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

Citation: *J. R. v. Minister of Employment and Social Development*, 2018 SST 762

Tribunal File Number: AD-17-418

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: July 25, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] In July 2012, the Respondent, J. R., was injured in a head-on collision with another vehicle. She was hospitalized for three days with multiple skeletal injuries, including fractures to her wrists and right foot and ankle. She developed pain in her right thigh and left knee and began experiencing problems with her mood and sleep. The accident aggravated her pre-existing back pain. She had several surgeries to her right ankle and left wrist, but she continues to experience chronic, widespread pain. The Respondent has been diagnosed with chronic pain syndrome, a mood disorder, and depression, amongst other things.

[3] The Respondent has not worked since her motor vehicle accident. She claims that she is severely disabled. She applied for a Canada Pension Plan disability pension in January 2015.

[4] The Appellant, the Minister of Employment and Social Development, denied the Respondent's application for a disability pension initially and upon reconsideration. On appeal of the Appellant's reconsideration decision, the General Division determined that the Respondent had a severe and prolonged disability in August 2013, when one of her physicians determined that "her pain is not improving and is chronic." The General Division deemed the Respondent disabled in October 2013, pursuant to s. 42(2)(*b*) of the *Canada Pension Plan*. Payments were to commence as of February 2014.

[5] The Appellant appealed the General Division's decision, alleging that it had given imprecise reasons, had erred in law, and had based its decision on erroneous findings. I granted leave to appeal because I was satisfied that there was an arguable case that the General Division erred in law. For the purposes of the leave application, I determined that it was unnecessary for me to consider other alleged errors that might have been committed by the General Division. In the appeal before me, I must decide whether the General Division did err.

[6] For the reasons that follow, I find that the General Division erred under s. 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal is therefore allowed.

ISSUES

[7] Based on the submissions before me, the issues are as follows:

1. Did the General Division err in law by:
    a. failing to ensure that the Respondent provided corroborative medical evidence?
    b. failing to consider "appropriate common law principles" when assessing whether the Respondent's disability was "severe" and "prolonged?"
2. Did the General Division base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?
3. Were the reasons of the General Division sufficient?

GROUNDS OF APPEAL

[8] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] The Appellant submits that the General Division erred under ss. 58(1)(*b*) and (*c*) of the DESDA.

ANALYSIS

Issue 1: Did the General Division err in law?

(a) Did the General Division err in law by failing to ensure that the Respondent provided corroborative medical evidence?

[10] The Appellant argues that it was insufficient to find the Respondent severely disabled on the basis of her testimony and that the General Division failed to identify any medical reports or any other evidence that corroborated the Respondent's testimony that she had a severe and prolonged disability by the end of her minimum qualifying period (MQP) of December 31, 2013.

[11] The Appellant argues that there simply was no medical documentation to suggest that the Respondent could be severely disabled by the MQP. For instance, regarding the Respondent's left wrist, one orthopaedic surgeon was of the opinion that she was "doing quite well with respect to pain," he "lifted any restrictions in terms of … motion and activity," and said "she can progress as tolerated with all range of motion."[1]

[12] Furthermore, as the Appellant argued before the General Division, the Respondent reported on March 20, 2014 that she was recovering well from surgery[2] and on April 3, 2014,[3] that she was not experiencing any ankle pain. On May 1, 2014, Dr. Sanders reported that the Respondent's stability was excellent and that the frequency of her falls had significantly improved,[4] and Dr. Philips reported on August 14, 2014, that her pain and instability had largely

[1] See report dated December 4, 2013, of Dr. Victoria Smith, orthopaedic surgeon, at GD2-78.
[2] See clinic report dated March 20, 2014, of Dr. Duncan Cushnie, orthopaedic surgeon, at GD2-73.
[3] See clinic report dated April 3, 2014, of Dr. Cushnie, orthopaedic surgeon, at GD2-72.
[4] See report dated May 1, 2014, of Dr. David Sanders, orthopaedic surgeon, at GD2-71.

resolved.[5] The Appellant argued that there was no obvious pathology to explain the Respondent's pain.

[13] The Appellant argues that the General Division failed to explain how any of this evidence could support its conclusion that the Respondent's disability was severe and prolonged by December 31, 2013.

[14] Notwithstanding these passages, I see that, at paragraph 45, the General Division relied on reports dated August 6, 2013 and October 28, 2013, as well as a report dated July 2, 2014, to conclude that the Respondent's disability was severe by the end of her MQP.

