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

Citation: *Minister of Employment and Social Development v. J. T.,* 2017 SSTADIS 227

Tribunal File Number: AD-16-205

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. T.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: May 18, 2017

REASONS AND DECISION

DECISION

The appeal is dismissed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal), issued on October 27, 2015, that granted the Respondent's application for a disability pension, having found that her disability was severe and prolonged, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP), which ended on December 31, 2009. Leave to appeal was granted on May 31, 2016, on the grounds that the General Division may have erred in rendering its decision.

OVERVIEW

[2] The Respondent was 56 years old when she applied for CPP disability benefits on April 26, 2013. In her application, she disclosed that she was born in Ghana, where she attended two years of secondary school. She immigrated to Canada in 1989, working at first as a nanny for the family that sponsored her, and later obtaining certification to be a health care aide. In 2003, she earned a personal support worker certificate and was hired by Sheridan Villa, a long-term care facility in X Region. On January 12, 2007, she injured her left wrist while assisting an Alzheimer's patient. She was off work for three or four days, and then returned to work with modified duties until August 2008 when worsening pain led her to leave her job. She then completed rehabilitation, labour market re-entry and vocational rehabilitation programs under the auspices of the Workplace Safety and Insurance Board (WSIB). However, she never worked again.

[3] The Appellant denied the application at the initial and reconsideration levels on the grounds that the Respondent's disability was not severe and prolonged as of the MQP. On April 1, 2014, the Respondent appealed these denials to the General Division.

[4] At a teleconference hearing held on October 26, 2015, the Respondent described her January 2007 workplace injury, which had left her with intense, stabbing pain in her left wrist and right shoulder. Her diabetes and elevated blood pressure worsened after the accident, triggering kidney dysfunction, which in turn was exacerbated by her use of pain medications. She said that she found the WSIB programs to be very difficult and that her pain prevented her from carrying out her duties at her work placement, a centre for recent immigrants. She insisted that, even if she were offered a customer service job, she would not have been able to do it, because of pain, physical limitations, lack of sleep and cardiovascular symptoms.

[5] In its decision of October 27, 2015, the General Division allowed the Respondent's appeal, finding that, on a balance of probabilities, she was incapable of substantially gainful work as of the MQP. It noted the multiplicity of her conditions and limitations, adding:

> [57] If the Appellant's disabling conditions were only the limitations arising from her left wrist injury the Tribunal would agree with the Respondent that her limitations and restrictions do not preclude all forms of gainful employment. However, as the *Bungay* and *Barata* decisions, supra, indicate the Tribunal should consider the cumulative effect of all of the Appellant's conditions and limitations. Her conditions and limitations include severe and constant left wrist and right shoulder pain, sleep disturbance, elevated blood pressure, diabetic complications, swollen legs, and follow up after parathyroid surgery. Although some of her conditions such as the diabetic complications may have worsened after December 2009, all of the conditions were present and limiting as of the MQP.

[6] The General Division remarked on the Respondent's strong work history, finding her to be an impressive witness who gave straightforward evidence concerning her multiple disabling conditions and how they have affected her life and capacity to work.

[7] On January 26, 2016, the Appellant filed an application for leave to appeal and notice of appeal with the Tribunal's Appeal Division, alleging various errors of fact and law on the part of the General Division.

[8] In a decision dated May 31, 2016, the Appeal Division granted leave to appeal to the Appellant on the sole ground that the General Division may have made an erroneous finding of fact when it determined that the Respondent's disability was "severe" on the basis of secondary conditions for which there was no objective evidence at the time of the MQP.

[9] The Appeal Division also invited the parties to provide submissions on whether a further hearing was required and, if so, in what format. The Appellant filed its submissions on January 25, 2017. The Respondent filed her submissions on November 1, 2016.

[10] I have decided that an oral hearing is unnecessary and that the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[11] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are the following:

(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 made in a perverse or capricious manner or without regard for the material before it.

[12] According to subsection 59(1) of the DESDA, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the decision of the General Division in whole or in part.

[13] Paragraph 44(1)(*b*) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an appellant must:

(a) be under 65 years of age;

(b) not be in receipt of the CPP retirement pension;

(c) be disabled; and

(d) have made valid contributions to the CPP for not less than the MQP.

