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

Citation: *S. A. v. Minister of Employment and Social Development*, 2016 SSTADIS 21

Appeal No: AD-14-299

BETWEEN:

**S. A.**

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, 2015

TYPE OF HEARING Videoconference

DATE OF DECISION: January 13, 2016

## REASONS AND DECISION

## IN ATTENDANCE

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|---|---|
| Appellant | S. A. |
| Representative for the Appellant | Rebecca Nelson (counsel) |
| Representatives for the Respondent | Julia Betts (articling student) and<br>Bahaa Sunallah (counsel) |

## INTRODUCTION

[1] This is an appeal of the decision of the General Division dated March 31, 2014. The General Division dismissed the Appellant's application for a disability pension, as it found that she did not have a "severe disability" for the purposes of the *Canada Pension Plan,* by her minimum qualifying period of December 31, 2009. Leave to appeal was granted on at May 5, 2015, on the grounds that the General Division may have erred in law. The hearing of the appeal of the decision of the General Division proceeded before the Appeal Division on November 24, 2015

## FACTUAL OVERVIEW

[2] The Appellant applied for a Canada Pension Plan disability pension on June 5, 2011. The Questionnaire for Canada Pension Plan Disability Benefits completed by the Appellant indicates that she has a Grade 8 education. The Questionnaire also indicates that the Appellant was last employed as a childcare provider in September 2009. The Appellant alleged in the Questionnaire that she stopped working at that time as she had generalized pain throughout her body, including her neck, lower back, arms and wrists. She also alleged that she had fibromyalgia, a pinched nerve, anxiety, depression, headaches, dizziness, numbness and non-restorative sleep. She also alleged that she suffered from poor concentration, forgetfulness and irritability.

[3] The Questionnaire indicates that the Appellant has numerous functional limitations and restrictions, including limitations with sitting, standing or walking, lifting, carrying, reaching and bending, driving and using public transportation. She relies on family for household maintenance.

[4] The Appellant attended at the Neuromuscular Clinic at Toronto Western Hospital in October 2009, where Dr. Sharma, a physiatrist, diagnosed her with mild carpal tunnel syndrome in her right hand. Otherwise, clinical findings and electrodiagnostic studies did not support any recent onset of C5-6 radiculopathy on the right side. The Appellant has also undergone numerous diagnostic investigations, including an MRI of her cervical spine done in August 2009 which revealed a paracentral disc herniation at C5-6 projecting to the right of the midline.

[5] The Appellant was seen by Dr. Lori Albert, a rheumatologist. In her consultation reports of February 2010, Dr. Albert was of the view that the Appellant presented with chronic cervical pain as well as some generalized non-articular pain and symptoms of numbness and heaviness that seemed to have followed a motor vehicle accident that occurred on June 30, 2009.

[6] The Appellant has been followed by her family physician, Dr. Hose, who diagnosed the Appellant with osteoarthritis of the cervical spine, mild chronic C7 right radiculopathy and fibromyalgia. Dr. Hose referred the Appellant to the Headache & Pain Management Clinic, where she was seen by an anesthesiologist and diagnosed with fibromyalgia. In his medical report dated August 4, 2011, Dr. Carstoniu was of the opinion that “the level of the Appellant’s impairment [would] always depend on her symptom severity and management efforts should focus on symptom reduction in an effort to maintain and/or improve her functional capacity”.

[7] The Appellant underwent a trial of physiotherapy until November 2010, when her auto insurer ended funding. As far as other treatment, she has taken various medications, including anti-depressants and pain relief medication.

[8] There were no updated medical reports -- including any insurance defence reports -- after August 4, 2011, by the time the hearing before the General Division proceeded on January 21, 2014.

## HISTORY OF PROCEEDINGS

[9] The Appellant applied for a Canada Pension Plan disability pension on June 5, 2010. The Respondent denied the application initially and subsequently on reconsideration, the latter on February 21, 2012.

[10] Counsel for the Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals on March 7, 2012. 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.

