Federal Court  Cour fédérale

Date: 20161103

Docket: T-869-15

Citation: 2016 FC 1209

Ottawa, Ontario, November 3, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DENISE PLAQUET

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Denise Plaquet [the Applicant] pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made on April 24, 2015, by a member of the Social Security Tribunal – Appeal Division (SST-AD) [SST-AD Decision], in which the Applicant's request for leave to appeal a decision made by the Social Security Tribunal – General Division (SST-GD) [SST-GD Decision] was denied, pursuant to section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 (*DESDA*). The

SST-GD Decision, made on March 11, 2015 dismissed an appeal from the denial of the Applicant's application for Canada Pension Plan (CPP) disability benefits at both the initial application stage [Denial Letter] and on reconsideration [Reconsideration Denial Letter].

[1] Judicial review is granted for the reasons that follow.

II. Facts

[2] The Applicant is a 52-year-old woman whose work experience is largely in general labour and machine operation. In 1995, she experienced a workplace injury that resulted in several physical and mental limitations. She has been diagnosed with Osgood-Schlatter Disease, fibromyalgia, spinal fatigue, tendonitis, chronic pain disorder and mood disorder with dysthymia (chronic depression). She is unable to sit or stand for prolonged periods of time, reach overhead, look up or down, remain in a static position, or bend repetitively. She is no longer able to take care of her home or do simple activities like brushing her cat. At the time of her second application for CPP disability benefits in 2011, she was receiving benefits from Ontario's provider of workers' compensation, the Workplace Safety and Insurance Board [WSIB].

[3] The Applicant has a Grade 12 education. During her testimony, she told the SST-GD that she ceased her studies upon finding full-time work in 1983/1984. She attempted to complete a college program for computer skills but alleges that she was unsuccessful due to her chronic pain.

[4] The Applicant stopped working on September 26, 2002. She claims that she ceased work due to loss of function and complex disabilities arising from her chronic pain and spinal fatigue.

[5] In January 2005, the WSIB approved the Applicant for a financial planner course and she took upgrading classes. She quit in September of that year due to "harassment" from school staff.

[6] The Applicant has made two unsuccessful applications for a CPP disability pension: the first in 2002, which was rejected in 2005 and a second in 2011, which is at issue today.

THE FIRST APPLICATION FOR CPP DISABILITY BENEFITS - 2002

[7] The Applicant made her first application for CPP disability on November 4, 2002. Her application was initially denied by the Respondent on January 29, 2003 and again upon reconsideration on November 5, 2003. The Applicant appealed the disability benefits denial to the Office of the Commissioner of Review Tribunals (OCRT). Her appeal was dismissed on July 13, 2004 [OCRT Decision]. At that time, the OCRT found her minimum qualifying period (MQP) was December 2004. In dismissing the Applicant's appeal, the OCRT Decision made note of the following**:**

> […] The [Applicant] listed multiple medical conditions as the reason she could no longer work including chronic right shoulder pain, neck pain, degenerative disc disease, chronic cervical back pain, headaches and sleep deprivation.
>
> […]
>
> The [Applicant's] family physician for over 15 years, Dr. I.J. MacLean, diagnosed the [Applicant] with tendonitis, degenerative disc disease and chronic intractable muscular pain in the upper back, leg, neck and shoulder girdle since an accident in 1995 […].

> […]
>
> […] the [Applicant] stated that she takes Tylenol #3's for pain when needed […] about three times per week and takes no other medications.
>
> The [Applicant] testified that she briefly took Celexa (antidepressant) for two months but discontinued it due to side effects. She has no other psychological and psychiatric treatment.
>
> […] she did have an emergency room visit in 1998 for muscle spasm [*sic*] but since then has had no emergency room or hospital admissions.
>
> […]
>
> An initial physiotherapy assessment on May 29, 2000 was done regarding the [Applicant's] three year history of neck and right shoulder pain […]. A physiotherapy program and conservative treatment was recommended.
>
> […] a Functional Abilities Evaluation (FAE) performed in April 2004 […] suggested that there would certainly be work the Appellant should be able to undertake, albeit modified.
>
> It was also reported in the FAE that the [Applicant] indicated she was called back to work by her original employer, Navistar, on March 8, 2004 but had not yet returned based on her waiting for restrictions and waiting for a job that can accommodate such limitations.
>
> […]
>
> There is no indication that the Applicant was ever referred to a pain clinic for her reported chronic pain.

