Citation: *AC v Minister of Employment and Social Development*, 2022 SST 1515

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. C.
Representatives:	Sunish Uppal and Vismay Merja
Respondent:	Minister of Employment and Social Development
Representative:	Joshua Toews

Decision under appeal:	General Division decision dated May 10, 2022 (GP-20-435)

Tribunal member:	Neil Nawaz
Type of hearing:	Videoconference
Hearing date:	November 9, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	December 7, 2022
File number:	AD-22-482

Decision

[1] The appeal is dismissed. The General Division did not make any errors. Its decision stands.

Overview

[2] This appeal is about a hearing that, for various reasons, went off the rails. The question for the Appeal Division is whether, amid the turmoil, the Appellant had a fair opportunity to be heard.

[3] The Appellant is a 61-year-old former registered nurse who for many years has suffered from chronic neck and back pain. In 2006, she had surgery on her back to repair a collapsed disc, and she stopped working full-time two years later.

[4] In June 2017, the Appellant applied for a Canada Pension Plan (CPP) disability pension. She claimed that she could no longer manage the physical demands of her job as an operating room nurse. She also claimed to be disabled by a number of other medical conditions, among them ulcerative colitis, hypothyroidism, hypertension, plantar fasciitis, and depression and anxiety.

[5] The Minister refused the application because, in her view, the Appellant had not proved that she had a severe and prolonged disability as of her minimum qualifying period (MQP), which ended on December 31, 2009.[1]

[6] The Appellant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held two hearings by videoconference. At the first, held on December 6, 2021, the Appellant's representative, Mr. Uppal, accused the presiding member of bias because she identified what she called a "gap" in the evidence between February 2009 and March 2010. In response, the member declared that her words and conduct could not have reasonably created an impression of bias. At

[1] The MQP is the period in which a claimant last had coverage for Canada Pension Plan (CPP) disability benefits. Coverage is established by working and contributing to the CPP.

that point, the Appellant experienced a panic attack, and the member adjourned the hearing to a future date.

[7] The member then invited Mr. Uppal to make written submissions on whether she was biased.[2] There is no record on file that he ever filed such submissions. The member scheduled another hearing for March 22, 2022.

[8] On the morning of the second hearing, the Appellant's representatives sent separate emails to the Tribunal expressing dismay that the member had not recused herself from the proceedings.[3] The representatives said that, based on past events, their client could not expect a fair hearing and would not be participating in the videoconference scheduled for that afternoon.

[9] The member convened the hearing. Mr. Merja joined the videoconference and confirmed that that his client would not be appearing. He made further arguments urging the member to recuse herself. The member again refused to do so and ended the hearing. She later dismissed the appeal based on a review of documents already on file. In written reasons for her decision, the member explained why her continued involvement with the appeal did not create a reasonable apprehension of bias. She proceeded to find that, while the Appellant had some limitations, the evidence did not show she was regularly incapable of a substantially gainful occupation as of December 31, 2009.

[10] The Appellant is now requesting permission to appeal the General Division's decision. She alleges that the General Division made the following errors:

- The presiding member displayed bias by
  - drawing conclusions before the hearing began;
  - showing rudeness and irritation toward the Appellant's representative;

[2] See member's request letter dated December 8, 2021, GD13.
[3] See separate emails from Sunish Uppal and Vismay Merja, both dated March 22, 2022, GD15, GD16.

  - refusing to let the Appellant's representative speak;
  - insisting on hearing the Appellant's testimony directly;
  - suggesting that the Appellant's podiatrist was not a "real" doctor;
  - refusing to recuse herself from the proceedings;
  - refusing to adjourn the second hearing; and
  - deciding the appeal without having heard evidence;

- The presiding member based her decision on erroneous findings of fact by
  - considering only the Appellant's neck and foot pain, along with her fainting spells, while ignoring her many other significant health problems; and
  - disregarding a ruling by a U.S. Social Security administrative judge that the Appellant was disabled as of August 2008.

