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

Citation: *J. V. v. Minister of Employment and Social Development*, 2017 SSTADIS 331

Tribunal File Number: AD-16-541

BETWEEN:

J. V.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: June 1, 2017

DATE OF DECISION: July 13, 2017

Canada

REASONS AND DECISION

IN ATTENDANCE

Representative for the Appellant	Alexandra Victoros (counsel)
	B. Kordasiewicz (counsel—observer)
Representative for the Respondent	Amanda De Bruyne (paralegal)
	Dale Randell (counsel—observer)
	Natalie Pruneau (paralegal—observer)
	Sarah Potechin (paralegal—observer)

INTRODUCTION

[1] This is an appeal of the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated January 20, 2016, which determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that her disability had not been "severe" by the end of her minimum qualifying period on December 31, 2013. I granted leave to appeal, on the ground that the General Division, in concluding at paragraph 32 of its decision that the Appellant was "obtaining reasonable sleep awakening refreshed," may have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it

[2] Given the complexities of the legal issues involved and the availability of videoconferencing facilities, as well as the Appellant's request to do so, this appeal proceeded by videoconference, pursuant to paragraph 21(*b*) of the *Social Security Tribunal Regulations.*

ISSUES

[3] In her application requesting leave to appeal, the Appellant argued that the General Division, in failing to apply the principles set out in the following authorities, made several errors of law:

(a) *Villani v. Canada (Attorney General)*, [2002] 1 FCR, 2001 FCA 248, and *Garrett v. Canada (Minister of Human Resources Development*), 2005 FCA 84;

(b) *Bungay v. Canada (Attorney General)*, 2011 FCA 47; and

(c) *Kambo v. Minister of Human Resources Development*, 2005 FCA 353.

[4] At the leave to appeal stage, I was not satisfied that the Appellant had made out a case that the appeal had a reasonable chance of success on the ground that the General Division had erred in law. The Appellant submits that she should nevertheless be permitted to re-visit and address these issues. In any event, she claims that the General Division's erroneous finding of fact led to an error of law, which thereby permits her to address other errors of law that the General Division allegedly made.

[5] Therefore, the issues before me are as follows:

(a) What is the scope of this appeal?

(b) Did the General Division base its findings on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard to the material before it?

(c) If I should determine that there is a broad scope to the appeal, or if the General Division made an erroneous finding of fact that led to an error of law, did the General Division fail to apply *Kambo*?

(d) What is the appropriate disposition of this matter?

SCOPE OF APPEAL

[6] The Appellant acknowledges that the Appeal Division has the expertise and is entitled to interpret its home statute in determining the scope of the appeal before it under section 58 of the *Department of Employment and Social Development Act* (DESDA). Subsections 58(2) and (3) of the DESDA read as follows:

> (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.
>
> (3) The Appeal Division must either grant or refuse leave to appeal.

[7] The Appellant submits that the Appeal Division should resolve any ambiguities in the DESDA in favour of a claimant, and that it should, in accordance with the principles of legislative interpretation and the prevailing jurisprudence, abandon a "surgical approach" when assessing applications for leave to appeal. The Appellant also submits, provided that at least one ground of appeal has been identified, that the Appeal Division should proceed to hear all grounds of appeal. These grounds include those on which leave to appeal had not been found to raise an arguable case, as well as any new ones that the Appellant might raise for the first time, subsequent to the granting of leave to appeal. The Appellant argues that the Appeal Division should adopt a broad, liberal and generous interpretation of section 58 of the DESDA, as this would be consistent with section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, and with the overarching principles enunciated in *Villani* and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

[8] Section 12 of the *Interpretation Act* provides that:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[9] The Appellant notes that in *Villani*, the Federal Court of Appeal indicated that Canadian courts have been especially careful to apply a liberal construction to so-called "social legislation," to which both the *Canada Pension Plan* and the DESDA belong. At

paragraph 27, the Federal Court of Appeal reviewed the jurisprudence in this regard, writing:

> [27] In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para. 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. This interpretive approach to legislation designed to secure a social benefit has been adopted in a number of Supreme Court decisions dealing with the *Unemployment Insurance Act, 1971* (see *Abrahams v. A.G. Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2; *Hills v. Canada (A.G.)*, 1988 CanLII 67 (SCC), [1988] 1 S.C.R. 513; *Canada (Canada Employment and Immigration Commission) v. Gagnon*, 1988 CanLII 48 (SCC), [1988] 2 S.C.R. 29; and *Caron v. Canada (Canada Employment and Immigration Commission)*, 1991 CanLII 108 (SCC), [1991] 1 S.C.R. 48).

