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

Citation: *C. G. v. Minister of Employment and Social Development,* 2017 SSTADIS 482

Tribunal File Number: AD-16-411

BETWEEN:

C. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Meredith Porter

DATE OF DECISION: September 22, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant seeks to appeal a decision of the General Division of the Social Security Tribunal of Canada (Tribunal), dated January 19, 2016, which determined that the Appellant was not entitled to a disability pension under the *Canada Pension Plan* (CPP).

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on March 9, 2016, and leave to appeal was granted on April 5, 2017.

[3] This appeal proceeded on the record for the following reasons:

a) Pursuant to subsection 37(a) of the *Social Security Tribunal Regulations* (SSTR), the Member had determined that no further hearing was required.

b) The SSTR requires that the appeal proceed as informally and as quickly as circumstances, fairness and natural justice permit.

c) The issues under appeal are not complex.

d) There are no gaps in the evidentiary record, and there is no need for clarification.

ISSUE

[4] Pursuant to subsection 59(1) of the *Department of Employment and Social Development Act* (DESD Act), the Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division's decision.

THE LAW

[5] According to subsection 58(1) of the DESD Act, 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

SUBMISSIONS

[6] The Appellant submits that:

i. The Appellant's application requesting leave to appeal the General Division decision had been filed more than a year before the Appeal Division rendered the decision granting leave to appeal, and this delay is excessive. As there are strict timelines for parties to file Notices of Appeal and submissions documents, the lack of strict timelines for rendering Appeal Division decisions constitutes procedural unfairness and results in a breach of natural justice.

ii. The Appellant argues that Appeal Division erred in law by failing to grant leave to appeal on the ground that the General Division had failed to apply the decision of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54, which determined that chronic pain patients are suffering and in distress, and that the "disability they experience is real."

iii. The Appellant argues that the General Division erred in law when it cited *Villani v. Canada (Attorney General)* [2002] 1 FCR 130, 2001 FCA 248, but that it also failed to

provide an in-depth analysis of the real-world factors, and that it failed to demonstrate that the hypothetical occupations that it had considered were not divorced from the Appellant's particular circumstances pursuant to *Garrett v. Canada (Minister of Human Resources Development)*, 2005 FCA 84;

iv. The Appellant argues that the General Division erred in law by failing to apply *Bungay v. Canada (Attorney General)*, 2011 FCA 47, and that it failed to consider all the Appellant's medical conditions on his ability to work, not simply the primary condition.

v. Finally, the Appellant argues that the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner by failing to consider post–minimum-qualifying-period (MQP) medical reports that indicate that the Appellant's medical conditions had not improved and that the Appellant remains unemployable, despite the General Division's findings that he demonstrated a capacity to work as of his MQP.

[7] The Respondent submits the following:

i. The General Division properly applied the "real world" approach as set out in *Villani*, and it also properly assessed the Appellant's capacity to work in the "real world" context as prescribed by *Villani*. Alternatively, because the Appellant was not found to suffer a severe disability based on the medical evidence in the record, it was unnecessary for the General Division to undertake a "real world" analysis.

ii. The General Division properly considered the totality of the evidence in the record, and it properly considered the impact of the Appellant's entire health condition on his capacity to work pursuant to *Bungay* and *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

iii. The General Division did not err in concluding that the Appellant had demonstrated some capacity to work, and it properly considered evidence that pre-dated the Appellant's MQP and evidence that post-dated the Appellant's MQP, which, in this case, was December 31, 2013. The Respondent argues that the Appellant, in arguing that

the General Division failed to properly consider certain evidence, is attempting to re-litigate his disability claim.

