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

Citation: *J. D. v Minister of Employment and Social Development*, 2018 SST 1268

Tribunal File Number: AD-17-981

BETWEEN:

J. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: December 4, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] J. D. (Claimant), stopped working in March 2010 because he had been laid off. He was incarcerated in a federal correctional centre from 2011 to 2014. He applied for a disability pension under the Canada Pension Plan (CPP) in May 2015. He stated that he was prevented from working because of arthritis, depression, stress, pain in his hand and shoulder, and difficulty walking. He also stated that he was unstable on his feet, moved slowly, and had chronic pain in his head and numbness in his legs. The Minister denied his application both initially and on reconsideration.

[3] The General Division denied the Claimant's appeal on May 23, 2017, finding that although the Claimant had medical conditions and functional limitations on or before December 31, 2013, when his minimum qualifying period (MQP) ended, he did not prove that his disability was severe within the meaning in the *Canada Pension Plan*.

[4] The Appeal Division granted leave to appeal the General Division's decision.

[5] The Appeal Division must decide whether the General Division made any errors under the *Department of Employment and Social Development Act* (DESDA) such that an appeal should be granted. The Appeal Division finds that the General Division decision does not contain any such error, and the appeal is dismissed.

PRELIMINARY MATTER

[6] The Claimant has provided a copy of a medical report from his doctor giving an opinion about the Claimant's medical condition from as early as 2012 and 2013. This is new evidence. The Claimant argues that he did not provide this evidence at the hearing because he did not believe this period of time to be at issue in his appeal at the time of the hearing. He also argues

that the General Division's failure to abide by the reasons in the Minister's decision in relation to this period of time was an error.

[7] The Appeal Division does not normally consider new evidence, although there are some limited exceptions to that rule.[1] None of the exceptions apply here, and the Appeal Division has not considered the new evidence.[2]

ISSUES

[8] The issues the Appeal Division will decide are:

1. Did the General Division make an error of law by failing to apply the real-world analysis of the Claimant's personal circumstances as required?

2. Did the General Division violate a principle of natural justice by disregarding the Minister's findings of fact without notice to the Claimant?

3. Did the General Division make an error of law by stating that the Claimant failed to show that the effects of his medical conditions were "so profound as to show that he was unemployable" and that "any job search would be fruitless?"

4. Did the General Division make an error of law by relying on a conclusion about the Claimant's "efforts to find suitable alternate employment" without first making a clear finding about whether there was evidence of capacity to work?

5. Did the General Division make an error under the DESDA by stating that it would be mere speculation to conclude that the Claimant had undiagnosed Parkinson's at end of the MQP?

[1] *Parchment v Canada (Attorney General)*, 2017 FC 354.
[2] AD2-5 to AD2-8.

ANALYSIS

Appeal Division's Review of the General Division's Decision

[9] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full at a new (de novo) hearing. Instead, the Appeal Division conducts a review of the General Division's 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.

[10] 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.[3] 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.

[11] By contrast, the DESDA 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.[4]

[12] In *Garvey v Canada*, the Federal Court of Appeal found that where errors of mixed fact and law merely involve a disagreement on the application of the settled law to the facts, they are not reviewable errors under the DESDA.[5]

Issue 1: Did the General Division make an error of law by failing to apply the real-world analysis of the Claimant's personal circumstances as required?

[13] The General Division did not make an error of law. It applied the real-world test to the question of severity of the Claimant's disability, considering both the functional effects of his medical conditions and his personal circumstances, as is required by the Federal Court of Appeal. It is not for the Appeal Division to re-weigh the evidence on those issues.

[14] The "real world" approach to assessing the severity of a disability requires the General Division to consider the Claimant's employability in light of "all the circumstances," which

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[3] DESDA, s 58(1)(c).
[4] *Ibid.*, s 58(1)(b).
[5] *Garvey v Canada (Attorney General)*, 2018 FCA 118.

includes the Claimant's background—including age, education level, language proficiency, and past work and life experience—and the Claimant's medical conditions.[6]

[15] The Claimant acknowledges that the General Division did note that the Claimant was 53 years old, that his English skills are limited, and that his employment opportunities were limited by his time in prison.[7] However, the General Division then stated:

> The Tribunal recognizes and is sympathetic to the challenges faced by the [Claimant]. However, the [Claimant's] entitlement to a disability pension cannot be based on his personal characteristics or background alone. In this case, the Tribunal has found that the [Claimant] has not otherwise met his burden and shown that his disability is severe.[8]

[16] The Claimant argues that the General Division did not apply the legal test that requires the General Division to consider a claimant's personal circumstances. He argues that it assessed his personal circumstances separately from the real-world impact of his medical conditions and their limitations.