[15] I note also that the Respondent continued to report that even after the fractures had healed, she had ongoing pain in her right ankle and left wrist. The General Division made the same observation.

[16] In the clinic report of October 28, 2013,[6] the Respondent described a "significant amount of pain," particularly with increased activity, that was ongoing for quite a few months. The physician was of the opinion that it was "very apparent that the pain and discomfort that this right ankle injury is causing for her is very distressing." The Respondent had noted some instability while walking and reported that she had a few incidents in which her ankle had given out. The Respondent expressed enthusiasm to undergo any type of procedure to resolve her symptoms, but the physician recommended exhausting more conservative options. The Respondent reported that she would be undergoing another surgery on her left wrist in February. The physician deferred seeing the Respondent again until after she had recovered from her wrist surgery and tried an ankle brace to address the instability and potentially help with the pain.

[17] The Respondent was seen again for her right ankle in January 2014. She had been wearing the lace-up type brace for the past couple of months and had noted some improvement in symptoms when she was wearing a brace, but when she removed it, she noticed immediate recurrence of her ankle instability. She still had some "very mild discomfort." The Respondent

[5] See report dated August 14, 2014, of Dr. Joel T. Phillips, orthopaedic surgeon, at GD2-69.
[6] See report dated October 20, 2013, of Alicia Kerrigan, clinical clerk for Dr. Sanders, at GD2-79 to 80.

was quite frustrated with her condition and was eager to proceed with further surgery on her right ankle.[7]

[18] The Respondent underwent surgery on her right ankle on March 3, 2014. On March 20, 2014, she appeared to be recovering well from her surgery.[8] On May 1, her stability was excellent although she continued to have pain, which was probably "slow to come along."[9] As the General Division noted, Dr. Sawa reported that the Respondent could have been experiencing chronic pain as a result of the initial fracture. When she saw him on August 14, 2014, Dr. Phillips wrote that the Respondent stated that her pain and instability symptoms had largely resolved; however, she still had pain. The Respondent reportedly stated that the pain was sharp and unpredictable, occurring both at rest and with activity. She experienced this pain "quite frequently, and it seem[ed] to be causing her significant distress." She was not taking any medications and was noted to be doing physiotherapy twice per week. Dr. Phillips was unable to identify any obvious pathology to account for the ongoing pain.

[19] The General Division found the August 6, 2013; October 28, 2013; and July 2, 2014 reports persuasive.

[20] The General Division also found the testimony of witnesses persuasive. The General Division found that these medical reports and witnesses' evidence supported the Respondent's testimony that she was severely disabled by December 31, 2013. It is clear also that the General Division did not view the evidence selectively and that it considered the preponderance of the evidence in assessing whether the Respondent could be found severely disabled by December 31, 2013. While the General Division certainly could have come to a different conclusion on the basis of the evidence before it, it cannot be said that the General Division failed altogether to identify any medical reports or other evidence that corroborated the Respondent's testimony.

(b) Did the General Division err in law by failing to consider "appropriate common law principles" when assessing whether the Respondent's condition was "severe" and "prolonged?"

[7] See clinic report dated January 30, 2014, of Dr. Ryan Degen, at GD2-77.
[8] See clinic report dated March 20, 2014, of Dr. Cushnie, at GD2-73.
[9] See clinic report dated May 1, 2014, of Dr. Sanders, at GD2-71.

[21] The Appellant argues that the General Division failed to apply relevant case law in its assessment of whether the Respondent was severely disabled.

Villani

[22] In *Villani v. Canada (Attorney General)*,[10] the Federal Court of Canada held that the statutory test for severity requires some degree of reference to the "real world." The test also requires a decision-maker to consider the particular circumstances of a claimant, such as age, education level, language proficiency, and work and life experience. In *Garrett v. Canada (Attorney General)*,[11] the Federal Court of Appeal held that a tribunal commits an error of law when it fails to conduct an analysis in accordance with the principles set out in *Villani*.

[23] The Appellant submits that, although the General Division cited *Villani* and listed the Respondent's characteristics, such as her age, language proficiency, education, and work experience, it failed to assess how they impacted her capacity regularly of pursuing any substantially gainful occupation, if at all. The Appellant contends that these characteristics in fact enhanced the Respondent's employability and "militate[d] against a finding of disability."