STANDARD OF REVIEW

[8] It was previously accepted that the standard of review applicable to appeals before the Appeal Division were governed by the same standards of review as set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9. The applicable standards were, as set out by the court in *Dunsmuir*, that, where there is an alleged error of law or a failure to observe a principle of natural justice, the applicable standard is that of correctness. The Appeal Division should demonstrate a lower threshold of deference to the General Division's findings. Further, the applicable standards were, as set out by the court in *Dunsmuir*, that, where there is an alleged erroneous finding of fact, the standard is held to be reasonableness. This meant that, where the General Division's findings fall within a range of possible, acceptable outcomes, the Appeal Division should be reluctant to intervene in the General Division's findings.

[9] The standards of review for administrative tribunals have changed since *Dunsmuir*. The Federal Court of Appeal decision in *Canada (Citizenship and Immigration) v. Huruglica*, [2016] 4 FCR 157, 2016 FCA 93, rejected the *Dunsmuir* approach and held that administrative tribunals should not use standards of review that were designed to be applied by appellate courts:

> [47] The principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in Dunsmuir at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law.

[10] Instead, the court in *Huruglica* held that administrative tribunals should first look to their home statutes for guidance in determining the applicable scope of review. The court in *Huruglica* also stated that "[o]ne should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies." Alternatively, the court stated that, when determining the scope of review for a decision of a lower level

administrative tribunal, one should look first to the tribunal's governing legislation as "One must seek instead to give effect to the legislator's intent."

[11] I note that, although *Huruglica* deals with a decision of the Immigration and Refugee Board, it does have implications for other administrative tribunals.

[12] Following *Huruglica*, the Tribunal's Appeal Division should confine its enquiry to a determination of whether the General Division has breached any of the provisions of subsection 58(1) of the DESD Act without engaging in a discussion or analysis of the principles or standards applied in the context of "judicial review." One of the standards, either reasonableness or correctness, will apply only if those words are specifically contained in the founding legislation, and they are not found in subsection 58(1) of the DESD Act.

[13] The Appellant in this case has argued that the General Division erred in law and that it based its decision on an error of fact. Further, the Appellant alleges that the delay in receiving a decision granting leave to appeal resulted in a breach of a principle of natural justice. As a result, I must consider the appropriate standard of review for each of the paragraphs found in subsection 58(1) of the DESD Act.

[14] On reading paragraphs 58(1)(*a*) and (*b*) of the DESD Act, I see that these provisions permit the Appeal Division to intervene where the General Division has erred in law or where it has breached a principle of natural justice. There is no qualification restricting the Appeal Division's intervention when such errors are alleged. There is no indication that the Appeal Division should show any deference to the General Division's findings.

[15] Paragraph 58(1)(*c*) deals with erroneous findings of fact, or errors of mixed fact and law. According to this provision, the Appeal Division may intervene only where the erroneous finding of fact, or of mixed fact and law, is "perverse or capricious" and "without regard for the material before it." Those words must be interpreted in light of their legislative intent, which, when plainly read, reflects that the Appeal Division should intervene only when the General Division has based its decision on a flagrant error of fact or on a factual finding that is at odds with the evidentiary record.

ANALYSIS

Does the absence of strict timelines for rendering Appeal Division decisions result in procedural unfairness?

[16] The Appellant’s counsel has argued that, while the Tribunal’s stated purpose is a more efficient and streamlined process for appealing decisions relating to Employment Insurance (EI), Old Age Security (OAS) and the CPP (the program rather than the legislation) in the absence of strict timelines for rendering decisions on leave to appeal the results of procedural unfairness. The Appellant’s counsel asserts that the delays in receiving leave to appeal decisions is excessive and unfair for disabled Canadians, and that the undue delay results in a breach of natural justice pursuant to paragraph 58(1)(*a*) of the DESD Act.

[17] I note that the principles of natural justice include procedural fairness, which generally concerns how hearings proceed. Procedural fairness largely includes such procedural guarantees as the Appellant:

- being notified of their hearing date;
- knowing their case to meet;
- being provided with a full disclosure of evidence;
- being provided with adequate time to prepare their case and also time to prepare to defend the case being brought in reply;
- having the right to an impartial decision-maker and the freedom from any bias; and
- being entitled to a decision that includes expressed reasons for how their case was decided.