[17] The Minister argues that the Claimant is really just raising an issue with the application of settled law to the facts of a particular case, which is not within the Appeal Division's jurisdiction to decide.[9]

[18] The General Division is expected to decide whether a claimant's disability is severe with regard to all of the circumstances, which include both medical conditions and personal circumstances. In this case, the General Division concluded that on or before the end of the MQP, there was sufficient evidence to show the Claimant had depression, pain, and some functional limitations, and that although the Claimant's ability to transition to suitable alternate employment was compromised by some of his personal circumstances, this did not "overcome the deficits in his appeal."[10]

[19] It seems that the General Division was not satisfied, based on the evidence about the Claimant's medical conditions, that he had a severe disability. The General Division considered

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[6] *Villani v Canada (Attorney General)*, 2001 FCA 248; *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[7] General Division decision, para 61.
[8] *Ibid*.
[9] *Quadir v Canada (Attorney General)*, 2018 FCA 21; *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[10] General Division decision, para 62.

the Claimant's personal circumstances, and, while they seemed to be in the Claimant's favour, they were not enough to overcome the "deficits" in his appeal. The General Division concluded that the functional effects of his medical conditions were such that the Claimant did not show he had a severe disability. The other part of that test for the severity of the disability is considering the claimant's personal circumstances. Although the General Division found that those circumstances were partly in the Claimant's favour, the General Division found that they were not sufficient to overcome the conclusion about severity based on the functional effects of the medical conditions. That is a question of the application of the Claimant's facts to the settled law, and the Appeal Division does not have jurisdiction in that regard.

Issue 2: Did the General Division violate a principle of natural justice by disregarding the Minister's findings of fact without notice to the Claimant?

[20] The General Division did not violate a principle of natural justice by disregarding the Minister's findings of fact without notice to the Claimant. The General Division provides a new (*de novo*) hearing on the question of the claimant's eligibility for the CPP disability pension. While the reconsideration decision from the Minister triggers the appeal process at the General Division, the reasons in the Minister's decision are not findings of fact that the General Division is obliged to maintain.

[21] Claimants make an application for a disability pension under the CPP, and the Minister either approves payment or does not.[11] The Minister provides reasons for that decision.[12] When a claimant is dissatisfied with that initial decision, the claimant can ask the Minister to reconsider that initial decision.[13] The Minister can then confirm the decision or vary it. It may also approve payment of a benefit, determine the amount of a benefit, or determine that no benefit is payable.[14] A claimant who is dissatisfied with that reconsideration decision may appeal to the General Division.[15]

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[11] *Canada Pension Plan*, s 60(1).
[12] *Ibid.*, s 60(7).
[13] *Ibid.*, s 81(1)(b).
[14] *Ibid.*, s 81(2).
[15] *Ibid.*, s 82.

[22] Claimants can appeal decisions relating to CPP benefits to the General Division, and the General Division provides a *de novo* hearing.[16] The General Division has the jurisdiction to decide "any question of law or fact that is necessary for the disposition of any application" made under the DESDA.[17] In CPP disability pension cases, the General Division may decide questions of law or fact only in terms of whether any benefit is payable to a person or in what amount.[18] The General Division may dismiss the appeal or confirm, rescind, or vary a decision of the Minister or the Canada Employment Insurance Commission (Commission) in whole or in part. It may otherwise give the decision that the Minister or the Commission should have given.[19]

[23] The Supreme Court of Canada has stated that part of the duty to act fairly is to allow the right to be heard.[20] The right to be heard is about giving a person the opportunity to answer the questions put to them and to make submissions on every fact or factor likely to affect the decision.[21]

[24] The letter the Claimant received in 2015 from the Minister denying him the CPP disability pension says:

> We recognize that you have identified limitations resulting from peripheral neuropathy, arthritis and depression and we realize that you cannot work now. However, we concluded that your condition did not **continuously** prevent you from doing some type of work since December 31, 2013.[22] [emphasis on original]

[25] The Claimant argues that the General Division violated a principle of natural justice by failing to be bound by part of the decision the Claimant received from the Minister in 2015. His MQP ended on December 31, 2013.[23] The Claimant argues that because the decision letter indicated only that he did not show that the disability was continuous since the end of the MQP, at the appeal level, the Claimant brought evidence about his disability only after the end of the MQP. He says he did not present evidence in the form of a medical opinion from his family