[11] In September, I granted the Appellant permission to appeal because I thought she had an arguable case that the General Division had breached some of the rules of procedural fairness. Last month, I held a hearing by videoconference to discuss the Appellant's allegations in full.

Issues

[12] There are four grounds of appeal to the Appeal Division. An appellant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[4]

[4] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

[13] To succeed, an appellant has to show that the General Division made an error that falls into one or more of the above grounds of appeal. In this appeal, I had to answer the following questions:

- Did the presiding General Division member's conduct raise a reasonable apprehension of bias?
- Should the member have recused herself from the proceedings?
- Did the member deny the Appellant an opportunity to be heard?
- Did the member ignore some of the Appellant's health problems?
- Did the member disregard the U.S. administrative judge's disability decision?

Analysis

[14] I have reviewed the documents on file, the recording of the hearing, and the General Division's decision. I have concluded that the General Division did not make any legal, factual, or procedural errors.

Nothing suggests the General Division was biased

[15] The hearing, split into two parts, was marred by a series of miscommunications and misunderstandings between the presiding General Division member and the Appellant's legal representatives. The member did not conduct the proceedings flawlessly but, in my view, nothing she said or did gave rise to a reasonable apprehension of bias. The Appellant and her representatives had no good reason to demand a recusal and even less reason to boycott the proceedings when it became clear that a recusal was not forthcoming.

– The threshold for a finding of bias is high

[16] Bias suggests a closed mind that is predisposed to a particular result. The threshold for a finding of bias is high, and the burden of establishing it lies with the party alleging its existence. Whether bias exists depends on the particular facts of a case.

[17] The Supreme Court of Canada has stated the test for bias as follows: “What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?”[5] A real likelihood of bias must be demonstrated, with mere suspicion not being enough.[6]

[18] Bias cannot rest on conjecture or the impressions of a claimant. It must be supported by material evidence demonstrating conduct that clearly deviates from the standard.[7] The Supreme Court has also said that a high threshold of proof is necessary because “the standard refers to an apprehension of bias that rests on serious grounds in light of a strong presumption of judicial impartiality.”[8]

[19] With these directions in mind, I will now examine various key points in the proceedings.

– **The member did not prejudge the Appellant’s case when she noted a “gap” in the medical evidence**

[20] At the first hearing, in December 2021, the proceedings began amicably enough but quickly went wrong when the presiding member identified what she saw as a weakness in the Appellant’s case. I suspect the member may have thought she was doing the Appellant a favour by giving her representative some preliminary guidance about where to focus his arguments. Instead, her remarks immediately put the representative on the defensive, and the hearing soon descended into acrimony.

[21] In the course of delivering her opening remarks, the member emphasized that the focus of her inquiry would be the Appellant’s condition as of the MQP. She then made this observation:

> It is also quite apparent that there are no medical reports—
> there are podiatry reports and physiotherapy and chiropractic
> reports in 2009—but otherwise… there’s no doctors’ information

[5] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[6] See *R. v S. (R.D.)*, [1997] 3 SCR 484, 1997 (SCC).
[7] See *Arthur v Canada (Attorney General)*, 2001 FCA 223.
[8] See *Wewaykum Indian Band v Canada*, 2003 SCC 45.

> between the end of 2008 and March 2010, when she sees Dr. Hynes again… but a year before the MQP, nothing about her neck, nothing about her back, nothing about her other health conditions. So that's going to be an issue for you, I would say.[9]

[22] Later, Mr. Uppal insisted that he needed the member to give him time to lead her through the file because she did "not give any weight to the clinical notes and records."[10] That led the member to clarify what she had said:

> No, I did not say that. What I said was, there was information prior to December 2009. There was not anything about what seemed to be major medical problems, particularly her neck, but there are many other documents listed in the year 2009. I didn't say there was no medical information at all—you need to really listen to what I say. I don't want my remarks to be misconstrued in any way.[11]

[23] In my view, this was a fair, if awkwardly phrased, comment. Most CPP disability cases turn on how much of the available medical evidence pertains to the most relevant period—that is, in and around the time when the Appellant last had coverage. In this case, the Appellant's MQP ended on December 31, 2009. Although the Appellant submitted a large volume of documentary evidence, much of it was dated well after the MQP and therefore not especially relevant to the Appellant's condition during the period when she needed to prove that she was disabled.