[8] The OCRT Decision also referenced several X-Rays on the Applicant's file:

- Cervical spine x-rays (May 13, 2002), showing mild degenerative changes;
- Thoracic spine x-rays, showing minimal degenerative changes; and
- Right hand x-rays, showing no significant abnormality.

[9] The Applicant did not appeal the 2004 OCRT Decision to the Pension Appeals Board (PAB). Consequently, pursuant to what was then s. 84 of the *CPP Act*, the OCRT Decision regarding the Applicant's CPP disability as of July 13, 2004 became final and binding, which is not in dispute.

THE SECOND APPLICATION FOR CPP DISABILITY BENEFITS - 2011

[10] The Applicant's second application for CPP disability was made on April 7, 2011. It was denied on November 9, 2011.

[11] The Denial Letter informed the Applicant of the final and binding nature of the earlier OCRT Decision:

> The legislation states that once a Review Tribunal makes a decision, their decision is **final** and **binding** on all parties to the appeal. This means that CPP cannot change their decision.
>
> [emphasis in original]

[12] It then identified the relevant times for the Applicant's current disability application:

> However, since the time of your Review Tribunal hearing, the last date you had sufficient contributions to the CPP to qualify for Disability benefits is December 2004. This means that for you to be eligible to receive a CPP Disability benefit we must determine whether your disability was severe and prolonged after July 13, 2004 to December 2004, the date you last qualified for benefits.

[13] The Denial Letter included a list of documents that had been reviewed, including the 2002 CPP disability benefits application and all related documentation, the family doctor's report from July 2011 and other medical reports from October 2002 to April 2011. It concluded:

> We recognize that you have identified limitations resulting from your fibromyalgia, and depression. However, the following factors were also considered:
>
> - [...] you attended a pain program and saw a pain specialist in 2005, […] In addition you do not currently take any significant medication for pain.
>
> - […] in April 2004, your functional abilities assessment suggested that you could do modified work. We have not received any new information from July 2004 to December 2004 indicating that you were unable to perform such work, in fact there is no evidence that you have attempted to return to work.

[14] The Applicant sought reconsideration. However, reconsideration was denied February 15, 2012. The Reconsideration Denial Letter outlined several additional limitations the Applicant had identified: "mobility, personal needs, bowel and bladder habits, household maintenance, sight, concentration, sleeping, breathing, driving a car, using public transportation." In addition to re-iterating the same considerations that had been included in the initial Denial Letter, the Reconsideration Denial Letter stated:

> - In January 2007, the pain program report noted you returned to school via WSIB in January 2005 to September 2005 to be a financial planner but stopped due to "harassment: from the school staff. [*sic*] Therefore, you engaged in schooling in the view of an alternate occupation. You stopped the education due to "harassment" not noted due to the medical condition. School is considered the equivalent to sedentary work and thus you demonstrated capacity for working after the last time you can be considered disabled due to earnings and contributions, December 2004.
>
> - In January 2007, the report also noted Dr. Mailis-Gagnon stated you did not fulfil the criteria for fibromyalgia at that

> time and provided a diagnosis of chronic pain disorder […] there are no objective findings of a severe condition. Chronic pain in the absence of a pathological medical condition does not preclude all activity including suitable work.
>
> - The objective evidence on file for December 2004, the last time you can be found disabled due to earnings and contributions, does not indicate a severe condition that would preclude all types of work.

[15] The Reconsideration Denial Letter concluded that, while the Applicant may not have been able to do her usual work, she was able to do some type of work. The Applicant appealed this decision to the OCRT.

[16] The appeal was transferred from the OCRT to the SST-GD on April 1, 2013, pursuant to s. 257 of the *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19.

[17] The Applicant had an oral hearing of her appeal before the SST-GD. On March 11, 2015, the SST-GD dismissed her appeal. The SST-GD recognized the final and binding nature of the OCRT Decision, stating:

> […] the Tribunal does not have the jurisdiction to consider the issue of disability prior to July 13, 2004 (*Candelaresi v MSD* (February 21, 2005), CP 21406 (PAB).