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[16] *Grosvenor v Canada (Attorney General)*, 2018 FC 36, para 7; *Stevens Estate v Canada (Attorney General)*, 2011 FC 103, paras 66–75 discusses that the Review Tribunal, before legislative changes in 2013, held *de novo* hearings.
[17] DESDA, s 64(1).
[18] *Ibid.*, s 64(2)(a).
[19] *Ibid.*, s 54(1).
[20] *Therrien (Re)*, 2001 SCC 35.
[21] *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).
[22] GD2-17.
[23] General Division decision, para 8.

doctor about his condition during the MQP because he already had a decision from the Minister that indicated he had a severe disability at that time.[24]

[26] The Minister argues that "the very fact that a *de novo* hearing was conducted by the [General Division] in this matter promotes the [Claimant's] natural justice rights."[25] The Minister also argues that the Claimant's allegation is not clear in the sense that he seems to argue that he did not present evidence at the General Division in the form of a medical opinion from his family doctor about undiagnosed Parkinson's before the end of the MQP, but in reality, the decision contains acknowledgement from Dr. Makhija regarding an investigation into early Parkinson's syndrome that was submitted to the General Division, and the General Division expressly considered it.

[27] The reconsideration decision, as in this case, affirmed the decision not to approve payment of the disability pension. The General Division provides a new hearing to a claimant who is dissatisfied with the decision not to approve payment. That means that the General Division will make the factual findings and decide the legal question of the claimant's eligibility for the disability pension. The Minister is required to give reasons for the decision not to approve payment of the disability pension, but the legislation does not support the idea that the General Division is bound by any part of the Minister's reasons, simply because one aspect of that decision favours the claimant.

[28] Claimants who receive reasons from the Minister that state they met part of the test for eligibility can expect that General Division will review the question of approving payment from scratch, and the General Division's reasons on each aspect of the test may not match the reasons the Minister gives on reconsideration. There is nothing in the legislation or the case law that suggests that the General Division is bound by the contents of any of the reasons in the decision it reviews. To the contrary, at the General Division:

> Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly

[24] AD2-16.
[25] AD4-20.

> of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities.[26]

[29] In any event, the decision letter from the Minister in this case does not clearly state that the Claimant had a severe disability on or before the end of the MQP. It acknowledges that the Claimant had "identified limitations" during that period, but not that he was incapable regularly of pursuing any substantially gainful occupation at any particular time. The letter does focus on the fact that the Claimant's limitations did not "continuously" prevent him from "doing some type of work, in [*sic*] December 31, 2013."[27] The language of this letter could be clearer, because the Claimant's counsel was under this impression that the issue was only the question of whether the disability continued after December 31, 2013, but that is not, strictly speaking, what the letter says.

[30] The Claimant had the opportunity to know the case to be met and to make submissions on all the issues before the General Division. He was represented in a *de novo* appeal before an administrative decision-maker tasked with deciding whether he was eligible for the disability pension. The General Division member took steps at the beginning of the hearing to explain to the Claimant the test for disability and the fact that she would be applying that test. It was the Claimant's responsibility to produce all evidence that addressed that issue of eligibility. The Claimant cannot operate on the assumption that some aspects of the Minister's reasons at the reconsideration level were binding. The General Division did not violate a principle of natural justice: it provided the Claimant with a new hearing and allowed him the right to be heard.

Issue 3: Did the General Division make an error of law by stating that the Claimant failed to show that the effects of his medical conditions were "so profound as to show that he was unemployable" and that "any job search would be fruitless?"

[31] The General Division stated that the Claimant failed to show that the effects of his medical conditions were "so profound as to show that he was unemployable" and that "any job search would be fruitless." These are poor choices of phrasing, but reading the decision as a whole makes it clear that the General Division recognized and applied the correct test.

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[26] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[27] GD2-17.