[24] The Appellant and her representative appear to have jumped to the conclusion that the member had "prejudged" her case. I don't see it that way. Every case has its weaknesses and, in my view, the member did the Appellant a service by identifying a potential problem with her case before the hearing got off the ground. In doing so, the member gave Mr. Uppal an opportunity, if he was willing to take it, to tailor his submissions to her concerns. But that didn't mean she had made up her mind; it only

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[9] Recording of the December 2021 General Division hearing from 13:00 to 14:45.
[10] Recording of December 2021 hearing at 23:00.
[11] Recording of December 2021 hearing at 24:15.

meant that she wanted more information. I see nothing inappropriate about directing a party to speak to issues that the decision-maker thinks are significant.

– **The member wasn't wrong to deem a podiatrist's letter "non-medical" evidence**

[25] There is no question that the member could have communicated her thoughts and intentions more clearly. She certainly could have communicated them more delicately. When Mr. Uppal protested that his client had, in fact, submitted "medical" evidence from the period leading up to December 31, 2009, the member said:

> There's information from a podiatrist, Shelly Garrow, and there's information from another healthcare provider—a physiotherapist or chiropractor or something like that—but not a doctor unless you count the podiatrist as a doctor. But the podiatrist wasn't talking about her neck.[12]

[26] The Appellant and her representative took offence to what they perceived was the member's dismissive attitude toward Dr. Garrow, her profession, and her reports. However, the member was not wrong to observe that podiatrists are not medical doctors. Although they are trained professionals, podiatrists generally treat less serious foot conditions than medical specialists such as, for instance, dermatologists or orthopedic surgeons. In that light, the General Division had reason to discount Dr. Garrow's reports, which, in any event, said that the Appellant's foot pain was improving as of December 2009.[13]

– **The member didn't prejudice the Appellant by briefly going off camera**

[27] Another flashpoint came when the General Division member turned off her video camera while the Appellant's representative was making his submissions.[14] On noticing that he could no longer see the member, there was this exchange:

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[12] Recording of December 2021 hearing at 25:20.
[13] See Dr. Garrow's report dated December 12, 2009, GD9-310.
[14] I only had access to an audio recording of the videoconference. For that reason, I can't be sure when, precisely, the member tuned off her camera or how long it remained off in total. I will assume that the member cut her video not long before the Appellant's representative spoke up about it.

Mr. Uppal:	Madame adjudicator, I can't see you.
Member:	I'm here and I'm paying attention!
Mr. Uppal:	I will object to that… In order to advocate for my client fairly I want to know that I have your attention.
Member:	Here I am.[15]

[28] From what I can gather, the member's camera was off for approximately 60 seconds. But even if it was off for longer, I fail to see how this act, by itself, prejudiced the hearing. I acknowledge that, having clashed with her several times, Mr. Uppal was unwilling to give the member the benefit of the doubt. But the following facts remain:

- the member turned her camera off for only a brief time;
- the member had a plausible explanation for going off camera;[16] and
- there is no indication that the member was ever out of earshot while Mr. Uppal was speaking.

Given these circumstances, I don't see how this relatively trivial incident, even considered in the context of the member's conduct as a whole, would warrant a new hearing on grounds of procedural fairness.

