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

Citation: *E. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 331

Tribunal File Number: AD-15-931

BETWEEN:

E. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON: March 22, 2016

DATE OF DECISION: August 24, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Representative for the Appellant	Bozena Kordasiewicz (counsel)
Representatives for the Respondent	Sylvie Doire (counsel) and Sophie Johnson (articling student)

OVERVIEW

[1] This is an appeal of the decision of the General Division dated June 25, 2015. The General Division determined that the Appellant was not eligible for a disability pension under the *Canada Pension Plan,* as it found that he did not have a severe and prolonged disability on or before the end of his minimum qualifying period of December 31, 2013.

[2] The Appellant filed an Application Requesting Leave to Appeal to the Appeal Division on August 20, 2015. The Appeal Division granted leave to appeal on September 8, 2015, on four grounds, that the General Division: (1) may have erred in failing to consider the reasonableness of the Appellant's non-compliance with treatment recommendations; (2) may not have considered all of the evidence before it; (3) may not have considered the evidence in its totality and (4) may have made erroneous findings of fact without any evidentiary basis.

[3] In his leave submissions, the Appellant submitted that the appeal should not be in the nature of a judicial review and that the Appeal Division should render the decision which the General Division should have given. In its leave decision, the Appeal Division invited submissions from both parties on this issue.

ISSUES

[4] The issues before me are as follows:

1. What is the nature of the appeal of decisions of the General Division to the Appeal Division?

2. Did the General Division do any of the following:

    a. fail to consider the reasonableness of the Appellant's lack of compliance with treatment recommendations;

    b. fail to consider all of the evidence before it;

    c. fail to consider the evidence in its "totality"; or

    d. make erroneous findings of fact without any evidentiary basis?

3. If I determine that the General Division erred as set out above, what is the appropriate disposition of this appeal?

HISTORY OF PROCEEDINGS

[5] The Appellant applied for a Canada Pension Plan disability pension on June 8, 2012. The Respondent denied his application initially and upon reconsideration. The Appellant appealed the reconsideration decision and the appeal was heard by the General Division.

[6] The General Division heard the appeal by videoconference. The General Division found that the Appellant has low back pain, a chronic pain syndrome and psychosocial issues. It also found that various health caregivers had made treatment recommendations, but that the Appellant had not followed all of them. At paragraph 53, the General Division wrote:

> [53] It is reasonable to assume that if the Appellant were to optimize his treatment his pain would be reduced and his mobility increased. Further his psychosocial issues would be reduced once his pain was lessened and following the recommended psychological treatment, for which the prognosis was good (see paragraph 45 above) he would be able to re-enter the work force albeit more likely than not, not to his former role in construction operating machinery.

[7] The General Division also found that there was evidence that the Appellant had some capacity to perform gainful employment but that, apart from a period of light office duty work, the Appellant otherwise had made no effort to seek suitable employment. As the

General Division found that the Appellant's disability was not severe, it did not make any findings on the prolonged criterion. The General Division dismissed the appeal.

[8] The Appellant sought leave to appeal on a number of grounds. Leave to appeal was granted on the four grounds cited above.

ISSUE ONE: NATURE OF APPEAL

[9] The parties agree that the nature of the appeal before the Appeal Division does not allow them to reargue the same issue. They also agree that the Appeal Division should not be conducting a judicial review or standard of review analysis. That much was clear in *Canada (Attorney General) v. Jean,* 2015 FCA 242 at para. 19, a decision of the Federal Court of Appeal. The parties differ however on how the Appeal Division should conduct appeals.

[10] The Appellant submits that the Appeal Division should heed the specific legislative provisions to determine the scope and limitations which were intended to govern the appeal from the initial to the second-tier administrative body, as this would be consistent with *Huruglica v. Canada (Citizenship and Immigration),* [2014] FCJ No. 845 and similar authorities from other jurisdictions.

