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

Citation: *S. G. v. Minister of Employment and Social Development*, 2018 SST 19

Tribunal File Number: AD-16-831

BETWEEN:

S. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

HEARD ON: August 23, 2017

DATE OF DECISION: January 8, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: S. G.
For the Appellant: D. Gelb, A. Bayda
For the Respondent: J. Cham, D. Randell, V. Ebert
Observer: B. G.

INTRODUCTION

[1] The Appellant stopped working as a truck driver in February 2009 due to back problems, and went on to have back surgery in September 2011. Her July 2012 claim for disability benefits under the *Canada Pension Plan* (CPP) was unsuccessful. On appeal, the General Division of the Social Security Tribunal of Canada (Tribunal) confirmed, in March 2016, that a disability pension was not payable. Leave was granted to appeal the General Division decision to the Tribunal's Appeal Division, in April 2017.

[2] This appeal proceeded by way of teleconference, consistent with the Tribunal's obligation to proceed informally and expeditiously, while respecting the requirements of fairness and natural justice, set out in s. 3(1) of the *Social Security Tribunal Regulations*.

ERROR OF LAW: *Villani*

[3] One of the permissible grounds of appeal to the Appeal Division is that "the General Division erred in law in making its decision, whether or not the error appears on the face of the record": s. 58(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA).

[4] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, held that the standards of review applicable to judicial review of decisions made by administrative decision-makers are not to be automatically applied by specialized administrative appeal bodies. Rather, such appellate bodies are to apply the grounds of appeal established within their home statutes. In this respect, I agree with the Respondent's submission that, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on errors of law.

[5] The Appellant's representative's first submission is that the General Division erred in law by not applying the principles found in *Villani v. Canada (Attorney General)*, 2001 FCA 248. I agree.

[6] The General Division was tasked with determining whether the Appellant had a severe and prolonged disability on or prior to December 31, 2011 (the end of her minimum qualifying period, or MQP). A disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any substantially gainful occupation" (s. 42(2)(*a*)(i) of the CPP).

[7] The General Division decision contains the following findings:

- The Appellant had mild carpal tunnel syndrome and was "able to perform sedentary duties as long as it is not repetitive or light [*sic*]";
- With respect to her back condition, the Appellant's physical capabilities were limited;
- The Appellant had the capacity to pursue alternative, sedentary employment; and
- The Appellant did not look for alternative employment despite having the capacity to do so.

[8] From these facts, the General Division drew the conclusion that the CPP criteria for a severe disability had not been established, relying upon *Inclima v. Canada (Attorney General)*, 2003 FCA 117. While the decision mentioned the "real world context" of *Villani* at paragraph 61, there was no discussion, in the analysis, of the contextual factors potentially affecting the Appellant's employability.

[9] This appeal thus addresses the interplay of the principles found in *Villani* and *Inclima.*

[10] *Villani* (issued in August 2001) stands for the proposition that each of the words in the statutory definition of severity has meaning, and the question of whether an individual is incapable regularly of pursuing any substantially gainful occupation must be considered in the context of the individual's particular circumstances, such as age, education level, language proficiency and past work and life experience. *Garrett v. Canada (Minister of Human Resources*

Development), 2005 FCA 84, confirms that a failure to conduct an analysis of severity in accordance with the principles of *Villani* constitutes an error of law.

[11] Subsequent to *Villani*, the Federal Court of Appeal began interpreting and expanding upon the "real world" test for severe disability. In *Canada (Minister of Human Resources Development) v. Rice*, 2002 FCA 47, Rothstein J.A. wrote that socio-economic conditions ("whether real jobs are available in the labour market") are not relevant to the analysis of severity. In *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, Desjardins J.A. reiterated that the words "regularly," "substantially" and "gainful" must be considered, and extended the "real world" context to include the reasonableness of a refusal to undergo treatment and its impact on disability status (in addition to the claimant's personal circumstances). In *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140, Desjardins J.A. indicated that the claimant must suffer from disabilities that "in a 'real world' sense, render her incapable regularly of pursuing any substantially gainful occupation." In *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254, Sharlow J.A. summarized *Villani* as requiring that "an assessment of the claimant's employability must be realistic and practical."