[18] Therefore, the issue was whether it was more likely than not that the Applicant had a severe and prolonged disability from July 13, 2004 to the date of her MQP on December 31, 2004 [the "relevant time"].

[19] The SST-GD found it must determine whether there was evidence of a new condition or a change in the circumstances of the Applicant's condition at relevant time.

[20] The SST-GD concluded that there was "[…] no evidence of a new condition […]" [STT-GD Decision at para 36] and that the "[…] medical evidence before the Tribunal did not show that the [Applicant's] condition had worsened between July 2004 and December 31, 2004 […]" [SST-GD Decision at para 39]. Instead, the Member found that the "symptoms and diagnoses of the [Applicant's] condition as early as 2002 has remained consistent with the medical evidence provided at her MQP." The SST-GD stated:

> [40] The Appellant also provided medical evidence post her MQP. The Tribunal noted Dr. Leung's diagnosis of fibromyalgia and depression in December 2005 which she described as secondary. However, this is one year post the Appellant' MQP. There is no evidence that either of these conditions was evident in 2004 or that either would have precluded the Appellant from working. In fact, in June 2005, attendance at the Pain Management Clinic noted that the Appellant had rebounded from her emotional instability and the report of Dr. Chandrasena, psychiatrist, in 2006 noted that the Appellant was relatively stable and there was no psychiatric or psychological condition that would prevent the Appellant from being employed. The medical evidence of Dr. Angela Mallis-Gagnon [*sic*] of January 2007 concluded that the radiological investigations conducted were all unremarkable. As well, the Appellant was neurologically intact and did not even reproduce pain across the areas of which she had complaints. Further, the Appellant was only tender in 4/18 fibromyalgia tender points. Based on her examination, Dr. Maillis-Gagnon concluded that the Appellant did not fulfill the tender point criteria for fibromyalgia. The conclusions reached in this evidence were well past the Appellant's MQP. Therefore, the Tribunal finds that there is no evidence to suggest that between July 14, 2004 and December 31, 2004, the Appellant suffered from any new condition, which would have prevented her from all work.
>
> [41] The Appellant argued that an issue of concern before the OCRT in July 2004 was the lack of a report from attendance at a pain management clinic regarding the issue of chronic pain. The Appellant argued that she attended the pain management clinic

> from March 2005 to June 2005 for 12 sessions. However, while it was the conclusion of the Pain Management Center that the Appellant had a poor prognosis for significant functional advancement and that further psychoeducational like therapy would likely not enhance her health, this is not evidence that the Appellant suffered from a new condition since July 13, 2004 or that her condition worsened between July 13, 2004 and her MQP that would render her disabled in accordance with the CPP. It is the effects of the condition and not the diagnosis that is the focus of the Tribunal. In this case, the symptoms associated with her chronic pain remained the same between July 13, 2004 and her MQP as evidenced by the Appellant's testimony and the medical evidence.
>
> …
>
> [43] The Tribunal finds that there is no evidence of a new condition or a change in circumstances of the Appellant between July 13, 2004 and December 31, 2004. […]
>
> [emphasis added]

[21] The Member concluded the Applicant "[did] not suffer from a severe disability within the meaning of the CPP."

[22] The Applicant applied for leave to appeal the SST-GD's decision on April 1, 2015. The SST-AD denied leave to appeal on April 24, 2015.

III. Decision under Review

[23] The SST-AD indicated that, in order to succeed on an application for leave to appeal to the SST-AD under *DESDA*, the Applicant must present an arguable ground upon which the proposed appeal might succeed. The Member cited case law for the proposition that an arguable case is "akin to whether legally an applicant has a reasonable chance of success." She made note

of the fact that, pursuant to s. 58(1) of *DESDA*, there are only three grounds under which an appeal to the ST-AD can be considered.

