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

Citation: *B. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 447

Tribunal File Number: AD-16-104

BETWEEN:

B. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: February 13, 2017

DATE OF DECISION: September 5, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

(via videoconference)

Appellant	B. R.
Appellant's representatives	Sarah E. Colquhoun (counsel) Claire Littleton (counsel—observer)
Respondent's representatives	Natalie Strelkova (counsel) Sylvie Doire (counsel) Annie Richards (paralegal)

INTRODUCTION

[1] This is an appeal of the General Division's decision dated September 25, 2015. The General Division determined that the Appellant was ineligible for a *Canada Pension Plan* disability pension, as it found that her disability had not been "severe" by the end of her minimum qualifying period on December 31, 2006.

[2] The Appellant sought leave to appeal the General Division's decision on several grounds. The Appeal Division granted leave to appeal on January 15, 2016, after determining that the General Division may not have applied the appropriate standard of proof when it had written that the medical evidence on file "leaves some doubt as to the severity of her symptoms." The Appellant had raised other issues, but the Appeal Division found that they did not have a reasonable chance of success on appeal.

[3] The Appellant argues that, as the Appeal Division did not specifically restrict the appeal to the grounds that had been found to have a reasonable chance of success, she should be able to rely on and re-argue each of the grounds, even if leave to appeal had not been granted on those bases.

[4] Given the complexities of the issues under appeal, the need for additional information, the availability of videoconference in the area where the Appellant resides and the requirements under *Social Security Tribunal Regulations* (Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit, this hearing proceeded by way of a videoconference hearing, pursuant to paragraph 21(*b*) of the Regulations.

[5] At the hearing, the Respondent was unprepared to fully address each of the grounds upon which the Appellant had been seeking leave to appeal. In the interests of justice and to ensure that there were no delays in this matter, I permitted the Respondent to file any written submissions addressing only the grounds upon which leave to appeal had not been granted, with a right of reply for the Appellant. Both parties filed submissions (documents AD6 and AD7).

ISSUES

[6] There are several issues before me:

i. What is the scope of the appeal? Can an appellant revisit grounds of appeal that he or she had advanced in the application requesting leave to appeal, even if the Appeal Division found that the appeal did not have a reasonable chance of success on those grounds?

ii. Did the General Division err in law by requiring the Appellant to prove the severity of her disability on a higher standard of proof than required?

iii. If the Appellant may revisit grounds of appeal,

   a. did the General Division fail to observe a principle of natural justice when it decided to hear the appeal by teleconference, rather than by a videoconference hearing or by an in-person hearing?

   b. did the General commit any errors of law?

c. did the General Division base its decision on erroneous findings of fact that it had made in a perverse or capricious manner or without regard for the material before it?

i. If the General Division erred, what is the appropriate disposition of this matter?

PRELIMINARY ISSUE: SCOPE OF APPEAL

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. The only grounds are as follows:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(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.

[8] The Appeal Division granted leave to appeal after determining that the General Division may not have applied the appropriate standard of proof, but the Appellant argues that I should revisit each of the grounds or issues raised in the application requesting leave to appeal. I invited the Appellant to cite any authorities or basis upon which the Appeal Division may revisit any grounds of appeal, if leave to appeal had not been granted on those particular grounds. I queried whether this otherwise amounted to an attack of the leave to appeal decision and whether it properly ought to have been the subject of an application for judicial review to the Federal Court of Canada.

[9] The Appellant argues that the Appeal Division has no legislative authority to limit its jurisdiction on appeal. The Appellant asserts that, at the leave to appeal stage, the Appeal Division's function is to conduct a cursory review, rather than an in-depth review of the substance of the appeal or a full analysis of potential errors in the General

Division's decision. The leave to appeal decision simply grants leave to appeal, and it does not limit the grounds of appeal that can be argued. The Appellant refers to subsection 58(3) of the DESDA, which states that the Appeal Division must either grant or refuse leave to appeal. She argues that the subsection does not suggest that the Appeal Division may allow a partial appeal or that it may, in any other way, limit the matters to be argued in the actual appeal. The Appellant also relies on subsection 58(5) of the DESDA, which provides that the application for leave to appeal becomes the notice of appeal; she argues that the application for leave to appeal would not become the notice of appeal if any grounds or issues were restricted by the leave to appeal decision.

