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

Citation: *D. D. v. Minister of Employment and Social Development*, 2018 SST 278

Tribunal File Number: AD-16-1087

BETWEEN:

D. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: March 27, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] In June 2000, the Appellant, D. D., was involved in an accident while operating his truck in the course of his employment. A passenger in the other vehicle did not survive. Although the Appellant did not incur any physical injury, in 2001, his family physician diagnosed delayed-onset post-traumatic stress disorder (PTSD).

[3] The Appellant also had a hunting accident in November 2001, when he fell 30 feet to the ground from a hunter's blind in a tree. He sustained multiple injuries, including fractures to his sternum, left hip, left ribs, left femur, and left ankle.

[4] The Appellant first applied for *Canada Pension Plan* (CPP) disability benefits in July 2009.[1] The Appellant's minimum qualifying period (MQP) date is December 31, 2002. He was 40 years of age on his MQP date. The Respondent, the Minister of Employment and Social Development, denied his application. He made a second application for disability benefits on February 14, 2014.[2] The Minister denied this second application initially and upon reconsideration. While acknowledging that the Appellant had identified certain limitations resulting from chronic pain and depression, the Minister concluded that his condition did not stop him from working in December 2002 and continuously thereafter.[3]

[5] The Appellant appealed to the General Division, which dismissed his appeal because, among other things, the medical evidence did not show that he suffered from a severe disability at the time of the MQP and continuously thereafter. He is appealing that decision.

[6] I have determined that the Appellant's appeal succeeds because the General Division erred in law, as it did not consider the totality of his medical condition when determining

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[1] GD2-318 to GD2-324.
[2] GD2-21 to GD2-24.
[3] GD2-6.

whether his disability was severe. I reject the other grounds of appeal put forward by the Appellant.

SUBMISSIONS

[7] In his notice of appeal,[4] the Appellant argues that the General Division committed an error of law by failing to consider the issue of severity in the "real-world" context mandated by the Federal Court of Appeal's decision in *Villani v. Canada (Attorney General)*.[5] He also submits that the General Division failed to consider the Court's decision in *Inclima v. Canada (Attorney General)*.[6] In addition, he contends that the General Division committed errors of law by failing to assess his disability as at the MQP date of December 31, 2002, and that "in failing to do so, [it] erred in its application of the facts to the law [*sic*]". He contends that the General Division also erred in law by relying on the fact that he did not see a specialist psychiatrist or psychologist to treat his psychological problems between 2002 and 2009.

[8] The Appellant also submits that the General Division committed errors of fact in its analysis by not giving equal weight to his oral testimony and the written evidence, by failing to appreciate the experts' evidence, and by failing to give due weight to the evidence of his family physicians. He also takes issue with findings of fact made by the member in relation to the Appellant's participation in and withdrawal from an Ontario Workplace Safety and Insurance Board (WSIB) labour market re-entry plan.

[9] With respect to the alleged errors of law, the Minister submits that the General Division applied the correct test for severity and that it considered both the Appellant's personal circumstances and the totality of his health conditions. Furthermore, with respect to the argument that the General Division failed to consider *Inclima*, the Minister submits that the Appellant had made one attempt at retraining, through the WSIB, "that the General Division noted was unsuccessful and under cloudy circumstances"[7], but had made no other effort to retrain, despite the evidence that at the time of the MQP he was 40 years old, had transferrable skills from a variety of occupations, and had the intellectual capacity to retrain. The Minister submits that

[4] AD1.
[5] 2001 FCA 248.
[6] 2003 FCA 117.
[7] AD3-13.

medical evidence at the MQP date showed the Appellant had largely recovered from his physical injuries (fractures) from the fall in November 2001 and that, in November 2002, a psychiatrist, Dr. Tahlan, assessed him as needing to consider retraining, assessed his mental health conditions as moderate and his adaptive functioning in the previous year as fair, and stated that he seemed to have coped reasonably well with previous events and injuries.[8]

[10] With respect to the alleged errors of fact, the Minister submits that weighing and assessing evidence lies at the heart of the General Division's mandate and its decisions are entitled to deference. The Minister submits that contrary to the Appellant's argument, the General Division's finding that his disability was not severe was open to it on the evidence before it, especially as the evidence noted that his physical injuries had healed well from his fall a year before the MQP, and his mental health symptoms were moderate. Furthermore, the Minister argues, any deterioration of his mental condition after the MQP date was not relevant to his condition on that date. In the Minister's submission, the General Division analyzed the evidence in relation to, and was focussed on, the MQP date.

