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

Citation: *J. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 474

Tribunal File Number: AD-15-1290

BETWEEN:

J. 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: May 16, 2016

DATE OF DECISION: December 6, 2016

Canada

REASONS AND DECISION

<u>IN ATTENDANCE</u> (via videoconference)

APPELLANT: A. Victoros (counsel)

RESPONDENT: V. Luna (counsel)

OVERVIEW

[1] This case raises a number of issues. Primarily, this case pertains to whether the General Division erred in failing to either consider the totality of the evidence before it, or in failing to consider whether the Appellant was capable "regularly" or "with consistent frequency" to pursue any substantially gainful occupation, by the end of her minimum qualifying period on December 31, 2010. Secondly, this case also raises the issue as to whether a party can raise additional grounds of appeal or re-visit a ground of appeal on which leave had not been granted, and if so, whether the General Division erred in placing weight on the fact that the Appellant had received regular Employment Insurance benefits.

HISTORY OF PROCEEDINGS

[2] The General Division rendered its decision on October 10, 2014. The Appellant filed an application requesting leave to appeal to the Appeal Division, on several grounds. The member in that case determined that the General Division had not assessed the impact of the Appellant's fatigue on her other medical conditions or on her capacity to work, and that this therefore might constitute an error of law or of mixed law and fact. The Appeal Division granted leave to appeal on January 5, 2015.

[3] The member did not provide the Appellant's representative with an opportunity to respond to submissions filed by the Respondent and made a decision on the written record without notice and before the Appellant had received the Respondent's submissions. The Appeal Division Member dismissed the appeal on February 24, 2015.

[4] The Appellant filed an application for judicial review from the decision of the Appeal Division dated February 24, 2015. The parties agreed that the application for judicial review should be allowed. The Federal Court of Appeal allowed the application for judicial review and referred the matter to the Appeal Division for redetermination by a different member after receipt of all necessary submissions.

[5] Given the complexities of the legal issues involved, the appeal before me proceeded by videoconference, pursuant to paragraph 21(b) of the *Social Security Tribunal Regulations.*

ISSUES

[6] The following issues are before me:

a. At the appeal stage, can the Appeal Division consider new grounds of appeal and/or grounds of appeal which had been raised in the application requesting leave to appeal, but on which leave to appeal had not been granted?

b. Did the General Division fail to apply *Bungay v. Canada (Attorney General),* 2011 FCA 47, in neglecting to consider the totality of the evidence before it by the end of the Appellant's minimum qualifying period of December 31, 201, and did it thereby commit an error of law or of mixed fact and law?

c. Did the General Division fail to apply *D'Errico v. Canada (Attorney General),* 2014 FCA 95, in neglecting to consider whether the Appellant was capable "regularly" or "with consistent frequency" to pursue any substantially gainful occupation, by the end of her minimum qualifying period on December 31, 2010, and did it thereby commit an error of law or of mixed fact and law?

d. If the Appeal Division can re-visit a ground of appeal on which leave to appeal had not been originally granted, did the General Division fail to apply *Taylor v. Minister of Human Resources Development* (June 25, 1997),

CP04436 (PAB) by placing weight on the fact that the Appellant had received regular Employment Insurance benefits?

e. Are there any errors on the face of the record?

f. What is the appropriate disposition of this appeal?

GROUNDS OF APPEAL

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. It reads:

> 58. (1) The only grounds of appeal are that
>
> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[8] The Appeal Division granted leave to appeal on two succinct grounds, namely, that the General Division might have erred in law. The Appeal Division was not satisfied that the appeal had a reasonable chance of success on other grounds raised by the Appellant. The Appellant proposes to revisit one of the grounds of appeal, although the Appeal Division had not granted leave on that particular ground.

[9] The Appellant argues that, notwithstanding the fact that the Appeal Division had not granted leave to appeal on a third ground, nonetheless the Appeal Division is not precluded from considering it on appeal. She argues that there is an equitable basis upon which I can consider *Taylor,* after leave to appeal had been denied on that ground, given the factual circumstances and history of proceedings. On February 11, 2015, after the leave

decision had been rendered, the Appellant filed a reply to the leave to appeal decision. She argues that the Appeal Division ought to have considered the reply at that time, but an appeal decision was rendered shortly thereafter, resulting in the Appellant's application for judicial review to the Federal Court of Appeal on the issue of procedural fairness. The Appellant argues that it would only be "just and right" for the Appeal Division to exercise its discretion to consider *Taylor*.