[10] The Appellant submits that the Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, determined that the grounds of appeal are often inter-related and that, as such, it would not serve any purpose to limit the grounds in the hearing of the appeal. She argues that the Federal Court of Appeal agreed that the Appeal Division has the jurisdiction to consider all the grounds of appeal in the notice of appeal—not just the grounds that had been found to have a reasonable chance of success.

[11] The Appellant further submits that, while there may be circumstances whereby it may be appropriate to limit the grounds of appeal, those circumstances are not present here, as her grounds of appeal are inter-related. For instance, while the factual errors on their own were not serious enough to be an independent ground of appeal, she argues that, combined with the statement that there was some "doubt" as to the severity of the her disability, the factual errors that the General Division cited may be part of the reason that it reached a conclusion that was not supported by the preponderance of the evidence.

[12] The Appellant argues that, in any event, if the General Division intended to limit the grounds of appeal, it was required to use specific language to evidence that intention. In this case, the Appeal Division member had written that the application for leave to appeal was granted, as the Appellant had "presented a ground of appeal that falls within section 58 of the Act and that may have a reasonable chance of success on appeal." The Appellant asserts that the General Division's language falls far short of reflecting any intention to limit the grounds of appeal.

[13] The Respondent, on the other hand, argues that the Appeal Division clearly restricted the grounds of appeal, given that it had conducted a comprehensive analysis on each of the issues under appeal, including the ground that the General Division had breached principles of natural justice and that it had based its decision on erroneous findings of fact that it had made in a perverse or capricious manner or without regard to the material before it. The Respondent rebuffs any notion that the Appeal Division in this case conducted a cursory review. The Respondent notes, for instance, that the Appeal Division member, before concluding that she was "not satisfied that the General Division failed to observe the principles of natural justice when it held a teleconference hearing in this matter," carefully examined—over three pages—the issue of whether there had been a breach of natural justice.

[14] The Respondent argues that it would be inconsistent with and that it would offend the spirit of paragraph 3(1)(*a*) of the Regulations to conduct proceedings as informally and as quickly as the circumstances and the consideration of fairness and natural justice permit, if an appellant were permitted to re-examine each of the grounds or issues on appeal, after the Appeal Division had already assessed each ground or issue and had undertaken a comprehensive determination of the grounds at the leave to appeal stage. The Respondent argues that the leave to appeal process was intended to act as a gatekeeping function, by narrowing the issues or grounds of appeal.

[15] The Respondent contends that, if the Appellant strongly feels that she is entitled to re-argue each of the issues or grounds of appeal, the appropriate recourse would have been to seek judicial review of the leave to appeal decision. The Respondent argues that, essentially, the Appellant is contesting the leave to appeal decision, and the Respondent maintains that the appropriate recourse under such circumstances is to seek judicial review of the leave to appeal decision. After all, the Federal Court stated in *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 26, that:

> [26] The DESDA does not give statutory authority to the [Social Security Tribunal – Appeal Division] to appeal or to review its own final and binding decisions regarding leave, nor is any other appeal mechanism provided. Upon granting or refusing leave, the SST-AD is

functus officio with respect to their decision under section 58 of the DESDA.

[16] The Respondent rejects any notion that the grounds of appeal are inter-related. The Respondent also asserts that the Federal Court in *Mette* did not close the door to a "surgical approach" and that it remains open to the Appeal Division to methodically determine whether to grant or refuse leave to appeal on individual grounds of appeal.

[17] In *Mette*, Dawson J.A. wrote:

> [13] One final comment is directed to the submission of the Attorney General about the Appeal Division's decision not to grant leave to appeal on the issue of whether the General Division erred in finding that the evidence presented did not meet the test for new evidence. The Attorney General argues that the Appeal Division then erred by considering this ground of appeal when it dealt with the appeal on the merits and that, in any event, this finding rendered the appeal to the Appeal Division moot.
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> [14] The Appeal Division interpreted subsection 58(2) of the Act to permit it to consider all of the grounds raised because the order granting leave was not specifically restricted to the grounds that were found to have a reasonable chance of success. The decision simply stated that "[l]eave to appeal to the Appeal Division of the Social Security Tribunal is granted."
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> [15] In oral argument the Attorney General relied upon subsection 58(2) of the Act to argue that the Appeal Division was required to deny leave on any ground it found to be without merit. However, subsection 58(2) provides that leave to appeal "is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." **The provision does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave.**
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> [16] The Attorney General has not shown the Appeal Division's interpretation of its home statute to be unreasonable. In my view the interpretation falls within the range of possible, acceptable outcomes defensible in both fact and law.
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> (My emphasis)

[18] The Appellant argues that *O'Keefe* is distinguishable and that it does not fundamentally address the issue of the scope of an appeal.

