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

Citation: *M. K. v. Minister of Employment and Social Development*, 2018 SST 869

Tribunal File Number: AD-17-260

BETWEEN:

M. K.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: September 4, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, M. K., last worked as a nurse's assistant in 2011. She submits that she has not worked since then because of migraine headaches and chronic back pain. She applied for a Canada Pension Plan (CPP) disability pension. The Respondent, the Minister of Employment and Social Development, denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada (Tribunal). On December 31, 2016, the General Division determined that the Appellant was not eligible for a disability pension under the CPP. The Appellant appealed that decision, and the Tribunal granted leave to appeal on December 15, 2017. A hearing was conducted on June 28, 2018.

[3] For the reasons that follow, I have concluded that the General Division erred in law in its analysis of the Appellant's non-compliance with recommended treatments. However, exercising my authority under ss. 59 and 64 of the *Department of Employment and Social Development Act* (DESDA), I find that even when these conditions are considered, the Appellant does not meet her burden to prove that her disability was severe, in accordance with the CPP criteria, on or before her minimum qualifying period (MQP) date. As a result, the appeal is dismissed.

PRELIMINARY MATTERS

[4] In submissions that the Appeal Division received on April 6, 2017, the Appellant's representative included new medical reports in addition to additional arguments on behalf of her client. These reports were filed three months after the General Division rendered its decision, so the General Division did not take them into consideration. In response to these submissions, the Respondent argued that the Tribunal's Appeal Division should not accept the new medical documents contained in pages 1-4 and pages 8-20 of the submissions.[1] However, the Respondent

[1] AD1A1 – AD1A4 and AD1A 8- AD1A-20.

did agree that the Appeal Division should consider pages 5–7 of these submissions[2] because they offer arguments, not new evidence.

[5] At the hearing, the Respondent and the Appellant's representative agreed that much of these submissions (specifically pages 1–4 and 8–20) constituted new evidence and, as such, would not be considered by the Appeal Division. Both parties agreed that the Appeal Division does not conduct *de novo* hearings.[3]

[6] I did not accept the new medical evidence and have not considered it. However, I did consider the submissions provided on pages 5–7 of the document in question.

ISSUES

[7] The Appellant advanced numerous arguments. After a review of the submissions, I have determined that they can be addressed through the following main issues:

Issue 1: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by referring to the drug Topamax in the wrong context?

Issue 2: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the evidence in its totality?

Issue 3: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the unpredictable nature of her headaches and the evidence of efforts made to obtain and maintain employment?

Issue 4: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction when the member allegedly told the

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[2] AD1A-5 – AD1A-7.
[3] *Canada (Attorney General) v. O'keefe*, 2016 FC 503; *Tracey v. Canada (Attorney General)*, 2015 FC 1300; *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.

Appellant that the other members of the panel did not want to come to her hearing so the member would be the only one making the decision?

Issue 5: Did the General Division err in law by failing to assess whether the Appellant's non-compliance with treatment recommendations was reasonable?

ANALYSIS

[8] In considering the appeal, the Appeal Division has a limited mandate. There is no authority to conduct a rehearing. The Appeal Division's jurisdiction is restricted to determining whether the General Division committed an error under s. 58(1) of the DESDA.[4]

[9] According to s. 58(1) of the DESDA, 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.

[10] 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).

Issue 1: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by referring to the drug Topamax in the wrong context?

[11] Leave to appeal was granted on this issue. The evidence on file and the Appellant's oral testimony show that Topamax is prescribed for lower back pain, but the General Division member may have thought it was prescribed for migraines, given the findings in paragraph 33 of the General Division decision.

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[4] *Parchment v. Canada (Attorney General)*, 2017 FC 354.

[12] Where it is found that the General Division based its decision on an erroneous finding of fact, the Appeal Division may intervene only where the error is perverse or capricious or without regard for the material before it. Although it appears that there was an error in understanding what Topamax was prescribed for, the decision was not solely based on this piece of evidence.