[11] On November 19, 2013, the Social Security Tribunal issued a Notice of Hearing that the General Division intended to proceed with an in-person hearing on January 21, 2014.

[12] On January 21, 2014, an in-person hearing proceeded before the General Division. On March 31, 2014, the General Division rendered its decision, dismissing the appeal.

[13] On June 6, 2014, counsel for the Appellant filed an application requesting leave to appeal. The Appeal Division granted leave on May 5, 2015.

[14] On June 11, 2015 and June 18, 2015, respectively, counsel for the Appellant and counsel for the Respondent filed submissions. The hearing of the appeal of the decision of the General Division proceeded before the Appeal Division on November 24, 2015.

The hearing proceeded by videoconference, after considering that both parties were represented, 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 DIVISIN DECISION

[15] The General Division agreed with the submissions of counsel for the Appellant that the medical reports suggested a consistency in the Appellant's complaints since the motor vehicle accident. The General Division noted, for example, that Dr. Sharma reported on October 19, 2009 that the Appellant complained of pain in her neck with radiation to the right arm and right leg as well as numbness and that similarly, Dr. Albert reported on February 11, 2010, that the Appellant was evaluated for complaints of cervical pain as well as generalized non-articular pain and symptoms of numbness. The General Division also noted that on June 8, 2011, Dr. Hose indicated that the Appellant had had problems for two years with little change in her symptoms and abilities. The Appellant herself had also testified that her pain had remained constant since the accident.

[16] The General Division noted that the Appellant currently faced significant health concerns. It wrote however that "that the medical evidence on file leaves some doubt as to the severity of her symptoms as of the [minimum qualifying period]". The General Division then went on to write as follows:

> Dr. Sharma indicated in his report dated October 19, 2009 that nerve conduction studies showed mild carpel tunnel syndrome in her right hand and EMG examination showed only mild chronic C7 root irritation but no abnormality in the C5-C6 innervated muscles. On February 11, 2010, Dr. Lori Albert indicated that the findings were consistent with central sensitization syndrome and conservative treatment was recommended, consisting of the use of carpal tunnel splints at night, ongoing massage therapy, exercise therapy and participation in a pain management program. There are no follow-up reports from Dr. Albert on file. With respect to her depression and anxiety, there are no medical reports on file prior to the MQP from either a psychiatrist or psychologist nor is there any evidence of hospitalizations prior to the MQP. The Tribunal finds that there is evidence of work capacity.

[17] The General Division referred to *Inclima v. Canada (Attorney General)*, 2003 FCA 117, in requiring that's the Appellant show that efforts at obtaining and maintaining employment had been unsuccessful by reason of her health condition. The General Division found that the Appellant had not made any efforts to obtain employment after she stopped working in July 2009, nor had she made any attempts to upgrade her skills. The General Division found that there was evidence of work capacity and that the Appellant had not shown that she had made any efforts at obtaining or maintaining employment.

[18] The General Division found that the Appellant had not demonstrated that she was incapable regularly of pursuing any substantially gainful occupation as of her minimum qualifying period.

## LEAVE DECISION

[19] I granted leave to appeal on two grounds:

a) whether the General Division erred in law in applying the wrong standard of proof and

b) whether the General Division erred in law in failing to consider the medical evidence and opinion following the minimum qualifying period, when it was seen to be consistent with the evidence prior to the minimum qualifying period.

## 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 err in law, i.e. did it apply the wrong standard of proof, or did it fail to consider the medical evidence and opinion following the minimum qualifying period?

3. If the General Division erred in law, what is the appropriate remedy, if any?

## ISSUE 1: STANDARD OF REVIEW

[21] Ms. Betts' colleague, Dale Randell, counsel, who prepared the written submissions on behalf of the Respondent, provided comparatively lengthier submissions on the issue of the standard of review. He submits that it would be appropriate for the Appeal Division to conduct what he characterizes a "modified standard of review analysis" which encompasses a review of the following:

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

[22] As counsel for the Appellant points out, there is no authority that suggests a modified standard of review analysis is required. Ultimately, the Respondent's representative agrees with counsel for the Appellant that for questions of law, such as whether the General Division applied the appropriate standard of proof, the Appeal Division should apply a correctness standard. The Respondent's representative submits that the Appeal Division should show no deference to the General Division's decision under this standard; counsel for the Appellant submits that the *Department of Employment and Social Development Act* (DESDA) is silent about the level of deference to be accorded to the General Division but agrees that where there are errors in law, it would not be appropriate to give deference to the General Division.