[19] I examined the issue of the scope of an appeal to the Appeal Division at some length, in *J.V. v. Minister of Employment and Social Development*, 2017 SSTADIS 331. Therein, I found that *O'Keefe* does not preclude the Appeal Division from considering issues or grounds of appeal, even if the Appeal Division had not granted leave to appeal on those issues or grounds. Indeed, I referred to *Canada (Attorney General) v. Tsagbey*, 2017 FC 356, where the Federal Court indicated that contesting the Appeal Division's reasons, rather than its disposition, was improper. The Federal Court determined that the language of the DESDA provides for "only one result without qualification." At the same time, the Court indicated that there was nothing in the DESDA to suggest that the Appeal Division was prohibited from limiting the scope of the appeal. Ultimately, the Federal Court held that the administrative process should be given an opportunity to run its course before an application for judicial review to the Federal Court of Appeal, on the merits of the matter, including on any rulings on the scope of the appeal, is brought.

[20] There may be instances when it is highly desirable and practical to limit the issues or grounds of appeal. In past, the Federal Court of Appeal suggested that the Pension Appeals Board had the discretion to determine the scope of the appeal before it. In *Canada (Minister of Human Resources Development) v. Ash*, 2002 FCA 462, the Federal Court of Appeal accepted that the Pension Appeals Board could place conditions under which it had granted leave to appeal. Hearings before the Pension Appeals Board were heard on a *de novo* basis, but appellants were still required to seek leave to appeal. The language governing leave to appeal to the Pension Appeals Board, under the *Canada Pension Plan*, was similar to the language governing leave to appeal to the Appeal Division under the DESDA, in that the only two options were to either grant or refuse leave to appeal. Although the issue before the Federal Court of Appeal was to determine the subject matter of the appeal before it, the Court nevertheless accepted that it was within the Board's jurisdiction to restrict or limit the scope of the appeal before it.

[21] In *J.V.*, I concluded:

> [33] [...] Consequently, in instances where the Appeal Division member neither intends to restrict nor expressly restricts the issues on appeal, absent any compelling reasons otherwise, at the appeal stage, the Appeal Division should permit an appellant to return to issues mentioned in the initial application requesting leave to appeal, even if they did not necessarily raise an arguable case at the leave to appeal stage.

[22] Having considered the parties' submissions, as well as the prevailing jurisprudence and my decision in *J.V.*, I find it appropriate to consider the additional issues or grounds of appeal, even if leave to appeal had not been granted on those bases.

GROUNDS OF APPEAL

a. Alleged error of law: standard of proof

[23] At paragraph 31 of its decision, the General Division set out the standard of proof. It wrote that the Appellant was required to prove "on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2006." The parties agree that this statement correctly sets out the applicable standard of proof. The General Division restated the applicable standard of proof at paragraph 37, where it wrote that it was not satisfied "on the balance of probabilities" that the Appellant suffers from a severe disability.

[24] However, at paragraph 35 of its decision, the General Division wrote, "While the Tribunal noted the significant health concerns currently facing the Appellant, it also noted that the medical evidence on file **leaves some doubt** as to the severity of her symptoms as of the [minimum qualifying period]." (My emphasis)

[25] The Appellant submits that, effectively, the General Division member applied "too high a standard of proof" and that, notwithstanding the fact that it stated the correct standard of proof at paragraphs 31 and 37, the General Division ultimately required her to prove her case beyond a reasonable doubt, rather than on the balance of probabilities.

She argues that, had the General Division properly applied the appropriate standard of proof, it would have found that the preponderance of the evidence supported a finding that she had met the definition of a disabled person by the end of her minimum qualifying period.

[26] The Respondent, on the other hand, argues that the General Division member correctly stated the applicable standard of proof, at paragraphs 8, 31 and 37 of her decision. At paragraph 8, the General Division member wrote that she had to decide whether "it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the [minimum qualifying period]." The Respondent argues that the member was "merely noting, the difficulty of determining the severity of the Appellant's symptoms […] and not articulating a different test for the standard of proof." The Respondent essentially argues that, after one considers the overall context and totality of the evidence, it becomes clear that the member in fact applied the correct standard of proof.