[10] In *Canada (Attorney General) v. Tsagbey*, 2017 FC 356, the Federal Court noted that subsection 58(3) of the DESDA provides that the Appeal Division must either grant or refuse leave to appeal, and it does not "on its face" permit the Appeal Division to restrict the scope of the appeal if leave to appeal is granted. The Court determined that the DESDA provides for only one result without qualification. At the same time, the Court indicated that there was nothing in the DESDA to suggest that the Appeal Division was prohibited from limiting the scope of the appeal. Ultimately, the Court held that the administrative process should be given an opportunity to run its course before an application for judicial review is brought. It referred to *L. G. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 89 [L.G.C.], indicating that if the appellant in that case were to seek a judicial review of the Appeal Division's decision, the Federal Court of Appeal would be in a position to consider the Appeal Division's reasoning and interpretation of the DESDA to determine the reasonableness of its decision.[1]

[11] The Appellant argues that the Federal Court of Appeal has indicated that a broad and liberal approach is reasonable. In *Mette v. Canada (Attorney General)*, 2016 FCA 276, the Federal Court of Appeal held that it was reasonable that the Appeal Division in that case

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1 The Appellant L.G.C. filed an application for judicial review of this decision on April 13, 2017.

had interpreted subsection 58(2) of the DESDA to permit it to consider all the grounds raised because the order granting leave to appeal was not specifically restricted to the grounds that had been found to have a reasonable chance of success. The Appeal Division decision stated that "[l]eave to appeal to the Appeal Division of the Social Security Tribunal is granted." The Federal Court of Appeal noted that the wording under subsection 58(2) of the DESDA does not require that individual grounds of appeal be dismissed. The Federal Court of Appeal indicated that, "[i]ndeed, 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."

[12] The Appellant further submits that it is clear from the prevailing jurisprudence that the Appeal Division should adopt a liberal approach when interpreting its home statute. She cites, for instance, *Canada (Attorney General) v. Jean*, 2015 FCA 242, and *Maunder v. Canada (Attorney General)*, 2015 FCA 274, where the Federal Court of Appeal rejected any notion that the Appeal Division should be undertaking a standard of review analysis, or that it should be applying a standard of reasonableness to questions of fact or to mixed questions of law and fact.

[13] The Appellant also cites *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, and *Griffin v. Canada (Attorney General)*, 2016 FC 874. The Federal Court cautioned the Appeal Division to be wary of mechanistically or perfunctorily applying the language of section 58 of the DESDA when it performs its gatekeeping function, and that, on the contrary, it should review the underlying record and determine whether the decision failed to properly account for any of the evidence. In *Karadeolian*, the Court indicated that the Appeal Division should examine the medical evidence and compare it to the decision under consideration. The Court held that if important evidence is arguably overlooked or possibly misconstrued, leave to appeal should ordinarily be granted, notwithstanding the presence of technical deficiencies in the application for leave to appeal. I note that the Court also adopted this approach in *Eby v. Canada (Attorney General)*, 2017 FC 468, at para. 35; *Hideq v. Canada (Attorney General)*, 2017 FC 439, at para 14; and *Joseph v. Canada (Attorney General)*, 2017 FC 391, at paras. 43 and 44.

[14] The Respondent, on the other hand, posits that the Appeal Division is precluded from hearing all the issues in the application for leave to appeal because leave to appeal was granted on only one ground or issue. The Respondent submits that the Appeal Division effectively did so by inviting the parties to provide submissions that addressed only that one issue, and because it wrote that it was "not satisfied that the appeal has a reasonable chance of success" with respect to the remaining issues that the Appellant has raised, language similar to that used in *L. G. C.*

[15] The Respondent claims that limiting the scope of the appeal at the leave to appeal stage is in the interests of judicial economy and natural justice, as it enables the parties to know the case that they are to meet and is in keeping with the spirit of section 2 of the *Social Security Tribunal Regulations*, which stipulates that the Regulations are to be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications. The Respondent notes that there is a much lower standard to meet at the leave to appeal stage, and that if, at the leave to appeal stage, a particular ground failed to meet this lower threshold of success, it would be "a waste of judicial resources" to re-examine that same ground at the appeal stage, as it would have no greater chance of success than at the leave to appeal stage, when a party typically advances his or her best case. In this regard, the Respondent relies on *Tsagbey*, to the extent that the Federal Court indicated that there is nothing in the DESDA to suggest that the Appeal Division is prohibited from restricting the grounds.