[23] On the issue of whether the General Division applied the appropriate standard of proof, counsel for the Appellant submits that if the burden of proof was set too high by the General Division, then the evidence must be reweighed with reference to the correct standard.

[24] Counsel for the Appellant submits that, similarly, the second issue, as it involves both rules of procedure and evidence -- whether the decision-maker improperly excluded the consideration of relevant evidence in arriving at her decision -- also invokes a review on the standard of correctness. She submits that this question does not attract a reasonableness standard; she submits that "either relevant evidence exits (*sic)* and was not considered or it does not exist or it was considered". Counsel submits that if the evidence was not considered that ought to have been, the decision must be reconsidered in light of the evidence as a whole.

[25] 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.

[26] 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.

[27] 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.

[28] 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 approved this approach in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[29] The Federal Court of Appeal suggests 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".

[30] 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.

[31] 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, erred in law in making its decision, whether or not the error appears on the face of the record.

## ISSUE 2: ERRORS OF LAW

### a. Burden of Proof

[32] At paragraph 22 of its decision, the General Division set out the burden of proof. It wrote that the Appellant was required to prove "on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2009". The parties agree that statement correctly sets out the applicable burden of proof.

[33] However, at paragraph 26 of its decision, the General Division wrote, "While the Tribunal noted the significant health concerns currently facing the Appellant, it was also noted that while the medical evidence on file **leaves some doubt** as to the severity of her symptoms… " (my emphasis)

[34] Counsel for the Appellant submits that in its actual application of the burden of proof, it appears that the General Division did not weigh the evidence for and against, in determining whether the requisite burden was discharged, once it determined that there was "some doubt" as to the severity of the Appellant's symptoms. Counsel submits that this wording effectively required the Appellant to dispel any doubt as to the severity of her disability. Counsel submits that after the General Division made the statement that it was left with "some doubt", it reviewed the evidence that created this doubt. Counsel submits that this evidence consisted of the following:

- lack of abnormality in the C5-C6 muscles on EMG
- Dr. Albert's recommendation of conservative treatment with no follow-up reports
- no medical reports from a psychiatrist or psychologist

[35] The Appellant's counsel submits that by focusing only on the evidence which left doubt as to the severity of the symptoms, the General Division in effect misdirected itself. She submits that the inquiry is not whether there is evidence that creates some doubt, but "whether on the totality of the evidence, both for and against, the [Appellant] has established that it is more likely than not that her condition is severe. This involves a weighing of the evidence for, as well as against". She submits that, in other words, by pointing to where there was a lack of evidence supporting severity, it appeared that the General Division considered whether doubt was removed with respect to work capacity, instead of weighing all the evidence towards determining where the balance of probabilities lay.

[36] The Respondent's representative on the other hand rejects any notion that the General Division did not direct itself to considering and weighing all of the evidence before it, and submits that the expression "leaves some doubt" simply represents a colloquial expression. The representative submits that the phrase alone is inadequate to permit the Appeal Division to conclude that the General Division applied the stricter "beyond a reasonable doubt" standard of proof.

[37] The representative points to the preceding page of the decision, at paragraph 25, where the General Division reviewed the evidence that was favourable to the Appellant's claim. This included the medical reports of Drs. Sharma, Albert and Hose, as well as the Appellant's testimony that her pain has remained constant since the accident. The General Division found that this evidence suggested a consistency in the Appellant's complaints since her motor vehicle accident. The representative submits that I should not read paragraph 26 in isolation and that I should read paragraphs 25 and 26 conjunctively, as the General Division's weighing of the evidence will only then become apparent. The

representative submits that once I have done so, then it will become clear that the General Division was "simply contrasting the current significant health concerns of the Appellant with the inadequate evidence as to the severity of her symptoms around [her minimum qualifying period]" and then explaining its finding by assessing the relevant medical evidence for the relevant time period in paragraph 26.