– **The member had the right to demand arguments, not evidence, from the Appellant's representative**

[29] Unfortunately, Mr. Uppal took the member's preliminary remarks the wrong way. Having convinced himself that the member was skeptical about his client's claim, he asked her to "have an open mind and give me an opportunity to present as much evidence as possible on behalf of my client."[17]

[30] Mr. Uppal's choice of words was, at best, unfortunate. They raised a red flag in front of the member, who immediately advised Mr. Uppal that she wanted to hear

[15] Recording of December 2021 hearing at 29:00.
[16] Later, in her decision, the General Division member said that she had turned off her camera to take a drink of water.
[17] Recording of December 2021 hearing at 21:50.

evidence from the Appellant, not him. She also expressed concern that Mr. Uppal intended to occupy the hearing by going through medical documents that she had already read. Mr. Uppal assured the member that he would be asking his client questions but then added:

> Mr. Uppal: At the same time, Madame Adjudicator, what's imperative here is that it be understood where my client be given a fair chance, because she doesn't know how to speak very well. I will be speaking on her behalf as her lawyer to go over the clinical notes and records with you to [18]
>
> Member: What I really want is to hear from her. Otherwise, this can all be done on paper.

[31] In substance, the member was right. It is not clear whether Mr. Uppal intended to give evidence or merely present it, but the member was within her rights to caution counsel to stick to advocacy.[19] Nor was it inappropriate for the member to let Mr. Uppal know that she expected to hear from the Appellant herself.

[32] But once again there was a misunderstanding. Mr. Uppal apparently took the member's request to hear from the Appellant as a request to hear from no one else **except** the Appellant. However, I don't think that's what the Member intended to say, and she later clarified what she meant in this exchange:

> Mr. Uppal: Madame adjudicator, I've done several CPP hearings and never have I ever been told by an adjudicator that he or she just wants to hear from my client and not from me.
>
> Member: I didn't say I just wanted to hear from your client. But you were telling me you were going to take me through a lot of medical

[18] Recording of December 2021 hearing at 22:40.
[19] It appears that the member's suspicion that Mr. Uppal intended to give evidence himself was well founded. In the Appellant's reasons for appealing to the General Division, Mr. Uppal's office wrote: "[The member] also states that 'as a legal representative, Mr. Uppal is unable to give evidence.' The whole point of retaining legal representation is so they may guide the applicant and act on their behalf for their appeal. Mr. Uppal was in a position to **provide** evidence on behalf of the applicant by virtue of his retention. [The member] cannot force an applicant to provide answers if she has a lawyer who has been hired to do the **same** [my emphasis]."

> documentation, and I said I have had situations where the representative wants to speak for the whole hearing.[20]

[33] At that point, the Appellant's representative should have understood that the member was willing to let him speak, so long as his submissions did not encroach on his client's opportunity to testify. As it happens, the member had good reason to worry about that very possibility. Mr. Uppal proceeded to read, word for word, the Appellant's U.S. Social Security decision, which included a detailed discussion of the "five-step sequential evaluation process" for determining whether an individual is disabled under American law.[21]

[34] The member allowed Mr. Uppal to continue in this vein for nearly six minutes before intervening. That led to a final verbal clash, one that led the first hearing to break down once and for all.

– The General Division's observation about the absence of reports from Dr. Hynes was neither inaccurate nor an indicator of bias

[35] While going through the U.S. Social Security decision, Mr. Uppal noted that the Appellant attended the Back Clinic in February 2008 and X Pain Management Associates in May 2008. He then addressed the member: "These are M.D.s she was visiting, Madame adjudicator, these are not just physiotherapist and podiatrists."[22] The member immediately countered that remark with some force, saying that she had earlier noted a gap, not in 2008, but in 2009: "There was no report, that I could see, from a doctor, and particularly not from Dr. Hynes."[23]

[36] This prompted the Appellant to interject. She said that she hadn't seen Dr. Hynes since the day he operated on her—only his assistant, Mr. Velez:[24] She accused the