[12] The Federal Court of Appeal has occasionally found that consideration of a claimant's personal circumstances is not necessary in a particular case. In *Doucette v. Canada (Minister of Human Resources Development)*, 2004 FCA 292, Nadon J.A. wrote that "an in-depth analysis of the constraints posed to the applicant's capacity to return to the work force by his educational level, language proficiency and past work and life experience" was not required, in light of a finding that the claimant's inability to return to work was due to his failure to make greater efforts between the accident date and the MQP (similar to an *Inclima* analysis). In *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187 (relied upon by the Respondent in this appeal), the Pension Appeals Board had not been satisfied that the claimant had made reasonable efforts to participate in recommended treatment, and found that she had failed to prove that she was suffering from a disability that was severe and prolonged. Nadon J.A. wrote that the Board did not need to apply the "real world" approach because it was "not persuaded that the applicant suffered from a severe and prolonged disability." The meaning of the latter statement is unclear, since *Villani* asserts that the determination of severe disability itself requires consideration of the

individual's particular circumstances as well as his or her medical condition. While it is difficult to reconcile these decisions, it appears that the *Villani* factors may not need to be considered, or considered in detail, in cases where other factors are already determinative of whether a claimant is incapable regularly of pursuing any substantially gainful employment. Neither *Doucette* nor *Giannaros* appears to have been applied subsequently, by the Federal Court of Appeal, for the principle that a *Villani* analysis need not be applied in certain circumstances. A third, more recent, example is found in *Kiriakidis v. Canada (Attorney General)*, 2011 FCA 316, but on substantially different facts. In that decision, Dawson J.A. dismissed the argument that the Pension Appeals Board had erred by failing to apply the *Villani* principles, since it had reasonably concluded that the claimant had the capacity to work and was in fact working at the end of his MQP.

[13] *Inclima* was issued by the Federal Court of Appeal in March 2003. Pelletier J.A. noted that *Villani* had affirmed that medical evidence and evidence of employment efforts and possibilities would still be needed for a determination of severity, and concluded as follows:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[14] The Federal Court of Appeal has repeatedly affirmed the principles of both *Villani* and *Inclima*, without explicitly addressing their interplay. Some examples follow:

- In *Canada (Attorney General) v. Fink*, 2006 FCA 354, Malone J.A. wrote that "disability must normally be demonstrated on more than the claimant's evidence" and that "[o]nce evidence of employability is established, evidence that the claimant made efforts to obtain and maintain employment but failed by reason of a serious health condition is usually also required."

- In *Klabouch v. Canada (Social Development)*, 2008 FCA 33, Nadon J.A. noted that "whether the applicant attempted to find alternative work or lacked motivation to do so" is a relevant consideration in determining whether a disability is severe, while also

indicating that, in that case, the medical evidence, work history and personal circumstances had all been addressed.

- In *Gallant v. Canada (Human Resources Development)*, 2008 FCA 64, in dismissing a request for judicial review, Desjardins J.A. noted that there was no evidence of any attempt to obtain employment or retrain "although it is apparent from her evidence that she is educable", thereby referencing an aspect of the claimant's personal circumstances.

- In *Canada (Attorney General) v. Ryall*, 2008 FCA 164, Ryer J.A. referred to medical evidence that the claimant could perform a job that did not require physical activity, noted that it was thus incumbent upon her to demonstrate efforts to obtain and maintain employment, and considered the Pension Appeals Board's decision to be unreasonable by ignoring the evidence that the claimant did not seek alternate employment or retraining.

- In *Erickson v. Canada (Human Resources Development)*, 2009 FCA 58, Trudel J.A spoke favourably of the Pension Appeals Board's conclusion that the claimant did not have a severe disability, based upon medical evidence and "conclusive evidence on her lack of employment efforts."

- In *Farrell v. Canada (Attorney General)*, 2010 FCA 181, Stratas J.A. confirmed that the Federal Court of Appeal's decisions must be followed, including the proposition from *Inclima* that claimants must show that efforts at obtaining employment have been unsuccessful because of a serious health problem.

- In *Bungay v. Canada (Attorney General)*, 2011 FCA 47, Stratas J.A. reiterated that the interpretation of "severe" requires a determination of employability in the circumstances of the claimant's background and medical condition.