[11] The Appellant maintains that, under this approach, a legitimate expectation arises after leave to appeal has been granted, that the Appeal Division will review all of the evidence before the General Division and, if necessary, will substitute its own decision in place of that of the General Division. This is so as subsection 59(1) of the *Department of Employment and Social Development* (DESDA) confers considerable latitude to the Appeal Division. In other words, the Appeal Division engages in a two- step process: the first, to determine whether the General Division made any errors under subsection 58(1). If errors are found to have been made, the second step consists of determining the appropriate remedy under subsection 59(1). This approach is largely akin to the *de novo* hearing process under the former Pension Appeals Board. The Appellant's counsel contends that, if this second step is triggered, the appropriate disposition here is to remit the matter to the General Division for a full redetermination on its merits. She explains this would be appropriate

because the evidentiary record is incomplete (i.e. the recording of the evidence in the hearing before the General Division is inaudible).

[12] The Respondent's approach takes into account the following elements: the respective roles and expertise of each division, Parliamentary intent, and the degree of deference to be accorded to the General Division. The Respondent is of the position that no deference is owed where the General Division commits any errors which fall within subsection 58(1) of the DESDA. No deference is owed for erroneous findings of fact which are perverse or capricious or made without regard for the material before it. Otherwise, for questions of fact or questions of mixed fact and law (such as when assessing credibility), the Respondent argues that the Appeal Division should show deference to the General Division and not engage in a redetermination of matters over which the General Division enjoys a significant advantage as the trier of fact.

[13] In terms of determining Parliamentary intent, the Respondent submits that the words of the DESDA are to be read in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The Respondent notes the similarities between the grounds of appeal in subsection 58(1) of the DESDA and the grounds set out in the former subsection 115(2) of the *Employment Insurance Act*. On this basis alone, the Respondent submits that Parliament must have intended the appeal by the Appeal Division to be a circumscribed review, and that the role of the Appeal Division must be similar to the role of the Employment Insurance Umpires. The Respondent relies on *Canada (Attorney General) v. Merrigan*, 2004 FCA 253 at para. 9, where the Federal Court of Appeal determined that the substance of the Umpire's jurisdiction was largely identical with that of the Federal Court of Appeal in section 28 of the *Federal Courts Act*, and that the proceeding was therefore not an appeal in the usual sense of that word but a circumscribed review. And, before that, in *Canada (Attorney General) v. McCarthy*, [1994] FCJ No. 1158 at para. 18, the Federal Court had already determined that appeals to Umpires were not appeals in the usual sense, but "proceeding[s] in the nature of judicial review".

[14] In keeping with the principles set out by the Federal Court of Appeal in *Huruglica*, the Appeal Division must look to its enabling legislation and determine legislative intent. As the Court 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. That provision sets out the grounds of appeal, whereas 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.

[15] Accordingly, I should restrict myself to determining whether the General Division committed any of the alleged errors under subsection 58(1) of the DESDA, and if so, I then move to determine the appropriate remedy under subsection 59(1) of the DESDA. That however does not necessarily trigger a redetermination of the evidence. Each matter must be assessed individually on the facts to determine the appropriate disposition.

ISSUE TWO: GROUNDS OF APPEAL

(a) Non-compliance with treatment recommendations

[16] The Appellant alleges that, other than when faced with cost constraints, or some other justification, he has otherwise fully complied with all treatment recommendations. He claims that the General Division also overlooked the fact that his family physician, as his primary caregiver, is qualified and for years has provided mental health counseling for the Appellant's anxiety and depression. He submits that, in this regard, the General Division

failed to consider the reasonableness of his non-compliance with recommendations for psychological treatment. The Appeal Division granted leave to appeal on this ground.

[17] At paragraph 45 of its decision, the General Division found that the Appellant had not followed recommended psychological treatments to optimize his recovery, which left him with ongoing psychosocial concerns that impaired his return to work. In paragraphs 12, 16 and 29, the General Division acknowledged that the Appellant faced cost constraints and was unable to afford private psychological treatment. The General Division confirmed this barrier when it wrote in its analysis that the Appellant "has not followed up on this recommendation due to the cost", however made no mention that his family physician provided counselling for anxiety and depression.

[18] The Respondent submits that there was no evidence before the General Division that the family physician had provided counselling to the Appellant. Indeed, the General Division noted in paragraph 29 that the family physician had recommended that the Appellant continue with psychotherapy (notwithstanding costs constraints), amongst other things. If the Appellant was receiving counselling from his family physician, why would it have been necessary for her to recommend psychotherapy?