[38] If I am to accept that the expression "leaves some doubt" is a colloquial expression or an unfortunate slip, I need to examine the context in which the expression has been used. Both parties seem to acknowledge that there may be some circumstances in which use of the expression represents an error, and other circumstances in which the expression might represent an unfortunate slip. If I should determine that the expression represents an unfortunate slip, then it would seem that the decision can be saved, whereas, if the use of the expression indicates the standard of proof which the General Division applied, then that might warrant my own analysis, and ultimately could involve substituting my own view as to the correct outcome, under subsection 59(1) of the DESDA.

[39] While I agree that that the decision of the General Division has to be taken as a whole and cannot be subdivided into its constituent parts and that paragraphs 25 and 26 must therefore be read conjunctively, the difficulty with the representative's submissions in this regard is that the General Division does not appear to have turned its attention to the issue of severity of the Appellant's disability in paragraph 25.

[40] Paragraph 25 reads:

> [25] The Tribunal agrees with the Appellant that the medical reports on file suggest a consistency in her complaints from the time of the motor vehicle accident. For example, Dr. Sharma reported on October 19, 2009 that the Appellant complained of pain in her neck with radiation to the right arm and right leg as well as numbness. Similarly, Dr. Albert reported on February 11, 2010, that she was evaluated for complaints of cervical pain as well as generalized non-articular pain and symptoms of numbness. On June 8, 2011, Dr. Hose indicated that she has had problems for two years with little change in her symptoms and abilities. The Appellant herself also testified that her pain has remained constant since the accident.

[41] The evidence referred to in paragraph 25 does not suggest whether the Appellant's pain is severe or otherwise; at most, it suggests that seemingly there has been a consistency to the Appellant's complaints over time. While the Appellant's complaints of pain may have been constant over time, that unto itself cannot be a barometer of the severity of her disability.

[42] It is of no relevance whether, as the representative for the Respondent submits, the General Division's assessment of the evidence set out in paragraph 26 of its decision was reasonable.

[43] In paragraph 26 the General Division noted the "significant health concerns currently facing the Appellant". On the one hand, the General Division's use of the word "significant" could signify a finding of severity, but even so, the finding is tempered by the fact that the finding represents the Appellant's current health concerns, and not necessarily the Appellant's health concerns or her disability at the minimum qualifying period. On the other hand, it is not entirely clear how and upon what evidence the General Division might have come to this conclusion about the state of her disability, given that in the preceding paragraph, there is no discussion or any analysis undertaken regarding the severity of the Appellant's current status. There is no direct relationship between the consistency of complaints over time and the severity of those same complaints. Had the General Division written that there was a *consistency in the severity* of the Appellant's complaints, that too would have fallen short in necessarily establishing the severity of one's disability, as that does not spell out the level of intensity or severity of the disability.

[44] Had the General Division undertaken more analysis, particularly of the expert opinion regarding the Appellant's pain levels, overall functionality and capacity, and paragraph 25 was then set against this backdrop, not only would this have been more definitive, but it could also have been conclusive as to whether the General Division was indeed weighing the evidence regarding the severity of the Appellant's disability.

[45] Here, the expression "some doubt" was followed by what appears to be a reference to the evidence which created that doubt. The General Division also described some of the medical evidence which it might have expected the Appellant would have

obtained. The General Division certainly lent the impression that had there been, for instance, follow-up reports from Dr. Albrecht and medical reports prior to the minimum qualifying period from either a psychiatrist or psychologist, or some evidence of hospitalizations prior to the minimum qualifying period, this would then have gone towards establishing the severity of the Appellant's disability. Without them and given the medical references in paragraph 26 to the opinions of Dr. Sharma and Albert, the General Division stated it was left in "some doubt" as to the severity of the Appellant's symptoms. Given the analysis undertaken by the General Division, it is not entirely evident that it weighed the evidence on a balance of probabilities. On this basis, the General Division erred in law.