[13] Paragraph 33 of the General Division decision reads:

> The evidence of the Appellant was that she is in pain daily due to her back. The Tribunal accepts that the Appellant has limitations imposed by ongoing back pain, however, finds that the evidence does not support that the condition would be "severe" as defined in the legislation. The evidence of the Appellant is that she requires no assistive devices and that her pain is well controlled with the change in medication to Topamax. Further, there is no evidence that the Appellant's condition has required any treatment other than pain medication or any consultation with any specialist. While the Appellant may not be able to return to her previous occupation as a nurse's assistant, the issue before the Tribunal is not whether the Appellant can return to her previous occupation, but rather, whether she is incapable regularly of pursuing any substantially gainful occupation. The measure of whether a disability is "severe" is not whether the person suffers from severe impairments, but whether his or her disability prevents him or her from earning a living. The determination of the severity of the disability is not premised upon a person's inability to perform his or her regular job, but rather on his or her inability to perform any work (*Klabouch v. Canada (Social Development)*, 2008 FCA 33). The evidence of the Appellant regarding her physical capabilities and limitations would support that she would be unable to work in a physically demanding environment, but they would not preclude her from a more sedentary nature occupation. Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[14] The Appellant argues that the General Division's analysis to determine severity is based on the erroneous belief that Topamax is used to treat back pain. The Respondent argues that the analysis and conclusion are still valid, despite the mischaracterization of Topamax, given the Appellant's oral testimony at the hearing, where she stated:

- Audio recording at 25:50: she uses Hydromorphone regularly for back pain "to allow her to function;"

- Audio recording at 26:30: she confirms that no other treatment is recommended;
- Audio recording at 41:50: she confirms that back pain is well-controlled via medication;
- Audio recording at 42:15: she confirms that Topamax is used for migraines.

[15] The General Division's ultimate decision was based on evidence in the file and the Appellant's testimony at the hearing. Although the Respondent and the Appellant agree that Topamax is not used to treat back pain, the evidence on file still shows that she was taking medication to help her back pain and that medication for back pain was assisting in the control of her symptoms.

[16] In assessing whether an appellant succeeds in establishing the ground of appeal under s. 58(1)(*c*) of the DESDA, there are three components that must be established: (1) that there is an erroneous finding of fact, (2) General Division based its decision on the erroneous finding of fact, and (3) that the finding of fact was made in a perverse or capricious manner or without regard for the material. An erroneous finding of fact by itself is not necessarily a valid ground of appeal; under s. 58(1)(*c*) of the DESDA, the General Division must have based its decision on that erroneous finding of fact.

[17] In this case, I cannot say that the decision was based on the erroneous finding of fact. The mention of Topamax was incorrect in the context, but it was established that a medication was helping with the Appellant's back pain. The conclusion was that back pain was being treated—a finding the Appellant did not deny. The decision was based on this finding. So even though there was an erroneous finding of fact, the ultimate decision was not based on the mischaracterization of Topamax.

Issue 2: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the evidence in its totality?

[18] The General Division is tasked with assessing and weighing the evidence. It is not the Appeal Division's role to reassess or reweigh the evidence.[5] Furthermore, the General Division is not required to refer to each piece of evidence before it in its reasons: it is presumed to have considered all of the evidence.[6] As the trier of fact, the General Division considers which evidence is most credible and reliable, then it must provide reasons for its determinations regarding the evidence before it.[7]

[19] The Appellant submits that the General Division member ignored some of the information provided by Dr. Zaitlen, the neurologist. She submits that the General Division neglected to mention Dr. Zaitlen's note in the December 4, 2014, consultation report, which stated: "I would like to set up some referral for her headache, the therapy, and then follow up with this patient."[8]

[20] However, in paragraph 14, the General Division member clearly notes that Dr. Zaitlen's December 4, 2014, report suggests that the Appellant be referred to another facility. The General Division decision relies on this report to a significant degree, because the member determined that Dr. Zaitlen's recommendations for treatment were required, given the Appellant's limited success with medications. The General Division member also notes in paragraph 18 of the decision that the Appellant testified she had not attempted any of the treatments that Dr. Zaitlen had recommended to her. At the Appeal Division hearing, the Appellant again explained that she had not attempted some therapies due to the costs involved. She did not challenge the testimony as the member reported it in paragraph 18.