[10] The Respondent is of the position that the Appeal Division is restricted to considering only those grounds upon which leave to appeal had been granted. The Respondent argues that the leave decision is *functus* and is conclusive as to the grounds which can be considered and that the only recourse for the Appellant, had she wished to pursue the *Taylor* issue, was to seek judicial review of the decision granting leave to appeal. The Respondent argues that, as the Appellant did not seek judicial review of the leave decision, she cannot now pursue *Taylor* and there is therefore no basis or authority for the Appeal Division to consider it. The Respondent cites the recent decision of *Canada (Attorney General) v. O'Keefe,* 2016 FC 503.

[11] Can the Appeal Division re-visit a ground of appeal on which leave to appeal had been refused? The Federal Court of Appeal recently resolved this question, in *Mette v. Canada (Attorney General),* 2016 FCA 276, at paragraphs 13 to 16, where Dawson J.A. wrote:

> [13] One final comment is directed to the submission of the Attorney General about the Appeal Division's decision not to grant leave to appeal on the issue of whether the General Division erred in finding that the evidence presented did not meet the test for new evidence. The Attorney General argues that the Appeal Division then erred by considering this ground of appeal when it dealt with the appeal on the merits and that, in any event, this finding rendered the appeal to the Appeal Division moot.
>
> [14] The Appeal Division interpreted subsection 58(2) of the Act to permit it to consider all of the grounds raised because the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply stated that "[l]eave to appeal to the Appeal Division of the Social Security Tribunal is granted."

> [15] In oral argument the Attorney General relied upon subsection 58(2) of the Act to argue that the Appeal Division was required to deny leave on any ground it found to be without merit. However, subsection 58(2) provides that leave to appeal "is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." The provision does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave.
>
> [16] The Attorney General has not shown the Appeal Division's interpretation of its home statute to be unreasonable. In my view the interpretation falls within the range of possible, acceptable outcomes defensible in both fact and law.

[12] From this, it is clear that, provided that the decision granting leave to appeal is not specifically restricted to the grounds that were found to have a reasonable chance of success, it is open to the parties to advance any new grounds of appeal, or even grounds on which leave to appeal had not been specifically granted, at the appeal stage.

[13] In *Canada (Minister of Human Resources Development) v. Ash,* 2002 FCA 462, the Pension Appeals Board granted leave to appeal, "in respect only of the following issues …" In the appeal, the Pension Appeals Board interpreted this to mean that the appeal was therefore restricted to the specific issue identified in the leave decision. The Federal Court of Appeal determined that the Board's reading and understanding was neither unreasonable nor improper.

[14] In the underlying leave to appeal decision, the Appeal Division granted leave on the basis that the Appellant had "presented at least one ground of appeal that has a reasonable chance of success on appeal". Unlike *Ash,* the Appeal Division did not indicate that it was specifically restricting the grounds of appeal. Given this, I will consider any additional grounds which the Appellant raises or revisits.

BUNGAY V. CANADA (ATTORNEY GENERAL)

[15] The Appellant argued that, while the General Division reviewed the Appellant's various medical issues, it was required to consider the Appellant's conditions in their totality and their cumulative impact on her ability to sustain regular substantially gainful employment. The Appellant argued that the General Division failed to consider the

Appellant's physical and non-physical complaints, and in particular, her extreme fatigue, her requirement of daily naps and unreliability as an employee on her ability to perform any regular substantially gainful employment in a real world employability scenario.

[16] The Appellant relied on *Bungay,* where the Federal Court of Appeal, citing *Villani v. Canada (Attorney General)*, 2001 FCA 248, indicated that the assessment of the severity of an appellant's disability is a broad enquiry, requiring that the claimant's condition be assessed in its totality, and that "all of the possible impairments of the claimant that affect employability are to be considered, not just the biggest impairments or the main impairment".