[18] I recognize that procedural fairness is largely concerned with the **manner** in which a decision is made. Procedural fairness does not extend to substantive issues, which include the correctness of the decision. Safeguarding the principles of natural justice ensures that the decision-maker followed the proper procedure in arriving at their decision. The principles of natural justice and procedural fairness are based on the belief that the substance of a decision is more likely to be fair if the procedure through which that decision has been made was fair.

[19] Section 3 of the SSTR instructs the Tribunal to conduct proceedings as informally and as quickly as the circumstances and the considerations of fairness and natural justice permit. Section 3 of the SSTR does not provide any guidance or any indication for how quickly the Tribunal should proceed. The Appellant is correct that there are no timelines specified for the rendering of leave to appeal decisions or decisions on appeal merit.

[20] While I can appreciate that the decision granting leave to appeal in this case was rendered more than one year after the application requesting leave to appeal had been filed, the Appellant's counsel has not articulated how delays in rendering leave to appeal decisions affect **this** particular Appellant's ability to put his case forward fully and fairly. Although the Appellant's counsel has asserted that "[t]here are no such timelines with regard to the SST-AD making determination of a Leave to Appeal decision, resulting in excessive wait periods for disabled Canadians," without any further details or arguments regarding the basis for the claim that the alleged delay in this case resulted in a situation of procedural unfairness, I cannot determine how the principles of natural justice were breached in this case pursuant to paragraph 58(1)(*a*) of the DESD Act.

[21] The Federal Court of Appeal has addressed the issue of unreasonable delays in the administrative law context in *Canada (Attorney General) v. Norman*, [2003] 2 FCR 411, 2002 FCA 423. The court in *Norman* was addressing an Employment Insurance case, but the reasoning of the court has implications in the administrative law context generally. Citing Bastarache J., in the Supreme Court of Canada decision *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44, the Federal Court of Appeal in *Norman* stated that:

> [25] I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process.

[22] The Court in in Norman further held:

> [26] To meet this threshold, the respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings.

[…]

> [27] In *Blencoe, supra*, Bastarache J. recognized that if inordinate delays cause significant psychological harm to a person, or attach a stigma to a person's reputation, such that the human rights system would be brought into disrepute, the prejudice may be sufficient to constitute an abuse of process. With respect to that point he states [at paragraph 115]:
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> > I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.
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> [28] Moreover, the actual prejudice caused by the delay must be of such magnitude that the public's sense of decency and fairness is affected.

[23] The Appellant's counsel has not argued that the Appellant's psychological well-being was affected by the delay, nor have there been any details or arguments that the Appellant's interests were prejudiced in any way, much less the occurrence of "significant prejudice amounting to abuse of process." He was not prevented from bringing forward his case fully and fairly in any way as a result of the alleged delay. Hearings before the Appeal Division are not *de novo* hearings, so the accuracy of the evidence or its "freshness" is uncompromised by any delay. I also do not find that, in this case, this Appellant was treated any differently from other individuals seeking to appeal a General Division decision to the Appeal Division.

[24] In the absence of any evidence that supports the claim that the Appellant was prevented from putting his case forward fully and fairly, or that his interests were unduly prejudiced by the alleged delay in rendering the leave to appeal decision, I cannot find in the Appellant's favour on this issue, as there is no basis to make a finding that "[t]he delay was unacceptable to the point of being so oppressive as to taint the proceedings," or that the delay in this case was to the extent that "the public's sense of decency and fairness is affected."

Did the Appeal Division err in law by failing to grant leave to appeal on the ground that the General Division had failed to apply the decision in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*?