[32] In order to be eligible for a CPP disability pension, a claimant must have a severe disability on or before the end of the MQP. A person with a severe disability is a person who is incapable regularly of pursuing any substantially gainful occupation.[28] This is not the same as requiring a claimant to be incapable at all times of pursuing any conceivable occupation.[29] The test is not the inability of a claimant to hold any job or some specific job.[30]

[33] Medical evidence and the claimant's evidence of work efforts and possibilities are necessary.[31] The decision-maker must assess the claimant's employability in light of all the circumstances, including the claimant's background and the claimant's medical conditions.[32]

[34] Claimants must show that they have made efforts to manage their condition.[33] Where there is evidence of capacity to work, claimants must show that efforts to obtain and maintain employment were unsuccessful by reason of the health condition.[34]

[35] In this case, the General Division stated:

> [...] the [Claimant] was functionally limited before the MQP, but the Tribunal does not also find that the effects were so profound as to show that he was unemployable. Specifically, the Tribunal does not find that the functional effects of the [Claimant's] conditions were such that any job search would be fruitless. Therefore, the Tribunal finds that the [Claimant] has not shown that he made sufficient efforts to manage his conditions by seeking suitable alternate employment.[35]

[36] The Claimant argues that the General Division made an error of law by requiring him to show that he was "unemployable" and that "any job search would be fruitless" in order to show that he made sufficient efforts to obtain work, instead of merely requiring him to show that he was incapable regularly of pursuing any substantially gainful occupation.

[37] The Minister argues that in stating the Claimant failed to show that the effects of his condition were "so profound as to show that he was unemployable" and that "any job search

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[28] *Canada Pension Plan*, s 42(2).
[29] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[30] *Canada (Attorney General) v Thériault*, 2017 FC 405.
[31] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[32] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[33] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.
[34] *Inclima v Canada (Attorney General)*, 2003 FCA 117.
[35] General Division decision, para 60.

would be fruitless," the General Division is basically saying that the Claimant's condition was not so severe that it would prevent him from being employed in any substantially gainful employment on or before the end of the MQP.

[38] The Appeal Division finds that the General Division did not make an error of law.

[39] The General Division set out the correct legal test for a severe disability at the beginning of the decision.[36] The General Division stated correctly that the measure of whether a disability is severe is whether a disability prevents a person from earning a living.[37] The General Division acknowledged that the determination of whether a disability is severe is not based on a person's inability to perform their regular job, but rather on their inability to perform any work.[38] It would have been more accurate to replace the phrase "any work" in that sentence with "any substantially gainful occupation." However, the reference to earning a living assists in showing that the General Division was aware of the correct test in law.

[40] The General Division found that at the time of the MQP, the Claimant was functionally limited in his ability to walk and to use his left shoulder and thumb, and that while he had depression that minimally impaired his functioning, it was effectively managed by medication and was stable.[39] In light of those findings, the General Division went on to consider the Claimant's efforts to manage the effect of his conditions and concluded that he did not show sufficient efforts to find suitable employment. The General Division found that the Claimant was in jail during the MQP and therefore did not show efforts to secure employment. It also found that he also turned down counselling services from the transition housing because he feels he cannot work.

[41] The General Division's use of the phrases "unemployable" and "any job search would be fruitless" are unfortunate because they may leave the reader with the impression that the General Division was requiring the Claimant to show more than just efforts to secure any substantially gainful work. However, the Appeal Division must read the decision as a whole. Reasons must be read together with the outcome and must show whether the result falls within an acceptable

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[36] *Ibid.*, para 7.
[37] *Ibid.*, para 56.
[38] *Ibid.*, para 56.
[39] *Ibid.*, para 57.

range of outcomes.[40] The General Division set out the correct test for a severe disability at the outset of the decision. However, in light of the clear findings about the nature of the Claimant's limitations, and given that the evidence of work efforts was lacking, the General Division did not make an error of law.

[42] Even if the Appeal Division is wrong and the General Division did set the bar too high for the Claimant when it assessed his employment efforts, the Claimant was in jail during the MQP, and his evidence was that he did not participate in a job counselling service after he was released because he felt he was not well enough to work. The outcome of this case did not turn on this issue. In other words, this is not a situation in which the Claimant showed that he made efforts at finding any substantially gainful occupation but the General Division required him to show more, namely that any job search would be fruitless. The Claimant did not show evidence of employment efforts because he did not believe he was well enough to work once he was out of jail.

Issue 4: Did the General Division make an error of law by relying on a conclusion about the Claimant's "efforts to find suitable alternate employment" without first making a clear finding about whether there was evidence of capacity to work?

[43] The General Division did not make an error of law. Employment efforts and possibilities are relevant. That was the standard the General Division applied, and it found that the Claimant did not have a severe disability. The decision from the Federal Court of Appeal in *Inclima v Canada*[41] states that where the General Division finds evidence of capacity for work, the claimant must show that efforts to obtain and maintain employment were unsuccessful by reason of their health condition. The General Division did not apply that test, nor did it need to, because it had already determined the Claimant did not have a severe disability.

