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

Citation: *I. B. v. Minister of Employment and Social Development*, 2018 SST 551

Tribunal File Number: AD-17-194

BETWEEN:

I. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: May 18, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, I. B., who is now 60 years old, was born in Poland, where she attended high school and worked in administrative jobs. She and her husband immigrated to Canada in 1993, and they started a janitorial services business, which they ran for the next 20 years. The Appellant reports that her husband's health began to decline, as did hers, leading them to close the business in April 2014.

[3] That month, the Appellant applied for a disability pension under the Canada Pension Plan (CPP), claiming that she could no longer work because of osteoarthritic knee pain, diabetes, hypertension, high cholesterol, and depression. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability was not "severe," as defined by the *Canada Pension Plan* (CPP), as of her minimum qualifying period (MQP), which at that time ended on December 31, 2015.[1] While the Minister acknowledged that the Appellant was subject to limitations, it concluded that she was still capable of some type of work.

[4] Ms. Tomaszewska, the Appellant's legal counsel, appealed the Minister's determination to the General Division of the Social Security Tribunal. On October 27, 2016, the General Division convened a hearing by videoconference but quickly adjourned it when Ms. Tomaszewska raised a concern that the interpreter on hand spoke a dialect of Polish that her client could not understand. The hearing reconvened in person on November 24, 2016, with another interpreter and, in a decision dated November 30, 2016, the General Division dismissed the Appellant's appeal, finding insufficient evidence that she was regularly incapable of pursuing a substantially gainful occupation. It also found that her conditions were controlled with

[1] The Appellant subsequently registered another year of valid earnings and CPP contributions, extending her MQP to December 31, 2016.

medication and that her age and limited English language skills were not impediments to her ability to perform suitable work.

[5] In March 2017, Ms. Tomaszewska requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division had committed numerous errors of fact, law and natural justice.

[6] In a decision dated September 21, 2017, I granted leave to appeal because I saw an arguable case that the General Division had violated the Appellant's right to be heard by aggressively badgering and cross-examining her during the November 24, 2016, videoconference.

[7] At that point, the Appellant submitted an application to rescind or amend the General Division's November 30, 2016, decision. This matter was placed into abeyance pending resolution of the application. The General Division refused the application on February 11, 2018, and I then scheduled a teleconference to hear this appeal.

[8] I have now reviewed the parties' oral and written submissions on all grounds and concluded that none have sufficient merit to warrant overturning the General Division's decision.

PRELIMINARY MATTER

[9] At various times in this proceeding, both before and after my leave to appeal decision, Ms. Tomaszewska has submitted medical documents, many of which were never presented to the General Division.

[10] For reasons that I explained at the outset of the hearing, I have declined to admit new medical evidence for this appeal, although I did consider Ms. Tomaszewska's accompanying written arguments where they were relevant to the issues at hand. According to the Federal Court's decision in *Belo-Alves v. Canada*,[2] the Appeal Division is not ordinarily a forum in which new evidence can be introduced, given the constraints of the *Department of Employment and Social Development Act* (DESDA), which do not give the Appeal Division authority to consider new evidence or entertain arguments on the merits of an appellant's disability claim.

[2] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.

ISSUES

[11] Although I found a reasonable chance of success for only one of the Appellant's reasons for appeal, I did not restrict the scope of the appeal. Accordingly, I entertained and considered submissions on all issues raised by Ms. Tomaszewska.

[12] Under the DESDA, the only grounds of appeal to the Appeal Division are that the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) 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.[3]

[13] The issues before me are as follows:

Alleged breaches of natural justice

Issue 1: Did the General Division display bias toward the Appellant or deny her right to be heard by badgering and aggressively questioning her during the hearing?

Issue 2: Did the General Division consider the Appellant's case prematurely?

Issue 3: Did the General Division mischaracterize the problem with the Polish interpreter at the first hearing?

Alleged error of law

Issue 4: Did the General Division consider the Appellant's real-world employability?