- In *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, Stratas J.A. noted both the need to apply the test for severity "with a view to considering the claimant's employability based on education, employment background and daily activities" and the need for a claimant to "establish she has tried to obtain and maintain employment but has been thwarted by her health problems" where there is evidence of capacity to work.

In that case, consideration of the claimant's employability based upon her personal circumstances and "real world attempts to work" led to the conclusion that she was incapable regularly of pursuing any truly remunerative occupation.

- In *Yantzi v. Canada (Attorney General)*, 2014 FCA 193, Stratas J.A. was satisfied that the test for benefits was not met, highlighting "the lack of a sufficient search for suitable employment" in circumstances where there was evidence of some capacity to work.

- In *Kiraly v. Canada (Attorney General)*, 2015 FCA 66, Boivin J.A. outlined the principles of *Villani* and *Inclima*, and accepted an analysis in which residual capacity to work together with a failure to seek work within limitations led to a finding that the disability was not severe. It was also held that *Villani* does not require a decision-maker to identify specific employment within a claimant's limitations.

- In *MacKenzie v. Canada (Attorney General)*, 2015 FCA 201, Ryer J.A. wrote that the Tribunal's conclusion that a claimant had not established a severe disability was defensible on the facts and law, when it accepted that the claimant's condition did not preclude light to medium work and he had not sought any work.

[15] For its part, the Federal Court recently set aside a refusal of leave to appeal on the basis of an argument that evidence respecting the claimant's vocational aptitudes (an aspect of his personal circumstances) had not been considered by the General Division prior to its determination of work capacity and the application of *Inclima*: *Eby v. Canada (Attorney General)*, 2017 FC 468.

[16] The courts have not explicitly defined the term "work capacity," as it is used in the *Inclima* analysis. I cannot agree with the Appellant's representative's view that the concept of "work capacity" used in these decisions is the same as the concept of being able regularly to pursue any substantially gainful employment. In my view, and consistent with the Respondent's position, "work capacity" (often qualified as "some" or "residual" work capacity) must refer simply to the ability — any ability — to work, rather than the capacity regularly to pursue a substantially gainful occupation: otherwise, a finding of work capacity (that the person was capable regularly of pursuing any substantially gainful occupation) would encompass the entire test in s. 42(2)(*a)*(i) of the CPP and be determinative of severe disability in and of itself, whether

or not efforts to return to work had failed by reason of the health condition. In other words, there would be no need for an *Inclima* analysis if the decision-maker had already found that the claimant had not met the severity test set out in s. 42(2)(*a*)(i) when finding some work capacity. This view is further supported by the fact that the many Federal Court of Appeal decisions applying the *Inclima* analysis do not discuss, for example, the regularity or predictability of the claimant's capacity to pursue employment, nor the remunerative aspects of potential employment, when accepting a finding of work capacity. Finally, I do not find those Pension Appeals Board decisions that note that the concept of severity entails consideration of capacity to work to be useful (summaries of which were cited orally by the Appellant's representative); while the test for severity certainly requires consideration of work capacity, this does not mean that the test for work capacity and severity are one and the same.

[17] The burden of proving on a balance of probabilities that one's disability is severe and prolonged rests with the claimant. While there is no explicit requirement under the CPP for a claimant to search for employment, attempt lighter work or retrain in order to expand their vocational options, the failure of such employment efforts can provide an evidentiary basis to support a claimant's inability regularly to pursue a substantially gainful occupation (by substantiating an inability to work at all, or by supporting an inability to maintain employment, to work in sufficiently remunerative employment, or to do so with consistent frequency). Starting with *Inclima*, the Federal Court of Appeal has repeatedly affirmed that evidence of employment efforts is required to discharge the burden of proof, in the context of residual work capacity. As I understand the direction from the Federal Court of Appeal, an individual who is capable of some type of employment will not generally establish, on the balance of probabilities, that he or she is truly incapable regularly of pursuing any substantially gainful employment, without making genuine yet unsuccessful efforts to secure such employment.