[21] The General Division member did address these two pieces of evidence and weighed them, determining in the end that Dr. Zaitlen's recommendations were important and that there were further treatment options available. In paragraph 35, the General Division member writes:

> The Tribunal accepts the Appellant's testimony and the opinion of Dr. Zaitlen that the Appellant has tried numerous medications without much success regarding her headaches and migraines. This is corroborated by the evidence on file. As a result, it was Dr. Zaitlen's opinion that non-

[5] *Tracey v. Canada (Attorney General),* 2015 FC 1300.
[6] *Simpson v. Canada (Attorney General),* 2012 FCA 82.
[7] DESDA, s. 54(2).
[8] GD3-7.

> pharmaceutical options seemed to be almost mandatory and must be tried. Dr. Zaitlen recommended psychologics such as stress management, biofeedback, hypnosis and relaxation techniques, and injections, blocks and injections of Botox. The Tribunal accepts the Appellant's argument that she cannot afford Botox treatments, however, the evidence of the Appellant is that she has not attempted any of the other recommendations of Dr. Zaitlen that are non-pharmaceutical. The Appellant's evidence was that she was waiting to have a scheduled appointment to a facility to have some of the recommended treatments done, but that at the time of the hearing, this had not yet happened. While the Appellant has tried numerous drugs to improve her headaches and migraines, they have not been successful and her condition has not responded to medications. Therefore it is reasonable to accept Dr. Zaitlen's opinion that the Appellant's condition would likely not improve with further medication trials and therefore nondrug therapy may have success. It is also reasonable to accept Dr. Zaitlen's recommendations when considering that the primary treatment regime regarding the Appellant's migraines has been unsuccessful pharmaceutical treatments and that there has been no real focus on treating the Appellant's condition with non-pharmaceutical measures. Therefore, when considering the reasoning provided by Dr. Zaitlen and his subsequent recommendations, the Tribunal finds that further treatment options are available to the Appellant.

[22] It is clear from the General Division decision that the member examined Dr. Zaitlen's reports and recommendations thoroughly. The member also examined the recommendations within the context of the rest of the file and the oral testimony provided by the Appellant. As the trier of fact, the General Division considers which evidence is most credible and reliable. The General Division member considered the evidence, weighed it, and explained why emphasis was placed on Dr. Zaitlen's recommendations. The General Division member noted that there was a recommended referral and then reviewed this in light of the Appellant's testimony that she did not follow through with recommended treatment.

[23] It appears that the submissions under this ground are an attempt to have me reassess and re-weigh the evidence and come to a different conclusion. The General Division adequately discharged its duty to conduct a meaningful analysis of the evidence. Mere disagreement with the outcome is not a ground of appeal.[9]

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[9] *Griffin v. Canada (Attorney General)*, 2016 FC 874.

Issue 3: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it by failing to consider the unpredictable nature of her headaches and the evidence of efforts made to obtain and maintain employment?

[24] The Appellant submits that the General Division member erred in law in the application of *Villani* and *Inclima*.[10] The application of the legal requirements to the facts of this case could raise an error of mixed fact and law or an error of fact under s. 58(1)(*c*) of the DESDA, rather than an error of law. I note that s. 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 law as distinct grounds. The Appeal Division therefore does not have jurisdiction to review a General Division decision to determine whether the General Division committed an error of mixed fact and law.[11] I find that the alleged error is better characterized as an alleged erroneous finding of fact and I have treated it as such.

[25] The Appellant submits that the analysis of work capacity was not conducted adequately because she submits that the General Division did not consider certain evidence. In her submissions, she argues that the General Division member neglected to consider the Appellant's testimony as to the unpredictable nature of her headaches or the evidence that she has 5–6 bad days in a week. The Appellant also argues that the General Division member ignored the evidence of the efforts she has made to obtain and maintain employment.

[26] *Villani* instructs us that a decision maker must look at the particular circumstances of a claimant when assessing the severity requirement. At s. 38 of *Villani*, the Federal Court of Appeal states:

> This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that

[10] *Villani v. Canada (Attorney General)*, 2001 FCA 248; *Inclima v. Canada (Attorney General)*, 2003 FCA 117.
[11] *Quadir v. Canada (Attorney General)*, 2018 FCA 21 (CanLII) at para. 9.

> Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[27] The test in *Inclima* requires a decision-maker to examine a claimant's capacity to work in order to determine whether that claimant's disability is severe. The principle in *Inclima* is:

> … 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, as here, 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.

[28] *Villani* and *Inclima* both guide decision-makers in understanding that they must consider a claimant's personal circumstances to determine whether the claimant is incapable regularly of pursuing any substantially gainful occupation. In order to make a finding that there is a severe disability, the decision-maker must first determine whether there is evidence of work capacity. Then, if there is evidence of work capacity, the claimant must show that efforts to obtain and maintain that work have been unsuccessful due to health conditions in order to show that the disability is severe.

[29] In this case, the General Division member did consider the Appellant's personal circumstances, noting that the Appellant was young at the time of her MQP (43 years old); had completed Grade 12; and had obtained some certifications as a nurse's assistant, teacher's aide, and supervisor for mentally challenged individuals. The General Division member also noted that her work experience was primarily in a caregiver capacity.[12]

[30] Much of the Appellant's employment history appears to have been collected through the testimony provided at the hearing before the General Division. The General Division member notes that the Appellant's last job was in a long-term care facility. In paragraphs 16 and 17 of the decision, the General Division member provides the Appellant's description of her work history:

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[12] General Division decision, paragraphs 3, 15, 29, and 33.

> She advised the Tribunal that she first experienced migraines in 2011and that her pain is very painful, her left hand foot goes numb and she gets an aura and vomits. She has headaches about 6 days a week. Calling in numerous times sick. Her doctor put her off work after she missed lots of time. Her migraines are often triggered by changes in the weather. She stated that she has a high blood cell count which may be contributing to her headaches, so her family physician sent her to Dr. Gill in Sudbury at the Cancer Centre, who could not figure out why her red blood cell count was high. She stated that her family physician is monitoring this situation.
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> The Appellant testified that she was on regular Employment Insurance benefits after she moved and that her condition improved enough that she would look for a job up until June 2012. She said there was a transitional time when she moved, but during the 6 months on EI regular benefits, her condition continually got worse and she could not work as of July 1, 2012.

[31] *Villani* instructs the decision-maker at to ensure that medical evidence is required, as is evidence of employment efforts and possibilities. The General Division examined the following evidence when it concluded that the Appellant could perform sedentary work:

- A CT of the Appellant's neck, performed on November 9, 2012. Results of the CT revealed mild prominence of the lingual tonsils bilaterally and few nonspecific bilateral level I and II lymph nodes, of questionable clinical significance.[13]

- A medical report dated April 11, 2014, by Dr. George Freundlich, family physician, which noted that the prognosis of the Appellant's condition was fair because there was no life/limb threatening condition.[14]

- Dr. Zaitlen's diagnosis in his December 4, 2014, report was chronic headaches including migraines. Dr. Zaitlen was of the opinion that the Appellant would need to be treated with nondrug therapy mainly. He suggested psychological treatment, such as stress management, biofeedback, hypnosis, and relaxation techniques. Dr. Zaitlen stated that in a difficult case, such as the Appellant's, injection or blocks or [*sic*] injections of Botox should definitely be considered

[13] General Division decision, paragraph 10.
[14] General Division decision, paragraph 12.

and that non-pharmaceutical options seemed to be almost mandatory and somehow must be tried.[15]

- The Appellant gave oral testimony before the Tribunal regarding her physical abilities: this included the ability to work with her arms over her head for five minutes; inability to climb ladders; ability to bend at the knees; inability to lift a 10lb bag of potatoes; ability to sit comfortably for 30–60 minutes; ability to stand comfortably for 30 minutes; ability to walk five minutes before needing to rest; and the ability to sit in a vehicle for 30 minutes. She reports lower back pain when she moves or twists side to side; she needs to take breaks when she uses stairs; and her husband drives, in case she has a migraine with aura.[16]

- The Appellant reported that her family physician states her pain is well-controlled.[17]