ISSUES

[11] The issues before me are as follows:

Alleged errors of law

Issue 1: Did the General Division fail to consider the Appellant's employability in a "real-world" context, as mandated by *Villani*?

Issue 2: Did the General Division fail to consider *Inclima*?

Issue 3: Did the General Division fail to assess disability as at the MQP date?

Alleged errors of fact

Issue 4: Did the General Division inappropriately rely on the lack of specialist treatment of the Appellant's psychological issues?

Issue 5: Did the General Division fail to place sufficient weight on the Appellant's testimony and his family physicians' evidence, and fail to appreciate the experts' evidence?

[8] AD3-14 to AD3-15.

ANALYSIS

[12] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) states that 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.

[13] In order to allow the appeal, I must be satisfied that the Appellant has proven it is more likely than not that the General Division committed an error falling within the scope of s. 58(1).

Alleged errors of law

[14] The Federal Court of Appeal recently clarified that when Parliament creates a multilevel administrative framework, the scope of the appeal tribunal's review of the lower tribunal's decision is to be determined by the language in the governing statute. [9]

[15] I agree with the Minister that, based on the unqualified wording of s. 58(1)(*b*) of the DESDA, no deference is owed to the General Division on errors of law. The General Division's decisions on such matters may be set aside if the Appeal Division concludes the decision was not correct.

Issue 1: Did the General Division fail to consider the Appellant's employability in a "real-world" context, as mandated by *Villani*?

[16] The General Division's task was to determine whether the Appellant had a severe and prolonged disability on or before December 31, 2002 (the end of his MQP). Under the CPP, a disability is "severe" if "by reason thereof the person […] is incapable regularly of pursuing any

[9] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paras. 46–48. Although *Huruglica* dealt with a decision of the Refugee Appeal Division of the Immigration and Refugee Board, the Court's reasoning applies equally to other multilevel administrative frameworks, such as the Social Security Tribunal.

substantially gainful occupation".[10] According to the Supreme Court of Canada, in the context of the CPP, "the yardstick is employability": an individual may suffer severe impairments but will not be entitled to CPP benefits if those impairments, serious though they may be, do not prevent him or her from earning a living.[11]

[17] In *Villani*, the Federal Court of Appeal directed that in assessing whether a disability is severe, the General Division must adopt a "real-world" approach. The "real-world" approach requires it to determine whether a claimant, in the circumstances of his or her background and medical condition, is employable, i.e. capable regularly of pursuing any substantially gainful occupation. Employability is not to be assessed in the abstract, but rather in light of all of the circumstances." A claimant's circumstances fall into two categories:

> a) *The claimant's background*: Matters such as "age, education level, language proficiency and past work and life experience" are relevant here;[12] and
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> b) *The claimant's medical condition*: This is a broad inquiry, requiring that the claimant's condition be assessed in its totality. All of the possible impairments of the claimant that affect employability—both physical and psychological—are to be considered, not just the biggest impairments or the main impairment.[13]

[18] The member cited *Villani* in his analysis.[14] He considered the Appellant's background factors—that he was 40 years old at the MQP, had been involved in a number of occupations and his employment record indicated he had obtained transferrable skills, he was proficient in English, and a February 2003 psycho-vocational report stated he had good intellectual skills and the potential to do training if required. I find the member appropriately considered the Appellant's background factors.

[19] Moving to the Appellant's medical condition, the General Division member noted all facets of the Appellant's medical condition in his summary of the evidence, comprising skeletal injuries, PTSD, anxiety and depression. However, in the analysis portion of his decision, in the

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[10] CPP, s. 42(2)(*a*)(i).
[11] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, at para. 28.
[12] *Villani* at para. 38.
[13] *Bungay v. Canada (Attorney General)*, 2011 FCA 47, at para. 8.
[14] Reasons, para. 55.

course of determining whether the Appellant suffered from a severe disability on or before the MQP and continuously thereafter, the member considered only the skeletal injuries and the PTSD. He concluded that neither condition rendered the Appellant incapable regularly of pursuing any substantially gainful occupation. He did not explicitly consider the Appellant's depression and anxiety when he made this determination. As directed by the Court, all aspects of a claimant's medical condition should be considered, not just the biggest impairment or the main impairment. On this basis, I find the General Division did not consider the totality of the Appellant's medical condition. This constituted an error of law.