[16] The Respondent suggests that, unless either the DESDA or the Regulations specifically enables the Appeal Division to revisit a ground of appeal that it had not granted at the leave to appeal stage, the Appeal Division is curtailed from being able to do so, on the basis that it stands *functus officio* once it has granted leave to appeal. The Respondent notes that in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 26, the Federal Court held that:

> [26] [t]he *DESDA* does not give statutory authority to the SST-AD to appeal or to review its own final and binding decisions regarding leave, nor is any other appeal mechanism provided. Upon granting or refusing leave, the SST-AD is *functus officio* with respect to their decision under section 58 of the *DESDA*. (Italics added in the original)

[17] The Respondent notes that the Appeal Division has interpreted *O'Keefe* in this restrictive manner, such that it will not revisit any issues or grounds of appeal if it had already determined at the leave to appeal stage that those particular grounds of appeal did not raise an arguable case: *H. M. v. Minister of Employment and Social Development*, 2015 SSTAD 988, at para. 3; *Minister of Employment and Social Development v. S. D.*, 2016 CanLII 59173 (SST), at paras. 18 to 21, and more recently in *L. G. C.* In citing *L. G. C.*, the Respondent asserts that rearguing grounds of appeal at this stage would be akin to reopening the leave to appeal decision when, properly, the only avenue of appeal lies with the Federal Court in an application for judicial review.

[18] The Appellant argues that *O'Keefe* is of no applicability, because the Federal Court distinguished it in *Tsagbey*. I do not see that to be the case, given, as I have indicated above, that the Federal Court has determined that the Federal Court of Appeal would be in a better position to address this matter after it has had the benefit of reviewing the Appeal Division's complete reasoning on the issue of the scope of the appeal. Had the Federal Court in *Tsagbey* determined that *O'Keefe* was definitive on this very issue, it would have been inconsistent and at complete odds for the Court to then conclude that the administrative process should be given an opportunity to run its course before an application for judicial review is brought.

[19] Although I am of the view that the Federal Court did not distinguish *O'Keefe*, I am nevertheless unconvinced that *O'Keefe* precludes the Appeal Division from considering issues or grounds of appeal, even if leave to appeal had not been granted on the basis of those issues or grounds. Much like it had in *Tsagbey* (where it was the Appellant), in relying on *O'Keefe*, the Respondent is essentially seeking to attack the Appeal Division's reasons, rather than its ultimate disposition. Ms. Tsagbey resisted the application for judicial review, arguing that there was no basis to judicially review a tribunal's reasons unless a party was seeking a different disposition by the Tribunal. Ms. Tsagbey relied on *GKO Engineering - A Partnership v. The Queen*, 2001 FCA 73 (CanLII), 268 NR 383, [2001] FCJ No. 369, at paras. 2 and 3, and on *Rogerville v. Canada (Attorney General)*, 2001 FCA 142 (CanLII), [2001] FCJ No. 692, at para. 28.

[20] In that case, the applicant GKO Engineering sought to strike certain paragraphs from the respondent's record that dealt with issues that the applicant had not raised in its notice of application for judicial review or in its application record. The applicant argued that to raise such issues, the respondent should have filed her own application for judicial review, which she had not done. The Federal Court of Appeal dismissed the application, holding that, unless the respondent was seeking a different disposition altogether, there was no basis to bring its own judicial review application.

[21] In *Tsagbey*, the Federal Court indicated that attacking the Appeal Division's reasons, rather than its disposition, was improper. At paragraph 55, it wrote:

> [55] The language of the statute is clear that there are only three grounds of appeal and that appeal is either granted or refused. As such, since the Attorney General is not seeking a different disposition from this Court, the application has no basis upon which to bring a judicial review application prior to the completion of the appeal proceedings: *GKO Engineering*, above, at para. 3.

[22] Accordingly, I do not accede to the Respondent's interpretation of *O'Keefe* that the Appellant's recourse is to seek judicial review of the leave to appeal decision, if she does not agree with the reasons therein. *Tsagbey* indicates that the appropriate recourse for an appellant is with the Federal Court of Appeal in an application for judicial review of a decision on the merits of the matter, including on any rulings on the scope of the appeal.

[23] The courts have recognized that the Appeal Division is a specialized tribunal with the expertise to decide issues within the scope of its own appeal jurisdiction and governing statute. The Respondent argues that the Appeal Division has already determined that the scope of appeal is narrow: *H. M.*, *S. D.* and *L. G. C.* In *L. G. C.*, my colleague wrote:

> [36] [I] cannot see anything in the legislation or the emerging case law that prohibits the Appeal Division from limiting the scope of an appeal as it moves from consideration at the leave stage to consideration at the merits stage. I endorse the submissions of the Respondent and agree that the leave mechanism was designed to bring a measure of efficiency to the Appeal Division by giving it a tool to winnow out trivial grounds, thereby enabling it to hold full hearings only on issues of substance.

[24] My colleague observed that, unlike *Mette*, he had explicitly and purposely restricted the grounds of appeal at the leave to appeal stage. Given that he had explicitly restricted the grounds of appeal at the leave to appeal stage, he did not specifically address the Respondent's submissions relating to *O'Keefe.* In his leave to appeal decision, he had granted leave to appeal as follows: "I am allowing leave to appeal on all five grounds for which the Appellant claimed the General Division erred in law." In noting that the Federal Court in *Mette* had held that subsection 58(2) "does not require that individual grounds of appeal be dismissed," he determined that the section "does not prevent such an action either," and that the intent of paragraph 17 was to recognize that the DESDA confers discretionary power on the Appeal Division to manage individual grounds as it sees fit, two points with which the Federal Court agreed in *Tsagbey*. My colleague found that a contextual reading of the language used by the court in *Mette* suggested that it "actually condon[ed] the final disposition of individual grounds at the leave stage," a point that the Federal Court declined to address in *Tsagbey*, as the application before it was premature.