- There is no evidence that the Appellant has required other treatment, aside from pain medication, and there have been no consultations with specialists for her back.[18]

[32] After reviewing the Appellant's personal circumstances and consulting the medical evidence on file, the member concludes that in the real world context, the Appellant would not be incapable regularly of pursuing any substantially gainful occupation.[19] The finding is that the Appellant possesses work capacity in some form. The General Division makes it clear that the test is not whether the Appellant can return to her previous employment, but rather whether she is incapable regularly of pursuing **any** substantially gainful employment. After making this finding, the General Division member then moves on to determining whether or not efforts to obtain and maintain employment were unsuccessful by reason of the Appellant's health conditions.[20]

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[15] General Division decision, paragraph 14.
[16] General Division decision, paragraph 21.
[17] General Division decision, paragraph 24.
[18] General Division decision, paragraph 33.
[19] General Division decision, paras. 29–33.
[20] *D'Errico v. Canada (Attorney General),* 2014 FCA 95.

[33] It appears from the record that the Appellant did not attempt work after August 25, 2011. There is an obligation on the Appellant to demonstrate that efforts in obtaining and maintaining employment had been unsuccessful due to a health condition. The Appellant argues that there were failed attempts at returning to work. The submissions provide no further guidance on this point. I have reviewed the record and have not been able to find evidence that indicates that there were attempts at obtaining and maintaining work that failed by reason of her health condition.

[34] Additionally, the Appellant argues that the General Division's conclusion that she could perform sedentary work that would be considered substantially gainful is contrary to the evidence provided. In her submissions, the Appellant argues that her testimony that she "spends her days resting," that leaving the house and being active for an hour and a half will "knock her out" for the next day; and that she will have "5–6 bad days in a week" is proof that she could not be employed. However, when paragraph 23 of the General Division decision is read in its totality, it reads:

> The Appellant explained that she spends her days resting and that leaving the house and being active for 1 ½ hours will "knock her out" for the next day. She noted that on a good day, she will try and do the dishes, make a meal and take the dog out. On a bad day, she will do nothing, she said she will have 5-6 bad days in a week.

[35] The General Division decision notes that the evidence does not support the finding of "severe" disability, because the evidence on file indicates that with medication, the Appellant's various ailments are able to be controlled.

[36] The onus rests on the Appellant to prove that she is incapable regularly of pursuing any substantially gainful occupation. The General Division member assessed the evidence, both medical and subjective, reviewed it in the context of the Appellant's personal circumstances, and determined that there was a capacity to work. The General Division decision noted that without evidence of attempts to work, one cannot state that the obtaining and maintaining of work was unsuccessful due to a health condition.[21] In assessing the information provided, the General Division determined that "The evidence of the Appellant regarding her physical capabilities and

[21] *Ross v. Canada (Human Resource Development*), 2007 FCA 102; *MacKenzie v. Canada (Attorney General*), 2015 FCA 201.

limitations would support that she would be unable to work in a physically demanding environment, but they would not preclude her from a more sedentary nature occupation."[22]

[37] The General Division member is the trier of fact, and after a review of the file, I was unable to find where the member erred in her review of the evidence The Appellant's personal circumstances were part of the review, and then the General Division member turned her mind to whether the Appellant had made employment efforts. Assigning weight to the evidence, whether written or oral, is the province of the trier of fact.[23]

[38] I find there is no basis to conclude the General Division member committed an error within the scope of s. 58(1)(*c*) of the DESDA in her review of the evidence.

Issue 4: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction when the member allegedly told the Appellant that the other members of the panel did not want to come to her hearing so the member would be the only one making the decision?

[39] In submissions received on April 6, 2017, the Appellant states that the General Division member informed her that there were decision-makers who did not want to attend her hearing. The Appellant writes:

> On December 1st 2016 the day of my tribunal the decision maker, Connie Dyck informed me that in a tribunal for CCP [sic] there is a board or panel of people that is present in this particular hearing (tribunal). She stated to me and my other two Appellants [sic], that none of them wanted to come to my tribunal, so she would be the only one that would make the decision. This made me feel subordinate and less than anybody else that may have attended their tribunal. Why was I any different from anybody else?

