or 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, and if so, then to determine the appropriate remedy.

ISSUE 2: BURDEN OF PROOF

[30] Counsel submits that the General Division did not place an additional burden on the Appellant when it was skeptical of the Appellant's testimony. Counsel submits that the General Division was merely weighing the oral testimony given by the Appellant against the objective medical evidence in the form of notes written contemporaneously by Dr. Krywuluk. Counsel submits that, on matters of credibility, deference is to be afforded to the trier of fact: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 20, where the Supreme Court of Canada held that:

> 22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[31] Counsel further submits that at paragraph 23, the Supreme Court of Canada held that it is not the role of an appellate court or body to second guess the weight to be assigned to various items of evidence.

[32] Counsel submits that the General Division noted two instances where the Appellant's testimony was not corroborated by the documentary evidence, thus leading the General Division to be skeptical of the Appellant's testimony. Counsel submits that it is within the General Division's role as the trier of fact to note the evidence upon which he relied, and the weight to be assigned to that evidence. Counsel submits that in this case there was no additional burden placed on the Appellant.

[33] I am satisfied by these submissions that the onus of proof remained on the balance of probabilities, though it was, as coined by the Ontario Superior Court of Justice in *Karkus v. Cotroneo*, 2007 CanLII 12893, "enhanced by an element of a 'healthy skepticism.' "

ISSUE 3: ERRORS

a. Did the General Division fail to observe a principle of natural justice?

[34] Was it just or fair for the General Division to draw conclusions regarding the source of the Appellant's earnings for 2009, without providing him with an opportunity to obtain any supporting documentation, and then to draw what appears to be adverse findings of credibility against him? In the leave application, the Appellant indicated that the General

Division had failed to provide him with an opportunity to investigate the source of these earnings. The Appellant wrote:

> When [the General Division Member] asked me what the payment was for I told him I had no idea and couldn't remember. I told him I would look into it and get back to him.

[35] The Appellant could not recall the source of his 2009 earnings. These earnings arose two years prior to his minimum qualifying period, so likely he did not expect that they would be relevant to the issue of his capacity at his minimum qualifying period, and as such, he would not have thought to obtain any information regarding the source of these earnings.

[36] The Appellant obtained records from his employer subsequent to the hearing before the General Division. The employer confirmed that the earnings were in respect of outstanding vacation pay, along with some other benefits (the specifics of which are not legible in the copy of the documents). The employer confirmed that the Appellant had not been paid any employment earnings after 2007, while on long-term disability from his employment.

[37] Usually, any new records would not be considered either on appeal or at the leave stage, unless it addressed one of the enumerated grounds of appeal under subsection 58(1) of the DESDA. Here, the Appellant filed documentation from the employer to support his allegation during the leave stage that the General Division failed to observe a principle of natural justice and provide him with a full opportunity to respond, and I therefore deemed it admissible for that purpose.

[38] In assessing the leave application, I questioned whether drawing an adverse finding against the Appellant, and drawing conclusions which might ultimately prove to be incorrect, could in any way colour or prejudice the General Division's overall assessment of the Appellant's claim for disability benefits, even if, on the face of it, the assessment might appear reasonable.

[39] I granted leave to appeal, in part, on the basis that I was satisfied that the General Division might have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, when it did not provide the Appellant with an

opportunity to investigate the source of earnings two years prior to the minimum qualifying period. However, I granted leave in part on the submissions made by the Appellant that the General Division had canvassed this issue with him and that he had indicated that not only did he not recall the source of the 2009 earnings, but that he would also investigate. I have learned now that the Appellant's submissions were in fact misleading.

[40] The Respondent filed an affidavit sworn on April 23, 2015 by Jean-Francois Cham, paralegal and assistant to Laura Dalloo, counsel for the Respondent. Mr. Cham deposes that he listened to the audio recording of the hearing before the General Division and that he transcribed portions of the recording. He further deposes that the recording indicates that the Appellant did not seek any additional time to produce records to explain the source of earnings for 2009. The transcription reads in part: [AD4-895 to AD4-908]

GLENN (*sic)* JOHNSON: And just in terms of um, the last entry 2009, you see where it says seven thousand, eight hundred eighty nine dollars.

D. R.: hmm hmm.

GLENN (*sic)* JOHNSON: Do you know where that was from?

D. R.: hmmm, I am being paid right now by my insurance company.

GLENN (*sic)* JOHNSON: And that would have started in 2009?

