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

Citation: *J. M. v. Minister of Employment and Social Development*, 2018 SST 1089

Tribunal File Number: AD-17-468

BETWEEN:

J. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: October 23, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] J. M. (Claimant), worked as a floral designer until July 2009, when she broke her ankle. She has multiple conditions that she says impact her ability to work. She experiences pain, fatigue, headaches, and migraines.

[3] The Claimant applied for a disability pension under the *Canada Pension Plan* (CPP) and the Minister denied her application both initially and on reconsideration. She appealed to this Tribunal, and the General Division dismissed her appeal. The Appeal Division granted leave to appeal, but ultimately dismissed the appeal. The Federal Court of Appeal sent the case back to the Appeal Division for reconsideration. The Appeal Division granted the appeal and sent the case back to the General Division for reconsideration.

[4] After a new oral hearing, the General Division dismissed the appeal again in April 2017, finding that the Claimant had not established that she was incapable regularly of pursuing any substantially gainful occupation during her minimum qualifying period (MQP), which ended on December 31, 2010, or the possible prorated period, which ended on January 31, 2011.

[5] The Claimant appealed the April 2017 General Division decision. The Appeal Division granted leave to appeal. The Appeal Division must decide whether the General Division made any errors such that an appeal should be granted.

[6] The Appeal Division dismisses the appeal. The General Division did not make an error of law or an error of fact under the *Department of Employment and Social Development Act* (DESDA).

ISSUES

1. Did the General Division make an error of law by failing to make a definitive finding about the Claimant's capacity to work?

2. Did the General Division make an error of law or an error of fact by failing to take into account the Claimant's chronic pain condition and a legal principle about that condition acknowledged by the Supreme Court of Canada?
3. Did the General Division make an error of law or an error of fact by focussing on the Claimant's symptoms and not their impact as she described in her evidence?
4. Did the General Division make an error of fact or of law by failing to consider evidence about whether the Claimant was **incapable regularly** of pursuing any substantially gainful occupation?
5. Did the General Division make errors of fact by finding that the Claimant had not missed time from work in the past and that she felt able to work regularly?

ANALYSIS

Appeal Division Review of the General Division Decision

[7] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new hearing. Instead, the Appeal Division conducts a review of the General Division decision to determine whether it contains errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[8] The DESDA says that a factual error occurs when the General Division bases 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.[1] For an appeal to succeed at the Appeal Division, the legislation requires that the finding of fact at issue from the General Division's decision be material ("based its decision on"), incorrect ("erroneous"), and made in a perverse or capricious manner or without regard for the evidence.

[9] By contrast, the DESDA simply says that a legal error occurs when the General Division makes an error of law, whether or not the error appears on the face of the record.[2]

Issue 1: Did the General Division make an error of law by failing to make a definitive finding about the Claimant's capacity to work?

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[1] DESDA, s. 58(1)(*c*)
[2] *Ibid.*, s. 58(1)(*b*)

[10] The General Division did not make an error of law by stating that the Claimant **may** have **some** capacity to work in sedentary occupations and then requiring that the Claimant show that efforts at obtaining and maintaining employment were unsuccessful by reason of her health condition.

[11] The Federal Court of Appeal has stated that in CPP disability pension cases, medical evidence will still be needed, *as will evidence of employment efforts and possibilities* [emphasis in original].[3] In that case, called *Inclima*, the Federal Court of Appeal decided that where there is evidence of work capacity, a claimant must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the claimant's health condition.

[12] The Claimant's argument is based on this paragraph of the General Division's decision, which reads:

> The evidence does suggest that at her MQP that she may have had some capacity to work in sedentary occupations. 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.[4]

[13] The Claimant argues that the General Division made an error of law in the above paragraph because it did not make a definitive statement as to the Claimant's capacity for regular substantially gainful employment, but rather that she **may** have **some** capacity to work in sedentary occupations.