[40] Although this point is not phrased under a specific ground of appeal, it appears that the Appellant is arguing that the principles of natural justice were not observed in her appeal.

[41] In submissions received on January 29, 2018, the Respondent did address this possible argument. In their submissions, the Respondent provided details from the recording of the

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[22] General Division decision, paragraph 33.
[23] *Simpson v. Canada (Attorney General)*, [2012] FCJ No. 334 (QL), at para. 10.

General Division hearing as evidence that the General Division member did not make the alleged comments. I have reviewed the recording of hearing and confirm the following:

> General Division member: Now the Department that you've dealt with till now that has denied the application to this point, they have chosen not to attend the hearing and that is very standard. They generally don't attend. They've sent in their written submissions and they just don't come. So it's just going to be us today.[24]

[42] It is clear from the recording of the hearing that the General Division member was explaining that the Respondent would not be attending. The General Division member did not tell the Appellant that others who were supposed to be making a decision with her did not want to come to the Tribunal hearing.

[43] The General Division did not fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction.

Issue 5: Did the General Division err in law by failing to assess whether the Appellant's non-compliance with treatment recommendations was reasonable?

[44] The General Division member concluded that the Appellant had not pursued recommended treatment options. The Appellant submits that the General Division member erred by not considering all of the factors in deciding whether she was unreasonably non-compliant with medical treatments. Specifically, the Appellant argued that she did not pursue the treatments recommended by Dr. Zaitlen—namely stress management, biofeedback, hypnosis, and relaxation techniques—because she was still waiting for an appointment at a facility that would provide those treatments. Additionally, she submits that she did not pursue Botox treatment because the cost was prohibitive.

[45] Although not expressly articulated as such, the Appellant's arguments essentially allege that the member failed to apply the test in the Federal Court of Appeal's decision in *Lalonde*.[25]

[46] In *Lalonde*, the Federal Court of Appeal stated:

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[24] Audio recording of the General Division hearing at 2:20–2:40.
[25] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 2011.

> In *Villani [v. Canada (Attorney General),* 2001 FCA 248], this Court concluded at paragraph 38 of its decision, that its analysis of subparagraph 42(2)(a)(i) of the Act [CPP]:
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> ... strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
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> […]
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> The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.

[47] Although the General Division member did conclude there were still treatment options available to the Appellant, the decision lacked the meaningful analysis of why the Appellant had been non-compliant required by *Lalonde*. Paragraph 35 of the General Division decision mentions the recommended treatments and the Appellant's evidence that she had not pursued the treatments, but falls short of explaining why her non-compliance was unreasonable.

[48] The General Division member did not engage in any analysis of whether the Appellant acted reasonably in refusing treatment and, if she was unreasonable, what the impact of this refusal was on the Appellant's disability. Where the lack of pursuit of treatment options is found, the decision-maker is obligated to assess whether the reason for not pursuing treatment is reasonable. Without this analysis, one cannot ascertain whether the failure to pursue certain treatments had a detrimental effect on the person's disability. The failure to conduct any such analysis constitutes an error of law.

CONCLUSION

[49] Under s. 59 of the DESDA, the Appeal Division may give the decision the General Division should have given. Furthermore, under s. 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[50] I am satisfied that this is an appropriate case for the Appeal Division to give the decision that the General Division should have given. The record is complete.

[51] With respect to the analysis under the direction of *Lalonde*, I must determine whether there was a refusal to pursue recommended treatments. If there was, then I must analyze whether that lack of compliance with recommended treatments was unreasonable and, if so, whether that non-compliance impacted the Appellant's disability status.

