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

Citation: *J. R. v. Minister of Employment and Social Development*, 2018 SST 961

Tribunal File Number: AD-16-1241

BETWEEN:

J. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: September 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. R., applied for a Canada Pension Plan disability pension in August 2010, more than five years after she stopped working in May 2005. She had stopped working because of increasing pain in her left shoulder, which radiated down her arm, resulting in discolouration and swelling. She also experienced pain in her neck leading to the back of her head, resulting in headaches, nausea, and eye pain. She attempted to return to work after May 2005, but was unsuccessful because of ongoing symptoms.

[3] The Respondent, the Minister of Employment and Social Development, denied her application for a disability pension, initially and on reconsideration. The Appellant appealed the Respondent's reconsideration decision, but the General Division also determined that she was ineligible for a disability pension, because it found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2007. The end of the minimum qualifying period is the date by which a claimant is required to be disabled to qualify for a Canada Pension Plan disability pension.

[4] The Appellant is now appealing the General Division's decision rendered on July 18, 2016.[1] She raised several grounds. I granted leave to appeal on the basis that the General Division may have erred in law and based its decision on an erroneous finding of fact that it made without regard for the material before it when it found that the Appellant should have regularly undergone injections. I did not address any other grounds in my leave to appeal decision.[2]

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[1] The General Division initially rendered a decision in 2015. The Appellant appealed that decision to the Appeal Division, which returned the matter to the General Division for a rehearing. The General Division conducted an in-person hearing and rendered a decision on July 18, 2016.
[2] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

[5] I must determine whether the General Division either erred in law or 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.

[6] For the reasons that follow, I find that the General Division erred under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) by failing to properly address the Appellant's primary complaint of a chronic pain disability and by determining that she necessarily exhibited work capacity since she was able to work three temporary positions, without considering whether those temporary positions constituted substantially gainful occupations. Despite the General Division's errors, I am dismissing the appeal because I find that the preponderance of evidence is insufficient to support a finding of a severe disability.

PRELIMINARY MATTERS

[7] The Appellant filed a medical letter dated August 28, 2017, prepared by Kelly Humphrey, a nurse practitioner.[3] The General Division did not have a copy of this letter when it rendered its decision on July 18, 2016. Generally new evidence is not admissible on an appeal, except in limited circumstances.[4] The Appellant concedes that the letter is inadmissible.

[8] The Appellant raised several objections regarding other issues:

(a) There is an appearance of bias when the same Appeal Division member who rendered the leave to appeal decision presides over the hearing of the appeal;

(b) As a matter of default, when an appeal is allowed, the Appeal Division should not routinely return the matter to the General Division, as it has authority under subsection 59(1) of the DESDA to give the decision that the General Division should have given; and,

(c) This appeal should be bifurcated or split, as there may be a constitutional issue regarding the assessment of medical conditions on an organic versus inorganic plane.

[3] Letter dated August 28, 2017, prepared by Kelly Humphrey, nurse practitioner, at page ADN1C-3.
[4] *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at paragraph 31.

[9] The Appellant argues that there will always be a perception of bias when the same Appeal Division member hears both the application for leave to appeal and the appeal. Generally the same Appeal Division member renders both the leave to appeal and the appeal decision. In this particular case, she argues that the Respondent faces bias. The Respondent did not make any submissions on this point. I see that no evidentiary foundation has been made out. In fact, the Appeal Division has both denied and allowed appeals in favour of appellants. I find no merit to this allegation.

[10] The Appellant argues that, when the Appeal Division grants appeals, it routinely returns matters to the General Division, rather than consider whether it might be appropriate to render the decision that should have been given in the first instance. I see no evidentiary basis for this assertion. Indeed, there have been many occasions where I have given the decision that the General Division should have given, particularly when the facts were undisputed. I recommended that counsel address this issue when arguing what the appropriate remedies might be in the event that I should determine that the General Division erred under subsection 58(1) of the DESDA.

[11] The Appellant argues that there are constitutional issues that should be litigated, and that, as a result, this demands a bifurcation of this appeal. The Appellant's constitutional arguments have yet to crystallize. The Appellant did not advance any constitutional arguments before the General Division, nor did she lay any evidentiary foundation to make such arguments. As I indicated during the hearing of this appeal, it is now far too late in the proceedings to raise any Charter arguments for the first time. It would prejudice the Respondent if I were to order this matter to be bifurcated, and it would also unduly delay these proceedings.

ISSUES

[12] The Respondent attempted to categorize the several issues that the Appellant raised. The Appellant preferred a "global" approach. Be that as it may, I find that it is be helpful to clearly set out the issues as follows:

> Issue 1: Did the General Division err in law by failing to properly assess whether the Appellant had a chronic pain disorder?

> Issue 2: Did the General Division err in law by equating the capacity for sedentary work and the ability to do housework, pursue recreational activities, or attempt a return to work with the capacity regularly of pursuing any substantially gainful occupation?
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> Issue 3: Did the General Division err in law by failing to assess the cumulative impact of the Appellant's medical conditions on her capacity regularly of pursing any substantially gainful occupation?
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> Issue 4: Did the General Division err in law or 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 finding that the Appellant had been non-compliant with treatment recommendations?
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> Issue 5: Did the General Division err in law when assessing the Appellant's credibility?

ANALYSIS

[13] 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;
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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.

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

Issue 1: Did the General Division err in law by failing to properly assess whether the Appellant had a chronic pain disorder?

[15] The Appellant's appeal largely revolves around the issue of whether the General Division overlooked her chronic pain disorder when assessing the severity of her disability.

[16] The Appellant notes that the Supreme Court of Canada has recognized chronic pain as a compensable disability.[5] However, she is not suggesting that a diagnosis of either chronic pain or a chronic pain disorder on its own justifies entitlement to a Canada Pension Plan disability pension. Indeed, the Federal Court of Appeal confirmed that *Martin* does not stand for the proposition that claimants are automatically entitled to a disability pension because they suffer from a chronic pain syndrome.[6]

[17] Rather, the Appellant submits that the General Division failed to understand the basis and nature of a chronic pain disability (aka chronic pain disorder or syndrome) and confused it with fibromyalgia. She argues that, as a result, the General Division did not properly assess whether she had a severe disability by the end of her minimum qualifying period. The Appellant contends that the General Division should have looked at both objective and subjective criteria. She argues that the General Division erred by requiring objective, quantifiable evidence of an injury and by overlooking her subjective complaints of pain. She asserts that a chronic pain disorder by definition necessarily also encompasses a subjective component. She claims that "the less there is of objective proof of injury the more it goes to proving [a chronic pain disorder]."[7] She further claims that unless the General Division member clearly understands that his "decision and application of the evidence … is guided and is weighed through the prism of subjective and NOT objective testing,"[8] he arrives at a capricious and arbitrary result.

[18] The Appellant argues that the General Division failed to appreciate the difference between organic and inorganic conditions. She explains that clinical testing can detect and measure the former, whereas the latter, such as a chronic pain disorder, is undetectable. She argues that the "whole point of [chronic pain disorder] (inorganic) is that there are always a

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[5] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54.
[6] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[7] Application for Leave to Appeal to SST from decision of July 18, 2016, at page ADN1-5.
[8] *Ibid*.

'paucity' of objective findings and reports"[9] and that this paucity supports the presence of a chronic pain disorder and makes her report of pain levels "that much more compelling."[10] The Appellant argues that the General Division member confused organic and inorganic conditions when he wrote at paragraph 55 that the medical information did not reveal severe pathology in her left shoulder, elbow, or wrist.

[19] The Appellant reported that she experienced severe pain throughout 2007 and claimed that, because of it, she was unable to work. The Appellant acknowledges that none of her treating health caregivers had diagnosed her with a chronic pain disorder or syndrome by the end of her minimum qualifying period on December 31, 2007, but she claims that there was overwhelming subjective evidence that she had a severe chronic pain disorder by the end of her minimum qualifying period. She claims that she testified that she distinctly recalled that she had high levels of pain and that she faced numerous restrictions and limitations, which rendered her incapable regularly of pursuing any substantially gainful occupation by the end of her minimum qualifying period. She asserts that the General Division should have unequivocally accepted her evidence and found that she was therefore severely disabled by the end of her minimum qualifying period. However, she declined to refer me to any specific portions of her oral testimony.