D. R.: Umm Long Term Disability was started in two thousand [Pause]. Long Term Disability was started somewhere around 2000 ... 2007. I have no idea what that is. Is that... is that number an indication of earnings?

. . .

GLENN (*sic)* JOHNSON: But then 2009, it shows an amount there an earnings amount …

D. R.: I have absolutely no idea what that could be. I have not worked one day.

. . .

D. R.: Long term. I am, you know long term kicks in after I believe with a, with Standard Life and with my benefit um situation of my employer. I thought it was three months. I thought it was 3 months of short term and then there was an assessment period and then if you were deemed long term then that would kick in right there and then. But I, I have no idea what that money would be, unless you have some idea that might have something to do with Standard Life ... I have earnings in 2009, from ... yeah.

GLENN (*sic)* JOHNSON: Yeah it just seems odd that a ... D. R.: It does. I don't know what to say.

GLENN (*sic)* JOHNSON: But in 2008 you did received the Standard Life benefits?

D. R.: As far as I know I did um, I received benefits starting with short term, on, soon after I left work, and I haven't been back to work since.

. . .

GLENN (*sic)* JOHNSON: Now, you mentioned that you haven't returned to Ashley Chemical or other employment but have you made any attempt to retrain since you left in June 2007, for any other job?

D. R.: No.

[41] I am prepared to accept that Mr. Cham's transcription more or less accurately reflects the questions and answers before the General Division. The evidence of Mr. Cham shows that the Appellant did not request an opportunity to investigate and provide any documentation relating to the source of his 2009 earnings.

[42] Had I been aware that the Appellant did not indicate that he would investigate and obtain documentation regarding the source of the 2009 earnings, I might not have granted leave on the ground that the General Division might have failed to observe a principle of natural justice. I am not persuaded that the General Division denied the Appellant the opportunity to address the issue of his 2009 earnings, or that it had denied him the opportunity to investigate and obtain any documentation. Accordingly, given the evidence of Mr. Cham, I am not persuaded that the General Division failed to observe a principle of natural justice.

[43] Despite my conclusions on this issue, I do not find that it was necessarily reasonable to expect that the Appellant should have realized prior to the hearing before the General Division that his 2009 earnings would have been a live issue and that he should have thought to obtain supporting documentation to show the source of these earnings. After all, the Appellant had these earnings two years prior to the minimum qualifying period, and the earnings would not have been determinative of the severity of his disability by 2011.

b. Did the General Division base 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?

[44] The Appellant essentially submits that the General Division made its decision in a perverse or capricious manner or without regard for the material before it, in finding it "conceivable that he was … able to return to some work in 2009, and earn $7,889". The Appellant acknowledges that he was unable to recall the source of these earnings at the time of the hearing before the General Division.

[45] As I indicated above, the Appellant obtained and filed records from his employer with his leave application. I had deemed these records inadmissible, based on the submissions that the Appellant had requested that the General Division provide him with an opportunity to obtain these records. However, upon learning that the Appellant had not in fact requested an opportunity to obtain these records, I must re-evaluate the admissibility of these records. I can see no basis whereby I can deem them admissible, as they do not address any of the grounds of appeal under subsection 58(1) of the DESDA. They certainly would not be admissible for the purposes of proving the allegation that the General Division based its decision on an erroneous finding of fact made without regard for the material before it. The General Division could only make a determination based on the materials before it, not on any evidence which was either inadmissible or had not been produced. Thus, I must disregard the employer's records which were filed after the hearing before the General Division had concluded, and must give no consideration to the evidence contained therein. I am guided only by the evidentiary record that was before the General Division.

[46] If I am to find that the General Division may have made an erroneous finding of fact as contemplated by paragraph 58(1)(c) of the DESDA, I would also need to find that it did so without regard for the material before it, or that it was done in a perverse or capricious manner.

[47] There was no documentary record before the General Division relating to the Appellant's 2009 earnings. The General Division conducted an examination of the

Appellant, who gave evidence regarding the source of these earnings. His evidence is helpfully set out in Mr. Cham's affidavit.

[48] The General Division drew conclusions about the source of the earnings, based on the Appellant's past employment history. The General Division held:

> 34. The Tribunal is also skeptical[sic] of the Appellant's testimony that he did not return to employment, of some sort in 2009, as is indicated in the CPP contribution history. He could not offer an explanation for the inconsistency, but did acknowledge that he was able to return to work following the rock wall injury in the fall of 2006, up to June 22, 2007, when he last worked. It is therefore conceivable that he was also able to return to some work in 2009, and earn $7,889, an amount which is not trivial.