[46] Counsel for the Appellant submits that the Appeal Division should accord no deference to the General Division and that the Appeal Division should render the decision which the General Division should have given, had it properly applied the appropriate burden of proof. However, counsel submits that the General Division focused only on the evidence which left some doubt. As counsel notes, had the General Division applied the appropriate burden of proof, it would have assessed and weighed the evidence in determining whether the Appellant could be found severely disabled by her minimum qualifying period. For me to now assess and weigh the evidence at this juncture without having provided the General Division with the opportunity to do so firsthand would usurp its role as the primary trier of fact.

b. **Consistency of Complaints pre- and post-MQP**

[47] Counsel for the Appellant submits that as the General Division accepted that the Appellant's complaints were consistent over time, the General Division should have considered the medical evidence after the minimum qualifying period, rather than restrict itself to considering the medical evidence at or around the minimum qualifying period. Counsel submits that as the Appellant's symptoms and limitations have remained consistent, then the medical opinions after the minimum qualifying period would also describe the Appellant's situation at her minimum qualifying period. Presumably, counsel did not advance these submissions before the General Division that all of the medical

evidence after the minimum qualifying period could be used to infer that the Appellant was disabled at her minimum qualifying period, as the General Division did not address the medical evidence following the minimum qualifying period, other than the opinions of Dr. Albert in February 2010 and Dr. Hose in June 2011.

[48] Counsel submits that if a decision-maker is satisfied on a balance of probabilities that an appellant's disability and functional abilities after the minimum qualifying period are representative of her abilities within the minimum qualifying period, then one can properly draw inferences about severity from the post-minimum qualifying period evidence. Counsel submits that it is a matter of making proper inferences from relevant and probative evidence. Counsel submits that had the General Division considered the medical evidence after the minimum qualifying period, it would have found that the Appellant was severely disabled by the minimum qualifying period.

[49] Counsel submits that referring to the medical evidence generated after the minimum qualifying period also recognizes that physicians do not gather evidence of disability with an eye towards the possible minimum qualifying period and that rather, evidence comes to light in the normal course of investigating and treating a medical condition. She submits that this happens on a different time scale, such that certain evidence may not become available until after the minimum qualifying period, such as here, where the minimum qualifying period expired only four months after the onset of disability. Counsel submits that it was quite reasonable that the family physician did not start with specialist referrals this early in the process and instead focused on determining the nature of the injury and appropriate treatment, with the hope that the injuries would improve over time. Counsel submits that once it becomes apparent that the injuries have not improved it is only then that further investigations are warranted. Counsel submits that one cannot infer that an appellant cannot necessarily have been disabled because there were no specialist referrals or consultations prior to the minimum qualifying period. Counsel submits that, "however, it does mean that the evidence of disability was generated outside of that period".

[50] Counsel acknowledges that it is not every case in which evidence arising after the minimum qualifying period will be relevant or probative; she submits that if I were to determine it appropriate to consider the post-minimum qualifying evidence to establish severity by the minimum qualifying period, that this would not open the floodgates to applications in which applicants rely on post-minimum qualifying evidence to establish severity within the minimum qualifying period. Counsel submits that in each and every case, an assessment must be made with respect to whether the post-minimum qualifying evidence is relevant and, if so, a determination must then be made as to the weight to assign to that evidence. I agree with this as a general proposition, insofar as a medical practitioner specifically addresses the issue of an appellant's disability at his or her minimum qualifying period. Counsel submits though that we should go beyond this and draw inferences, where the evidence might not specifically address an appellant's disability at his or her minimum qualifying period.