[14] The calculation of the MQP is important because a person must establish that they had a severe and prolonged disability during the MQP.

[15] Paragraph 42(2)(*a*) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if they are incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration, or is likely to result in death.

ISSUES

[16] The issues before me are as follows:

(a) How much deference should the Appeal Division show to decisions of the General Division?

(b) Did the General Division err in determining that the Respondent's disability was "severe" on the basis of secondary conditions for which there was no objective evidence at the time of the MQP?

(c) If the answer to the preceding question is "yes," what remedy is appropriate?

SUBMISSIONS

Degree of Deference

Appellant

[17] The Appellant noted that the Federal Court of Appeal had not yet settled on a fixed approach for the Appeal Division in considering appeals from the General Division. The Appellant acknowledged the recent Federal Court of Appeal case, *Canada v. Huruglica*,[1] which it said confirmed that the Appeal Division's analysis should be influenced by factors such as the

[1] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

wording of the enabling legislation, the intent of the legislature when creating the Tribunal and the fact that the legislature is empowered to set a standard of review if it so chooses. It was the Appellant's view that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(*c*) of the DESDA continued to permit a wide range of acceptable outcomes.

[18] The Appellant submits that the Appeal Division should not engage in a redetermination of matters in which the General Division has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicates that Parliament intended for the Appeal Division to show deference to the General Division's findings of fact and to intervene only if a finding of fact is made in a "perverse or capricious manner" or is made "without regard for the material" before the General Division. However, no deference is to be shown by the Appeal Division to the General Division's decisions on questions of natural justice, jurisdiction and law.

Respondent

[19] The Respondent agrees, citing the Federal Court of Appeal in *Canada v. Jean*,[2] that it is no longer appropriate for the Appeal Division to engage in the type of standard of review analysis set out in *Dunsmuir v. New Brunswick*.[3] The Appeal Division must frame its determination with reference to the language in the DESDA and, unless the General Division violated one of the grounds contained in section 58 of the DESDA, the Appeal Division must dismiss the appeal.

[20] Nonetheless, *Dunsmuir* remains instructive on how a reviewing body is to execute its legislated function without trammeling on the legislated functions of other delineated bodies within the appeals structure. The instruction from *Dunsmuir* is that deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, and their particular expertise and experience. The General Division's unique role is to assess and weigh the documentary and oral evidence that comes before it and satisfy itself that a claimant does or does not qualify for disability benefits under the CPP. Essentially, the General Division is the trier of fact and some degree of deference is owed to it. In this case, there was

[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242.
[3] *Dunsmuir v. New Brunswick*, 2008 SCC 9.

some justification in the record to determine that the General Division's decision was within an acceptable range of outcomes, and that the Appeal Division's intervention is not warranted.

Secondary Conditions at MQP

Appellant

[21] The Appellant alleges 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 when it found that all of the Respondent's medical conditions were present and limiting prior to December 31, 2009. In doing so, it misapplied *Bungay v. Canada*,[4] which stands for the proposition that a claimant's medical condition be assessed in its totality during the MQP. In its decision, the General Division considered the cumulative effect of all the Respondent's conditions and limitations, which it listed as:

(i) Severe and constant left wrist and right shoulder pain;

(ii) Sleep disturbance;

(iii) Elevated blood pressure and swollen legs;

(iv) Diabetic complications; and

(v) Follow-up after parathyroid surgery.

[22] The Appellant notes that, at paragraph 57, the General Division found that all of these conditions were present and disabling as of the MQP, although it acknowledged that some of them may have worsened after December 2009. In fact, there was little evidence that any of the Respondent's secondary conditions were even symptomatic, let alone limiting, until years later:

- There was no record of any investigation into, or treatment for, sleep disturbance, other than the Respondent's subjective complaints.
- The Respondent reported elevated blood pressure, but Dr. Gottesman's medical report dated December 23, 2013, some four years post-MQP, indicated that

[4] *Bungay v. Canada (Attorney General)*, 2011 FCA 47.

although she had hypertension, it was well within target. The Respondent also claimed to suffer from swollen legs, but there was no evidence on the record of any investigation or treatment as of her MQP, other than the Respondent's subjective complaints.