[24] At paragraph 42, the General Division acknowledged that the severe criterion must be assessed in a real world context and that this means that when it is deciding whether a claimant's disability is severe, it must keep in mind such factors as age, level of education, language proficiency, and past work and life experience. The General Division wrote that, in concluding that the Respondent's disability was severe, it had considered the fact that she is very young, well-educated, fluent in the English language, and had worked as a hairstylist, office worker, and payroll administrator.

[25] Although the General Division stated that it had considered the Respondent's circumstances when it assessed the severity of her disability, it did not describe how they impacted her capacity regularly of pursuing any substantially gainful occupation, how they diminished her employability, or why it considered that they would render her severely disabled. It did not consider how such factors as her age, education, language, and work experience,

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[10] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[11] *Garrett v. Canada (Attorney General)*, 2005 FCA 84.

together with her medical conditions, affected her capacity regularly to pursue a substantially gainful occupation in a "real world" context.

[26] By failing to show how it assessed the Respondent's particular circumstances in a real-world context, the General Division's analysis fell short of meeting the legal requirements set out under *Villani*.

Lalonde* and *Kaminski

[27] In *Lalonde v. Canada (Minister of Human Resources Development)*[12] and *Kaminski v. Canada (Social Development)*,[13] the Federal Court of Appeal determined that a "real world" assessment requires a decision-maker to consider whether a claimant's refusal to undergo treatment is unreasonable and what impact that might have on their disability status, should the refusal be considered unreasonable.

[28] The General Division wrote at paragraph 48 that it was satisfied that the Respondent had made "genuine efforts to improve her health." It noted the treatment that the Respondent had undergone, including six surgeries. The General Division wrote that it noted the "extreme efforts that [the Respondent] and her family have taken to attend the recommended treatment, without significant improvement." The General Division also noted that the Respondent had not had the benefit of attending a multi-disciplinary facility because none were available where she resided.

[29] The Appellant argues that paragraph 48 merely represents a restatement of the facts regarding the Respondent's treatment. The Appellant argues that the General Division failed to determine whether the Respondent's refusal to pursue all treatment recommendations was reasonable and whether that refusal had any impact on her disability status. In particular, the Appellant claims that there was ample evidence that numerous pain relief medications remained available to the Respondent in 2013 and 2014. The Appellant makes particular reference to Dr. Macaluso's clinic note dated August 6, 2013. He wrote that part of the management plan was to start the Respondent on medications focused on restoring sleep and helping with pain. They decided on Nortriptyline 10 mg at bedtime, which could be increased as tolerated. He also

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[12] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211, at para. 19.
[13] *Kaminski v. Canada (Social Development)*, 2008 FCA 225, at paras. 14 to 16.

provided a prescription for Pennsaid, specifically trying to focus on the ankle and wrist region.[14] He increased the dosage to Nortriptyline 40 mg and Pennsaid 40 drops for pain by September 2013.[15]

[30] I note, however, that in his most recent report, dated September 19, 2013, Dr. Macaluso noted that the Respondent had tried Pennsaid, but "did not find that it really helped significantly" and that the Nortriptyline was weaned up to 40 mg a night "without any significant benefit."[16] Given Dr. Macaluso's most recent report, I find that neither Nortriptyline nor Pennsaid remained outstanding options.

[31] The Appellant also relies on Drs. Sawa's and Sanders' report suggesting that other pharmacological options remained open to the Respondent. On July 2, 2014, the Respondent saw Dr. Sawa, a resident for orthopaedic surgeon Dr. Robert Richards. Dr. Sawa advised the Respondent to continue with non-steroidal anti-inflammatory drugs for pain as needed.[17] On August 14, 2014, Dr. Joel Phillips, a resident for Dr. Sanders, observed that the pain in the Respondent's right ankle seemed to be causing her "significant distress." He also noted that she was not taking any medications at that time.[18] The Respondent also disclosed in her questionnaire for disability benefits that she was not taking any medications.[19] Furthermore, at the hearing before the General Division in February 2017, the Respondent testified that she had tried several pain relief medications, but was not taking any pain medications at that time.[20] Finally, in his medical-legal chronic pain assessment, Dr. Mula made several recommendations that included trialing several medications, including Tylenol and such antidepressants as Nortriptyline or Cymbalta, provided that there were no contraindications.[21]

[32] It is unclear whether Dr. Mula was aware that the Respondent had already undergone a trial of Nortriptyline without any appreciable benefit. Notably, Dr. Mula recommended that the