[25] It is the Appellant's position that the Appeal Division was incorrect to refuse leave to appeal on the ground that the General Division had failed to follow the Supreme Court of Canada's reasoning in *Nova Scotia v. Martin; Nova Scotia v. Laseur*. The Appellant's counsel argues that the Supreme Court held in that case that, for individuals suffering from chronic pain syndrome, the "disability they experience is real." Further, chronic pain sufferers are often impaired by a condition that cannot be supported by objective findings. The Appellant's counsel argues that chronic pain sufferers should be found disabled under the CPP as a result of their condition as recognized by the Supreme Court.

[26] I had refused leave to appeal on this ground, as I had not found that the argument had a reasonable chance of success. I based this determination on existing jurisprudence regarding how disability is to be determined under the CPP. Although the Appellant may suffer from a serious health condition, disability under the CPP is based on employability. The test for determining disability under the CPP has been articulated by the Federal Court of Appeal in *Villani*:

> [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. [my emphasis]

[27] The Federal Court of Appeal in *Villani* also clarified, at paragraph 44:

> […] The proper test for severity is one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of **employability**. [my emphasis]

[28] *Nova Scotia v. Martin; Nova Scotia v. Laseur* deals with the issue of whether the workers' compensation scheme in Nova Scotia is discriminatory pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, as it denies chronic pain sufferers access to regular benefits and, instead, provides limited four-week benefits intended to facilitate the return to work. The discrimination argument before the court was that the compensation scheme does not correspond to the actual needs and circumstances of workers suffering from chronic pain. Alternatively, workers are subject to uniform, limited benefits based on their presumed characteristics as a group, and they are deprived of any individual assessment of their needs and circumstances.

[29] The argument of the Appellant's counsel in this case is that, as chronic pain syndrome is a disabling health condition, those diagnosed with it ought to be entitled to a disability pension under the CPP, even where there is a void of objective medical evidence to support their claimed health condition as required by the court in *Villani*. I had refused leave to appeal on this argument, as I had not found that it had a reasonable chance of success. If the reasoning of the Appellant's counsel were followed, every individual diagnosed with a chronic pain syndrome would be entitled to a disability pension under the CPP. The Federal Court of Appeal has rejected this argument in *Klabouch*, where it held:

> [14] First, the measure of whether a disability is "severe" is not whether the applicant suffers from severe impairments, but whether his disability "prevents him from earning a living" (see: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2001] 1 S.C.R. 703, paragraphs 28 and 29). In other words, it is an applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.

[30] The workers' compensation legislative scheme, as well as its adjudicative framework, is different from the framework for determining disability under the CPP. The court in *Nova Scotia v. Martin; Nova Scotia v. Laseur* dealt with workers' compensation provisions that limited who could receive benefits (those suffering from chronic pain as opposed to other

injured workers), the timeframe for receiving benefits, whether the pain suffered resulted from a work-related injury, and the purpose of the benefits (intended to facilitate re-entry into the workforce). While it may be the case that the Appellant would be entitled to benefits under the workers' compensation benefit legislation, the CPP is clearly a different statute with different requirements, and the jurisprudence interpreting how disability is determined under the CPP is different.

[31] I do find that the court's reasoning in *Nova Scotia v. Martin; Nova Scotia v. Laseur* is helpful from the perspective that not all individuals who suffer chronic pain ought to be treated the same. There should not be a blanket approach to the assessment of their needs, to treatment or to their entitlement to compensation. In refusing leave to appeal on the ground that the General Division had erred in law on this issue, I did not find that the General Division had erred in assessing and weighing the evidence in the record that reflected this Appellant's particular circumstances. The General Division did appropriately rely on medical evidence in the record to "assess the relevant degree of impairment," as set out by the Court in *Nova Scotia v. Martin; Nova Scotia v. Laseur* at paragraph 6, with respect to the Appellant's injury, and it provided reasons for preferring certain medical evidence:

> [12] On reading the General Division's decision, at paragraph 39 to 41, I see that the General Division considers both the medical evidence and the Applicant's evidence in the context of the legal test for determining disability under the CPP. The General Division preferred the evidence of Dr. Ballyk, and it provides reasons for doing so. Dr. Ballyk found that, at the time leading up to the Applicant's MQP date, the Applicant's electromyogram and nerve conduction studies had shown no nerve damage, and his pain had been anticipated to subside. The General Division preferred this evidence to the opinions of other health professionals as it had been based on neurological testing, MRI and ultrasound studies. The General Division is allowed to prefer certain evidence, but it must provide reasons for doing so (subsection 54(2) of the DESD Act).