- Although the Respondent was diagnosed with diabetes in February 2003, there was no evidence that she suffered from diabetic complications as of her MQP, contrary to the General Division's findings. Indeed, Dr. Gottesman's report dated January 8, 2008 indicated that the Respondent had no symptoms to suggest complications of diabetes referable to the eye, kidney, heart, peripheral or autonomic nervous systems. Dr. Gottesman also commented on the Respondent's diabetes in December 2013, noting that although she now required insulin, she had no microvascular complications of diabetes. In September 2014, the Respondent was examined by Dr. Mills, a retina specialist, who found that she had no diabetic retinopathy. In the same month, Dr. Perkins found that the Respondent's renal function was stable.
- While the Respondent did have parathyroid surgery in the spring of 2010, after her MQP, she was found to be doing well post-operatively in May 2010, and Dr. Gottesman indicated in December 2013 that her surgery had been a success.

Respondent

[23] The Respondent submits that the General Division did not err in finding that her medical conditions and impairments were present and disabling as of her MQP. The oral and documentary evidence supports that these conditions and impairments were not only present and limiting as of the MQP, but also inextricably linked to the Respondent's experience of pain and her overall functionality. Requiring independent confirmation of every health problem is the antithesis of the "broad inquiry" into the totality of the claimant's condition called for by *Canada v. St-Louis.*[5] In order to properly conduct such an inquiry, the Respondent submits that it is incumbent on the General Division to take into account all the evidence, including testimony. The Appellant makes no reference to the Respondent's sworn oral evidence about

[5] *Canada (Attorney General) v. St-Louis*, 2011 FC 492.

her own health problems in its entire submission. As a result, the Appellant's argument ignores the entire context on which the General Division properly based its decision. The Appellant's argument rests, in part, on an assertion that has been repeatedly rejected in the CPP adjudicative regime— that every aspect of a claimant's medical condition must be established by medical evidence in order for it to be a factor in the disability determination. In fact, there is no legal requirement for objective evidence.

[24] Although the Federal Court of Appeal held in *Warren v. Canada*[6] that there should be "some" objective medical evidence to support a finding of CPP disability, this also does not set the bar at the impossibly high level of requiring objective medical evidence or independent confirmation of every health problem in order for it to be considered in a CPP disability determination. In *Canada v. Hounsell,*[7] a case cited by the General Division in its decision, the Pension Appeals Board (PAB) accepted the applicant's descriptive evidence of her disability and articulated that "it is incumbent on us to assess all of the evidence and not restrict ourselves to one class of medical evidence." The Appeal Division has adopted the *Hounsell* approach in cases such as *S.W. v. Canada*,[8] which held that "although the CPP Regulations require information by way of medical evidence, the Act and Regulations do not restrict entitlement to a disability pension to those who furnish 'objective medical evidence' of their condition." Similarly, in *MHRSD v. B.P.*,[9] the Appeal Division found:

> … I do not think that the law requires that there be independent, corroborating documentary evidence to support each and every factual point of a party's *oral* testimony, but in my view, there should be some independent, corroborating evidence to support the general thrust of his claim, and that evidence too ought not to be assessed in isolation but as part of the overall picture ...

[25] According to *Bungay*, all of the claimant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment. This approach is consistent with subsection 68(1) of the CPP Regulations, which requires claimants to submit highly particular information concerning "any physical or mental disability," not just what the claimant might believe is the dominant impairment.

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[6] *Warren v. Canada (Attorney General)*, 2008 FCA 377.
[7] *Minister of Human Resources v. Hounsell*, (September 18, 2000) CP 10061 (PAB).
[8] *S.W. v. Minister of Human Resources and Skills Development*, 2014 SSTAD 30.
[9] *Minister of Human Resources and Skills Development v. B.P.*, 2014 SSTAD 168.