Alleged factual errors

Issue 5: Did the General Division incorrectly find that the Appellant had no limitations in remembering and concentrating?

Issue 6: Did the General Division consider the Appellant's psychiatric condition?

Issue 7: Did the General Division err in finding that the Appellant's psychiatric condition was addressed by medication?

[3] *Department of Employment and Social Development Act* (DESDA), at s. 58(1).

Issue 8: Did the General Division assume that the Appellant's conditions were well managed with medication?

Issue 9: Did the General Division disregard the Appellant's testimony that she is unable to take pain medication due to side effects?

Issue 10: Did the General Division consider injuries from the Appellant's October 2016 car accident?

Issue 11: Did the General Division consider the Appellant's osteoarthritis?

Issue 12: Did the General Division selectively consider the affidavit evidence?

Issue 13: Did the General Division consider misdirected evidence?

Issue 14: Did the General Division ignore evidence that the Appellant's condition was progressively deteriorating?

Issue 15: Did the General Division misstate why the Appellant stopped working?

Issue 16: Did the General Division ignore the Appellant's neck and hand pain?

Issue 17: Did the General Division err in concluding that her condition would likely improve after surgery?

Issue 18: Did the General Division consider the Appellant's earnings history?

Issue 19: Did the General Division consider the Appellant's conditions in their totality?

ANALYSIS

Alleged breaches of natural justice

Issue 1: Did the General Division display bias toward the Appellant or deny her right to be heard?

[14] The Appellant alleges that the presiding General Division member was biased and engaged in behaviour that ignored her psychiatric condition. She claims that the General Division member badgered and aggressively cross-examined her during the hearing of November 24, 2016. As a result, she became anxious and flustered and was unable to present her evidence effectively.

[15] I have listened to the entirety of the audio recording of the hearing and heard little to substantiate Ms. Tomaszewska's account. To be sure, the presiding General Division member asked the Appellant many questions, some of them pointed, but none of them irrelevant. She did so in, it seems to me, a respectful tone, never raising her voice. The Appellant may have felt anxiety—understandably so given the unfamiliar setting and what was at stake for her—but she was able to answer the questions coherently and with no audible signs of distress.

[16] Ms. Tomaszewska took particular issue with the General Division's questions about her client's interactions with Dr. Mech, suggesting that it was illegitimate to ask her how many times she had seen the psychiatrist. I see nothing improper in this question, which pertained to the extent of the Appellant's treatment for her psychological conditions. Ms. Tomaszewska also objected to the General Division member asking the Appellant, "Do you think a psychiatrist can arrive at diagnosis after seeing a person one time?"

[17] In fact, the audio recording indicates that during the relevant exchange,[4] the General Division member did not utter the word "diagnosis" but rather questioned whether Dr. Mech was in a position, at the beginning of their clinical relationship, to pronounce on the Appellant's vocational capacity:

Member:	When were you referred to Dr. Mech?
Appellant:	[Translated] Spring of 2014.
Member:	And what did the psychiatrist say?
Appellant:	After the first appointment with the doctor, he told me I am not fit to work.
Member:	And what year was that?
Appellant:	My first visit with him—spring of 2014.
Member:	What made him reach that conclusion?
Appellant:	He listened to my complaints, he made some notes. I don't know; you have to ask him.

[4] Recording of General Division hearing, at the 1:14:20 mark.

[18] It is true that the General Division member's questions expressed a note of skepticism that Dr. Mech could have reached such a firm conclusion about the Appellant's ability to work after one consultation, but such doubt was well-founded. All other things being equal, it is only natural that the evidence of an assessor who has a deep and intimate knowledge of a patient's history should be given more weight than that of one who has not. Moreover, Dr. Mech's initial report, dated May 14, 2015,[5] offered no opinion on the Appellant's work capacity and made only a "provisional" diagnosis of depression—suggesting that Dr. Mech, contrary to the Appellant's testimony, had not made any definitive findings at that point.