[20] The Appellant submits that the General Division's fundamental misunderstanding of a chronic pain disorder is apparent at paragraph 33, where it wrote:

> The Tribunal observes that in the volumes of medical reports presented by the Appellant, there was scant mention of generalized chronic pain. The shoulder injury has resulted in what some reports refer to as chronic shoulder pain syndrome. Others, simply as "chronic pain". Clearly, she has had a painful shoulder since her work injury. By the length of time she has suffered from this rotator cuff problem, the Tribunal agrees that that pain could be considered chronic. There is little comparative evidence of the effect of the analysis of this evidence on her general functionality. Many of her generalised complaints were extant even before her 1999 work accident and later surgery.

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[9] Application for leave to appeal to SST from decision of July 18, 2016, at page ADN1-8.
[10] *Ibid*.

[21] The Appellant argues that this paragraph demonstrates that the General Division merely referenced the chronicity of her symptoms, without appreciating that she had been diagnosed with a chronic pain disorder. She argues that her chronic pain emanated from her shoulder and then went on to qualify as a chronic pain disorder.[11]

[22] Although the Appellant argues that the General Division confused her condition with fibromyalgia, I do not see any reference to fibromyalgia in its decision, other than in an unrelated context relating to another claimant. (That said, I note that a rheumatologist diagnosed her with "chronic pain syndrome/fibromyalgia.")[12]

[23] At paragraph 33, the General Division focused on the Appellant's shoulder injury, referring to it as a rotator cuff problem. The General Division accepted that the pain was chronic. In the following paragraph, the General Division indicated that it was important to consider all of the physical limitations or workplace restrictions. The General Division acknowledged the Appellant's complaints of pain and dysfunction in her elbow, wrist, neck, and back. It is true that the General Division did not address the issue of whether the Appellant had a chronic pain disorder by the end of her minimum qualifying period in these two introductory paragraphs of its severity analysis. However, it is also apparent that the General Division intended to then proceed to consider all of the Appellant's medical conditions and restrictions.

[24] After briefly discussing some of the Appellant's physical complaints, the General Division reviewed several of them, including her knee, shoulder, wrist, elbow, back, and neck pain, headaches, nausea, eye pain, depression, bunions, cardiac issues, and finally, chronic pain. The General Division used subheadings to review these complaints. The General Division used the separate subheadings "Shoulder, Wrist and Elbow Pain," "Depression," and "Chronic Pain." Although the General Division also had a separate subheading "Objective vs. Subjective Evidence," a review of the section indicates that the General Division considered the Appellant's complaints of chronic pain under both "Chronic Pain" and "Objective vs. Subjective Evidence." For instance, at paragraph 52, under the subheading "Chronic Pain," and at paragraph 56, under the subheading "Objective vs. Subjective Evidence," the General Division referred to a chronic pain syndrome.

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[11] Application for leave to appeal to SST from decision of July 18, 2016, at page ADN1-6.
[12] Consultation report dated February 13, 2012, of Dr. A. Abdelgader, at page GT1-205.

[25] However, the Appellant argues that merely referring to a chronic pain syndrome does not mean that the General Division necessarily or properly examined whether she actually had a chronic pain syndrome by the end of her minimum qualifying period.

[26] That said, one needs to be mindful that, as the Supreme Court of Canada wrote in *Martin*,[13] "chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world" because there is no authoritative definition for it and no means of objective measurement. The Supreme Court of Canada went on to say that medical experts recognize that chronic pain syndrome is partially psychological in nature, resulting as it does from many factors both physical and mental.

[27] The Court noted that the Nova Scotia *Workers' Compensation Act* defines "chronic pain" as follows:

> **10A** In this Act, "chronic pain" means pain
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> (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
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> (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain,
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> and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

[28] In its analysis under the subheading "Chronic Pain," the General Division initially focused on the Appellant's left shoulder rotator cuff tear, which it found led over time to chronic rotator cuff pain, dysfunction, and tendonitis. At paragraph 50, the General Division wrote, "[a]pparently the chronic shoulder pain did not extend to a debilitating form of overall chronic pain that prevented all work." The General Division noted the Appellant's assertions that she was deemed unemployable after completing a work placement at X, but the General Division

[13] *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, *supra*.

was unable to find any documentary evidence to support such an assertion. Indeed, the General Division found that the Appellant's chronic pain did not preclude her from completing the work placement—she was able to attend the job and received a satisfactory report, although her immediate supervisor stated that she would not be hired because she was unable to meet all of the physical demands of the position.

[29] The General Division reviewed the Appellant's treatment, which it found consisted of Naproxen and Cesamet "well after her [minimum qualifying period] expired." The General Division also noted that the Appellant had a neurology consultation.

[30] Finally, the General Division referred to Ms. Humphrey's May 2013 report,[14] in which she noted that, based on her knowledge and understanding of the Workplace Safety and Insurance Board's (WSIB) definition of chronic pain, the Appellant qualified as having a chronic pain disability, given that the degree of pain and disability was greater than expected for the organic injury and that she had suffered from chronic depression and anxiety since her injury.

[31] The General Division concluded that, while it could be guided by the WSIB's definition of a chronic pain diagnosis, it was not bound by it. The General Division wrote that it "distinguished between a generalized chronic pain disability and one related specifically to a localized centre of pain which is being treated with interventions that have assisted the levels of pain and functionality in each of the areas of left hand, wrist, elbow, shoulder and neck […]."

[32] Turning to its analysis under the subheading "Objective vs. Subjective Evidence," the General Division stated that there are instances when the nature of subjective evidence can outweigh the absence of any objective clinical medical evidence. The General Division acknowledged that, despite the lack of objective findings, patients could nevertheless experience pain.

[33] The General Division noted the Appellant's arguments that if it accepted her evidence regarding her pain levels and if it found her credible, then it should award her a disability pension based on the chronicity of her pain. It found however, that not only was there little

[14] Medical-legal letter dated May 30, 2013, prepared by Kelly Humphrey, nurse practitioner, at pages GT1-200, 217, 333, 363, 388, and 412.

objective medical information, such as diagnostic examinations, but that there was also little subjective evidence before 2007. The General Division noted that there was no indication that the Appellant required any aggressive psychiatric interventions, such as a referral to a mental health professional. The General Division did note that the Appellant assessed her neck pain levels at 6 to 7 out of 10 and shoulder pain at 6 to 8 out of 10 in 2007.

[34] The General Division referred to the Appellant's subjective complaints of pain in 2007, but it did not examine whether the Appellant exhibited other symptoms that are usually common features of a chronic pain syndrome, such as symptoms affecting her overall emotional or mental health. The General Division noted (under the subheading "Depression") that the Appellant's family physician observed that she began to suffer from depression after the accident, but it did not otherwise consider her depression in its analysis of whether she might have already developed a chronic pain syndrome by 2007, and, if so, how it might have impacted her disability on a cumulative basis, other than to find that she did not require any aggressive psychiatric interventions.

[35] In its conclusions, the General Division wrote that it recognized that the Appellant has pain symptoms, but it stated that "diagnostic testing did not reveal any severe pathology or structural decline." The General Division also noted the "chronic nature of her isolated shoulder, neck and arm issues" was controlled by medication and mitigating appliances. It also wrote that "[d]espite the Appellant's ongoing complaints of pain in 2010, eliciting a referral to a neurologist, following this evaluation, no significant neurological conclusions were identified. Based on the conclusions, the Tribunal finds that the Appellant was not organically medically disabled by the end of her minimum qualifying period."

[36] These concluding passages suggest that the General Division focused on the organic nature of the Appellant's complaints with little regard, if any, for not only the Appellant's subjective experiences, but also her mental or psychological health. Having done so, the General Division did not sufficiently address the Appellant's primary argument that she had a chronic pain syndrome that affected her capacity regularly of pursuing any substantially gainful occupation.

[37] The General Division concluded that the Appellant did not have a severe disability in part because the Appellant worked after the end of her minimum qualifying period. It wrote that the "condition described was not such that the Appellant was incapable regularly of pursuing any substantially gainful occupation as evidenced by her subsequent employment."[15] This suggests that the General Division determined that the Appellant's employment constituted a substantially gainful employment. If indeed the Appellant had clearly exhibited capacity regularly of pursuing a substantially gainful occupation, it would have been unnecessary for the General Division to examine whether the Appellant had a chronic pain syndrome.

[38] The Appellant was involved in a relatively brief work placement at X in 2008 and then in three separate temporary placements through an agency. Some of her duties entailed heavy work, but, as the General Division noted, she did not encounter any problems with certain aspects of the job, such as providing directions to customers.