Issue 2: Did the General Division fail to consider *Inclima*?

[20] In *Inclima*, the Federal Court of Appeal stated, "an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where […] there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition".[15]

[21] It is important to bear in mind that the burden of proving on a balance of probabilities that one's disability is severe and prolonged rests with the claimant. Therefore, where there is evidence of work capacity, a claimant bears the burden to demonstrate that he or she made efforts to obtain work, but was unable to do so because of his or her health condition.

[22] The Appellant testified that he never worked after 2001 and that he never looked for work. He testified that he made only one attempt to retrain when, in 2003, he was placed in a computer networking course by the WSIB as part of a labour market re-entry plan. He testified that the course was to last a number of months, but he withdrew because he could not keep up with the classroom training, had trouble sitting, and was exhausted because he was not sleeping.[16] In a letter to the WSIB on July 5, 2004, his family doctor, Dr. Wendling, stated that the Appellant "recently had a flare in his symptoms of PTSD. He has had increasing anxiety, depression, anger, irritability and poor concentration. For this reason, he is unable to attend his current school program. He will remain off for an additional 6-8 weeks." The General Division

[15] *Inclima* at para. 3.
[16] General Division hearing recording, part 1, at 42:00 and 44:08.

member did not refer to this letter in his reasons, although he did note that Dr. Wendling's clinical notes "indicated the Appellant was unable to complete his computer course due his condition [*sic*] and must avoid all stressful situations."[17]

[23] The General Division member had difficulty with the Appellant's testimony regarding the reasons why he did not complete the computer course, in light of the conviction by the Ontario Court of Justice on one count of willfully failing to inform the WSIB of a change in circumstances under s. 149(2) of the Ontario *Workplace Safety and Insurance Act*.

[24] On October 4, 2006, the Appellant pled guilty to one count of willfully failing to inform the WSIB of a change in circumstances under s. 149(2), and the matter proceeded by way of an agreed statement of facts and a joint submission as to the sentence. The Appellant was fined $10,000, plus a victim fine surcharge. In a letter dated February 21, 2007, following up on the conviction, the WSIB stated:

> … [T]he evidence indicated you stopped participating in your Labour Market Re-Entry plan in May 2004. Although you claimed that a recurrence of your condition prevented you from participating, no medical documentation on record supports this. In addition, the evidence indicates that, at the time you stopped participating in your Labour Market Re-Entry program, you became self-employed operating a retail pet and supply store.[18]

[25] The Appellant testified that he had not known he had to inform the WSIB of his change in circumstances, he had not known about the guilty plea, and he had not agreed to a joint statement of facts. He did not deny that the store was registered in his name, but said his father registered it in his name without his knowledge. He testified that the pet store shut down because it went bankrupt.

[26] The member concluded that the Appellant had been functioning "in a greater capacity" than he had reported to the WSIB.[19] The member stated "[t]he Tribunal therefore notes this conviction as one factor in assessing the application for a disability benefit based partly on the oral evidence of the Appellant".

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[17] Reasons, para. 36.
[18] GD2-215 to GD2-216.
[19] Reasons, para. 48.

[27] The Appellant argues that the General Division member erred because he failed to consider *Inclima*. I cannot agree. The Appellant testified that he never looked for work after 2001 and that he never worked after 2001. With regard to the Appellant's only attempt at retraining, the member did not make an express finding that he rejected the Appellant's evidence that he had withdrawn from the retraining because of health reasons. However, on the basis of the conviction by a court of competent jurisdiction, the member took notice of the decision and he accepted that the Appellant had willfully failed to report a change in circumstances (i.e. becoming self-employed operating a retail pet and supply store) in order to maintain his entitlement to a benefit. He also accepted that the Appellant was functioning at a higher level than he had been reporting to the WSIB and that he became involved in the pet and supply store when he stopped participating in the Labour Market Re-entry Program.