[25] The Appellant argues that the Appeal Division member in *L. G. C.* exceeded his jurisdiction by using restrictive language and by limiting the grounds of appeal. She argues that once the Appeal Division granted leave to appeal, it acted beyond its jurisdiction in restricting the scope of the appeal. In this regard, she contends that it is irrelevant whether, in this case, I might have intended to limit the scope of the appeal, as I too would have exceeded my jurisdiction under subsection 58(3) of the DESDA.

[26] I am unconvinced by these particular submissions, as they suggest that the Appeal Division is prohibited from ever limiting the scope of an appeal, when there may be circumstances in which it is highly desirable to do so. Surely the DESDA would have been drafted in such a manner, had that been the intention. My findings in this regard are consistent with those of my colleague in *L. G. C.*, although he did not address the broader issue of whether the Appeal Division stands *functus* on its reasons, i.e. on constituent issues, after the leave to appeal decision has been granted, where it is not apparent that the scope of appeal has been restricted.

[27] In the past, the Federal Court of Appeal suggested that the Pension Appeals Board had the discretion to determine the scope of the appeal before it. In *Canada (Minister of Human Resources Development) v. Ash*, 2002 FCA 462, the Federal Court of Appeal accepted that the Pension Appeals Board could place conditions under which it had granted leave to appeal.

[28] Hearings before the Pension Appeals Board were heard on a *de novo* basis, but appellants were still required to seek leave to appeal. The language governing leave to appeal to the Pension Appeals Board, under the *Canada Pension Plan*, was similar to the language governing leave to appeal to the Appeal Division, under the DESDA, in that the only two options were to either grant or refuse leave to appeal.

[29] Formerly, section 83 of the *Canada Pension Plan* provided that:

> **83.** *Appeal to Pension Appeals Board* – (1) A party, or subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act*, or under subsection 84(2) may, within ninety days after the day on which that decision is communicated to the party, or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.
>
> (2) *Decision of Chairman or Vice-Chairman* – The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.
>
> . . .
>
> (3) *Where leave refused* – Where leave to appeal is refused, written reasons must be given by the person who refused the leave.
>
> (4) *Where leave granted* – where leave to appeal is granted, the application leave to appeal thereupon becomes the notice of appeal,

> and shall be deemed to have been filed at the time the application for leave to appeal was filed.

[30] On its face, section 83 of the *Canada Pension Plan* (as it read prior to April 1, 2013) did not permit the Pension Appeals Board to restrict the scope of appeal, yet, the Federal Court of Appeal in *Ash* found that the Board was permitted to do so. There, the Board had granted leave to appeal in the following terms: "Leave to appeal to the Pension Appeals Board is granted this day in respect only of the following issues: […]" (underline added in the original) and in its decision where it wrote after quoting the decision granting leave to appeal: "The appeal therefore is restricted to the issue of […]" Although the issue before the Federal Court of Appeal was to determine the subject matter of the appeal before it, the Court nevertheless accepted that it was within the Board's jurisdiction to determine the scope of the appeal before it.

[31] Provided that an Appeal Division member uses the appropriate language to reflect his or her intentions, I see no basis on which he or she cannot, as a means of managing individual issues, restrict the scope of the appeal in appropriate situations, for whatever reason he or she deems justifiable, or for whatever is in the interests of justice. That said, in my view, the Appeal Division should be wary of routinely or mechanistically restricting the scope of the appeal before it. After all, as the Appellant aptly points out, it is clear from the prevailing jurisprudence that the Appeal Division should adopt a fair, large and liberal approach when interpreting the DESDA. The Tribunal should be guided by this principle, and it should avoid perfunctorily restricting the scope of an appeal.

[32] Although the Respondent suggests that there is no basis on which to revisit the grounds of appeal unless it is specifically provided for in the statute, I note that this position has found little support in the Court's interpretation of the DESDA. In *Maunder*, the Federal Court of Appeal allowed an application for judicial review, in a case in which the Appeal Division had refused Ms. Maunder's representative's request to respond to submissions filed by the Minister of Employment and Social Development Canada. The Appeal Division had determined that the Regulations did not provide for a right of reply to the other party's

submissions. In that case, the Appeal Division member made her decision on the written record without notice and before Ms. Maunder's representative had received the Minister's submissions. The parties agreed that the application for judicial review should be allowed and that the matter should be remitted to the Appeal Division for redetermination. The Court referred the matter back to the Appeal Division for redetermination "after receipt of all necessary submissions." It was clear that, although neither the DESDA nor the Regulations expressly provided for a right of reply, that did not preclude a party from making a reply.