[14] The Minister argues that there is no requirement for the General Division to definitively make a statement on capacity in order to require the Claimant to show that efforts at obtaining and maintaining employment were unsuccessful by reason of health condition. The Minister also urges the Appeal Division to consider the decision as a whole, as the Supreme Court of Canada requires—a decision should not be set aside simply because the General Division did not make an explicit finding on each element leading to its final conclusion.[5] The Minister relies on the many findings throughout the General Division decision that are consistent with the Claimant's

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[3] *Inclima v. Canada (Attorney General)*, 2003 FCA 117
[4] General Division decision, para. 64
[5] The Minister cites *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 16

capacity to work,[6] including the final conclusion that the cumulative effect of her conditions did not make her incapable regularly of pursuing a substantially gainful occupation.[7] The Minister also argues that this use of this one phrase that the Claimant "may have some capacity to work in sedentary occupations" is not sufficient evidence that the legal principle in *Inclima* was not followed.

[15] The General Division did not make an error of law.

[16] The plain language from the Federal Court of Appeal in *Inclima* requires that there be "evidence of work capacity" as the trigger for the Claimant to show efforts at obtaining and maintaining employment. Was the General Division required to make a definitive finding that the Claimant has capacity to work, or is the statement that the evidence suggests that she **may** have **some** capacity sufficient?

[17] The General Division structured its analysis by reviewing the evidence about the Claimant's conditions and limitations first. The General Division provided a detailed analysis of the medical evidence related to the Claimant's medical conditions and limitations.[8]

[18] Second, the General Division found that "the evidence does suggest that at her MQP that she may have had some capacity to work in sedentary occupations."[9]

[19] It would have been clearer to the reader if the General Division had been more definitive in its finding, rather than using the words **may** and **some**. Some General Division members use the phrase "residual capacity to work." Noting that there is evidence for some capacity to work is sufficient to trigger the requirement to show that work efforts were unsuccessful by reason of health condition.

[20] It would also have been preferable for the General Division not to have used the word **may** in describing the Claimant's capacity to work. However, to find an error based on this wording alone is too formalistic. The rest of the decision is clear that, in fact, the General

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[6] General Division decision, paras. 56–58, 61, 62
[7] *Ibid*., para. 68
[8] *Ibid*., 54–63
[9] *Ibid*., para. 64

Division did consider the medical evidence and found that there was evidence of work capacity. The General Division did not make an error of law.

Issue 2: Did the General Division make an error of law or an error of fact by failing to take into account the Claimant's chronic pain condition and a legal principle about that condition acknowledged by the Supreme Court of Canada?

[21] The General Division expressly considered the Claimant's chronic pain in its analysis of her conditions and limitations, so there is no error of law. The Supreme Court of Canada's decision does contain a reference to the fact that people with chronic pain experience distress, despite the lack of objective findings in their medical files. That reference by the Supreme Court of Canada does not create a legal principle that the General Division failed to follow in this case when it weighed the Claimant's evidence about her pain.

The General Division did not make an error of law or an error of fact by failing to consider one of the Claimant's conditions

[22] The General Division did not make an error here. It did not ignore evidence of one of the Claimant's conditions, and by the same token, it did not base its decision on a finding made without regard for the evidence about that condition.

[23] The General Division must consider the Claimant's medical condition in its totality. It must analyze all the medical impairments, not just the biggest impairments or the main impairments.[10] A failure to follow that principle, as set out by the Federal Court of Appeal, can be framed as an error of law because failing to consider the condition in its totality is a failure to properly apply the test for a severe disability.

[24] At the same time, if the General Division fails to consider one of the Claimant's conditions, this can also be framed as an error of fact, where the General Division fails to have regard for evidence about one of the Claimant's medical conditions in reaching its decision.

[25] The Claimant argues that the General Division did not have regard for her evidence about her pain, which alleges an error of fact. The Claimant argues that ignoring evidence about her pain was also an error of law because it represents a failure to consider all of the conditions, as is required when properly applying the test for a severe disability.

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

[26] The Minister concedes that the General Division did not specifically address the effect of the Claimant's chronic pain, but argues that this is not an error of law because the General Division is not required to make an explicit finding on each element leading to its final conclusion. The Minister argues that the General Division's analysis was sufficient and that in the end, it assessed the totality of the Claimant's conditions—which would include the effect of the Claimant's chronic pain—and their cumulative effect, as is required.