[17] In *Bungay,* the Pension Appeals Board focused on the appellant's osteoporosis, what it considered were the appellant's primary disabling conditions, rather than "all of her various impairments", although there was evidence that she suffered from an array of medical conditions, including hyperparathyroidism, multiple endocrine neoplasia, polydipsia and depression.

[18] Here, the General Division examined the Appellant's various medical conditions, including anxiety/depression, hypothyroidism, fibromyalgia, headaches, chest discomfort/gastrointestinal problems, blood pressure, neck, knee and back pain, cognitive decline and right and left ankle pain and mobility issues. The General Division analyzed and categorized each impairment separately.

[19] In the Notice of Appeal, the Appellant argued that the General Division failed to consider the totality of the Appellant's conditions and in particular, her extreme fatigue, and the impact it would have on her ability to sustain regular substantially gainful employment. The Appellant's fatigue appears in the documentary record in the context of her hypothyroidism. The General Division summarized these at paragraph 14. Although the Appellant testified about her fatigue levels and napping, there was little to no supporting documentary evidence. There were no other references to the Appellant's fatigue in the documentary record, in or around the end of the minimum qualifying period, other than in the two endocrinology records. The other two references to fatigue appear in the clinical records, for the entry of June 9, 2008 when the Appellant reported that she tired easily

(GT3-21/25) and March 15, 2012, when the Appellant reported being “tired, tried to return to work at flower shop” (GT3-55), but these arose well before and after the end of the minimum qualifying period.

[20] The Appellant notes that while the General Division mentioned the endocrinology reports at paragraph 14 of the decision, the General Division did not refer to these findings regarding the Appellant’s extreme fatigue in its analysis. The Appellant argues that by failing to mention the impact of the Appellant’s extreme fatigue on her real world employability, the General Division committed an error of law.

[21] In fact, when undergoing his analysis, the member referred to and considered the Appellant’s fatigue. At paragraph 51 of the analysis, the General Division noted that the Appellant testified “repeatedly as to her fatigue”. After analyzing some of the medical evidence, the General Division wrote that it was not satisfied that “hypothyroidism or associated symptoms such as fatigue prevented the Appellant from working at the [minimum qualifying period]”. In this regard, the General Division wrote:

> [51] Neither the Appellant nor Dr. Riddle referred to hypothyroidism as one of her main disabling conditions and the Appellant did not address it in her oral testimony. However, she did testify repeatedly as to her fatigue. Dr. Fettes, endocrinologist, in his March 2009 report dealing with hypothyroidism did note “extreme fatigue” for over a six month period. In her Questionnaire, the Appellant indicated that she received regular Employment Insurance benefits between February 9, 2008 and May 2, 2009, which would overlap the six month period referred to by Dr. Fettes, During this period, the Appellant would have been required to be capable of, available for and looking for work. The Tribunal also finds that the Appellant left her job in July 2009 due to her right ankle fracture and not because of hypothyroid related symptoms such as fatigue. There is also no evidence that the Appellant’s hypothyroidism was not adequately controlled with medication at the MQP. The Tribunal is not satisfied that hypothyroidism or associated symptoms such as fatigue prevented the Appellant from working at the MQP.

[22] From this perspective, the member met the *Bungay* requirements in considering not only the Appellant’s primary disabling condition, but also “all of [her] possible impairments”, including hypothyroidism and associated symptoms, such as fatigue.

[23] However, the Appellant argues that, in analyzing the impairments separately, the General Division failed to consider all of the conditions together, i.e. on a cumulative basis, in a real world context. The Appellant asserts that it was insufficient for the General Division to assess each condition individually and determine that, if each condition separately was not severe, she could not be considered severely disabled for the purposes of the *Canada Pension Plan*.

[24] As noted above, the member used several headings to organize his review of a specific medical impairment. The headings included the following: anxiety/depression, hypothyroidism, fibromyalgia, headaches, chest discomfort/GI problems, difficulty in controlling blood pressure, neck, knee and back pain, cognitive decline, and finally, right and left ankle. The member did not use any headings after "R and L ankle", but it is clear that the member concluded his review of the right and left ankles when he wrote at paragraph 67 that he was satisfied that the Appellant's complaints of "vague" balance problems would not render her incapable regularly of performing sedentary work. After all, he had used the same or similar wording in concluding his analyses of the Appellant's other medical impairments.