[19] I agree that there is no documentary evidentiary basis to suggest that the family physician provided psychological counselling to the Appellant; this inference is supported by the fact the family physician recommended that her client resume psychotherapy. Alternatively, if she had been providing some counselling, it clearly was inadequate, hence leading to a recommendation for psychotherapy.

[20] The Respondent submits that one can infer that the General Division must have considered the issue of the reasonableness of the Appellant's non-compliance with treatment recommendations. For instance, the Respondent points to paragraph 49, which states that that "there is no satisfactory explanation as to why he has not followed up with [epidural pain blocks] considering it was again recommended by Dr. Drew in January 2014 as his weight has stabilized".

[21] Although the General Division sought a satisfactory explanation from the Appellant as to why he did not pursue epidural pain blocks, it does not appear that the General Division considered whether the Appellant's failure to comply with the recommendations for psychological counseling was reasonable. It is not enough that the General Division referred to the Appellant's financial constraints, as that does not indicate whether it actually considered whether that factor reasonably explained the Appellant's non-compliance.

[22] However, the Appellant had received other treatment recommendations too, such as epidural pain blocks and a multidisciplinary rehabilitation program. The General Division noted that the orthopaedic surgeon recommended an assessment with a pain clinic, as the Appellant might benefit from a multi-disciplinary approach that included psychological and medication counseling, education and active rehabilitation. The orthopaedic surgeon was of the opinion that this was likely to have the greatest impact in a successful return to work strategy and recovery for the Appellant. The Appellant's counsel confirmed that the Appellant neither had participated in a multi-disciplinary approach nor sought epidural pain blocks.

[23] The Appellant indicates that he had not pursued a multi-disciplinary approach as he relied upon the Workplace Safety and Insurance Board (WSIB) to arrange this, despite the fact that WSIB was not providing full treatment coverage. It does not appear that this evidence explaining why the Appellant did not pursue the multi-disciplinary rehabilitation program was before the General Division and I am therefore unprepared to consider it. As the Federal Court stated in *Canada (Attorney General) v. O'Keefe,* 2016 FC 503 at para. 28, an appeal to the Appeal Division does not allow for new evidence. If the Appellant is going to advance submissions that the General Division failed to consider the reasonableness of his non-compliance, he should at the very least show that there was some evidence before the General Division that explains his non-compliance. Without this, I can make no findings one way or the other whether the General Division failed to consider the reasonableness of his non-compliance with the recommendation to participate in a multidisciplinary rehabilitation program.

[24] One of the physiatrists recommended nerve blocks to the Appellant's left sacroiliac nerve root for additional pain control. An orthopaedic surgeon also recommended epidural blocks. The Appellant claims that he did not pursue epidural pain blocks as he understood that he would not benefit from this treatment modality, given his height and weight. This explanation however is inconsistent with the evidence set out in paragraph 32 of the General Division's decision. The paragraph indicates that the Appellant's weight would no longer be a problem against proceeding with pain blocks, and that he was advised to schedule an appointment with the pain clinic if he wished to proceed. The Appellant's counsel suggested that there must have been a language barrier and a misunderstanding on the part of the Appellant that he might not benefit from this treatment. This submission however only arose in the course of the hearing of this appeal and comes without the support of any evidence. I find that the General Division reasonably found that there was no satisfactory explanation as to why the Appellant did not follow up and undergo nerve blocks.

[25] It is unclear whether the General Division considered the reasonableness of the Appellant's non-compliance with recommendations that he resume psychotherapy or psychological counselling. I find that the General Division did consider the reasonableness of his non-compliance that he undergo epidural pain blocks. In *Lalonde v. Canada (Human Resources Development)*, 2002 FCA 211, the Federal Court of Appeal has held that a claimant must submit to all reasonable treatment recommendations, and here, the Appellant has not done so, nor provided a satisfactory explanation for his failure to comply with some of the recommendations.

(b) Consideration of all of the evidence

[26] The Appellant submits that the General Division failed to appreciate several medical reports. In granting leave to appeal, the Appeal Division wrote:

> It is not necessary for a decision to contain reference to each and every piece of evidence that was presented at the hearing, as the Member is presumed to have considered all of the evidence (*Simpson v. Canada (Attorney General)*, 2012 FCA 82). However, this presumption can be rebutted. The fact that there were multiple reports by a number of different doctors that were not mentioned may rebut this presumption in this case.