[19] The audio recording indicates that the Appellant detected the General Division's skepticism, but it also shows that she pushed back, telling the member that her question was better directed to Dr. Mech. Again, I do not find that the General Division's line of questioning was aggressive or unreasonable, but even if my perception is wrong, I heard no sign that the Appellant was intimidated or flustered by it.

[20] Ms. Tomaszewska also alleged that the General Division used a "tone of voice that did objectively sound as accusatory" when questioning the Appellant about her back pain. She alleges the General Division member exclaimed, "What back pain? There is nothing in the file about back pain!"

[21] A review of the audio recording tells a slightly different story. When the Appellant began testifying about back pain, the General Division member initiated this exchange:[6]

> Member: Is there any mention of back pain in any of these documents? In her application, she hasn't mentioned back pain, and in her doctors' reports there is no mention of back pain so when you begin to mention back pain I'm getting a little bit surprised. It's there—I'm not saying she doesn't have it—but all I wanted to know is, where is it mentioned?
>
> Ms. Tomaszewska: I did not see back pain myself, and it is my submission that perhaps they are not very

[5] GD5-5.
[6] Recording of General Division hearing, 1:02:30.

	competent and did not realize how important every single word is.
Member:	Is there anything mentioned by the doctor of back pain?
Ms. Tomaszewska:	No, I read the file and I made notes and in my last summary, submissions, I referred to the documents that I felt were relevant, but I would need to take time out to review that to pinpoint any specific document.
Member:	But you said you didn't inquire anything about back pain?
Ms. Tomaszewska:	The back pain?
Member:	Yes. I mean, because it's something we are really dwelling on now. If we are dwelling on it now, there should be something in the file, and some doctor should have made some mention of back pain.

[22] The General Division member's questions were directed to the Appellant's representative. Throughout, the member's tone was measured, and I detected no note of aggression or hostility in her voice. In my view, she was simply asking a reasonable question: If the Appellant was testifying that her back pain was severe, why did there appear to be no mention of it in the file?

[23] Finally, Ms. Tomaszewska objected to the General Division member's observation at the hearing that there were "no objective findings or tests to confirm [the Appellant's] conditions." This remark, Ms. Tomaszewska alleged, was inappropriate and caused her client anxiety because she perceived it to be an accusation of wrongdoing.

[24] Again, I find nothing to support this ground of appeal. My review of the recording indicates that, while the General Division member never used the phrase "objective evidence," she did ask Ms. Tomaszewska[7] whether there were on file any MRIs, x-rays or diagnostic reports to support her client's complaints of pain during the MQP. Ms. Tomaszewska conceded that

[7] Recording of General Division hearing, 44:00.

there were not. Later,[8] the General Division asked the Appellant whether, since 1996, she had seen a specialist or undergone an MRI, x-ray or CT scan for her back pain. The Appellant replied no to all questions. The General Division member then added: "Just remember, I am not disputing that you have these pains; it is my duty to try to find out as much information as I can to help me with my decision… and I'm not judging you." To this, the Appellant replied, "I understand."

[25] The General Division member's questions sought to clarify the Appellant's testimony about her medical conditions and the treatment she had received for them. In my view, the General Division's attempts to determine whether the Applicant's testimony was corroborated by the documentary evidence were meant to elicit relevant information and fell safely within its role as the trier of fact. Again, I heard nothing objectionable in the General Division member's conduct during the hearing. Ms. Tomaszewska argued that, whatever my interpretation of the audio recording, what mattered was the Appellant's perception that the General Division member was threatening. However, I do not think that the question of whether a claimant has been treated fairly can depend purely on their subjective view of the matter.

[26] In any event, I note that Ms. Tomaszewska never raised any objection to the style or substance of the General Division's questioning until her appeal to the Appeal Division. Ms. Tomaszewska conceded as much in her oral submissions to me, and she did not have an adequate explanation for why she had let the matter pass at the General Division. One must assume that, had Ms. Tomaszewska believed that her client's right to procedural fairness had been significantly compromised, she would have said something about it during the hearing before the General Division.