[28] The Appellant argues that the WSIB conviction was not relevant to his eligibility for CPP disability benefits. Had the member looked to the WSIB documentation for a determination on whether the Appellant qualified for CPP disability benefits, this would be an error, because only the CPP definition of disability is relevant. However, the member was entitled to take into account the fact that the Appellant was convicted and the reasons for the conviction, since these matters had a bearing on the Appellant's participation in the training program in the relevant period. This evidence also had a bearing on the Appellant's credibility. Indeed, had the General Division not taken this evidence into account, it could be criticized for having failed to consider the totality of the evidence.[20]

[29] With regard to the medical evidence, the member stated that he preferred the evidence of the specialists because the family physicians had become advocates for the Appellant. He concluded that Dr. Wendling's conclusions were not supported by the objective evidence of the specialists and that Dr. Yu's reports were dated well after the MQP and did not relate to the Appellant's condition in the relevant time period. (Dr. Yu started treating the Appellant after 2009. [21]) These were findings open to him on the evidence before him. In all the circumstances,

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[20] *Canada (Procureur Général) c. Bellil*, 2017 CAF 104.

[21] The Appellant testified that he changed family physicians because Dr. Wendling "did not do very well for me" (General Division hearing recording, part 2, time: 7:05), though there is a letter dated November 9, 2009, (GD2-115) from Dr. Wendling to the Appellant telling him that she would no longer provide care to him as of that date because it had come to her attention that he had committed fraud with regard to the prescriptions she had given him for medical treatment. The Appellant started seeing Dr. Yu after this.

given these findings, it is apparent that the member rejected the Appellant's evidence that he had withdrawn from the retraining course due to his health. Although the member did not refer to the *Inclima* decision in his reasons, I find that he conducted his analysis in accordance with the principles in *Inclima*.

[30] The Appellant has not demonstrated on a balance of probabilities that the appeal should be allowed on this basis.

Issue 3: Did the General Division fail to assess disability as at the MQP date?

[31] The Appellant submits that the General Division is required to assess a claimant's medical condition as of the MQP date and that, "in failing to do so, [it] erred in its application of the facts to the law [*sic*]".[22]

[32] Application of the law to the facts is a question of mixed fact and law. Subsection 58(1) of the DESDA does not include errors of mixed fact and law as a ground of appeal, but instead addresses errors of fact and errors of law as distinct grounds. The Appeal Division therefore does not have jurisdiction to review a General Division decision to determine whether it committed an error of mixed fact and law.[23]

[33] In order to determine whether a claimant is disabled within the meaning of the CPP, it is necessary to determine whether he or she suffers from a severe and prolonged disability on or before the MQP date and continuously thereafter. Therefore, the Appellant is certainly correct that the determination includes an assessment of a claimant's medical condition as of the MQP date. The General Division member noted that this was his task at various points in his reasons. At para. 6, the member found that the Appellant's MQP date is December 31, 2002. At para. 7, he stated, "the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP", and he repeated this principle as he embarked on his analysis, at para. 45.[24] The member considered the medical evidence relating to the severity of the Appellant's medical condition in the analysis portion of his decision, at paras. 50 through 57 of his reasons.

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[22] AD1-21, para. 50.
[23] *Quadir v. Canada (Attorney General)*, 2018 FCA 21, at para. 9.
[24] Reasons, para. 7.

[34] In para. 54, he focussed on the Appellant's condition as of the MQP, noting that Dr. Tahlan had recommended retraining in her November 2002 report. She had assessed his mental health conditions as moderate and his adaptive functioning in the last year as fair, and had stated that he seemed to have coped reasonably well with previous events and injuries.[25]

[35] The member noted that the psycho-vocational report prepared in February 2003[26] indicated the Appellant had good intellectual skills and potential to retrain; that the orthopedic consultant Dr. Gurr had indicated he was stable in November 2002[27]; and that Dr. Thomas had noted the Appellant considered himself physically well [in May 2003] and had concluded that although the Appellant had "lingering" effects of PTSD, the evidence indicated this was not of such a severe nature as to stop him from obtaining suitable employment within his capabilities.[28]

[36] The member also considered the Appellant's medical condition post-MQP, as part of his analysis regarding whether the Appellant had a severe disability continuously thereafter. The member concluded that the Appellant had not proven on a balance of probabilities that he had a severe disability, as defined in the CPP, at the time of the MQP and continuously thereafter.[29]

[37] Without commenting on whether the member's application of the law to the facts was correct (as this is a question of mixed fact and law outside my jurisdiction), I find the member correctly instructed himself as to the legal principles and applied those principles in his assessment of the evidence.

[38] Accordingly, I find there is no merit to the contention that the General Division member failed to consider the Appellant's medical condition in the lead-up to and around the MQP date.