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[20] Recording of December 2021 hearing at 27:20.
[21] Recording of December 2021 hearing from 29:40 to 35:30. The U.S. Social Security disability decision can be found at GD2-115 and GD9-41.
[22] Recording of December 2021 hearing at 35:20.
[23] Recording of December 2021 hearing at 35:30.
[24] The record shows that Dr. Richard Hynes performed a cervical discectomy and fusion on the Appellant in April 2006.

member of not having read her file: "The fact that you keep mentioning you have not seen a report from Dr. Hynes is to me redundant… So please stop saying, 'produce reports'! This is a bloody nuisance!"[25]

[37] Mr. Uppal then added:

> Ms. Wilton, with all due respect, when you walked in today, I feel you came in with your mind already made up that my client does not meet the test… Either we seek an adjournment or we would ask that you recuse yourself and have somebody else to replace you so that my client can get a fair hearing. I feel uncomfortable making presentations. You turned the camera off on me once. You've been making faces. I feel you're being irritated by me… You said you read the file all week and you've obviously missed out on several [pieces of] medical documentation that clearly point to the fact.[26]

[38] It is important to pause here and review what produced the Appellant's outburst. The member was merely observing—again—that there was a lengthy period (from February 2009 to March 2010), in which the Appellant received no documented treatment, whether from Dr. Hynes, Mr. Velez, or any other healthcare provider, for what was supposed to be one of the most significant contributors to her disability. Having reviewed the file, I don't see how the member was wrong about that.

[39] The member declared that she would not be recusing herself and that she intended to carry on with the hearing. She emphasized that she wanted to give the Appellant an opportunity to tell her about her functional limitations in 2009. However, the Appellant remained agitated, and her representative asked for a recess. When they returned, the Appellant said that she was having a panic attack: "I do not wish to continue with this because I feel that you are biased. I would like to tell you that Shelly Garrow is a female doctor—she is a foot podiatrist. You haven't gone through my file… I can't deal with your behaviour."[27]

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[25] Recording of December 2021 hearing at 36:00.
[26] Recording of December 2021 hearing at 38:00.
[27] Recording of December 2021 hearing at 45:50.

[40] At that, the member adjourned the hearing.

[41] The member was clearly not content to passively accept the Appellant's submissions. She was not shy about telling the Appellant's representative what she wanted to hear from him. She pushed back against what she perceived to be weaknesses or inconsistencies in the evidence. The Appellant may have found this proactive approach disconcerting, but that did not mean the member was biased. And while the Appellant may not have agreed with her comments, I saw no indication that the member neglected to read the file or misunderstood key aspects of it.

– **Rudeness, irritability, or sarcasm are not necessarily signs of bias**

[42] The Appellant accuses the member of rudeness, but that is not among the grounds of appeal, nor is it necessarily a sign of bias. Of course, rudeness lies in the eye of the beholder. In my review of the hearing recording, I heard the member speak bluntly. I heard her engage in several tense exchanges with Mr. Uppal. I heard her deploy sarcasm ("What would you like to tell me that I might have missed"[28]) when Mr. Uppal persisted in reading evidence. On more than one occasion, as we have seen, the member was barely able to disguise her impatience when she felt that Mr. Uppal had misinterpreted her words and actions.

[43] However, throughout it all, the member managed to control her temper. She did not raise her voice. She interrupted Mr. Uppal only in an effort to divert him to more productive lines of inquiry. She certainly challenged some of Mr. Uppal's submissions, but expressions of doubt or disagreement do not, by themselves, amount to rudeness.

[44] Members of the General Division are trained adjudicators, with skills and experience in managing hearings and processing information. I heard nothing to upset the presumption that the member carried out her duties in an unbiased and impartial manner.

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[28] Recording of December 2021 hearing at 31:00.