[27] The Appellant identified several medical reports which he alleges the General Division failed to consider. He argues that each of these reports is critical towards establishing a severe disability, whereas the Respondent claims that, as the trier of fact, the General Division should be given deference with respect to how it uses the evidence before it. In this regard, the Respondent relies on *Housen v. Nikolaisen*, (2002) SCC 33 at para. 22, where the Supreme Court noted that triers of fact (such as the General Division here) are "in an advantageous position when it comes to assessing and weighing vast quantities of evidence".

[28] I concur that the General Division must be afforded some degree of deference. In the same vein, I note that the Federal Court of Appeal has also determined that it is unnecessary for a decision-maker to write exhaustive reasons addressing all of the evidence and facts before it. In *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 50, Stratas J.A. remarked that:

> … 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.

[29] Although the matters before the Federal Court of Appeal were decidedly more complex and the documentary record was significantly more expansive in the *South Yukon* case, the same principles apply in the proceedings before me.

[30] The Respondent maintains that the Appeal Division should consider setting aside the presumption established in *Simpson* only when the probative value of the evidence that is not expressly discussed is such that it should have been discussed. This would be consistent with the decision of the Federal Court in *Singer v. Canada (Attorney General)*, 2010 FC 607 at para. 20. To this, the Respondent claims that there was nothing new or critical, and that it was simply a matter of the General Division showing preference for some medical reports over others. The Respondent claims that essentially the Appellant is seeking a reassessment and re-weighing of the evidence in his favour, which is beyond the purview of the Appeal Division.

[31] This necessitates an examination of the medical reports which the Appellant submits were overlooked by the General Division, and comparing the content of these reports to the General Division's analysis, bearing in mind that the applicable minimum qualifying period is December 31, 2013. It is unnecessary to refer to and discuss a specific report because it mentions a particular symptom, provided that it is clear from the analysis that any symptoms and any limitations or impact caused by those symptoms were considered.

[32] Two general comments emerge. The first concerns whether the General Division should have given any consideration or weight to a health caregiver's opinion regarding the extent of an appellant's disability, and the second concerns whether the General Division should assign the same weight to dated medical reports, when there are reports which are prepared closer in time to the end of an appellant's minimum qualifying period.

[33] A physiatrist considered the Appellant to have a "permanent partial disability" while the family physician opined that the Appellant "is not fit for any kind of job since his problem is severe and prolonged enough for him to be considered for disability". It is unclear if the Appellant is suggesting that the General Division should have considered and accepted these two particular statements as proof of his disability.

[34] If health caregivers were to render opinions on the severity of an applicant's disability, this would usurp the role of the trier of fact. The question whether an applicant can be found disabled for the purposes of the *Canada Pension Plan* is reserved for the General Division. It is for the General Division to determine whether an applicant meets the statutory requirements under the *Canada Pension Plan.* This involves considering a number of elements, including medical evidence, an applicant's personal characteristics, and where some residual capacity is exhibited, an applicant's efforts at obtaining and maintaining any substantially gainful occupation, amongst other factors. The two statements were of little probative value for this reason and were not required to have been considered by the General Division.

[35] Additionally, most of the medical reports were prepared one to two years before the end of the minimum qualifying period and therefore are of less probative value on the

severity issue, versus reports or opinions that were produced contemporaneous to the end of the minimum qualifying period. The only two reports that were within a year of the end of the minimum qualifying period are the functional abilities assessment dated November 27, 2013 and the WSIB comprehensive assessment dated January 27, 2014.