[27] The General Division took into consideration evidence related to the Claimant's pain. In the "Evidence" section, the General Division noted that:

a) the Claimant was referred to Dr. Lapp for pain and that he found little to report after the physical exam, other than the fact that the Claimant is mildly obese and complains of ankle pain;[11]

b) the Claimant complained to Dr. Casses of soft tissue pain over both feet and swelling and that he felt she required anti-inflammatory drugs;[12]

c) the Claimant's physiotherapist noted that despite treatment, the Claimant was still reporting mild pain;[13]

d) Dr. Casses noted that the Claimant experienced continued pain, so he recommended orthotics and anti-inflammatories;[14]

e) the Claimant testified that one ankle is more painful than the other and they were worse in 2010;[15]

f) the Claimant testified that she experienced chronic ankle pain that was worse with activity and that she took anti-inflammatories for that pain, but the pain never goes away completely;[16]

g) the Claimant testified that standing for long periods is painful;[17]

[11] General Division decision, para. 12
[12] *Ibid*., para. 14
[13] *Ibid*., para. 17
[14] *Ibid*., para. 18
[15] *Ibid*., para. 27
[16] *Ibid*., para. 28

h) the Claimant testified that she obtained orthotics, which help, and that anti-inflammatories take some of the pain away, but she can take only low doses;[18]

i) the Claimant testified that both her knee and neck bother her more since the falls;[19] and

j) the Claimant testified that she was diagnosed with fibromyalgia in the 1980s; that she has burning pain in her arms and muscles, which are inflamed and swollen; and that she complained about the pain to Dr. Riddle in July 2010.

[28] Then, in its analysis of the evidence, the General Division considered the impact the Claimant's pain had on her capacity for work. The General Division specifically acknowledged the list of medical conditions the Claimant stated kept her from working, which included "knee and back pain" and "left ankle pain."[20] In its analysis, the General Division specifically considered a review of the medical evidence regarding the Claimant's fibromyalgia and noted that there were "earlier reports of generalized muscle aches and pains" but no specific diagnosis in the documents.[21] The General Division expressly considered Dr. Lapp's note from April 2012, which mentions that the Claimant reported some neck and left knee pain that she said had increased since her ankle injuries. However, the General Division noted that Dr. Riddle did not reference these pains in his letter from July 2010, nor did he mention them "in any of his medical notes surrounding the MQP. Dr. Lapp does note some chronic neck pain in November 2010."[22]

[29] The General Division determined that while "she had some history of neck and knee pain she had always been able to work with those complaints."[23] The General Division specifically noted Dr. Casses' finding from October 2010: "while [the Claimant] was having some minimal soft tissue pain on the left side the joints were stable and with completely normal range of motion."[24] The General Division acknowledged[25] that medical reports after the MQP suggest that the Claimant continued to have some pain and balance issues.

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[17] *Ibid*., para. 29
[18] *Ibid*., para. 30
[19] *Ibid*., para. 31
[20] *Ibid*., para. 54
[21] *Ibid*., para. 58
[22] *Ibid*., para. 62
[23] *Ibid*., para. 62
[24] *Ibid*., para. 63

[30] The General Division did not make an error of fact or an error of law.

[31] The General Division considered the Claimant's pain and did not ignore the evidence on that question. The General Division recounted the Claimant's history with pain and determined that while the pain and balance issues meant that she was not able to make a successful return to her previous work from 2012 in the florist shop, she had capacity to work in a sedentary position.[26]

[32] In the context of the finding that the Claimant had capacity to work at the MQP or the possible prorated MQP, the General Division considered the Claimant's pain in some detail, noting that the treatment was anti-inflammatories, that she had a history of working despite pain, and that the jobs she said she could not return to were those that involve "extended walking and stairs."[27] The General Division based its decision that the Claimant was not capable of performing her previous job at the florist, in part, on the existence of her pain.