[25] While headings are of some assistance in managing and organizing voluminous reams of evidence, they could distract from undertaking an assessment of an appellant's disabilities on a cumulative basis. That does not appear to be the case here. Although the member did not use a heading after reviewing the Appellant's left and right ankles, it is clear that he proceeded to consider other issues. At paragraph 68, the General Division indicated that it would consider "whether the Appellant's non ankle related conditions cumulatively rendered her disabled".

[26] The Appellant maintains that this particular sentence does not amount to a *de facto* cumulative assessment of the Appellant's multiple impairments. She argues that the General Division addressed her physical conditions and then her non-physical conditions, such as her fibromyalgia and cognitive decline, for instance, but that otherwise the member did not "put the two things together". She stresses that the member does not, in any way, indicate that he looked at both physical and non-physical impairments together.

[27] Despite these submissions, it is clear that the member contemplated the physical and non-physical impairments together, at paragraph 68. For one, the member indicated that he would be assessing the conditions cumulatively. He also used the expression "these conditions" on two separate occasions. This wording suggested that the member did not restrict his assessment to a single medical impairment or condition. In addition, the member also indicated that he considered that there was an absence of neuropsychological evidence establishing cognitive impairment or any psychiatric reports diagnosing and treating depression or anxiety. Given the Appellant's numerous medical impairments, it is not unreasonable that the member described them generally as "non ankle related conditions", rather than listing each of them.

[28] Paragraph 69 also indicates that the member was mindful of assessing the severity of the Appellant's disability on a cumulative basis. Although it is curious that the member utilized the expression "non ankle related conditions cumulatively" in paragraph 68, as it suggests that he might have considered all but the Appellant's ankle issue in undertaking a cumulative assessment, the member conducted a cumulative assessment, which included the ankle issues, at paragraph 69.

[29] The member determined that the medical evidence indicated that the Appellant had the capacity regularly of pursuing a substantially gainful occupation of a sedentary nature. After concluding that there were no physical contraindications to performing sedentary work, the member also considered whether the Appellant's cognitive and mental health issues could impair her capacity regularly of pursuing a substantially gainful occupation of a sedentary nature.

[30] Given the foregoing considerations, I am not persuaded that the General Division failed to apply *Bungay* and consider the totality of the evidence.

D'ERRICO V. CANADA (ATTORNEY GENERAL)

[31] The Appellant submits that the Federal Court of Appeal has interpreted a "severe disability" under subparagraph 42(2)(a)(i) of the *Canada Pension Plan* as one in which an applicant has the inability to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation". In *D'Errico*, the Federal Court of Appeal held:

> [26] Applying a real world perspective to the evidence around the time of her minimum qualifying period (December 31, 2009) – *i.e.*, Ms. D'Errico's employability based on education, employment background, daily activities, and, importantly in this case, her actual real world attempts to work – Ms. D'Errico was unable to pursue "with consistent frequency" or "regularly" any "truly remunerative occupation."

[32] During the course of the appeal, the Appellant did not describe any problems with sitting and, as a result, the General Division found that the Appellant had the residual capacity to perform sedentary work.

[33] The Appellant argues that the General Division erred in failing to address the Appellant's evidence with regard to her unreliability as an employee due to her profound fatigue and her memory lapses and how this would impact her ability to maintain regular substantially gainful employment. The Appellant contends that, in failing to address the regular aspect of the disability test equating the ability to sit as the only requirement for engaging in sedentary employment, the General Division committed an error of law.

[34] The Respondent on the other hand submits that the General Division considered the issue of fatigue and its impact on the Appellant's capacity to work when it determined that the "Appellant left her job in July 2009 due to her right ankle fracture and not because of hypothyroid-related symptoms such as fatigue" (paragraph 51). The General Division also observed that the Appellant testified that she could not upgrade her computer skills to do more administrative work as "she feels she could not cope with learning it and does not have the energy. She naps during the day and has irregular sleep although it is somewhat better today than it was in December 2010" (paragraph 43). The General Division also noted that the Appellant indicated that "She does not believe she could be a reliable worker in accordance with a schedule given her pain level and fatigue" (paragraph 43).