[51] Counsel compared the evidence within and following the minimum qualifying period, culminating with a chart listing the Appellant's complaints and functional limitations she reported to Dr. Sharma in October 2009, Dr. Albert in February 2010 and Dr. Carstoniu in August 2011. Counsel submits that Dr. Carstoniu essentially recorded the same complaints and functional limitations as Drs. Albert and Sharma. Counsel submits that the records of Dr. Carstoniu can also be compared to the physiotherapy records from July 2009, as the Appellant reported similar complaints and functional limitations to both the physiotherapist and Dr. Carstoniu.

[52] Counsel's review of the medical evidence prior to and following the minimum qualifying period included the Appellant's testimony regarding her disability and functional limitations since June 2009. Counsel summarized the medical report of Dr. Hose, dated June 8, 2011 (GT1-130 to GT1-133) and the medical report of Dr. Sharma, dated October 19, 2009 (GT1-137 to GT1-139).

[53] The Appellant relies on the medical opinions of Dr. Hose, including the medical report dated June 8, 2011 (at pages GT1-130 to GT1-133) and submits that this particular report, along with the medical reports of Drs. Sharma, Albert and Carstoniu, establish the

severity of the Appellant's disability. She submits that the reported complaints and limitations are consistent with those made in October 2009.

[54] In oral submissions, counsel submitted that the Appellant suffered from severe anxiety following the motor vehicle accident, and that it is the combination of the Appellant's pain, depression and anxiety that causes her limitations. Counsel acknowledges that while the Appellant was not under the care of a psychologist or psychiatrist, there is evidence of depression within and shortly after the minimum qualifying period. For instance, Dr. Hose had prescribed an anti-depressant to her in December 2009; in February 2010, Dr. Albert documented the Appellant's "rather flat affect"; in April 2010, there was a prescription for a new anti-depressant; and, in May 2010, the physiotherapy records indicate that the Appellant has been diagnosed with depression and that she is taking anti-depressants. There was otherwise relatively little documentary evidence regarding the Appellant's depression, and its effect on her, combined with her physical complaints. The presence of these symptoms and the fact that the Appellant might have been taking antidepressants alone do not establish severity.

[55] To be clear, I am not conducting an assessment of the medical evidence to determine whether the evidence following the minimum qualifying period represents the Appellant's disability at her minimum qualifying period, and whether it establishes that she is disabled for the purposes of the *Canada Pension Plan.* That said, while the Appellant had similar pain complaints to Drs. Sharma, Albert and Carstoniu, there was little or no evidence in these medical reports regarding any functional limitations the Appellant might have exhibited early on. For instance, the Appellant's chart shows that Dr. Sharma did not address any functional limitations in the report of October 2009. And, while there were limitations reported in Dr. Albert's report of February 2010 of "significantly reduced level of activities", "painful to do simple activities" or "trouble with activities at home" that does not necessarily address one's severity or capacity regularly of pursuing a substantially gainful occupation. Thus, even if I were to accept the Appellant's submissions that the evidence post-minimum qualifying period should have been considered when assessing severity, the evidence may well not have accomplished that, when it was lacking in detail.

[56] My role is to determine whether, as a matter of law, the General Division erred when it did not appear to consider the medical evidence following the minimum qualifying period, and in particular, the opinion of Dr. Carstoniu.

[57] The General Division considered the medical opinion of Drs. Hose and Sharma in its analysis as to the severity of the Appellant's disability. The General Division made specific reference to their respective reports. That said, and as I have noted above, it is not altogether apparent that the General Division directed itself to a determination as to whether this evidence supported a finding of severity. At most, the General Division found that these medical reports suggested a consistency in the Appellant's complaints over time. Even so, this does not mean that a decision-maker is required to examine the evidence following the minimum qualifying period to determine if it establishes severity of an appellant's disability at the minimum qualifying period.

[58] The representative for the Respondent submits that the General Division's finding that the Appellant's complaints have been consistent with respect to pain does not equate to a finding that her symptoms and level of functioning from the date of her motor vehicle accident in June 2009 remained the same such that the evidence well post- minimum qualifying period can be said to necessarily and accurately reflects her capacity to work on or before her minimum qualifying period. As the representative points out, I had indicated in my leave decision that the General Division did not go so far as to state that it accepted that the medical evidence supports a consistent and ongoing disability with severe functional limitations from June 2009. That would represent a mischaracterization of the decision of the General Division. A reporting of pain symptoms does not correlate with the severity of one's disability. After all, one can complain of, for instance, neck or back pain, but that pain can be mild, moderate or severe.