[18] How then is the contextual analysis required by *Villani* integrated with an *Inclima* analysis? While the Federal Court's decision in *Eby* suggests that *Villani* factors must be addressed prior to an *Inclima* analysis, the Federal Court of Appeal has not provided clear direction. As outlined above, the Federal Court of Appeal has in some cases affirmed the principle of *Inclima* without indicating whether and when the contextual *Villani* factors have been considered; in other cases reference has been made to the claimant's personal

circumstances; and in one case (*Doucette*) "in-depth" consideration of such circumstances was not required under an *Inclima*-like analysis. It may well be that in some cases a claimant's personal circumstances do not affect employability in a substantially negative fashion, such that a brief, rather than in-depth, *Villani* analysis is sufficient. In any event, *Villani* is settled law, as has been repeatedly affirmed. As such, although I disagree with the Appellant's representative with respect to the scope of residual work capacity, I agree with him that the real world approach must be applied in the analysis of severity. Moreover, this approach must be undertaken at the stage of determining work capacity; if not, a claimant could be disentitled from benefits under an *Inclima* analysis without the impact of his or her disability in the particular context of his or her personal circumstances ever having been considered. In some cases, where there have been efforts at retraining or lighter work (as in *D'Errico*), the decision-maker will be able to consider a claimant's disability, his or her personal circumstances and employment efforts collectively to determine whether he or she is incapable regularly of pursuing any substantially gainful occupation. In other cases, the decision-maker will consider a claimant's disability and personal circumstances to determine whether there is residual work capacity, and may then conclude, based upon a lack of employment efforts, that an inability regularly to pursue any substantially gainful occupation has not been proven.

[19] Put another way, the preponderance of the jurisprudence drawn from *Villani* and *Inclima* suggests that an analysis of severity under the CPP ought to address the following questions, applying the balance of probabilities as the standard of proof, and always guided by the overarching question of whether the claimant became incapable regularly of pursuing any substantially gainful employment by reason of the disability on or before the end of the MQP:

1) Did the claimant have a serious health condition that affected his or her work capacity? Did the claimant have residual work capacity? Factors to be considered include the following:

    i. the nature of the health condition(s) and the totality of the associated physical and/or psychological functional limitations;

    ii. the recommended treatment(s), and any unreasonable refusal to pursue such treatment(s); and

iii. the claimant's personal circumstances, including such things as age, education level, language proficiency and past work and life experience.

A total lack of work capacity is conclusive of a severe disability.

2) If there is evidence of work capacity, what do the claimant's employment efforts tell us about whether he or she was, in the real world context, "incapable" "regularly" of "pursuing" "any" "substantially gainful" occupation? Were the claimant's efforts at obtaining and maintaining employment unsuccessful by reason of the health condition?

   If there have been no employment efforts, or if employment efforts failed solely for reasons unrelated to the health condition, the *Inclima* analysis allows the decision-maker to conclude that severity has not been established; in these circumstances the claimant has not discharged the burden of proving that he or she was, by reason of his or her disability, incapable regularly of pursuing any substantially gainful occupation.

[20] Applying this discussion to the case at hand, the General Division was obliged to apply *Villani* by considering the Appellant's personal circumstances when determining whether she had residual capacity to work, and prior to concluding, under an *Inclima* analysis, that the test for severity had not been met. I disagree with the Respondent's submission that the General Division "clearly considered the Appellant's personal circumstances." As argued by the Appellant's representative, the references to such circumstances in the recitation of evidence, and the bald assertion that "the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience" are insufficient. Regardless of the strengths and weaknesses of a claimant's personal circumstances, some analysis of the impact of those circumstances upon the Appellant's employability was required, even if not "in-depth." I recognize that consideration of the *Villani* factors was not required in *Giannaros* or in *Kiriakidis*, but note that the facts are not analogous to those in this appeal, and these decisions do not reflect a general repudiation of *Villani*. In the result, I find that the General Division erred in law by failing to apply the principles of *Villani*, which require consideration of a claimant's personal circumstances in the assessment of severity.

[21] I note that the Appellant's representative focused his oral submissions upon the Appellant's hand function as one of the Appellant's "real world" factors. While I have found that the General Division erred in not considering the Appellant's personal circumstances as required by *Villani*, I do not find that the General Division failed to consider the Appellant's medical condition, including her back and hands.

[22] This matter is to be referred back to the General Division for reconsideration, so that the Appellant's personal circumstances may be considered within the assessment of whether her disability was severe on or prior to December 31, 2011. To allow the General Division to better determine the scope of its reconsideration, I will address the other errors claimed by the Appellant.