[36] I turn now to a consideration of the specific reports or evidence which the Appellant alleges the General Division failed to consider. The Appellant's counsel helpfully identified the passages within each report which the Appellant considers vital (AD1-8 to AD1-11). The General Division referred to some of the specific reports in both the evidence and analysis sections. The Appellant argues that the following medical reports merited some consideration and analysis by the General Division:

i. psychological assessment dated June 15, 2011 (GT1-62 to GT1-65);

ii. physiatrist's report dated June 17, 2011 (GT1-42 to GT1-44/GT1-57 to GT1-59);

iii. pain specialist's report dated December 21, 2011 (GT1-66 to GT1-67);

iv. Health Status Report dated April 17, 2012 (GT3-104 to GT3-115);

v. Canada Pension Plan Medical Report dated April 2012 (GT1-38 to GT1-41);

vi. family physician's letter dated June 8, 2012 (GT3-69);

vii. Functional Abilities Evaluation (FAE) dated November 27, 2013 (GT3-132 to GT3-146) ; and

viii. WSIB Comprehensive Assessment Report dated January 27, 2014, prepared by Dr. B. Drew, orthopaedic surgeon, and R. Masek, physiotherapist (GT6-17 to GT6-23).

[37] The Appellant relies on the FAE and the WSIB Comprehensive Assessment Report, but the General Division referred to the FAE at paragraphs 33, 50 and 51, and the WSIB report at paragraphs 36, 45, 49 and 51. Although the General Division did not

undertake a lengthy analysis of these two reports, nor refer to the specific testing results, the General Division did allude to the reports' overall findings and conclusions.

[38] For instance, the WSIB report indicates that the Appellant has been experiencing chronic pain syndrome due to lumbar back strain and mild degenerative changes to his lumbar spine, including an annular tear at L4-5, and as it also indicates that the Appellant has not experienced any recovery and full recovery was not anticipated. The orthopaedic surgeon also recommended treatment. The General Division noted in its analysis that the Appellant has a chronic pain syndrome and that he was given recommendations for treatment. Hence, it cannot be said that the General Division did not consider the WSIB report, particularly when it dealt with the treatment recommendations.

[39] The Appellant relies on some of the reports as they document some of his symptoms, such as his back and "psychosocial issues" (i.e. depression and anxiety) and also detail the diagnostic history. These include the psychological assessment, physiatrist's reports, and CPP medical reports. Some of the reports however are similar in content to other reports, where they document his symptoms, their impact on him and treatment options. As such, it can be presumed that the General Division considered these reports and that it was unnecessary for the General Division to specifically refer to or analyze them.

[40] The Appellant also relies on the Canada Pension Plan report because the family physician indicated that the prognosis was guarded. However, the prognosis is irrelevant in this case because the General Division determined that the Appellant did not have a severe disability.

[41] The Appellant relies on the pain specialist's report dated December 21, 2011. The General Division referred to this report at paragraph 44. The report reads in part as follows:

> Bilateral neck pain is increased by neck movements and goes to the right and left arms. Bilateral shoulder pain is increased by overhead activities.
>
> . . .
>
> IMPRESSION AND DIFFERENTIAL DIAGNOSIS: work related injury, depression, cervical disc disease, osteoarthritis of the cervical spine, myofascial

> pain in both shoulders, lumbar disc disease, left sciatica, osteoarthritis of the lumbar spine and secondary spasm of the paraspinal musculature in the lumbar spine.

[42] The Appellant relies on this report largely because it documents his neck and shoulder pain and as he understands that the pain specialist recommended against the epidural steroid injections. The physiatrist in fact offered epidural block and epidural steroid injection and nerve blocks as an option, though provided the Appellant with the customary warnings of risks.

[43] I note that there are other references to either neck or bilateral shoulder pain in the hearing file before the General Division. The Appellant also mentioned neck and arm pain in the questionnaire accompanying his application for a disability pension. However, the General Division did not specifically mention any neck or shoulder pain anywhere in its decision. Had the General Division described the pain as "generalized" or in words to that effect, or if the neck and shoulder pain appeared on only one occasion (in or about December 2011), the omission might not have merited greater consideration. The complaints of neck and shoulder pain however continued into 2014 and were amongst the Appellant's chief complaints when he underwent the comprehensive assessment report. The pain in his neck and shoulder at times appeared to radiate from his lower back, but it is not apparent that the General Division's description of chronic pain encompassed more than just the back pain. The probative value of the history taken by the pain specialist in his report becomes apparent when one considers that the neck and shoulder pain also relate to certain activities, such as doing overhead activities.