[39] The Record of Earnings and Contributions indicate that, in 2009, the Appellant had declared earnings of slightly more than $7,000.[16] The General Division noted that these earnings were comparable to the earnings she had in a full-time capacity from 1998 to 2005, when she generally earned between $20,000 and $28,000.

[40] The Appellant testified that the longest of the three temporary positions lasted perhaps three to four weeks, although she could not be entirely certain.[17] The positions, largely of a physical nature, may have collectively lasted three months. The Appellant has not worked again since then. The General Division wrote that "[r]egrettably she did not seek less physically demanding work within her known restrictions which may well have demonstrated that she was capable of regular work and not just a series of temporary jobs." The General Division found that the Appellant was capable of working, despite the fact that she assessed her pain levels at 6 to 8 out of 10 on a pain scale.

[41] Effectively, the General Division considered that the series of three temporary positions qualified as a substantially gainful occupation. However, it came to this conclusion without

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[15] General Division decision rendered July 18, 2016, at paragraph 75.
[16] Record of Earnings/Contributions, at pages GT1-33 to GT1-41.
[17] Appellant's oral testimony, at approximately 29:08 of audio recording labelled
Part 3."

examining the circumstances of her employment, such as whether she was able to perform at a competitive level without any accommodation from her employer or without assistance from work colleagues. The Appellant testified that she relied on co-workers, otherwise she was unable to carry out her duties. While the Appellant exhibited some work capacity, this is not tantamount to exhibiting capacity regularly of pursuing any substantially gainful occupation. The General Division did not examine whether these positions might have constituted failed work attempts. It overlooked the short-lived nature of these positions, the Appellant's limitations, and her reliance on co-workers when it effectively determined that her 2008 work placement and 2009 temporary positions constituted substantially gainful occupations. These shortcomings undercut the General Division's finding that the Appellant was not severely disabled under the *Canada Pension Plan*.

[42] In other words, the General Division should have conducted a more rigorous examination into whether her 2008 work placement and three temporary positions in 2009 could, on their own or collectively, constitute a substantially gainful occupation, before concluding that she could not have been severely disabled. In other words, the General Division could have addressed the Appellant's primary argument that she had a chronic pain syndrome to determine whether she was indeed severely disabled by the end of her minimum qualifying period.

[43] That said, it was inappropriate for the Appellant to rely on the temporary employment as proof of failed work attempts because the work placement and three temporary positions were physically demanding and purportedly largely beyond her physical capacities. The positions were likely not a suitable measure of whether the Appellant had any work capacity because they were not physically appropriate for her.

[44] The Appellant argues that the General Division erred by failing to properly analyze whether she had a chronic pain disability. I agree. The General Division's analysis on the issue of whether the Appellant had a chronic pain syndrome was inadequate.

[45] This then leads to the next question: Did the Appellant develop a chronic pain disability by the end of her minimum qualifying period, because this would then warrant a full reassessment of the evidence. After all, if there was insufficient evidence of a chronic pain disability by the end of her minimum qualifying period, the outcome would have been moot whether the General Division had conducted a full and proper assessment into her alleged

chronic pain disability. I will address this issue below when I consider the appropriate disposition of this matter.

Issue 2: Did the General Division err in law by equating the capacity for sedentary work and the ability to do housework, pursue recreational activities, or attempt a return to work with the capacity regularly of pursuing any substantially gainful occupation?

[46] The Appellant submits that the General Division erred in law by equating the capacity for sedentary work and the ability to do housework, pursue recreational activities, or attempt a return to work with the capacity regularly of pursuing any substantially gainful occupation.

[47] The Appellant also asserts that the General Division overlooked "whether or not she was able to work substantially gainful employment […] as well as whether she could regularly work."[18]

[48] At paragraph 6, the General Division correctly identified the legal test for a severe disability. It wrote that a "person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation." At paragraph 32, the General Division also cited the "real world" test set out by the Federal Court of Appeal in *Villani.*[19]

[49] In deciding whether the Appellant had a severe disability, the General Division considered several factors, including the fact that she rode a motorcycle after December 31, 2007, and, at some point, had moved a cabinet, activities that it found were inconsistent with the Appellant's description of her functional limitations. Had the General Division determined that the Appellant could not have been severely disabled solely on the basis of whether she was able to do housework or engage in certain recreational pursuits or whether she had attempted a return to work, this could have constituted an error, but the General Division was guided by other considerations.

[50] The General Division was mindful that a severe disability under the *Canada Pension Plan* requires an element of employability. The General Division cited *Klabouch*[20] and

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[18] Application for Leave to Appeal to SST, at page ADN1-6.
[19] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[20] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

paragraph 50 of *Villani.*[21] It noted that a decision maker had to look beyond a claimant's impairments and determine whether that person demonstrated the capacity regularly of pursuing any substantially gainful occupation. At no time did it suggest that the Appellant's ability to do housework, attempt recreational pursuits or attempt a return to work or even her capacity for sedentary work was dispositive of the severity issue. Indeed, the General Division pointedly noted at paragraph 37 that it had to determine "if during the relevant period of time, the Appellant [had] been able to **regularly** seek gainful employment" (my emphasis) and then at paragraph 38 that "[c]ollectively, all of her conditions contribute to the test related to her ongoing ability **regularly** to seek gainful employment" (my emphasis). The General Division again noted at paragraph 38 that it had to determine if the Appellant was "prevented **regularly** from pursuing a substantially gainful occupation up until her [minimum qualifying period]" (my emphasis).

[51] Despite recognizing the legal test for a severe disability, the General Division determined at paragraph 58 that the Appellant exhibited "capacity regularly of seeking employment," without providing much, if any, explanation for why it concluded that the Appellant was engaged in a substantially gainful occupation. Although the Appellant was certainly able to perform numerous aspects associated with the work placement and the series of temporary jobs and largely met her employers' expectations, regularly attended work, and earned over $9,000 in a few months, the short-lived nature of these positions should have prompted the General Division to analyze whether any of them could have qualified as a substantially gainful occupation and whether she was capable regularly of pursuing them (or any substantially gainful occupation) before deciding that her employment after December 31, 2007 showed that she was not severely disabled.

[52] However, such an analysis in this case was overall unnecessary, given that the General Division determined that the Appellant exhibited work capacity. Having concluded that the medical evidence did not support a severe disability and that there was evidence of work capacity, the General Division required the Appellant to demonstrate that she had sought and maintained employment and that her efforts in this regard had been unsuccessful because of her health condition. This approach followed the test set out by the Federal Court of Appeal in

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

Inclima.[22] The General Division found that the temporary jobs ended for reasons unrelated to her health condition and the Appellant therefore did not bring herself within the definition of a severe disability. It found that she had not shown that efforts at obtaining and maintaining suitable employment were unsuccessful because of her health condition.

[53] This would have been conclusive of the appeal, but for the fact that there were shortcomings in the General Division's analysis of whether the Appellant had a chronic pain disability that rendered her severely disabled by the end of her minimum qualifying period. Absent this analysis, I find that it may have been premature for the General Division to conclude that the Appellant exhibited work capacity on the basis that she worked temporary jobs after December 31, 2007.

[54] If the Appellant had indeed been regularly engaged in a substantially gainful occupation, this too would have been determinative of the appeal. But without fully addressing whether the Appellant had a severe disability and relying on her employment as a measure of her capacity, it became necessary for the General Division to assess whether the Appellant's employment after December 31, 2007 constituted a "substantially gainful occupation" and whether she was able to regularly pursue it. In short, if the General Division was going to rely on the Appellant's employment as a measure of capacity, it should have examined whether her employment substantially gainful and whether she was capable of regularly pursuing it.

[55] In other words, it was premature for the General Division to conclude that the Appellant could not have been severely disabled because she was engaged in a substantially gainful occupation, without first assessing whether her employment was substantially gainful and whether she was capable of regularly pursuing it. This constitutes an error in law.

Issue 3: Did the General Division err in law by failing to assess the cumulative impact of the Appellant's medical conditions on her capacity regularly of pursing any substantially gainful occupation?

[56] The Appellant contends that the General Division failed to conduct a cumulative assessment by engaging in only a condition-by-condition analysis. The Respondent counters that

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[22] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

the General Division demonstrated at paragraphs 35 to 38—under the subheading "Cumulative Effect of the Medical Conditions"—that it was aware that it had to consider the totality of the Appellant's medical conditions. The Respondent submits that the General Division "was fully informed of the totality of the [Appellant's] conditions" by undertaking an extensive analysis of each of the conditions.