[27] As MacKay J. wrote in *Hidri v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 949, at para. 28, "It cannot be assumed that using the word 'convince' automatically connotes a higher burden of proof without a careful examination of the contextual basis of the decision."

[28] The Appeal Division has adopted this approach, although the examinations have led to differing outcomes. In *S.A. v. Minister of Employment and Social Development*, 2016 SSTADIS 21, I dealt with the same issue, where the same General Division member also wrote that the medical evidence on file "leaves some doubt" as to the severity of S.A.'s symptoms. I examined the context in which the expression had been used. I agreed that the General Division's decision had to be taken as a whole and that it could not be subdivided into its constituent parts. I determined that paragraphs 25 and 26 were to be read conjunctively but, having done that, found that the General Division had addressed the consistency of S.A.'s complaints, rather than the severity of her pain or symptoms. At one point, the General Division had alluded to S.A.'s "significant health concerns," but it was unclear how the General Division concluded that

S.A. had significant health concerns, given that the member had not discussed or analyzed the severity of S.A.'s status. The expression "some doubt" was followed by what appeared to be a reference to the evidence that created that doubt. The General Division also described some of the medical evidence that it might have expected S.A. to obtain. The General Division left the impression that S.A. could have established a severe disability if she had produced certain medical opinions or medical records. Given the analysis that the General Division undertook, it was not entirely evident that it had weighed the evidence on a balance of probabilities, resulting in an error of law.

[29] In *K.J. v. Minister of Employment and Social Development*, 2016 SSTADIS 217, my colleague Neil Nawaz was confronted by the same expression, used by the same General Division member. He wrote that "Requiring [K.J.] to prove her case by removing 'some doubt' effectively elevates the standard of proof of to the 'beyond reasonable doubt' test demanded in criminal proceedings." He found that the fact that the General Division had initially stated the standard of proof correctly did not cure the defects in its decision. Ultimately, the Appeal Division found that, while the expression "some doubt" was unfortunate, the remainder of the General Division's decision did not indicate that it had applied an unduly onerous standard of proof. The Appeal Division noted that the General Division had analyzed the evidence that both supported and did not support a conclusion that K.J.'s disability had been severe at her minimum qualifying period. The Appeal Division also noted that the General Division had cited relevant case law and that it had considered the totality of the evidence and the cumulative effect of K.J.'s medical conditions. In dismissing K.J.'s appeal, the Appeal Division found that the expression "some doubt" amounted to no more than an unfortunate slip, especially in the context of the entire decision. The General Division had actively analyzed the evidence, had weighed K.J.'s submissions against the Respondent's, and it had considered the strengths and weaknesses of the parties' respective cases. The Appeal Division saw no indication that the General Division had rejected K.J.'s claim on the basis of "some doubt."

[30] Clearly, I need to examine the broader context in which the expression "[left] with some doubt" has been used in the proceedings before me. The General Division's

decision has to be taken as a whole, and it ought not to be subdivided into its constituent parts. If I should determine that the expression represents an unfortunate slip, then it would seem that the decision can be saved, whereas, if the use of the expression indicates the standard of proof that the General Division applied, then this would constitute an error of law.

[31] Paragraph 35 of the General Division's decision reads as follows:

> [35] While the Tribunal noted the significant health concerns currently facing the Appellant, it also noted that the medical evidence on file leaves some doubt as to the severity of her symptoms as of the MQP. For example, Dr. Wilson's report dated March 29, 2005 indicates that she is capable of modified work that does not involve heavy, repetitive or overhead tasks and his report dated October 12, 2006 indicates that she could be retrained if her symptoms do not improve with physiotherapy. Similarly, Ms. Latimer felt that, although she could not do office administration work, she could be retrained in another area with less repetitive motions to allow her to return to work. The Functional Restoration Program Discharge Summary noted that she was capable of performing activities at the limited physical demand level with a number of permanent medical precautions for her left shoulder and hand. On December 11, 2007, Dr. Payandeh reported that pain in her arms improved following open rotator cuff decompression and, on February 23, 2009, that she had success with carpal tunnel release on both hands. Although she was receiving treatment for depression from Dr. Johnston, he indicated on January 20, 2007 that counselling and medication were having a positive effect on her mood, on February 19, 2008 that her counselling sessions were beneficial and on October 6, 2008 that she no longer met the diagnostic criteria for diagnosis of MDD. Although she was diagnosed with pancreatic cancer, she was treated with surgery. The Tribunal also noted that a number of her medical conditions began significantly after the MQP, including her cardiac problems (2009), sleep apnea (2010) and gastric bypass surgery (March 2015).