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[14] Clinic note dated August 6, 2013, of Dr. Steven Macaluso, physiatrist.
[15] Consultation report dated September 5, 2013, of Dr. Macaluso.
[16] Clinic note dated September 19, 2013, of Dr. Macaluso
[17] Clinic note dated July 2, 2014, of Dr. Kathryn Sawa.
[18] Clinic note dated August 14, 2014, of Dr. Joel Phillips.
[19] Questionnaire for Disability Benefits, completed on January 12, 2015, at GD2-16.
[20] Audio recording of General Division hearing, February 24, 2017, from approximately 31:51 to 39:50.
[21] Medical-legal chronic pain assessment, dated July 7, 2015, of Dr. David Mula, primary care physician, GD1-20 to 45 / GD2-35 to 57.

Respondent participate in a comprehensive, multi-disciplinary pain management program and a trial of nerve block injections / trigger-point injections under the care of a pain specialist.

[33] The Appellant asserts that if the Respondent's pain was so severe, it would have been reasonable to expect that she would have exhausted all treatment recommendations and that she would have tried or regularly taken the recommended pain relief medication in an effort to alleviate the severity of her pain, unless her chronic pain was resistant to treatment. However, because the Respondent refused to try other pain relief medications, the Appellant argues that either this refusal was unreasonable or the Respondent's pain could not have been that severe.

[34] The Respondent claims that she has tried every treatment recommendation.

[35] The Respondent has undergone a vast treatment regimen and seen multiple specialists, some at the request of her insurer. Although she saw Dr. Mula for medical-legal purposes, he also provided treatment recommendations, including a multi-disciplinary approach. Although the General Division noted that there were no multi-disciplinary treatment facilities where the Respondent resided, it failed to consider whether it was reasonable for her not to pursue such treatment or any other recommendations and what impact that refusal had on her disability status.

[36] The General Division should have examined what treatment recommendations remained outstanding, whether the Respondent had been compliant with those treatment recommendations, whether it was reasonable for her to have refused those treatment recommendations, and what impact any refusal might have had on her disability status. It was insufficient for the General Division to state that there were no multi-disciplinary facilities available where the Respondent resided because it may have otherwise found that the Respondent should have travelled to these facilities; that is, it could have found that her refusal was unreasonable. However, without undertaking such an assessment, the General Division erred in law in failing to apply the principles set out in *Lalonde* and *Kaminski*.

Inclima

[37] The Appellant argues that the General Division also failed to apply *Inclima v. Canada (Attorney General)*.[22] There, the Federal Court of Appeal held that claimants seeking to bring themselves within the definition of severe disability must not only show that they have 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. The Appellant claims that the General Division failed to examine whether the Respondent had undertaken any efforts at obtaining and maintaining employment, and if so, whether those efforts had been unsuccessful because of her health.

[38] I am not persuaded by these arguments because the General Division found that the Respondent in this case did not exhibit any residual work capacity. An *Inclima* assessment is triggered only after the trier of fact is satisfied that there is evidence of work capacity. If the General Division had determined that the Respondent exhibited work capacity, then it would have been required to apply *Inclima*.

Monk

[39] The Appellant submits that the General Division failed to apply *Monk v. Canada (Attorney General)*[23] in determining whether the Respondent's attempt at a return to work constituted a "failed work attempt." The Federal Court held that a failed attempt would be dependent on the facts of a particular case; it stated that a return to work that lasted only a few days would be a failed attempt, but two years of earnings consistent with what had been earned before could not be considered a failed attempt.

[40] The Appellant notes that the Respondent testified before the General Division that she had attempted to return to work as a receptionist in a salon for approximately 30 minutes but she was unable to handle it. The Appellant argues that the General Division should have examined whether this attempt could be considered a "failed work attempt."

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[22] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[23] *Monk v. Canada (Attorney General)*, 2010 FC 48, at para. 10.

[41] I do not think that this particular argument assists the Appellant. The Respondent's attempt to work as a receptionist for 30 minutes would seem to fall within the failed attempt category described in *Monk*. Nevertheless, if the Respondent's work as a receptionist was a sincere effort to return to work and was considered suitable employment, the General Division should have examined whether it reflected a "failed work attempt" and whether she exhibited any capacity regularly of pursuing any substantially gainful occupation.