[57] I find that, on its face, the General Division seemingly failed to conduct a cumulative assessment. The Appellant has multiple medical conditions. However, there is no evidence that some of these medical conditions existed before the end of the minimum qualifying period. On the contrary, the evidence suggests that some of these medical conditions arose after the end of the minimum qualifying period. Of those conditions that did exist or may have existed before December 31, 2007, such as the Appellant's neck pain, anxiety and depression, there was very limited evidence regarding their impact on the Appellant.

[58] It is true that the General Division assessed each of the Appellant's multiple conditions individually, and that it was mindful that it was required to assess the cumulative effects of her various conditions. The General Division member wrote that, "collectively, all of her conditions contribute to the test related to her ongoing ability regularly to seek gainful employment"[23] and "The idea is that her medical conditions (either individually or collectively) are analyzed to determine employment capacity as of her [minimum qualifying period] and continuing thereafter."[24]

[59] The Respondent relies on *Simpson v. Canada (Attorney General)*[25] arguing that it is unnecessary for the General Division to cite all of the evidence before it. I find that *Simpson* does not apply because the issue is whether the General Division properly applied the law.

[60] The General Division reviewed each of the Appellant's medical conditions to assess whether individually they could support a severe disability. However, despite the subheading "Cumulative Effect of the Medical Conditions" and despite stating that her medical conditions would be analyzed collectively, it is not readily apparent that the General Division had in fact

[23] General Division decision rendered July 18, 2016, at paragraph 38.
[24] *Ibid.*
[25] *Simpson v. Canada (Attorney General),* 2012 FCA 82.

conducted a cumulative assessment of the Appellant's various medical conditions or determined whether such a test was relevant. For instance, there is no indication that the General Division considered what conditions affected the Appellant at the end of her minimum qualifying period and what the cumulative effect those conditions had on her capacity regularly of pursuing any substantially gainful occupation. There is also no general statement that, after having considered the Appellant's conditions individually and collectively, the General Division could not find her severely disabled.

[61] On its face, the General Division appears to have overlooked applying the test that it had set out for itself. It is insufficient for it to refer to the test that requires it to assess a claimant's conditions cumulatively without applying that test.

[62] However, assessing the Appellant's conditions cumulatively must be done with consideration for the minimum qualifying period. In that regard, although the Appellant has multiple medical issues, some of them did not arise until after December 2007 and therefore would not be part of that cumulative assessment. For instance, the General Division found that the Appellant had bunions, cardiac issues, and pain in her left knee, right finger, wrist, and elbow, but it found that these did not arise until after December 2007. The General Division also found that the Appellant had back pain, but the first documented reference to it was well after the end of the minimum qualifying period, in April 2009. The General Division also noted the Appellant's complaints of headaches, nausea, and eye pain, but it also noted that there was no documentation describing how they affected her functionality. Because the General Division found that these complaints arose after the end of the minimum qualifying period, they would not factor into any cumulative assessment for the time frame surrounding the minimum qualifying period.

[63] A bone scan of the Appellant's neck, left hand, and left arm revealed that she had degenerative changes in her knees and feet, although there are no records to suggest that she complained of knee and feet pain in 2007 or early 2008.

[64] The 2007 and early 2008 medical records indicate that the Appellant was primarily dealing with left shoulder and neck pain, as a result of which the General Division focused on the Appellant's chronic left shoulder pain. The General Division acknowledged that both

Dr. Blanchard and the nurse practitioner, Kelly Humphrey, found that the Appellant had depression and anxiety following her accident in 1999, but this diagnosis was made presumably based on the Appellant's own self-reporting, given that both first saw the Appellant well after the accident occurred and given that there are no documented references to anxiety or depression before 2008. Indeed, Dr. Blanchard first saw the Appellant in April 2008, while the first indication of Ms. Humphrey's involvement in the Appellant's care was in 2010, although the Appellant testified that she first began seeing Ms. Humphrey in either 2013 or 2014.[26]

[65] It is unclear whether the General Division accepted Dr. Blanchard's and Ms. Humphrey's opinions that the Appellant also had anxiety and depression by the end of the minimum qualifying period. Assuming that it did, the General Division should have considered the cumulative impact of her depression, anxiety, and shoulder and neck pain, along with any other conditions that the General Division found existed before the end of the minimum qualifying period.

[66] Although the General Division seemingly did not conduct a cumulative assessment, it would not have materially changed the outcome, given the paucity of evidence regarding the Appellant's neck pain, anxiety, and depression, or any other complaints, as well as their cumulative effect by the end of her minimum qualifying period. Although the Appellant testified that her depression was severe in December 2007 and that it affected her family life and activities of daily living, there is nothing to corroborate this, either in the documentary record or in the testimony of other witnesses. Similarly, there was little, if any, evidence to show how the Appellant's neck pain—together with her other complaints—impacted her in and around December 2007. Although the General Division may not have conducted a full cumulative assessment, given the lack of evidence surrounding the Appellant's neck pain, anxiety, and depression, I find that these conditions would have contributed little, if anything, to any cumulative assessment.

Issue 4: Did the General Division err in law or 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 finding that the Appellant had been non-compliant with treatment recommendations?

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[26] Oral evidence at approximately 1:07:18 of audio recording labelled 2016.07.18_10.21_01.

[67] I granted leave to appeal on the basis that the General Division may have erred in law and based its decision on an erroneous finding of fact without regard for the material before it on finding that the Appellant should have regularly undergone injections. As I indicated, I was unable to locate any recommendations in the hearing file that, after December 2012, the Appellant should regularly undergo injections or any statements that she refused to have any further injections. In other words, there might not have been an evidentiary basis for the General Division to find that the Appellant had been non-compliant.

[68] However, although the General Division found that the Appellant had failed to regularly undergo injections as a "mitigating strategy," it did not suggest that she could not therefore have been severely disabled, meaning that the General Division did not base its decision on any findings it made regarding the fact that the Appellant did not regularly undergo injections under paragraph 58(1)(*c*) of the DESDA.

[69] I find that this finding is supported by the fact that, when the General Division addressed the issue of non-compliance and the reasonableness of any non-compliance,[27] it referred explicitly to the fact that the Appellant had not worn splints and braces, arbitrarily discontinued taking prescribed medications, and took advice from her friends rather than medical caregivers. The General Division did not include the issue of the injections.

[70] On the other hand, the General Division based its decision that the Appellant did not have a severe disability, in part, on its finding that she was non-compliant with recommendations that she use prescription medication. In particular, the General Division found that the Appellant could not have had a severe mental health condition because she had independently discontinued taking prescription medication and did not wish to take any antidepressants.

[71] The General Division also noted that the family physician had documented that the Appellant had not been taking the medications prescribed by the cardiologist.[28] The General Division concluded that the Appellant "has not been entirely compliant with recommendations

[27] Summarized at paragraph 61 of the General Division's decision.
[28] General Division decision rendered July 18, 2016, at paragraph 41.

from her doctors (not wearing splints and braces and arbitrarily going off prescribed medications and taking advice from friends instead of relying on her medical caregivers.)”[29]

[72] Having found that the Appellant had been non-compliant with treatment recommendations, the General Division then wrote that she had to establish the reasonableness of her non-compliance.[30] In *Lalonde v. Canada (Minister of Human Resources Development)*,[31] the Federal Court of Appeal held that a real-world assessment means a decision maker is required to consider whether a claimant’s refusal to undergo treatment recommendations is unreasonable and what impact that refusal might have on the claimant’s disability status should the refusal be considered unreasonable.

[73] The General Division acknowledged that the Appellant had financial constraints, but concluded that it was unreasonable for the Appellant not to wear an elbow brace and not to replace any worn braces or splints. It also implied that wearing braces or splints affected the Appellant’s disability, describing the recommendation as “sound medical advice.” In other words, it found that the refusal to use braces or splints impacted the Appellant’s disability. On this particular issue, the General Division cited and applied the test for non-compliance, as set out in *Lalonde*, and accordingly, there is no justification for my intervention. As Gleason, J.A. wrote in *Garvey*:

> [7] As this Court held *Quadir v. Canada (Attorney General)*, 2018 FCA 21 (*Quadir*), a disagreement with the application of settled principles to the facts of a case does not afford the [Social Security Tribunal-Appeal Division] the basis for intervention. Such a disagreement does not constitute an error of law or a factual finding made in a perverse or capricious manner or without regard to the evidence.