[44] The Minister argues that the General Division decision does not contain an error of law. The Minister argues that once the General Division finds that a claimant's condition is not severe, then it is implied that the claimant has a capacity to perform substantially gainful employment.

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[40] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.
[41] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

[45] To be eligible for a disability pension under the *Canada Pension Plan*, claimants must show medical evidence and evidence of employment efforts and possibilities.[42] In some cases, the General Division will review that evidence but will not yet have come to the ultimate conclusion as to whether the claimant's disability meets the test in the *Canada Pension Plan* for a "severe" disability. In some cases, the General Division will be in the position, after assessing that evidence, to conclude that there is evidence of work capacity. This means something short of finding that the evidence shows that the claimant is incapable regularly of pursuing any substantially gainful occupation, and is sometimes referred to as a "residual" capacity to work.[43]

[46] If the General Division finds that capacity to work, then the requirement in the *Inclima* decision goes a step further in terms of the legal test to be met regarding employment efforts, because then claimants must show that their efforts to obtain and maintain employment were unsuccessful by reason of their health condition.

[47] In this case, the General Division did not make a legal error by relying on a conclusion about the Claimant's efforts to find suitable alternate employment. The General Division concluded that the Claimant had "not shown that he made sufficient efforts to manage his conditions by seeking suitable alternate employment."[44] This was a finding about the evidence of employment efforts and possibilities, evidence that is relevant even if *Inclima* is not applied to require the Claimant to prove that efforts to obtain and maintain employment were unsuccessful by reason of his health condition.

[48] In light of the Claimant's medical evidence about his conditions and their limitations, the General Division decided that he did not make sufficient efforts to manage his condition. This was not a statement about whether the Claimant had met his obligation to show that efforts to obtain and maintain employment were unsuccessful because of his health condition, because the General Division did not apply that test at all—it found, based on the evidence, that the Claimant's disability was not severe.

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[42] *Villani v Canada (Attorney General)*, 2001 FCA 248.
[43] *S.G. v Minister of Employment and Social Development Canada*, 2017 141823 (SST).
[44] General Division decision, para 60.

Issue 5: Did the General Division make an error under the DESDA by stating that it would be mere speculation to conclude that the Claimant had undiagnosed Parkinson's at end of the MQP?

[49] The General Division did not make an error of law under the DESDA by concluding it could not make a finding that the Claimant had undiagnosed Parkinson's disease before that disease was diagnosed. There is evidence in the decision that the General Division did consider the evidence before it on that question and that it was not closed to the idea that the General Division can find that a claimant had a disease before that disease is diagnosed. The General Division also did not make an error of fact: it considered the evidence about the Claimant's Parkinson's disease and was neither capricious nor perverse in its finding.

[50] On the issue of the Claimant's Parkinson's disease, the General Division stated:

> Likewise, there is little evidence to show that the [Claimant] developed Parkinson's disease on or before the MQP. The Tribunal acknowledges the [Claimant's] representative's submissions that the [Claimant] exhibited the symptoms of Parkinson's disease before it was diagnosed. The [Claimant's] representative pointed to the reports of Ms. Murdock-Vegt, Dr. Baughen and Dr. Beckett as evidence that the [Claimant] was showing signs of Parkinson's disease as far back as 2012. However, none of these reports go beyond general queries and it was not until 2016 that the [Claimant] was given a positive diagnosis of Parkinson's disease. Furthermore, there is no objective evidence that connects the [Claimant's] earlier symptoms with his ultimate diagnosis. While it is possible that the [Claimant's] Parkinson's disease remained undiagnosed for three years, the Tribunal is unwilling to make a positive finding based on mere speculation. The Tribunal can only make findings based on the evidence available to her. In this case, the Tribunal finds that there is insufficient evidence to show that the [Claimant] had developed Parkinson's disease on or before the MQP. [45]

[51] The Claimant argues that the General Division made both an error of law and an error of fact by concluding that it would have been "mere speculation" to conclude that the Claimant had undiagnosed Parkinson's at the end of the MQP. The Claimant argues that stating that it would be "mere speculation" to find the Claimant had undiagnosed Parkinson's disease is an error of fact because it was a finding made without regard for: (a) the medical records from Dr. Beckett and Dr. Baughen in March and December 2013 that noted the Claimant's "Parkinsonian face,"

[45] *Ibid.*, para 55.

shuffling gait, and weakness; and (b) the references in the record to the fact that the Claimant had collapsed while in the prison yard and that he complained of numbness in the feet in 2012.[46] The Claimant argues that the General Division's statement that it would be mere speculation to find the Claimant had undiagnosed Parkinson's disease is capricious and perverse.