[49] The record of earnings (i.e. the Canada Pension Plan contribution history) shows that the Appellant had earnings in 2009. The General Division determined that this likely had to represent employment earnings. The General Division found that there was an inconsistency in the Appellant's evidence, and that the Appellant was unable to explain this apparent inconsistency. This apparent inconsistency stemmed from the General Division's willingness to assume that the 2009 earnings were derived from employment, and unless the Appellant was unable to definitively prove that the earnings were derived from another source, was unprepared to accept the Appellant's evidence that he did not return to any employment after 2007. The General Division was also prepared to find that if the Appellant had been able to return to work after a previous injury in fall 2006, that he had to have been able to work again after his injury in June 2007.

[50] There were two significant findings of fact made by the General Division:

a. that the record of earnings (i.e. the Canada Pension Plan contribution history) necessarily reflected employment earnings and the corollary to this, and

b. that as the Appellant was unable to verify the source of the 2009 earnings, he must have been working.

[51] Apart from the record of earnings, what was the evidence before the General Division? The General Division looked at the Appellant's prior work history and in

particular, relied upon the fact that the Appellant had returned to work after an injury in 2006. This is not evidence that could have been relied upon to prove that he had to have returned to work again after 2007.

[52] The only evidence regarding the possible source of the 2009 income came from the Appellant's own testimony. This is set out in Mr. Cham's affidavit. The Appellant testified that he could not recall the source of the earnings. He speculated that they might be long-term disability benefits but was uncertain. However, he was consistent in his evidence that he had not worked throughout 2009 or since he left his employment in 2007. He testified, "I have absolutely no idea what [the 2009 earnings] could be. I have not worked one day" and "I received benefits starting with short term, on soon after I left work, and I haven't been back to work since". The General Division seems to have discounted this evidence altogether, but it erred in having done so, since the evidence was capable of supporting a finding that the 2009 earnings were not derived from employment.

[53] In my leave decision, I briefly reviewed some of the jurisprudence addressing the issue as to what might qualify as perverse or capricious. I noted that neither the DESDA nor the *Social Security Tribunal Regulations* defines the term. In *Synchrosat Ltd. v. Canada,* 2004 FCA 55, Létourneau J.A. found that there had to be, "sufficient evidence to support the findings and conclusions" and in *Canada (Attorney General) v. Schultz*, 2006 FC 1351, the Federal Court determined that the evidence had to have been "overwhelming". These authorities suggest that there must be some evidence or some basis upon which the General Division is to make a finding of fact, to avoid being perverse or capricious.

[54] Counsel for the Respondent submits that these authorities provide limited guidance. She relies upon a number of other authorities, for the proposition that a decision which "ignores the evidentiary record" or is based upon ignoring "crucial documentary evidence" or evidence "not appropriately considered" will be one made in a perverse or capricious manner: *Canada (Attorney General) v. MacLeod* (2010), 410 NC 166 (FCA) at para. 5; *Canada (Attorney General) v. McCarthy*, [1994] F.C.J. No. 1158 (C.A.) at para 22; and *Vincent v. Canada (Attorney General),* [2007] F.C.J. No. 964 (C.A.) at para. 38.

[55] Counsel submits that before concluding whether there is any evidence which was ignored, the Appeal Division is required to examine the General Division's reasons for decision and the evidence, keeping in mind the nature and scope of the appeal to the Appeal Division: *Mishibinjma v. Canada (Employment Insurance Commission),* 2005 FCA 17 at paras. 5 to 6. There, the Federal Court of Appeal wrote:

> [5] The matter before the Umpire was an appeal and the Umpire could only intervene on factual issues where the Board had based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. In the present case the Umpire could only make such a determination if the evidence before the Board was available to him.
>
> [6] In the present case, there were crucial findings of fact by the Board of Referees with respect to the Appellant's alleged disability and it was therefore an error by the Umpire to proceed to make findings as he, did in the absence of that evidence.