[32] The General Division's assessment of the Appellant's health condition is consistent with the reasoning of the court in *Nova Scotia v. Martin; Nova Scotia v. Laseur*, to the extent that the General Division did not impose a "blanket approach" to assessing the severity of the Appellant's health condition. I did not grant leave to appeal on this issue, and I still do not find in favour of the Appellant.

Did the General Division err in law by citing *Villani* but failing to provide an in-depth analysis of the "real-world" factors, and did the General Division also fail to consider hypothetical occupations consistent with the Applicant's particular circumstances (*Garrett*)?

[33] The Appellant's counsel submits that the General Division failed to apply *Garrett* by inadequately weighing the *Villani* factors when considering hypothetical occupations consistent with the Appellant's health condition. It is argued that the General Division failed to consider the impact that the Appellant's health condition has on his ability to work. The Appellant acknowledges that the General Division cited *Villani* in its decision, and that it noted aspects of his personal background and characteristics. However, the Appellant's counsel argues, the General Division "did not discuss the *Villani* factors with regard to whether the Appellant was capable of real world employability." The Appellant's counsel refers specifically to the Appellant's severe and continuous neck and shoulder pain, reduced range of motion, and his resultant inability to engage in work using his right upper limb and his inability to push, pull, lift or grip. The Appellant argues that he is required to take pain-control medication, which compromises his cognitive functioning and memory, and which also causes fatigue.

[34] The Respondent argues that the General Division adequately canvassed the Appellant's health condition and specifically his claim that he suffers impaired cognitive functioning and fatigue. The Respondent further argues that the General Division properly applied the "real world" approach prescribed by *Villani*. According to the Respondent, the General Division relied on objective medical evidence, to which it afforded more weight than it afforded to the Appellant's subjective evidence, in finding that the Appellant retained some capacity to work, and the General Division's findings should be afforded considerable deference as a result because the General Division's role is trier of fact.

[35] The Respondent argues that, in finding that the Appellant retained some capacity to work in a "real world" context, the General Division properly relied on medical evidence in the file, the Appellant's oral testimony and the Questionnaire for Disability Benefits that, together, do not indicate that the extent of the impairment of the Appellant's cognitive functioning or memory is such that the Appellant has claimed.

[36] The Appellant has argued that, although he has developed certain transferable skills, his skills are limited to physically-demanding jobs. However, although he never worked as a Registered Practical Nurse (RPN), he has demonstrated both a capacity to learn through his completed education and a capacity to retrain through years of work experience in various occupations.

[37] The Appellant alleges that the General Division, in assessing the Appellant's capacity to work in a "real world" context and considering his limited transferrable skills, erred in concluding that he retained a capacity to function in a workplace or to retrain for employment within his limitations. He argues that the General Division's assessment failed to demonstrate that the hypothetical occupations that it considered the Appellant was capable of were not divorced from the Applicant's particular circumstances pursuant to *Garrett*. This was a ground of appeal on which leave to appeal was granted, as I had found it had a reasonable chance of success if proven on its merits. In granting leave to appeal, I noted at paragraph 15 and 16:

> […] The Applicant relies on Garrett in which the Federal Court of Appeal determined that, in addition to the Applicant's primary health condition, the *Villani* factors should be considered in a "real world" context regarding the reality of an applicant's employability and that any hypothetical occupations that a decision-maker considers cannot be divorced from the reality of the applicant's health condition and any aggravating factors:
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> > [3] In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the applicant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.
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> [16] At paragraphs 35 to 40 of the General Division's decision, the Applicant's physical impairments are both set out and analysed in the context of the *Villani* factors. Leave was not granted on this issue. However, the General Division specifically notes, in paragraph 35, that "[the Applicant] experiences migraine headaches associated with the shoulder and neck pain. Taking pain medication causes cognitive impairment." The Applicant submits that the General Division, in finding evidence of work capacity based only on the Applicant's physical

> impairments resulting from his health condition, committed an error of law in failing to consider any impact that the described cognitive impairment and fatigue has on the Applicant's real-world employability (*Garrett*).