[24] The SST-AD made the following findings:

> [9] The Applicant's repetition of her contention that she was disabled is not a ground of appeal that has a reasonable chance of success on appeal. It does not point to any error of fact or of law, or to any breach of the principles of natural justice made by the General Division.
>
> [10] In addition, I accept that the Applicant was not diagnosed with chronic pain syndrome, mood disorder with dysthymia or depression prior to the Review Tribunal hearing in 2004 despite having symptoms of these conditions. However, in *Klabouch v Canada (Social Development)* 2008 FCA 33 the Federal Court of Appeal concluded that it is not the diagnosis of a condition but its impact on a claimant's ability to work that is determinative of disability. Consequently, I am not satisfied, in this case, that the fact that new diagnoses were made based on the same symptoms is a ground of appeal that has a reasonable chance of success on appeal.
>
> [emphasis added]

[25] The SST-AD Member concluded that the grounds of appeal put forward by the Applicant did not have a reasonable chance of success on appeal and, on that basis, refused the Applicant's application for leave.

IV. Issues

[26] At issue is whether the SST-AD's conclusion that the Applicant's proposed appeal was not based in a ground under s. 58 of *DESDA* that had a reasonable chance of success on appeal, is reasonable in light if the medical evidence provided.

V. Standard of Review

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A decision by the SST-AD granting or refusing leave to appeal should be reviewed on the reasonableness standard. *Canada (Attorney General) v O'keefe,* 2016 FC 503 at para 17, which also states that "substantial deference" should be given to the SST-AD decision; *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 17; *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at para 27.

[28] In *Dunsmuir* at para 47, the Supreme Court of Canada also sets out what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Relevant Provisions

[29] *DESDA* governs the operation of the Social Security Tribunal. Subsection 58(1) provides the only three grounds of appeal from a decision of the SST-GD:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of	58 (1) Les seuls moyens

appeal are that	d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.
Decision	**Décision**
(3) The Appeal Division must either grant or refuse leave to appeal.	(3) Elle accorde ou refuse cette permission.

[30] The requirements to obtain disability benefits under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP Act*] are found in sections 42 and 44 of the *CPP Act*. Subsection 44(1)(b) sets out eligibility requirements for the CPP disability pension. Subsection 42(2) defines "disability" for the purposes of the statute. Under s. 42(2)(a), a person is considered disabled when they have

a “severe and prolonged” mental or physical disability. A disability is “severe” when it renders the person incapable regularly of pursuing any substantially gainful occupation [*CPP Act* s. 42(2)(a)(i)]. A disability is “prolonged” when it is likely to be long continued and of indefinite duration or is likely to result in death [*CPP Act* s. 42(2)(a)(ii)] Subsection 42(2)(a) is conjunctive; a person must satisfy both the “severe” and “prolonged” criteria in order to be found disabled within the meaning of the CPP. If they fail to satisfy one of the two criteria, the other need not be assessed. Subsection 42(2)(b) puts a temporal limit on when a person may be deemed disabled.

VII. Parties’ Submissions and Analysis

A. *Applicant*

[31] The Applicant argues the SST-GD failed to consider allegedly new conditions that arose after the OCRT Decision and during the relevant period (July 13, 2004 to December 31, 2004). In this respect, the Applicant relies on evidence: (1) that she suffered from chronic pain, depression and anxiety as described in the October 29, 2004 report by Dr. Plotnick containing his recommendation for 12 pain management sessions; (2) a subsequent June 2005 report from the Pain Management Clinic; and (3) a September 19, 2005 report of Dr. Chandrasena, a psychiatrist, who diagnosed the Applicant with “chronic pain syndrome” and “mood disorder with dysthymia with depression”. These three documents describe her conditions, provide medical diagnoses and prognoses; all three assessments were made after the OCRT Decision of July 13, 2004. The Applicant says they describe her conditions in the critical intervening period between July and December, 2004, and that they differ from the diagnoses and prognoses prior

to that time. She says these reports, diagnoses and prognoses were not considered by the OCRT in 2004. She is correct that these reports were not before the OCRT at that time; this is not disputed.

B. *Respondent*

[32] The Respondent argues the SST-AD Decision was reasonable because it identified and applied the correct legal test and evidenced an awareness of the main thrust of the Applicant's leave application.