– **The General Division had the right to control the hearing**

[45] The law gives administrative tribunals wide latitude to conduct their hearings as they see fit as they attempt to balance priorities of informality, efficiency, and fairness. In this regard, the Supreme Court of Canada has said:

> As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.[29]

[46] The presiding General Division member had the right to ask tough questions. She was within her authority to direct Mr. Uppal to address what issues she wanted to hear about. She was free to ask Mr. Uppal to refrain from reciting documentary evidence that she had already read. I have seen and heard nothing to make me suspect that the member approached the Appellant's appeal with anything less than an open mind.

The member did not have to recuse herself

[47] Once the Appellant asked her to recuse herself from the proceedings, the member found herself the somewhat awkward position of having to adjudicate a matter in which her own conduct was at issue. However, the member had, not just the right, but the duty to address the Appellant's accusations of bias in the first instance.

[48] In a case called *Grigorenko,* the Federal Court considered who must apply the test for bias:

> It goes without saying that the criteria for assessing the apprehension of bias apply not only to the judges who are asked to review the decision but also to the person himself or

[29] See *Prassad* v *Canada (Minister of Employment and Immigration)*, 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560. See also *Mohammad v Canada (Minister of Citizenship & Immigration)* (2000), 4 Imm. L.R. (3d) 152.

> herself against whom the apprehension is alleged. In *R. v S. (R.D.)*, Cory J. wrote:
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> > It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them… In order to fulfil this duty the decision-maker must be and appear to be unbiased (my emphasis).
>
> It is clear from this passage that despite the difficulty, more apparent than real, of placing himself or herself in the shoes of an informed and reasonable observer, that is nevertheless what a judge who is asked to recuse himself or herself by reason of appearance of bias must do.[30]

[49] In this case, it was appropriate for the presiding General Division member to assume the role of an "informed person, viewing the matter realistically and practically" and to conduct a first line adjudication of the accusations against her. As the Minister's representative noted, judges and tribunal members routinely decide whether their conduct has raised a reasonable apprehension of bias. This has been seen at the Federal Court, the Federal Court of Appeal, and the Social Security Tribunal.[31]

[50] The presumption of judicial and quasi-judicial neutrality led the Supreme Court to impose a high standard of proof on parties alleging bias. The presumption recognizes the tradition of integrity and impartiality in our system of justice, but it also protects against a practical danger: a low standard might encourage tactical motions by parties seeking another adjudicator whenever they anticipate an unfavourable outcome. In my view, there is a risk that the integrity of the Tribunal could be called into question if members recuse themselves on demand. When the Appellant and her representative perceived that their submissions were not being met with unquestioned acceptance, it was perhaps understandable for them to want to exchange the presiding General

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[30] See *Grigorenko v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8320 (FC).
[31] See *Oberlander v Canada (Attorney General)*, 2018 FC 488, upheld on appeal in *Oberlander v Canada (Attorney General)*, 2019 FCA 64; and *R.M. v Minister of Employment and Social Development*, 2020 SST 743, in which the Appeal Division upheld the General Division's finding that its conduct did not raise a reasonable apprehension of bias.

Division member for a new one. But there was no legal basis for the member to withdraw, and she was right not to do so.

The General Division did not deny the Appellant an opportunity to be heard

[51] In this appeal, I paid particularly close attention to the incident that originally triggered the Appellant's allegation of bias, which in turn led to the series of misunderstandings that followed. I was looking to see whether there was any objective basis for her representative to request a recusal and for his subsequent decision to advise his client not to attend the second hearing. In the end, I concluded that there wasn't.

[52] As I have explained above, the Appellant and her representative had no cause to accuse the member of bias and thus had no cause to ask for a recusal. When the member refused to withdraw on the spot, they had no cause to withdraw from the first hearing in distress and anger. In doing so, the Appellant, on the advice of her representative, cost herself a chance to tell her side of the story.

[53] I know that the Appellant was upset to hear the member questioning her evidence. I can understand why she was anxious about the outcome of the hearing. But her emotional delicacy did not change the fact that she no real basis to question the member's impartiality. Mr. Uppal did not help matters by making his own unfounded allegations.