[33] I find that it is unnecessary for the DESDA to expressly stipulate an "open" scope of appeal for the Appeal Division to conduct a broader scope of appeal than on just the issues that were found to have an arguable case at the leave to appeal stage. Consequently, in instances where the Appeal Division member neither intends to restrict nor expressly restricts the issues on appeal, absent any compelling reasons otherwise, at the appeal stage, the Appeal Division should permit an appellant to return to issues mentioned in the initial application requesting leave to appeal, even if they did not necessarily raise an arguable case at the leave to appeal stage. This should not be viewed as an opportunity for an appellant to merely revisit the same arguments. He or she should supplement his or her submissions at the leave to appeal stage. After all, if he or she relies solely on the same submissions made at the leave to appeal stage, they are likely to be found without any merit at the appeal stage and are likely to be dismissed.

[34] In my leave to appeal decision, I did not use any restrictive language. I identified two issues where I was "not satisfied that the appeal has a reasonable chance of success," and another issue where I saw "no reason, given the facts before me, to interfere with the assessment of the General Division in this matter." I granted leave to appeal on one issue, concluding that the "application for leave to appeal is allowed," without saying anything about the scope of the appeal.

[35] As for the issue on which I had granted leave to appeal, I indicated that the parties should provide submissions on the issue of whether the General Division had misconstrued the evidence. The Respondent suggests that when I indicated to the parties that they should provide submissions on this succinct issue, this limited the scope of the appeal. However,

my intention was to draw the parties' attention to that particular issue. I was unprepared to grant leave to appeal on the other issues because I was not satisfied that the appeal had a reasonable chance of success on the ground that the General Division had erred in law. Nevertheless, I addressed each of the issues under this ground to signal that they were inherently weak and that they lacked a credible basis for success on appeal, based on the materials that were before me. For instance, I found that the Appellant had failed to fully and sufficiently identify any evidence that allegedly explained why she had been non-compliant with several treatment recommendations. I note that, in arguing that the scope of the appeal is not limited, the Appellant provided more details on the issue of her non-compliance with treatment recommendations. In keeping with my findings above, it is appropriate that I revisit and reconsider this particular issue, despite the fact that I found that it did not raise an arguable case at the leave to appeal stage.

GROUNDS OF APPEAL

(i) Erroneous finding of fact—Appellant's sleep behaviour

[36] The General Division found that there was insufficient medical evidence to establish that the Appellant suffered from a severe disability. At paragraph 32 of its analysis, it wrote:

> [32] There must be sufficient objective medical evidence to indicate the Appellant suffers from a severe and prolonged disability as defined in the CPP. The medical evidence must relate to the date of the MQP. The medical evidence indicates the Appellant had not suffered from a grand mal seizure since taking medication and in May 2014 her medical condition was controlled to the point the Neurologist supported the return of her driver's license. The medical imaging conducted on the Appellant indicated normal head scans. A medical note dated May 1, 2014 indicated the Appellant was obtaining reasonable sleep awaking refreshed. It further noted she "thinks" she is having night-time seizures being a handful in past few months. There are not any medical reports on file that would substantiate the evidence of the Appellant that she was suffering from absent seizures on a frequent daily basis. There are not any medical reports that would substantiate the Appellant is suffering from severe depression that would render her incapable regularly of pursuing any substantially gainful occupation. The only

> limitation noted in the medical reports is by the Family Physician that the Appellant is unable to continue as a school bus driver due to licensing concerns. The Tribunal finds there is insufficient objective medical evidence to prove a severe disability as defined in the CPP at the time of the MQP and continuously since.

[37] The Appellant submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the evidence before it when it found that the Appellant was "obtaining reasonable sleep awakening refreshed." The General Division relied on an entry dated May 1, 2014 in the family physician's clinical records (GD3-43). While the quotation is accurate, the Appellant argues that the expression is taken out of context and that it misconstrues the evidence relating to the Appellant's sleeping behaviour altogether. The Appellant asserts that the General Division conveyed the impression that the Appellant's sleep was sufficient and that it left her feeling refreshed, ignoring the fact that she required daily afternoon naps. The Appellant argues that, as such, the General Division concluded from this, along with other considerations, that she was capable regularly of pursuing a substantially gainful occupation.

[38] The clinical entry, in its entirety, reads:

> P[atient] is sleeping a reasonable amount at night (~9:30pm-6am) and awakes feeling quite refreshed, but has been requiring an early afternoon nap of ~1 hour in order to make it through the rest of the day. This napping behavior is new to her." (GD3-43)

[39] In a subsequent entry dated May 23, 2014, the family physician wrote:

> Reports napping daily and that this has become essential to her functioning. (GD3-44)

[40] The Appellant stresses that the conjunction "but" in the May 1, 2014 entry is of some significance, as it joins two contrasting points. The Appellant suggests that she would have been unable to continue functioning for the rest of the day without a daily nap. She

argues that the General Division's failure to consider her napping is similar to the misstatement of the evidence in *Murphy v. Canada*, 2016 FC 1208.