[33] The Respondent argues that pain was the issue before the CPP adjudicators and reviewing tribunals not only in the 2011 application, but as far back as the 2002 application as well. The SST-AD Decision reasonably referred to *Klabouch v Canada (Minister of Social Development)*, 2008 FCA 33 [*Klabouch*] and reasonably concluded that the appearance of an official diagnosis of pre-existing symptoms that had already been considered did not give rise to a ground of appeal that had a reasonable chance of success. The Respondent says that the impact of these pre-existing conditions was previously and finally considered by the OCRT and that these three new reports, while dated after the OCRT Decision do not shed new light on her condition in the MQP.

C. *Analysis*

[34] In my respectful view, judicial review should be granted because the SST-AD's decision to the effect that the Applicant's arguments did not give rise to a ground of appeal that had a reasonable chance of success, is unreasonable. The SST-AD's decision is not justifiable or

defensible in respect of the facts and law, as required by the Supreme Court of Canada's decision in *Dunsmuir*.

[35] First, the SST-GD held, contrary to the evidence, that new conditions suffered by the Applicant, which it correctly found were not before the OCRT in 2004, did not alter her employability as assessed by the 2004 OCRT Decision. The SST-GD, in my view, failed to reasonably assess how the new diagnoses of chronic pain syndrome and chronic depression outlined in these reports impacted and affected the Applicant's employability. The three new reports provided a new understanding of what she suffers from, and what she faces in her "real world" employability context.

[36] In my view, the three reports referred to in para. 32 above do not simply give new labels to old symptoms; instead they provide evidence of a profound change in her prognosis, both medically and more importantly in terms of her employability. In this the SST-GD acted unreasonably.

[37] Secondly, the SST-GD acted unreasonably (and erred in applying established law) in determining that the test for severe disability requires the Applicant to establish that her new diagnosis and forward-looking prognoses prevent her from "all work." That finding places the bar too high and is contrary to the Federal Court of Appeal's decision in *Villani v Canada (Attorney General)*, 2001 FCA 248 [*Villani*].

[38] In these two respects, the SST-AD acted unreasonably because it refused leave notwithstanding that the Applicant had a reasonable prospect of success on her proposed appeal under paragraphs 58(1)(b) and (c) of *DESDA*.

D. *Unreasonably failing to consider the impact of the new conditions on the Applicant's employability - DESDA s. 58(1)(c))*

[39] Before going further it is useful to consider the meaning of two of the terms discussed in the three reports, namely chronic pain syndrome and fibromyalgia.

Chronic pain syndrome

[40] The Supreme Court of Canada described chronic pain syndrome in *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54:

> 1 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. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. 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. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported by

> objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.

Fibromyalgia

[41] The following concerning fibromyalgia is stated in *Fontaine v Canada,* 2009 TCC 162 per Archambault T.C.J.

> 49 Although I noted no such problems at the hearing, it is possible that Mr. Fontaine now has serious walking problems. However, I have not been convinced that they existed in 2005 and 2006. Fibromyalgia, which appears to have been diagnosed by Dr. Villeneuve in 2007, would more likely account for such problems than atypical autonomic headache. The following definition of fibromyalgia is from *Stedman's Medical Dictionary,* 28th ed.:
>
> > Fibromyalgia is a disorder of unknown cause characterized by chronic widespread aching and stiffness, involving particularly the neck, shoulders, back, and hips, which is aggravated by use of the affected muscles. The American College of Rheumatology has established diagnostic criteria that include pain on both sides of the body, both above and below the waist, as well as in an axial distribution (cervical, thoracic, lumbar spine, or anterior chest). Additionally, point tenderness must be found in at least 11 of 18 specified sites. Tender points are sharply localized and often bilaterally symmetric. Some points may correspond to sites of pain and others may be painless until palpated. Usually associated fatigue, a sense of weakness or inability to perform certain movements, paresthesia, difficulty sleeping, and headaches are found. About one fourth of patients with fibromyalgia receive partial or total disability compensation. Fibromyalgia frequently occurs in conjunction with migraine headaches, temporomandibular joint dysfunction, irritable bowel syndrome, restless legs syndrome, chronic fatigue, and depression; symptoms are typically exacerbated by emotional stress. The prevalence in the U.S. is estimated at 1-