[59] The representative submits that the General Division was not required to refer to each and every piece of evidence before it, as it is "presumed to have considered all the evidence": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. I do not take *Simpson* to mean however that material evidence of some probative value is to be discarded or

overlooked in a decision-maker's analysis, as it could determine the outcome of the proceedings.

[60] In my leave decision, I set out some of my misgivings regarding the Appellant's submissions. They bear repeating:

> [30] In the case of Dr. Carstoniu, it would have been one thing had he seen the Applicant in the period leading up to or shortly after the MQP, as he might have been in a position then to provide an opinion on the Applicant's work capacity and functionality for the MQP. Dr. Carstoniu however apparently did not begin to see the Applicant until August 2011, approximately two years after the minimum qualifying period. If Dr. Carstoniu set out the Applicant's complaints regarding her capacity and limitations pre- and post-MQP, I do not see why the General Division necessarily would be expected to rely on the history provided to Dr. Carstoniu, as the Applicant could have (and presumably) provided that same history directly to the General Division, and the General Division then could have formed its own conclusions from that evidence.
>
> [31] The other difficulty that I have with this submission involving the post- MQP records is that if counsel suggests that the complaints have been consistent over time, and that one should infer a severe disability from the post-MQP symptoms and functionality, logically one should have been able to make the same inference from the same symptoms and functionality pre-MQP, without having to consider the post-MQP circumstances. The General Division considered the pre-MQP evidence and was not persuaded that the evidence showed the Applicant to be severely disabled. If I were to now suggest that one could consider the post-MQP evidence to reflect the Applicant's pre-MQP disability, despite a finding that the pre-MQP evidence was insufficient, this potentially could amount to allowing one to get in through the back door what one was unable to get in through the front door, particularly if those submissions had not been advanced at the hearing before the General Division.

[61] The Appellant has not persuaded me that she should be able to rely on the medical evidence (particularly the medical opinion of Dr. Carstoniu) following the minimum qualifying period to establish severity of disability, when that evidence does not specifically address the Appellant's disability at her minimum qualifying period. If there was documentary evidence of the Appellant's pain complaints and limitations prior to the minimum qualifying period, she should rely on them to advance her claim, rather than on the evidence following the minimum qualifying period.

[62] This is not to say that an appellant cannot rely on reports that are prepared after the minimum qualifying period, as they could address an appellant's disability at the material time. For instance, it would have been quite reasonable for the General Division to consider any medical reports that were prepared after the minimum qualifying period, where the medical practitioner had been in a position to and did render an opinion on the Appellant's disability at her minimum qualifying period. However, in the case of Dr. Carstoniu's opinion, there was no continuum. Dr. Carstoniu could not credibly provide an opinion on the Appellant's disability at her minimum qualifying period based on his own personal observations, given that he did not see the Appellant until August 2011, well past the minimum qualifying period. While the trier of fact could still consider Dr. Carstoniu's opinions, they might have less weight than a report from an expert who had seen the Appellant over a greater stretch of time closer to the minimum qualifying period.

[63] The best evidence of the status of the Appellant's disability rested with the medical evidence at or around the minimum qualifying period and in the opinions of practitioners who had seen the Appellant prior to, at and following the minimum qualifying period. In that regard, I note that the General Division considered Dr. Hose's report of June 2011.

[64] I am not persuaded that this ground, on the facts before me, has any merit.

**ISSUE 3: REMEDIES**

[65] Although I find that there is no merit to the submission that the General Division should have assessed the severity of the Appellant's disability on her pain complaints and functional limitations after the minimum qualifying period on the facts before me, where there appeared to be a consistency in her complaints, I am satisfied that the General Division erred in law in its application of the burden of proof. The appropriate recourse is to refer this matter back to the General Division.

## 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