[44] The Appellant relies on the Health Status Report and on the family physician's letter of June 8, 2012, as both document several complaints, including sleep issues. The family physician indicated in his letter of June 2012 that the Appellant's severe back pain, depression, weight loss and sleep impairment render him unemployable, despite undergoing "[a]ll modalities of treatment". The General Division referred to the sleep issues in its evidence section, but made no mention of the sleep impairment or how it impacted on the Appellant. Given that the sleep impairment was regarded as one of the Appellant's primary complaints, the reports, or any evidence documenting it, were of sufficient probative value that they should have been given some consideration.

[45] The Appellant's submissions to the General Division focused primarily on his back, depression and anxiety, rather than to his bilateral neck and shoulder pain or sleep impairment. It is easy to see why the General Division would have focused on the Appellant's primary complaints, but where there are other documented complaints which are also described as being primary, the General Division should have considered these too.

(c) Cumulative effect of disabilities

[46] In granting leave to appeal, the Appeal Division noted that the General Division referred to and considered each of the Appellant's disabilities, but "it [was] not clear, however, whether they were examined in totality as required by law".

[47] The Respondent submits that the General Division fully considered all of the Appellant's various disabilities, unlike the situation before the Federal Court of Appeal in *Bungay v. Canada (Attorney General)*, 2011 FCA 47 at para. 11, where the Pension Appeals Board had limited its consideration to the appellant's osteoporosis and no other medical condition, despite the fact that Ms. Bungay suffered from a broader array of medical conditions, including hyperparathyroidism, multiple endocrine neoplasia, polydipsia and depression.

[48] The Appellant's counsel on the other hand submits that, in granting leave to appeal, the Appeal Division likely meant instead that the General Division had failed to consider the cumulative effect that the Appellant's disabilities may have had on his capacity regularly of pursuing any substantially gainful occupation.

[49] The Appellant's counsel submits that the General Division failed to consider all of the medical issues in the Appellant's case on a cumulative basis. She submits that in *Taylor v. MHRD* (July 4, 1997), CP 4436, the Pension Appeals Board established that an applicant's physical and psychological conditions must be considered as a whole, where multiple medical problems exist. The Appellant's counsel submits that the General Division did not assess the Appellant's case in its entirety because it failed to consider the fact that he suffered from multiple health problems at his minimum qualifying period.

[50] The Respondent's counsel submits that indeed the General Division examined the Appellant's various medical conditions on a cumulative basis. She submits that there is an interaction between the Appellant's depression and his back pain issues, and that the General Division was alive to this. For instance, the Respondent's counsel submits that, at paragraph 36 of its decision, the General Division noted that Dr. Drew spoke of a multidisciplinary approach for the Appellant and, that in addition to undergoing active rehabilitation, the Appellant should also undergo psychological counseling. And, at paragraph 27, the General Division noted that the psychologist had directly linked the Appellant's depression to his chronic pain. The psychologist concluded that the Appellant's current physical limitations and unemployment would negatively contribute to his psychological condition. The psychologist recommended psychological intervention, as well as physical treatments such as massage and physiotherapy.

[51] These considerations culminated in paragraph 53 of the decision where the General Division discussed the treatment recommendations for the Appellant. The General Division wrote that it was reasonable to assume that if the Appellant were to optimize his treatment, his pain would be reduced and his mobility increased, and his psychosocial issues would be reduced once his pain was lessened. The Respondent's counsel suggests that this paragraph illustrates that the General Division had to have been mindful of the interaction or link between the Appellant's two conditions.

[52] The General Division acknowledged that the Appellant had been diagnosed with a chronic pain syndrome and that a multidisciplinary approach had been recommended. The General Division also noted that the health assessment of November 2013 suggested that the Appellant had psychosocial injuries related to his injury and that his perception of his abilities was below the demonstrated physical demand level. As the Respondent points out, paragraph 53 of the decision of the General Division indicates that the General Division considered the Appellant's physical and psychosocial issues together. However, given my findings above that the General Division did not consider the Appellant's neck or sleep issues, despite the fact that the Appellant described them as amongst his primary complaints, it cannot be said that the General Division considered the cumulative effect of the Appellant's disabilities.