[42] As set out above, the General Division erred in law by failing to properly assess the severity of the Respondent's disability and in particular, by failing to properly apply *Villani, Lalonde, Kaminski,* and *Monk.*

Issue 2: Did the General Division base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

[43] The Appellant submits that the General Division based its decision on two erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it: (1) that the Respondent had tried Percocet and (2) that there was "no evidence of work capacity."

Percocet

[44] The Appellant submits that it was perverse for the General Division to find that the Respondent had taken Percocet. The Appellant notes that the Respondent had testified before the General Division that she had taken various medications in the past but did not specifically mention Percocet. She had also testified that she was not taking any medications at the time of the hearing, other than calcium channel blockers. The Appellant notes that, similarly, the Respondent's disability questionnaire indicated that she was not taking any medication to control her pain.[24] Furthermore, the Appellant notes that several physicians reported that the Respondent did not wish to take any medications.

[45] At paragraph 17, the General Division summarized its understanding of the Respondent's evidence that she had tried numerous pain medications, including Percocet. At paragraph 48 of

[24] Questionnaire for Disability Benefits, at GD2-116.

its analysis, the General Division wrote that the Respondent had "tried numerous pain medications, which caused severe nausea and inability to function." The General Division did not, however, list any specific medications at paragraph 48.

[46] Although the Respondent may not have testified that she took Percocet, she disclosed in an undated letter to the General Division that she had tried it.[25] In the same letter, she listed her medications, which included Oxycocet, the generic name for Percocet. Although there was no supporting documentary evidence, it cannot be said that there was no evidence whatsoever that the Respondent had tried Percocet.

[47] Irrespective of whether the General Division erred in identifying Percocet as one of the pain relief measures that the Respondent had taken, I find that it makes little difference whether the Respondent took Percocet or some other pain medication. The General Division did not base its decision on the fact that the Respondent took a particular pain medication. Instead, the General Division was focused on the number of different pain medications that the Respondent took. I find that the General Division did not base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it when it determined that the Respondent had taken Percocet.

Work capacity

[48] The Appellant submits that it was perverse for the General Division to find "there is no evidence of work capacity," given the evidence before it. The Appellant argues that there was, in fact, evidence before the General Division that "tend[ed] to establish the Respondent's condition is not 'severe' prior to [the end of the MQP]," and the General Division therefore erred in concluding that there was no evidence of any work capacity. The Appellant asserts, for instance, that a 2014 vocational assessment and transferable skills analysis indicates that the Respondent retained residual capacity to work and that, despite her physical injuries, the Respondent would be able to work as a receptionist, general office clerk, administrative assistant, wholesale sales and account representative, or payroll clerk.[26]

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[25] Undated letter to the General Division, at GD1-9.
[26] Vocational assessment and transferable skills analysis referred to in medical-legal chronic pain assessment dated July 7, 2015, prepared by Dr. David E. Mula, chronic pain management consultant, at page GD1-40.

[49] I note that neither party produced a copy of the vocational assessment. Dr. Mula referred to the vocational assessment in his medical-legal chronic pain assessment, but he rejected any notion that these types of occupations were appropriate for the Respondent yet, because he felt that she would be unable to meet the mental and physical demands due to her chronic left wrist and right hand pains, low back pain, and ongoing mood disorder.

[50] The Appellant contends that little weight should be assigned to Dr. Mula's opinion because the balance of the 2015 medical evidence does not support Dr. Mula's opinion that the Respondent was severely disabled at that time. For instance, while the Respondent expressed in her disability questionnaire (prepared in January 2015) that she had physical limitations, the Appellant says that these limitations would not have precluded her from regularly performing sedentary work that was either part-time or seasonal. While the Respondent disclosed in the disability questionnaire that she did not have any issues with sitting, she did indicate that her left hand "[was] very limited." This is consistent with some of the medical evidence. As her physician noted in his medical report (prepared in January 2015), the Respondent is left-hand dominant and was unable to use her left wrist for long without exacerbating her pain. Indeed, the Respondent underwent a further surgery involving her left wrist in March 2015. It is unlikely that the Respondent would have undergone a further surgery on her left wrist if she had been pain-free or had full functionality of her left wrist.