Alleged errors of fact

[39] Another of the permissible grounds of appeal to the Appeal Division is that "the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".[30] This language indicates that the

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[25] Reasons, paras. 31 and 54. See also GD2-270 to GD2-273.
[26] GD4-99 to GD4-108.
[27] GD2-269. Dr. Gurr stated, "It is my impression that David's fracture has healed. It is stable."
[28] Reasons, para. 54. GD2-250 to GD2-257.
[29] *Ibid*.
[30] DESDA, s. 58(1)(*c*).

Appeal Division is to show deference to the General Division's findings of fact: in addition to the disputed finding of fact being material ("based its decision on") and incorrect ("erroneous"), for the appeal to succeed, the disputed finding must also have been made in a perverse or capricious manner or without regard for the evidence before the General Division. The language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.[31]

Issue 4: Did the General Division inappropriately rely on the lack of specialist treatment of the Appellant's psychological conditions?

[40] The Appellant submits that the General Division erred in law because, in its analysis of whether the Appellant's disability was severe on or before the MQP date and continuously thereafter, it relied on the fact that he did not see a specialist for his psychological issues from 2002 to 2009. The Appellant submits that the General Division failed to appreciate that his PTSD, depression, and anxiety were being closely monitored by his family physician.

[41] Although the Appellant characterizes this as an error of law, his argument more properly falls within s. 58(1)(*c*) of the DESDA. He is arguing, in essence, that the General Division based its decision on an erroneous finding of fact—that his mental complaints were not severe because he did not see a mental health specialist between 2002 and 2009—and that such a finding was made in a perverse or capricious manner or without regard for the material before it, because he saw his family doctor throughout this period for these aspects of his condition.

[42] There is no doubt that the General Division member accepted that the Appellant had PTSD and other psychological issues, and that he also appreciated that the Appellant was receiving treatment from his family physician for these issues. He noted this at multiple points in his reasons.[32] In *Villani*, the Federal Court of Appeal confirmed that a claimant bears the onus to manage his medical condition. The member was entitled to consider the type of medical treatment the Appellant sought out as an indicator of the seriousness of the effect of his medical conditions on him at the MQP date and continuously thereafter. Seeing a specialist for the psychological issues between 2002 and 2009 may have been an indicator of the seriousness of the impact of these issues on him and his capability to work.

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[31] *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 58.
[32] Reasons, paras. 23, 27, and 36.

[43] The Appellant's counsel argues that according to the Pension Appeals Board decision in *Minister of Social Development v. Kumar*, family physicians are qualified to treat depression. In *Kumar*, the Board in its reasons summarized the evidence of a family physician who said that family physicians are trained to diagnose and even treat depression. However, the Board did not make any finding in this regard, and did not endorse the family physician's evidence, only going so far as to state that Mr. Kumar's treating family physician "would have made a note of those symptoms when he saw the Respondent on regular visits".[33] There were no such notes made by the family physicians in Mr. Kumar's case and the Board allowed the Minister's appeal, finding that Mr. Kumar had failed to satisfy the onus of establishing he was disabled within the meaning of s. 42(2)(*a*) of the CPP. The *Kumar* decision does not assist the Appellant.

[44] I am unable to conclude the General Division committed an error falling within the scope of s. 58(1) by considering the fact that the Appellant did not see a specialist for seven years after November 2002 in his assessment of whether the Appellant's disability was severe on or before December 31, 2002, and continuously thereafter. This factor was directly related to the impact of the psychological condition on the Appellant and to his attempts to manage his condition.

Issue 5: Did the General Division fail to place sufficient weight on the Appellant's testimony and his family physicians' evidence, and fail to appreciate the experts' evidence?

[45] An allegation that the General Division failed to apply proper weight to the evidence does not fall within a ground of appeal under s. 58(1) of the DESDA.[34]

[46] Counsel for the Appellant alleges that the General Division member stated in his reasons that "no medical documentation on record" supported the Appellant's evidence that his condition prevented him from participating in the Labour Market Re-entry Program, and that this statement is contrary to the evidence.[35] The passage referred to by counsel for the Appellant is a quote, included in the member's summary of the evidence, from the letter dated February 21, 2007, from the WSIB to the Appellant.[36] It was not a finding by the member. The General Division member referred to Dr. Wendling's statement in her clinical notes that "the Appellant was unable

[33] *Minister of Social Development v. Kumar*, March 14, 2005.
[34] *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para. 42.
[35] AD1-7.
[36] Reasons, para. 20.

to complete his computer course due to his condition and must avoid all stressful situations,"[37] indicating that the member was aware of evidence on this issue. However, the member preferred the evidence of the specialists over the evidence of Dr. Wendling.