(d) Evidentiary basis for factual findings made in paragraph 53

[53] The Appeal Division granted leave on a fourth ground, that the General Division did not set out an evidentiary basis to support its conclusion in paragraph 53 that it was reasonable to assume that if the Appellant optimized his treatment, his pain would decrease, his mobility would increase and his mental health would improve such that he could re-enter the workforce in some fashion.

[54] The Respondent submits that, in granting leave to appeal, the Appeal Division went fishing for grounds of appeal. The Respondent argues that, on the facts of this particular case, it was inappropriate for the Appeal Division to have raised a ground of appeal on an issue of an erroneous finding of fact when the Appellant had not raised it. The Respondent's counsel cites *Canada (Attorney General) v. Hines*, 2016 FC 112. Although *Hines* was rendered after leave to appeal in these proceedings had already been granted, the Respondent maintains that the error nonetheless cannot be saved.

[55] In *Hines*, the Appeal Division granted leave to appeal on the basis that the General Division misstated the law when it held that an applicant's age at the time of application for a Canada Pension Plan disability pension always serves as an absolute bar to entitlement to such a pension, without noting or considering whether there could be exceptions -- such as incapacity -- to the general rule. In the leave decision, the Appeal Division noted that there might not be sufficient evidence or any evidence of incapacity, but determined that it was inappropriate at the leave stage to assess the evidence and to make any findings based on that evidence. The Federal Court determined that that was an error and that there was insufficient evidence to establish a lack of capacity at the relevant time. The Court stated that, "where there is no evidence, a tribunal need not consider every possible exception or ground for relief" (my emphasis).

[56] The language used by the Federal Court is of some guidance. Significantly, the Federal Court employed the words "need not" rather than "shall not". The language is permissive rather than mandatory and suggests that the Appeal Division may grant leave to appeal on grounds that may not have been raised or advanced by an applicant. That said, I do not have any jurisdiction to consider whether the Appeal Division exceeded its

jurisdiction in finding any grounds of appeal which had not been raised by the Appellant. Had the Respondent intended on appealing the issue of the scope of the Appeal Division's jurisdiction, the appropriate recourse would have been to seek judicial review.

[57] Setting jurisdictional issues aside, the Appellant's counsel submits that this fourth ground was in fact advanced in the leave submissions, at paragraphs 35 to 37, under the heading "The Tribunal failed to consider *Inclima v. The Attorney General*, 2003 FCA 117". The *Inclima* submissions address the issue as to whether there was evidence of work capacity and if so, whether the Appellant had also shown that efforts at obtaining and maintaining employment had been unsuccessful by reason of his health condition. I see no connection between the Appellant's submissions on *Inclima* and the fourth ground upon which leave to appeal was granted. Indeed, the Appeal Division appears to have addressed the Appellant's submissions on *Inclima* at paragraph 7d) of its leave decision. Although the Appeal Division did not specifically refer to nor mention *Inclima*, paragraph 7d) of the leave decision incorporates the wording in paragraph 37 of the Appellant's submissions.

[58] The Respondent submits that, notwithstanding whether the Appellant raised this ground, there was in fact an evidentiary basis for the General Division to have concluded that it was reasonable to assume that if the Appellant optimized his treatment, his pain would decrease, his mobility would increase and his mental health would improve such that he could re-enter the workforce in some capacity.

[59] In the same paragraph where it drew its conclusions, the General Division wrote:

> [53] It is reasonable to assume that if the Appellant were to optimize his treatment his pain would be reduced and his mobility increased. Further his psychosocial issues would be reduced once his pain was lessened and following the recommended psychological treatment, for which the prognosis was good (see paragraph 45 above) he would be able to re-enter the workforce albeit more likely than not, not to his former role in construction operating machinery.

[60] The General Division Member specifically directed the parties to the evidence upon which it drew its conclusions -- at paragraph 45. There, the General Division member indicated that the psychologist recommended cognitive behavioral training for the Appellant's psychological condition and also opined that the prospects were good. The

Respondent's counsel also pointed to other supporting medical evidence upon which the General Division could have made its findings. Given this, I am not persuaded that the General Division based its decision on an erroneous finding of fact in paragraph 53 that it made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

[61] The appeal is allowed and the matter referred to the General Division for a re-hearing.

Janet Lew
Member, Appeal Division