[26] The Respondent submits that the oral evidence does not conflict with the written evidence. She claims that, from the time of her application, she has consistently given an account of her medical condition as being a set of health problems that originated from her workplace injury:

- At her hearing, the Respondent testified about her sleep problems. In the report dated November 10, 2009 from Dr. De Araujo, the Respondent reported that her "blood pressure fluctuates as a result of her pain experience and impaired sleep" and it was noted that "she is usually awakened by the discomfort every two hours or so." The June 17, 2008 WSIB Hand Specialty Program Treatment Plan noted "difficulty sleeping due to pain." The Respondent also reported pain-induced sleeping problems after her Functional Abilities Evaluation (FAE) on May 8, 2008. The Appellant argues that there is no evidence in the record of any investigation or treatment of sleep disturbance, other than the Respondent's subjective complaints, but it is unrealistic or irresponsible to suggest that the medical system must undertake some kind of investigation or treatment on pain-related sleep issues in order for that medical problem to be properly before the General Division. Indeed, it is well accepted that medical reports cannot confirm all pain symptoms. The Respondent's evidence is that she has experienced pain since her workplace injury. She provided credible oral evidence that her pain caused her sleep-related problems. It is a reasonable inference that those sleep-related problems would be a factor in her total medical condition.

- The Respondent also testified about her elevated blood pressure and swollen feet as of the MQP. It was supported by documentary evidence, including a May 27, 2009 WSIB Memo indicating that the Respondent was earlier unable to participate in her FAE because of high blood pressure. On March 28, 2008, the Respondent reported to the WSIB that her blood pressure problems were inextricably linked to her pain. Dr. De Araujo's report of November 10, 2009 also confirmed that her blood pressure fluctuated with her pain and level of sleep impairment. The Appellant referred to Dr. Gottesman's December 23, 2013 medical report, which noted that the Respondent's blood pressure was "well

within target," but this statement was presented without context. The swollen feet were noted to be related to the Respondent's medications, which was corroborated by the written record.

- The Appellant also noted that Dr. Gottesman's medical report dated January 8, 2008 indicated that the Respondent had no symptoms to suggest complications of diabetes "referable to the eye, kidney, heart, peripheral or autonomic nervous system." However, this is not an exhaustive list of all possible diabetic complications, to which the General Division may have been referring. Notably, in the same report, the doctor also indicated that the Respondent's blood sugars "are still quite high." The Appellant also cited Dr. Perkins' September 24, 2014 report indicating "stable" renal function in support of its position that there were no diabetic complications as of the Respondent's MQP. However, without further clarification, a medical finding of a "stable" functioning kidney cannot support an inference that the Respondent therefore had a "well-functioning" kidney as of her MQP. "Stable" generally means that it did not change, not that it was good. Prior to the 2014 report, the same doctor had already indicated worsening renal function, and Dr. Mouldey had also indicated in the CPP Medical Report dated March 13, 2013 that the Respondent's relevant medical history included "diabetic neuropathy and a GFR (Glomerual Filtration Rate to test kidney function and stage of disease) of 29," The latter factor suggested a severe loss of kidney function by at least that point in time. The General Division acknowledged that the Respondent's diabetic complications worsened after her MQP, but made an explicit finding that diabetic complications were present and limiting as of her MQP. It was open for the General Division to do so based on the written and oral evidence before it. The General Division properly took diabetic complications into account when it assessed the Respondent's total medical condition and its impact on her ability to work as of her MQP.
- It is clear in the written evidence that the Respondent was experiencing issues with her thyroid prior to the MQP. She had a parathyroidectomy in April 2010,

> only three months after her MQP. Given the evidence of thyroid issues in 2008 and the practical reality that a patient will have to wait for investigations and referrals prior to surgery, it was reasonable for the General Division to infer that thyroid issues existed at the Respondent's MQP. It was not a perverse or capricious error of fact to consider her parathyroid surgery in assessing the totality of the medical evidence.

[27] While the General Division noted that there was very little medical evidence directly referencing the Respondent's condition as of the MQP, it was very clear about the time frame to which the Respondent had to refer when providing oral evidence. The General Division explicitly verified that the health problems the Respondent had testified about throughout the hearing were, in fact, existent as of the MQP. It is not for the Appeal Division to second guess the General Division's consideration of and weight prescribed to the evidence before it. The General Division found that the Respondent's sleep problems, elevated blood pressure, diabetic complications, swollen feet and parathyroid problems were present and limiting aspects of her medical condition as of the MQP. That finding is supported by the credible oral evidence and corroborating written evidence in the record.