[74] It can also be inferred that the General Division considered the reasonableness of the Appellant’s non-compliance with taking prescription medications and the impact non-compliance had on her disability status. The General Division described the non-compliance as

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[29] General Division decision rendered July 18, 2016, at paragraph 61.
[30] General Division decision rendered July 18, 2016, at paragraph 64.
[31] *Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211.

"arbitrarily going off prescribed medications."[32] Yet, there was also evidence that the Appellant stopped taking medications because she experienced side effects. Even the General Division noted some of this evidence. For instance, at paragraph 14, the General Division noted that the Appellant testified that she experienced side effects with antidepressants. She also testified that she experienced side effects with pain relief medication.[33] However, I do not see any indication that the General Division considered her evidence about any side effects when it assessed the reasonableness of the Appellant's non-compliance with treatment recommendations about medications, and what impact that might have on her disability status if her refusal was unreasonable.

[75] The Appellant testified that she stopped taking antidepressants because of side effects, but the General Division did not consider whether it was reasonable or whether she should have explored alternatives to taking antidepressants. The General Division should have considered this evidence because it was relevant.

[76] Even so, the General Division was ultimately dismissive of the notion that the Appellant had to take any prescription medication or antidepressants as a treatment measure. The General Division determined that the Appellant could not have had a severe disability if she did not have to rely on prescription medication or antidepressants and if she could rely on conservative measures such as water and Epsom salt baths for treatment. In short, although the General Division erred by failing to consider some of the evidence when it assessed the reasonableness of her non-compliance with recommendations to take prescription medication, it was moot given that the General Division found that the Appellant's disability could not have been severe if she did not have to take any pain relief medication or antidepressants.

Issue 5: Did the General Division err in law when assessing the Appellant's credibility?

[77] The Appellant submits that the General Division erred in law at paragraph 62 when it assessed her credibility because it failed to provide an adequate explanation for its findings in this regard.

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[32] General Division decision rendered July 18, 2016, at paragraph 61.
[33] Oral evidence at approximately 14:42 of audio recording labelled "Part 3."

[78] I find that, although the General Division did not provide comprehensive reasons, they were overall adequate.

[79] At paragraph 62, the General Division found that the Appellant's testimony was "not wholly consistent with the medical evidence." The Appellant argues that the General Division member failed to provide any support for his conclusion. She claims that, at most, the General Division could only point to the absence of any specific report that states she is unable to work at all. The Appellant argues that the General Division was required to provide specific examples of inconsistences rather than general references to them; she argues that, without them, the General Division's conclusions regarding her credibility simply were not supportable. She contends that, while the medical evidence lists her restrictions and suggests that she is capable of aspects of work, this is not the equivalent of being able to perform "the entire job."

[80] The Respondent argues that the Appellant is essentially seeking a reassessment of credibility but that it is not the Appeal Division's role to reassess the Appellant's credibility or reweigh the evidence. The Respondent notes that the courts have consistently found on this matter that the trier of fact is best positioned to assess credibility and evidence, given the advantage it has in seeing and hearing the witnesses' evidence.[34]

[81] While that may be so, if the General Division is to make findings of credibility, it would be required to explain how it assessed a claimant's credibility. Here, the General Division explained that it considered "consistency vs. inconsistency and to a lesser extent, demeanor of the witness." The Appellant accepts that inconsistencies can diminish a witness's credibility but contends that, in this case, the General Division failed to provide any specifics of any inconsistencies.

[82] The Respondent argues that, on the contrary, the General Division's reasons are sufficient and that it did not have to provide any further supporting evidence or submissions. Indeed, the General Division cited "the gap between [the Appellant's] memory on things supportive of her application and those characteristics which demonstrate capacity to work since her injury in 1999." In addition, it also found that, while the Appellant did not seem intentionally evasive, she

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[34] *Wsol v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 242, at paragraph 10 and *Housen v. Nikolaisen*, 2002 SCC 33, at paragraphs 12, 14, and 18.

was at times misleading. Furthermore, it also found that her answers were sometimes not "on the point of the question" and that the "answers were occasionally deflecting in a possible attempt to answer in a way that was obviously intended for the General Division to draw a conclusion of disability rather than simply stick to the facts as called for by questions from her counsel."

[83] The Respondent notes that the General Division found that the Appellant's motivation and success at seeking temporary jobs was inconsistent with a finding of incapacity to work.[35] The Respondent also notes that the General Division determined that it was inconsistent for the Appellant to claim that she was prevented from regularly pursuing any substantially gainful occupation because of her elbow, wrist, and back when she had had these same conditions dating back to 1999 and yet had been able to work at substantially gainful occupation after that time.[36]

[84] The General Division was not questioning the Appellant's motive, but it is clear that it found that she was not a reliable historian; the Appellant's testimony that her memory was terrible[37] and that she was not good with dates and times undercut the reliability of her evidence. As the Respondent notes, under these circumstances, the General Division drew adverse findings of credibility because of what it construed was the unreliable nature of the Appellant's evidence. The Appellant maintains that the General Division's conclusions regarding credibility were simply unsupportable, but having set out several reasons for its findings, I find no basis to interfere with the General Division's findings on credibility.

RELIEF SOUGHT

[85] I find that there were shortcomings in the General Division's analysis of whether the Appellant had a chronic pain syndrome, and, because of them, it may have been premature for the General Division to conclude that the Appellant exhibited work capacity on the basis that she worked temporary jobs after December 31, 2007. If the General Division was going to rely on the fact that the Appellant worked temporary jobs to measure work capacity, it should have first determined whether those positions constituted a substantially gainful occupation and whether she was capable regularly of pursuing any of them.

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[35] General Division decision rendered on July 18, 2016, at paragraph 62.
[36] *Ibid*.
[37] At approximately 27:55 of audio recording labelled 2016.07.18_10.19_02.

[86] The Appellant argues that, under ss. 59(1) of the DESDA, the Appeal Division is empowered to give the decision that the General Division should have given. She argues that the evidence overwhelmingly shows that she had developed a chronic pain disability that rendered her severely disabled by the end of her minimum qualifying period.

[87] The Respondent argues that, if I should find that the General Division committed an error—which it does not concede—it would be inappropriate for me to reweigh the evidence and come to my own assessment of the evidence. In *Quadir v. Canada (Attorney General)*,[38] the Federal Court of Appeal held that the application of settled principles to the facts is a question of mixed fact and law and not an error of law, and that the Appeal Division had no jurisdiction to interfere with the General Division in such circumstances.

[88] I note that the Federal Court of appeal rendered two decisions after *Quadir* that address this issue. In *Cameron v. Canada (Attorney General)*,[39] 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. And, in the more recent decision of *Garvey v. Canada*,[40] 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 subsection 58(1) of the DESDA.

[89] 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 Division could not intervene, specifically when there was simply mere disagreement with the application of settled law to the facts. I find that there are clear errors of law that afford me the basis to intervene under subsection 58(1) of the DESDA. I also find that subsection 59(1) of the DESDA provides some latitude in how I may dispense with the appeal. The subsection reads, in part, that the Appeal Division may render the decision that the General Division should have given. Reweighing the evidence may be integral to enabling the Appeal Division to render the decision that the General Division should have given.

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[38] *Quadir v. Canada (Attorney General),* 2018 FCA 21.
[39] *Cameron v. Canada (Attorney General)*, 2018 FCA 100.
[40] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.

[90] I note also that this matter has been previously returned by the Appeal Division to the General Division. If I were to return the matter to the General Division, this would further delay resolution of the Appellant's claim. The Appellant is represented by an experienced legal practitioner, who has produced an extensive medical record, although largely for the post-minimum qualifying period. The Appellant also gave evidence. The General Division member noted that the hearing before him ran approximately 5.5 hours, during which considerable evidence was elicited regarding the Appellant's medical history. Given the dated minimum qualifying period—now more than 10 years ago—it would be of little use to return the matter to the General Division. Witnesses' memories have eroded given the passage of time. There is no indication that the Appellant would adduce any additional medical records that address the issue of her medical condition at the end of her minimum qualifying period. It is therefore appropriate that I review the evidence and determine whether the Appellant was severely disabled by the end of her minimum qualifying period.

[91] I find that the evidence regarding the Appellant's work history after the end of her minimum qualifying period insufficient to determine whether she was engaged in a substantially gainful occupation and that I need to focus on the medical evidence.

Oral evidence

[92] The Appellant urges me to place considerable weight on her oral evidence, given the absence or paucity of any objective measures of her pain or documentation regarding the extent of her limitations.