[47] The Appellant also alleges that it was "inappropriate for Member Rodenhurst, while determining [the Appellant's] eligibility for CPP benefits, to put 'significant' weight only on his oral testimony". The Appellant contends that the member "ought to have been applying equal weight to the written and oral evidence on the file" [underlining in original].[38]

[48] I believe the Appellant has misconstrued what the reasons say on this point. In his reasons,[39] the member stated, "The Tribunal relies significantly on the subjective evidence of *an appellant* and if credible the evidence is given significant weight" [italics added]. This was a general statement about the member's approach to the evidence. There is nothing inappropriate about this statement.

[49] The member also stated that the Appellant's oral testimony was material to the resolution of the appeal before him. The member found problematic the Appellant's oral testimony in relation to his conviction by the Ontario Court of Justice, and he determined he would give more weight to the judgment of a court of competent jurisdiction than to the Appellant's testimony on matters peripheral to and related to the judgment. In doing so, he was acting within his authority as the trier of fact.

[50] In *Simpson v. Canada (Attorney General)*,[40] the Federal Court of Appeal commented on the respective roles of the trier of fact and an appeal tribunal:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

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[37] Reasons, para. 36.
[38] AD1-8.
[39] Reasons, para. 46.
[40] 2012 FCA 82, at para. 10.

[51] I do not accept the Appellant's suggestion that the Appeal Division has the authority to direct the General Division to give equal weight to the Appellant's evidence and the written evidence.

[52] The Appellant objects to the fact that the member preferred the evidence of his specialists over the evidence of his family physicians, Drs. Wendling and Yu. (The Appellant stopped seeing Dr. Wendling in November 2009, and started seeing Dr. Yu sometime after this.)

[53] The member stated that he gave more weight to the specialists' evidence because the family physicians appeared to have become advocates for the Appellant, and their conclusions were not supported by the specialists' evidence. The Tribunal has held in other decisions that, understandable as it may be on the part of physicians to advocate for their patients, in doing so, they may display the appearance of a lack of objectivity and their evidence may be accorded less weight as a result: see *R. D. G. v. Minister of Human Resources and Skills Development*.[41] This principle was recognized by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Angheloni*.[42] I see no basis to find the member committed an error falling within the scope of s. 58(1)(*c*) of the DESDA when he gave more weight to the specialists' evidence than to the family physicians' evidence.

[54] While the Appellant disputes the General Division's assessment of the evidence, he is essentially attempting to persuade me to reassess the evidence and come to a different conclusion. This is beyond my role on this appeal. An appeal to the Appeal Division does not provide an opportunity to re-litigate or re-prosecute the claim. Furthermore, the Federal Court has confirmed that failure to apply appropriate weight to the evidence is not a ground of appeal under s. 58(1) of the DESDA.[43]

Summary

[55] I have found that the General Division erred in law by failing to consider the totality of the Appellant's medical condition in the assessment of severity. The General Division did not otherwise commit any error falling within the scope of s. 58(1) of the DESDA—specifically, it

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[41] 2013 SSTADIS 14.
[42] 2003 FCA 140, at para. 36.
[43] *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para. 42.

did not otherwise err in law pursuant to s. 58(1)(*b*), or base its decision on erroneous findings of fact falling within the scope of s. 58(1)(*c*).

[56] The General Division's error does not resolve the Appellant's claim for disability benefits; indeed, the Appellant's entitlement to such benefits continues to be contested by the Minister. Therefore, it is appropriate to refer this matter back to the General Division for reconsideration.

CONCLUSION

[57] The appeal is allowed for the reason that the General Division erred in law by failing to consider the totality of the Appellant's medical condition in the assessment of severity. Pursuant to s. 59 of the DESDA, this matter is referred back to the General Division for reconsideration on this basis.

[58] The other grounds of appeal put forward by the Appellant are rejected.

Nancy Brooks
Member, Appeal Division

HEARD ON:	February 12, 2018
METHOD OF PROCEEDING:	By teleconference
APPEARANCES:	D. D., Appellant Bozena Kordasiewicz, Representative for the Appellant Minister of Employment and Social Development, Respondent Sandra Doucette, Representative for the Respondent