[41] At paragraph 32 in *Murphy*, the Federal Court determined that a "critical misapprehension" occurred when the General Division found that, "[t]he evidence also indicates that the [Ms. Murphy] was able to work for numerous years and attend school after her MQP" [emphasis added]. The Federal Court also determined that the finding was of central importance because it misstated the nature of Ms. Murphy's ability to work, and did so in a manner that was not defensible on the record because it was contrary to the record. The Federal Court found that, "[t]here was in fact no evidence that [Ms. Murphy] was able to work for a single year, let alone the "numerous years" found by the SST-GD. The facts of this case do not support the finding that she was able to work for numerous years."

[42] The Appellant submits that the General Division's error in these proceedings relates to the issue of her employability, in that her daily napping necessarily affects her ability to "regularly" pursue a substantially gainful occupation. She argues that the entry of May 23, 2014, which states, "Reports napping daily," confirms that she takes naps throughout the day (as opposed to just one nap a day). She argues that her napping throughout the day means that she is incapable of going to work as often as necessary and that she is incapable of predictably reporting to work, and that she is therefore severely disabled: *Atkinson v. Canada (Attorney General)*, 2014 FCA 187; *Chandler v. Minister of Human Resources Development* (November 25, 1996), CP4040, at para. 6; and *Gallant v. Minister of Human Resources Development* (June 25, 1998) CP00612, at paras. 2 and 3.

[43] The Respondent argues that the General Division was not required to refer to all the evidence before it, as it is presumed to have considered all the evidence. However, in this case, the Respondent notes that the General Division had, in fact, referred to the Appellant's oral testimony that she would need "to find a boss who would let her nap in the afternoon, and her attendance would not be consistent." The Respondent also notes that the General Division stated at paragraph 14 that the Appellant "now naps every day." The Respondent argues that although the General Division may not have comprehensively described the Appellant's napping behaviour, the reasons that the General Division provided are

sufficient. The Respondent submits that reasons need not be perfect or comprehensive: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62, at para. 18.

[44] The Respondent further submits that the Federal Court of Appeal has stated that the Tribunal is not required to provide a detailed assessment of all the evidence, and that a decision is adequate unless the reasons show a failure to grapple with the evidence of such degree that no one can understand how the decision-maker arrived at the decision or carried out its mandate: *Yantzi v. Canada (Attorney General)*, 2014 FCA 193.

[45] The Respondent contends that it is clear that the General Division was alive to the fact that the Appellant napped in the afternoons and that, as such, the decision is sufficient. Apart from this consideration, the Respondent asserts that, most importantly, the Appellant's napping behaviour was not the only information that the General Division relied upon in coming to its decision. I note that this was a critical consideration in *Yantzi*, where the Federal Court of Appeal wrote:

> [5] In the course of identifying the medical evidence showing that Mr. Yantzi's condition did not meet the legal tests for severity, the Tribunal did consider contrary evidence, albeit briefly: see the Tribunal's reasons, paragraphs 69 and 77. In some cases, that sort of treatment of the evidence may not be sufficient. However, in this case, the Tribunal had other grounds for finding on the evidence that the test for benefits was not met, including the lack of sufficient search for suitable employment in circumstances such as these where there is evidence that Mr. Yantzi had some capacity to work: see the Tribunal's reasons, paragraphs 80 and 81.

[46] In the proceedings before me, the General Division had, for instance, also considered the Appellant's compliance with treatment recommendations as well as whether there had been any efforts to either retrain or locate alternative employment. In other words, the General Division did not base its decision solely on the Appellant's "awak[ening] feeling quite refreshed."

[47] The General Division was mindful of the Applicant's napping patterns, referring to them at paragraphs 14 and 17 in the evidence section, but the member did not address this evidence in his analysis. It is clear that the General Division based its decision, in part, on the two entries in the clinical records, despite the fact that they arose several months after the minimum qualifying period had passed. The General Division concluded that the Applicant did not suffer from a severe disability, in part, because she "was obtaining reasonable sleep awaking refreshed."

[48] While I agree with the Respondent that a decision-maker is not required to refer to all the evidence before him or her or to provide comprehensive reasons, at the same time, a decision-maker is required to set out the evidence in such a manner that it accurately conveys its true nature and meaning. It would have been preferable had the General Division noted that the Appellant required daily afternoon naps, as this would have provided a greater understanding of the Appellant's condition and her limitations.