[35] Paragraph 43 however forms part of the summary of the evidence and does not form part of the General Division’s analysis. Paragraph 51 does form part of the General Division’s analysis and falls under its subheading “Hypothyroidism”.

[36] I find that there is some overlap with the preceding section on whether the General Division considered the totality of the evidence and am of the view that the General Division considered and addressed the issue of the Appellant’s fatigue and its impact on her.

TAYLOR V. MINISTER OF HUMAN RESOURCES DEVELOPMENT CANADA

[37] The Appellant sought leave to appeal on *inter alia* the ground that the General Division had erred in law by not applying *Taylor,* when it placed “a great deal of weight on the fact that [the Appellant] had collected regular [Employment Insurance] benefits”, at paragraphs 51, 52, 54 and 59.

[38] In the leave decision, the Appeal Division held that, as *Taylor* had been rendered by the Pension Appeals Board, the decision was not binding on the Social Security Tribunal, and therefore the General Division did not err when it neither applied nor relied upon it.

[39] In *Taylor,* the Pension Appeals Board noted that the Review Tribunal specifically had not placed any weight on the fact that the appellant had received unemployment insurance commission benefits. The Review Tribunal said:

> ... The Tribunal's decision is based on the insufficiency of the medical evidence to support a finding of severe disability, and not on the Minister's argument that ... the Appellant is making the statement that he is ready, willing and able to work.

[40] The Pension Appeals Board concluded that it too would determine the appeal on the basis of the medical evidence and the appellant’s evidence.

[41] The Respondent argues that, at most, *Taylor* can only be persuasive, much like decisions of the Social Security Tribunal Appeal Division. The Respondent argues, in any event, that if *Taylor* is binding as it is a decision of the Pension Appeals Board, then other decisions of the Pension Appeals Board, including *Bruneau v. Minister of Human Resources Development* (April 24, 1997), CP 3865, in which receipt of regular employment insurance benefits were considered as a factor in whether a claimant was disabled, ought to be equally binding. In *Bruneau,* the Pension Appeals Board wrote:

> To receive [Unemployment Insurance benefits], one must declare one is ready, willing and able to work. Counsel for the Respondent submitted that while Unemployment Insurance benefits such as in this instance can be considered by the Board, they are not conclusive of whether the degree of disability required by Canada Pension Plan has been met. That is correct. However, as far as this writer is concerned, situations such as exist here, can raise serious questions of credibility on the part of the applicant involved.

[42] In other words, the fact that the claimant had been receiving regular employment insurance benefits during the period in which she claimed to be disabled was alone not determinative of whether she was severely disabled.

[43] Decisions of the Pension Appeals Board may be highly persuasive but the General Division was not required to follow *Taylor,* as decisions of the Pension Appeals Board lack precedential value.

[44] In *Osborne v. Canada (Attorney General),* 2005 FCA 412, the Pension Appeals Board had concluded that the applicant was not suffering from a “severe” and “prolonged” disability. The Federal Court of Appeal recognized that the Board had not only considered the medical and factual evidence, but also considered the fact that the applicant had received unemployment insurance benefits, and that he would have had to affirm that he was ready, willing and able to work. Nadon, J.A. held that, “In the end, [he] was unable to conclude that the Board made any error of law …”

[45] On the basis of *Osborne,* I am not persuaded that the General Division erred in considering the fact that the appellant had received unemployment insurance commission benefits.

[46] As for the issue of weight, there may be circumstances whereby it may be appropriate to place weight on the fact that an appellant receives regular employment insurance benefits, and other circumstances when the facts do not warrant placing any weight on that fact. As the trier of fact, the General Division is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. I would defer to the General Division's assessment t of the evidence in this regard.