[33] By the same token, the General Division did not skip over one of the conditions—to do so would be to make an error of law by failing to consider all the conditions in their totality. It is true that the General Division did not use the term "chronic pain syndrome" and analyze it as a separate condition. The Claimant argues that the General Division should have addressed chronic pain syndrome, but all the examples the Claimant provides for why the General Division should have considered chronic pain syndrome were indeed considered by the General Division, even if it did not use the term "chronic pain syndrome." The Claimant has not shown any error here.

The General Division did not make an error of law by failing to follow a legal principle from the Supreme Court of Canada about chronic pain

[34] The Claimant argues that the General Division made a legal error because its analysis does not take into account this statement from the Supreme Court of Canada in a case called *Martin*: "Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real."[28] The Claimant argues that the General Division should have taken that statement from *Martin* into account and that the

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[25] *Ibid*., para. 63
[26] *Ibid*., paras. 62, 63, 54, and 58
[27] *Ibid*., para. 65
[28] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54

failure to do so is evident in the General Division's finding that the Claimant appeared to overstate some of her symptoms and medical conditions as compared to the medical reports.[29]

[35] The Claimant argues that when the General Division makes a finding that a claimant has overstated symptoms and medical conditions as compared to reports, it should specifically address the context: if the context is chronic pain, the General Division must consider the Supreme Court of Canada's comment in *Martin* about the lack of objective findings in files even when patients are suffering and in distress.

[36] The Minister argues that *Martin* was decided in the context of an "unrelated constitution issue. And with regard to an insurance scheme that is fundamentally different from the CPP in both its criteria and purpose."[30] The Minister argues that *Martin* does not contain a principle of law that must be followed in this case and that chronic pain must be considered "in the specific context of the CPP, and should not receive special weight in determining whether a claimant is entitled to compensation."[31]

[37] The *Martin* decision does not set out a principle of law that the General Division failed to follow in this case. *Martin* contains a general statement—namely that chronic pain patients experience disability even where there is a lack of objective medical findings in their files. This does not translate into a legal principle or test that the General Division must follow when the claimant's evidence includes references to chronic pain. The Federal Court of Appeal has considered the impact of the *Martin* decision on disability pension cases before the General Division:

> Insofar as concerns the *Martin* case, it does not stand for the proposition that Mr. Garvey advances. 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*

[29] General Division decision, para. 55
[30] ADN2-12, para. 30
[31] *Ibid.*, para. 30

> *Pension Plan*, which requires consideration of whether the claimed disability is severe and prolonged.[32]

[38] The test for a severe disability under the CPP requires medical evidence. Claimants are free to make arguments based on *Martin* about how the General Division should weigh the medical evidence in the record versus their own evidence about the impact of their disability, but there is no specific test or specific legal principle from *Martin* that will decide that question or provide the approach that the General Division must apply when the claimant's claim for disability benefits from CPP is based on chronic pain.

Issue 3: Did the General Division make an error of law or an error of fact by focussing on the Claimant's symptoms and not their impact as she described in her evidence?

[39] The General Division did not make an error of fact by ignoring the Claimant's testimony about the impact of her symptoms on her employability. By the same token, the General Division did not make an error of law, either. It considered that testimony as part of its legal obligation to focus on the impact of the Claimant's symptoms on employability, as is required by the Federal Court decision in *Plaquet*.[33]

The General Division did not make an error of fact by ignoring the Claimant's testimony

[40] The Claimant argues that the evidence about how her conditions impacted her ability to work came largely from her own testimony, many aspects of which she says were ignored; she alleges that this is an error of fact.

[41] The Claimant alleges that the General Division ignored these aspects of her testimony about her employability:

a) The fibromyalgia caused burning pain in her body with fatigue. She could not rectify the situation, and she had difficulty concentrating on what she needed to do.

b) She was extremely fatigued working at a nursing home, and her fatigue levels worsened after she broke both her ankles. She needed to lay down even when she was doing something and she lays down every day. She sleeps and rests most days and must sit

[32] *Garvey v. Canada (Attorney General)*, 2018 FCA 118
[33] *Plaquet v. Canada (Attorney General)*, 2016 FC 1209, para. 59

down. In 2010, her fatigue was extreme, and she could not sleep because of body pain and could not get comfortable. She cannot go a whole day without taking a nap. Her fatigue means she could not work on a schedule. She would have to have a flexible schedule that would allow her to come and go as she pleased.