[27] I agree with the Minister that Ms. Tomaszewska's failure to raise a timely objection about the General Division's behaviour constitutes an implied waiver of the right to argue that her client was a victim of bias or denied her right to be heard. Any apprehension of a breach of

[8] Recording of General Division hearing, 1:04:25.

natural justice must be raised as early as is practicable. According to the most relevant case law,[9] the Appellant is now barred from asserting such an argument.

Issue 2: Did the General Division consider the Appellant's case prematurely?

[28] The Appellant's representative suggests that the General Division's decision was "unsolicited and premature" because it came prior to the Appellant's MQP, which ended on December 31, 2016. In her words,

> claimant was only seeking to address and review prior decisions rendered by CPP Department pertaining to MQP in April 2014 (as per date of Medical Certificate of April 4, 2014 or, what was expressed during the hearing at most on the day when Psychiatric Certificate was issued May 2015[…].

[29] It appears that the Appellant's representative is confused about the nature and purpose of the MQP. The CPP is explicit in requiring claimants to show that they became disabled on or before the end of the MQP; one cannot pick and choose the date to be assessed for disability—even if the MQP is current. The MQP is based on a formula tied to the claimant's earnings and contribution history, and whether their disability is "severe and prolonged" is ordinarily assessed as of the final day of that period. If, as was the case in the Appellant's appeal, the end of the MQP lies in the future, then "severe and prolonged" is assessed as of the day of the medical adjudication or Tribunal hearing, as the case may be.

[30] This was done at every step of the Appellant's appeal process. The Appellant's representative suggests there was an "apparent error and discrepancy" in either the Minister's or the General Division's respective determinations of the MQP, because its end date changed over time, going from December 31, 2015, in the Minister's initial and reconsideration decision letters,[10] to December 31, 2016, in the Minister's submissions to the Tribunal[11] and the General Division's decision. However, this revision was not a product of incompetence, as the Appellant implies, but merely a reflection of an update to her record of earnings sometime in early 2015,[12]

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[9] *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191; *Benitez et al v. Minister of Citizenship and Immigration*, 2006 FC 461.
[10] Initial decision dated August 11, 2014, and reconsideration decision dated March 18, 2015.
[11] Submissions of the Minister dated November 20, 2015.
[12] Compare records of earnings generated on October 27, 2014, (GD2-60) versus June 16, 2015 (GD2-5).

which registered valid earnings and contributions in 2014, thereby extending her MQP by another year.

[31] This issue was discussed at the hearing before the General Division. At 7:30 of the audio recording, the member asks the Appellant's representative whether she agreed that the MQP was December 31, 2016. After some initial hesitation, Ms. Tomaszewska did so, although she emphasized that her client submitted her application in April 2014. The General Division member then explained that the Appellant was required under the law to show that she was disabled as of the end of the MQP and continuously thereafter, adding, "So don't get confused." At 24:10, Ms. Tomaszewska apologized for what she described as her "error" regarding the MQP.

[32] The record shows that Ms. Tomaszewska raised no real objection to the MQP date. If she was uncomfortable with holding the hearing prior to the end of the MQP, it was open to her to request an adjournment in the proceedings until after December 31, 2016. She never did so. Indeed, in July 2016, she returned a hearing information form to the Tribunal indicating her client's readiness to proceed.

[33] The appeal cannot succeed on this ground.

Issue 3: Did the General Division mischaracterize the problem with the Polish interpreter at the first hearing?

[34] The Appellant's representative takes issue with paragraph 4 of the General Division decision, alleging that the General Division committed a factual error by mischaracterizing a problem with the Polish interpreter who was on hand for an abortive hearing on October 27, 2016. The Appellant's representative maintained that she objected to the interpreter, not because he spoke the wrong dialect of Polish, but because he could not, or would not, accurately translate a commonplace term.