[52] It is uncontested that Dr. Zaitlen recommended a number of treatments to the Appellant. His December 4, 2014, report recommends:

> All of the alternatives for treatment available for headaches I went over with the patient Including taking good care of environmental and lifestyle measures, the trigger factors, she must identify and address. Physical therapy treatments, various modalities might be of some benefit although could be limited. Medications obviously and is extensively used in this case including all types of agents, acute, abortive and preventative. It is not clear how much better any other drugs will be, and so this patient agree may need nondrug therapy mainly. Even psychologic can be tried such as stress management, biofeedback, hypnosis, relaxation techniques and so on, in such a difficult case. A procedure like injection of blocks or injections of Botox should definitely be considered. My worry is that she has such bad and frequent headaches, and there may be no much more we can do with drugs. Medications of course are relatively easy and simple to give prescription, I agree and other advantages, but here may be really a problem to find anything just using pharmaceutical options that will help this patient. Nonpharmaceutical options seem to be almost mandatory somehow must be tried.[26]

[26] GD 3-5 – GD 3-7

[53] It is also uncontested that the Appellant, at the time of the General Division hearing, had not attempted any of the treatments recommended by Dr. Zaitlen.[27]

[54] The Appellant's arguments as to why she had not attempted the recommended treatments were twofold. With respect to the psychological treatment options, such as stress management, biofeedback, hypnosis, and relaxation techniques, the Appellant submits that at the time of the hearing, she was still waiting for an appointment. With respect to Botox, the Appellant submits that the cost was prohibitive.

[55] With instruction from *Lalonde*, I must determine whether the refusal to undergo the treatment was unreasonable. Dr. Zaitlen's initial recommendations for non-drug therapies was in a report dated December 4, 2014,[28] and the General Division hearing was held on December 1, 2016—almost two full years later. The Appellant's submitted that she was still awaiting an appointment at a facility to try these treatments.

[56] I must determine whether these reasons constitute unreasonable refusals of treatment. According to Dr. Zaitlen, non-drug treatments were the Appellant's next course of action. When I review the file, it is apparent that the Appellant had achieved some success with medication but Dr. Zaitlen recommended further therapies because he thought they might offer the Appellant more relief.

[57] With respect to the submissions that the Appellant was waiting for a facility to contact her about the non-drug therapies, the Appellant was unable to present evidence of attempts to contact the facility or evidence of contacting Dr. Zaitlen to investigate other avenues for treatment. In this way, the Appellant was very passive in the concern for her health. Given the oral testimony regarding her pain, it is not reasonable to determine that she would just wait and be passive with respect to her health.

[58] I see no credible explanation for why the Appellant, if she had a severe and prolonged disability, would passively wait almost two years for a consultation and would not raise this with the physician who had recommended the treatment. Even though there is the consideration that

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[27] General Division decision, paragraphs 18 and 35.
[28] GD3-5 – GD3-7

Botox might be prohibitive due to costs, there were other treatments recommended that the Appellant had not attempted and furthermore, the Appellant put no effort into attempting to access those treatments in a timely manner. Her explanation was unreasonable.

[59] Finally, given the Federal Court of Appeal's instruction in *Lalonde*, I must consider whether the unreasonable refusal of recommended treatment impacted the Appellant's disability status. Given the conclusions in Dr. Zaitlen's report of December 4, 2014, the options provided in that report were clearly aimed at alleviating symptoms because many of the medications she had tried had provided limited success. Dr. Zaitlen's report of December 4, 2014, notes that these therapies "seem to be almost mandatory," indicating that there was an urgency to the need for treatment.

[60] Dr. Zaitlen's opinion was that psychological treatments, such as stress management, biofeedback, hypnosis, and relaxation techniques could assist in symptom management. The Appellant did not make reasonable efforts to follow medical advice to alleviate her conditions or provide a reasonable explanation why she did not do so. There is the possibility that these recommended treatments could have altered the Appellant's disability status if she had tried them.

[61] Although I found that the General Division member erred in law by not applying *Lalonde*, exercising my authority under ss. 59 and 64 of the DESDA and bearing in mind that the burden of proving on a balance of probabilities that her disability is severe and prolonged rests with the Appellant, I conclude that the Appellant's refusal to follow through on recommended treatments was unreasonable and that this non-compliance could have impacted her disability status. Accordingly, the appeal cannot succeed.

[62] The appeal is dismissed.

Jennifer Cleversey-Moffitt
Member, Appeal Division

HEARD ON:	June 28, 2018

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. K., Appellant Therese Menard, Representative for the Appellant Philipe Sarrazin, Representative for the Respondent