[32] The member appears to have focused on the evidence that created "some doubt" as to the severity of the Appellant's symptoms. By focusing on the evidence that left "some doubt," the member unwittingly left the impression that she may not have fully engaged in an analysis and a weighing of the totality of the medical evidence to

determine severity. However, at paragraph 34, the member noted the medical evidence upon which the Appellant relied, and then the member addressed it at paragraph 35.

[33] For instance, at paragraph 34, the member noted multiple diagnoses that the nurse listed in her CPP Medical Report of February 3, 2012. At paragraph 35, the member noted the same nurse's opinion that, although the Appellant was unable to do office administration work, she could be retrained in another area with "less repetitive motions" to allow her to return to work.

[34] The member also noted, in paragraph 34, that Dr. Wilson confirmed in an opinion dated March 29, 2005 that the Appellant had been diagnosed with a chronic pain syndrome and that she could not return to work, except on modified duties without heavy, repetitive or overhead tasks. In the same paragraph, the member noted that Dr. Wilson had also confirmed on October 12, 2006 that the Appellant's left shoulder was worse following surgery. At paragraph 35, the member confirmed Dr. Wilson's opinion regarding the Appellant's capacity. The member also noted his opinion of October 12, 2006 that the Appellant could be retrained in another area with "less repetitive motions" to allow a return to work.

[35] Similarly, the member noted in both paragraphs 34 and 35 that the Functional Restoration Program Discharge Summary dated June 23, 2006 set out the Appellant's permanent medical precautions. Despite the precautions, the member noted that the authors of the report, taking into account the precautions for her left shoulder and hand (GT2-43 to GT2-50), were of the opinion that the Appellant was capable of performing activities at the limited physical demand level.

[36] Finally, the member noted in paragraph 34 that Dr. Johnston, a clinical psychologist, reported that the Appellant had been receiving counselling and had been taking medications to treat her depression. As the member noted at paragraph 35, Dr. Johnston indicated in the same report and in a subsequent report that the counselling and medication were having a positive effect on her mood.

[37] These examples suggest that the member conducted an analysis and weighed the medical evidence before it in determining where the balance of probabilities lay. The General Division set out the medical evidence that it found favoured a severe disability, and then it weighed it against the medical evidence that it found did not favour a severe disability. When I read it as a whole, I am satisfied that the General Division member understood the burden of proof required of the Appellant and that it applied that burden of proof, irrespective of the fact that it used the phrase "leave some doubt," which might be read as indicating it applied a higher burden. The expression alone does not establish a standard of proof, nor does it indicate that the General Division applied a more stringent standard than one on the balance of probabilities. I find no error on this issue.

b. Alleged breach of natural justice – form of hearing

[38] The Appellant maintains that the General Division failed to observe a principle of natural justice when it decided to hear the appeal by teleconference, rather than by a videoconference hearing or an in-person hearing.

[39] When examining whether to grant leave to appeal, the Appeal Division found that this issue did not raise an arguable case, for several reasons but, primarily, she determined that "nothing before [her] suggests that the General Division was not able to receive the Appellant's evidence and weigh it properly because the hearing was held by teleconference." The member also noted that there was no entitlement to an in-person hearing under the Regulations, and that, as it was a discretionary decision for the General Division to determine the appropriate form of hearing, its decision on the form of hearing should be accorded deference. The member also examined whether the General Division's decision had affected the Appellant's rights, privileges or interests to such an extent that it offended the concepts of fairness and natural justice. In this regard, she considered some of the factors that the Supreme Court of Canada listed in *Baker v. Canada (Minister of Immigration and Citizenship)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), to determine what the duty of fairness requires in a particular case. After weighing all these considerations, the Appeal Division was not satisfied that the General

Division had failed to observe principles of natural justice when it had held a teleconference hearing.