[35] I see no merit in this argument, which does not appear to raise a material issue. Whatever the perceived deficiency in the first interpreter, the record indicates that the General Division rightly adjourned the hearing so that a second interpreter, one more acceptable to the Appellant, could be made available. The General Division's error, if it was that, in documenting this episode

was at most minor, and I cannot see how it prejudiced the Appellant's interests or affected the outcome of her appeal.

Alleged error of law

Issue 4: Did the General Division consider the Appellant's real-world employability?

[36] Ms. Tomaszewska submits that the General Division failed to properly apply *Villani v. Canada*,[13] which requires a decision-maker, in assessing disability, to consider the claimant as a whole person, including background factors such as age, education, language proficiency, and work and life experience. In essence, Ms. Tomaszewska argues that the General Division did not direct its mind toward the Appellant's real-world employability.

[37] I see little merit in this submission, which amounts to a request to reassess the evidence as it pertains to the Appellant's personal characteristics. I note the words of the Federal Court of Appeal in *Villani*:

> […] as long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[38] In paragraph 30 of its decision, the General Division correctly summarized the principles articulated by *Villani* and, in paragraph 48, undertook an analysis of the impact of the Appellant's impairments in the context of her age, education, and work experience:

> The Tribunal has considered the *Villani* factors and acknowledges that the Appellant has limited English knowledge and that at 58 years of age given her limited English and transferable skills it would be difficult for her to retrain to another job. However the medical evidence currently on file is not supportive of a severe medical condition that affects her ability to work at some suitable job.

[13] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

[39] This passage indicates that the General Division was aware of the challenges faced by the Appellant in the labour market but was unconvinced that her impairments were serious enough to prevent her from pursuing some form of employment. I see no reason to overturn the General Division's assessment, where it has noted the correct legal test, taken the Appellant's background into account, and arrived at a defensible conclusion. While she may not agree with the outcome, it emerges from what strikes me as a good-faith attempt to assess her employability using the *Villani* principles.

Alleged errors of fact

Issue 5: Did the General Division incorrectly find that the Appellant had no limitations in remembering and concentrating?

[40] The Appellant alleges that the General Division erred in finding that "she did not report any functional limitations in remembering and concentrating." She then listed several instances in the record that referred to her cognitive issues.

[41] I see no merit in this submission. The passage quoted by the Appellant comes from paragraph 12 of the General Division's decision and is part of a summary of her answers to the questionnaire that accompanied her CPP disability application. Inspection of that document indicates that the General Division was correct in noting that the Appellant did not report limitations with "remembering or concentrating."

Issue 6: Did the General Division consider the Appellant's psychiatric condition?

[42] The Appellant alleges that the General Division mentioned her psychiatric referral but did not analyze Dr. Mech's evidence that she was disabled.

[43] I must disagree. The General Division summarizes both of Dr. Mech's reports[14] in paragraph 20 and 21 of its decision, noting that the psychiatrist had diagnosed the Appellant with persistent depressive disorder and assigned her a Global Assessment of Functioning score of 45. Later, in its analysis proper, the General Division relied on these findings in coming to its decision.

[14] Reports of Dr. Mech dated May 14, 2015, and August 12, 2015.

Issue 7: Did the General Division err in finding that the Appellant's psychiatric condition was addressed by medication?

[44] The Appellant alleges that the General Division "failed to acknowledge that the evidence in the file does not indicate that the medication prescribed for psychiatric condition makes her asymptomatic."

[45] I am not satisfied that this is a valid ground of appeal. The General Division did not suggest that the Appellant was "asymptomatic," only that she had residual capacity to work. In paragraph 47, the General Division referred to the Appellant's ongoing use of antidepressants, which suggested to it, in the absence of any other form of treatment, something less than a severe psychiatric condition. The General Division, as trier of fact, is entitled to weight the evidence before it within reasonable limits, and I do not see an error here, much less one that is "perverse, capricious or made without regard for the material before it."