[56] Counsel submits that it would be an error of law to find that the General Division erred in assessing the evidence and to substitute its own view of the facts without first concluding that the General Division somehow erred in principle in reaching their conclusion. Counsel submits that there is no evidence that the General Division erred in principle: *McCarthy,* at paras. 17 and 22. At para. 22, the Federal Court of Appeal held:

> [22] The question before the Umpire was whether there was evidence in the record before the Board to support their conclusion that the Respondent had left her employment voluntarily. Without answering that question and without first finding that the Board had erred in principle in reaching their conclusion, the Umpire substituted his own view of the facts for that of the Board. In doing so he ran afoul of the principle laid down in *Roberts.* The Attorney General of Canada is, therefore, entitled to succeed on this issue. (My emphasis)

[57] Counsel submits that as the record of earnings shows that the Appellant earned $7,889 from employment in 2009, the finding that he earned this income in 2009 is reasonable, as the Appellant offered no clear explanation about its source. Counsel submits that the General Division did not err in finding that the Appellant "was able to return to some work in 2009" because the Appellant's medical reports confirm that retraining was contemplated and recommended by his physicians in 2009.

[58] While the 2009 earnings could have represented employment earnings, it could have also represented other earnings as well, so there had to have been an evidentiary basis upon which the General Division could tie the earnings to employment. The General Division did not explain the basis upon which it necessarily determined that the earnings had to have been from employment, other than to say that as the Appellant had returned to work after a previous injury in 2006, he must have been able to return to work again after his more recent 2007 injury. There was no suggestion by the General Division that it determined he had to have returned to work in 2009 as retraining had been contemplated and recommended by his physicians that year.

[59] It is not an issue as to whether there is "evidence in the record". As the Federal Court of Appeal determined in *McCarthy*, that evidence must be able to support the conclusion which is drawn.

[60] In this particular case, the General Division looked at the Appellant's past employment history and to the fact that the Appellant had been able to return to work after a 2006 injury, as evidence that he had to have been able to return to work after his injury in 2007. The decision of the General Division cannot stand on this basis. Neither this – the fact that the Appellant had been able to return to work after a previous injury - nor the record of earnings and Canada Pension Plan contribution history can be regarded as evidence of or any basis upon which one could find that the Appellant was indeed working in 2009. The evidence relied upon cannot support the conclusion which is drawn. The past work history, i.e. the fact that the Appellant had been able to return to work after a previous injury, and record of earnings is not sufficient to support the findings and conclusions made by the General Division, particularly against the backdrop of the Appellant's testimony that he did not work again after 2007. The Appellant was consistent in his evidence that he did not work again after 2007, yet the General Division ignored this evidence altogether and provided no reasons as to why it should be disbelieved.

[61] The other shortcoming with the General Division's finding is that the 2009 earnings of $7,889 were "not trivial". It seems that in describing them in this manner, the General Division could have been suggesting that they represented substantially gainful employment.

Even if the 2009 earnings had been derived from employment, the General Division would have had to conduct further enquiries to determine whether they could in fact represent a substantially gainful occupation. If they were annualized, and if they were earned in the environment of a benevolent employer, they may not have qualified as representing a substantially gainful occupation. However, without having undertaken any enquiries or without any evidence before it regarding how any employment income was earned, if the General Division was suggesting that the 2009 earnings represented a substantially gainful occupation, that would have been an error.

ISSUE 4: REMEDY

[62] Although I find that there is no merit to the submission that the General Division failed to observe a principle of natural justice, I am satisfied that the General Division based its decision on an erroneous finding of fact that it made in either a perverse or capricious manner or without regard for the material before it.

[63] Counsel submits that the decision of the General Division is nonetheless reasonable. Counsel submits that there is a lack of medical reports around the minimum qualifying period, no medical reports which indicate that the Appellant is disabled, that the Appellant has residual work capacity and that the Appellant failed to retrain or look for suitable work. Counsel submits that, given these considerations, the decision of the General Division is intelligible and falls within the range of possible acceptable outcomes based on the law and evidence before it and that the appeal should therefore be dismissed. Alternatively, she submits that if I should find an error of fact, that I remit the matter to a different member of the General Division.

[64] The Federal Court of Appeal suggests that the Appeal Division ought not to apply a reasonableness standard, even where there are errors of fact or mixed errors of fact and law. In other words, the reasonableness approach articulated in *Dunsmuir,* that a determination as to whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, ought to be abandoned when hearing appeals from decisions of the General Division. I will therefore also refrain from determining whether the

decision of the General Division might have been reasonable, otherwise the submissions of counsel regarding the reasonableness of the decision might have held some sway.

[65] The appropriate recourse is to refer this matter back to the General Division for a redetermination.

CONCLUSION

[66] The appeal is allowed and the matter referred back to the General Division for redetermination by a different member.

Janet Lew
Member, Appeal Division