[40] The Appellant repeated many of the same submissions that she had made in her application requesting leave to appeal. Although there is a lower standard to meet at the leave to appeal stage, I have nevertheless reviewed them in the context of this appeal, along with her additional arguments on this issue. The Appellant now also argues as follows on this issue:

> 23. Furthermore, this is a chronic pain case. The nature of the Appellant's disability is such that it is difficult to measure objectively. Consequently, the Appellant's testimony was the most important evidence tendered at the General Division hearing. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003 2S.C.R. 504) [*sic*]
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> 24. To determine the reliability of this key piece of evidence, the trier of fact had to determine the Appellant's credibility. The Tribunal needed to clearly observe the Appellant to make actual determinations central to the appeal. On the facts of this case, the denial of an in-person or video-conference hearing prevented the Appellant from presenting her case and led to a breach of natural justice.
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> 25. The *Social Security Tribunal Regulations* do provide that hearings may be held in writing or by teleconference, and it may well be that there are appeals that do not require findings of credibility where it would be appropriate to hold a hearing of that type. It is submitted that appeals of disability determination, particularly in chronic pain cases, do require a hearing format that allows the adjudicator to observe the Appellant.

[41] In her application requesting leave to appeal, the Appellant had suggested that, because there was a teleconference hearing, the General Division was in no position to assess credibility. In assessing the application requesting leave to appeal, the Appeal Division did not directly address the issue of whether a teleconference hearing enabled the General Division to assess the Appellant's credibility and demeanour, other than to conclude that the two decisions of the Pension Appeals Board, upon which the Appellant had relied, were not binding on the Social Security Tribunal and were therefore distinguishable on that basis alone. However, she did conclude that there was nothing

before her to suggest that, because the hearing was held by teleconference, the General Division was not able to receive and weigh the Appellant's evidence. In my own review of the General Division's decision, it is clear that the issue of the Appellant's demeanour and credibility were not at issue. Indeed, the General Division accepted the Appellant's testimony that she has several medical concerns and significant health concerns, and that she had been receiving ongoing treatment.

[42] The Appellant suggests that the form of hearing precluded her from being able to fairly and properly present her case, as she has chronic pain issues. However, as my colleague pointed out in her leave to appeal decision, the Appellant has failed to indicate how she was precluded from being able to properly present her case. For instance, the Appellant does not suggest that she was unable to give evidence, nor does she indicate how her evidence might have differed or might have been presented any differently had there been an in-person hearing or a videoconference hearing.

[43] In *Murphy v. Canada (Attorney General)*, 2016 FC 1208, the matter proceeded without a hearing. The General Division in that case determined that a review of the documentary file was sufficient to render a decision. The Federal Court noted that the General Division had given notice to Ms. Murphy that it intended to conduct a paper appeal. Ms. Murphy did not respond to any invitations from the Tribunal to comment and submit additional material. The General Division explained why it proceeded on the record. It had determined that the issues under appeal were not complex, that there were no gaps in the information in the file and that there was no need for clarification, that credibility was not a prevailing issue and that the form respected the requirements under the *Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[44] In seeking leave to appeal, Ms. Murphy did not contest the form of hearing. Yet, the Federal Court was doubtful that a proper *Villani*[1] assessment could have taken place without a *de novo* hearing before the General Division, given Ms. Murphy's limited

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

education, her limited ability to make written representations, her speech impediment as the Social Security Tribunal staff had documented and her difficulty in expressing her thoughts.

[45] Ms. Murphy's personal circumstances markedly differ from those of the Appellant. As well, Ms. Murphy had been deprived of any hearing at all, whereas, the General Division afforded the Appellant a teleconference hearing. There is no indication that the Appellant in the proceedings before me had any difficulty expressing her thoughts in a teleconference format.

[46] In *Robbins v. Canada (Attorney General)*, 2017 FCA 24, the Federal Court of Appeal also addressed whether it was procedurally unfair when the Appeal Division decided the matter on the basis of written materials only. After examining the nature of the issues, the evidence and the circumstances of the case, the Federal Court of Appeal rejected any submission that the Appeal Division had committed procedural unfairness. It wrote:

> [21] […] The Appeal Tribunal is entitled to decide matters without a hearing (*i.e.*, decide only on a written record and written submissions): section 43 of the *Social Security Tribunal Regulations*, SOR/2013-60. It is entitled to some leeway in making that sort of procedural choice, in part because its choice is often based upon its appreciation of the issues, the evidence before it and the circumstances of the case: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 27; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 89. Finally, we note that by law the Appeal Tribunal "must conduct its proceedings as informally and quickly as the considerations of fairness and natural justice permit": para. 3(1)(*a*) of the *Social Security Tribunal Regulations*.
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> [22] Even if we afforded the Appeal Tribunal no leeway and assessed its decision to proceed on the basis of written material with exactitude, we are satisfied that Mr. Robbins had a full opportunity to offer evidence and make submissions and that an oral hearing would not have changed the result: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1. At the hearing, Mr. Robbins fairly conceded that he would have largely reiterated what was in the written material.