[46] The General Division found "no indication that the [Appellant's] medication has failed to provide her with relief from her depressive symptoms," but I fail to see how this finding was inconsistent with the evidence. Dr. Mech apparently prescribed the Appellant with Pristiq just before his retirement, and the Appellant testified that she was taking duloxetine (trade name Cymbalta) at the time of the hearing. Every drug has side effects of some kind, but it is reasonable to assume, as the General Division has done here, that a physician would not recommend a medication unless its expected benefits outweighed its costs.

Issue 8: Did the General Division assume that the Appellant's conditions were well managed with medication?

[47] The Appellant alleges that the General Division erred in assuming that her conditions were "well-managed" with medication.

[48] Here, I fail to see an erroneous finding of fact as it is defined by s. 58(1)(*c*) of the DESDA. In its decision, the General Division did not, in fact, use the phrase "well-managed" in connection with the Appellant's medical conditions, although it did find, after considering the evidence, that none of them, individually or in combination, prevented her from regularly pursuing a substantially gainful occupation. Again, it is reasonable to assume that doctor-prescribed medications produce a net benefit, but the General Division's decision is not based on

a finding, as the Appellant would have it, that "all of her physical and psychiatric symptoms" were managed. It is true that, at various points in its decision, the General Division noted that the Appellant's cholesterol, hypertension and diabetes were "controlled" with medication, but my review of the record indicates that these findings were amply supported by the evidence.

Issue 9: Did the General Division disregard the Appellant's testimony that she is unable to take pain medication due to side effects?

[49] The Appellant alleges that the General Division failed to consider her evidence that she is unable to take some pain medication due to side effects.

[50] I disagree. At paragraph 13 of its decision, the General Division documented the Appellant's testimony that she had been prescribed Tylenol No. 3 in the past but that she had stopped taking it due to severe side effects.

Issue 10: Did the General Division consider injuries from the Appellant's October 2016 car accident?

[51] The Appellant alleges that General Division failed to consider evidence that her back pain was exacerbated in an October 11, 2016, motor vehicle accident (MVA).

[52] I agree with the Minister that this ground of appeal cannot succeed. The MVA occurred more than a month before the scheduled hearing date. In the weeks leading up to the hearing, neither the Appellant nor her representative submitted information about the MVA. It was open to the Appellant to request an adjournment to allow additional time in which to investigate and treat her injuries and to submit medical evidence relating to them. She did not do so. At the hearing, the Appellant and her representative did not raise the MVA, except for a brief mention of it (at 1:44:05 of the audio recording) in response to the General Division's question about why she was afraid of driving. Although she had an opportunity to describe how the accident aggravated her injuries, she did not do so, and the General Division cannot be faulted for not discussing the matter in its decision.

Issue 11: Did the General Division consider the Appellant's osteoarthritis?

[53] The Appellant alleges that the General Division erred in omitting to mention the Appellant's osteoarthritis diagnosis in paragraph 48 of its decision.

[54] I see no basis for this argument. While the paragraph at issue does not contain the word "osteoarthritis," it is nonetheless concerned with the Appellant's joint pain. In any case, the General Division refers to arthritis (as well as the Appellant's pain symptoms) in numerous other places throughout its decision.

Issue 12: Did the General Division selectively consider the affidavit evidence?

[55] The Appellant alleges that the General Division selectively considered her daughter's and her own testimony and affidavits to find that she was not disabled as of the MQP.