> 3% of the population, with all races and socioeconomic strata affected about equally. Most patients (90%) are adult women. The onset of symptoms usually occurs before age 50. The disorder is chronic but not progressive. Routine hematologic, serologic, and imaging studies yield uniformly normal results. However, the sleep EEG typically shows intrusions of alpha waves into non-REM sleep and infrequent progression to stage 3 and stage 4 sleep. One third of patients with fibromyalgia have low insulin like growth factor (IGF) levels. Elevation of cerebrospinal fluid substance P, depression of cortisol production, and orthostatic hypotension have also been reported. Most patients experience moderate to severe disability, but symptoms can usually be mitigated by treatment. Effective treatment programs include education, a regular program of low-impact aerobic exercise, and physical therapy as needed. Cognitive therapy and group therapy are often helpful. About one third of patients respond to pharmacologic agents such as antidepressants (amitriptyline, fluoxetine) and muscle relaxants (cyclobenzaprine).
>
> [emphasis in original]

[42] Both divisions below acknowledge that the Applicant suffered from conditions that were not diagnosed at the time of the OCRT Decision in July, 2004. The conditions now diagnosed were not in evidence before the OCRT.

[43] At paragraph 10 of its decision, the SST-AD found that the Applicant was not diagnosed with chronic pain syndrome, mood disorder with dysthymia or depression prior to the OCRT hearing in 2004 (this paragraph is quoted in its entirety above at para 22):

> In addition, I accept that the Applicant was not diagnosed with chronic pain syndrome, mood disorder with dysthymia or depression prior to the Review Tribunal hearing in 2004 despite having symptoms of these conditions.

[44] At paragraph 40 of its decision, the SST-GD also noted the more recent diagnoses of fibromyalgia and depression and found no evidence that either of these conditions was evident in 2004 (this paragraph is quoted in its entirety above at para 18):

> There is no evidence that either of these conditions was evident in 2004 or that either would have precluded the Appellant from working.

[45] The SST-GD and SST-AD use different terms to describe the diagnoses presented in the three new reports. However, I was not pointed to any difference between diagnoses of fibromyalgia and depression, as discussed by the SST-GD, and chronic pain syndrome, mood disorder with dysthymia (chronic or long term depression), as considered by the SST-AD. For convenience, I will refer to them as chronic pain syndrome/fibromyalgia, and mood disorder/chronic depression.

[46] While the Respondent says that "pain was the issue" in both the 2002 and 2011 applications, which is true in a sense, this over-simplifies the matter. In my view, there is a difference between symptoms of "chronic right shoulder pain, neck pain, degenerative disc disease, chronic cervical back pain, headaches and sleep deprivation" (as found by the OCRT) and what we now know to be chronic pain syndrome/fibromyalgia.

[47] I agree that simply identifying different conditions, i.e. making different diagnoses, does not assist the Applicant if the resulting forward-looking prognoses for her employability are the same. However, that is not the situation in this case. Here, the prognoses for the Applicant's employability changed materially, and for the worse, as a result of the new diagnoses.

[48] It is not the different diagnoses but the change in their related *prognoses* that is of critical importance to resolving this case. It is the change in *prognoses* that the divisions below failed to appreciate in reaching their conclusions. In my view, the impacts of the new prognoses are demonstrated by comparing the report of Dr. Plotnick of October, 2004 with the Pain Management Report of June 2005.

[49] Before doing so I wish to note that Dr. Plotnick was retained not by the Applicant, but by the WSIB to assess her for WSIB purposes following a workplace injury in 1995; I therefore consider his evidence and reports independent and reliable.

[50] The 2004 report of Dr. Plotnick was in essence an interim report. It stated, among other things, that "[T]here was an absence of updated medical information accompanying the referral. Accordingly, the opinions to follow may be subject to alteration or revision pending the provision of medical or rehabilitation reports at some future date." Dr. Plotnick's report concluded that the Applicant's medical evaluations appeared to be "somewhat inadequate". He said that both the diagnosis of her current medical condition, and the treatment rendered to date were "lacking." At page 11, Dr. Plotnick recommended "[r]eferral to the appropriate medical professionals for comprehensive evaluation, diagnosis and treatment as may be warranted." Part of his mandate was to make recommendations to assist the Applicant in re-engaging with the workplace.