ERROR OF LAW: Test for severe disability

[23] The Appellant's representative also submits that the General Division applied the wrong test of severity, noting the General Division's conclusion that "the Appellant had the capacity to seek alternative employment," rather than finding her "incapable regularly of pursuing any substantially gainful occupation." The Appellant's representative argues that the test is not whether the Appellant had the capacity to "seek" alternative employment, but rather whether she could seek and maintain with consistent frequency any truly remunerative occupation.

[24] The General Division's concluding statements were as follows:

> [68] The Tribunal has concluded that even though the Appellant was limited in terms of her physical capabilities, the evidence does not establish on the balance of probabilities that she lacked the capacity to pursue sedentary type employment. […]
>
> [70] The Tribunal notes that *Inclima* provides there is an obligation to pursue alternative employment when the Appellant retains the residual capacity to do so… In this case, the Tribunal is satisfied that the evidence establishes that the Appellant had the capacity to seek alternative employment prior and after her MQP of December 31, 2011.
>
> [71] The Appellant has the burden of proof, and after a careful review of the evidence, the Tribunal has found that the Appellant has not established, on the balance of probabilities, a severe disability in accordance with CPP criteria.

[25] While not restated in paragraph 71, the General Division had previously correctly outlined the "CPP criteria" in paragraph 6, stating that "A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation."

[26] It is apparent from the General Division's decision that the reference to seeking alternative employment related to the finding that the Appellant had residual work capacity, which is separate from the conclusive determination of severity. In other words, this terminology was not a misstatement of the test stipulated in s. 42(2)(*a*)(i) of the CPP, but rather a statement of the notion of work capacity outlined in *Inclima* (in language similar to that used by the Federal Court of Appeal). After determining that the Appellant had residual work capacity, and applying *Inclima*, the General Division concluded that the Appellant had not discharged the burden of proof with respect to the CPP criteria. While it may have been preferable to reiterate the statutory language in paragraph 71, the analysis (that residual work capacity together with a lack of employment efforts is insufficient to meet the test for severity found in s. 42(2)(*a*)(i) of the CPP) is consistent with the jurisprudence, as discussed above. I do not find that the General Division erred in law by applying the wrong test of severity

ERROR OF LAW: *Nicoletti*

[27] Thirdly, the Appellant submits that the General Division erred in law by incorrectly applying the decision of *Nicoletti v. MHRD* (May 7, 1999) CP05587 (PAB) to justify preferring spinal surgeon Dr. Cundal's evidence over that of family physician Dr. Mucciarone. The General Division's analysis includes the following relevant paragraph:

> [69] The Tribunal finds that Dr. Cundal [sic] evidence as [sic] more objective and credible than Dr. Mucciarone because Dr. Cundal is a specialist and has met with the Appellant on occasion between 2009 and 2014 (see *Nicoletti*, supra). Dr. Cundal is of the opinion that the Appellant is able to perform sedentary type of work whereas on September 23, 2015, Dr. Mucciarone wrote in a letter that "the Appellant has chronic pain which is permanent. She has been unable to work since she was first seen in July 14, 2014."

[28] As indicated in paragraph 63 of the General Division decision, *Nicoletti* is a Pension Appeals Board decision which states that "The general practitioner refers patients to the

specialist because the latter have the experience and knowledge of a particular disease not possessed by the general practitioner," and asserts that "where there exist differences of opinion," the opinions of the specialist are generally preferred. Pension Appeals Board decisions are not binding upon the Tribunal, but may have persuasive value.

[29] The Appellant's representative points out that the two physicians' opinions do not conflict, but rather that Dr. Mucciarone provided an update of the Appellant's progressively worsening condition some three years later. However, to the extent that the Appellant was relying upon Dr. Mucciarone's opinion to support her claim of severe disability by December 2011, it is understandable that the General Division would consider the medical opinions to be in conflict; on this basis, I do not consider the General Division's reference to *Nicoletti* in paragraph 69 to constitute an error of law. Moreover, applying a principle found in a non-binding decision in a somewhat different fashion than originally expressed is not, in my view, an error of law; placing more weight on a specialist's opinion than a family doctor's opinion, even when there is no explicit conflict, is not incompatible with the legislation or jurisprudence.