[54] The Tribunal scheduled another hearing for March 2021. For reasons that are unclear, Mr. Uppal appears to have simply assumed that another member of the General Division would be taking over. On the morning of the second hearing date, when he discovered that the same member would continue to hear the appeal, he advised his client not to attend, costing her another opportunity to speak. Mr. Uppal himself stayed away from the second hearing, sending another representative from his office instead.

[55] Contrary to the Appellant's allegations, the member did not prevent her representatives from speaking at either hearing. At the December 2020 hearing, the member clearly said that her interest in hearing the Appellant's testimony did not mean she had no interest in hearing from Mr. Uppal. She asked him to continue with his presentation, and he seemed ready to do so until his client indicated that she was having a panic attack.

[56] At the March 2022 hearing, the Appellant and her representatives had another opportunity to make her case. The Appellant's second representative, Mr. Merja, opened with yet another submission demanding that the member recuse herself. He did so even though his colleague, Mr. Uppal, had not responded to the member's prior invitation to make written submissions on this issue.

[57] Having heard Mr. Merja's submissions, the member again refused to withdraw. She then asked Mr. Merja whether he had anything else to add.[32] She also asked Mr. Merja whether he wanted to call his client and give her a final chance to testify.[33] He declined the offer, citing the likelihood that his client would suffer another panic attack if she appeared before the member.

[58] The member proceeded to decide the appeal on the record. As she later noted, the Tribunal is entitled to proceed in a party's absence if it is satisfied the party received notice of the hearing.[34] It also has an obligation to proceed as informally and quickly as the circumstances and considerations of fairness and natural justice permit.[35] Moreover, the "Tribunal **must** proceed in a party's absence if the Tribunal had previously granted an adjournment or postponement at the request of the party [emphasis added]."[36] The hearing had previously been adjourned, by my count, **six**

[32] Recording of March 2022 hearing at 8:40.
[33] Recording of March 2022 hearing at 9:35.
[34] See *Social Security Tribunal Regulations* (SST Regulations) section 12(1).
[35] See SST Regulations, section 3(1).
[36] See SST Regulations, section 12(2).

times at the Appellant's request. When the member chose to proceed, she was doing nothing more than responding to her regulatory obligations.

[59] As noted, the member's conduct was not perfect, but whatever her failings, they did not give rise to a reasonable apprehension of bias. Since the Appellant had no real reason to believe she would not get a fair hearing, she had no justification to demand a recusal and to walk away when she didn't get one. It wasn't the member who cut short the proceedings; it was the Appellant. The member offered the Appellant several opportunities to speak, but she refused them. Having done so, she cannot now argue that she was prevented from being heard.

The General Division considered all of the Appellant's health problems

[60] The Appellant alleges that the General Division considered only her major physical problems—neck and foot pain, fainting spells—during her MQP. She says that the General Division ignored the multitude of other health problems that the Appellant was facing at the time, including

- Occipital neuralgia;
- Back pain;
- Bilateral leg pain;
- Left hip pain;
- Ulcerative colitis;
- Difficulty concentrating;
- Dizziness;
- Drowsiness;
- Insomnia;
- Hypertension;
- Hypothyroidism;
- Major depressive disorder;
- Fatigue and low energy; and
- Anxiety.

[61] I fail to see merit in this argument.

[62] One of the General Division's roles is to establish facts. In doing so, it is presumed to have considered all the material before it.[37] That means it does not have to refer to each and every item of available evidence in its decision.