[47] Although *Robbins* was in the context of an appeal before the Appeal Division, the same considerations apply in the matter before me, though the primary considerations are whether, in the circumstances of this case, the Appellant had a full opportunity to offer and make submissions and that an in-person hearing or a videoconference hearing, as opposed to a teleconference hearing, would not have changed the result. The Appellant has not convinced me that an in-person hearing or a videoconference hearing would have necessarily changed the result, or that she was deprived of a full opportunity to present her case and to make submissions.

[48] Significantly, the hearing took place in September 2015—more than eight years after the end of the Appellant's minimum qualifying period had passed. Although the General Division did not remark on it, the relatively lengthy passage of time after an appellant's minimum qualifying period would generally, for the most part, seem to negate any compelling need for a hearing that focuses on an appellant's medical condition at the end of his or her minimum qualifying period. After all, witnesses' memories erode over time and, generally, a witness's recollection with respect to past events decreases and arguably becomes less reliable over time. In those instances where the end of the minimum qualifying period has long passed, generally the documentary record may be viewed as a more reliable indicator of an appellant's medical status than his or her own recollection of past events. I am unconvinced that an in-person hearing or a videoconference hearing was necessarily required or that it would have enhanced the quality of that evidence when relating to a dated minimum qualifying period.

[49] Given these considerations, I am not convinced that the General Division failed to observe a principle of natural justice when it proceeded by way of teleconference rather than an in-person hearing or a videoconference hearing.

c. Other alleged errors of law

[50] The Appellant argues that the preponderance of evidence supported a finding that she had a severe and prolonged disability that rendered her incapable of engaging in remunerative employment. She further argues that the General Division's conclusion that her disability is not severe fails to accord with the preponderance of the evidence in the appeal.

[51] The Appellant is attempting to re-litigate her claim, but a reassessment of the evidence is not appropriate, as it does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA.

d. Alleged erroneous findings of fact

[52] In her application requesting leave to appeal, the Appellant argued that the General Division had based its decision on erroneous findings of fact that it had made in a perverse or capricious manner and without regard for the material before it. In its leave to appeal decision, the Appeal Division found that this ground did not have a reasonable chance of success, noting, for instance, that mere disagreement with the General Division's description of her education did not constitute a ground of appeal and that there was an evidentiary basis for this finding of fact. The Appeal Division indicated in its leave to appeal decision that the General Division had noted the Appellant's limitations in English, so it found that the General Division had not made any erroneous finding of fact regarding her bilingualism. The Appeal Division also acknowledged that although the General Division's description of schooling accommodations "may not have been completely accurate," it was not satisfied that any error was made in a perverse or capricious manner, as it was "based on the evidence presented." Apart from this, the General Division did not base its decision on the nature of the accommodations themselves.

[53] The Appellant does not directly dispute the Appeal Division's findings in the leave to appeal decision, nor does she revisit the issue of whether the General Division might have based its decision on erroneous findings of fact that it had made in a perverse

or capricious manner and without regard for the material before it. However, she alluded to the General Division's findings regarding retraining that was directed by the Workplace Safety and Insurance Board. I will therefore re-examine this issue.

[54] The Appellant suggests that the General Division based its decision on an erroneous finding of fact that it had made without regard for the material before it, when it found that she had participated in a full-time, college-level program in the English language. It was on this basis, in part, that the General Division determined that the Appellant retained the capacity to perform, at a minimum, regular part-time work. The General Division relied on *Kotsopoulous v. Minister of Human Resources Development* (March 14, 2004), CP21310 (PAB), which, it found, stood for the proposition that the capacity to perform regular part-time work, modified activities or sedentary occupations has been held to preclude a finding of severity.