c) She has at least four headaches a week. In 2010, she was having headaches every day. She missed time from work because of migraines.

d) After sitting for a while, she has to put her feet up because of pain. She applied for an office job but was physically too uncomfortable and fatigued. She was told she was not the right person for the job. She was not up to the job. This was before she broke both ankles.

e) She was given a computer manual to learn for a sedentary job but she could not read it.

f) She tried a job with a realtor. She was given a computer manual to study for a couple of weeks. She was too foggy to retain the information. She was told she needed to go home. She was too fatigued. This was before she broke both her ankles.

[42] A person with a severe disability within the meaning of the CPP is a person who is incapable regularly of pursuing any substantially gainful occupation.[34] The CPP defines a disability as severe when it affects the claimant's employability, which must be assessed in light of all the circumstances.[35] The General Division is presumed to have considered all the evidence before it, and that presumption is disproven where the importance of the evidence is such that it needed to be discussed.[36]

[43] The General Division did not make an error of fact as the Claimant alleges. The General Division summarized the Claimant's testimony in its decision, including references to her fatigue, pain, headaches, and difficulty concentrating.[37] The General Division summarized the Claimant's evidence about her fibromyalgia and the fact that she worked anyway in order to

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[34] *Canada Pension Plan*, s. 42(2)(*a*)
[35] *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[36] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498
[37] General Division decision, paras. 27–46

support her children.[38] The General Division acknowledged the evidence about the Claimant's fatigue and how it impacted her capacity for work at the nursing home.[39]

[44] In its analysis, the General Division considered the Claimant's evidence about her capacity to work in light of her fatigue and concluded that it was a factor when she left the nursing home but also found that it appeared to be related to family and work stresses at the time.[40] This is not a conclusion that the Claimant would have liked the General Division to reach, but the General Division did not ignore the evidence.

[45] The testimony about the Claimant's attempt to work for a realtor is not summarized in the General Division's decision specifically, but there is reference to "other jobs the Claimant tried or applied for without success due to troubles focusing and with memory," which appears to cover this aspect of the Claimant's evidence.[41] Although it is an example of the impact of the Claimant's fatigue on her employability, it is not an error for the General Division to have omitted such details. The Claimant's evidence was that this work attempt occurred before she broke her ankle. The timing of this evidence in relation to her subsequent work attempts and to the MQP and proration dates is such that it is not particularly important because she left work due to the broken ankle.

The General Division did not make an error of law by failing to focus on the real world impact of the Claimant's symptoms on her employability

[46] The Claimant argues that the General Division failed to focus on the real world impact of her symptoms on her employability, which is the approach the General Division is required in law to take, according to the decision from the Federal Court in *Plaquet*. She argues that the General Division focussed on her symptoms and not on their real world impact on her employability, which would be an error of law.

[47] The Claimant argues that the General Division stated her conditions[42] and then went on to discuss the diagnoses[43] without considering how those diagnoses affect her ability to work.

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[38] *Ibid*., para. 33
[39] *Ibid*., para. 35
[40] *Ibid*., para. 57
[41] *Ibid*., para. 45
[42] General Division decision, para. 54

[48] The Minister does not seem to dispute that the Federal Court's decision in *Plaquet* means that the General Division must focus on the real world impact of her symptoms on the Claimant's employability, and notes that there is other legal authority for that approach as well.[44] The Minister argues that this was the approach the General Division actually took in assessing the Claimant's conditions in the analysis, by weighing the medical evidence before it.[45]

[49] The General Division did take the approach required by *Plaquet* and, therefore, there is no error of law based on any principles from that decision. The General Division considered the Claimant's evidence, but expressed a concern in its analysis about the Claimant's oral evidence, finding that some of it was "lacking," some of it appeared "contradictory or evasive," and that she appeared to "overstate some of her symptoms and medical conditions as compared to the medical reports that were filed and it appeared that she was often speaking about her condition following the MQP."[46]

[50] The Appeal Division will not intervene in the General Division's analysis here. The Claimant gave evidence about her abilities, and the General Division assigned weight to her evidence. It reviewed the evidence in light of the correct test for a severe disability, which includes consideration of how the disability affects employability, and it weighed the evidence from the Claimant on that point. The General Division took an approach that is consistent with *Plaquet*.