[51] The Appellant argues that, apart from this consideration, Dr. Mula's report does not address the Respondent's capacity at or near the end of her MQP on December 31, 2013. Dr. Mula prepared his opinion in July 2015. The Appellant submits that, in assessing the severity of the Respondent's disability—i.e. whether she is incapable regularly of pursuing any substantially gainful occupation—one must examine the disability at or near the end of the MQP. The Appellant argues that the General Division erred by basing its decision on medical opinions[27] that addressed the Respondent's disability after the end of the MQP had long passed.

[52] While the General Division relied, in part, on medical opinions that had been prepared after the end of the Respondent's MQP, I find that the General Division also relied on 2013 reports. For instance, at paragraph 45, the General Division indicated that it had considered

[27] Dr. Mula's medical report, dated July 5, 2015 (GD1-40); Dr. Green's letter, dated June 29, 2015 (GD2-58) and Dr. Emond's report, dated December 4, 2015 (GD1-14).

Dr. Macaluso's report of August 6, 2013, and the consultation report dated October 28, 2013 of Drs. Kerrigan and Sanders. For this reason, I cannot accede to the Appellant's submissions that the General Division neglected to address the Respondent's capacity at or near the end of her MQP.

[53] The Appellant further claims that the General Division also misapprehended the evidence when it examined the new family physician's medical report. The Appellant claims that the family physician essentially states that the Respondent is "temporarily disabled" because he recommends granting a disability pension and reassessing the Respondent's eligibility in 12 to 18 months "to see how these therapeutic measures have assisted her at all."

[54] I note, however, that the family physician did indicate that he would have to await the results of the surgery that the Respondent might undergo, but he did not in any way suggest that the surgery and any other therapeutic measures would necessarily be successful in alleviating the Respondent's pain and discomfort. From this perspective, I am not convinced that the family physician necessarily found that the Respondent was, at that time, "temporarily disabled," given that close to three years had already elapsed since the motor vehicle accident.

[55] All in all, it was open to the General Division to interpret and draw conclusions from the evidence before it, but any findings necessarily required a solid evidentiary basis. While the General Division clearly concluded that there was no evidence of work capacity, it was an overreaching statement, given that there was some evidence that perhaps the Respondent retained some work capacity. This evidence included the orthopaedic surgeon's assessment and the vocational assessment to which Dr. Mula referred. The General Division did not have to accept the evidence of work capacity, but it should have acknowledged it and explained why it preferred other medical evidence that it found established that the Respondent had a severe disability.

[56] While the General Division may have been dismissive of this evidence, for whatever reason, and found that it could not be supported on a preponderance of the evidence, because this evidence indicated that the Respondent had some work capacity, the General Division erred in finding that there was no evidence of work capacity. The General Division based its decision, in

part, on this finding. This constituted an erroneous finding of fact under s. 58(1)(*c*) of the DESDA.

Issue 3: Were the reasons of the General Division sufficient?

[57] The Appellant raises a third ground of appeal: the General Division's reasons are insufficient, primarily because they do not address the Respondent's submissions before the General Division. The Appellant claims that the insufficiency of reasons results in a breach of the principles of natural justice. Because I have allowed the appeal on the basis of the previous grounds, it is unnecessary for me to address this third ground of appeal.

[58] Nevertheless, I will briefly address this third ground. The Appellant argues that the General Division was required to give understandable reasons that provide sufficient details and a logical basis for the conclusion. The Appellant maintains that the adequacy of the reasons should be assessed, considering that the General Division's role was to determine whether the Respondent proved that she was disabled within the meaning of the *Canada Pension Plan* on or before the end of her MQP and that she has been continuously disabled since then.

[59] The Appellant acknowledges that the General Division set out its position at paragraphs 40, 43, and 49 of its decision, but it argues that the General Division failed to explain why it was rejected. The Respondent notes that it had argued that there was considerable evidence that could have established that the Respondent's disability was not severe. According to the Appellant, this evidence is outlined in paragraphs 63 to 66 of its submissions and consists of the following:

- Dr. Mula's report, dated July 5, 2015 (GD1-40)
- affidavit of Tania Arreaga, sworn May 29, 2017 (Exhibit A, pages 1 to 2 and pages 7 to 8, Volume I, Appendix D)
- Questionnaire for Disability Benefits (GD2-111)

[60] The Appellant also notes that although the General Division referenced evidence that "tends to establish [that] the Respondent's condition was not 'severe'," its analysis of this evidence was insufficient for the Appellant to assess whether the correct legal test had been

applied to determine whether the Respondent qualifies for a disability pension under the *Canada Pension Plan*. In particular, the Appellant notes that the General Division chose to assign little weight to the opinions that Dr. Mula summarized in his report, simply because they had been generated "pursuant to an insurance claim." The Appellant argues that at the same time, however, the General Division may have relied on Dr. Mula's report to conclude that the Respondent's disability was severe, although it too had been prepared in an insurance context.