[56] I am unconvinced by this argument. First, there is the general presumption, set out by the Federal Court of Appeal in *Simpson v. Canada*,[15] that a decision-maker is presumed to have considered all the evidence and need not refer in its reasons to each and every item of information before it. Second, the Appellant has not specified what material aspect of her daughter's evidence was ignored or distorted by the General Division. In paragraph 40 of its decision, the General Division wrote:

> In September 2015, the Appellant and her daughter both stated in affidavits that her husband was extremely sick in 2013 and required the help of the Appellant and her daughter to help in completing work assignments. The Appellant herself was sick at the time, but she was able to work and continued to work until the couple closed the business in 2014 due to increased difficulty with the Appellant performing work on her own and due to her own medical issues. In fact by the time the business closed, she herself began to rely more and more on her daughter to perform the heavier tasks. Despite that, there is no documented medical report of visits to her doctor with respect to her worsening condition. Inability to perform her heavy labour job however does not transcend to inability to perform work which would have been more suitable to the Appellant's limitations.

[57] I have examined the supporting affidavits[16] and fail to see how the above passage misrepresents their essential contents. The Appellant takes particular issue with the final sentence, claiming that there was never any evidence that she did "heavy labour," but I do not see a material error here. It is clear that, in using this term, the General Division is referring to the more strenuous duties, such as prolonged mopping and vacuuming, that the Appellant used to

[15] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[16] GD4-15 and GD4-17.

perform in her cleaning business but was forced to give up over time. I also note that the Appellant herself drew a distinction in her affidavit, between these tasks and "light" duties, such as dusting. In this context, I cannot find that the General Division mischaracterized the Appellant's previous activities by describing them as "heavy."

Issue 13: Did the General Division consider misdirected evidence?

[58] The Appellant suggests that the General Division may have acted improperly by relying on the above-mentioned affidavits, which were prepared and submitted pursuant to her late husband's disability application and appended, by mistake, to the Minister's written submissions.

[59] I cannot see any basis for appeal on this submission. As the Minister notes, this issue was addressed at the hearing before the General Division. At 16:55 of the audio recording, the parties discussed at length the package of documents labelled GD4 in the record. Ms. Tomaszewska stated that she was uncertain whether the version of GD4 that was before the General Division contained the two affidavits, but if it did, she consented to them being considered for the Appellant's appeal.

[60] I note that GD4 contains a cover letter dated September 24, 2015, and signed by Ms. Tomaszewska[17] indicating that she was filing affidavits from the Appellant and her daughter. The subject line of this letter indicated that they were related to the Appellant's appeal, and not her husband's. The affidavits themselves were clearly marked "Re: CPP Disability Claim of I. B.."

[61] I see no indication in the record that an affidavit pertaining to the late Mr. B. was ever placed in the Appellant's file or that, if so, it was ever removed. Furthermore, the General Division member saw no sign of such an affidavit either, and she is clearly heard in the recording saying that, if she ever came across it, she would promptly disregard it.

Issue 14: Did the General Division ignore evidence that the Appellant's condition was progressively deteriorating?

[62] The Appellant submits that the General Division ignored evidence showing that she had been suffering from a progressively deteriorating condition. She alleges that the General

[17] GD4-18.

Division erred when it found, in paragraph 40, “no documented medical report of visits to her doctor respecting worsening of her condition.”

[63] I see little merit in this submission. Paragraph 40 is concerned with the Appellant’s condition in the period leading up the closure of her business in April 2014. A review of the evidentiary record indicates that the General Division’s finding was not wrong. It is true that Dr. Praglowski, in the medical report accompanying the Appellant’s CPP disability application, described her arthritis as “progressively worsening,” but this opinion did not come until April 2014. The family physician used similar terminology in an August 2016 report, but neither this nor any of her other evidence pertained to the months and years in which the Appellant claimed to be struggling to maintain her capacity.

Issue 15: Did the General Division misstate why the Appellant stopped working?

[64] The Appellant alleges that the General Division erred, in paragraph 31, when it stated that she stopped working “due to the business closing down and due to her medical conditions.” She objects to the implication that the closure of the business was unrelated to her medical condition.