[93] I have listened to the audio recording of the General Division hearing that took place on July 18, 2016. The Appellant's counsel spent approximately 20 minutes in his closing submissions and about 1.5 hours on his closing submissions, meaning a little more than 3 hours was devoted to the Appellant's evidence.

[94] There are portions of the audio recording where the Appellant's testimony is inaudible or where the General Division member, the Appellant, or her counsel simultaneously spoke. There were a couple of instances where the Appellant testified that her "memory is terrible" or that she

was "not good with dates."[41] She testified that the time frame between 2005 and 2007 "seems to be [her] big blur."[42]

[95] The Appellant testified she re-injured her shoulder at work in 2002. She returned to full-time work in 2003 and 2004, although there were times when she took time off work because of shoulder pain and because she was unable to move her arm. As a result, she was placed on light duties. She continued working into 2005, but her employer advised her that it no longer had any light-duty work for her. She did not work for the remainder of 2005 through to 2007. The WSIB arranged for a three-month work placement in 2008. The Appellant ran out of life savings, so she was forced to return to the workforce by 2009. She worked temporary jobs in the automotive sector for approximately three months but found the work too physically strenuous. She went to a Canada Service Centre for assistance in preparing a resumé but, upon disclosing her limitations, was advised to apply for a disability pension.

[96] The Appellant testified that although her initial injury occurred in 1999 and the re-injury in 2002, she was able to work on and off up to 2005 because she took medications and because she had to sustain herself. She stopped working because she found that she could no longer tolerate the pain. Any activity, including any activities of daily living, exacerbated the pain.

[97] The Appellant testified that, in 2007, her neck pain rated 6 to 7 out of 10, but when she performed any activities, the pain in both her neck and shoulder rated "probably 20 … off the charts."[43] She did not find surgery helpful, stating, "if anything, [the pain] got a little worse."[44] She rates her neck pain currently at 8 to 9 out of 10. She testified that in 2007, her shoulder pain rated from 6 to 8 out of 10, and that it currently rates at 8 to 9 out of 10 and is sometimes 10 out of 10. She also testified that she experienced numbness in her wrists in 2007, though it has become worse since then.[45]

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[41] At approximately 27:55, 38:25, 39:00, and 39:55 of audio recording labelled 2016.07.18_10.21_01.
[42] At approximately 39:45 of audio recording labelled "Part 2."
[43] At approximately 7:37 and 19:15 of audio recording labelled "Part 2."
[44] At approximately 8:00 of audio recording labelled "Part 2."
[45] At approximately 21:12 of audio recording labelled "Part 2."

[98] The Appellant testified that she has been unable to afford pain relief medications. She had injections to her neck but found that any relief was short-lived, lasting from three to five weeks. The excruciating pain levels then returned.

[99] The Appellant testified that her depression was severe in December 2007.[46] Her marriage had broken down, and she was fighting with her husband and her children. They did not understand that she was in pain, and they still expected her to do the laundry, get groceries, maintain the yard, and look after the children. The Appellant claims that she was suicidal and was constantly crying while at home or while driving. She claims that her doctor prescribed antidepressants, but she found that it made her suicidal and more depressed, so she stopped taking them and has not tried any other antidepressant since then.[47] The Appellant saw a counsellor but found her too young and ineffective. Besides, the counsellor was not interested in hearing about the Appellant's injury.

[100] She testified that, sometime between 2005 and 2007, she had taken a three-hour motorcycle ride to an event, but it was difficult to ride, even as a passenger, with the weight of the helmet and the force of the wind. She had to take pain relievers every three hours during the trip. She testified that she last rode her own motorcycle in late 2014 or early 2015, but it was for only a very short distance.

[101] The remainder of the Appellant's evidence largely addressed her X work placement and temporary work positions.

Documentary medical evidence

[102] I note that there are but a handful of records for 2007 and early 2008 that speak to the Appellant's medical condition at or around the end of her minimum qualifying period.

[103] The Appellant testified that she had a work-related injury to her left shoulder in 1999. She returned to work but re-injured her left shoulder in 2002. She believes that she underwent surgery for her left shoulder in 2005. (Dr. Yousif's reports dated September 11, 2007 and April 1, 2009 indicate that the surgery took place sometime between September 11, 2007 and April 1,

[46] At approximately 28:00 of audio recording labelled "Part 2."
[47] At approximately 35:41 of audio recording labelled "Part 2."

2009.[48]) Other than a single clinical note dated March 19, 2002, prepared by her family physician,[49] the General Division hearing file does not contain any other medical records prepared before April 13, 2007.

[104] A more comprehensive hearing file could have been useful for the Appellant's case, because it could have shown how her medical conditions were progressing and how they were impacting her. For example, a referral note dated December 20, 2010 indicates that in 2002 the Appellant had been diagnosed with myofascial pain syndrome with restrictions to avoid work requiring repetition, heavy lifting, or gripping or pinching with either hand.[50] Yet, other than the single clinical record dated March 19, 2002, there are no records from 2002 to April 13, 2007. There were also other gaps in the medical records; some of the consultation reports, for instance, referred to diagnostic examinations for which results were not produced as part of the hearing file.

[105] When seen on March 19, 2002, the Appellant complained that she had a "[p]roblem with [b]eing [u]nemployed." Her physician referred her to individual counselling. There were no other documented complaints during this visit regarding her shoulder, neck, elbow, or wrist. The Record of Earnings[51] show that the Appellant worked again after March 2002; she had employment earnings after 2002—from 2002 to 2005 and in 2009.

[106] The medical records for 2007 and into early 2008 consist of the following:

- April 13, 2007 – Bone scan[52] for assessment of neck, left hand and arm pain. Mild degenerative changes were seen in both knees and feet.

- September 11, 2007 – Consultation report[53] of Dr. T. Yousif, orthopaedic surgeon. He saw the Appellant for complaints of left shoulder pain that originated from the work-related injury in 1999. She reported that she received

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[48] Dr. Yousif's medical report of September 11, 2007, at pages GT1-68 to 69, GT1-168 to 169, and GT1-331, and medical report of April 1, 2009, at GT1-70, GT1-146, and GT1-309.
[49] Clinical note dated March 19, 2002, at page GT1-191.
[50] Referral letter dated December 20, 2010, prepared by Kelly Humphrey, nurse practitioner, at page GT1-216.
[51] Record of Earnings, at pages GT1-33 to 41.
[52] Bone scan on April 13, 2007, at pages GT1-332.
[53] Consultation report dated September 11, 2007, of Dr. T. Yousif, orthopaedic surgeon, at pages GT1-68 to 69, GT1-168 to 169 and GT1-331.

physiotherapy and some medications for pain. The Appellant went for physiotherapy for six to eight months in 2001, but it did not help much. She had not received any cortisone injections at that time. She reported that she had some unconnected neck-related problems along with her shoulder problem. At the time, she was taking Tylenol no. 3, Advil, Pariet, and 25 mg of Amitriptyline. Previously, she had tried Naprosyn and Ranitidine. The orthopaedic surgeon examined her and found restricted range of motion and tenderness over the shoulder. X-rays showed a type II acromion and mild osteoarthritic changes. The MRI showed that there was osteoarthritis of the AC joint and also a full thickness tear of the rotator cuff. The plan was for her to undergo surgery, though it would not solve her neck pain. He expected that it would help with her shoulder pain.

- October 22, 2007 – Chest X-rays[54] showed that she did not have acute disease in the chest.

- December 10, 2007 – The clinic note from Dr. Jim Gall[55] indicates that the Appellant's chief complaint was a rotator cuff syndrome. Her shoulder was still painful, but she was attempting passive movements; she was limited by pain at extremes. The recommendations included case management and coordination, returning to therapy, avoiding ice and getting up off the ground. She had stopped Percocet and was using Tylenol no. 3.

- December 20, 2007 – Progress notes from Sandwich Community Health Centre.[56] The handwritten notes are not fully legible, but it is clear that the Appellant continued to complain of pain in her left shoulder. She sought a prescription for Tylenol no. 3. She was already on other pain relief medications.

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[54] Chest X-rays dated October 22, 2007, at pages GT1-167 and 330.
[55] Clinical note of Dr. Gall, at pages GT1-78 and GT1- 242.
[56] Progress notes from Sandwich Community Health Centre, dated December 20, 2007, at pages GT1-79.

- January 24, 2008 – Progress report.[57] The Appellant saw a physiotherapist regarding her shoulder. She was unable to attend school that day because of her pain and muscle tension.