Issue 4: Did the General Division make an error of fact or of law by failing to consider whether the Claimant was incapable regularly of pursuing any substantially gainful occupation?

[51] There is ample evidence in the General Division's decision that the member considered whether the Claimant was capable **regularly** of pursuing any substantially gainful occupation as is required by law. The General Division did not ignore evidence such that there was any error of fact here either.

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[43] *Ibid*., paras. 56–63
[44] namely, in *Bungay v. Canada (Attorney General)*, 2011 FCA 47
[45] General Division decision, paras. 56–63
[46] *Ibid*., para. 55

[52] In determining whether a claimant has a severe disability, the General Division must consider whether the claimant was incapable **regularly** of pursuing any substantially gainful occupation.[47] Each part of that test is relevant and has meaning.[48] The test for the severity of a disability means that it is the incapacity for work that must be regular.[49] The Federal Court of Appeal is clear that the question is whether there is an inability to pursue "with consistent frequency" any truly remunerative occupation.[50] Predictability is the essence of regularity within the CPP definition of a severe disability.[51]

The General Division did not ignore evidence about whether the Claimant was "incapable regularly" of pursuing any substantially gainful occupation

[53] The Claimant argues that the General Division did not take the Claimant's oral and written evidence into account with regard to her ability to be a "regular" employee. In the Claimant's application, she stated that she was working 3–4 hours per day and that her employer questioned her ongoing employment due to her confidence, anxiety levels, and health conditions. The General Division stated that while the Claimant

> […] felt that she could not work to a set schedule and it was submitted that her conditions would have prevented her from regularly working, there was no evidence of missed time in the past. She also attempted to return to work in 2012 which suggests that at the time she felt able to work regularly.[52]

[54] The General Division did not ignore the evidence about whether the Claimant was capable regularly. It did not reference every part of the evidence on this question, but it is not required to do so.[53] The General Division referenced the Claimant's belief that she could not work a set schedule, and was not required to re-state her evidence about her employer's opinion.

The General Division did not make an error of law by failing to apply the part of the test for a severe disability that requires the Claimant to be "incapable regularly"

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[47] *Canada Pension Plan*, s. 42(2)(*a*)
[48] *Villani v. Canada (Attorney General)*, 2001 FCA 248, para. 50
[49] *Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34
[50] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95
[51] *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, para. 38
[52] General Division decision, para. 65
[53] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

[55] There is no error of law. There is evidence in the decision that the General Division did consider whether the Claimant was **capable regularly** of any substantially gainful occupation. The General Division set out the appropriate test[54] and then applied it with reference to the notion of "regular" capacity.[55] The General Division acknowledged the Claimant's evidence that she did not believe she could work a set schedule, and weighed it against other evidence in determining that she had a capacity to work.[56] It is not for the Appeal Division to re-weigh that evidence.

[56] The General Division considered the evidence before it and turned its mind to the Claimant's argument about whether she was incapable **regularly** of substantially gainful employment.[57]

Issue 5: Did the General Division make errors of fact by finding that the Claimant had not missed time from work in the past and that she felt able to work regularly?

[57] The General Division stated that there was no evidence of missed time in the past. This statement may have been inaccurate if the General Division accepted some of the Claimant's oral evidence on that question, but it does not constitute an error of fact under the DESDA because the General Division did not base its decision on this fact. According to the DESDA, an error of fact must be made in a perverse or capricious manner, or it must be a finding that the General Division makes without regard for the evidence before it. An error must also be material, which is to say that the General Division must have based its decision on the finding.