[38] The General Division notes several of the "real world" factors prescribed by the court in *Villani* in the "Evidence" section of its decision at paragraphs 8 and 9. The General Division notes the Appellant's age (48 at the time of his MQP), his past work experience (including as an employee at a printing company, as a worker in the shipping department in a carpet factory, as an employee in a diaper manufacturing company and as a house framer), his education (he completed high school and a one-year course to become an RPN). Other than further references to the *Villani* "real world" factors at paragraph 34 of the decision, there is no further analysis of the prescribed factors as they pertain to the Appellant.

[39] In *Garrett*, the Federal Court of Appeal stated that "[a] failure to cite or to conduct an analysis in accordance with the principles set out in *Villani*, *supra*, is an error of law." The court went on to articulate what constituted a proper analysis:

> [3] In the present case, the majority failed to cite the *Villani* decision or conduct their analysis in accordance with its principles. This is an error of law. In particular, the majority failed to mention evidence that the Appellant's mobility problems were aggravated by fatigue and that she would have to alternate sitting and standing; factors which could effectively make her performance of a sedentary office or related job problematic. This is the 'real world' context of the analysis required by *Villani*.

[40] In this case, while the General Division set out the Appellant's medical conditions, cited the correct *Villani* test and set out some of the relevant *Villani* factors, it did not conduct the type of analysis contemplated by *Garrett* before it stated its conclusion that the Appellant had failed to demonstrate that he suffered a severe disability and that he had also failed to demonstrate that he lacked a capacity to work. Leave to appeal had been granted on this ground, specifically in relation to the evidence in the record, which reflected some cognitive impairment resulting from pain-control medication prescribed to the Appellant.

[41] While the General Division's failure to conduct the type of analysis prescribed by the court in *Garrett* is an error of law, the Respondent has further submitted that the General

Division was not necessarily required to engage in a full assessment of the *Villani* factors, as there was no finding, based on the medical evidence, that the Appellant suffered a severe disability. Citing the Federal Court of Appeal in *Giannaros v. Canada (Minister Social Development)*, 2005 FCA 187, the Respondent argues that, since the Appellant's failed to demonstrate that he suffered a severe disability under the CPP, "[t]his failure renders moot further discussion of the application of the 'real world' approach." As a result, because of the impact of the *Giannaros* decision, the finding that the General Division erred in applying *Garrett* may not render the General Division decision unreasonable when the decision is taken as a whole.

[42] The Respondent relies on *Giannaros*, and it has put forward the alternative argument that, having found that the Appellant did not have a severe medical condition, it was unnecessary for the General Division to apply the "real world" approach to the Appellant's case. In paragraphs 14–15 of its decision in *Giannaros*, the Federal Court of Appeal held that, whenever the decision-maker is not convinced that there is a serious medical condition, it is unnecessary to undergo the "real world approach" analysis. On my reading of the court's decision, for *Giannaros* to apply, it presumes a finding separate from the severity analysis. On reading the General Division's decision, I do find that the General Division found, based on medical evidence and testimony that the Appellant and his wife had provided, that the Appellant had failed to demonstrate that he suffered a severe condition on or before his MQP date. At paragraph 40 of the General Division's decision, it reads:

> The medical evidence indicates that the shoulder injuries and the impairment of the Appellant's physical and mental functioning on or before the MQP were not as serious as the Appellant described it in his evidence, and that he was expected to recover capacity to perform at a certain level of work before the MQP, although not necessarily as a house framer.