- April 8 and 10, 2008 – Progress report.[58] The Appellant had experienced an increase in left shoulder pain over the previous two days. She reported having pain in her neck, entire shoulder, and elbow, as well as numbness in her left hand. She was awakening nightly with numbness in her fingers. She was undergoing physiotherapy on a daily basis. She was taking Advil and avoided Tylenol no. 3 because she found that it made her groggy. She reported that she found it hard to perform her activities of daily living. Given her complaints, her physician recommended that she contact the orthopaedic surgeon with her concerns about her pain levels. She was diagnosed with tendonitis and chronic left shoulder and neck pain.

- April 10, 2008 – Return to Work/School Form prepared by Dr. Ozols.[59] He stated that the Appellant was not capable of returning to the workplace or school between March 31, 2008 and June 30, 2008.

- April 30, 2008 – Return to Work/School Form prepared by Dr. Blanchard.[60] He stated that the Appellant would have been required to have been off work or school between April 27, 2008 and May 2, 2008. In the questionnaire, Dr. Blanchard also responded that Appellant was capable of returning to the workplace or school.

[107] Dr. Yousif's September 2007 consultation report suggests that the Appellant underwent an arthroscopy for her left shoulder sometime in 2008. The Appellant testified that she did not see any appreciable improvement in either her neck or shoulder pain following surgery.

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[57] *Ibid*.
[58] Progress notes from Sandwich Community Health Centre, dated December 20, 2007, at pages GT1-80 to 81.
[59] Return to Work/School Form prepared by Dr. Ozols, GT1-164 and GT1-327.
[60] Return to Work/School Form prepared by Dr. Blanchard, GT1-163 and GT1-326.

[108] The Appellant saw the orthopaedic surgeon again for follow-up on April 1, 2009.[61] He did not find any evidence of a rotator cuff tear. He had referred her to another physician, but he doubted that she had seen him yet. He was of the opinion that further surgery was not required.

[109] The Appellant was first diagnosed with possible fibromyalgia in May 2008.[62] She reported to her physician that she had felt suicidal earlier that month but that she no longer had those feelings because she was taking her friend's antidepressants. She also reported that she was fighting workers' compensation because they wanted her to retrain, despite the fact that she felt unable to sit in classes because of the pain in her shoulder, arm, and hand. She also fought with one of her children over household chores. The Appellant reported that she felt depressed because she was frequently sleeping and crying. She reported that she was having difficulty managing stress, which was complicated by her past accident. The physician recommended that she seek medical advice regarding medications for depression. The Appellant also wanted to work on depression in counselling because she found that it had helped in past.[63]

[110] These complaints about her stress continued throughout June 2008.[64] Indeed, by mid-June 2008, the Appellant was diagnosed with a mood disorder.

[111] The Appellant saw Dr. Desai, a psychiatrist and neurologist, who prepared a consultation report dated February 4, 2011, for left arm and left shoulder pain. There were no complaints of paresthesia. Dr. Desai was of the opinion that the cause of the Appellant's symptoms appeared to be "mostly musculoskeletal." He recommended that she wear a wrist brace and elbow pad to see if they might help her symptoms and advised that she could stop wearing them if they did not help. He also recommended that she undergo physiotherapy and take anti-inflammatories.[65]

[61] Consultation report from the orthopaedic surgeon, at pages GT1-70, GT1-146, and GT1-309.
[62] Progress notes dated May 7, 2008, at page GT1-83.
[63] Progress notes dated May 26, 2008, at page GT1-84; and clinical note dated May 26, 2008, at pages GT1-190 and GT1-197.
[64] Clinical notes dated June 4, 11 and 16, 2008, at pages GT1-189 and 196; GT1-87 and GT1-251; and GT1-88, GT1-188, and GT1-195.
[65] Consultation report dated February 4, 2011, of Dr. H. Desai, psychiatrist and neurologist, at pages GT1-214 to GT1-215.

[112] In December in 2011, the Appellant went to the Windsor Regional Hospital for her left shoulder and upper extremity pain. She had trigger point injections, which she tolerated without any side effects.[66]

[113] On February 8, 2012, the Appellant saw Dr. Marchuk, a physiatrist, who diagnosed her with chronic cervicothoracic myofascial pain syndrome and left ulnar neuropathy.[67] She reported some improvement in her pain levels after trigger point injections. The Appellant also found Zuacta cream beneficial for reducing her neck pain.

[114] On February 13, 2012, the Appellant saw Dr. Abdelgader, a rheumatologist, for her left shoulder pain. The rheumatologist noted the history of depression and atrial fibrillation and a family medical history of cancer, heart disease, and fibromyalgia. Dr. Abdelgader was of the opinion that the Appellant had a history and physical exam consistent with "chronic pain syndrome/fibromyalgia" and that she needed to be seen by a pain clinic for pain management.[68]

[115] The Appellant returned to see Dr. Marchuk for follow-up on May 1, 2012 and December 18, 2012. When seen on December 18, 2012, the Appellant reported that she had done "quite well for the last six months doing regular exercise" but, two to three weeks ago, had experienced a pain flare-up. She requested a trigger point injection since she found that they had been helpful in past. He administered an injection. He also encouraged the Appellant to take frequent breaks and stretching. He also recommended aqua therapy. He stated that he would follow up in three months.[69]

[116] As noted above, the Appellant saw Kelly Humphrey, nurse practitioner. In her opinion dated May 30, 2013, Ms. Humphrey diagnosed the Appellant with a chronic pain disability. The healing time exceeded six months, longer than expected for a rotator cuff injury. The degree of pain and disability was greater than expected for the organic injury. The Appellant was noted to have suffered from chronic depression and anxiety since her injury. The nurse practitioner was of the opinion that the Appellant might be able to work at some gainful occupation with continued treatment and re-training, although ruled out overhead work or repetitive moving involving her

[66] Windsor Regional Hospital records, throughout hearing file, including at pages GT1-209 to 211.
[67] Consultation report dated February 8, 2012, of Dr. Y. Marchuk, at pages GT1-206 to 207.
[68] Consultation report dated February 13, 2012, of Dr. A. Abdelgader, *supra*.
[69] Consultation report dated December 18, 2012, of Dr. Marchuk, at pages GT1-201 to 202.

head or neck, and any physical occupations that require heavy lifting, pushing, or pulling. A sedentary occupation would be suitable. The nurse practitioner recommended ongoing physiotherapy and a chronic disease management program to help manage the Appellant's chronic pain and depression.[70]

Chronic pain syndrome

[117] As I have noted above, the Appellant is not suggesting that a diagnosis of either chronic pain or a chronic pain disorder on its own justifies entitlement to a Canada Pension Plan disability pension. Rather, she argues that subjective complaints of pain are sufficient to establish the presence of a severe chronic pain syndrome to qualify for a disability under the *Canada Pension Plan*. She relies on several authorities to support her argument:

i. *Minister of National Health and Welfare v. Densmore*[71] – The Pension Appeals Board wrote, "[t]he issue is difficult because its resolution depends upon the view which the Board ultimately takes of the genuineness of what are strictly subjective symptoms. In effect, the judgment call, made generally without the assistance of objective clinical signs, will be one of credibility on a case by case basis, as to the severity of the pain complained of."

ii. *Curnew v. Minister of Human Resources Development*[72] – Mr. Curnew was diagnosed with a chronic pain syndrome over three months after the minimum qualifying period. The Pension Appeals Board referred to *Densmore* and stated that, because a chronic pain syndrome is progressive, a claimant has to show that treatment was sought and efforts were made to cope with the pain to determine a date of onset.

iii. *Hildebrandt v. Minister of Human Resources Development*[73] – Ms. Hildebrandt was diagnosed with fibromyalgia by several physicians, despite the fact that there was no objective underpinning to substantiate her complaints. The Board found that the

[70] Medical-legal letter dated May 30, 2013, of Kelly Humphrey, *supra*.
[71] *Minister of National Health and Welfare v. Densmore* (June 2, 1993), CP2389 (PAB).
[72] *Curnew v. Minister of Human Resources Development* (June 25, 2001), CP12886 (PAB).
[73] *Hildebrandt v. Minister of Human Resources Development* (August 14, 2000), CP07641 (PAB).

doctors concluded that she suffered from the disease "based largely on what she [told] them."

iv. *Minister of Human Resources Development v. Chase*[74] – Orthopaedic surgeons were unable to find any explanation for Ms. Chase's symptoms and suggested that she had fibromyalgia. The Board held that the subjective experiences of an applicant are important considerations.

v. *Gobeil v. Minister of Human Resources Development*[75] – Ms. Gobeil received extensive investigations and testing, all of which generally reflected normal conditions and did not determine the cause of her pain. One pain specialist diagnosed Ms. Gobeil's condition as myofascial pain syndrome, neuropathic pain with vascular component resulting in a complex regional pain syndrome. Another specialist was of the opinion that her widespread musculoskeletal pain indicated fibromyalgia. The Board found that Ms. Gobeil's complaints were supported by the fact that she had undergone two major surgeries in the hope that she would obtain pain relief.

vi. *Romanin v. Minister of Social Development*[76] – The Board found that Mr. Romanin suffered from severe chronic pain. The Board cited *Martin*, stating that, despite objective findings, there was no doubt that chronic pain patients are suffering and in distress and that the disability they experience is real.