ANALYSIS

Degree of Deference

[28] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as earlier set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*,[10] to administrative forums, because the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law: "one should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[29] This premise led the Court to a determination that the appropriate test flows entirely from an administrative tribunal's governing statute:

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[10] *Supra*.

> [T]he determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[30] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, a fact that suggests the Appeal Division should afford no deference to the General Division's interpretations.

[31] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Finding that Secondary Medical Conditions Contributed to Severity as of MQP

[32] This case raises the question of what an oral hearing is for. Section 21 of the SST Regulations empowers the General Division to choose among several formats to hear evidence, including written questions and answers; videoconference, teleconference or other means of communication; or personal appearance of the parties. In this case, the General Division exercised its discretion to hold a hearing by teleconference because, among other reasons, it felt that there were "gaps in the information in the file and/or a need for clarification."

[33] The General Division obviously believed the Respondent's oral testimony would have some value; otherwise, it could have just as easily chosen to conduct the hearing on the record or by means of written questions and answers. The most important reason—if not the only one—to call for oral evidence is to assess the credibility of witnesses—in particular the individual who is claiming disability benefits. In this case, we see that the General Division

paid close attention to the Respondent's testimony and went out of its way to make a finding of credibility:

> [55] … The Tribunal has determined that as of the MQP, and continuously thereafter, the Appellant [in this proceeding, the Respondent] lacked the capacity to pursue any form of gainful employment on a regular and consistent basis. In making this determination the Tribunal relied upon the Appellant's credible oral evidence as well as her multiple disabling conditions as confirmed by the extensive medical documentation.
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> [56] The Tribunal found the Appellant to be an impressive witness who gave straightforward evidence concerning her multiple disabling conditions and about how they have affected her life and capacity to work. She has a strong work history, and impressed the Tribunal as a person who is eager to live a normal and active life but is overwhelmed by her deteriorating medical conditions.

[34] Under the heading "Guiding Principles," the General Division cited *Bungay* in asserting that all of the Respondent's possible impairments that affect employability were to be considered, not just her biggest impairments or the main impairment. The General Division also referred to the PAB decision, *Barata v. MHRD*,[11] which stated: "Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled."

[35] I agree that the prevailing jurisprudence requires a claimant's medical condition to be assessed in its totality, and it should go without saying that such an assessment must be conducted as of the MQP. At paragraph 57 of its decision, the General Division wrote:

> If the Appellant's disabling conditions were only the limitations arising from her left wrist injury the Tribunal would agree with the Respondent that her limitations and restrictions do not preclude all forms of gainful employment. However, as the *Bungay* and *Barata* decisions, supra, indicate the Tribunal should consider the cumulative effect of all of the Appellant's conditions and limitations. Her conditions and limitations include severe and constant left wrist and right shoulder pain, sleep disturbance, elevated blood pressure, diabetic complications, swollen legs and follow up after parathyroid surgery. Although some of her conditions such as the diabetic complications may have worsened after December 2009, all of the conditions were present and limiting as of the MQP.

[36] This passage indicates that the General Division found the Respondent to be disabled, not because of any single condition, but because of a combination of five or six of them, some more significant than others. Although the General Division took pains to make it clear that this particular combination was severely disabling as of the MQP, the Appellant alleges that the

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[11] *Barata v. MHRD* (January 17, 2001) CP 15058 (PAB).

General Division based its decision on erroneous findings of fact without regard for the record. While the Appellant concedes that the Respondent's left wrist and right shoulder pain were present and may have been limiting as of December 31, 2009, it alleges that there was no evidence of any investigation into or treatment for the Respondent's secondary conditions as of the MQP, other than the Respondent's subjective complaints.

[37] In its decision, the General Division thoroughly and, in my view, fairly summarized the documentary evidence on which it relied. The Appellant is correct to note that the pre-2010 medical reports did not, on their face, suggest that any of the Respondent's secondary conditions were by themselves debilitating, although all were mentioned at various times in the record, to one degree or another. A WSIB memo from May 2009 (GD3-95) disclosed that high blood pressure, as monitored by her family doctor, was a factor in her disability. Dr. Gottesman's January 2008 report confirmed that the Respondent was diagnosed with diabetes in 2003, although there were no symptoms suggesting complications at that time. The November 2009 psycho-vocational assessment by Dr. De. Araujo relayed the Respondent's self-reported history of disturbed sleep, hypertension and diabetes, although there were apparently no symptoms of diabetic neuropathy at that time.