VILLANI

[47] The Appellant raised a new ground of appeal, alleging that the General Division failed to properly apply *Villani.*

[48] As the Federal Court recently noted in *Plaquet v. Canada (Attorney General),* 2016 FC 1209 at para. 65, the *Canada Pension Plan* does not require total disability, i.e. an inability to do all or any kind of work, as a precondition for a disability pension. The Federal Court referred to paragraphs 38 and 39 in *Villani,* where the Federal Court of Appeal stated:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable <u>regularly</u> of pursuing any <u>substantially gainful</u> occupation is quite different from requiring that an applicant be incapable <u>at all times</u> of pursuing <u>any conceivable</u> occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

> [39] I agree with the conclusion in Barlow, supra and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.
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> [My emphasis]

[49] In *Plaquet,* the Federal Court determined that the General Division had adopted too strict an approach to the severity requirement, in requiring the applicant to establish that her condition and related prognoses and impacts, "would have prevented her from all work". This represented a failure to properly apply *Villani*.

[50] Although the General Division correctly set out the test for severity at paragraph 7, the member adopted what appears to be a stricter test, as follows:

- at paragraph 50, in finding that the Appellant's anxiety and depression was not so serious that "it prevented her from working at the [minimum qualifying period]";
- at paragraph 51, in finding that the Appellant's hypothyroidism or associated symptoms such as fatigue "prevented the Appellant from working at the [minimum qualifying period]";
- at paragraph 53, in finding that the Appellant's fibromyalgia prevented the Appellant "from working at the [minimum qualifying period] and/or that the Appellant reasonably explored all recommended treatment";

- at paragraph 54, in finding that the Appellant's "headaches were actively being treated or of such frequency, severity and duration as to prevent her from working at the [minimum qualifying period]";

- at paragraph 55, in finding that the Appellant's "chest discomfort/[gastrointestinal] problems prevented her from working at the [minimum qualifying period]"; and

- at paragraph 57, in finding that the Appellant's blood pressure was inadequately controlled and "prevented her from working" at the minimum qualifying period.

[51] In assessing the Appellant's neck, knee and back pain, at paragraph 59, the General Division then applied the correct test, when the member found that the pain did not render her incapable regularly of pursuing any substantially gainful occupation.

[52] At paragraph 60, the General Division then reverted to what appears to be a stricter test, in assessing the Appellant's purported cognitive decline. The member found that this condition did not prevent the Appellant "from working" at the minimum qualifying period.

[53] The General Division applied what appears to be a variation of the severity test – albeit a slightly stricter one -- at paragraph 64 and 67, when the member wrote that the Appellant's soft tissue pain arising from her ankle fractures and problems with proprioception rendered the Appellant "incapable regularly from performing sedentary work [My emphasis]", rather than being incapable regularly of pursuing any substantially gainful occupation.

[54] At paragraph 68, in considering the Appellant's medical impairments on a cumulative basis, the General Division wrote that it was not satisfied that these conditions cumulatively rendered her "incapable of pursuing any substantially gainful employment". It is unclear whether the member intended that this re-statement of the severity test be the equivalent of the test under paragraph 42((2)(a) of the *Canada Pension Plan.*

[55] Although the General Division identified the correct definition for "severe" at the outset, the member seemingly applied the incorrect test and then perpetuated that error throughout its analysis. It may be that the member understood and applied the correct legal test, but simply abbreviated it. After all, the Federal Court of Appeal did so in *Klabouch v. Minister of Social Development*, 2008 FCA 33. At paragraphs 14 and 15, Nadon J.A. stated:

> [14] First, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living" (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703[1], paragraphs 28 and 29). In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.
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> [15] Second, as a corollary to the above principle is the principle that the determination of the severity of the disability is not premised upon an applicant's inability to perform his regular job, but rather on his inability to perform any work, "i.e. "any substantially gainful occupation" (see: *Canada (Minister of Human Resources Development) v. Scott,* 2003 FCA 34 (CanLII), at paragraphs 7 and 8).

[56] It is unclear whether the General Division may have applied a stricter test when assessing the severity of the Appellant's disability.

CONCLUSION

[57] Given the foregoing reasons, namely, that it is unclear what test the General Division used in assessing the severity of the Appellant's disability, the appeal is allowed and the matter remitted to the General Division.

Janet Lew
Member, Appeal Division

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[1] actual citation for *Granovsky v. Canada (Minister of Employment and Immigration* is [2000] 1 S.C.R. 703.