[118] While decisions of the Pension Appeals Board may be instructive, they are not binding.

[119] The Appellant relies on the WSIB's definition of a chronic pain disability, which draws a distinction between chronic pain and a chronic pain disability. As the Appellant describes, chronic pain is defined as pain that persists for six or more months beyond the usual healing time for the injury, whereas "chronic pain disability" is used to describe the condition of a person whose chronic pain has resulted in marked life disruption. In turn, marked life disruption is characterized by the disruptive effect on the worker's activities of daily living, vocational

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[74] *Minister of Human Resources Development* v. *Chase* (November 6, 1998), CP06540 (PAB).
[75] *Gobeil v. Minister of Human Resources Development* (July 9, 2001), CP09864 (PAB).
[76] *Romanin v. Minister of Social Development* (November 18, 2004), CP21597 (PAB).

activity, physical and psychological functioning, as well as family and social relationships. In a case of chronic pain disability, the degree of pain is inconsistent with organic findings.

[120] Although, as the Supreme Court of Canada wrote in *Martin*, there is no authoritative definition for a chronic pain syndrome, it wrote that it is also partially psychological in nature. A chronic pain syndrome encompasses symptoms beyond pain alone.

[121] In this case, the Appellant alleges that she has also had depression and anxiety since her re-injury in 2002. While neither depression nor anxiety is an essential component for a diagnosis of a chronic pain syndrome, they may be suggestive of a chronic pain syndrome.

[122] The Appellant testified that her depression was severe in December 2007 because of her pain and limitations and the effect that they had on her family relationships. However, this is not corroborated by the documentary medical evidence. All of the 2007 medical records relate to her physical complaints. The first documented reference to depression arose in May 2008, when she reported that she had felt suicidal earlier that month until she began taking her friend's antidepressants. It was then that her physician recommended that she seek medical advice regarding the appropriate pharmacological response for her depression. It was also the first documented occasion when she sought counselling for depression. I do not see that similar issues arose before the end of her minimum qualifying period. I find that, although the Appellant may have been depressed in 2007, it was not severe enough for her to mention it to any of her physicians, and, more significantly, depression did not feature prominently in her presentation to the extent that any of her health caregivers observed and mentioned it.

[123] Apart from complaints of pain primarily involving the Appellant's left shoulder and, to a lesser extent, her neck, none of the 2007 or January 2008 records address any other medical issues. The diagnostic results, the physiatrist's diagnosis in September 2007 of a rotator cuff tear, and his recommendation that she undergo arthroscopy speak to an organic injury. Aside from the prolonged nature of her pain, the rotator cuff tear alone could account for the Appellant's pain complaints. There was no suggestion by any of her health caregivers in 2007 that the Appellant's pain levels were inconsistent with or could not be accounted for by any organic findings.

[124] Even if the evidence could support a finding that the Appellant had developed a chronic pain syndrome by December 31, 2007, I note that the Pension Appeals Board held in *Densmore* that it is not sufficient for a chronic pain syndrome to be found to exist. It held that the pain had to be of such severity that it prevented a claimant from regularly pursuing a substantially gainful occupation. And, in *Garvey*, the Federal Court of Appeal wrote:

> Proof that a claimant suffers from chronic pain syndrome does not automatically mean that a claimant is entitled to disability benefits under the *Canada Pension Plan* or that the lack of medical evidence to support a claimed disability must be disregarded. Rather, entitlement to disability benefits depends on whether a claimant meets the definition of disability set out in section 42 of the *Canada Pension* Plan, which requires consideration of whether the claimed disability is severe and prolonged.

[125] I am unconvinced that the Appellant had developed a chronic pain syndrome—distinct from chronic pain—by the end of her minimum qualifying period on December 31, 2007. Or, if she had developed a chronic pain syndrome, it had not resulted in a severe disability (whether alone or in combination with her other medical issues). This is not to suggest that the Appellant cannot have acquired a chronic pain syndrome since then, but that is another issue altogether.

[126] Although there may have been shortcomings in the General Division's analysis on whether the Appellant had a severe chronic pain disability by the end of her minimum qualifying period, that does not render the balance of the decision untenable, nor does it require a full reassessment of the medical evidence. After all, it has become moot that the General Division's analysis on the issue of the Appellant's chronic pain disability fell short, given that the evidence is insufficient to support a finding that the Appellant had a chronic pain disability by the end of her minimum qualifying period. (Had the nature of the error differed, a reassessment might have been appropriate.)

[127] There is no question that the Appellant was experiencing neck and shoulder pain in 2007 to the extent that she required surgical intervention, but the General Division determined that, nevertheless, the pain, along with any medical conditions she had at the time, did not render her incapable regularly of pursuing a substantially gainful occupation. As the General Division noted, none of the Appellant's health caregivers around the time of the minimum qualifying

period addressed her capacity regularly of pursuing a substantially gainful occupation. There was no suggestion either by her family physician or the orthopaedic surgeon that she was precluded from pursuing a substantially gainful occupation because of the cumulative effects of her shoulder, neck, and back issues and any other medical conditions that she complained of at that time. Indeed, there was relatively little medical information for 2007; whereas, there was comparatively more available medical information for 2008 and 2009 that showed that not only were her pre-existing symptoms becoming worse and having a greater effect on her, but that she also began developing other medical issues. None of the 2008 evidence suggested that her progressing situation could be traced back to 2007. The evidence supports a finding that the Appellant's condition became progressively worse over time, but it falls short of establishing that the Appellant had a severe disability by the end of her minimum qualifying period.

[128] I note that the General Division relied on Ms. Humphrey's medical opinion of May 30, 2013, that, although the Appellant had restrictions, particularly with physical occupations that require heavy lifting, pushing, or pulling, she "may be able to work at some gainful occupation with continued treatment and re-training" and that a "sedentary occupation would be suitable."[77] The General Division found that Ms. Humphrey's opinion served to support the Respondent's arguments that a severe and prolonged disability had not been established at the end of the minimum qualifying period and continuously since that time[78] and that she retained some work capacity. The Appellant argues that this is entirely speculative, as it would require continued treatment and re-training, and she had been largely unresponsive to treatments to date. The weakness of this contention is that several years has elapsed since the end of the minimum qualifying period, and that, even by her own account,[79] her condition has progressed since then.

[129] Finally, although the Appellant's 2009 positions were temporary, the General Division noted that the employment ended for reasons unrelated to the Appellant's medical condition. The General Division determined that the Appellant exhibited the capacity to perform non-physically demanding work, but she had not shown efforts at obtaining and maintaining any type of non-physically demanding work, such as assisting and directing customers. At paragraph 65, the General Division found it notable that the family physician queried whether the Appellant could

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[77] Medical-legal letter dated May 30, 2013, of Kelly Humphrey, *supra*
[78] General Division decision rendered July 18, 2016, at paragraph 52.
[79] At approximately 24:02 of audio recording labelled "Part 1."

work in a call centre. Clearly, the General Division determined that, the Appellant's limitations aside, she was under a duty to attempt work that had been identified as possibly suitable for her, and it was only by attempting this type of employment and being unable to maintain it that she would have met the test set out in *Inclima*.[80]

CONCLUSION

[130] Although I have determined that there were shortcomings in the General Division's analysis on whether the Appellant had a chronic pain disability, I find that the preponderance of evidence is insufficient to establish that the Appellant was severely disabled by the end of her minimum qualifying period. I find also that there was evidence that she retained some capacity and that she therefore had a duty to mitigate her damages by showing efforts at obtaining and maintaining suitable employment. The appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	June 29, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. R., Appellant Steven R. Yormak, for the Appellant Marie-Andrée Richard, Representative for the Respondent

[80] *Inclima v. Canada (Attorney General)*, *supra*.