[61] The Appellant asserts that, overall, the decision is deficient because the General Division failed to set out or explain what evidence established the severity of the Respondent's disability. While the General Division acknowledged the Appellant's submissions that there were conflicting medical opinions,[28] the Appellant maintains that it is difficult to know whether the General Division considered any of the medical evidence that suggested the Respondent was not severely disabled by the end of her MQP, because there was no analysis undertaken.

[62] The Appellant suggests that if the General Division assigned little or no weight to the medical evidence that was favourable to the Appellant's position solely because it had been prepared on behalf of the insurer, it erred. The Appellant argues that this is an insufficient basis to assign little weight to an expert opinion.

[63] The Appellant disagrees with the General Division's analysis and the basis upon which it concluded that the Respondent is severely disabled, and it argues that the General Division should have addressed its arguments, but that does not thereby render the decision unintelligible overall. After all, as the Federal Court of Appeal stated in *Canada v. South Yukon Forest Corporation*,[29] it is unnecessary for a decision-maker to write exhaustive reasons addressing all the evidence and facts before it.

[64] The General Division found that the 2013 opinions of Dr. Macaluso, Dr. Sanders, and Ms. Kerrigan; some of the 2014 and 2015 reports; and the witnesses' testimony established that the Respondent has a severe disability. The General Division found that the Respondent had pursued all reasonable treatment recommendations, other than attending a multi-disciplinary facility. The General Division found that it was reasonable that the Respondent had not already

[28] Appellant's submissions at paras. 40, 43, and 49.
[29] *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 50.

participated in a multi-disciplinary program because "of where she lives." The General Division clearly explained how it came to its conclusion.

[65] However, I agree with the Appellant that the General Division failed to adequately address the Respondent's arguments that there was other evidence that could have led it to decide differently. I am not suggesting that the evidence the Appellant relies on does, in fact, establish that the Respondent could not have been severely disabled by the end of her MQP. However, having reviewed the evidence, I find that there was at least some basis for the Appellant to argue that the Respondent could not have been severely disabled. The Appellant, for instance, points to the results of an orthopaedic surgeon's assessment and a vocational assessment that identified suitable occupations. Accordingly, there is merit to the Appellant's arguments that the General Division should have addressed its submissions that there was evidence that could establish that the Respondent was not severely disabled.

[66] In this regard, the General Division's decision is deficient. The General Division was required to set out its analysis, assess the evidence and explain, for instance, why it preferred the evidence of Dr. Macaluso, Dr. Sanders, and Ms. Kerrigan; some of the 2014 and 2015 reports, and the witnesses' testimony over the evidence that, as the Appellant claims, tended to establish that the Respondent was not severely disabled.

[67] In supplemental submissions filed on July 9, 2018, the Appellant provided me with two additional authorities that addressed the issue of the weight to be assigned to independent or defence medical reports. In *S.L. v. Minister of Employment and Social Development*,[30] the Appeal Division granted leave to appeal on the basis that the General Division had "discounted" the medical reports of six specialists who had assessed S.L. in the one-year period prior to the end of her MQP, when there were no other medical reports for that timeframe. The General Division had determined that the reports had been produced in the context of insurance litigation. The Appeal Division concluded that the General Division's findings were of concern and warranted further review.

[30] *S.L. v. Minister of Employment and Social Development*, 2016 SSTADIS 262.

[68] Similarly, in *H.T. v. Minister of Employment and Social Development*,[31] the Appeal Division found that the General Division had failed to clearly explain why independent medical reports were less helpful or "valuable" than those from treating physicians, and in that case, whether it had considered them in its disability assessment. The Appeal Division also granted leave to appeal in this case.

[69] Both *S.L.* and *H.T.* were resolved on consent; the parties came to an agreement and consequently there was no hearing on the merits of the case. The Appeal Division did not make any final determinations respecting the issue of the assignment of weight to independent or defence-oriented medical reports.