[63] In any event, the General Division's reasons included a section on the Appellant's other conditions, which specifically addressed her ulcerative colitis, hyperthyroidism, hypertension, and her anxiety and depression.[38] Moreover, when discussing the Appellant's neck pain, foot pain, and fainting spells, the General Division also addressed her headaches, back pain, and dizziness.[39]

[64] It is true that the General Division's decision did not mention the Appellant's leg pain, left hip pain, concentration difficulties, drowsiness, or insomnia. However, there was a good reason for that. All of the available medical evidence supporting these conditions was dated after the Appellant's MQP. The Appellant's leg pain was first mentioned in a February 2012 report.[40] The Appellant's hip pain was first mentioned in a November 2014 report.[41] The Appellant's insomnia and concentration difficulties were first mentioned in reports from June 2010 and October 2010, respectively.[42] Finally, drowsiness is noted in medical reports only as a side effect of Ambien and Xanax.[43]

[65] The Appellant may not agree with its analysis, but the General Division, in its role as trier of fact, is entitled to some leeway in how it chose to weigh the evidence.[44] I see no reason to interfere with how it assessed the Appellant's medical conditions.

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[37] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[38] See General Division decision, paragraph 68–72.
[39] In paragraph 65 of its decision, the General Division referred to the Appellant's migraine headaches, for which she had received a prescription. In paragraph 58, footnote 35, the General Division noted that the Appellant "also had some less significant pain in her upper and lower back." In paragraph 66, the General Division mentioned that headache medication had decreased her unsteadiness.
[40] See consultation note dated February 21, 2012 by Richard Hynes, M.D. and Damian Velez, physician assistant, GD2-55.
[41] See consultation note by Dr. Ronald Stern dated November 10, 2014, GD3-70.
[42] See office note by Dr. Gita Koshy dated June 18, 2010, GD9-565, and psychological evaluation by Dr. John Mallams dated October 19, 2010, GD9-344.
[43] See colonoscopy discharge instructions dated March 10, 2012, GD3-31.
[44] See *Simpson*, note 37.

The General Division addressed the U.S. Social Security decision

[66] In April 2011, an adjudicator with the U.S. Social Security Administration found that the Appellant had been disabled since August 1, 2008.[45] The Appellant argues that the General Division did not properly take this decision into account. She notes that the U.S. *Social Security Act* and the *Canada Pension Plan* use similar definitions of disability.

[67] I don't find this argument persuasive.

[68] First, although the two definitions have similarities, the reality is that they are not identical and have significant differences. Moreover, the U.S. social security regime operates in a different country in a different legislative and legal context. The U.S. definition of disability is augmented by a body of jurisprudence that likely bears little resemblance to its Canadian equivalent.

[69] Given these differences, the General Division could have validly dismissed the U.S. decision as irrelevant. It chose not to do so. Instead, it dedicated a significant portion of its decision to a point-by-point rebuttal of the U.S. adjudicator's analysis. Given this, I don't think it can be fairly said that the General Division failed to "properly appreciate the contents" of the U.S. decision.

[70] From what I can see, the General Division found that the U.S. decision had little applicability to her inquiry because, among other factors:

- The U.S. adjudicator was focused on whether the Appellant was disabled as of April 2011, not as of December 2009;
- The U.S. adjudicator did not consider the absence of medical reports about the Appellant's neck condition from February 2009 to March 2010;

[45] See decision dated April 14, 2011 by Vertis J. Worsham, Attorney Advisor with the U.S. Social Security Administration Office of Disability Adjudication and Review, GD2-115.

- The U.S. adjudicator failed to consider reports showing that the Appellant was capable of significant physical activity after December 2009;[46] and
- The U.S. adjudicator relied on an orthopedic report from October 2010 that was prepared after the Appellant's MQP.[47]

[71] The Appellant may not agree with this analysis but, other than simply declaring it wrong, she has not specified what errors it contained. That is not enough to overturn the General Division's decision.

Conclusion

[72] The General Division did not commit an error that falls within the permitted grounds of appeal. From what I can see, it proceeded fairly, reviewed the evidence conscientiously, and applied the law correctly. Its decision stands.

[73] The appeal is therefore dismissed.

Member, Appeal Division

[46] See Damian Velez's reports dated September 3, 2010 (GD2-81) and March 24, 2011 (GD2-67).
[47] See Dr. Krishna Vara's report dated July 30, 2010, GD9-626.