[43] Applying the court's reasoning in *Giannaros* once it found that the Appellant had failed to establish that he had a severe condition, the General Division no longer had to consider the *Villani* factors. While the General Division erred in its application of *Villani* and failed to properly apply *Garrett*, I do not find the error renders the overall decision unreasonable.

Did the General Division fail to apply *Bungay*?

[44] Disability is determined according to an individual's employability. Employability, the Appellant argues, is to be assessed in light of all the circumstances (*Bungay*). The Appellant has submitted that the General Division failed to consider the impact of all the Appellant's health conditions on his ability to work. He argues that the General Division failed to consider his "severe chronic right shoulder pain, upper arm and chest pain, right arm weakness, exhaustion, inability to focus and loss of depth perception" on his ability to obtain and maintain gainful employment.

[45] The Respondent argues that the General Division made no error of law in assessing the totality of the Appellant's health conditions on his ability to work. The Respondent contends that the General Division's assessment of the Appellant's circumstances was "full and genuine."

[46] With respect to the General Division's assessment of the totality of the Appellant's health condition, the Respondent cites *Simpson v. Canada (Attorney General)*, 2012 FCA 82, where the court held that an administrative tribunal is not required to refer to each and every piece of evidence before it, and that it can be presumed to have considered all the evidence. Despite *Simpson*, the Respondent contends that the General Division demonstrated that it was live to all the health conditions that the Appellant suffers from, and it cites several instances during the General Division hearing where the Appellant failed to describe his health conditions as "chronic." Further, none of the evidence in the record refers to chest pain as the Appellant's counsel has claimed.

[47] I find that the General Division did adequately assess the Appellant's employability in light of all the circumstances. The General Division summarizes the Appellant's subjective testimony regarding his health conditions in paragraphs 8–16. The summary includes:

- details of the Appellant's personal circumstances and background;
- his medical history, including the health care professionals he had consulted, as well as the testing and treatment he underwent;

- his subjective assessment of his physical and mental limitations resulting from his health problems; and
- his subjective assessment of his capacity to work.

[48] In paragraphs 17 and 18, the General Division summarizes the evidence that the Appellant's wife has provided regarding her observations of the Appellant's health condition, the assistance that he requires from her in completing daily tasks and personal care, and the improvements to his health from prescribed treatment. Finally, the General Division summarizes the medical evidence in the record in paragraphs 19–30.

[49] Most relevant to the proper application of *Bungay* is the General Division's analysis of how the totality of the Appellant's health conditions affects his ability to work in any gainful occupation. It is not the diagnosis of a condition, or the fact of an injury that makes the disability severe, but rather its impact on the claimant's ability to work (*Klabouch*). In paragraph 35 of the decision, the General Division finds that the primary limitations that the Appellant suffered relate to his right shoulder, right arm and neck injury. The General Division notes the Appellant's evidence that he suffers migraine headaches as a result of the injury, as well as the cognitive impairment he sustains when taking pain-control medication. However, the evidence that both the Appellant and his wife provided was that, following a reduction in pain-control medication prescribed and surgery post-MQP in 2015, both the injury and its effects on the Appellant's functioning had improved.

[50] The General Division thoroughly considers the medical evidence in the record, which reflects the Appellant's overall health condition and functioning between 2012 and 2015 (post-MQP), including the X-rays of the Appellant's shoulder and neck, MRI results, and the assessed range of motion and level of strength that the Appellant's physiotherapist completed. The General Division considers the medical evidence, including prescribed treatments and their results, in the context of the impact on the Appellant's overall physical and mental functioning in paragraphs 35–40. The General Division acknowledged that the Appellant may be incapable of returning to his previous employment as a house framer, but regarding the limitations noted in the medical evidence, prior to the MQP date, the limitations included that the Appellant could not work overhead or below the waist due to his limited range of motion in his neck.