[49] However, although the General Division failed to refer to the Appellant's napping in its analysis, I do not see that it thereby resulted in a "critical misapprehension" of the evidence, in the same nature as in *Murphy*. This is so, because there is no evidence that the daily afternoon naps, even had the General Division mentioned them, were necessarily vital to the Appellant's functioning (to use the words attributed to her in the clinical entries) or to her capacity regularly of pursuing a substantially gainful occupation in the hours before she required a nap in the early afternoon, or that she could not somehow awaken feeling refreshed after "sleeping a reasonable amount at night […]"

[50] In this regard, I do not accept the Appellant's claims that the May 23, 2014 entry in the clinical records, "Reported daily napping," substantiates her claims that she required naps throughout the day. While that may have occurred, at most, the documentary evidence suggests that the Appellant took daily naps. This is consistent with the entry of May 1, 2014 that she requires an early afternoon nap of approximately an hour.

[51] Even if I had found that there was a "critical misapprehension" of the evidence, I would have found that it was overall irrelevant, considering that any evidence relating to the Appellant's napping behaviour arose well after the end of the minimum qualifying period had passed. After all, there is no indication from the parties that there was any evidence before the General Division that the Appellant had begun taking daily naps before the end of the minimum qualifying period or that, if she had, they were either limited to an hour each day or that they occurred throughout the day. Indeed, I note that the May 1, 2014 entry indicates that the "napping behaviour is new to her." Although the General Division referred to the 2014 documentary evidence, it recognized that the evidence had to "relate to the date of the [end of the minimum qualifying period of December 31, 2013]."

(ii) Errors of law

Kambo

[52] The Appellant submits that the General Division incorrectly applied *Kambo* in that it failed to determine whether her non-compliance with treatment recommendations was reasonable.

[53] In the application requesting leave to appeal, the Appellant focused on her use of Tegretol. Ultimately, I determined that the General Division had considered the reasonableness of her non-compliance with taking Tegretol, and I found that the issue did not raise an arguable case. The Appellant now argues that there were other instances where the General Division failed to consider the reasonableness of her non-compliance. For the reasons I have expressed above, I will consider this issue.

[54] At paragraph 31, the General Division wrote:

> Appellants have a personal responsibility to cooperate in their health care (*Kambo v. MHRD*, 2005 FCA). Dr. Singh noted in his medical notes on more than one occasion he was concerned about the Appellant's compliance. In June 2014 he noted the Appellant did not do her blood test and he hoped she would comply in the future and warned her to comply. The Appellant complained of depression but wanted to hold off on medication (May 23, 2014). The Appellant testified she had obtained

> counselling twenty minutes from her house but found this too far and stopped attending. She testified she hates her Family Physician and only attends if necessary and is no longer seeing the Neurologist. The Tribunal finds the Appellant has not fulfilled her personal responsibility to cooperate in her health care.

[55] The Appellant argues that there was ample evidence before the General Division whereby she had explained why she had failed to comply with treatment recommendations. For instance, as set out in paragraph 31, the Appellant wished to hold off on taking anti-depressant medication, she did not pursue counselling because she considered it too far from home, she disliked her family physician and she attended appointments with her family physician only when necessary. She notes that this was reflected in her family physician's clinical records of July 3, 2013 (GD3-27 of the hearing file), which reads that the Appellant "has a hard time getting here … as they only have one car." She also argues that the General Division erred in suggesting that she was non-compliant in no longer seeing a neurologist. She explains that this is different altogether from not having any reason to continue to see a neurologist. The Appellant also notes that, in the May 23, 2014 entry of her family physician's clinical records (GD3-44 of the hearing file), she was reportedly trying to be compliant with medications, but was forgetful. In the June 11, 2014 entry of the clinical records (GD3-45), she claimed poverty for her lack of compliance. She argues that the General Division failed to address whether her explanations were reasonable.

[56] The Appellant also relies on her oral evidence at 1:07:33 and 1:09:34 of the audio recording of the hearing before the General Division.

> Q: There's a couple of references to non-compliance. In fact, there are two references and it says, "The rationale for doing this is unclear. Uhhh, the patient was cautioned about her compliance." Do you know, there is no explanation as to what the doctor is referring to when they talk about an issue with compliance? Do you know what that is?
>
> A: Do I know what compliance is or do … [illegible]?
>
> Q: No, do you know what the concern was about your lack of compliance?

A: Okay. Actually, yes and I've been waiting to explain this to somebody and I would sure like to … I wish he was on the phone too. I read that and it upset me greatly. When he first diagnosed me, I asked him what happens if I don't take my pills and I even said, what I mean by that is will I die or something? And he said, yes you will and you do need to take the pills and you cannot be non-compliant and then he gave me a speech about what non-compliance is and that's when somebody decides not to [illegible] pills for whatever reason and [illegible]. Thereafter, he decides that umm my Tegretol levels are too low. Okay. My bloodwork the first couple of months umm taking the Tegretol, he decided that my Tegretol was too low and my bloodwork, even though I assure him that I'm taking these damn pills, writing it down on a piece of paper every single time I do take them. Now, this is where I get pissed off. I was honest with the man. I was honest with the man and said what happens if I don't? What happens? Can I die? What happens if I forget? Can I die? I was honest with the man and now it, I look like a fuckin' liar.