[51] Dr. Plotnick's report concerning the Applicant's employment prospects on re-entering the work force was very guarded. He identified possible jobs for the Applicant, but only as

"options." In fact, Dr. Plotnick explicitly stated at page 13 that these options "are subject to consideration in respect of [the Applicant's] physical capabilities" which, as he had stated earlier, were in need of proper evaluation, diagnosis and treatment.

[52] Indeed, Dr. Plotnick anticipated, at page 11, that the pain experienced by the Applicant (not then chronic pain syndrome/fibromyalgia) would be "apt to represent a significant and limiting factor in the context of the [Labour Market Re-entry] and further vocational endeavours."

[53] Dr. Plotnick's recommendations in this interim report were followed; thereafter, the Applicant saw a number of medical professionals, and had further assessments conducted by a pain management team, which included Dr. Plotnick, all of which took place over 12 sessions. These sessions culminated in a Pain Management Report, dated June 15, 2005.

[54] While the Applicant's prospects were qualified in Dr. Plotnick's October 2004 report, which called for further investigation, the 2005 Pain Management Report confirmed a poor *prognosis* in terms of the Applicant's employability. In my view, this presents a very different employability impact than previously identified.

[55] The Pain Management Report concluded: "[T]he collection of issues outlined in the body of this report and [the Applicant's] complex medical phenomenon draw a poor prognostic indication for significant functional advancement. Further psychoeducational like therapy would not appear to enhance her health status to the degree that occupational objectives would likely be

realized." [emphasis added] This speaks directly to the Applicant's employability, or more appropriately, her unemployability.

[56] Subsequently, the Applicant was diagnosed with chronic pain syndrome with a 50+ Global Assessment of Functioning (GAF) by the psychiatrist, Dr. Chandrasena, whose report is dated September 19, 2005.

[57] To understand what the GAF is, the Respondent provided the following excerpt from the American Psychiatric Association's DSM-IV Manual, *Diagnostic and Statistical Manual of Mental Disorders,* 4th ed. (1994) at page 34:

51-60	Moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with peers or co-workers).
41-50	Serious symptoms (e.g. suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

[58] In my view, the SST-GD dismissed the Pain Management Report based on selective extracts. Where the SST-GD erred was in failing to consider the "real world" impact of the new diagnosis and resulting prognosis in respect of chronic pain syndrome/fibromyalgia on this Applicant. This is ironic in that the SST-GD correctly stated, "[…] it is the effects of the condition and not the diagnosis that is the focus of the Tribunal," but then went on to say that "the symptoms associated with her chronic pain [remained the same] […]." It did not follow its own guidance in that respect. This was an erroneous finding in that it looked at the *diagnoses* without appreciating the related *prognoses* i.e., forecast consequences of those same diagnoses.

The unreasonableness was to focus on the symptoms and not on their effects and related real world impacts on the Applicant and her employability. It misapprehended the record before it, which was a ground of appeal the SST-AD acting reasonably ought to have recognized.

[59] The reality is that between October 2004 and June 2005, the situation changed from a medical report with some room for optimism, albeit not much, in terms of the impact of the symptoms on the Applicant's employability, to a genuinely negative prognosis – a "poor" prognosis– regarding her employability. In my respectful view, in dismissing the Pain Management Report, the SST-GD lost sight of its very negative employability prognosis, which should have been at the forefront of its analysis.

[60] The SST-AD acted unreasonably in failing to grant leave to appeal on this basis. It should have considered the SST-GD's unreasonable disregard of the medical prognoses in assessing whether there was no reasonable chance of success on appeal. In my view, the Applicant had an arguable ground upon which her proposed appeal might succeed: had leave been granted her appeal had a reasonable chance of success.

[61] The Respondent argues that neither the Pain Management Report nor that of the psychiatrist speaks of the Applicant's condition at the time of her MQP. The Respondent thereby suggests the new diagnoses and related prognoses were not in existence at the time of her MQP but arose later. I do not accept that argument. The implication of the Respondent's argument is that chronic pain syndrome/fibromyalgia and mood disorder/chronic depression occur almost overnight; but there is no evidence to support that contention. Instead, the record is just the

opposite: another report filed, that of Dr. Leung, relates the Applicant's chronic pain syndrome as far back as 2002.