[65] I see no error here. The General Division did not suggest that the closure of the business was unrelated to the Appellant’s medical condition. Moreover, there is evidence on the record that the Appellant’s medical condition was not the only factor behind the closure of the cleaning business. She testified that there was also a concurrent decline in her husband’s health, which shifted to her an additional workload that she ultimately could not bear. None of this was contradicted by the information in her affidavit or that of her daughter.

Issue 16: Did the General Division ignore the Appellant’s neck and hand pain?

[66] The Appellant alleges that the General Division omitted her neck and hand pain in paragraph 31, when it wrote: “At the hearing of this appeal, she testified that her disabling conditions included knee and back pain both of which affect her functionality.”

[67] I see no error here. It is true that the General Division’s decision did not address neck or hand pain, but that is because these symptoms played a secondary role in the Appellant’s disability claim. My review of the audio recording indicates that the Appellant talked about her

neck and hand pain far less than her knee and back pain, among other conditions. At 55:30, when the Appellant was asked to list her physical symptoms, she cited severe knee pain, back pain, muscle pain, dizziness, and diabetes. She did not mention neck or hand pain. In any event, as noted above, the General Division must be presumed to have considered all of the evidence before it.

Issue 17: Did the General Division err in concluding that her condition would likely improve after surgery?

[68] The Appellant alleges that the General Division erred when it found, in paragraph 36, that her condition would likely improve after surgery. She maintains that there was nothing to this effect in the medical record.

[69] I see no error here and certainly not one that meets the criteria of s. 58(1)(*c*) of the DESDA. As the General Division correctly notes, future surgery is indeed contemplated by Dr. Praglowski in her August 2016 letter. In that letter, the family physician writes, "I believe one of her knees was replaced with very limited improvement… she is expected to have more pain and most likely more surgical intervention." Although Dr. Praglowski is not an orthopedic surgeon, she is nevertheless a trained medical professional who is familiar with the Appellant's history. It was open to the General Division to infer from Dr. Praglowski's comments that surgery offered a reasonable prospect for improvement in the Appellant's condition.

Issue 18: Did the General Division consider the Appellant's earnings history?

[70] The Appellant alleges that the General Division did not consider her CPP contributions from 1995 to 2014, which confirmed, in her view, that she is a hard worker.

[71] I do not see an argument on this point. In its decision, the General Division does note, in paragraph 11, the nearly 20 years that the Appellant and her husband spent working in their cleaning business. Ultimately, though, the length of her work history is not relevant to her claim; what matters is whether she was disabled, according to specific legislative criteria, within the MQP.

Issue 19: Did the General Division consider the Appellant's conditions in totality?

[72] The Appellant alleges that the General Division failed to "group" her symptoms and analyze them "holistically."

[73] Here, the Appellant appears to be alluding to the principle, set out most prominently in *Bungay v. Canada*,[18] that all of a claimant's possible impairments affecting employability are to be considered, not just the main impairments. Paragraph 48 is the General Division's attempt to sum up the Appellant in her entirety:

> It is acknowledged that she may have a worsening of her pain with advanced age, however there is no supporting objective medical evidence to suggest that her knee, back or shoulder pain or her diabetes, hypertension, high cholesterol and mental health conditions singularly or in combination are so severe as to preclude her from working at a job suitable to her limitations.

[74] The General Division goes on to consider the Appellant's impairments in the context of her *Villani* factors before concluding:

> On the totality of all of the medical evidence currently on file, the evidence does not support that the Appellant suffers from a severe medical or psychological condition or conditions, which singularly or in combination make her incapable regularly of pursuing any substantially gainful occupation as of the date of hearing this appeal and continuously thereafter.

[75] In my view, the General Division fulfilled its obligation to consider the Appellant and her medical conditions in their totality.

CONCLUSION

[76] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds enumerated in s. 58(1) of the DESDA.

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

[77] This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	May 3, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	I. B., Appellant Monika Tomaszewska, Representative for the Appellant Stéphanie Pilon, Representative for the Respondent Peter Swiatlogorski, Interpreter of Polish Jean-François Cham, Observer