Otherwise, the Appellant's prognosis was that his ability to function would improve over time and that the pain would also settle. The Appellant had, in fact, contemplated possible alternative employment options with Dr. Ballyk in 2013.

[51] On reviewing the evidentiary record and listening to the recording of the hearing before the General Division, I find that the General Division genuinely grappled with the totality of the Appellant's numerous claimed impairments and that it assessed the impact of those ailments on his capacity to engage in gainful employment.

Did the General Division base its decision on an erroneous finding of fact in failing to consider pre- and post-MQP evidence, which reflected that the Appellant's condition had not improved?

[52] The Appellant has argued that the General Division based its decision on an erroneous finding of fact in determining that the Appellant had demonstrated some capacity to work on or before his MQP date. The Appellant bases this argument on paragraph 41 of the General Division decision, which reads, in part:

> The Appellant testified that he did not attempt a return to any work environment because he felt this arm and neck movements were too restricted. While the Appellant had pain and restrictions in the functioning of his right shoulder and arm, **<u>the weight of the medical evidence demonstrates that he had some work capacity after January 7, 2013. The symptoms were expected to improve that year.</u>** He was in fact considering alternative work. [my emphasis]

[53] The portion of the General Division decision with which the Appellant takes issue is underlined and bolded. There is a medical report completed by Dr. Murray, the Appellant's family doctor, dated November 8, 2012, which states that the Appellant is unable to work until January 7, 2013. It is his position that, because his condition did not in fact improve after January 2013, the General Division was incorrect to find that he had some capacity to work after that date.

[54] The Respondent asserts that the General Division's findings are not based on an erroneous finding of fact, as the General Division based its finding on the premise that the Appellant retained a capacity to work both pre- and post-MQP. The Respondent argues that the

medical evidence in the record demonstrated that the Appellant had regained his range of motion in his right upper limb and that his pain level had subsided. The General Division based its decision on the totality of the evidence and provided reasons for preferring certain evidence in the record over other evidence.

[55] I have already found, in paragraph 53 above, that it is evident in reading the General Division's decision that the Member genuinely grappled with the totality of the Appellant's claimed impairments and that it adequately assessed the impact of those ailments on his capacity for gainful employment. I do not find that the General Division erred in finding that the Appellant retained some capacity to work based on both the medical evidence and the Appellant's oral testimony, along with that of his wife. Although the General Division may not have completely detailed all the relevant medical evidence and opinions both pre- and post-MQP on which its findings are based, I have already cited *Simpson* (in paragraph 49 above), which held that an administrative tribunal is not required to refer to each and every piece of evidence before it, but rather that it is presumed to have considered all the evidence before it.

[56] I find that most of the Appellant's arguments on this issue essentially amount to a request for the Appeal Division to reconsider and reweigh the evidence that was before the General Division with the hope that the Appeal Division will decide the issue differently. The Appeal Division is not in a position to reweigh the evidence that was before the General Division because, as set out above in paragraph 5, the grounds for appeal to the Appeal Division do not include a reconsideration of evidence that the General Division has already considered (*Tracey v. Canada (Attorney General)*, 2015 FC 1300). The General Division has discretion to assign appropriate weight to the evidence before it in reaching a decision. Where the General Division finds certain evidence more reliable than other evidence, it must give reasons for preferring that evidence (*Canada (Attorney General) v. Fink*, 2006 FCA 354). The General Division's decision, in this case, has provided reasons for relying on particular medical evidence in the record.

[57] The Appellant may disagree with the General Division's findings, but the Appellant's disagreement with the General Division's finding is not a ground for appeal enumerated in subsection 58(1) of the DESD Act. It would be an improper exercise of the delegated authority

granted to the Appeal Division to allow an appeal on grounds not included in subsection 58(1) of the DESD Act (*Canada (Attorney General) v. O'keefe*, 2016 FC 503).

CONCLUSION

[58] The appeal is dismissed.

Meredith Porter
Member, Appeal Division