[52] The Claimant acknowledges that the General Division is not required to draw the rational inference that there was undiagnosed Parkinson's, but the General Division's conclusion that such a finding would be "mere speculation" meant that the General Division did not turn its mind to the question of whether this would have been a reasonable inference, which is in the nature of an error of law.

[53] The Minister did not address directly whether the General Division made an error of law in stating that it would be "mere speculation" to find that the Claimant had undiagnosed Parkinson's disease during the MQP. However, the Minister argues that even if the Claimant showed symptoms associated with Parkinson's disease on or before the end of the MQP, the question was whether the Claimant had a severe disability at the time, that is, whether the Claimant was incapable regularly of pursuing any substantially gainful occupation. The Minister notes that it is not the diagnosis that is important, but the limitations, and that the yardstick for measuring the severity of the disability is employability.[47] The Minister argues that the record showed that the Claimant's mobility was not impaired in 2013 and 2014: it reports him running at the time.[48] In other words, the Claimant's activities before the end of the MQP suggest that his symptoms would not prevent him from engaging in suitable gainful employment.

[54] There are several principles of law relevant to determining whether the General Division made an error in its consideration of the Claimant's Parkinson's. The General Division has the jurisdiction to decide any question of fact necessary to decide the case before it.[49] A claimant must provide some objective medical evidence of disability.[50] It is possible for a condition to

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[46] *Ibid.*, paras 17, 21, 22, and 24. The General Division cited GD1B-44, GD1-95, GD1-33, and GD1-76 in the record.
[47] The Minister relies on *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33, in this regard.
[48] AD4-13.
[49] DESDA, s 64.
[50] *Warren v Canada (Attorney General)*, 2008 FCA 377.

impact a claimant prior to its actual detection.[51] It is the claimant's capacity to work that is important when determining eligibility for the disability pension, not the diagnoses.[52]

[55] The General Division is entitled to draw inferences from the evidence if those inferences are reasonable. It was not prevented from drawing an inference based on the evidence that the Claimant had Parkinson's disease before he was actually diagnosed. The Claimant is correct that the General Division is not required to draw that inference. Requiring the General Division to draw an inference from the facts would be an error of mixed fact and law. Where errors of mixed fact and law merely involve a disagreement on the application of settled law to the facts, there is no error under the DESDA for the Appeal Division to review.[53]

[56] The General Division did not make an error of fact by stating that it would be "mere speculation" to find that the Claimant had undiagnosed Parkinson's for three years. The General Division made that finding with express reference to the evidence the Claimant is concerned it ignored. The General Division set out the evidence about the Claimant's Parkinson's-like symptoms in the section of the decision titled "Documentary Evidence,"[54] and then in its analysis, it characterized that evidence as "general queries" with physicians and ultimately decided that it was not sufficient to support a finding that the Claimant had undiagnosed Parkinson's as early as 2012.[55] In other words, the General Division gave such little weight to that medical evidence that it determined it was not reasonable to draw an inference from it. The General Division is free to assign weight to the evidence when applying the facts to the law.

[57] The General Division did not make an error of law, either. Although the General Division stated that it would be "mere speculation" to find that the Claimant had undiagnosed Parkinson's disease, the decision does not actually show that the General Division was closed to the idea that there could be evidence to support such an inference. It was just that, in this particular case, the General Division was "unwilling" to make the inference because the evidence was "insufficient."[56] In this case, the General Division seems to suggest that where such an inference

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[51] *MacDonald v Minister of Human Resources Development* (May 16, 2000) CP 11114 (PAB).
[52] *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33.
[53] *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[54] General Division decision, paras 17, 21, 22, and 24.
[55] *Ibid.*, para 55.
[56] *Ibid.*

cannot reasonably be drawn, as the General Division decided here, then to draw the inference would be mere speculation. This observation does not form the basis for an error of law.

[58] The General Division noted that "while the functional effects of the [Claimant's] current conditions are apparent, it is much more challenging to determine the functional effects of the [Claimant's] conditions as he experienced them on or before the MQP."[57] The General Division's decision focussed appropriately on those functional effects and considered the relevant evidence on that question, regardless of the onset date for the Claimant's Parkinson's disease.

CONCLUSION

[59] The appeal is dismissed.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	Teleconference August 14, 2018
APPEARANCES:	Darius Pazirandeh, Representative for the Appellant Viola Herbert, Representative for the Respondent

[57] *Ibid.*, para 57.