[38] Post-MQP medical evidence can be relevant, although its value typically diminishes with the passage of time from the eligibility period. The available reports dated after December 31, 2009 indicate that high blood pressure and diabetes continued to be matters of concern for the Respondent's treatment providers, and it appears they were being poorly managed. There was evidence of thyroid issues prior to the MQP, and the Respondent's thyroidectomy three months after the MQP was documented in the file. Dr. Perkins' nephrology January 2013 report referred to "slightly worse" renal function and a GFR of 29, which, as the Respondent's representative noted, indicated a "severe" loss of kidney function. While Dr. Gottesman's report of December 23, 2013 noted that the Respondent's blood pressure was on target, he also listed multiple other conditions, including renal dysfunction, which he suspected might be an element of diabetic nephropathy.

[39] Whether one can reasonably infer that conditions documented in 2013 existed, or were significant, in 2009 is a matter for the trier of fact to determine, provided that it fairly considers all relevant evidence and complies with the law. In this case, the General Division chose to make that inference, relying on (i) Dr. Mouldey's March 2013 CPP medical questionnaire, which implicitly linked the Respondent's withdrawal from the workforce in 2008 to, not just her wrist injuries, but her many other vascular pathologies and (ii) the Respondent's own testimony about the debilitating effect of her health conditions during the MQP. As noted by the Respondent, the General Division closely questioned the Respondent about the nature and extent of her secondary conditions as of December 31, 2009 and took care in its decision to specifically find that those conditions, along with her wrist pain, had combined to result in a severe disability as of that date.

[40] This is not a case in which the General Division based its decision entirely on the subjective and retrospective oral evidence of the claimant. There was a firm evidentiary foundation in the documentary record that established that the Respondent's secondary conditions predated December 31, 2009 and manifested in the form of debilitating symptomology by that date. From that foundation, the General Division inferred that those symptoms, with her musculoskeletal injuries, collectively amounted to a disability that met the criteria set out in paragraph 42(2)(*a*) of the CPP. The decision indicates that the General Division made this inference following consideration of the pre and post-MQP evidence, together with an assessment of the Respondent's testimony, which it explicitly found was credible. As discussed, the hearing was presumably held to determine whether the Respondent was credible, and I am reluctant to interfere with that finding, particularly since case law has held that such a determination is ordinarily the province of the tier of fact.[12]

[41] Case law has also held that, once called, oral evidence must be given consideration.[13] Whether it can take primacy over documentary evidence prepared by purportedly "objective"

[12] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[13] *Grenier v. Canada (MHRD)*, 2001 FCT 1059.

parties is another question. The leading case on the CPP disability regime, *Villani v. Canada*,[14] suggests that oral evidence must be in some way buttressed with medical evidence:

> [50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

[42] In my view, the General Division's approach to the Respondent's oral evidence was compatible with *Villani*. There is also a line of cases,[15] which originated from the PAB, that not only put oral evidence on equal footing with documentary evidence, but under some circumstances, permit decision makers to assign it greater weight. Although I am not bound by decisions of the now-defunct PAB, which was the predecessor body to the Appeal Division, I agree that *viva voce* evidence, if credible, is entitled to due weight and serious consideration. In finding the Respondent's testimony determinative, I do not see that the General Division based its decision on an error of fact or law.

[43] In effect, the Appellant has proposed that an applicant for CPP disability benefits, who claims to be disabled through a concatenation of several interconnected medical conditions, must back up each and every one of those conditions with (i) results from objective testing and (ii) medical opinions declaring they would impede work capacity. In this particular circumstance, I do not think this is a realistic or fair expectation for most claimants.

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[14] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[15] *Duncan v. MHRD* (December 8, 1999), CP 9220 (PAB); *Smallwood v. MHRD* (July 20, 1999), CP 9274 (PAB); *MHRD v. Chase* (November 6, 1998), CP 6540 (PAB); *Pettit v. MHRD* (April 22, 1998), CP 4855 (PAB).

CONCLUSION

[44] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division erred in fact or law on the alleged grounds. The appeal is therefore dismissed.

Member, Appeal Division