[70] I find that the General Division erred in assigning little weight to some of the expert evidence simply because it had been generated pursuant to an insurance claim. This alone is an improper basis to determine the amount of weight to assign. Had the General Division determined, for instance, that the experts were not properly qualified or that they exhibited bias or that the assumptions that formed the basis of their opinions were faulty, that might have been a basis to deem them inadmissible or to assign little, if any, weight to the reports. However, the fact that the reports had been prepared on behalf of an insurer was, on its own, an insufficient basis to assign little weight.

RELIEF SOUGHT

[71] Section 59 of the DESDA empowers me to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, or to rescind or vary the decision of the General Division in whole or in part.

[72] The Appellant submits that this is not a proper case for me to vary the decision of the General Division. The Appellant urges me to allow the appeal, rescind the decision of the General Division, and refer the matter back to the General Division for a *de novo* hearing by a different member.

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[31] *H.T. v. Minister of Employment and Social Development*, 2016 SSTADIS 525.

[73] The Appellant argues that this is the appropriate disposition because it is not the Appeal Division's role to reweigh and reassess the evidence; rather, it is a matter for the General Division, particularly where the parties disagree on a key factual question: in this case, whether the Respondent had been treatment-compliant. The Appellant asserts that such an outcome is consistent with *Quadir v. Canada (Attorney General)*,[32] *Garvey v. Canada (Attorney General)*,[33] and *Cameron v. Canada (Attorney General)*[34] and that the Federal Court of Appeal has held that it is the General Division's role to determine the issue of disability. The Appellant contends that the circumstances when the Appeal Division is to substitute its own decision should occur only exceptionally, in circumstances where the parties agree that certain errors were made, and should never occur where the parties disagree on key pieces of evidence that are central to the ultimate issue. The Appellant maintains that the factual circumstances of this case and the nature of the legal errors warrant returning the matter to the General Division.

[74] Furthermore, the Appellant claims that the record is incomplete and that returning the matter to the General Division would enable the Respondent to produce a more fulsome documentary record.

[75] In *Quadir*, the Federal Court of Appeal determined that the Appeal Division simply disagreed with the conclusion that the General Division had reached and its intervention on a question of mixed fact and law—in the absence of an extricable legal error—was, in light of its jurisdiction, unreasonable. Similarly, in *Cameron*, the Federal Court of Appeal held that mere disagreement with the application of settled principles to the facts of a case does not afford the Appeal Division the basis for intervention.

[76] In *Garvey*, the Federal Court of Appeal held that where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under s. 58(1) of the DESDA. While the Federal Court of Appeal stated that it was reasonable for the Appeal Division to have concluded that it was not entitled to reweigh the evidence before the General Division, the Court stated this in the context where the Appeal

[32] *Quadir v. Canada (Attorney General)*, 2018 FCA 21.
[33] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[34] *Cameron v. Canada (Attorney General)*, 2018 FCA 100.

Division could not intervene, i.e. when there was simply mere disagreement with the application of settled law to the facts.

[77] While there may be circumstances where it would be appropriate for the Appeal Division to substitute its own decision, this is not one of those occasions. Although the General Division found that the Respondent made genuine efforts to improve her health, this alone did not address the *Lalonde* requirement. The General Division did not ascertain whether there were other treatment recommendations, whether the Respondent complied with them, whether any possible refusal was unreasonable, and finally, whether any refusal had any impact on her disability status.

[78] The Respondent vigorously denies that she has been non-compliant with treatment or that any treatment options remain available, whereas the Appellant asserts that the documentary evidence shows that the Respondent had several options, including a multi-disciplinary program that remained outstanding. Regrettably, the General Division did not explore whether there were other reasons, such as costs considerations, why the Appellant may not have pursued this particular option or other treatment recommendations.

[79] Had the General Division determined that the Respondent's refusal to comply with treatment options had been unreasonable, this could have constituted another error if it did not examine the Respondent on her compliance record.

[80] These considerations merit returning the matter to the General Division.

[81] Finally, I note that in the course of the proceedings before me, the Respondent provided updated medical records. Generally, an appeal to the Appeal Division does not allow for new evidence—with certain, limited exceptions—but the re-hearing before the General Division will allow the Respondent to rely on these and any additional records, subject to any objections to admissibility that the Appellant might have.

CONCLUSION

[82] The appeal is allowed and the matter referred to a different member of the General Division for a new hearing.

Janet Lew
Member, Appeal Division

HEARD ON:	June 19, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Laura Dalloo (counsel), Representative for the Appellant J. R., Respondent