[58] The General Division stated:

> While she felt that she could not work to a set schedule and it was submitted that her conditions would have prevented her from regularly working, there was no evidence of missed time in the past. She also attempted to return to work in 2012 which suggests that at the time she

[54] General Division decision, para. 6
[55] *Ibid*., paras. 56, 57, 58
[56] *Ibid*., para. 57
[57] The Claimant argues that the finding about the Claimant's capacity to work is also not reasonable in light of the Claimant's evidence that she requires daily naps and rest periods. This is a question of mixed fact and law which merely involves a disagreement on the application of settled law to the facts, which is not a ground for appeal under the DESDA. See *Garvey v. Canada (Attorney General)*, 2018 FCA 118

> felt able to work regularly. She only left that job because of the physical difficulties related to her ankles and balance.[58]

[59] The Claimant argues that the General Division's finding that there was "no missed time in the past" is an error that was made without regard to the Claimant's evidence that she: missed time because of migraines; was told she needed to go home because she was too fatigued when she tried to work with the realtor; and was occasionally told by nurses she go home from work at the nursing home, due to her fatigue.

[60] The Minister argues that the reference to "no missed time in the past" does not meet the high bar in the DESDA for a factual error that is perverse or capricious or made without regard for the material before it. The Minister argues that the General Division did not make its decision based on this finding of fact, and the Claimant's reasons for being sent home were not reasons that prevented her from working in 2010.

[61] It appears that the General Division's statement that there was "no evidence of missed time in the past" was inaccurate. The Claimant gave evidence about missed time. At the hearing, her counsel asked her whether she ever missed work because of migraines and the Claimant said yes. The Claimant stated that nursing staff at the nursing home thought the work was too much for her, but that was not the reason she gave as to why she stopped working there, so it is difficult to reach any conclusion about employability on that basis. The Claimant gave evidence about having trouble with a manual she needed to learn in order to work with a realtor and the role fatigue played in her lack of success in that position. The Claimant did not indicate how often she missed work due to migraines such that employability could be assessed on this basis. In any event, this inaccuracy does not give rise to an error of fact under the DESDA.

[62] Even if the General Division had found the Claimant had missed some time at work in the past due to migraines, headaches, and fatigue, the General Division reviewed the evidence in some detail on fatigue[59] and on headaches and migraines.[60] The General Division concluded that the medical evidence near the MQP did not support that the Claimant was addressing her fatigue at that time or that it was a major issue making her incapable regularly of pursuing gainful

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[58] General Division decision., para. 65
[59] *Ibid*., para. 57
[60] *Ibid*., para. 60

occupation. The General Division acknowledged generally that the Claimant "testified about her headaches and migraines" but does not specifically mention her evidence that she missed time as a result.

[63] However, the General Division again reviewed the available medical evidence on the issue, as well as the fact that it did not "appear to be the reason she left either the florists [*sic*] or the nursing home" and that it was also not a significant factor at her MQP.[61] In light of the General Division's analysis of the medical evidence, the finding that there was no missed time was immaterial to the question of whether the Claimant meets the test for a severe disability.

[64] The Claimant also argues that the finding that she felt able work regularly was an error of fact. The General Division stated that the Claimant "also attempted to return to work in 2012 which suggests that at the time she felt able to work regularly."[62]

[65] The Minister argues that the General Division did not make an error of fact under the DESDA. The finding about whether the Claimant felt able to work regularly in 2012 was not material to the question of the severity of her condition during the MQP or the period of proration. Findings that are not material do not rise to the level of an error of fact under the DESDA.

[66] The General Division did not find as a matter of fact that the Claimant felt able to work regularly; it stated that the return to work **suggested** that she felt that she could work regularly. The Claimant's submission amounts to a request for the Appeal Division to analyze the evidence again and conclude that the fact that she tried to return to work in 2012 meant something different, but that is not the proper role of the Appeal Division. Furthermore, the Appeal Division accepts the Minister's submission, in the context of the General Division decision, that this finding was not material.

CONCLUSION

[67] The appeal is dismissed.

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[61] *Ibid*.
[62] *Ibid*., para. 65

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference August 9, 2018
APPEARANCES:	J. M., Appellant Alexandra Victoros, Representative for the Appellant Minister of Employment and Social Development, Respondent Sara Mitchell, Representative for the Respondent