[62] To the very considerable extent the Respondent relies on guarded and qualified statements in Dr. Plotnick's October 2004, such reliance is misplaced. As I stated earlier, the report was an interim assessment. Its major recommendation was that the Applicant should be properly assessed and properly treated which had not yet happened at the time the report was prepared.

[63] For the foregoing reasons, it is my view the SST-GD made its decision without regard for the material before it, thereby committing an error per paragraph 58(1)(c) of *DESDA* and further, the SST-AD did not act reasonably in refusing leave in light of that error.

E. *Failure to correctly apply Villani – DESDA paragraph 58(1)(b)*

[64] The failure of the SST-GD to correctly apply the definition of "severe," as determined by the Federal Court of Appeal in *Villani*, is an additional ground of leave in respect of which the Applicant had a reasonable chance of success.

[65] In *Villani*, the Federal Court of Appeal set out guiding principles for the interpretation of the *CPP Act's* disability provisions. Unlike other pension plans, the *CPP Act* does not require total disability, i.e., an inability to do all or any kind of work, as a precondition of disability benefits. The Federal Court of Appeal stated:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.
>
> [39] I agree with the conclusion in Barlow, supra and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.
>
> [emphasis added]

[66] Notwithstanding this direction, the SST-GD, in my respectful view, adopted the very approach rejected in *Villani* in seemingly requiring the Applicant to establish that her newly diagnosed conditions and related prognoses and impacts, "would have prevented her from all work" [emphasis added]:

> Therefore, the Tribunal finds that there is no evidence to suggest that between July 14, 2004 and December 31, 2004, the Appellant suffered from any new condition, which would have prevented her from all work. [emphasis added]

[67] Since this issue was not argued by the parties, I will not say more in this respect except to add that in *Villani,* the Federal Court of Appeal granted judicial review because the tribunal adopted a similar "strict abstract approach to the severity requirement":

> [43] But this is precisely what the Board has done in the present case. The Board has adopted the strict abstract approach to the severity requirement in subparagraph 42(2)(a)(i) without analysing all of the legislative language. For ease of reference, the Board's analysis of the severity definition in subparagraph 42(2)(a)(i) is repeated below (See page 10 of the decision):
>
> > It is very important to note that the words "regularly pursuing <u>any</u> substantially gainful occupation..." means just that: <u>any</u> occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is <u>any</u> occupation, even though the applicant may lack education, special skills, or basic language.
> >
> > A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]
>
> It is evident, to my mind, that the Board in this case has effectively read out of the severity definition the words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the drafters of the *Plan*. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test for severity.
>
> [44] In my respectful view, the Board has invoked the wrong legal test for disability insofar as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

[68] In this respect, the SST-GD's approach was contrary to settled law and thus I conclude the SST-AD acted unreasonably in not granting leave, as the failure to properly apply *Villani* presents another ground upon which the Applicant's appeal had a reasonable prospect or chance of success under paragraph 58(1)(b) of *DESDA*.

VIII. Conclusions

[69] For the reasons set out above, I have concluded that the decision of the SST-AD does not fall within the within the range of possible, acceptable outcomes, which are defensible in respect of the facts and law applicable in this case. Judicial review is therefore granted.

IX. Costs

[70] The Respondent has not asked for costs, nor has the Applicant, and in the circumstances each party shall bear their own costs.

X. Procedural Note – Style of Cause

[71] The Respondent correctly requests that the style of cause in this matter be amended to show the respondent as the Attorney General of Canada. The Applicant consents and therefore it is so ordered, effective immediately.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to show the Attorney General of Canada as the Respondent, effective immediately.

2. Judicial review of the Decision of the SST-AD, dated April 24, 2015, is granted and the said Decision is set aside.

3. The matter is remanded to a differently constituted SST-AD for redetermination.

4. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-869-15
STYLE OF CAUSE:	DENISE PLAQUET v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 20, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 3, 2016

APPEARANCES:

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