[55] The Appellant argues that the General Division erred in its finding because she required significant accommodation and "was only able to complete three days of a six-week work placement." (AD3-8)

[56] The General Division set out the evidence regarding the Appellant's retraining and work placement:

> [12] With the assistance of the Workplace Safety and Insurance Board (the "WSIB"), she obtained her high school diploma in 2010 through correspondence courses at an independent learning centre. She also attended the Sylvain Centre for assistance in learning the course material.
>
> [13] She then attended a one-year College level office administration program on a full-time basis (4 hours per day). She was able to attend the program and complete the required course work, but was assisted with typing and given longer to write her exams. As part of her program, she was required to complete a six week work placement, which she attempted to do, but stopped after three days due to her shoulder injury. She was initially advised that she would not be able to graduate, but was ultimately granted an exception and did receive her diploma.

[57] The General Division then concluded that the Appellant "was able to attend and complete high school correspondence courses followed by a full-time College level program in the English language."

[58] The evidence indicates that the Appellant was unable to complete the work placement portion of the college-level program, having stopped after three days. It is clear that the six-week work placement was an integral component of the office administration program, given that the Appellant initially was not going to be able to graduate because she had failed to complete this portion. Notwithstanding this fact, the General Division appeared to accept that the Appellant had completed the college-level program, including the work placement, when it suggested that she was able not only to attend and complete the high school correspondence courses, but also to participate in and complete the full-time college-level program. This somewhat mischaracterizes the evidence, and it gave a misleading impression that the Appellant had not encountered any problems or issues with completing the program.

[59] The retraining largely took place after the end of the minimum qualifying period. From that perspective, it should have been a moot consideration whether the Appellant had been unable to complete or fully participate in the program, as it may not have been an accurate measurement of her capacity in December 2006. Nevertheless, the General Division determined that the Appellant had been able to fully undergo retraining and that this therefore established that she retained the capacity to perform regular part-time work.

[60] Although the General Division mischaracterized the evidence that the Appellant had been able to participate in and complete a full-time college-level program (and implicitly, a work placement), at the same time, the General Division also determined that there was no medical evidence before it to establish that the Appellant was severely disabled. My own review of the medical evidence indicates that there was relatively little medical documentation prepared contemporaneously to the minimum qualifying period before the General Division.

[61] An orthopaedic surgeon assessed the Appellant in January 2006 and found that the Appellant suffered from chronic and diffuse pain about the neck and periscapular

region. He was of the opinion that the Appellant's pain continued to impact her ability to return to any repetitive or physical-based work (GT2-51 to 52).

[62] A discharge summary of the Appellant's functional tolerances, dated June 23, 2006, indicated that the Appellant would be able to perform limited activities for upwards of four hours per day, and that the hours could be gradually increased as tolerated. She had permanent medical precautions for her left shoulder and hand, and she was advised to avoid activities such as repetitive or prolonged use of her left upper extremity. She was also advised not to participate in activities that would require her to overcompensate with her right upper extremity (GT1-40 to 41 and GT2-43 to 50).

[63] The Appellant consulted an orthopaedic surgeon in October 2006, following surgery on her left shoulder. She reported that her symptoms were worse and that her adhesive capsulitis had completely recurred. She was also experiencing more numbness and tingling in her upper extremities. The Appellant did not wish to have a steroid injection. The physician recommended that if she was not making any progress with physiotherapy, that she should be discharged on home exercises and that she should be re-trained. He did not find it necessary to recommend surgery, given her response the first time (GT2-42).

[64] The Appellant was diagnosed with a reactive depression, in response to pain and insomnia caused by her injuries. She was taking anti-depressants and underwent counselling with a psychologist (GT2-40 and 41). Counselling and medication had a positive effect, although the Appellant continued to struggle with a number of issues and her mood remained labile and depressed. The psychologist recommended ongoing use of anti-depressants, as well as additional counselling sessions.

[65] The General Division reviewed these medical opinions and found that they fell short of establishing a severe disability. I would defer to the General Division's assessment of the evidence. As the trier of fact, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign. The Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. Additionally, I am mindful of the words of the Federal Court

in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, that the "weighing and assessment of evidence lies at the heart of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[66] Despite the General Division's mischaracterization of the evidence that the Appellant was able to participate in and complete a full-time College level program, and implicitly, the work placement, I find that this does not change the outcome, given that, ultimately, the General Division found that there was insufficient evidence establishing a severe disability at the minimum qualifying period.

CONCLUSION

[67] Given the foregoing considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division