Q: Okay, so what do you think the non-compliance is, is because you questioned, you questioned him on what the alternatives were if you didn't take medication?

A: Absolutely.

Q: So in your mind he analyzed…

A: Ever since …

Q: He analyzed that as being a compliance problem, because you questioned him?

A: [illegible] sucker instead of being genuinely interested in my prognosis… [illegible]

Q: Okay. Thank you.

[57] The Respondent argues that there were other occasions when the Appellant was non-compliant with treatment recommendations and when she failed to provide a reasonable explanation for her non-compliance. For instance, in the same clinical entry of June 11, 2014, the Appellant was noted to have changed the times when she took Tegretol. The neurologist was unclear about the Appellant's rationale for having done this. The Respondent argues that although the Appellant pleads poverty for her non-compliance, this

fails to reasonably explain why the Appellant did not do blood tests or why she altered the time when she took her medication.

[58] However, in *Lalonde v. Canada (Minister of Human Resources Development*), 2002 FCA 211, the Federal Court of Appeal indicated that it is insufficient that a decision-maker considers whether an appellant's refusal to undergo treatment is unreasonable; it must also consider what impact that refusal might have on the appellant's disability status should the refusal be considered unreasonable. In other words, it is insufficient for a decision-maker to consider only whether an appellant unreasonably refuses treatment. That refusal must not only be unreasonable and without explanation, but it must also have had an impact on an appellant's disability status.

[59] At paragraph 31, the General Division found that the Appellant had failed to comply with some of the treatment recommendations. Although the General Division referred to some of the Appellant's explanations for her non-compliance, it is unclear whether the General Division had considered them. On that basis, I might have allowed the appeal, but the Respondent notes that there were other instances where the Appellant had failed to provide any explanation, such as for her alleged non-compliance with taking Tegretol at specified times. The Appellant denied any suggestions that she was not taking Tegretol, but the neurologist's report in fact suggests that she was taking it, albeit at different times than recommended. Although the Appellant was reportedly "invok[ing] poverty to account for her lack of compliance [with taking Tegretol]" (GD3-45), the Appellant testified before the General Division that she was taking Tegretol and that she was documenting her use of it.

[60] The General Division preferred the neurologist's report over the Appellant's testimony, in finding that she had not been compliant with recommendations that she consistently take Tegretol. Although the Appellant claims poverty to explain her non-compliance, at the same time, she insists that she was compliant and that she was regularly taking it. Yet, upon learning that the Appellant had experienced a "few more nocturnal 'seizures,'" the neurologist was unsurprised and identified non-compliance as being a problem again. From this, I find that the Appellant had likely been taking Tegretol, but that

she was inconsistent in her use and taking it at different times than had been recommended to her.

[61] I can see no credible explanation why the Appellant was either inconsistent in her use, or had changed the time for taking Tegretol, given that the neurologist identified that compliance was vital. He had, after all, cautioned the Appellant about her compliance and hoped that she would comply. He also indicated that he was against the idea of changing her dosage or prescribing other medication. Clearly, the neurologist was of the opinion that her non-compliance had some impact on her disability status. Otherwise, it is unlikely that he would have voiced these opinions.

[62] Further, as I indicated in my leave to appeal decision, there were other instances where the Appellant had been non-compliant. The Appellant indicated that she wished to hold off on taking any anti-depressant medication in May 2014 because she was exploring counselling as an option (GD3-44), but there is no indication in the hearing file that the Appellant resumed taking any anti-depressant medication after she stopped attending counselling sessions (for reasons that it was too far to travel), or why she had refused to do so. Surely the Appellant's healthcare providers had prescribed anti-depressant medication with the expectation that it could alleviate some of her depressive symptoms, so taking anti-depressants could have had a positive impact on her disability status.

Garrett and _Villani_ —"Real world" analysis

[63] The Appellant did not revisit the issues of whether the General Division might have erred in law with respect to *Villani*, *Garrett* and *Bungay*. As I expressed in my leave to appeal decision, the Federal Court of Appeal indicated that one should be reluctant to interfere in the assessment of the applicant's circumstances, as it involves a question of judgment. I see no reason, given the facts and submissions before me, to interfere in the General Division's assessment in this regard. The General Division discussed the Appellant's alleged impairments, including fatigue, fear, anxiety and "absent periods," and it then proceeded to assess the severity of the Appellant's disability in a "real world context" by considering her personal characteristics.

CONCLUSION

[64] Given the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division