[30] I note that even if this had been an error of law, it would not have been an error "in making its decision." The General Division referenced a more significant, indeed determinative, reason for preferring Dr. Cundal's evidence: Dr. Cundal treated the Appellant between 2009 and 2014, during which time the MQP ended, whereas Dr. Mucciarone began seeing the Appellant in July 2014, two and a half years after the end of the MQP. Even accepting the Appellant's representative's submission that Dr. Mucciarone "is the medical expert in the best position to provide an updated opinion" and that "the two opinions should be read, interpreted and applied together," Dr. Mucciarone's opinion of the Appellant's condition in and beyond 2014 has no bearing on the severity of her disability by December 2011.

ERROR OF FACT: Testimony inconsistent with file documentation

[31] Another of the permissible grounds of appeal to the Appeal Division is that "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": s. 58(1)(*c*) of the DESDA. This language requires the Appeal Division to show some deference on factual errors. Mere disagreement is insufficient. For the appeal to succeed, the impugned finding of fact must be material ("based its decision on") and wrong ("erroneous"), as well as made in a perverse or capricious manner or without regard for the evidence.

[32] The Appellant's representative contends that the General Division made erroneous findings of fact with respect to the consistency of the Appellant's evidence with the file documentation, with respect to her right hand and back injections.

[33] The Appellant's representative first notes that the General Division cited correspondence from the Workers' Compensation Board in 2004, regarding post-surgical stiffness, burning and inability to grip with the right hand, such that the Appellant was unable to return to her previous employment, yet did not mention this in the analysis portion of the decision. This evidence, he submits, supports the Appellant's testimony of post-surgery symptoms and her inability to write for more than five minutes. He notes further that the Appellant would not be expected to know whether these symptoms were due to carpal tunnel syndrome (CTS) or something else.

[34] Whether or not the Appellant ought to have known the specific diagnosis for her right hand symptoms, the General Division was not incorrect in describing the Appellant's testimony of problems associated with CTS as inconsistent: the file evidence did not support ongoing issues of significance related to CTS. Furthermore, and despite the Appellant's representative's submission to the contrary, the member did not make a general finding with respect to the Appellant's credibility. Rather, the member preferred the objective medical evidence over the Appellant's testimony, which he was entitled to do; indeed, weighing evidence is the role of the General Division. Moreover, the General Division did not err in finding on the evidence before it that the Appellant could use her right hand in light, non-repetitive duties: this was consistent with the information on file, it would exclude repetitive hand-writing, and only mild CTS had been diagnosed since 2004. The General Division need not refer to each and every piece of

evidence in its analysis. I note further that the Appellant was able to drive a truck (surely involving the use of the hands) for several years, and neither her questionnaire nor her physician's medical report supporting her application for disability benefits makes mention of an ongoing medical problem, or functional limitations, respecting the hands. I find no basis to conclude that the General Division made an erroneous finding of fact, without regard to the evidence before it, in stating that the Appellant's testimony was inconsistent with other evidence, or in finding that she could use her right hand in light, non-repetitive duties.

[35] With respect to the injections, the Appellant's representative submits that the General Division made a credibility finding based on only a portion of the evidence, in that the result of a second injection supported the Appellant's statement that her back condition had not improved. It is true that the General Division referenced the results of one injection and not the second, in paragraph 67 of the decision. However, I see no material finding of fact, nor a finding of credibility, made in that paragraph. If there was an implicit finding of fact that lumbar spine injections in June 2011 helped decrease the Appellant's back pain, and even if that was incorrect (I agree that there likely was no long-term improvement from the injections, given that the Appellant went on to have surgery), this was not a finding upon which the General Division based its decision. Rather, the General Division accepted that the Appellant had physical limitations, and based its decision upon its findings with respect to employability, relying largely upon the medical evidence from Drs. Emery and Cundal.

[36] Consequently, I do not find that the General Division based its decision on erroneous findings of fact made without regard to the material before it, in respect of the Appellant's hand symptoms or back injections.

CONCLUSION

[37] I have found that the General Division erred in law by failing to apply the principle of *Villani* which requires consideration of a claimant's personal circumstances in the assessment of severity. The General Division did not otherwise err in law, or base its decision upon erroneous findings of fact made without regard for the material before it, as claimed.

[38] Pursuant to s. 59 of the DESDA, this matter is referred back to the General Division for reconsideration.

Shirley Netten
Member, Appeal Division